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ON THE HILL

Senate Confirms Nominees to Labor, EEOC Posts

By voice vote on December 19, 2007, the Senate confirmed four pending Department of Labor (DOL) nominees. Acting Deputy Secretary Howard Radzley, a former Solicitor of Labor under President Bush, was confirmed as Deputy Secretary, the second highest post in the DOL. White House aide Gregory Jacob was confirmed as the new Solicitor of Labor. The Senate also confirmed Keith Hall as Commissioner of the Bureau of Labor and Statistics and Douglas Webster as Chief Financial Officer.

Additionally, the Senate confirmed Commissioner Stuart Ishimaru of the Equal Employment Opportunity Commission (EEOC) for a second term expiring on July 1, 2012. Commissioner Ishamaru has served on the EEOC since November 2003. The EEOC currently has four members (two republicans and two democrats), with no nomination for the fifth seat currently pending before the Senate.

Congress Calls NLRB Members to Joint Hearing

On December 13, 2007, the Senate Health, Employment, Labor and Pensions (HELP) Committee and House Education and Labor Committee held a joint hearing to examine several recent decisions of the National Labor Relations Board (NLRB) and their potential impact on employees. The hearing occurred in the wake of high anti-Board sentiment, including a recent protest in which union activists marched in front of the agency in Washington carrying signs such as "NLRB: Close it for Renovations."

The Committees heard from two current Board members, outgoing Chairman Robert Battista and Wilma Liebman, as well as University of Illinois Law Professor Matthew Finkin, AFL-CIO General Counsel Jonathan Hiatt, former Board member Charles Cohen, and Feliza Ryland, a victim of unfair labor practices.

Chairman Battista, whose term expired on December 16, declared that "the decisions this board has issued are correctly decided, soundly reasoned and speak for themselves."

Chairman Battista did not discuss any particular Board decision, but rather focused on the Board's accomplishments, the objectives of the National Labor Relations Act (NLRA) and the Board's purpose under that law.

Chairman Battista noted that under his leadership the NLRB has issued on average 500 cases a year, drastically cut the number of days cases are pending and decreased the case backlog to its lowest level in thirty years.

Chairman Battista emphasized that two fundamental principles undergird the NLRA: (1) to provide for employee free choice by allowing employees to decide for themselves whether to be represented by a union and, (2) if employees choose union representation, to encourage collective bargaining. Chairman Battista described the role of the Board as a neutral arbitrator balancing the interests of employees and employers, and noted that "The law is neutral . . . and so is this agency." Chairman Battista noted that "[t]he statute was not intended to benefit unions or employers," but "[r]ather, the rights granted by the statute belong only to employees—whether unionized or not."

Chairman Battista dismissed the current criticism of the Board as "special-interest attacks designed to gain support for their position in the coming election cycle." He argued that some of the criticism directed towards the Board is overblown. For example, in response to the allegation that the Board has eagerly overturned decades of precedent, Chairman Battista pointed out that the Board has issued 21 decisions overturning precedent compared with the Clinton Board's 60 decisions reversing precedent. Chairman Battista also noted that enforcement of the Board's decisions in the courts of appeal is high, which he felt was strong evidence that the board's decisions have been faithful to the NLRA.

Member Liebman, a Clinton appointee who was reappointed by President Bush, disagreed strongly with Chairman Battista, stating that "virtually every recent policy choice by the Board impedes collective bargaining, creates obstacles to union representation or favors employer interests." Member Liebman described the core purpose of the NLRA as protecting the right of employees to organize and promoting collective bargaining, and argued that the Board has fallen far short of upholding these principles.

Member Liebman specifically called into question several September 2007 Board decisions that she says leave fewer workers with fewer rights, including *Dana Corp.*, *Wurtland Nursing & Rehabilitation Center*, *Toering Electric Co.*, *St. George Warehouse* and *Grosvenor Resort*. Member Liebman said that she believes these decisions have resulted in a loss of confidence in the Board and the legitimacy of the process. As evidence of the loss of confidence in the Board, Member Liebman noted that case intake is down drastically.

Professor Finkin and Hiatt dismissed Chairman Battista's characterization of the board as a "neutral arbitrator." Hiatt argued that the Board is no longer serving the goal of protecting workers' rights, and stated that the Board's decisions have "significantly narrowed worker protections, while expanding the scope of anti-union conduct lawfully available to management." Professor Finkin disputed Chairman Battista's reliance on judicial affirmance as a benchmark, noting that it is a long-held principle of administrative law that the courts must defer to agency decisions.

