RSC
Republican Study Committee

Legislative Bulletin……..……January 8, 2009

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H.R. 12—the Paycheck Fairness Act of 2009

Key Conservative Concerns

Take-Away Points

--H.R. 12 serves as a boon to trial lawyers, making it easier to sue, creating more conditions under which suits are allowed, and making it harder for employers to defend themselves. The bill encourages discrimination claims to be filed based on allegations that have nothing to do with discrimination.

-- H.R. 12 creates *unlimited* punitive and compensatory damages for violations of the Equal Pay Act without having to show intent to discriminate.

-- H.R. 12 will increase the number of class action lawsuits in discrimination cases.

-- H.R. 12 makes it difficult for employers to defend legitimate pay differentials between employees by requiring employers to affirmatively demonstrate that the differential is not based on sex, is specific to the position in question, and is consistent with business activity.

For more details on these concerns, see below.

H.R. 12—the Paycheck Fairness Act (*DeLauro, D-CT*)

Order of Business: The legislation is scheduled to be considered on Friday, January 9, 2009 under a closed rule (pursuant to the rules package for the 111th Congress) that waives all points of order against consideration of the bill (except those for PAYGO and earmarks), provides for one hour of general debate, and provides for one motion to recommit.

Major Changes Since the Last Time This Legislation Was Before the House: There are no major changes since the bill (H.R. 1338) was considered in the 110th Congress.

Summary: H.R. 12 would make more strict the equal pay requirement established in the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.). Specifically, the major provisions of the bill are as follows:

- Requires employers, when defending against allegations of pay discrimination, to affirmatively demonstrate that such pay differential is not based on sex, is specific to the position in question, and "is consistent with business necessity."

- Invalidates this employer defense when the relevant employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such pay differential and that the employer has refused to adopt such alternative practice.

- Deems employees as working in the same establishment, even if they are working in different locations within the same county or similar political subdivision of a state. The Equal Employment Opportunity Commission (EEOC) could define "same establishment" even more broadly.

- Applies these provisions above to applicants for employment (if their potential employment would make them subject to FLSA).

- Makes it illegal to discharge, or in any other manner discriminate against, any employee because such employee has inquired about, discussed, or disclosed his or her own wages or those of another employee (subject to certain exceptions—such as payroll officers violating privileges).

- Makes private-sector employers liable under FLSA for UNLIMITED compensatory and UNLIMITED punitive damages. There is no indication that the employer would have to be shown to have intended to do harm.

- Makes the federal government liable only for UNLIMITED compensatory damages (and not for punitive damages at all).

- Exempts class action lawsuits from the current-law prohibition from making an employee a party plaintiff to any FLSA action unless he gives his consent in writing to become such a party. In other words, a person could be unknowingly incorporated into a class action suit unless he or she somehow finds out about it and opts-out.

- Authorizes the court, in awarding an FLSA judgment to the plaintiff, to require that the defendant also pay for the fees of experts used in the case.

- Authorizes the Secretary of Labor to supervise the payment of compensatory or punitive damages and to bring action in court to recover any unpaid damages.

- Requires the EEOC and the Office of Federal Contract Compliance Programs to train EEOC employees and affected individuals and entities on matters involving wage discrimination. The Labor Department refers to this requirement as "unnecessary and superfluous."

- Authorizes the Secretary of Labor, in consultation with the Secretary of Education, to make competitively-awarded grants to eligible entities (essentially any government or nonprofit entity) for negotiation skills training programs for girls and women. This training would have to "help girls and women strengthen their negotiation skills to allow the girls and women to obtain higher salaries and rates of compensation that are equal to those paid to similarly-situated male employees."

- Directs the Secretary of Labor to conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women. The Secretary would have to convene a "national summit" to discuss approaches for rectifying pay disparities.

- Establishes the Secretary of Labor's National Award for Pay Equity in the Workplace, awarded to an employer who has made extraordinary efforts to eliminate pay disparities.

- Directs the EEOC to, within 18 months of this bill's enactment, survey the available data on pay disparities and issue regulations providing for the collection from employers of additional payroll data, classified by the sex, race, and national origin of employees.

- Directs the:
  - --Commissioner of Labor Statistics to continue to collect data on women workers in the Current Employment Statistics survey;
  - --Office of Federal Contract Compliance Programs to use specified types of methods in investigating compensation discrimination and in enforcing pay equity (while prohibiting the preferred regression analysis of the current Labor Department and requiring the reintroduction of a survey instrument that the Labor Department was shown to yield a 93% false-positive rate); and
  - --Secretary of Labor to make accurate information on compensation discrimination and its elimination readily available to the public, via print and electronic media.

