

## WASHINGTON LABOR & EMPLOYMENT WIRE

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### ON THE HILL

#### *Akin Gump Partner Eric Dreiband Testifies Before Senate Committee on Ledbetter Bill*

On January 24, 2008, the Senate Health, Employment, Labor and Pensions (HELP) Committee held a hearing on the proposed Fair Pay Restoration Act (H.R. 2831, S. 1483), which is a legislative response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (May 29, 2007). The bill would enable applicants and current and former employees to challenge decades-old personnel decisions and would eliminate the statute of limitations for federal employment discrimination claims. For example, the bill would permit any claim to be brought within 180 days after an employee receives a paycheck that is the product of alleged discriminatory acts that occurred years or decades before the paycheck issued, no matter how far in the past the underlying act of discrimination allegedly occurred. Eric Dreiband, a partner at Akin Gump and former general counsel of the Equal Employment Opportunity Commission (EEOC), testified that the legislation would not advance the public interest. Witnesses in favor of the legislation included litigant Lilly Ledbetter, Washington University law professor Samuel Bagenstos and U.S. Women's Chamber of Commerce Chief Executive Officer (CEO) Margot Dorfman.

Ledbetter testified about suing her employer for alleged gender-based pay discrimination. Although Ledbetter was successful at trial, she recounted that the Supreme Court rejected her claims as untimely because she did not allege any acts of discrimination within the 180-day charging period. She said that each paycheck constituted a discriminatory act because each reflected the pay disparity resulting from intentionally discriminatory pay decisions that occurred outside the limitations period. She also complained that her pension and other retirement benefits were lower than they would have been if her employer had not discriminated against her throughout her 19-year career.

Ledbetter emphasized that a jury awarded her more than \$3 million in compensatory and punitive damages, but the judge was forced to reduce the award to the \$300,000 statutory cap, a point that both Sen. Mikulski (D-MD) and Sen. Kennedy (D-MA) noted in their questioning. Later that day, Sen. Kennedy introduced the Civil Rights Act of 2008 (H.R. 5129, S. 2554), which would eliminate the damages cap in Title VII cases, among other provisions.

Dorfman testified in favor of the legislation on behalf of women business owners. Dorfman argued that unchecked pay discrimination hurts those business owners who “play fair” by putting them at a competitive disadvantage.

Bagenstos testified that paychecks reflecting discriminatory pay decisions were treated as discriminatory acts for the purposes of the charge filing period by 10 federal circuit courts of appeals prior to the *Ledbetter* decision, and that the proposed legislation would overturn that decision in favor of “a simple commonsense rule to govern the timeliness of pay discrimination claims.” Bagenstos pointed out that unlike the refusal to hire or discriminatory discharge contexts, a pay disparity victim may not immediately recognize he or she is being discriminatorily paid less because many employees do not know their coworkers’ wage rates. Bagenstos argued that because pay discrimination is less readily identifiable, the proposed legislation is necessary to preserve the timeliness of pay discrimination claims.

Dreiband warned that the bill is not limited to compensation or anything else, and that it contains no time limit for any award of compensatory and punitive damages authorized by Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. He said that the bill likewise contains no time limit on any award of back pay and liquidated damages that may be recovered under the Age Discrimination in Employment Act. Dreiband cautioned that the Fair Pay Restoration Act does not exclude or exempt pension benefits and, if enacted, it may expose pension funds to “unanticipated and potentially staggering liability that could risk the retirement security of many Americans.” Dreiband said that the *Ledbetter* decision was consistent with more than thirty years of Supreme Court decisions, and that the Fair Pay Restoration Act mistakenly assumes that the law currently endorses hidden or concealed discrimination. Dreiband pointed out that Ms. Ledbetter herself knew about alleged sex-based pay disparities several years before she filed a charge of discrimination, and that her delay had real consequences: “Ms. Ledbetter’s case dragged on for nearly ten years, and one of the defendant’s most important witnesses died before the trial.”

Sen. Mikulski questioned Ledbetter about the economic and psychological costs that resulted from bringing her claim. Sen. Mikulski asserted that fears that the proposed legislation would result in many frivolous lawsuits were unfounded given the personal and professional sacrifices involved.

