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Employment Law

Equal Pay

The Ledbetter Act Was Only the First Step: What Employers Should Know About Aggressive Equal Pay Legislation on the Horizon

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Discrimination in pay on the basis of sex should be, and has been, outlawed for almost 40 years. First, Congress passed the Equal Pay Act of 1963 ("EPA"). Part of the Fair Labor Standards Act, the EPA covers all employers of two or more employees. A year later, Congress passed the Civil Rights Act of 1964. The Act went into effect on July 2, 1965. Title VII of that Act also made pay bias unlawful and extended pay bias to race, color, religion, national origin and also sex. There simply is no question but that there have been clear statutory prohibitions governing pay bias for decades now. Moreover, since 1978, the EEOC has had authority to investigate *any* employer for unlawful sex bias in pay through its power to conduct "directed investigations" under the EPA.

President Obama and various members of Congress have made clear that passing the Lilly Ledbetter Fair Pay Act ("Ledbetter Act") was only the first step of their quest to crack down on employers and close the purported gender wage gap.[1] They are now pushing legislation to modify the Equal Pay Act and close what they view as "loopholes" in existing laws and "barriers to effective enforcement."[2] Indeed, despite the current focus on health care legislation, the Senate Committee on Health, Education, Labor and Pensions ("HELP") held a hearing as recently as March 11 and voiced their hopes of passing additional equal pay legislation during this Congress.[3] The bills they propose, including the Paycheck Fairness Act ("PFA")[4] and the Fair Pay Act of 2009 ("FPA")[5] would materially alter the EPA by:

Limiting the affirmative defenses currently available to employers;

Enhancing employees' ability to seek un-capped compensatory and punitive damages for even unintentional discrimination;

Making it easier to pursue class actions for equal pay claims; and

Requiring employers to provide equal pay for men and women not only in identical or the same jobs, but also "comparable" jobs.

If passed, the PFA and the FPA will pave the way for a flood of equal pay claims that will be more

challenging and difficult for employers to defend. This article outlines the proposed changes, explains the increased risks to employers, and discusses actions they should consider taking – such as conducting privileged audits and reviewing their record-retention policies and procedures – to better protect themselves from the anticipated litigation that will undoubtedly result.

The Current Body of Law

To succeed under the current EPA, an employee must prove that:

1. employees of the opposite sex in the same establishment are paid higher wages;
2. those employees perform equal work in jobs that require equal skill, effort and responsibility; and
3. the jobs are carried out under similar working conditions.[6]

Once an employee meets this test, the employer can defeat the claim by showing that the wage difference is justified because it is based on:

1. a seniority system;
2. a merit system;
3. a system which measures earnings by quantity or quality of production; or
4. a differential based on a factor other than sex.[7]

If the employer proves one of these affirmative defenses, the burden then shifts back to the employee to show that the employer's proffered reasons for the wage difference are actually a pretext.[8] However, the employee need not prove that the employer *intended* to discriminate – *i.e.*, acted with malice or reckless disregard.[9]

The lack of an intent requirement makes EPA claims easier for plaintiffs to prove. Moreover, an employee can recover not only backpay, but may also recover liquidated damages if the employer fails to demonstrate reasonable and good faith grounds for believing it complied with the EPA.[10] Compensatory or punitive damages are not currently available under the EPA.

Employees seeking to redress pay discrimination often seek recovery simultaneously under Title VII because it allows for more substantial damages, including compensatory and punitive damages.[11] Title VII also allows for "opt-out" class actions, where class members are included in the class unless they specifically exclude themselves.[12] The current EPA allows for collective actions only where class members affirmatively opt in through written consent.[13]

Under Title VII, compensatory and punitive damages are capped. Depending on the employer size, such damages can range from $50,000 to $300,000 and are available only when the employee can prove the employer acted with malice or reckless disregard.[14] When employees seek damages for *unintentional* gender wage disparities (*i.e.*, "disparate impact" cases), Title VII limits them to equitable relief. The employee must also prove a *specific* employer policy or practice giving rise to the wage disparity. Broadly attacking an entire body of wage practices of an employer is not sufficient.[15] Title VII further requires employees to obtain right to sue letters from the EEOC or a state agency before filing a claim.[16]

What the New Legislation Proposes

The proposed changes to the EPA would make it dramatically easier for employees to prove gender pay discrimination claims, significantly enhance the rewards they can recover, and impose enormously greater liability, especially on small to mid-sized employers.

