On The Hill

NELA's Washington Report

NELA Advocates for Employee Rights
National Employment Lawyers Association

June 2012

Paycheck Fairness Act Dies A Partisan Death In The Senate, Advocates Look For Alternatives

On June 5, 2012, the Paycheck Fairness Act (PFA) failed to earn the requisite 60 votes to proceed to final consideration in the Senate. The PFA would have barred companies from retaliating against workers who inquire about pay disparities and permit employees to sue for punitive damages if they find evidence of broad differences in compensation between male and female workers. The bill also would have bolstered reforms enacted in the Lilly Ledbetter Fair Pay Act of 2009 that expanded the statute of limitations for filing equal pay lawsuits. Ironically, Lilly Ledbetter watched the vote on the bill fail from the Senate gallery.

In the end, the final vote was 52-47, with all Republicans voting along party lines in opposing the bill. Included in the Republican opposition were Senators Kelly Ayotte (NH), Susan Collins (ME), Kay Bailey Hutchison (TX), Lisa Murkowski (AK), and Olympia Snowe (ME). Some say the failure of the bill to survive the Senate or even be considered in the House, will prove in the long run, a political lightning rod President Obama can use against Republicans in his re-election campaign. The reality is that that gender discrimination remains the number one reason women earn 77 cents for every dollar men earn.

NELA, and its advocacy partners that form the broad-based, national coalition that vigorously advocated for the PFA's passage, are already contemplating alternative, interim initiatives, including the potential issuance of a presidential executive order that would have the critical effect of banning retaliation against the 26 million workers in America who work for federal contractors when attempting to ascertain if they are being paid fairly. Amending currently introduced legislation with similar provisions as the PFA is also a viable option.

In this issue:

NELA Redoubles Lobbying Efforts On Garnering Republican Support For The Civil Rights Tax Relief Act Of 2011

NELA's signature legislation – the Civil Rights Tax Relief Act (CRTRA) of 2011 – already introduced in both chambers of Congress by Representatives John Lewis (D-GA), and Jim Sensenbrenner (R-WI) as well as Senators Jeff Bingaman (D-NM) and Susan Collins (R-ME), remains mostly a bipartisan bill with its original co-sponsors. No other Republican members of Congress have signed on to the legislation.

In an effort to attract bipartisan support – a difficult task in an increasingly polarized Congress – NELA has reached out to several Republican members of the House Committee on Ways and Means, including the Chairman, Representative Dave Camp (R-MI). NELA will be on the Hill over the next several weeks to

discuss the CRTRA with Republican offices and to meet with Republican co-sponsors of the CRTRA of the 110th Congressional to reenlist their support. In light of recent indications by Chairman Camp that a Republican-led tax reform bill might be in the works, we continue to shop the bill around the House for more co-sponsors as well as take advantage of our meetings with tax counsel to educate them on the CRTRA's pragmatic approach to amending the Internal Revenue Code's disparate tax treatment of non-economic damages for employees who suffer from unlawful discrimination, and to permit income averaging of lump-sum back and front pay awards received to compensate workers for multiple years of unlawful treatment.

If you are attending NELA's Annual Convention in San Diego, stop by the Legislative & Public Policy table to learn how you can help secure additional Congressional support for the CRTRA. In particular, we need NELA members who have connections to Congressmembers on the House Ways and Means Committee.

Arbitration Fairness Act Shows Little Sign Of Traction This Congressional Session, CFPB Study Might Provoke Some Movement
Of the 87 studies required by the Dodd-Frank Act, one may get a bump up the priority list thanks to the recent U.S. Supreme Court decision in *CompuCredit v. Greenwood*, 132 S.Ct. 665 (2012), which upheld the rights of companies to include forced arbitration clauses in their user agreements.

