

PAYCHECK FAIRNESS ACT PASSED BY HOUSE OF REPRESENTATIVES

On July 30, 2008, the U.S. House of Representatives passed the Paycheck Fairness Act (“PFA”). If approved by the Senate, the PFA would amend the Equal Pay Act (“EPA”), to tighten requirements for employers, expand protections for employees, and increase the penalties available for gender-based wage discrimination. While the EPA already provides certain protections against gender-based wage discrimination, the PFA would substantially expand those protections. For instance, the PFA would allow employees to recover unlimited compensatory and punitive damages for gender-based wage discrimination, even when a disparity in pay was unintentional; automatically enroll class members with an option to opt-out of litigation; prohibit retaliation against employees for sharing wage information with coworkers; lower the threshold required for statistical evidence offered as proof of gender-based discrimination; increase the training available to Equal Employment Opportunity Commission (“EEOC”) employees; and increase the EEOC’s collection and dissemination of survey data. The PFA would also increase employers’ burdens when defending an allegation of wage discrimination; while employers previously only had to establish that a pay differential was based on a factor other than gender, the PFA would require employers to show the differential is not based on gender, is job-related, and is consistent with business necessity. An employee may defeat this defense by showing the existence of a nondiscriminatory alternative business practice that the employer refused to adopt. The PFA would also establish the Secretary of Labor’s National Award for Pay Equity in the Workplace and provide grant monies to select organizations for negotiation skills training for girls and women. Should the Senate pass the PFA, it is uncertain whether it would ultimately be enacted into law. The Bush Administration threatened to veto the PFA in a Statement of Administration Policy, while stating that it is “firmly committed to the principle of equal pay for equal work.” Given the recent focus on gender-based pay discrimination, as evidenced by the PFA and the Lilly Ledbetter Fair Pay Act, it would be prudent for employers to review their compensation plans to ensure that no disparities exist based on employees’ gender. If you have questions about the PFA or if you would like assistance in reviewing your compensation information, please contact a member of Koley Jessen’s Employment, Labor and Benefits Group.

CALIFORNIA SUPREME COURT CLARIFIES POSITION ON NONCOMPETITION AGREEMENTS

In an anticipated decision, the California Supreme Court in *Edwards v. Arthur Andersen* (“*Edwards*”) ruled that even narrowly drawn noncompetition agreements violate California law and are unenforceable. The employee in *Edwards* signed a restrictive covenant with his employer that prohibited him for 18 months from performing accounting services for any client he had worked for during the last 18 months of his employment. The California Supreme Court found that such prohibition, even though narrowly drawn, violated a California statute that renders all contracts that act as a restraint on trade, business, or engaging in a lawful profession void. In doing so, the Court declined to adopt the limited or “narrow-restraint” exception to the California statute that the Ninth Circuit Court of Appeals had applied in various cases to uphold noncompetition agreements that were not complete prohibitions on competition and reaffirmed California’s long-standing prohibition on noncompetition agreements. Employers with California employees should review any restrictive covenants to ensure that they do not include unenforceable noncompetition provisions. The decision in *Edwards* did not address the “trade secret” exception which has previously been used to enforce nonsolicitation agreements that seek to protect an employer’s trade secrets by limiting an employee’s ability to solicit former customers. Also unchanged by this decision are those situations in which a noncompetition agreement is specifically permitted by California statute, such in the context of the sale or dissolution of a business, partnership or limited liability corporation. If you have questions about the California Supreme Court’s decision in *Edwards* or would like to have your restrictive covenants reviewed to ensure enforceability, please contact a member of Koley Jessen’s Employment, Labor and Benefits Group.

REMINDER: THE DEADLINE FOR FILING EEO-1 REPORTS IS SEPTEMBER 30, 2008.

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