Cohen, who served as a Board member between 1994 and 1996, disagreed with allegations that the Board is pro-employer. Despite the critics, Cohen stated that the Board's decisions are consistent with the NLRA and do not represent a "sea change."

Many have questioned the propriety of the committees requiring board members to testify about recent decisions. For example, in a letter to leaders of the Senate HELP Committee, the U.S. Chamber of Commerce stated that it is

inappropriate for Congress to attempt to influence Board decisions by calling members to testify when it disagrees with Board rulings.

Congress Passes Expansion of FMLA to Cover Leave to Care for Injured Service Members

President Bush is expected to sign the National Defense Authorization Act for Fiscal Year 2008, which amends the Family and Medical Leave Act (FMLA). These amendments provide unpaid leave to employees to care for a family member injured through service in the Armed Forces or to deal with an urgent family situation that occurs when a close family member is called away because of military service.

Leave is available under the amendment. Under the amended FMLA, an eligible employee may take a total of 26 work weeks of unpaid leave during a 12-month period to care for a service member who is suffering from a serious injury or illness incurred by the member "in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating."

The amendment also permits an eligible employee to take up to a total of 12 work weeks of leave during any 12-month period because of any "qualifying exigency" arising because the employee's spouse, child or parent has been called to active duty in support of military "contingency operations." The legislation leaves to the Secretary of Labor the job of defining "qualifying exigency" by regulation.

Eligibility for leave. The amended FMLA expands the definition of employees eligible to take service member family leave. In particular, the amendment defines an eligible employee to include the spouse, child, parent or "next of kin" of the service member. The term "next of kin," which is defined as "nearest blood relative," does not appear in the existing statute.

The legislation defines covered service members to include any Armed Forces member, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, in outpatient status, or on the temporary disability retired list, for a serious injury or illness.

Form in which leave may be taken. Leave may be taken as a block, intermittently or on a reduced leave schedule when medically necessary. If the intermittent or reduced leave is foreseeable based on planned medical treatment, the employer could require the employee to transfer to an available temporary alternative position for which the employee is qualified. The alternative position must (1) provide equivalent pay and benefits and (2) accommodate recurring periods of leave better than the employee's regular position. If the same employer employs a husband and wife entitled to leave to care for an injured service member, the aggregate amount of leave to which both would be entitled could be limited to 26 work weeks.

As with all FMLA leave, an employee can choose, or the employer may require the employee, to substitute any accrued paid vacation, personal, sick or family leave for FMLA leave. *Id.* at 129; 29 U.S.C. § 2612(d).

Notice requirements. Under the legislation, if an employee takes leave to care for an injured service member and that leave is foreseeable because of planned medical treatment, the employee must give 30-days notice to the employer. If the treatment requires leave to begin in less than 30 days, the employee is only required to provide notice as soon as practicable. Furthermore, the employee must also make a reasonable effort to schedule the treatment to avoid undue disruption to the employer's operations, subject to the approval of the injured service member's health care provider.

An employee taking leave because a spouse, child or parent has been called to active duty would be required to provide reasonable notice to the employer where the necessity for leave is foreseeable.

The Secretary of Labor sets employers' posting requirements under the FMLA, so employers should anticipate updated regulations regarding posting of newly available leave provisions once the legislation takes effect.

Medical certification. For employees taking leave to care for an injured service member, an employer can require a certification of the service member's condition issued by a health care provider. An employer could also require supporting certification for an employee's request for leave because a family member has been called to active duty. The timing and content requirements of such certification would be prescribed by regulations issued by the Secretary of Labor.

The legislation is awaiting action by the President, who is expected to sign it. Once it becomes law, the Secretary of Labor will need to define certain key terms through a rule-making process.

AGENCY ACTIVITY ALERT

DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AND U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Stay Granted in Case Challenging DHS Safe Harbor Rule for Employers Receiving No-Match Letters

On December 14, 2007, District Court Judge Charles R. Greyer granted the Department of Homeland Security's motion to stay the proceedings in *AFL-CIO v. Chertoff*, Case No. 07-CV-4472 CRB (N.D. Cal.) pending new rulemaking planned by DHS to address the court's concerns. On October 10, 2007, Judge Greyer had issued a preliminary injunction enjoining DHS and the Social Security Administration (SSA) from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." The new rule identifies the receipt of a no-match letter from the SSA as evidence that the employer had "constructive knowledge" that the employees listed in the letter were not authorized to work in the United States unless the employer takes certain steps within a specific time frame. The case is scheduled for a status conference on March 28, 2008. DHS has appealed the preliminary injunction to the 9th Circuit.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

OSHA's Revised Enhanced Enforcement Program

The Occupational Safety and Health Administration (OSHA) has announced a new Enhanced Enforcement Program (EEP), which will become effective January 1, 2008. OSHA implemented the original EEP on September 30, 2003, to "target those employers who are indifferent to their obligations under the OSH Act." The new program continues this objective but will "focus greater enforcement emphasis on those employers that have a history of violations with OSHA" or its state equivalents (State Plans).

