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PRESIDENT OBAMA SIGNS LILLY LEDBETTER FAIR PAY ACT INTO LAW

In this issue:

*By: Stephen S. Zashin**

Recently, President Barack Obama signed the Lilly Ledbetter Fair Pay Act into law in front of a crowd of onlookers. The Act overturns the U.S. Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co, 550 U.S. 618 (2007), which held that employees were required to file pay discrimination lawsuits against their employers within 180 or 300 days of an employer's initial discriminatory compensation decision.

Ledbetter alleged that she worked at Goodyear for 19 years before discovering that Goodyear paid her significantly less than her male counterparts with the same or less experience. She filed a charge when she discovered the discriminatory pay decision of her employer. Ledbetter argued that each check she received while employed constituted a new act of discrimination, which reinitiated the 180-day statutory filing period. The U.S. Supreme Court, in a 5-4 decision, found Ledbetter's argument unpersuasive.

The Court held that her complaint had to be filed within 180 days of the initial compensation decision by Goodyear to pay her less than here male counterparts, even if she did not know of the decision until 19 years later. The Court's decision meant that the 180-day statute of limitations for filing a charge of discrimination began on the date the employer made the compensation decision, not on the date of the most recent paycheck. This decision precluded lawsuits by plaintiffs who alleged ongoing pay discrimination but did not discover it until years later.

The Lilly Ledbetter Fair Pay Act overturns Ledbetter and amends Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the American with Disabilities Act ("ADA") and the Rehabilitation Act to clarify at which point in time discriminatory actions qualify as an "unlawful employment practice." According to the Lilly Ledbetter Fair Pay Act, unlawful conduct occurs when:

1) an employer adopts a discriminatory compensation decision or other practice;
2) an individual becomes subject to the decision or practice; or
3) an individual is affected by application of the decision or practice, *including each time compensation is paid.* (Emphasis added).

Reason three, as indicated above, allows employees to file a claim against their employers any time a payment is received which is based on an employer's discriminatory pay decision. Accordingly, the Act means that every paycheck or arguably any other pay practice resulting, in whole or in part, from an earlier discriminatory pay decision constitutes a violation of Title VII, the ADEA, ADA or the Rehabilitation Act. As long as an employee files a charge within 180 days of any discriminatory payment, their charge will be considered timely. In addition, employees who are victims of discrimination may receive up to two years of back pay.

Further, not only can paychecks represent new acts of discrimination, but the Act indicates that any type of *compensation* which is based on a discriminatory act constitutes an act of discrimination. For example, pension payments and 401(k) distributions based on an employee's compensation may constitute separate acts of discrimination.

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2008 UNIONS WIN HIGHEST RATE EVER

*By: Patrick J. Hoban**

According to National Labor Relations Board ("NLRB") data, unions won 66.8 percent of representation elections conducted by the NLRB in 2008. This figure represents the highest win rate since 1955 when unions won 67.6 percent of the elections in which they participated. The 2008 union election win rate is a 6.4 percent increase over 2007 and represents an 8.4 percent increase over 2004.

The number of voters eligible to participate in the elections also increased from 102,494 in 2007 to 108,587 in 2008. In 2008, unions organized 70,511 workers through NLRB elections, up from 58,260 in 2007.

Unions had the greater organizing success among both small and large collective bargaining units. Unions won 69.3 percent of elections in units of fewer than 50 employees, and 64 percent of elections in units of more than 500.

The industries with the highest percentage of wins were finance, insurance, and real estate (89.7 percent), followed by health care (74.3 percent). Other sectors where unions won at least 50 percent of the elections in which they participated included services (72.9 percent), transportation, communications, and utilities (70.8 percent), construction (66.2 percent), and retail (54.7 percent). Unions won less than 50 percent in wholesale (48.9 percent), communications (48 percent), mining (47.4 percent), and manufacturing (46.5 percent).

Representation elections by union affiliation also generally increased. Unions affiliated with the AFL-CIO won 64.5 percent of representation elections in 2008 compared with 59.5 percent in 2007. Unions in the Change to Win federation won 61.3 percent of the elections they participated in 2008. In 2007, the Change to Win federation won 52.4 percent of their representation elections. The International Brotherhood of Teamsters (IBT) won 58.6 percent of the elections in 2008, up from 48.8 percent in 2007.

Notably, these NLRB statistics do not reflect the full extent of organizing by labor unions. Many unions organize through check-card recognition, neutrality agreements, and methods other than NLRB-run, secret ballot elections. These statistics, as well as the possibility that the Employee Free Choice Act may still become law, should encourage all non-union employers to review and revise workplace policies related to union organizing and monitor their workplaces for potential union organizing efforts.

