

Lame Ducks and Other Challenges

Congress and federal agencies are very active on workplace issues. Washington insiders warn us of one key bill that could become law in a lame duck session between election day and January 3rd.

The Paycheck Fairness Act

This Bill passed the House in January (HR 12) and is now in line for consideration when the Senate returns post-election (S.3772). Senate Majority Leader Harry Reid is the sponsor and promises a lame duck vote on the Bill aimed at reducing gender pay differences. The old law allows an employer to defend a case by showing “any factor other than sex” led to the pay difference. Education, experience and geographic pay differences are examples of good defenses today.

The new law would require employers to show a “bona fide factor other than sex” required by “business necessity” and that

there were no alternatives. It would also make opt-out class actions and unlimited compensatory and punitive damages available.

Supporters of the Bill say it contains needed changes to the 1963 Equal Pay Act because employers have too many defenses and loopholes. Opponents say the bill goes too far and will prevent important, legitimate defenses to pay differences such as geographic pay differentials, market competition issues and counter-offers to keep a valuable employee. The EEOC would issue implementing regulations.

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MY PREDICTION:

I believe this bill is viewed by many with the same lens as the Lilly Ledbetter Fair Pay Act, the first law signed by President Obama. Ledbetter also dealt with gender-based pay equity and was very popular in Congress. Both bring up complex issues of litigation procedure and defenses, meaning they are hard for opponents to “soundbite”. Congress handles soundbites better than complex concepts. If there is a lame duck session based on the results of the November elections, I believe this Bill may pass under the soundbite of gender equity and the President promises to sign the Bill into law. Go to www.ecnc.us to contact Senator Burr (a no vote) or Hagan (a yes vote) by email, or, call Senator Hagan’s labor aide at (202) 224-6342. If there is no serious lame duck legislative push, the election outcomes will control the Bill’s viability in the next Congress.

By the way, some say that “Card Check” (EFCA) could get a vote during a lame duck session. AFL-CIO President Richard Trumka made such noises on October 7th. My guess is it is chest-beating and the votes would not be there in the Senate after all the post-election vote-switching occurred. The opposition has soundbited that Bill very well.

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HOW TO PREPARE:

This is a classic case of resource triage. I would spend time ensuring that current pay practices, compensation plans, market pay methods and differences among employees in the same or similar job categories are based on legitimate business or market reasons. In other words, are your pay practices in compliance with today’s laws and could you prove that if challenged? Are there historic pay differences that you could not defend with specific business reasons? There will be time to increase the level of internal scrutiny required if/when this Bill becomes law and clarifying rules are issued making its reach more clear. For example, EEOC’s rules could require pay comparisons across a multi-state enterprise where today that is usually not the case. Those kinds of regulatory changes could have major impacts.

An Update on Regulatory Challenges

Whether labor relations issues are on your radar or not, pay attention to what is happening at the National Labor Relations Board. The NLRB experience gives us insights into how OFCCP, EEOC, USDOL, NMB and other key regulators are looking at workplace issues. In sum, the Board’s pendulum has swung decidedly anti-employer with the recent presidential appointments of three labor union lawyers to the Board.

Contact me directly if I can help you or your team.



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