To achieve this renewed focus, OSHA has modified the triggering criteria for EEP cases, the definition of what constitutes prior OSHA history and the procedures once a case is in the EEP.

OSHA has significantly increased the number of cases that will qualify for the program. Under the existing program, only certain high-gravity serious violations could prompt the EEP. Under the new guidelines, serious violations of any gravity will initiate enhanced treatment. The following violations will qualify for the EEP—

- a fatality inspection in which OSHA finds one or more willful or repeat (any gravity) violations related to the death
- a fatality inspection in which OSHA finds one or more serious (any gravity) violations related to the death, and the employer has either—
- an OSHA history of violations similar in kind to the violation that led to the current fatality consisting of one serious, willful or repeat violation within the last three years
- the occurrence of another fatality within the last three years regardless of whether any citation was issued
- an inspection that results in the citation of three or more serious (any gravity) violations classified as willful or repeat, and the employer has an OSHA history of violations, similar in kind to one or more violations found in the current inspection, consisting of one serious (any gravity), willful or repeat violation within the last three years
- an inspection that results in one or more failure-to-abate notices where the underlying violations were classified as serious (any gravity)
- any egregious case
- a case consisting of one or more inspections in which the proposed penalties total more than $100,000.

Because an employer's previous violations and inspection history factor into the threshold question of EEP qualifying criteria, OSHA has clarified what constitutes "OSHA history." Under the revised program, an employer's OSHA history can only include final orders from federal OSHA jurisdictions and/or State Plans.

The revised EEP also alters the procedures governing the implementation of the program. First, instead of transferring any related establishments from the Site-Specific Targeting (SST) secondary list to the primary list as the previous EEP program did, OSHA will now move all related establishments on the year's primary or secondary list to each area office's current inspection cycle if the establishment is in the same three-digit North American Industry Classification System code (or two-digit Standard Industrial Classification System code). This change will result in OSHA inspecting related worksites sooner than it would under the previous program. Second, the EEP will now also apply to agriculture and maritime employers. Third, now if OSHA determines that the establishment's safety and health problems need to be addressed at the company headquarters, it will not only notify the company president, but also the employee representatives. Finally, OSHA has provided a list of provisions that area directors can include in settlement agreements in connection to violations in the EEP. These provisions are—

- requiring the employer to hire a qualified safety and health consultant to develop an effective and comprehensive safety and health program with management support in the establishment, and assist the company in implementing such a program
- applying the agreement company-wide

- using settlement agreements to obtain from employers a list of their current jobsites, or future jobsites within a specified time period, in construction (and, where appropriate, in agriculture, maritime and general industry)

- requiring the employer to submit to OSHA its log of work-related injuries and illnesses on a quarterly basis and to consent to OSHA's conducting an inspection based on the report;

- requiring the employer to notify the area office of any serious injury or illness requiring medical attention and to consent to an inspection

- obtaining employer consent to entry of a court enforcement order under Section 11(b) of the Act.

New Proposed Rule for Confined Spaces in Construction

On November 28, 2007, OSHA published a proposed rule designed to increase the protection provided to construction employees working in confined spaces. The existing general industry standard for confined spaces does not apply to the construction industry. OSHA plans to extend the general industry standard to the construction industry but with the following seven significant changes—

- providing a step-by-step process explaining how to assess hazards, classify a confined space and to implement effective procedures to protect employees

- requiring the controlling contractor to coordinate entry operations among contractors who have employees in a confined space regardless of whether the controlling contractor has an employee in the confined space

- addressing work in confined spaces in which the hazard has not been isolated, in particular by allowing employers to establish an isolated-hazard confined space (IHCS) by isolating or eliminating all physical and atmospheric hazards in a confined space

- requiring continuous monitoring unless the employer demonstrates that periodic monitoring is sufficient

- implementing an explicit requirement for the entry supervisor to monitor the permit-required confined spaces' conditions during entry

- not requiring a written plan if the employer maintains a copy of the standard at the worksite

- creating an early-warning requirement for upstream hazards in sewer-type spaces.

OSHA has asked for public comments in connection with this proposed standard. The comment period will remain open until January 28, 2008. 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, 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.

