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I.

LEGISLATIVE/ADMINISTRATIVE UPDATE

President Obama's First Law Makes it Easier for Employees to Sue for Pay Discrimination

On January 29, 2009, President Barack Obama signed his first piece of legislation into law – the Lilly Ledbetter Fair Pay Act (“the Act”). The Act expands the time frame in which an employee can sue for discrimination he or she experienced based on gender, race, national origin or religion. Under the new law, an employee may now bring a lawsuit for up to six months after he or she receives any paycheck which he or she alleges is discriminatory. The Act was initiated by Congress in reaction to the United States Supreme Court’s 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, Lilly Ledbetter was a manager at Goodyear Tire. After several years of working at Goodyear, she discovered that she was paid less than her male peers. She sued for pay discrimination, claiming that she had been unfairly evaluated due to her gender, and thus had been paid significantly less than her male counterparts. At trial, the jury found in favor of Ledbetter and awarded her back pay and damages. Goodyear appealed, arguing that all damages which were incurred more than 180 days before the filing of her lawsuit, were void due to the statute of limitations. The case was eventually appealed to the highest court, and the U.S. Supreme Court held that Ledbetter “could have, and should have sued” when the pay decisions were made, instead of waiting. The Court concluded that a plaintiff must file a pay discrimination claim within 180 days of an employer’s initial decision to pay the plaintiff in a discriminatory manner.

In an immediate reaction to the Court’s decision, Congress introduced the Act, which revised the law to state that the 180-day statute of limitations for pay discrimination will reset and start again with each new discriminatory paycheck. This legislation became law upon President Obama’s signature on January 29,

2009. Notably, the text of the Act states that the effective date is May 29, 2007 – the day the U.S. Supreme Court issued its decision. This means that the law is retroactive, at least to pending cases.

The effect of the Act is that all pay discrimination claims are now timely so long as one paycheck issued under the discriminatory practice falls within the 180-day statute of limitations. Under the Act, a discriminatory pay decision (which includes wages, benefits, or other compensation) occurs each time that compensation is paid pursuant to that illegal decision or practice, regardless of how long the practice has been in effect. This Act affects Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. The Act also allows an employee to obtain relief, including recovery of back pay, for up to two years preceding the filing of the charge, where the unlawful practices that occurred during the period are similar to, or related to, practices that occurred outside the time for filing the charge.

Given that the Act is retroactive, employers should review their pay policies in force as of that date (May 29, 2007) to ensure that no protected class of workers is paid disproportionately to another for the performance of equal or comparable work. Further, employers should review any discriminatory wage claims asserted in pending litigation. Given that the federal statute of limitations is now extended to start from *each* pay period, employers should revise their retention policies to indefinitely maintain records regarding the reasons and justifications for all compensation decisions.

Implementation of New Immigration Tools Delayed

The United States Citizenship and Immigration Services announced that the date upon which employers must begin utilizing the revised Form I-9 has been delayed until April 3, 2009. During this delay, the public comment period will be re-opened, with comments being accepted until March 4, 2009. The rule, if implemented, would stipulate that employees cannot use expired identification documents to verify their work eligibility.

Similarly, the U.S. government has agreed to delay until March 21, 2009, implementation of a new rule requiring federal contractors to use the federal government's E-Verify employment eligibility system.

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II.

JUDICIAL UPDATE

U.S. Supreme Court Confirms Expansive Scope of Title VII's Anti-Retaliation Protections

In *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, the United States Supreme Court held that the protections of Title VII's anti-retaliation provisions extend to employees who speak out about discrimination not only on their own initiative, but also in response to questions posed during their employer's internal investigations.

Vicky Crawford, a 30-year employee of the Metro School District ("the District"), reported that the District's employee relations director had sexually harassed her. The District took no action against the alleged harasser but soon fired Crawford for embezzlement. Crawford filed suit under Title VII of the Civil Rights Act of 1964, claiming that the District had retaliated against her for her complaints of sexual misconduct. The trial court granted summary judgment for the District and the Sixth Circuit Court of Appeals affirmed, holding that the protection afforded by the "opposition clause"¹ of Title VII demanded "active" and "consistent" opposition activities, and did not cover Crawford because she had not initiated any complaint prior to the District's commencement of its internal investigation.

The U.S. Supreme Court reversed, holding that the statements Crawford made during the course of the District's internal investigation were covered by the opposition clause, as an ostensibly disapproving account of the employee relations director's "sexually obnoxious" behavior toward her. As the Court explained, "oppose" reaches beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" certain conduct by responding to someone else's questions just as surely as by provoking the discussion. The Court concluded that "[n]othing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question."

This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Cara Patton, Tyler Theobald or Jenna Leyton at (858) 755-8500 or Eric DeWames at (310) 417-1137.

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¹ The anti-retaliation provisions of Title VII make it unlawful "for an employer to discriminate against any . . . employee" who (1) "has opposed any practice made an unlawful employment practice [pursuant to the other provisions of the Act] (opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under other provisions of the Act]" (participation clause).