

January 29, 2009

Lily Ledbetter Fair Pay Act of 2009; Retaliation Law Development

Today, January 29, 2009, President Obama signed the Lily Ledbetter Fair Pay Act of 2009 (“LLFPA”). The law is retroactive to May 28, 2007, effectively reviving all claims that are pending on or after that date. Employers should be alert to this change and its potential for increased litigation.

The LLFPA amends Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Age Discrimination in Employment Act of 1967 (“ADEA”), and modifies the operation of the Americans with Disabilities Act of 1990 (“ADA”) and the Rehabilitation Act of 1973, to make the statute of limitations for claims of compensation discrimination run anew each time wages or benefits are paid under a discriminatory compensation scheme.

The new law erases the 2007 Supreme Court case of *Ledbetter v. Goodyear Tire & Rubber Co.* There, a jury found that a woman earned less than male colleagues in the same position, in violation of Title VII. The Supreme Court, however, held that such claims must be filed within 180 days (300 days in some states) of the original alleged discriminatory pay decision in order for the claim to be timely. Congress found this Supreme Court decision contradicted congressional intent in passing civil rights statutes to protect individuals against discrimination in compensation.

In order to change the law in *Ledbetter*, the LLFPA redefines the “accrual” of a compensation discrimination claim as follows:

“For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is

adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”

Although in our view the LLFPA restores the law to where it was prior to the Supreme Court decision under the “continuing violation” doctrine, critics of the legislation cited concerns that employers will be exposed to discrimination claims based on discriminatory actions that took place years ago, when the person responsible may no longer be employed at the company, or even living, making it difficult for employers to defend the claims.

The legislation also raises concerns regarding pension benefits, since retirees may now be able to allege that their pension benefits are lower than deserved due to discriminatory compensation practices that took place decades ago.

Recommended Employer Actions

- Employers who have frozen or otherwise modified salaries to cope with the present challenging economy should ensure that such measures apply equally to employees without disparities on the basis of gender, age, race, disability, or other protected classes.
- Employers need to pay increased vigilance to possible pay discrepancies not attributable to legitimate non-discriminatory reasons; be sure

to justify and document compensation decisions.

- Because there no longer is a real statute of limitations for alleged discriminatory compensation differences, employers must be

sure that they have a record retention system that both captures and preserves the original rationale.

In another significant legal development affecting employers, this week the U.S. Supreme Court ruled in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn* that employees who participate in internal investigations are protected against retaliation under Title VII of the Civil Rights Act of 1964. Although this has been our advice, a split among courts arose.

Recommended Employer Actions

- If employers have a need to discipline or terminate an employee who has participated in an internal investigation, make sure to keep a well documented file showing the action would have been taken even if the employee had not participated in the investigation. Participation does not provide blanket immunity, but be sure that evidence of legitimate, non-retaliatory, business, non-investigation reasons for the action are documented.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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