New Limits to the "Factor Other Than Sex" Affirmative Defense

Proponents of the new legislation suggest that the current "factor other than sex" defense "excuses far too much pay inequality" and "accepts virtually any superficially gender-neutral explanation for paying women less."[17] Professor Deborah Brake, who testified before the Senate HELP Committee on March 11, noted that courts have, for example, allowed employers to rely on an employee's prior salary to justify a current pay disparity without any further justification. Ignoring marketplace realities, Brake argues that this "perpetuat[es] ongoing pay discrimination against women, since women on average earn less than men."[18] Brake noted that employers can currently rely on differences in how employees negotiate their salary to support wage disparities. This, she contends, is problematic because studies suggest that men and women differ in how they negotiate and employers respond differently to women who negotiate.[19] Brake believes the pending legislation would eliminate these and other similar issues. Specifically, it would shift the burden to employers to prove that the factor other than sex:

1. is not based upon or derived from a sex-based differential in compensation;
2. is job-related with respect to the position in question; and
3.

is consistent with business necessity.[20]

Furthermore, the defense would not apply if the employee can demonstrate that "an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."[21]

Brake supports the new legislation by pointing out that the language mirrors Title VII's disparate impact framework, which also requires employers to show job-relatedness and business necessity.[22] Yet Brake and other PFA/FPA proponents have failed to acknowledge that, unlike the EPA, Title VII balances the scales in disparate impact cases by allowing for only equitable relief and requiring employees to *specify* an employer practice giving rise to the alleged wage disparity.[23] This is likely why the original EPA gave employers more room to defend nondiscriminatory compensation decisions that were based on holistic, albeit indefinable, analyses of employees' worth. While the circuits so far have split on whether the "factor other than sex" must have a "business purpose," they have universally granted employers some reasonable business leeway to present their own rationales without questioning from less business-savvy judges or juries.[24]

Ultimately, the changes would likely preclude or at least materially limit employers from defending wage decisions based on factors such as market conditions, the employer's financial circumstance, or the need to offer a raise to retain a given worker at a given moment, as these are arguably not "job related."[25] An employer would have to point to a specific reason that the higher paid employee adds more value to the company than his or her lesser-paid counterpart. Employers would also have to be vigilant in ensuring that those employees hired when labor is in low demand have wages raised to match any hires made during a period of high demand. Failure to do so might create a presumption of discrimination.

Practically speaking, employers will have a much harder time prevailing on summary judgment, as most circumstances will involve intricate factual disputes as to whether the employer's decisions were "job related" and "consistent with business necessity."

Increased, Uncapped Damages

Not only will EPA claims become much harder to defend, but large and small employers alike will become vulnerable to the possibility of *unlimited* damage awards. Unlike under Title VII, compensatory and punitive damages under the proposed EPA amendments are *not* restricted or capped, nor are they limited to cases in which employees prove intentional discrimination. Indeed, as discussed above, plaintiffs could recover compensatory and punitive damages on claims for which they could not even recover *equitable relief* under Title VII. The only protection employers would have against excessive compensatory and punitive damages is the 14th Amendment's due process protection, which lacks clear guidelines on the contours of "excessive," unconstitutional remedies.[26] The congressional record makes clear that the purpose of imposing increased, uncapped damages is to more severely punish employers who violate the substantive provisions of the EPA and deter other employers from engaging in unscrupulous, discriminatory business

practices.[27]

