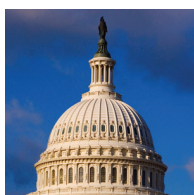


## WASHINGTON LABOR & EMPLOYMENT WIRE

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### **WASHINGTON LABOR & EMPLOYMENT WIRE TO MOVE TO BLOG FORMAT**

Effective April 2008, the *Washington Labor & Employment Wire* will be coming to you in a blog format that will notify you as new items are posted. This will enable us to provide you with news of developments more quickly. Everyone on our e-mail distribution will automatically be subscribed to receive the news in a daily digest format. Each day that an item is posted to the blog, you will receive an e-mail from us with a summary of that day's postings. You can also opt to receive the news by RSS feed.

We appreciate your continued feedback on the *Wire* and welcome further suggestions.

### **ON THE HILL**

#### ***House Subcommittee Holds Hearing on "Protecting American Employees from Workplace Discrimination"***

On February 12, 2008, the House Education and Labor Subcommittee on Health, Employment, Labor and Pensions (HELP) held a hearing on the adequacy of existing anti-discrimination protections and the advisability of several legislative proposals. The subcommittee was particularly concerned with mandatory arbitration clauses in employment contracts, religious discrimination and employment protections for service-members, voluntary firefighters and emergency medical personnel.

The first group of witnesses spoke out against mandatory arbitration clauses and in favor of the arbitration prohibition section of the Civil Rights Act of 2008 (H.R. 5129). Among the witnesses were Michael Foreman of the Leadership Conference on Civil Rights, who testified that most employees have no realistic choice other than to sign mandatory arbitration agreements, thereby signing away their rights to jury trials, and subjecting their claims to private arbitrators who have pro-employer incentives because they depend on employers for repeat business.

Mark De Bernado, executive director and president of the Council for Employment Law Equity, testified against the arbitration prohibition section of H.R. 5129, which he warned would “effectively end arbitration in employment in America.” De Bernado outlined the benefits of alternative dispute resolution (ADR) for employers and employees, such as speedier resolution of disputes, increased chances for amicable resolution of employment problems and the same available remedies as litigation. De Bernado urged the subcommittee to codify commonly accepted elements of effective ADR programs as ADR “safeguards” rather than enacting H.R. 5129 and flooding the courts with litigation of formerly arbitrable claims.

The subcommittee also heard testimony about the Workplace Religious Freedom Act (H.R. 1431) (WRFA), which would make it more difficult for employers to deny employee requests for accommodation of religious practices, including days off for religious holidays and the ability to wear religious clothing at work.

Several witnesses testified about proposed amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA) to include wages as a “benefit of employment” covered by the statute, prohibit discrimination against “potential applicants” for military service, explicitly permit disparate impact claims and require states receiving federal funding to waive their 11th Amendment immunity.

The subcommittee also heard testimony from witnesses about the alleged lack of employment protections for individuals who volunteer as firefighters or emergency medical service personnel.

### ***Senate Committee Holds Hearing on Rising Unemployment***

On March 6, 2008, the Senate Committee on Health, Education, Labor and Pensions (HELP) heard testimony related to the state of the economy and rising unemployment, including the consideration of measures to extend unemployment benefits (S. 2544).

Committee Chairman Edward Kennedy (D-MA), who noted his previous unsuccessful attempts to include extension of unemployment benefits in recent economic stimulus legislation, introduced the measure on a stand-alone basis in January.

The proposed legislation would provide state governments with significant resources to extend unemployment benefits to out-of-work individuals for up to 20 weeks in most states, with benefits extending to 33 weeks in states with the highest levels of unemployment.

Sen. Mike Enzi (R-WY), ranking member of the committee, expressed his opposition to S. 2544, instead urging improvements in federal education and job-training initiatives to combat unemployment. Former Senator and Secretary of Labor William Brock (R-TN), testified in favor of such initiatives, urging Congress to prioritize such programs, including a proposed Personal Competitiveness Account program that would allow workers to save for education and training throughout their careers.