In particular, OSHA requests comments in the following six areas—

- Should OSHA combine the excavation standard in subpart P with this proposed standard or does subpart P provide sufficient protection from confined-space hazards during excavation work? If the standards remain separate, OSHA requests comments on how to reconcile the difference in lower flammable limits (LFLs) between the excavation standard and this proposed standard.

- What means are available, other than electronic equipment, for an individual to effectively monitor multiple permit-required confined spaces while performing other assigned tasks without reducing the level of protection employees receive?

- What alternatives are available to retrieve employees from a permit-required confined space involving a vertical distance over five feet? In particular, OSHA wants to know if alternatives exist that would not occlude the space's entrance.

- With respect to its provision on timely response to a rescue summons, OSHA defines "timeliness" as a function of how quickly a rescue service needs to reach an employee to prevent further serious physical harm that may result from hazards in the confined space while waiting to be rescued. OSHA wants to know if the definition should remain performance-based or should it specify an exact time.

- The proposed standard only requires employers to maintain controlled-atmosphere confined space (CACS) and IHCS verification documents until they complete the work in the confined space. Should this retention period be longer?

- Have employers experienced any difficulties with public-sector emergency services being unable to perform entry rescues in confined spaces that rapidly change in configuration during the construction process?

Supreme Court Declines Review of Willful Violations Penalty Standard

On December 3, 2007, the Supreme Court denied certiorari of an appeal from a 5th Circuit ruling, *Jindal United Steel Corp. v. Chao*, that required the Occupational Safety and Health Review Commission (OSHRC) to assess penalties for "willful violations" on a per violation basis, rather than grouping them together.

In *Jindal*, the administrative law judge found that between 1998 and 2000, Jindal United Steel Corp. and its related company, Saw Pipes USA, committed 82 and 59 willful violations, respectively. The administrative law judge grouped these violations together for penalty purposes and assessed each company a $70,000 penalty. However, the 5th Circuit held that based on the OSH Act's penalty provision, the OSHRC must assess a penalty between $5,000 and $70,000 for "each willful violation charged and proven." As a result, instead of facing a total of $140,000 in penalties, Jindal and Saw Pipes owed over $2.2 million.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EEOC Issues Fact Sheet on Employment Tests and Selection Procedures

On December 3, 2007, the Equal Employment Opportunity Commission (EEOC) issued a fact sheet on employer-administered tests and other selection procedures. Issued in response to an observed increase in employment testing and employment testing-related charges, the fact sheet describes recent EEOC enforcement actions that illustrate principles on testing and focuses on best practices for employers to follow when using employment tests and other screening devices. Such devices, including cognitive tests, personality tests, medical examinations, credit checks and criminal background checks, can violate Title VII, the Americans with Disabilities Act (ADA) or the Age Discrimination in Employment Act (ADEA) if used to intentionally discriminate based on race, color, sex, national origin, religion, disability or age (40 or older), or if they have a disparate impact on any of these groups.

As part of its best practices for administering tests without regard to race, color, national origin, sex, religion, age or disability, the EEOC advises employers to ensure that their tests are properly validated for the positions and purposes for which they are used and not just rely on a test vendor's documentation supporting the validity of a test. In addition,

employers should monitor changes in job requirements and update selection procedures accordingly. The fact sheet is available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

EEOC Anticipates Focus on Age Discrimination Due to Expected Increase in Older Workers

In a December 4, 2007, conference marking the 40th anniversary of the ADEA, EEOC Commissioner Stuart Ishimaru remarked that age discrimination is sometimes the "stepchild" in the EEOC's enforcement agenda and the agency needs to do a "far better job" in enforcing the ADEA. Commissioner Ishimaru suggested that the EEOC needs to focus on preparing for the anticipated increase in older workers in the workforce as baby boomers stay in the workforce longer, but noted that the EEOC does not currently have an organized plan to address this trend.

Provision Barring Challenges to English-Only Rules Holds up EEOC Funding

EEOC funding for fiscal year 2008 is being held up at the conference committee stage due to objections to an amendment included in the Senate-passed version of the bill that would prevent the EEOC from bringing a civil action "against an entity on the grounds that the entity requires an employee to speak English while engaged in work." Members of the Congressional Hispanic Caucus object to the provision, arguing that it is unnecessary because Title VII already allows employers to have English-only policies if they have a legitimate, business-related need to require employees to speak English on the job.