Sen. Harkin (D-IA) asked Ledbetter if she thought a requirement that employers publish information about its compensation rates would have dissuaded her employer from discriminating. Ledbetter responded affirmatively, and noted that such information would also have helped her to more quickly recognize the extent of the disparity in her pay. Sen. Harkin appealed to the committee to pass the Fair Pay Act (H.R. 2019, S. 1087), which would require employers to disclose pay ranges for each position.

### ***Senator Kennedy and Representative Lewis Introduce Civil Rights Act of 2008***

On January 24, 2008, Sen. Edward Kennedy (D-MA) and Rep. John Lewis (D-GA) introduced the Civil Rights Act of 2008 (H.R. 5129, S. 2554) in their respective chambers. The new bill represents a comprehensive effort to extend various employment and civil rights protections to employees and respond to a series of Supreme Court decisions that limited the scope and remedies of various anti-discrimination statutes. Key features of the bill, which has strong Democratic support, include removing current caps on damages for violations of Title VII and the Americans with Disabilities Act, incorporating Title VII’s disparate impact standards into the Age Discrimination in Employment Act, replacing “opt in” collective actions with “opt out” class actions for Equal Pay Act claims, and prohibiting pre-dispute

arbitration agreements between employers and employees. A more detailed description of the bill's provisions may be found in our Bill Tracker section at <http://www.akingump.com/docs/publication/1088.pdf>.

### ***House Committee Holds Hearing on ADA Restoration Act of 2007***

On January 29, 2008, the House Education and Labor Committee held a hearing to evaluate the proposed ADA Restoration Act of 2007 (H.R. 3195, S. 1881), which purports to “restore” Americans with Disabilities Act (ADA) protections to those originally intended by Congress in 1990. The bill, introduced in August 2007 with bipartisan support, would remove the requirement that a claimant’s disability must “substantially limit” his or her ability to perform “major life activities” in order to be protected by the ADA and, in most circumstances, would no longer permit courts to consider “mitigating measures” in determining whether an individual is “disabled” under the statute.

House Majority Leader Steny Hoyer (D-MD), a leading figure in the ADA’s 1990 passage and co-sponsor of H.R. 3195, testified that the bill was a response to a series of Supreme Court decisions that had narrowed the ADA’s scope and undermined its intent.

Although Congress took the definition of “disability” directly from the Rehabilitation Act of 1973, which had given broad meaning to the term, Rep. Hoyer explained that courts had narrowed the term in recent years to exclude diabetes, epilepsy, heart conditions, cancer and mental illness. Professor Robert Burgdorf, a leading disability law scholar who helped craft the original ADA, contended that the courts have “basically rewritten” the definition of the term. Hearing chairman Rep. Robert Andrews (D-NJ) decried such rulings as constituting an “imbalance in the scales of justice.” Rep. Hoyer explained that the new legislation would not expand any rights, but simply restore the scope of the ADA’s protections.

The Committee heard from Carey L. McClure, an electrician and unsuccessful 5th Circuit ADA plaintiff suffering from muscular dystrophy. McClure, who was unable to raise his arms above shoulder-level, was denied an electricians’ job with General Motors after failing a physical due to his condition, even though he was otherwise qualified for the position if provided minor accommodation. McClure explained to the Committee that courts found him not to be “disabled” under the ADA, even though he suffered from a significant disease that led to the revocation of his job offer.

Andrew J. Imparato, president and CEO of the American Association of People with Disabilities, contended that courts analyzing ADA claims have unduly focused on irrelevant intimate details of the personal lives of employees, rather than examining whether disability discrimination occurred and whether the employee or applicant was qualified for the position. In support of his contention that courts have strayed from the ADA’s original intent to provide broad protections to disabled individuals, Imparato cited one case in which a court stated that it was uncertain whether thinking, communication and social interaction would be covered “major life activities” under the ADA. There, the court concluded that an adult plaintiff with the mental age of an eight-year-old was not “disabled” under the ADA.

The panel also discussed the “Catch-22” that currently exists under the ADA, where employees are required to show disability and qualification. With the demanding standard of proof required to show disability of applicants and employees, plaintiffs are forced to present evidence that undercuts their requirement of demonstrating that they are qualified for the position.

