

The White House Urges the Senate to Pass Legislation to End the Gender Pay Gap

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On July 20, the White House made a strong push for the Senate to pass the Paycheck Fairness Act (the Act), which the House approved in January 2009 in a 256-163 vote. In written remarks, President Obama thanked the House for its work and encouraged the Senate to approve the “common-sense bill.” Echoing the President’s sentiment, Vice President Joe Biden delivered a similar message to the Senate while speaking at a White House Middle Class Task Force event, saying “Closing the gender pay gap, helping parents keep their jobs while balancing family responsibilities, and increasing workplace flexibility—these are not only women’s issues, they are issues of middle class economic security.”

President Obama’s statement and Vice President Biden’s comments were made in support of the National Equal Pay Enforcement Task Force’s (NEPETF’s) recommended changes in federal law and enforcement policies to help bridge the gender pay gap in both public and private sector employment. The passage of the Act is just one of five initiatives recommended by the NEPETF.

The NEPETF

The Obama administration created the NEPETF to implement President Obama’s pledge to “crack down” on violations of equal pay laws. The policy-making group brings together representatives from the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM).

The NEPETF’s Recommendations

The NEPETF issued its recommendations this week as part of a broader effort coordinated by the White House Middle-Class Task Force and the White House Council on Women and Girls to develop solutions for families balancing the dual demands of work and caring for family. More specifically, the recommendations are aimed at eliminating what the NEPETF referred to as “persistent challenges” to equal pay enforcement.

1. Interagency Coordination

Noting that three different federal agencies have responsibility for enforcing equal pay laws, and candidly admitting that those agencies “do not consistently coordinate [] responsibilities,” the NEPETF proposed that the EEOC, DOJ, and DOL establish a standing working group to coordinate their enforcement efforts and identify areas in which they can issue joint guidance and provide training to

employers and employees. The agencies would also work together to promote consistency in policy and litigation positions, including filing amicus briefs when appropriate.

These coordinated investigatory and prosecutorial efforts will result in increased information sharing among the agencies, the use of “enforcement partnerships,” and concerted efforts to seek out business sectors where enhanced enforcement activity is deemed necessary. For example, the EEOC will begin to utilize its systemic enforcement and litigation program to address “patterns of wage discrimination in particular industries, occupations, or geographic areas.” The Office of Federal Contract Compliance Programs (OFCCP), which has primary enforcement authority on discrimination in federal contractors’ employment decisions, likewise will make the following changes to its enforcement policies in response to the NEPETF’s push for improved interagency coordination:

- (1) Establishing new standards with respect to systemic compensation discrimination
- (2) Rescinding a directive that required the identification of 10 discrimination victims before conducting an onsite audit
- (3) Removing its limitation on the number of contractors eligible for a full audit review
- (4) Hiring 200 additional employees—mostly compliance officers—to help uncover discriminatory pay practices by federal contractors

2. Private Workforce Data Collection

Citing the fact that private sector employers are not required to systematically report gender-identified wage data to the federal government, the NEPETF highlighted a need for identifying ways to collect wage data from employers that will be “useful to enforcement agencies” without creating “unnecessary burdens on employers.” In pursuit of this goal, the EEOC will engage an outside study to determine what data it should collect, potentially through revised EEO Reports, to provide the Commission with the employer-specific demographic wage data that will enhance its enforcement efforts. Similarly, if the Act is passed, the OFCCP will reinstate its own Equal Opportunity Surveys for federal contractors.

3. Public Education and Additional Training for Government Agency Employees

Having found that “employees and employers are insufficiently educated on their rights and obligations with respect to wage discrimination,” the EEOC, DOL, and DOJ will work to develop guidance for employers on evaluating pay disparities and identifying occupational segregation that leads to lower pay for female-dominated occupations. These agencies also will assess the efficacy of the educational tools they currently make available to employers, and develop additional educational and training materials for employers and employees as necessary. Each EEOC District Office will host a “Fair Pay Day,” where the offices will hold events related to wage discrimination to raise additional media attention on equal pay issues. Internally, these agencies intend to revise the training programs they provide to their own employees with regard to identifying wage disparities and understanding the different elements of proof in Equal Pay Act and Title VII cases. In addition, the DOL will work to improve the quantity, quality, and accessibility of wage data it makes publicly available.

4. Making the Government a Model Employer

In 2009, a Government Accountability Office (GAO) study found a wage gap between male and female government workers of \$.11 per hour. The EEOC will work with the GAO to determine the cause of this pay gap and provide guidance to federal employers on analyzing wage gap issues.

5. Passing the Paycheck Fairness Act

The last prong of the NEPETF's five-point proposal is the passage of the Paycheck Fairness Act. The Act would amend the Equal Pay Act to require employers to justify unequal pay and bear the burden of proving that pay decisions are job-related and consistent with business necessity. The legislation would also prohibit employers from retaliating against employees who share salary information with their coworkers. The Act would allow for uncapped compensatory and punitive damages, and permit mandatory (or opt-out) class actions, as opposed to the current Equal Pay Act enforcement regime, which requires absent class members to affirmatively opt-in to such lawsuits. Although Vice President Biden, in his comments earlier this week, expressed his belief that most employers would welcome the Act, the Chamber of Commerce disagreed, stating that the Act would burden American businesses with frivolous litigation.

Morgan Lewis will continue to follow developments regarding the NEPETF and the Act and will issue further alerts as developments occur. For more information about the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Nina G. Stillman 312.324.1150 nstillman@morganlewis.com

Dallas

Anne Marie Painter 214.466.4121 annmarie.painter@morganlewis.com

Irvine

Anne M. Brafford 949.399.7117 abrafford@morganlewis.com

Los Angeles

George A. Stohner 213.612.1015 gstohner@morganlewis.com

Miami

Anne Marie Estevez 305.415.3330 aestevez@morganlewis.com

New York

Sam S. Shaulson 212.309.6718 sshaulson@morganlewis.com

Palo Alto

Melinda S. Riechert 650.843.7530 mriechert@morganlewis.com

Philadelphia

Michael S. Burkhardt 215.963.5130 mburkhardt@morganlewis.com

Mark S. Dichter 215.963.5291 mdichter@morganlewis.com

Paul C. Evans 215.963.5431 pevans@morganlewis.com

Michael J. Puma 215.963.5305 mpuma@morganlewis.com

Princeton

Rene M. Johnson 609.919.6607 rjohnson@morganlewis.com

San Francisco

L. Julius M. Turman 415.442.1361 jturman@morganlewis.com

Washington, D.C.

Grace E. Speights
Howard M. Radzely
Robert J. Smith

202.739.5189
202.739.5996
202.739.5065

gspeights@morganlewis.com
hradzely@morganlewis.com
rsmith@morganlewis.com

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