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

EBSA Proposes New Regulation Relating to Settlement Class Exemption

On November 20, 2007, the Employee Benefits Security Administration (EBSA) announced a proposal to expand the type of consideration that can be accepted by an employee benefit plan in settlement of litigation. Although the Employee Retirement Income Security Act (ERISA) prohibits certain transactions, EBSA passed a regulation in 2003 generally exempting a plan's receipt of consideration from a related party in settlement of litigation. Under the present regulation, the consideration has to be in the form of cash. The proposed amendment would permit the receipt of non-cash consideration, including the promise of future employer contributions, but only where the consideration can be objectively valued. The proposal also would permit plans to acquire, hold or sell non-qualifying employer securities such as warrants and stock rights where such securities are received in settlement of litigation, including bankruptcy proceedings.

The complete text of the proposal is available at http://www.dol.gov/ebsa/regs/fedreg/notices/20071121.htm.

EBSA Proposes New Regulation Regarding ERISA Service Provider Disclosures

Under ERISA, plan fiduciaries must act prudently in selecting service providers and must ensure that only reasonable compensation is paid for services provided to plans. To perform this function, the fiduciary must have sufficient information regarding fees and compensation that the service provider receives and must ascertain whether there are interests on the part of the service provider that may call into question the objectivity of the service provider in providing its services to the plan. EBSA has proposed amending the existing regulation to clarify what constitutes a reasonable contract or arrangement and to require more comprehensive written disclosure concerning plan contracts with service providers.

For more information, see the Department of Labor's fact sheet titled Proposed Regulation Relating To Service Provider Disclosures Under ERISA Section 408(b)(2) at: http://www.dol.gov/ebsa/pdf/fs408b2.pdf.

New PBGC Proposed Rule Would Require Disclosure of Distress Termination Data

On December 4, 2007, the Pension Benefit Guaranty Corporation (PBGC) proposed a new rule requiring a defined benefit pension plan administrator to disclose information it submits to the agency in connection with a distress termination filing. The proposed rule would allow a court to limit disclosure of the confidential information to an authorized representative of the participants and beneficiaries who agree to keep the information confidential.

Under the rule, a plan administrator who has filed a Notice of Intent to Terminate with the PBGC must provide to an affected party, upon request, information submitted to the agency in connection with the filing no later than 15 days after receipt of such request. The PBGC's rule would also apply in situations where the agency initiated the termination. Once the plan administrator received a Notice of Determination from the agency, the plan sponsor, plan administrator, and PBGC would have to provide the requested information to an affected party upon request. The proposed rule would be applicable to both plan-initiated and agency-initiated terminations on or after Aug. 17, 2006.

The complete text of the proposal is available at http://www.pbgc.gov/docs/E7-23577.pdf.

CANDIDATE CORNER

This is the second in a series of capsules describing the positions of Democratic and Republican presidential candidates on issues of concern to the labor and employment community. We continue the series with Sen. Barack Obama (D-IL) and Gov. Mike Huckabee (R-AR).

BARACK OBAMA

"I want to be absolutely clear that the reason I'm in public life, the reason I came to Chicago, the reason I started working with unions, the reason I march on picket lines, the reason that I am running for president is because of you, not because of folks who are writing big checks." (Barack Obama, AFL-CIO Debate, 8/8/07).

General

Originally a community organizer in Chicago and an Illinois state legislator, Obama burst on the scene with his address at the 2004 Democratic Convention. Though he struggled for much of the year to translate his superstar following into poll numbers, he has now caught up to Sen. Hillary Clinton and is polling ahead or close behind in Iowa and New Hampshire.

Positions on Legislation

In Congress, Obama supported raising the minimum wage to $7.25 an hour by 2009. As president, Obama would further raise the minimum wage, index it to inflation and increase the earned income tax credit.

Obama supports expansion of the FMLA, especially to spouses of military personnel deployed overseas, and supports efforts to guarantee workers seven days of paid sick leave per year.

Obama was a cosponsor of the Employee Free Choice Act in the U.S. Senate and supports a card check system. He has said that as president he would continue to work for passage of the bill and sign it into law.

Obama's healthcare proposal—

- provides affordable, comprehensive and portable health coverage; mandates coverage of children, but not universal coverage
- supports modernizing the health care system, including wireless and paperless technologies, to reduce cost and improve quality of care
- focuses on disease prevention and increasing access to care to minimize long term costs
- requires fuller transparency of quality and cost, including full disclosure for patients.

Obama supports the federal Employment Non-Discrimination Act and has touted his role as the principal sponsor of similar legislation in the Illinois state Senate.