Yet innocent employers would be equally vulnerable to the risks imposed by the increased damages potential. Even in non-meritorious suits, many employers, especially smaller and mid-sized employers, will feel pressured to settle once they weigh the possibility of excessive damage awards and costs of litigation against their slimmer chance of success under the new statutory framework. This is alarming given the number of non-meritorious cases that are filed each year. In 2009, the EEOC found "reasonable cause" in only 4.6 percent of the 942 EPA charges filed with the agency.[28] Similarly, of the 28,028 Title VII sex discrimination charges filed, the EEOC found "reasonable cause" in only five percent.[29] Indeed, the experience of the EEOC – both in the low rate of its cause findings, and its decision not to pursue directed investigations of equal pay combined with the GAO and OECD studies – suggest that Ms. Brake and Congress may be seeking a massive statutory remedy for a gender gap that is *not* an employer-caused gap.

Opt-Out Versus Opt-In Class Actions

The proposed changes would create even greater risk for employers in the class action context, as they would require employees to "opt-out" rather than "opt-in" to participate in a class. This would likely increase the number of class actions filed under the EPA and make it easier to obtain class certification. According to EEOC statistics, in 2001, the EEOC received only 1,251 charges under the Equal Pay Act compared to 7,026 charges with compensation issues filed under Title VII.[30] Presumably, if Congress makes the EPA more analogous to Title VII, the more likely the number of EPA charges will resemble those of Title VII.

Employers should also be aware that some courts faced with equal pay discrimination claims have found that such claims are amenable to class treatment. In *Dukes v. Wal-Mart*—the largest sex discrimination class action in the country—the district court and two judges of a three-judge appellate panel held that plaintiffs' equal pay claims under Title VII could be certified under Rule 23(b)(2).[31] The plaintiffs alleged that, despite having higher performance ratings and greater seniority, women employed in Wal-Mart stores were paid less than men in comparable positions. The proposed class covered at least 1.5 million women who were employed over five years at about 3,400 Wal-Mart stores. The court held that plaintiffs' equal pay claims were amenable to class treatment because individuals who were paid less for comparable work could be identified by objective criteria through the use of computer software and would not require an individualized inquiry.

The *Dukes* case foreshadows the type of class actions that will likely arise if the EPA is amended as proposed. *Dukes* demonstrates that courts may accept objective criteria such as job descriptions and pay grades as common proof of an employer's practice or policy of discrimination. Similarly, computer software can potentially identify employees and pay disparities quickly and assess damages on a class-wide basis. Employers should continue to monitor *Dukes* closely, as it is on appeal before the Ninth Circuit *en banc*.

Broader Definition of "Same Establishment"

A more subtle but still meaningful change under the proposed legislation would enlarge the pool of comparators that an employee could use in proving discrimination. Under the current EPA, the employee must show that her male comparators work in the "same establishment," which is ordinarily defined as a "physically separate place of business."[32] Only in unusual circumstances may a court find that two or more distinct physical locations make up one "establishment."[33] The proposed amendments to the EPA would broaden the definition of establishment to mean "workplaces located in the same county or similar political subdivision of a State."

This new definition would impose a burden on employers who operate in counties in which market conditions or other relevant factors may justify paying different salaries in different locations. Take, for instance, a restaurant chain that has one restaurant downtown and one on the outskirts of the town or the county. It may be much easier to attract employees to one location over the other, depending upon customer traffic, potential for tips, safety, accessibility, and other similar factors. Therefore, the employer may have to pay employees at one location more than at another location just to ensure it can attract enough staff. Nevertheless, the employer would run the risk of a court ruling that such a pay differential is not "consistent with business necessity" or, even if it were, that an alternative practice would not serve the same business purpose without such a wage gap.