As previously reported in *On The Hill*, §1028 of the Dodd-Frank Act directs the Consumer Financial Protection Bureau (CPFB) to conduct a study and report to Congress on restricting pre-dispute forced arbitration, however, Congress set no deadline for completing the study. Once the CFPB completes the study, the Bureau has the authority to "prohibit or impose conditions or limitations" (via regulation) on arbitration agreements. The Bureau's rules must be consistent with the study.

The Arbitration Fairness Act (AFA) of 2011 (S. 987), sponsored by Senator Al Franken (D-MN), asserts that forced arbitration clauses were "intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power," not consumers. Representative Hank Johnson (D-GA) is sponsoring companion legislation (H.R. 1873) in the House. Both bills are sitting in their respective judiciary committees and are not expected to move any time soon in this contentious election year. NELA will submit comments to the CFBP to underscore how forced arbitration undermines the enforcement of our nation's workplace laws.

Senate Panel Passes Domestic Partner Benefits Measure For LGBT Partners Of Federal Employees
Only a week after President Barack Obama publicly proclaimed his support for same-sex marriage, the Senate Homeland Security and Government Affairs Committee approved the Domestic Partnership Benefits and Obligations Act that would extend benefits to gay and lesbian partners of federal workers. The bill, passed on a voice vote, is intended to give the same benefits to same-sex partners that spouses of straight federal workers currently receive.

Among the benefits that would be provided to same-sex partners are health care benefits, long-term care, family and medical leave, and retirement benefits. Statistics show that one in three employers offer benefits to their workers' domestic partners, as well as 60 percent of Fortune 500 companies and half of employers with more than 5,000 employees. Furthermore, 24 states and hundreds of local jurisdictions do so as well.

Senate HELP Committee Slates Hearing For ENDA
Senator Tom Harkin (D-IA), Chair of the Senate Health, Education, Labor, and Pensions Committee, has agreed to hold a hearing on the Employment Non-Discrimination Act (ENDA) following calls from lawmakers to hear testimony on anti-LGBT workplace discrimination. The hearing is scheduled for July 12, 2012.

The hearing could be the first opportunity for a transgender witness to testify before the Senate on LGBT workplace discrimination. In 2009, the committee held a hearing on ENDA, but no testimony came from a transgender witness. The announcement comes amid growing calls from the Senate co-sponsors for a hearing on the bill, including Senators Jeff Merkley (D-OR), Mark Kirk (R-IL), and Robert Casey (D-PA). NELA is a member of the ENDA Coalition led by the Human Rights Campaign and including several national LGBT organizations.

NELA Submits Comments To EEOC On The Withdrawal Of Its Proposed Revision Of The "Enforcement Guidance on Reasonable Accommodation And Undue Hardship Under the Americans with Disabilities Act (ADA)"

NELA submitted comments for inclusion in the record of the U.S. Equal Employment Opportunity Commission (EEOC) Public Meeting on its "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (ADA)" and its subsequent withdrawal from the agenda. The EEOC had already publicly announced its consideration of the guidance as an action item for its April 25, 2012 meeting. In our letter, we pointed out the appropriateness and timeliness of the Commission's proposed revision:

> For several reasons, a revised ADA guidance was appropriately scheduled to be considered at the Commission's meeting of April 25, 2012. First, and most important, the Commission scheduled for consideration at the very same meeting revised Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 ("Revised Title VII Guidance"). Like the proposed revised Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act ("Revised ADA Guidance"), the Revised Title VII Guidance addressed important enforcement issues on which EEOC guidance had not been updated for many years, i.e., a period in which key court decisions had issued, thereby rendering EEOC guidance out of date and far less helpful to employers and employees and courts than otherwise would be the case. In both cases, proposed guidance was EEOC's effort to bring existing guidance current with relevant precedent.
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> Second, the subject of reasonable accommodation had recently been the subject of significant EEOC outreach to affected stakeholders. The Commission held a hearing on "Leave as a Reasonable Accommodation" at its June 8, 2011 Public Meeting. At that meeting, the Commission heard extensive, detailed substantive testimony from experts representing both the plaintiffs' and the defense bar, as well as from experts at the Commission itself. The Commissioners asked numerous questions of the witnesses. And after the hearing the Commission received numerous further comments from interested parties and organizations, including NELA, regarding the substantive issues addressed at the hearing. After nearly a year to consider this rich record, the Commission clearly was in a position to act to update the public and the courts with its distillation of precedent and argument issued since its 2002 revision of its guidance on Reasonable Accommodation and Undue Hardship.