MIKE HUCKABEE

"Mike Huckabee was the only Republican candidate with the guts to meet with our members and the only one willing to figure out where and how we might work together … He is entitled to serious consideration from our members voting in the upcoming Republican primaries." – Tom Baffenberger, President, International Association of Machinists and Aerospace Workers (Nedra Pickler, "Machinists Union Endorses Clinton And Huckabee For Primaries; Carpenters Endorse Edwards," *The Associated Press*, 8/30/07).

General

Relatively unknown despite a decade as governor of Arkansas, Mike Huckabee has seen a surge of support in recent weeks to become a front runner for the Republican nomination. Harnessing his support from religious communities, as a Southern Baptist pastor, Huckabee is now leading the polls in Iowa and is running a strong second nationally and in other early states. However, lacking the money and the infrastructure of the other major candidates, he still has a tough road ahead.

Huckabee has won endorsements from the New Hampshire chapter of the National Education Association and the International Association of Machinists and Aerospace Workers, but admits they came partially because he was the only Republican to address the groups.

Positions on Legislation

Huckabee supports raising the minimum wage. While he was governor, Arkansas increased the minimum wage to $6.25 during a special legislative session in 2006.

Huckabee opposed passage of FMLA in 1993, saying he opposed any "law that would give workers time off to care for an ailing family member."

Huckabee's position on the Employee Free Choice Act has not been made clear and he has not directly responded to questions on the issue. He told a union audience he opposed the Act, but news reports cite him as the lone Republican to support a card check system.

Huckabee's healthcare plan—

- focuses on preventative medicine to achieve savings through the avoidance of costly issues later in life
- opposes a universal mandate for health insurance but supports expanding Health Savings Accounts, even without high deductibles, and portability
- allows states to become laboratories for new market-based approaches to health care
- encourages the private sector to seek innovative ways to bring down costs, including wireless and paperless technologies, and supports medical liability reform.

Huckabee opposes passage of the federal Employment Non-Discrimination Act.

BILL TRACKER

A complete list of bills is available at http://akingumpinfo.com/ve/ZZ96i87V72ntQN63YX/VT=0/page=4. Below are the bills not included in the last print edition of the *Washington Labor & Employment Wire*.

ENERGY INDEPENDENCE AND SECURITY ACT (H.R.6)

Core Provisions: This comprehensive energy package includes provisions from the Green Jobs Act of 2007 (H.R.2847) to fund an "Energy Efficiency and Renewable Energy Worker Training Program." The Department of Labor would administer this program to address job shortages that are obstructing growth in green industries, such as energy efficient construction, renewable electric power, energy efficient vehicles and biofuel development. The legislation also would expand Davis-Bacon Act prevailing wage requirements for federally funded energy-related projects.

Status: On December 6, 2007, the House gave final approval to the Energy Independence and Security Act by a vote of 235 to 181. On December 13, 2007, the Senate passed an amended version of the bill by a vote of 86 to eight. The amended version passed the House on December 18, 2007, and the President signed the legislation on December 19, 2007.

NATIONAL DEFENSE AUTHORIZATION ACT (H.R.1585) CONFERENCE REPORT (H.REPT.110-477)

Core Provisions: The National Defense Authorization Act conference report includes elements from pending legislation (see below) that would extend the FMLA provision of 12 weeks of unpaid leave to 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 conference report 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.

MILITARY FAMILY AND MEDICAL LEAVE ACT & SUPPORT FOR INJURED SERVICEWORKERS ACT (S.1898, H.R.3391 & S.1894, S.1975, H.R.3481)

Core Provisions: S.1898 and S.1975 would extend the FMLA provision of 12 weeks of unpaid leave to up to six months for spouses, children and parents of soldiers injured in combat; H.R.3481 would include primary caregivers as well. S.1894 would extend the FMLA to up to 26 work weeks for primary caregivers of service members with combat-related injuries, and H.R.3391 would extend the FMLA to up to 26 work weeks for spouses, children and parents.

Status: S.1898 was introduced in the Senate by Sen. Clinton (D-NY) on July 30, 2007 and was referred to the HELP Committee. Sen. Dodd (D-CT) introduced S.1894 on July 26, 2007, and he also introduced S.1975 on August 2, 2007. Both bills were referred to the HELP Committee. H.R.3481 was introduced in the House by Rep. Woolsey (D-CA) on September 6, 2007 and was referred to the Subcommittee on Workforce Protections, while Rep. Issa (R-CA) introduced H.R.3391 on August 3, 2007, which was also referred to the Subcommittee on Workforce Protections. S.1898 currently has nine co-sponsors, S.1894 has 10 co-sponsors, S.1975 has 16 co-sponsors, H.R.3481 has 70 co-sponsors, and H.R.3391 has five co-sponsors.