Although he joined his colleagues in expressing alarm at McClure’s plight, Committee Ranking Member Howard “Buck” McKeon (R-CA) expressed concern that H.R. 3195 might have unintended consequences, and could impose significant costs and litigation on employers by covering employees with insignificant and temporary injuries and

afflictions, potentially distracting from the goal of protecting those with the significant disabilities and “diluting” their protections under the ADA. Rep. McKeon urged that the bill face amendments, rather than being fast-tracked to the floor in its current state.

In support of this view, David Fram of the National Employment Law Institute testified that the bill as currently written – removing the requirement of a substantial limitation of a major life activity – could be logically read to cover all impairments, including sprained ankles, the flu and even baldness. Fram explained that the “restored” ADA would force employers to provide reasonable accommodations for these minor afflictions, potentially undercutting their ability to accommodate those with legitimate disabilities. He further described how the expanded definition of “disability” under H.R. 3195 would interact with the current ban against pre-offer questions relating to the disability. Because applicants with broken legs or head colds could be considered disabled, employers would be in violation of the law if they asked, “How did you break your leg?” or “Do you have a cold?” Fram further expressed concerns that the bill could potentially lead to a flood of litigation.

In response to these concerns, Rep. Andrews pointed to various state ADA-analogs with broader definitions of “disability” – none of which covered the baldness, chipped teeth and the other extreme examples cited by Fram. Burgdorf and Imperato further explained that, under H.R. 3195, employees are not entitled to time off for any claimed affliction. Rather, they would be entitled only to accommodation “that enables them to do the essential functions of the job.” To be protected under the “restored” ADA, those with minor afflictions would have to demonstrate that the affliction hinders an essential job function. Rep. Hoyer disputed the assertion that ADA plaintiffs no longer would have to prove they were “qualified” for the job in question.

Fram agreed that the Supreme Court had overlooked clear legislative history that forbade the consideration of mitigating measures, and Congress could address its concerns merely by preventing courts from looking into mitigating measures, rather than altering the substantial limitation inquiry.

As indicated in a letter to the Committee, the Justice Department’s Office of Legislative Affairs opposes the legislation as currently drafted, citing the prospect of increased “unnecessary” litigation and explaining that H.R. 3195 would “upset the balance” struck in the original ADA. Similar to Fram, the Justice Department recommends that the ADA only be amended to evaluate disabilities in the absence of mitigating measures, except for individuals using eyeglasses or contact lenses to correct sight impairments.

## **AGENCY ACTIVITY ALERT**

### **DEPARTMENT OF LABOR:**

#### ***New Proposed Family and Medical Leave Act Regulations Released***

On February 11, 2008, the Department of Labor (DOL) issued a Notice of Proposed Rulemaking, proposing numerous changes to the Family and Medical Leave Act (FMLA) regulations, and calling for public comment before the regulations become final. The draft regulations would change employers’ and employees’ responsibilities under the FMLA and would also change the procedure for taking FMLA leave. While there are numerous changes to the current regulations, employers should take special note of several new issues discussed below. For a more in-depth discussion of the proposed changes, please watch for a comprehensive analysis we will be distributing in the coming days.

***Intermittent leave.*** Despite the fact that most employers consistently identified intermittent leave as the most troublesome part of the FMLA, the DOL has proposed no change to the current regulation allowing workers to take leave in the smallest increment of time permitted under the employer's timekeeping system for intermittent leave. Instead, the DOL has tried to assuage employers' concerns over intermittent leave by requiring employees to follow the workplace call-in procedures if they want to take unscheduled, intermittent leave. Currently, employees can take leave and then designate it as FMLA-qualifying leave within two days of the absence. The proposal only allows such an approach in the case of emergencies.

***Employee notice requirement.*** The proposed regulations clarify past ambiguities and impose two notice timeframes: (1) for non-emergency situations, the new regulations would retain the old regulations' 30-days notice, and (2) for emergency situations, the new regulations would require employees to inform the employer the same day they learn of the need for FMLA leave (if the employee learns of the infirmity during work hours) or the next day (if the employee learns after work hours).