- Authorizes $15 million to carry out this legislation.

- Requires that the Secretary of Labor and the Commissioner of the EEOC develop technical assistance material to assist small businesses in complying with the bill.

- The Act shall take effect six months after enactment.

Additional Background: The Fair Labor Standards Act of 1938 establishes standards for minimum wages, overtime pay, recordkeeping, and child labor, affecting more than 100 million workers, both full-time and part-time, in the private and public sectors. http://www.dol.gov/compliance/laws/comp-flsa.htm.

Committee Action: There has been no committee action in the 111th. However, in the 110th it was marked up and reported out of the Education and Labor Committee and passed the House on July 31, 2008 by a vote of 247 – 178.

Possible Conservative Concerns: Some conservatives may be concerned about several provisions in H.R. 12, including the following:

Further Restricts the Free-Market Ability of Honest Employers to Set Wages. The bill would require employers to affirmatively demonstrate that a pay differential is not based on sex, is specific to the position in question, and "is consistent with business necessity." This would place heavy burdens on employers and make the basic free-market decisions of setting wages subject to the whims of judges and juries.

Allows Employees to Set Business Practices. This employer defense would be negated when an employee could show that another employment practice could have yielded a non-pay-differential result. This would take key business decisions out of the hands of employers.

Allows Unlimited Damages. The bill would allow for *unlimited* compensatory and punitive damages for private-sector employers (no punitive damages for the federal government) and would not require that an employer be shown to have intended to do harm. This could expose American businesses to tremendous risk and financial damage.

Greatly Expands the Definition of "Same Establishment." H.R. 12 would deem employees as working in the same establishment (and thus be subject to pay equity requirements), even if they are working in different locations within the same county or similar political subdivision of a state. The Equal Employment Opportunity Commission (EEOC) could define "same establishment" even more broadly, setting up the possibility that employees in lower-standard-of-living areas could sue to be paid the same as employees in higher-standard-of-living areas.

Facilitates the Creation of Class Action Lawsuits. The bill would make it far easier to create a class action lawsuit by allowing employees to automatically be assumed as part of a class action, unless they somehow find out about the suit and specifically opt-out.

Boon to Trial Lawyers. Each of the above-cited provisions of concern to conservatives would serve as a boon to trial lawyers, making it easier to sue, creating more conditions under which suits are allowed, and making it harder for employers to defend themselves.

Creates Constitutionally Questionable Grant Program for Sex-Based Negotiation Skills. The bill would create a new grant program aimed at helping females negotiate their wages. Such a negotiation-skills program would be constitutionally questionable since it is limited just to women.

Creates New Burdens on Employers. H.R. 12 would require the EEOC to issue regulations providing for the collection from employers of additional payroll data, classified by the sex, race,

and national origin of employees. Such regulations would likely yield additional paperwork and accounting burdens for employers.

Administration Position: The Administration released a Statement of Administration Policy (SAP) in the 110th recommending that President Bush veto the bill if it were to pass. http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr1338-r.pdf

Cost to Taxpayers: CBO confirms that the bill would authorize $15 million upon enactment.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill would further expand the federal government's reach into the private sphere by setting additional requirements for wages and placing additional burdens on employers, all of which negatively impact the labor market and could yield lower employment.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Although the bill does not contain any mandates as defined by the Unfunded Mandates Reform Act, the bill does clearly contain real-world mandates on what employers can pay their employees, how employers have to justify what they pay their employees, and how employers have to maintain records about what they pay their employees.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: Section 10(b) of the bill is a prohibition on earmarks. Additionally, the Education and Labor Committee, in House Report 110-783, asserts that, "H.R. 1338 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI."

House Rule XXI, Clause 9(d) defines "earmark" as "a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process."

Constitutional Authority: The Education and Labor Committee, in House Report 110-783, cites constitutional authority in Article I, Section 8, Clause 3 (the congressional power to regulate interstate commerce), The Fifth Amendment (the guarantee of due process of law) and Section 1 of the Fourteenth Amendment (the guarantee of due process of law and equal protection under such laws).

Note: Article VI, Clause 3 of the U.S. Constitution states that, "The Senators and Representatives…and all executive and judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution."

Outside Organizations Opposed to H.R. 12:

- Alliance for Worker Freedom
- Associated Builders and Contractors
- American Hotel & Lodging Association
- College and University Professional Association for Human Resources
- Eagle Forum
- HR Policy Association
- International Franchise Association
- International Public Management Association for Human Resources
- National Association of Convenience Stores
- National Association of Manufacturers
- National Public Employer Labor Relations Association
- National Restaurant Association
- National Retail Federation
- Society for Human Resource Management
- U.S. Chamber of Commerce

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