Enhanced Efforts to Increase Transparency Regarding Pay

The proposed legislation would empower the EEOC to issue regulations allowing it to collect wage data from employers that identifies the sex, race, and national origin of its employees. While the legislation would require the EEOC to "consider" the burdens on employers to provide the data, as well as how the agency would protect confidentiality, it does not guarantee any specific safeguards. This concern arose during the March 11 Senate HELP Committee hearing, when Senator Isakson asked Acting Chair of the EEOC, Stuart Ishimaru, how the agency would handle what most companies view as well-guarded trade secrets.[34] While Ishimaru assured Isakson that the agency would take special pains to ensure they "do it right" – that the collection of data needs to be "fair without unintended consequences" – he continued to be vague and offered little assurance to employers that the data will not end up in the hands of their competitors or over-zealous plaintiffs' lawyers. Indeed, Ishimaru placed great emphasis on the data disclosure component, suggesting that it would be the greatest factor allowing the EEOC to better "detect violations of the law and more readily engage in targeted enforcement." This legal tool will be undoubtedly enhanced by the President's recent creation of the National Equal Pay Enforcement Task Force, which Ishimaru notes will "ensure the most rigorous possible enforcement of our federal equal pay laws."[35] As noted earlier, the EEOC has had authority for 32 years (since 1978).to initiate "directed investigations" under the EPA, get employer pay data, and conduct pay investigations of its own choosing. Yet the EEOC has done only a handful of these investigations in 32 years. Moreover, another U.S. government agency with employer oversight for compensation, Office of Federal Contract Compliance Programs (OFCCP), has audited over 5,000 employers a year. It regularly obtains and analyzes employee compensation data as part of its audits. OFCCP, like EEOC, has found few instances of actual employee bias. This experience does not warrant a wholesale new set of pay inquiries of employers.

The new legislation also sets forth a retaliation cause of action to prevent employers from

penalizing employees who share salary information with their co-workers. This, too, would expose employers to greater litigation risks.

Equal Pay for "Comparable" Jobs Under the Fair Pay Act

While the March 11 Senate HELP Committee hearing was dedicated to the Paycheck Fairness Act, most of the participants present discussed the Fair Pay Act, including HELP Committee Chairman Senator Tom Harkin who introduced the FPA in the Senate. While similar to the PFA, the FPA would go further to require employers to provide equal pay for men and women not only in the same jobs, but also "comparable" jobs – *i.e.*, those that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."[36] While it may appear that the current EPA's "substantially equal" standard is not that different from the current EPA's "equivalent job" standard, proponents of the bill have made clear that the intent is to address the devaluation of what are traditionally "women's jobs." When introducing the FPA in the House of Representatives on April 28, 2009, Rep. Eleanor Holmes Norton explained,

> [T]he FPA recognizes that, if men and women are doing comparable work, they should be paid a comparable wage. For example, if a woman is an emergency services operator, a female-dominated profession, why is she often paid considerably less than a fire dispatcher, a male-dominated profession?[37]

This change in the degree of similarity required by courts would further enlarge the pool of comparators, making it dramatically easier for women to sue their employers for gender pay discrimination.

Recommendations to Employers

While the health care debate sidelined President Obama and the Democratic-controlled Congress in 2009, employers should expect to see great strides made to change the EPA in 2010. The confluence of the Ledbetter Act along with the amended EPA would almost certainly lead to an increased number of EEOC charges and investigations, more comprehensive OFCCP audits, and emboldened plaintiffs' attorneys. As a result, employers will face an increased risk of discrimination claims based on old discriminatory compensation decisions. It is therefore important for employers to assess compensation policies and employees' current pay decisions and take reasonable steps to identify any areas of potential disparity.

The most obvious first step for an employer to protect itself is to audit compensation. The scope of the audit will depend on the employer's view of the potentially expansive effect of the Ledbetter Act and whether the audit should take into account some or all of the changes in the pending legislation. Suggested steps below assume a more expansive approach to an audit.