***Employer notification process.*** Proposed § 825.300(b) would give employers five days to inform employees that they are eligible for FMLA leave after an employee has informed the employer of circumstances suggesting that the employee would need FMLA leave. This extends the previous two-day requirement.

***Medical certification process.*** Under the proposed regulations, employers would be able to contact medical providers directly to obtain clarification or authentication of documentation. Under the current rule, that communication may take place only between a health care provider who works for the employer and the employee's health care provider. This proposal complies with the Health Insurance Portability and Accountability Act's (HIPAA) privacy rule because a health care provider would still need permission from the patient in order to talk to the employer. If the patient does not give permission, the draft regulations would view that failure to give permission as a failure to provide proper certification if concerns arise about the certification.

***"Light-duty."*** The proposed regulations clarify that workers on "light-duty" after returning from FMLA-qualifying leave should not have the time count against the employee's 12 weeks of FMLA leave.

### ***President Signs Bill That Extends FMLA Protections To Care For Injured Service Members***

After vetoing the National Defense Authorization Act for FY 2008 (NDAA) earlier this month because of concerns over an unrelated provision dealing with Iraqi liability, President George W. Bush signed a revised NDAA into law on January 28, 2008. Section 585 of the NDAA amends the FMLA to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 work weeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

Employers should immediately advise their human resources department about this expanded scope in coverage. The FMLA amendment in the NDAA providing this leave is effective immediately. While the Department of Labor is currently in the process of preparing better guidance regarding rights and responsibilities under the new legislation, employers will still be liable for any violations of the new laws in the absence of comprehensive guidance.

The new amendment allows an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in

support of a contingency operation.” By its express terms, this provision of the NDAA is not effective until the secretary of Labor issues final regulations defining “any qualifying exigency.”

## **OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA):**

### ***OSHA Announces a New National Emphasis Program on Silica***

On February 1, 2008, OSHA announced a new National Emphasis Program that targets worksites where employees are at risk for developing silicosis, a disabling, nonreversible, and sometimes fatal lung disease caused by breathing in a large amount of crystalline silica.

This program builds upon the 1996 Special Emphasis Program, which included the following—

- a list of industries commonly known to have overexposure to silica
- detailed information on potential hazards linked to silica and about current research regarding silica exposure hazards
- guidance on calculating silica in the construction and maritime industries
- guidance on conducting silica-related inspections.

This National Emphasis Program also adds two components to the 1996 program: (1) an evaluation procedure for recording reductions of employee exposures to silica, and (2) information on outreach programs, partnerships and alliances with employers to share resources and training to reduce employee exposures.

### ***OSHA Requests Nominations to National Advisory Committee on Occupational Safety and Health***

On January 30, 2008, OSHA requested nominations for five individuals to serve on the National Advisory Committee on Occupational Safety and Health. The committee advises the secretaries of Labor and Health and Human Services on occupational safety and health programs.

OSHA will accept nominations for a two-year term in the following positions: two public representatives, one management representative, one safety representative and one health representative. To nominate an individual for any of these positions, OSHA requires the individual’s name, occupation, address, telephone number, nominated position and a resume describing the individual’s background, experience, and qualifications.

Nominations must be submitted by February 29, 2008. Nominations may be submitted by: (1) posting the comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>, (2) sending three copies to the OSHA Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C., 20210 or (3) faxing the comments to 202-693-1648.

### ***New Interpretation Letter Issued on Lockout/Tagout Standard***

On January 25, 2008, OSHA issued an interpretation letter regarding its “Control of Hazardous Energy (Lockout/Tagout)” standard, § 1910.147. This standard “covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.” The standard, however, contains the following exception:

Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection.

The question posed to OSHA was as follows:

“With regard to the minor servicing exception [contained in §1910.147(a)(2)(ii) note], would the described PLC system meet the definition of an *alternative measure which provides effective protection*?”

