



SBLC WEEKLY

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PAYCHECK FAIRNESS

Senate Majority Leader Harry Reid (D-NV) has set up the potential for a vote on a labor-related issue during the lame duck session. He has filed a cloture petition for a vote on S. 3772, the Paycheck Fairness Act.

The bill revises the Equal Pay Act's (EPA) "any factor other than sex" defense by requiring employers to provide non-gender reasons for the difference in wages based on a business justification.

This bill was part of an effort way back at the beginning of this Congress in January, 2009. The House used an unusual parliamentary move (in hindsight certainly foretold the way this Congress would unfold!) to add a version of this bill to another bill known as the "Ledbetter" bill (named for a plaintiff who lost a Supreme Court case) when the House passed the Ledbetter bill. The Ledbetter legislation amended equal employment opportunity laws to clarify that compensation discrimination occurs each time compensation is paid even though the original discriminatory decision was made many years ago.

The Senate opted not to consider the combined bill and passed its own version of the Ledbetter bill which the House then had to pass again and send on the President. The Ledbetter bill became law.

The Paycheck Fairness bill languished for 20 months until last week. The cloture motion "ripens" upon Congress' return after the elections. I would think some moderate Republicans support the principles behind the legislation, so they might be inclined to provide the 60 votes to secure cloture, especially if the picture looks bleak for the Democrats in the 112th Congress. But, as I have previously noted, notwithstanding the cloture petition, whether the Senate will really deal with anything during the lame duck is a matter of conjecture until we get passed the elections.

Under the bill, an employer would have to demonstrate that the disparity is based on a bona fide factor other than sex, such as education, training, or experience that is (1) not based upon or derived from a sex-based differential, (2) related to the position in question, and (3) consistent with business necessity. The bill would also lift the caps on punitive and

compensatory damages in suits brought under the EPA.

There is an anomaly at play here that broadens the potential impact on small businesses. The coverage threshold for a business under other equal employment opportunity laws such as Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) is fifteen or more employees and the Age Discrimination In Employment Act (ADEA) threshold is twenty or more employees. Most folks do not realize it, but the Equal Pay Act amended the Fair Labor Standards Act (FLSA). For the most part, almost all businesses that have an employee are covered by the FLSA and thus subject to the EPA but, because the evidentiary requirements of the EPA are so technical, not many claims are filed against small businesses if they have enough employees to fall under the equal employment opportunity laws. (There are also some very limited exemptions from the FLSA and EPA for certain types of businesses such as small intrastate-only retailers.) So, in theory, smaller businesses will be covered by the changes.

VIBES

As Congress packed up for the campaign trail, I was getting the vibes that some of the “Bush” tax cuts might be renewed when Congress returns for the lame duck session. My impression is there are a sufficient number of Democrats uneasy with the notion of turning the corner into the New Year with a tax increase, to make it happen. It is not realistic to make predictions about the composition of the renewal “package” at this point, but I think relief is in play. For us, the top individual marginal rate and the estate tax are the two items I would continue to press.

In the long shot category - if Congress does vote on some package of renewals, we might just be able to slide in a repeal of the Form 1099 requirement. To do that, the mission is to keep the issue on the congressional radar. Every campaign stop should feature a question on it. For those of you working the Washington scene, keep it on the staff radar.

WEEKLY

No Weekly while Congress is out of session. (Yes, Congress is out of session, but I thought I should refresh your memory on the Paycheck Fairness Act ☺)