Legal Alert: Legislative Update - Recently Introduced Legislation that Could Impact Employers

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As a follow-up to our article in the February issue of *Management Update*, "Significant Legislative Items to Watch," the following bills recently were introduced in Congress and, if enacted, could significantly impact employers.

Fair Pay Act of 2009

The Fair Pay Act of 2009, S. 904, introduced in the Senate on April 28, 2009, would amend the Equal Pay Act (EPA) provisions of the Fair Labor Standards Act (FLSA) to prohibit employers from paying lower wages for jobs dominated by women or minorities than paid for jobs dominated by men, if the jobs are equivalent. The legislation defines the term "equivalent jobs" as "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." The legislation would also prohibit discrimination against an employee or any other person because the employee discussed his or her own wages or the wages of any other employee. Additionally, the legislation would expand the EPA by permitting the recovery of compensatory or punitive damages.

The legislation would also require employers to provide reports to the EEOC that include information disclosing the wage rates paid to employees in each classification, position, or job title, including information with respect to the sex, race, and national origin of employees at each wage rate in each classification, position, or job title. However, these reports shall not include any employees' names.

The legislation has been referred to the Senate Committee on Health, Education, Labor and Pensions. An identical bill, H.R. 2151, has been introduced in the House of Representatives.

Expansion of WARN Act

The "Alert Laid off Employees in a Reasonable Time (ALERT) Act," H.R. 2077, which was introduced on April 23, 2009, would amend the Worker Adjustment and Retraining Notification (WARN) Act in two ways. It would (1) expand the definition of "mass layoff' under the WARN Act to include an employment loss at more than one of the employer's worksites, and (2) increase the penalty for WARN Act violations.

The WARN Act generally requires that an employer give 60 days advance notice of a "plant closing" or "mass layoff" to each employee who will suffer an

employment loss. It also requires notice to bargaining representatives and to local government officials. Currently, an employer's failure to provide the required WARN Act notice can result in exposure of up to 60 days' back pay.

Under the current WARN Act provisions, the determination of whether a mass layoff has occurred is based the number of employees who suffer an employment loss at a **single site of employment**.

The ALERT Act would change this by providing that a mass layoff occurs when a reduction in force results in an employment loss for a single employer at **more than 1 site of employment** during any 30-day period for:

• at least 33 percent of the employees of the employer (excluding any part-time employees) and at least 50 employees (excluding any part-time employees); or

• at least 500 employees (excluding any part-time employees).

The legislation would also increase the penalty for notice violations of the WARN Act from back pay to double back pay for each day of violation.

The legislation has been referred to the House Committee on Education and Labor. A similar bill was unsuccessfully introduced in Congress in 2007.

Patriot Employers Act

The Patriot Employers Act, S. 829, introduced in the Senate on April 20, 2009, would amend the Internal Revenue Code to provide for a tax credit for employers who are determined to be Patriot Employers. The legislation defines a Patriot Employer as one who: (1) maintains its headquarters in the United States; (2) pays at least 60% of each employee's health care premiums; (3) has a policy requiring neutrality in employee organizing drives; (4) maintains or increases the number of full-time workers in the United States as compared to the number employed outside the United States; (5) pays each employee a salary equal to at least the federal poverty level; (6) provides a defined benefit plan or defined contribution plan that fully matches at least 5% of worker contributions for every employee; and (7) provides full differential salary and insurance benefits for all National Guard and Reserve employees who are called for active duty. The requirements are slightly different for employers with fewer than 50 employees.

The legislation has been referred to the Senate Committee on Finance. An almost identical bill, the Eagle Employers Act, H.R. 989, has been introduced in the House of Representatives.

Additionally, a bill called the Patriot Corporations of America Act of 2009, H.R. 1874, was introduced in the House on April 2, 2009. This legislation provides for federal contracting preferences and a reduction in the rate of income tax imposed on companies that are certified as Patriot Corporations. The legislation defines a Patriot Corporation as one that: (1) produces at least 90% of its goods and services in the United States; (2) does not provide compensation to any management personnel at a level that exceeds 10,000% of the level of compensation of the company's lowest paid full-time employee; (3) conducts at least 50% of its research and development in the United States; (4) has contributed at least 5% of the wages paid during the year to a portable pension fund for the benefit of its employees; (5) has paid at least

70% of the cost of a health insurance plan for its employees; (6) has maintained neutrality in employee organizing drives and has a policy to that effect; (7) provides full differential salary and insurance benefits for all National Guard and Reserve employees who are called to active duty; (8) has not been (at any time during the taxable year) in violation of Federal regulations, including those related to the environment, workplace safety, labor relations and consumer protection; and (9) has not been in violation of any other regulations specified by the Secretary.

