

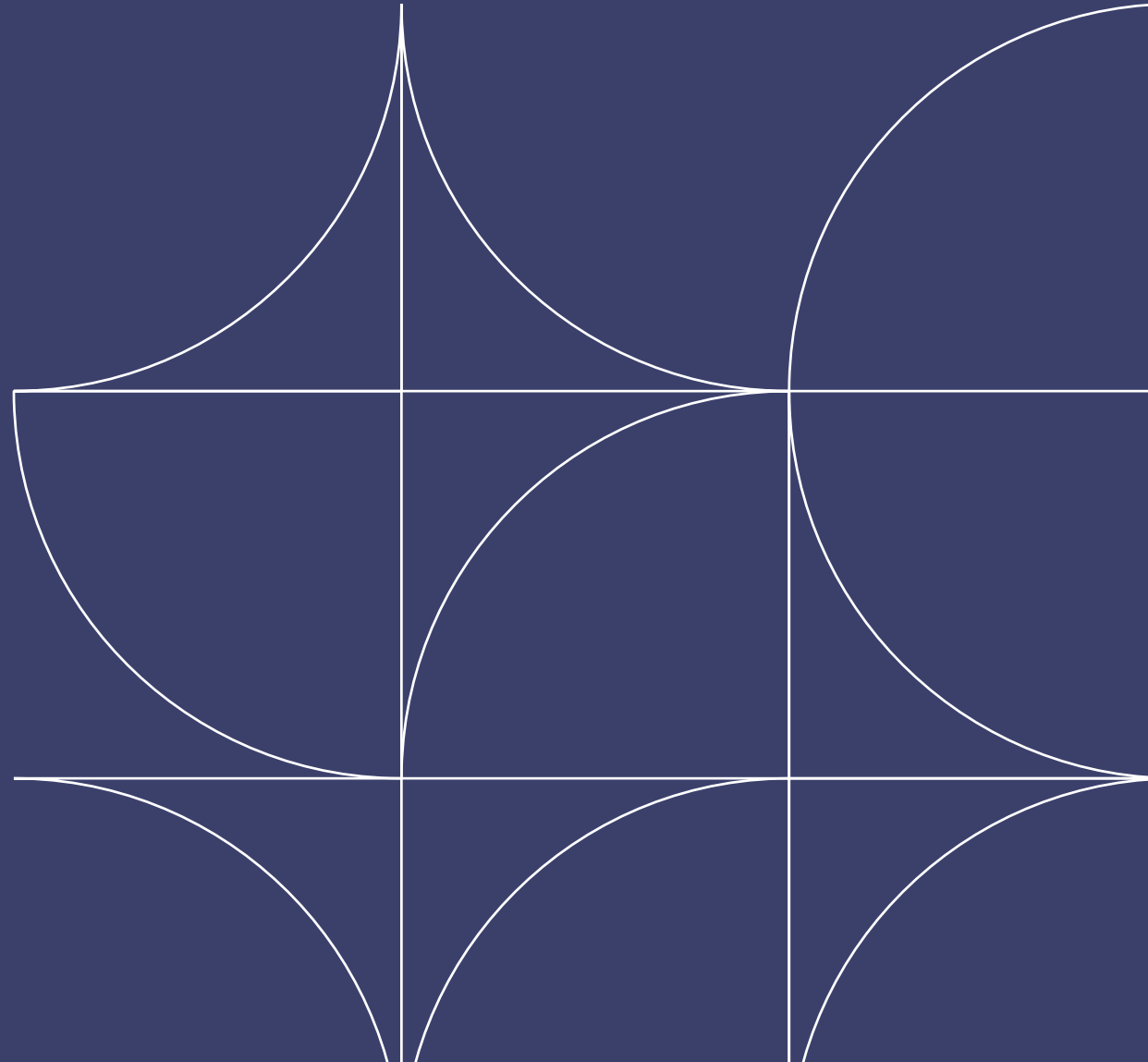


College of Labor and Employment Lawyers: Capitol Hill Update

February 2020

Seyfarth Shaw LLP

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Paycheck Fairness Act (H.R.7, S.270)

- Would radically amend the Equal Pay Act.
- Eliminate, as a practical matter, ability of employers to defend legitimate pay differences.
- Prohibits employers from relying on an applicant's pay when extending job offer.
- Expands class actions by changing rules to “opt out”.
- Injects unlimited punitive and compensatory damages into the EPA.
- Passed House Floor March 27, 235-187 with 7 Republicans supporting.