## **AGENCY ACTIVITY ALERT**

### **DEPARTMENT OF LABOR**

#### ***DOL Publishes New FMLA Update Poster***

The Wage and Hour Division of the Department of Labor (DOL) has published a new update poster for the expanded Family and Medical Leave Act (FMLA) coverage for American servicemen. Amended in the January 28, 2008

National Defense Authorization Act for FY 2008, the FMLA now permits a spouse, son, daughter, parent or next of kin of a service member to take up to 26 workweeks 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 post the new poster, which is available on the DOL’s Web site at <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>. While numerous private vendors have begun offering revised FMLA compliance posters, these private-sector posters are not required for FMLA compliance. Rather, employers need only post the free poster available through the DOL Web site.

### ***DOL Taking Comments on Proposed Regulations***

The DOL has published a [Notice of Proposed Rulemaking](#) under the FMLA and is now encouraging interested parties to submit comments on the proposed regulations by midnight, April 11, 2008. A copy of the Federal Register Notice, instructions for submitting comments and related documents are available at Wage and Hour’s [FMLA Notice of Proposed Rulemaking Web site](#).

Employers who are interested in commenting on the new FMLA regulations can contact Bob Lian at Akin Gump Strauss Hauer & Feld LLP for guidance on crafting a regulatory comment that best protects employer interests.

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

### ***OSHA Issues Enforcement Policy for Its Standards Addressing the Control of Hazardous Energy***

On February 11, 2008, OSHA issued a directive amending its enforcement policy to address the “Control of Hazardous Energy (Lockout/Tagout)” (LOTO) standard, 29 C.F.R. § 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 directive provides guidance for OSHA personnel performing inspection activity related to the LOTO standard.

OSHA made the following significant changes in this instruction:

- adds compliance safety officer guidelines that require compliance safety and health officers who are trained in energy control practices and procedures to be the only individuals that can evaluate machines and equipment to determine that they are properly locked and/or tagged out in accordance with § 1910.147
- provides examples of citations that may result from various scenarios
- describes three affirmative defenses commonly associated with the LOTO standard: (1) greater hazard to comply with the standard; (2) impossibility defense, which applies if the LOTO standard was functionally impossible or would prevent the performance of the work, and if there are no alternate means of employee protection; and (3) unpreventable employee misconduct
- incorporates compliance assistance flowcharts
- provides additional information on alternatives to the LOTO standard, which include (1) complying with the minor servicing exception, the note contained in § 1910.147(a)(2)(ii); (2) utilizing the cord and plug connected equipment or hot tap exemptions, §§ 1910.147(a)(2)(iii)(A) and (a)(2)(iii)(B); (3) effective machine guarding; (4) final actions granting LOTO standard variances; and (5) other applicable portions of 29 C.F.R. Part 1910 that prevent employee exposure to hazardous energy

- includes additional guidance of the minor servicing exception, specific energy control procedures, periodic inspections and unexpected energization
- adds vehicle repair and maintenance standards and practices to prevent the release of hazardous energy
- includes general reference material for information pertinent to hazardous energy control.

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)**

### ***EEOC Provides Guidance on Employment of Disabled Veterans***

The Equal Employment Opportunity Commission (EEOC) has issued two question-and-answer guides on workplace issues affecting veterans with service-connected disabilities. The two guides, one directed to employers and the other to disabled veterans, explain differences between the two laws protecting veterans with service-connected disabilities: the Americans with Disabilities Act (ADA), enforced by the EEOC, and USERRA, enforced by the DOL. For instance, while both laws include reasonable accommodation provisions, the EEOC notes that USERRA goes further than the ADA by requiring employers to make reasonable efforts to assist a veteran returning to the workplace in becoming qualified for a job. Both guides are available on the agency's Web site at [www.eeoc.gov](http://www.eeoc.gov).

## **NATIONAL LABOR RELATIONS BOARD (NLRB)**

### ***NLRB Issues Proposed Rule Making on Consent Election Procedure***

On February 26, 2008, the National Labor Relations Board proposed a rule that would allow a new type of "consent" election procedure for a Board-conducted election.

The new rule would permit an employer and a labor organization to file a petition jointly for certification consenting to an election. In contrast to the other voluntary and non-voluntary election procedures, which require at least a 30 percent showing of employee interest, this proposed rule requires no showing of interest among employees.

The petition would provide the election date, place and hours; a description of the parties' agreed-upon appropriate bargaining unit; the payroll period for voting eligibility; and the full names and addresses of employees eligible to vote in the election. The proposed election date must be within 28 days from the petition filing date. If the petition lacks any necessary information, the regional director will advise the parties and request that the petition be corrected.