The programmable logic controller (PLC) mentioned in the question above was designed to open all ungrounded supply conductors by two contractors wired in series and to isolate power to all points of operation that the operators may come in contact with during the service work. OSHA concluded that the PLC was not an energy isolating device under § 1910.147(b), which is defined as “a mechanical device that physically prevents the transmission or release or energy.” Therefore, the PLC was *presumed* to be an ineffective employee protection from injuries resulting from hazards such as component failure, program errors, magnetic field interference, electrical surges and improper use or maintenance.

However, OSHA also stated a PLC could be an alternative measure if the employer can demonstrate that the PLC provides effective employee protection with a system hazard analysis. To meet this requirement, the PLC must be individually designed, installed, used and maintained in accordance with the generally recognized good engineering practices to protect employees from hazardous energy sources during the minor servicing activities. If OSHA approves the PLC, the employer can only use it to protect employees who are performing routine, repetitive and integral minor tools and adjustments or other minor servicing activities that occur during normal production operations.

### ***OSHA Extends Comment Period for the Confined Spaces in Construction Notice of Proposed Rulemaking***

On January 23, 2008, OSHA announced that it has extended the public comment period for the proposed rulemaking for Confined Spaces in Construction by 30 days to February 28, 2008. The proposed rule was published on November 28, 2007 to increase the protection provided to construction employees working in confined spaces. For details regarding the proposed rulemaking and specific requests for comment, please consult a prior *Washington Labor & Employment Wire* article at the following link <http://akingumpinfo.com/ve/ZZ5800R91W92KV87Nj86/VT=0/page=2#osha2>.

Comments may be submitted by either: (1) posting the comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>, (2) sending three copies to the OSHA Docket Office, Docket No. 2007-0026, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 or (3) faxing the comments to 202-693-1648.

### **NATIONAL LABOR RELATIONS BOARD:**

#### ***President Bush Announces Three Nominations to the National Labor Relations Board***

On January 25, 2008, President Bush submitted three nominations for open seats on the National Labor Relations Board, including Republicans Robert J. Battista and Gerard Morales, and Democrat Dennis P. Walsh.

Battista, a former NLRB chairman, completed his five-year term on December 16, 2007. Prior to being appointed to the Board, Battista was a labor and employment management-side lawyer at a law firm in Detroit. If confirmed, Battista will serve for the remainder of a five-year term expiring on December 16, 2009. The president has also designated Battista to serve as chairman upon confirmation.

Morales is currently a management-side lawyer at the law firm of Snell & Wilmer L.L.P. in Arizona. Morales previously served as a field attorney with the Board and has written several articles concerning labor law in the United States and Mexico. The president has nominated Morales to serve a five-year term expiring on December 16, 2012.

Walsh is a former Board member who served as a recess appointee under President Bush from January 17, 2006 through December 31, 2007. Prior to being temporarily appointed by President Bush, Walsh served as a recess appointee from December 30, 2000 to December 20, 2001 under former President Clinton. Walsh has an extensive history of government service. Prior to being a Board Member, Walsh served as special assistant to Board Member Wilma Liebman, and chief counsel to Board Member Margaret Browning. If confirmed, Walsh will serve for the remainder of a five-year term expiring on August 27, 2008, and an additional five-year term expiring on August 27, 2013.

Bush's recent appointments have already garnered some negative criticism. Senator Edward M. Kennedy posted the following statement on his Web site: "It's unbelievable that President Bush would renominate Mr. Battista to the Board, after he led the most anti-worker, anti-labor, anti-union Board in its history." Kennedy also stated that the President's nominations demonstrate the Administration's "hostility to fairness and justice in the workplace."

AFL-CIO President John Sweeney stated that President Bush's nominations to the Board were a "blatant attempt to keep a labor board with unbalanced, anti-worker bias, and they would be poisonous to America's working families."

The three nominations have been sent to the Senate for confirmation. It is unclear at this point how quickly the Senate will act, especially considering that President Bush's previous nominees, Dennis P. Walsh and Peter J. Kirsanow, were awaiting confirmation for over two years. In the same announcement, President Bush also withdrew his prior nomination of Kirsanow to the Board.

