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CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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Fair Pay Initiatives — Pay Attention Now Or Pay Later

Since the Obama Administration has taken office, promoting fair pay has been a top priority. Indeed, signing the Lilly Ledbetter Fair Pay Act was President Obama's first legislative act as president. Recent events in Congress, including the introduction of the Fair Pay Act and the renewed support for the Paycheck Fairness Act, as well as regulatory initiatives, confirm that priority and are strong signals that employers should anticipate and prepare for critical reviews and more frequent challenges to pay and promotion practices and policies.

During a recent hearing before the congressional Joint Economic Committee, it was reported that women working in the private sector earn only 78 cents for every dollar earned by a male full-time worker. That same day, newly appointed Secretary of Labor Hilda Solis announced that a top priority of the Department of Labor in the coming year will be to ensure equal pay for women. Specifically, Solis stated, "We must work to close the pay gap that is taking millions of dollars out of the pockets of families across the country and undermining our economic stability."

Most recently, on May 21, 2009, Senator Christopher Dodd (D-CT), Senator Barbara Mikulski (D-MD) and Representative Rosa DeLauro (D-CT) called for the passage of the Paycheck Fairness Act, which would amend the Equal Pay Act of 1963 by creating stiffer penalties against employers who violate the Equal Pay Act, and would modify the burdens of proof on such claims. On April 28, 2009, the Fair Pay Act, which would amend the Fair Labor Standards Act to expand protections to prohibit wage discrimination based not only on sex but also on race or national origin, was reintroduced in the House and Senate.

As these events make clear, Ms. Solis, the Obama Administration and Congress are working in tandem to place equal pay at the forefront of their agendas by breathing new life into legislation designed to eradicate pay disparities between women and men, as well as between minorities and non-minorities. The question, then, is not "if" pay and promotion discrimination claims will rise, but when and how high.

The Fair Pay Act

On April 28, 2009, the Fair Pay Act ("FPA"), which would amend the Fair Labor Standards Act to expand protections to prohibit wage discrimination based not only on sex, but also on race or national origin, was reintroduced in the House and Senate. Under the FPA, it would be lawful to pay different wages to comparable employees only (1) under a bona fide seniority system or a system that measures earnings based on quantity

or quality of production or (2) based on "a bona fide factor other than sex, race, or national origin" if such factor furthers a legitimate purpose and was actually applied and used reasonably. In the second situation, an employer would need to be able to establish that its pay decisions were based on legitimate criteria that were job related. Importantly, this could significantly limit companies from paying differing wages based on market demand or based on an applicant's work and educational experience where that experience does not give the candidate a quantifiable "leg up" in performing the job functions. The FPA also would require employers to publicly disclose job categories and pay scales and would allow workers to file claims for wage discrimination with the Equal Employment Opportunity Commission ("EEOC") or to file suit for damages in federal court.

Paycheck Fairness Act

Also on Congress's agenda is the Paycheck Fairness Act ("PFA"), which was passed by the House on January 9, 2009, and is currently pending in the Senate. The PFA would amend the Equal Pay Act of 1963 to prohibit employers from retaliating against employees who share salary information with coworkers, and requiring employers who make job decisions based on "factors other than sex" to prove, as an affirmative defense to pay discrimination claims, that the factors are both "job related" and "consistent with business necessity." In cases in which the employee demonstrates that an alternative employment practice would have served the same business purpose, the defense will not apply. Opponents of the PFA argue that these provisions shift the burden of proof from the employee to the employer, requiring that the employer prove that its pay policies are nondiscriminatory rather than requiring the employee to make out a prima facie case of discrimination as has traditionally been the case.

Along with other mandates to federal agencies, the PFA also would require the Office of Federal Contract Compliance Programs ("OFCCP") to "use the full range of investigatory tools at the Office's disposal" in investigating pay disparities among federal contractors. This mandate is particularly important because it eliminates the requirement that the OFCCP examine alleged pay disparities using a recognized and tested regression analysis and allows the OFCCP leeway in any such examination. Thus, opponents of the law argue that it gives the OFCCP carte blanche authority to disregard recognized and reliable statistical analyses for other, less reliable methods of examining pay equality.

Finally, and perhaps most problematic for employers, the PFA would permit aggrieved employees to recover compensatory and punitive damages, rather than only liquidated damages and back pay as currently provided for by the Equal Pay Act. The PFA also would change the current opt-in collective action process, and would permit claims under the Equal Pay Act to be brought instead as *opt-out* class actions. These two amendments, combined with the longer statute of limitations on pay claims provided for under the recently enacted Lilly Ledbetter Fair Pay Act, are likely to create a surge in large pay and promotion discrimination class actions.

What Can You Do To Prepare For This Legislation?

Given the increased focus in Congress and the Obama Administration on fair pay legislation, employers must be proactive in ensuring that their pay practices are defensible. Critically reviewing pay practices and policies before litigation will enhance an employer's ability to defend itself and/or mitigate potential damages exposure. One way to do this is through a comprehensive pay audit. To be effective, however, pay audits must be statistically sound and should therefore be conducted by well-trained individuals, preferably experienced attorneys. Using experienced, independent attorneys to conduct or oversee audits ensures that proper statistical techniques are employed and helps to avoid exacerbating potential problems with pay through inaccurate or incomplete audit results. Not only this, but audits conducted by attorneys likely will be shielded from disclosure under the attorney-client privilege. In addition to conducting pay audits, employers also should take a critical look at their job descriptions, hiring process and promotion protocols to ensure pay and promotion decisions are appropriately vetted and documented.

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