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EMPLOYMENT LAW UPDATE

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Ledbetter Fair Pay Act Signed Into Law by President Obama

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), the United States Supreme Court ruled that employees cannot bring discrimination claims for disparate pay if the decisions that resulted in the disparate pay occurred outside of the 180 (or 300) day statute of limitations, even if the employee received a paycheck that was effected by the discriminatory decision within the statutory time period. The Court expressly rejected the “paycheck accrual rule,” which stated that each new paycheck could be the basis for a new claim of pay discrimination.

President Obama campaigned with a promise to overturn the *Ledbetter* decision and was a co-sponsor of the original 2007 Senate bill that aimed to do just that. Accordingly, it comes as no surprise that the Ledbetter Fair Pay Act was the first bill he signed into law as President.

Passage of the Ledbetter Fair Pay Act (“the Act”) is a major victory for plaintiffs and is expected to result in a greater number of individual and class action pay discrimination lawsuits. Moreover, it is expected that further pay discrimination legislation will be passed early in the Obama administration. For instance, the Paycheck Fairness Act will likely make its way to a congressional vote within the next six months. That bill would (1) limit employer defenses to pay discrimination suits, (2) increase available awards to successful plaintiffs, and (3) make it easier for employees to bring class action lawsuits regarding pay discrimination.

The Law

The Act amends Title VII to state that “an unlawful employment practice occurs, with respect to discrimination in compensation 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.”

In sum, the Act specifies that an unlawful employment practice occurs when (1) a discriminatory decision or compensation practice is adopted, (2) an employee becomes subject to that decision or practice, or (3) an employee is affected by that decision or practice. This means that the statute of limitations is re-started each time an employee receives a paycheck, benefit, or other compensation.

The changes to the rule for calculating the statute of limitations for discriminatory pay claims will allow employees to bring claims years, even decades, after a discriminatory decision was made. For

example, if a female employee began her employment in 1970 at a lower pay rate than her male colleague, and she still is paid less today, but has received equal raises since 1970, she may still bring a claim today even though the disparate pay was solely the result of a decision made in 1970.

The impetus for the bill was gender based discrimination. However, the Act prohibits pay discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973. Also, the Act is retroactive to May 28, 2007, the day before the Supreme Court's *Ledbetter* decision, and applies to all discrimination claims pending on or after that date. As such, the Act will apply to any case in which there is not yet a final judgment, including cases currently on appeal.

While the Act will undoubtedly cause much confusion and potential liability in an already fragile business climate, there are two points of good news for employers. First, while the Act does change the manner in which the statute of limitations is determined, it does not allow employees to recover for decades of discriminatory pay differentials. The amount of lost income an employee can recover is limited to two years prior to the filing of the discrimination claim. Second, Congress has explicitly made clear that there is no legislative intent to bar existing equitable defenses to stale claims such as the doctrines of laches and waiver.

Next Steps for Employers

Employers should take immediate steps to minimize the risks associated with pay discrimination lawsuits. Examples of such steps include: (1) reviewing all compensation policies and procedures, (2) conducting an audit, in conjunction with experienced employment counsel, of job classifications to fully assess any pay disparities, (3) collecting data on pay factors that may be critical to explain historical development of any pay disparities, and if necessary (4) revising internal pay structures.

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