Within three days of the docketing of the petition, the regional director will advise the parties of his or her approval of the petition. Absent "extraordinary circumstances," the parties' agreement as to date, place and time of the election will be approved. Within three days of docketing, the regional director will also send to the employer official NLRB notices to post in conspicuous places informing employees of the joint petition for certification and the date, place and time of election. The employer must also post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to the day of the election.

Unfair labor practice charges would not block the election, but would be handled in conjunction with any post-election proceedings. All election and post-election issues would be resolved by the regional director, with no appeal to the Board.

All written comments must be received by the Board on or before March 27, 2008. Comments should be sent to the Office of the Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Room 11600, Washington, DC 20570-0001.

## 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/files/upload/Bill\\_Tracker.pdf](http://www.akingump.com/files/upload/Bill_Tracker.pdf) to view the complete list.

### **PAUL WELLSTONE MENTAL HEALTH AND ADDICTION EQUITY ACT OF 2008 (H.R. 1424)**

**Core Provisions:** This legislation would amend the Employee Retirement Income Security Act of 1974 (ERISA) and the Public Health Service Act to prohibit group health plans from treating mental health or substance-related disorders differently than other health conditions in terms of treatment limitations, beneficiary financial requirements and out-of-network coverage. The bill specifies that plans must cover treatment for any mental health condition or substance-related disorder included in the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. This amendment would not apply to group health plans of employers with fewer than 50 employees. Provisions from the Genetic Information Nondiscrimination Act (H.R. 493), which was passed by the House but not yet acted upon by the Senate, were added to H.R. 1424 following passage in the House. The provisions added to this act would prohibit employers from discriminating against individuals on the basis of genetic information, limit genetic testing and information collection by insurers, and prohibit insurers from using genetic information to determine eligibility, premium rates or preexisting condition coverage exclusions.

**Status:** On March 9, 2007, the bill was introduced by Rep. Kennedy (D-RI). On March 5, 2008, the House passed H.R. 1424 by a vote of 268 to 148. On March 5, 2008, the White House released a statement expressing concerns about H.R. 1424 and urging Congress to pass S. 558 instead. The White House opposes H.R. 1424's preemption provisions and its application to physician-owned hospitals, and is concerned the legislation would "further distort the market for prescription drugs, and discourage innovation in the drug development process." The White House also expressed concern about H.R. 1424's provisions from the Genetic Information Nondiscrimination Act, but concluded that "the Administration looks forward to working with Congress to address these concerns and pass Mental Health Parity and Genetic Nondiscrimination legislation this year."

### **MENTAL HEALTH PARITY ACT OF 2007 (S. 558)**

**Core Provisions:** This legislation would amend ERISA to require group health plans to administer treatment limitations, beneficiary financial requirements and out-of-network coverage so that mental health benefits are no more restrictive than "substantially all medical and surgical benefits." This amendment would not apply to group health plans of employers with fewer than 50 employees.

**Status:** On February 12, 2007, the bill was introduced by Sen. Domenici (R-NM). On September 18, 2007, the Senate passed S. 558, and it was referred to the House HELP Subcommittee on October 17, 2007. On March 5, 2008, the White House released a statement urging passage of S. 558, because the bill "strikes the necessary balance of treating mental illness with the same urgency as physical illnesses without significantly increasing health care costs."

### **CPSC REFORM ACT (H.R. 4040, S. 2663)**

**Core Provisions:** H.R. 4040 and S. 2663 reform and strengthen the Consumer Product Safety Commission (CPSC). S. 2663 includes a whistleblower provision that provides employees with a procedure for bringing whistleblower complaints about consumer products to the attention of the DOL. After a specified period of time, either 90 days from a DOL determination or 210 days from the filing of the complaint (where the DOL fails to make a timely

determination), employees may bring suit in federal court. Prevailing plaintiffs may receive compensatory and consequential damages, fees and costs, including reasonable attorneys' and expert fees and up to \$250,000 in punitive damages. Courts may also issue injunctive relief.

The bill contains a fee-shifting mechanism, under which the employer is fined all fees and costs when an adverse determination is made against it by the DOL. The legislation discourages bad faith or frivolous claims brought by disgruntled employees, providing for a mechanism by which DOL may award reasonable attorneys fees up to \$1,000 when finding such an unmeritorious claim exists.