## **EMPLOYEE BENEFITS SECURITY ADMINISTRATION:**

### ***Employee Benefits Security Administration Releases Field Assistance Bulletin on Collection of Delinquent Contributions***

On February 1, 2008, the Employee Benefits Security Administration (EBSA) released a Field Assistance Bulletin to guide field investigators on the responsibilities of plan fiduciaries and trustees to monitor and collect delinquent employer and employee contributions owed to employee benefit plans governed by ERISA. The bulletin was written after several EBSA investigations revealed arrangements purported to relieve the financial institutions serving as plan trustees of any responsibility to monitor and collect delinquent contributions.

The complete text of the Field Assistance Bulletin 2008-01 is available at: <http://www.dol.gov/ebsa/regs/fab2008-1.html>



## BILL TRACKER

This section provides updates on pending and new labor and employment legislation in the House and Senate Below are the new and updated bills since the January edition of the *Washington Labor & Employment Wire*. Please visit: <http://www.akingump.com/docs/publication/1088.pdf> to view the complete list.

### CIVIL RIGHTS ACT OF 2008 (H.R. 5129, S. 2554)

**Core Provisions:** This bill is a comprehensive effort to extend various employment and civil rights protections to employees, as well as an effort to respond to a series of Supreme Court decisions by expanding the scope and remedies of various anti-discrimination statutes. The Civil Rights Act of 2008 would—

- Remove current caps on damages and thereby authorize recovery of unlimited compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act
- Expand disparate impact age discrimination liability by incorporating Title VII's disparate impact standards into the Age Discrimination in Employment Act (ADEA)
- Prohibit pre-dispute arbitration agreements between employers and employees
- Expand Equal Pay Act protections by limiting employer defenses, extending protections to applicants, authorizing compensatory and punitive damages, and replacing "opt-in" collective actions with "opt-out" class actions
- Authorize compensatory and punitive damages for retaliation claims brought pursuant to the Fair Labor Standards Act (FLSA).

The bill would also abrogate 11th Amendment immunity for states (as established in a line of Supreme Court decisions) under the ADEA and the FLSA when the state program or activity in question is a recipient of federal funds. Further, the bill provides individuals with a private right of action to sue programs receiving federal funds under Title VII of the Civil Rights Act of 1964, Title IX of the 1972 Education Amendments, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975. It also clarifies that military veterans possess a private right of action against state employers under the Uniformed Services Employment and Reemployment Rights Act. The bill further provides that the National Labor Relations Board may award back pay to undocumented immigrant workers terminated for union representation activity. Additionally, it would make it easier for plaintiffs to recover lawyers' fees under civil rights statutes and permits the recovery of expert fees by prevailing plaintiffs in Title VII cases.

**Status:** On January 24, 2008, Sen. Kennedy (D-MA) and Rep. Lewis (D-GA) introduced the Civil Rights Act of 2008 (H.R. 5129, S. 2554) in their respective chambers. The bill has drawn strong support from House and Senate Democrats.

### FAIRNESS IN AUTISM TREATMENT ACT OF 2007 (H.R. 5028)

**Core Provisions:** The Fairness in Autism Treatment Act would amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to require that group health plans provide coverage for pervasive developmental disorders such as autism. The expanded coverage would include therapeutic, respite and rehabilitative care for participants or for beneficiaries under the age of 22. In addition, the group health plan may not impose any annual or lifetime dollar limitation on benefits for pervasive developmental disorders unless such limitation applies to

all medical and surgical benefits. This amendment would not apply to group health plans of small employers, i.e., those with at least two but less than fifty employees.

*Status:* On January 16, 2008, the bill was introduced by Rep. Wexler (D-FL), and referred to both the Committee on Education and Labor, and the Committee on Ways and Means.

### **NATIONAL DEFENSE AUTHORIZATION ACT (H.R. 1585 & H.R. 4986), CONFERENCE REPORT (H.REPT.110-477)**

*Core Provisions:* This legislation includes provisions that would extend the FMLA provision of 12 weeks of unpaid leave up to 26 weeks of leave for an employee who is the spouse, child, parent or next of kin of a service member. Extending FMLA leave to military families was one of the recommendations of the President's Commission on Care for America's Returning Wounded Warriors. The National Defense Authorization Act also increases whistleblower protections for employees of defense contractors. Disclosures by contractor employees are currently protected if such disclosures are (1) made to a member of Congress and (2) reveal information "relating to a substantial violation of law related to a contract." The new provision would protect disclosures to more government actors, including an inspector general and the GAO, and would protect disclosures of information that employees reasonably believe indicate gross mismanagement or waste of defense contract funds, or unlawful activity related to a Department of Defense contract "including the competition for or negotiation of a contract."