This would entail compiling and analyzing (under appropriate privilege) of personnel data on wages of employees doing "equal work" at locations "in the same county or similar political subdivision of the State." When evaluating "wages," while the starting point is base salary,

employers should remember to analyze "all payments made to [or on behalf of] an employee as remuneration for employment." This might include things such as salary, profit sharing, monthly minimums, expense accounts, bonuses, uniform cleaning allowances, hotel accommodations, uses of a company car, gasoline allowances, vacation, holiday pay, premium payments for work on Saturdays, Sundays, and holidays, and fringe benefits like health insurance.[38]

Analyzing whether a wage disparity exists turns in large part on determining which employees to compare. Put differently, which employees perform "equal work," under the same or similar working conditions? In addition, the employer should consider whether there are any jobs which are predominantly one sex or another, which might support plaintiffs' argument that the pay differences between such jobs is sex-based. For example, are there parallel, similar job categories in which each category is dominated by one gender and where the pay of the female-dominated category is lower than in the male dominated one? Or is there evidence that women were unlawfully channeled into the lower-paying job?

An audit should also involve looking back as far as necessary to determine whether any of the company's current employees' compensation is affected by past discriminatory pay decisions or other practices related to pay. When evaluating those past decisions, employers should determine what factors have historically impacted them, such as those that are clearly accepted under the law (*i.e.*, seniority, merit, or quality and quantity of production), as well as those that require greater analysis to determine whether they are job related or necessary to the business. The employer must also not limit its inquiry to specific compensation decisions, such as initial wage determinations and raises. The EEOC and plaintiffs' lawyers are already arguing for an expansive (some would say "creative") view of other practices. Employers need to watch how the courts interpret Ledbetter. They should consider all practices that might arguably affect current compensation, including classification (salaries versus hourly), status (part-time versus full-time, permanent versus temporary), performance reviews, job placements, transfers, promotions or demotions, disciplinary actions, and even training opportunities.

In addition, employers should be sure to look for decisions that, while nondiscriminatory on their face, may have incorporated assumptions that could be viewed as discriminatory under the new law. For instance, employers may want to reconsider using an employee's salary at a previous employer as a factor in setting current salary, as doing so could effectively create liability for discriminatory decisions of the *former employer*. Employers may also want to reconsider rewarding employees for negotiating their salaries, given that proponents of the new legislation have argued that doing so could also be discriminatory since men are more likely than women to negotiate and tend to fare better when they do.

If the employer identifies a problem, it will need to determine how best to limit its liability. Among other things, the employer could consider adjusting employee compensation so that past decisions are no longer a factor in current pay.

The increased risk of litigation makes it critical for employers to work with attorneys in conducting audits so that the reviews will be privileged and not discoverable. Thinking ahead, employers will need to make sure that their human resources departments and managers document and maintain

records regarding employment actions that might affect compensation down the road – including documents regarding how salaries are set at time of hire or relating to promotions and pay raises. While retaining data can become quite burdensome and expensive over time, technology vendors are increasingly offering viable solutions, and the benefits may prove to outweigh the costs. Employers should weigh these considerations in assessing their retention policies and programs.

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1 While beyond the scope of this article, there are several independent studies, including one in 2003 by the GAO, that suggest much of the gender wage gap is *not* due to any employer bias, but due to other societal factors and that a fraction of the difference is due to "unexplained factors." A similar March 2010 study in Europe by the Organization of Economic & Community Development (OECD) found similar differences and similar cultural and societal reasons for the gender wage gap in OECD countries.

2 *See* http://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class (last visited Apr. 6, 2010); *see also A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (statement of Sen. Tom Harkin, Chairman, Sen. Comm. on Health, Education, Labor and Pensions).

3 *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (video of hearing available at http://help.senate.gov/hearings/hearing/?id=263e16b9-5056-9502-5db9-e17bfa4f6e01 [last visited Apr. 6, 2010]).

4 The PFA passed the House on Jan. 9, 2009 as part of the Ledbetter Act. However, the Senate detached it and opted to consider it at a later date under a companion bill, S.182.

5 Fair Pay Act of 2009, S. 904, 111th Cong. (2009).

6 *See Ryduchowski v. Port Authority of New York and New Jersey*, 203 F.3d 135, 142 (2d Cir. 2000); *see also* 29 U.S.C. § 206(d)(1).