The letter goes on to express NELA's strong recommendation that the Commission revisit its decision to defer consideration of a Revised ADA Guidance on Reasonable Accommodation and Undue Hardship without formal notice and comment procedures, considering the straight forward and practical purpose the guidance sets out to provide.

NELA extends its thanks to Dan Kohrman, NELA Vice President of Public Policy, for his significant contribution to these comments.

DOL - OSHA Announces Intent To Establish Whistleblower Protection Advisory Committee

The Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL) has announced plans to form a "Whistleblower Protection Advisory Committee." The Committee will advise, consult with, and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health on ways to improve the efficiency, effectiveness and transparency of OSHA's administration of whistleblower protections.

OSHA announced that the committee specifically intended to focus its efforts on the development and implementation of improved customer service models, enhancements in the investigative and enforcement process, training, and regulations governing OSHA investigations. In addition, it will advise OSHA in cooperative activities with other federal agencies that are responsible for areas covered by the whistleblower protection statutes enforced by OSHA.

OSHA enforces the whistleblower provisions of the Occupational Safety and Health Act and 20 other statutes protecting employees who report violations of various workplace, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health care reform, nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.

Senators Casey And Pryor Introduce Bills To Ensure Workplace Protection For Servicemembers
In the week leading up to Memorial Day, Senators Robert Casey (D-PA) and Mark Pryor (D-AR) introduced legislation that would increase reemployment and leave protections for veterans and returning members of the National Guard and Reserves.

The first bill, the Servicemembers Access to Justice Act (S. 3233) introduced by Senator Casey, would amend the Uniformed Services Employment and Reemployment Rights Act (USERRA) – which provides reemployment protections for returning service members and prohibits discrimination based on military service – by making it easier for those seeking redress under this Act to bring an action in civil court.

Among other things, the bill would:

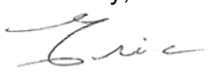
- Prohibit employers from requiring servicemembers to give up their ability to return to their prior position as a condition of employment. A servicemember could voluntarily leave their job upon deployment but could not be forced to do so as a condition for obtaining the job in the first place.
- Add minimum liquidated damages for willful violations of USERRA and punitive damages for violations committed with malice.
- Require that federal agencies provide notice to contractors of their potential obligations under USERRA.
- Render unenforceable an agreement between an employer and employee that would require arbitration of a USERRA-related dispute unless the parties voluntarily agree to arbitrate such claims.

The second service-related measure, the Servicemember Employment Protection Act (S. 3236) introduced by Senator Pryor, would permit veterans to take unpaid leave under the Family and Medical Leave Act (FMLA) in order to receive medical or dental treatment for service-related injuries or illnesses. In addition, the bill would allow federal contracting officers to suspend or bar companies that repeatedly violate military discrimination laws from receiving current or future government contracts for up to five years.

Like the Servicemembers Access to Justice Act, this bill would also prevent employers from requiring employees to resolve their USERRA-related claims via binding arbitration. Both measures have been referred to the Senate Committee on Veterans' Affairs.

I look forward to seeing those of you who will be joining us in San Diego for NELA's Annual Convention, "Full Speed Ahead: From Inspiration To Action." Be sure to stop by the Legislative & Public Policy table to learn more about how you can advance equality and justice in the American workplace on Capitol Hill! We also will be showing the Alliance for Justice's (AFJ) video, "A Question Of Integrity: Politics, Ethics and The Supreme Court."

Sincerely,



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