*Status:* On December 12, 2007, the House adopted the National Defense Authorization Act conference report by a vote of 370 to 49. On December 14, 2007, the Senate passed the conference report by a vote of 90 to three and sent it to the President for his signature. President Bush unexpectedly vetoed the legislation on December 28, 2007. On January 16, 2008, a modified version of the National Defense Authorization Act (H.R. 4986) was introduced that addresses the President's stated concerns with the original legislation. On January 16, 2008, the House passed H.R. 4986 by a vote of 369 to 46. The Senate passed the bill without amendment on January 22, 2008 by a vote of 91 to 3. The president signed the bill on January 28, 2008. In his signing statement, President Bush asserted that certain provisions of the bill – including the whistleblower protections for contractor employees – "purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."

### **FMLA AMENDMENT (H.R. 5090)**

*Core Provisions:* H.R. 5090 would amend the FMLA to make the eligibility requirements more lenient for the family members of wounded veterans. Currently, an employee must have worked for at least 1,250 hours for their employer during the previous 12-month period in order to be an "eligible employee" for FMLA purposes. H.R. 5090 would lessen that requirement to 625 hours for a veteran's spouse, parent, son or daughter taking leave to care for the covered service member.

*Status:* H.R. 5090 was introduced by Rep. Barrow (D-GA) on January 22, 2008, and referred to the House Committees on Education and Labor, Oversight and Government Reform, and House Administration.

## TRADE AND GLOBALIZATION ASSISTANCE ACT OF 2007 (H.R. 3920, S. 1848)

**Core Provisions:** H.R. 3920 and S. 1848 would streamline the trade adjustment assistance program (TAA), which provides training and benefits to workers who lose their jobs because of increases in trade. The major provisions include extension of benefits to service workers and expansion of benefits to workers who lose their jobs for reasons unrelated to trade agreements. The bill also increases the amount of payments for training of adversely affected workers and the maximum allowance to cover costs of such workers for job search and relocation expenses. This act would also amend the Worker Adjustment and Retraining Notification (WARN) Act by expanding the notice period from 60 days to 90 days, and requiring employers to provide employees with information regarding any benefits and services available to them. The act also requires notice to be sent to the Department of Labor, which in turn would transmit the information to relevant members of Congress. The amendment further calls for double damages in the form of two days' worth of pay for every day an employer falls short of the 90-day notice period, and enables the Department of Labor to enforce the Act.

**Status:** H.R. 3920 was introduced by Rep. Rangel (D-NY) on October 22, 2007, passed by the House on October 31, 2007, and referred to the Senate Finance Committee on November 5, 2007. S. 1848, co-sponsored by Sen. Baucus (D-MT) and Sen. Snowe (R-ME), was introduced to the Senate on July 23, 2007. Reauthorizing TAA is a top priority for Senate Finance Committee Chairman Baucus, who recently stated it would be the first item on his 2008 trade agenda. Saying he expects the Senate Finance Committee to mark up a bill reauthorizing the TAA program by the middle of February, Baucus outlined his plans in a speech to the Peterson Institute for International Economics to add service workers, double the training budget and expand TAA benefits to more workers. The White House threatened to veto the House bill, but President Bush encouraged Congress to renew the TAA program and enact changes to help workers affected by trade deals in his January 28, 2008, State of the Union address.

### SUGGESTIONS

We welcome feedback from you, our audience. Please feel free to contact us with suggestions for issues to be covered in future editions of the *Washington Labor & Employment Wire*. If you have any suggestions, please contact Bob Lian at [blian@akingump.com](mailto:blian@akingump.com). If you would like us to add any of your colleagues to our mailing list, please contact Laurie Spielman at [lspielman@akingump.com](mailto:lspielman@akingump.com).

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