7 *Id.*

8 *See Ryduchowski*, 203 F.3d at 142.

9 *Id.* ("The [EPA] creates a type of strict liability; no intent to discriminate need be shown.").

10 29 U.S.C. §§ 216(d), 260.

11 See 42 USC § 1981a.

12 *See* Fed. R. Civ. P. 23(b)(3).

13 *See* 29 U.S.C. § 216(b) (providing that an action can be brought "by any one or more

employees for and in behalf of himself or themselves and other employees similarly situated."); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 861 (9th Cir. 1977), *disapproved on other grounds in Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

14 42 U.S.C. § 1981a(b). Specifically, the complaining party must demonstrate "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

15 42 U.S.C. §2000e–2(k)(1)(A)(i); *see also Spaulding v. Univ. of Washington*, 740 F.2d 686, 708-9 (9th Cir. 1984).

16 *See County of Washington v. Gunther*, 452 U.S. 161, 175, n.14 (1981).

17 *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (statement of Deborah L. Brake, Professor of Law, University of Pittsburgh, available at http://help.senate.gov/imo/media/doc/brake.pdf).

18 *Id.*

19 *Id.* Specifically, Brake cites a study conducted by behavioral researchers Linda Babcock and Sara Laschever who found that among Carnegie Mellon University graduates, 57% of the men, but only 7% of the women, negotiated for a higher starting salary and, on average, were paid 7.4% more than those who negotiated. Brake also cited a series of experiments conducted by Babcock suggesting that men may be less inclined to work with women who negotiate for more money.

20 Paycheck Fairness Act of 2009, S.182, 111th Cong. (2009).

21 *Id.*

22 *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (statement of Deborah L. Brake, Professor of Law, University of Pittsburgh, available at http://help.senate.gov/imo/media/doc/brake.pdf).

23 42 U.S.C. §2000e–2(k)(1)(A)(i); *see also Spaulding v. Univ. of Washington*, 740 F.2d 686, 708-9 (9th Cir. 1984).

24 *See* H.R. Rep. No. 110-73, at 25 (2008).

25 *See id* at H131 (statement of Rep. Capps).

26 *See State Farm v. Campbell*, 538 U.S. 403, 425 (2003).

27 H.R. Rep. No. 110-783, at 31 (2008); *Closing the Gap: Equal Pay for Women Workers: Hearing before the Sen. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 10 (2007).

28 EEOC Equal Pay Act Charges, EEOC, available at http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm (last visited Apr. 6, 2010).

29 EEOC Sex-Based Charges, EEOC, available at http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm (last visited Apr. 6, 2010).

30 See Equal Pay Act Charges, EEOC, available at http://archive.eeoc.gov/stats/epa.html (last visited Apr. 6, 2010); Title VII Charges with Compensation as an Issue, EEOC, available at http://archive.eeoc.gov/epa/stats-vii.html (last visited Apr. 6, 2010).

31 *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004) (granting class certification in class action alleging women were paid less than men in comparable positions, in violation of Title VII), *affirmed by* 509 F.3d 1168 (9th Cir. 2007), rehearing *en banc* granted by 556 F.3d 919 (9th Cir. Feb. 13, 2009).

32 29 C.F.R. § 1620.9(a).

[33] 29 C.F.R. § 1620.9(b).

[34] *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (video of hearing available at http://help.senate.gov/hearings/hearing/?id=263e16b9-5056-9502-5db9-e17bfa4f6e01 [last visited Apr. 6, 2010]).

[35] *Id.* (statement of Stuart Ishimaru, Acting Chair of the Equal Employment Opportunity Commission, available at http://help.senate.gov/imo/media/doc/Ishimaru.pdf [last visited Apr. 6, 2010]).

[36] Fair Pay Act of 2009, S. 904, 111th Cong. (2009).

[37] 155 Cong. Rec. E999 (daily ed. April 28, 2009) (statement of Rep. Norton).

[38] 29 C.F.R. § 1620.10.

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