This legislation has been referred to the House Committee on Ways and Means and the House Committee on Oversight and Government Reform.

Common Sense English Act

The Common Sense English Act, H.R. 1588, was introduced in the House of Representatives on March 18, 2009. This legislation would amend Title VII of the 1964 Civil Rights Act to provide that it shall not be an unlawful employment practice for an employer to require employees to speak English while engaged in work. This legislation has been referred to the House Committee on Education and Labor.

Protecting America's Workers Act

This legislation, H.R. 2067, would amend the Occupational Safety and Health Act (the OSH Act). Among other things, it would expand the OSH Act to cover governmental workers as well as those in the railroad and airline industries. It would also expand the Act's whistleblower provisions by including a prohibition on discrimination against any employee who refuses to work if that person has a reasonable fear that performing his duties would result in injury. The legislation also provides for procedures for employees to file a complaint of discrimination. Additionally, the legislation would increase penalties against employers for repeated and willful violations of the law, require OSHA to investigate all cases of death and serious injuries including those that result in the hospitalization of two or more employees, and provide workers and their families the right to challenge reductions of fines and other penalties.

This legislation has been referred to the House Committee on Education and Labor.

Arbitration Fairness Act of 2009

The Arbitration Fairness Act of 2009, S. 931, introduced in the Senate on April 29, 2009, would make invalid and unenforceable predispute arbitration agreements that require arbitration of an employment, consumer, franchise or civil rights dispute. The legislation would not apply to arbitration provisions in collective bargaining agreements. It is almost identical to H.R. 1020, discussed in our February 19, 2009 Legal Alert, "Legislation Prohibiting Employment-Related Predispute Arbitration Agreements Introduced in Congress," available on our web site at http://www.fordharrison.com/shownews.aspx?show=4527.

This legislation has been referred to the Senate Committee on the Judiciary.

Healthy Workforce Act of 2009

Under the Healthy Workforce Act of 2009, S. 803, companies that sponsor

qualified wellness programs may be eligible for an annual tax credit if such programs offer at least 3 out of 4 components described in the Act: 1) health awareness, which includes health education and health screenings; 2) employee engagement, which includes the establishment of a committee to engage employees in worksite wellness programs and the tracking of employee participation; 3) behavioral change, which includes programs for altering employee lifestyles to encourage healthy living; and 4) supportive environment, which includes on-site policies that support a healthy lifestyle, employee incentives for employees who participate in health screenings or behavioral changes, and employee input.

The annual tax credit is capped at $200 per employee for the first 200 employees participating and $100 for each additional employee. This legislation has been referred to the Senate Finance Committee. Similar legislation was introduced in the House (H.R. 1897) and has been referred to the House Ways and Means Committee.

Legislation Relating to Executive Compensation

Two bills relating to executive compensation were introduced in the Senate on May 7, 2009. The Excessive Pay Shareholder Approval Act, S. 1006, would require a supermajority shareholder vote to approve excessive compensation of any employee of a publicly traded company. This legislation would amend the Securities and Exchange Act of 1934 to require the approval of 60% of shareholders in order for a public company to pay an employee more than 100 times the average of the pay of all company employees.

The legislation also would require the proxy materials for a shareholder vote to include the pay of the lowest-paid employee, the pay of the highest-paid employee, the average pay for all employees, the number of employees who were paid more than 100 times the average employee pay, and the total amount paid to the employees who were paid more than 100 times the average employee pay.

The Excessive Pay Capped Deduction Act of 2009, S. 1007, would prohibit employers from deducting any pay considered to be excessive compensation. The legislation defines excessive compensation as compensation that is more than 100 times the average pay for all employees for the taxable year.

The legislation also would require each employer that provides any excessive compensation to any employee during the taxable year to report to the Treasury secretary the pay of the lowest-paid employee, the highest-paid employee, and the average pay for all employees. Additionally, the employer would be required to report the number of employees who received excessive compensation during the taxable year and the amount of compensation these employees received.

Both of these bills were referred to the Senate Committee on Banking, Housing, and Urban Affairs.

Legislation Revising the FMLA

In addition to the legislation discussed above, legislation amending the Family and Medical Leave Act has been proposed. This legislation was discussed in our May 11, 2009, Legal Alert, "Legislation to Revise FMLA Introduced,"

available on our web site at http://www.fordharrison.com/shownews.aspx?show=4780.

We will continue to keep you updated on the status of these bills, as well as other pending legislation that could impact employers. If you have any questions regarding the legislation discussed above or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.