MILITARY FAMILY JOB PROTECTION ACT (S.1885)

Core Provisions: This Act would alter the FMLA to provide up to a full year of job protection, including protection from denial of any employment benefit or promotion, for any family member caring for a recovering service member at a military medical facility.

Status: S.1885 was introduced in the Senate by Sen. Obama (D-IL) on July 26, 2007 and was referred to the HELP Committee. S.1885 currently has 10 co-sponsors.

FAMILY AND MEDICAL LEAVE EXPANSION ACT (H.R.1369)

Core Provisions: This Act would expand the FMLA by applying the statute to employers of at least 25 employees (rather than the current 50-employee threshold), including domestic violence as a reason to take FMLA leave, and creating an employee entitlement to a total of 24 hours of leave during any 12-month period for a parent to "participate in an academic activity" of a child. The Act would also create a grant program to be administered by the states for providing income replacement to new parents for not less than six weeks during any 12-month period.

Status: H.R.1369 was introduced by Rep. Maloney (D-NY) on March 7, 2007 and referred to several House Committees. The House Education and Labor Committee referred the bill to the Subcommittee on Workforce Protections on June 27, 2007. H.R.1369 has one co-sponsor.

FAMILY LEAVE INSURANCE ACT OF 2007 (S.1681)

Core Provisions: This Act would create a federal insurance fund, similar to the unemployment benefits scheme, to provide eight weeks of pay for employees taking FMLA leave. Employees would contribute 0.2 percent of their annual earnings, and employers would match employee payments. The bill would allow employers with an equivalent or better paid-leave plan to opt out of participating in the insurance fund.

Status: S.1681 was introduced by Sen. Dodd (D-CT) on June 21, 2007 and referred to the Finance Committee. S.1681 currently has three co-sponsors.

2007 CIVIL RIGHTS PAY FAIRNESS ACT (H.R.2660)

Core Provisions: Attempting to reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (May 29, 2007), this legislation would reset the statutory limitations periods upon the receipt of any paycheck affected by a discriminatory decision involving pay, no matter how far in the past the underlying act of discrimination allegedly occurred. In *Ledbetter*, the Supreme Court ruled that the statute of limitations was only reset upon an actual discriminatory decision. This bill would also amend Title VII to extend the EEOC filing period from 180 days to 360 days, and from 300 days to 480 days for states with fair employment agencies.

Status: H.R.2660 was introduced by Rep. Ruppersberger (D-MD) on June 11, 2007 and referred to the House Subcommittee on Health, Employment, Labor and Pensions.

HEALTHY FAMILIES ACT OF 2007 (H.R.1542, S.910)

Core Provisions: This Act would require employers with at least 15 employees who work at least 30 hours a week to provide seven days of paid sick leave and pro-rated leave for part-time employees. The leave could be used for the employee, "a child, a parent, a spouse or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" requiring care for an illness, injury or medical condition, or for obtaining medical diagnosis or preventative care. The legislation includes a private right of action for employees to sue their employer, and a posting requirement.

Status: H.R.1542 was introduced by Rep. DeLauro (D-CT) on March 15, 2007, and on June 27, 2007 it was referred to the House Workforce Protections and Health, Employment, Labor and Pensions Subcommittees. S.910 was introduced by Sen. Kennedy (D-MA) on March 15, 2007 and referred to the HELP Committee. H.R.1542 currently has 74 co-sponsors, while S.910 has 24 co-sponsors.

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT (H.R.985)

Core Provisions: This legislation would expand protected disclosures to include "any" lawful communication of misconduct, and would expand protections for those paid with federal funds, including contractors. The bill would also give United States district courts jurisdiction for appellate review from the Merit Systems Protection Board, which is currently only within the jurisdiction of the Federal Circuit Court of Appeals.

Status: H.R.985 was introduced by Rep. Waxman (D-CA) on February 12, 2007 and passed in the House on March 14, 2007 by a veto-proof tally of 331 to 94. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, and is currently in the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. The White House has indicated that President Bush would veto the bill should it pass in the Senate.

TRUTH IN EMPLOYMENT ACT OF 2007 (H.R.2670, S.1570)

Core Provisions: This Act would amend the National Labor Relations Act to expressly mandate that the statute not be interpreted to require employers "to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status." This legislation is intended to address Supreme Court precedent protecting the practice of "salting," wherein union organizers apply for jobs with the specific intent to organize the workplace.

Status: H.R.2670 was introduced by Rep. King (R-IA) on June 12, 2007 and is currently in the House Subcommittee on Health, Employment, Labor and Pensions. S.1570 was introduced by Sen. DeMint (R-SC) on June 7, 2007 and referred to the HELP Committee. H.R.2670 currently has 15 co-sponsors, while S.1570 has one co-sponsor.

