



## **PROPOSED LEGISLATIVE EMPLOYMENT LAW REFORM**

*By: Matt Halpern, Esq.*  
**Jackson Lewis LLP**  
58 South Service Road, Suite 410  
Melville, New York 11747  
Phone: (631) 247-4603  
Fax: (631) 247-0417  
[halpernm@jacksonlewis.com](mailto:halpernm@jacksonlewis.com)  
[www.jacksonlewis.com](http://www.jacksonlewis.com)

May, 2008

As the national election scene heats up, workplace law issues imminently will attract greater attention. Below is a brief summary of proposed legislation currently pending before Congress.

### **A. Civil Rights Act of 2008**

In late January 2008, Senator Edward Kennedy, along with Senators Hillary Clinton and Barack Obama, introduced a bill entitled the Civil Rights Act of 2008. This proposed legislation would impose employment law reform. In its present form, the Civil Rights Act of 2008 would:

- Amend the Equal Pay Act to stiffen penalties for violations and to make it more difficult for employers to use the “bona fide factor other than sex” defense by limiting the defense only to where the employer can show that the differential is truly caused by something other than sex and is related to job performance -- such as differences in education, training, or experience;
- Add compensatory and punitive damages to the Fair Labor Standards Act so that an employee can recover those damages in addition to back pay (which is doubled if an underpayment is not in “good faith”);
- Amend the Federal Arbitration Act to prohibit clauses requiring arbitration of federal constitutional or statutory claims unless an employee knowingly and voluntarily consents to this clause after a dispute has arisen or it is part of a collective bargaining agreement;
- Make it easier for employees who prevail in part to recover expenses (like expert witness fees);
- Give the National Labor Relations Board authority to award back pay to undocumented workers;

- Provide individuals (as opposed to only the federal government) standing under Title VI, Title IX, the Rehabilitation Act of 1973, and the Americans with Disabilities Act to challenge the policies of recipients of federal funding that have an unjustified discriminatory effect based on race, color, national origin, disability, age or gender.
- Require disparate impact claims under the ADEA to be analyzed the same way Title VII claims are analyzed by making the standard of proof in cases alleging an unjustified discriminatory effect based on age the same as in cases alleging an unjustified discriminatory effect based on race, gender, national origin, or religion; and,
- Condition states' receipts of federal funds on their waiver of sovereign immunity against individual claims for monetary damages under the ADEA, the FLSA, and the Uniformed Services Employment and Reemployment Rights Act. This would reverse U.S. Supreme Court decisions that have barred these lawsuits against state governments.

## **B. Major Changes to Title VII Under Consideration By Congress**

Perhaps the most immediate action might be elimination of the caps that Congress imposed upon punitive and compensatory awards under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. An effort to remove these ceilings upon damages already is in progress. Senator Edward Kennedy (D-MA) has introduced legislation that would eliminate the caps on the amount of damages recoverable under the Civil Rights Act of 1991. Kennedy introduced the bill—the Equal Remedies Act of 2007 (S. 1928)—on August 1, 2007. Kennedy said his bill would end “the glaring inequality in the current federal antidiscrimination laws.” CRA 1991 permitted plaintiffs suing under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act of 1990 (ADA) to recover compensatory and punitive damages for intentional employment discrimination. However, it imposed a four tier program of limited caps. In contrast, plaintiffs suing under 42 U.S.C. §1981, which principally covers discrimination on the basis of race or color, can recover unlimited damages. According to Senator Kennedy, in addition to creating equality among all federal anti-discrimination laws, there is also a need for reform because “capped” damages do not serve as a significant deterrent because employers are aware that liability is limited.

Senators Obama and Clinton both are sponsors of the Equal Remedies Act of 2007 (“the Act”). Senator Obama is on record as stating that caps on compensatory and punitive damages under Title VII “presently impede the ability of victims of racial and gender discrimination to fully recover for the wrongs they have suffered.” He promises to sign the Act into law if elected. Although Senator Clinton has not directly addressed her support for the Act in her campaign literature, it is likely she would sign the Act into law if elected President. Both Obama and Clinton’s support for the Act provides insight into the labor and employment platform of whomever becomes the Democratic candidate for President.

Senator McCain, on the other hand, has not taken a public position for or against the proposed legislation. A clear example of his involvement with employment-related litigation is his “no-vote” against the points-based immigration system that would have admitted workers into the United States based on a government-created formula. Senator McCain voted in favor of the Civil Rights Act of 1991 (i.e., the Act that imposed the damages caps).

**C. Major Changes to Americans with Disabilities Act Under Consideration by Congress**

There also may be major expansion of employee protections under the Americans with Disabilities Act. With over 240 co-sponsors in the House, the ADA Restoration Act H.R.3195 and S.1881, has been the subject of hearings before the House Education and Labor Committee, House Judiciary Committee and the Senate Health, Education, Labor and Pension Committee.

As currently proposed, the ADA Restoration Act would redefine “disability” to include “a physical or mental impairment” or “a record of a physical or mental impairment” or “being regarded as having a physical or mental impairment.” The bill effectively overrules several U.S. Supreme Court decisions that narrowed the scope of the ADA’s protections. Individuals no longer would need to prove that impairments “substantially limit” one or more “major life activities.” Courts and employers also would be prohibited from considering the effects of mitigating measures (such as medication or devices) when determining whether individuals are disabled. The bill appears to shift the burden of proving whether an individual is not “qualified” to perform a job from employee plaintiffs to employers (rather than the worker establishing that he or she is qualified).

In a letter presented to the House Education and Labor Committee during its January 29, 2008 hearing, the U.S. Justice Department opposed the ADA Restoration Act as written, stating the bill “would dramatically increase unnecessary litigation, create uncertainty in the workplace, and upset the balance struck by Congress in adopting the ADA.”

\* \* \*

For the past several years, the employment law landscape has been stable enough to enable employers to develop preventive programs and for the employment practices liability insurance carriers to evaluate potential exposure. The broad changes and uncapped liabilities proposed in these bills will create uncertainty and great exposure to costly litigation.

**Matt Halpern**

Partner

Jackson Lewis LLP

Long Island Office

58 South Service Road, 4th Floor

Melville, New York 11747

Email: [halpernm@jacksonlewis.com](mailto:halpernm@jacksonlewis.com)

Phone: (631) 247-4603

Fax: (631) 247-0417

[www.jacksonlewis.com](http://www.jacksonlewis.com)

This article is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis LLP and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Jackson Lewis LLP. Jackson Lewis LLP represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed above or the Jackson Lewis attorney with whom you regularly work.