H.R. 4040 does not contain a comparable whistleblower provision.

**Status:** S. 2663 was introduced in the Senate by Sen. Pryor (D-AR) on February 25, 2008, and was passed by the Senate by a vote of 79-13 on March 6, 2008. H.R. 4040 was introduced by Rep. Rush (D-IL) on November 1, 2007, and passed unanimously on December 19, 2007. S. 2663 and H.R. 4040 await conference committee action.

### **NEW EMPLOYEE VERIFICATION ACT OF 2008 (H.R. 5515)**

**Core Provisions:** The New Employee Verification Act would replace the government's current E-Verify program with the Electronic Employment Verification System (EEVS) for verifying employees' eligibility to work in the U.S. The legislation would affect those employers already participating in the E-Verify program pursuant to the Immigration and Nationality Act (INA), as well as employers that may be selected for participation by the Secretary of Homeland Security. EEVS would be accessible via the Internet and a toll-free telephone line for determining whether an employee's identification information is consistent with records maintained by Homeland Security and Health and Human Services, and whether the individual is eligible for employment.

**Status:** H.R. 5515 was introduced by Rep. Johnson (R-TX) on February 28, 2008, and referred to several House committees including the Judiciary, Ways and Means, and Education and Labor Committees.

### **WORKSITE ENFORCEMENT ACT OF 2008 (S. 2711)**

**Core Provisions:** The Worksite Enforcement Act bars employment of unauthorized aliens either directly or through a contract or subcontract and outlines document verification and recordkeeping requirements. Like the New Employee Verification Act (H.R. 5515), the Worksite Enforcement Act provides for EEVS to replace the current E-Verify program for verifying employees' identification and work eligibility. The bill tightens reporting requirements and increases penalties for employers who incorrectly report employees' social security numbers on tax documents. The bill also orders the social security commissioner to issue fraud-resistant social security cards, and orders the Secretary of Homeland Security to establish a grant program to assist states in issuing identification cards that may be used to verify eligibility to work in the United States.

**Status:** On March 5, 2008, Sen. Sessions (R-AL) introduced S. 2711. The bill was then placed on the Senate Legislative Calendar.

### **SOCIAL SECURITY NO-MATCH LETTER LEGISLATION (UNNAMED BILL, S. 2710)**

**Core Provisions:** This legislation authorizes the Department of Homeland Security to use an employer's failure to timely resolve discrepancies with the Social Security Administration after receiving a "no match" notice as evidence that the employer violated section 274A of the INA. S. 2710 provides that an employer is deemed to have "constructive knowledge" an employee is not authorized to work in the United States if the employer:

(A) receives a Social Security no-match letter notifying the employer that the Social Security Administration has been unable to match the employee's name with the Social Security number provided by the employer; and

(B) fails to take the corrective action suggested by the Social Security Administration or the Department of Homeland Security within 90 days of receiving the letter described in subparagraph (A).

The bill also states that Secretary of Homeland Security shall promulgate necessary regulations related to the amendment.

**Status:** On March 5, 2008, Sen. Sessions (R-AL) introduced S. 2710. The bill was read the second time on March 6, 2008, and placed on the Senate Legislative Calendar under General Orders, Calendar No. 595.

## **EMERGENCY UNEMPLOYMENT COMPENSATION EXTENSION ACT OF 2008 (H.R. 4934, S. 2544)**

**Core Provisions:** This bill would provide full federal funding to state governments to temporarily extend unemployment benefits to qualifying out-of-work individuals. Such workers qualify for benefits when they have exhausted current benefits after filing an initial jobless claim in the past year. The bill provides eligible workers with up to 20 weeks of extended benefits, with employees in states with the highest unemployment rates receiving up to 33 weeks of extended benefits. The bill also contains safeguards to protect against fraud and overpayment.

**Status:** H.R. 4934 was introduced in the House by Rep. McDermott (D-WA) on January 15, 2008, and referred to the House Committee on Ways and Means. S. 2544 was introduced by Sen. Kennedy (D-MA) on January 22, 2008, and referred to the Finance Committee. A hearing on issues related to the bill was held on March 6, 2008, before the Senate HELP Committee.

### **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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