INDEPENDENT CONTRACTOR PROPER CLASSIFICATION ACT OF 2007 (S.2044)

Core Provisions: This legislation would revise existing presumptions and procedures involving whether an individual is classified as an independent contractor or an employee. If the Secretary of the Treasury makes an employee classification, employers may no longer rely on tax law provisions allowing independent contractor classification unless the employer had "no reasonable basis for not treating such individual as an employee." The bill would also remove the employer's ability to rely on "long-standing recognized practice of a significant segment of the industry" to support an independent contractor classification. The Act would also create a new procedure for an individual to appeal their classification status, and employers would be barred from retaliating against any individual who appeals his or her classification. The legislation also details consequences for misclassification determinations, including a possible employment tax audit of the employer. Lastly, the Act would impart new employer responsibilities including notice-posting, notifying independent contractors of their classification upon hiring and recordkeeping requirements.

Status: S.2044 was introduced by Sen. Obama (D-IL) on September 12, 2007 and referred to the Finance Committee. S.2044 currently has six co-sponsors.

TRADE AND GLOBALIZATION ASSISTANCE ACT OF 2007 (H.R.3920)

Core Provisions: Among other provisions, this Act would 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: The House passed H.R. 3920 on October 31, 2007. On November 5, 2007, it was received by the Senate and referred to the Committee on Finance.

THE FOREWARN ACT OF 2007 (H.R.3662, S.1792)

Core Provisions: The Federal Oversight Reform and Enforcement of the WARN Act (Forewarn Act of 2007) would amend the WARN Act to give enforcement authority to the Department of Labor and state attorneys general, and would increase penalties. The bill lowers the threshold triggering applicability of the statute for a plant/operating unit closing from 50 to 25, reduces the minimum employer size from 100 to 50 employees and lowers the mass layoff

threshold from 500 to 100 employees. The legislation would also expand the notice period from 60 to 90 days, and require employers to send written notice to the Department of Labor. Additionally, the House bill requires notice be provided to U.S. senators and representatives, state senators and representatives, the governor of the affected area and the federal Secretary of Labor. The House bill also requires employers to pay employees two days of pay for each calendar day the employer falls short of the notice period.

Status: H.R.3662 was introduced by Rep. McHugh (R-NY) on September 25, 2007 and was referred to the House Education and Labor Subcommittee on Workforce Protections on October 17, 2007. S.1792 was introduced on July 16, 2007 by Sen. Brown (D-OH) and referred to the HELP Committee. H.R.3662 has one co-sponsor, while S.1792 has eight co-sponsors.

EARLY WARNING AND HEALTH CARE FOR WORKERS AFFECTED BY GLOBALIZATION ACT (H.R.3796)

Core Provisions: This Act would amend the WARN Act by lowering the threshold for plant closings to 25 employees, and by lowering the mass layoff trigger to 25 employees. Similar to the other pending WARN Act proposals, this legislation would expand the notice period from 60 to 90 days, provide for double damage, and would require employers to send notice to the Department of Labor, which in turn would transmit the information to relevant members of Congress. The Act also calls for civil penalties for not posting the appropriate notice. However, employers are exempt from the notice requirement if the employment loss is due to a terrorist attack. Finally, the Act greatly expands COBRA coverage to those eligible for trade adjustment assistance.

Status: H.R.3796 was introduced on October 10, 2007, by Rep. Miller (D-CA) and was placed on the Union Calendar on October 25, 2007. H.R.3796 currently has 13 co-sponsors.

EQUAL REMEDIES ACT OF 2007 (S.1928)

Core Provisions: This legislation would repeal the $50,000 to $300,000 cap on damages available in employment discrimination cases under Title VII and the Americans with Disabilities Act.

Status: S.1928 was introduced by Sen. Kennedy (D-MA) on August 1, 2007 and referred to the HELP Committee. S.1928 currently has seven co-sponsors.

ADA NOTIFICATION ACT OF 2007 (H.R.3479)

Core Provisions: This legislation would amend the Americans with Disabilities Act to require that employers be provided with an opportunity to correct alleged violations before commencement of a civil action regarding a place of public accommodation or a commercial facility.

Status: H.R.3479 was introduced by Rep. Keller (R-FL) on September 5, 2007 and referred to the House Judiciary Committee. H.R.3479 currently has three co-sponsors.

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. If you would like us to add any of your colleagues to our mailing list, please contact Laurie Spielman at lspielman@akingump.com

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