Equality Act (H.R.5, S.788)

- Would amend numerous Federal civil right laws to prohibit discrimination based on sexual orientation or gender identity.
- Predecessor for employment was the Employment Non-Discrimination Act (ENDA).
- ENDA contained certain protections not included in the Equality Act.
- Passed the House on May 17, 236-137, with 8 Republicans supporting.

Protecting Older Workers from Discrimination Act (H.R.1230, S.485)

- Would amend the ADEA (reversing the Supreme Court’s Gross decision) and the ADA to permit so called “mixed motive” cases, including in retaliation cases. Would also similarly amend Title VII retaliation rules.
- If employer demonstrated that it would have made the same decision regardless of the improper factor, damages limited to injunctive relief and attorney fees, based on Title VII structure.
- Still, harder to obtain summary judgement.
- House passed 261-155, January 15, 2020, with 34 Republicans supporting.
- Bi-partisan support, strongly supported by AARP; H.R. 1230, 23D, 9R; S. 485, 1D, 2R (Grassley, Collins).
- Senate compromise possible? Still, Administration issued rare veto threat.

Protecting the Right to Organize Act (H.R.2474, S.1306)

- Sweeping overhaul of the NLRA.
- Codifies Browning Ferris on joint employment.
- Binding arbitration when impasse during first contract negotiations.
- Reverses Supreme Court McKay doctrine on hiring striker replacements.
- Private cause of action.
- Adopts FLSA, ADEA and Title VII remedies.
- Amends 14(b) on Right to Work to allow “fair share” agreements.
- Eliminates “captive audience” speeches.
- Requires Board to seek immediate 10(j) injunctive relief in discharge cases.
- Etc.
- House consideration week of February 3.

Pregnant Workers Fairness Act (H.R.2694)

Unlawful practice to “not make reasonable accommodations to the known limitations related to the pregnancy, childbirth or related medical conditions of a job applicant or employee ...”

- Negotiations may lead to bipartisan compromise and enactment into law. However, last minute issue over coverage of “faith based” employers at January 14, 2020 House Committee mark-up led to loss of most Republican support, 2 Rs supporting.
- House consideration expected soon.

Fairness for High Skilled Immigrants Act (H.R.1044, S.386)

Would eliminate the current cap of 7% per country of the total number of employment-based green cards (approximately 140,000).

- Will reduce lengthy waits for immigrants applying for green cards from countries such as India and China.
- Passed House 365-65 on July 10, with 140 Republicans supporting.
- Comparable bill in Senate bogged down, but compromise possible.

Payroll Fraud Protection Act (116th Congress Version Not Yet Introduced)

- Must give written notice to individual performing labor or services whether such person is classified as employee or a non-employee.
- Directs individuals to DOL website for further information on legal rights and must include statement of rights relating to the classification.
- Failure to provide notice creates presumption that individual is employee which is rebuttable only by “clear and convincing” evidence.

Leave Proposals

Numerous bills providing for paid child and family leave have been introduced in the Congress by both Republicans and Democrats. Varying approaches, including tax contributions and credits, drawing from Social Security and expanded coverage under the Family and Medical Leave Act.

- Administration has talked of supporting paid leave but has not backed any specific proposal.
- Pre-emption of state leave laws, or safe harbor for “equivalent” plans, goal of business community.

Raise the Wage Act (H.R.582, S.150)

- Bill to raise minimum wage to \$15.00 per hour.
- Raise phased in over 5 years, could be extended; indexed to inflation thereafter.
- Phases out tip credit.
- Eliminates sheltered workshops.
- Passed House July 18, 231-199, with 3 Republicans supporting.

Forced Arbitration Injustice Repeal Act (H.R.1423, S.610)

- Very broad: prohibits mandatory arbitration of employment, consumer, antitrust, civil rights claims;
- Can't require class action waivers;
- Independent contractors included;
- H.R.1423 passed House September 20, 2019, 225-186, with 2 Republicans supporting.
- Credible talk of compromise legislation in Senate Judiciary Committee.
- Numerous narrower bills introduced in House and Senate.
- Mandatory arbitration as term and condition of employment and so called “gag clauses” in crosshairs in politically sensitive areas such as nursing homes, veterans, sexual harassment/discrimination.

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Other Issues

Congress also looking at “gig economy” issues and artificial intelligence in employment. Multiemployer reform.