***Patrick J. Hoban** practices in all areas of labor and employment law, with a focus on private and public sector labor law. For more information on NLRB statistics or any other labor or employment issue, contact Pat at 216.696.4441 or pjh@zrlaw.com.*

U.S. SUPREME COURT HOLDS THAT UNION NONMEMBERS CAN BE CHARGED A FEE FOR NATIONAL LITIGATION EXPENSES

*By: George S. Crisci**

In Locke v. Karass, the U.S. Supreme Court held that the First Amendment permits a local union to charge nonmembers for national litigation expenses so long as (1) the subject matter of the litigation bears an appropriate relation to collective bargaining and (2) the charge is reciprocal in nature (*i.e.,* the local union's payment to the national affiliate is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.")

The state of Maine requires government employees to pay a service fee to the local union that acts as their exclusive bargaining agent even if those employees disagree with, and do not belong to, the union. The Maine State Employees Association ("the local") is the exclusive bargaining agent for certain executive branch employees. A collective-bargaining agreement between Maine and the local requires nonmember employees whom the union represents to pay the local a "service fee." The service fee includes a charge that represents the affiliation fee the local pays to its national union, the Service Employees International Union ("the national").

The portion of the service fee at issue was the amount that helps the national union pay for litigation activities, some of which do not *directly* benefit the local union but rather directly benefit other

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DISCRIMINATION CLAIMS RISE TO HIGHEST LEVELS EVER

*By: Michele L. Jakubs**

Discrimination claims based on race, retaliation, sex, age, disability and other reasons filed from fiscal year 2007 to 2008 with the Equal Opportunity Commission ("EEOC") rose 15% from 82,792 claims to 95,402 claims. This is the highest number of claims ever recorded in the 40+ year history of the EEOC. So, why all the new discrimination claims?

COMPLAINTS FILED ANNUALLY WITH EEOC

Category	FY 2007	FY 2008	Percent Change
Total charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retailiation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%
Age	19,103	24,582	28.7%
Disability	17,734	19,453	9.7%
National origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal pay act	818	954	16.6%

Source: Equal Employment Opportunity Commission
(Complaints can be filed in multiple categories.)

In short, discrimination claims tend to rise in tough economic times because more people lose their jobs and may become economically desperate. Tough economic times also can lead to poor communication by employers with their employees in the workplace. When employees are part of a layoff, termination, reduction in hours, or other employment decision they may not know why their employer made such a decision. If employees are left to guess as to why their employer made a certain decision, they may be more inclined to file a discrimination claim. Therefore, it is imperative that employers communicate to their employees the reasons for the particular decision.

Employers should prepare for even more discrimination claims in fiscal year 2009. According to one spokesman from the EEOC, job bias claims may rise to more than 100,000 claims in fiscal year 2009.

Age discrimination and retaliation claims saw the biggest rise in fiscal year 2008. Age discrimination claims rose 28.7% from 19,103 to 24,582 claims. Retaliation claims rose 22.6% from 26,663 to 32,690 claims.

These statistics emphasize that employers must maintain vigilant in their approach in understanding complying with employment laws.

***Michele L. Jakubs,** an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of employment litigation and wage and hour compliance and administration. For more information concerning discrimination or any other labor or employment issue, please contact Michele at 216.696.4441 or mlj@zrlaw.com.*

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COURT HOLDS: OHIO LAW RETALIATION BASED CLAIMS BROADER IN SCOPE THAN UNDER FEDERAL LAW

*By: Lois A. Gruhin**

An Ohio Court of Appeals recently held in Hughes v. Miller that Ohio law is broader in scope than Title VII in terms of who has the obligation to refrain from retaliation. In particular, the court determined that no "person" may retaliate under Ohio law, while an "employer" must refrain from retaliation under 42 U.S.C. 2000e-3(a). The court held that a retaliation claim asserted by an employee against a co-employee is perfectly actionable under Ohio law, even though it is not under Title VII.

In Hughes, the plaintiff and defendant both worked as Cuyahoga Community College ("Tri-C") police officers. The female defendant initially filed an internal complaint with Tri-C alleging that the male plaintiff committed various acts of sexual harassment against her. Tri-C conducted an internal investigation and disciplined the plaintiff. The plaintiff subsequently filed a lawsuit against defendant accusing her of defamation. The defendant filed a counterclaim against the plaintiff and alleged that plaintiff filed his complaint against her in retaliation for her filing the internal complaint.

The trial court dismissed the defendant's counterclaim under Rule 12(B)(6) for failing to state a claim. On appeal, the issue became whether the defendant's counterclaim sufficiently set forth a claim for retaliation for participation in a "protected activity" in violation of R.C. 4112.02(I). The defendant argued that her act of filing an internal complaint against Hughes was a "protected activity."

Under Ohio law, the court held that an employee may file a claim against a co-employee for retaliation if: (1) the claimant engaged in protected activity; (2) claimant's engagement in the protected activity was known to the opposing party; (3) the opposing party thereafter took adverse action against the claimant; and (4) there exists a causal connection between the protected activity and the adverse action. The court determined that the defendant sufficiently met the last three elements of the prima facie case. The court then looked for guidance from the United States Supreme Court ("USSC") and Ohio Supreme Court in determining if the defendant's claim was a "protected activity" under element one.

Ohio's Supreme Court cited Crawford v. Metro. Govt. of Nashville and Davidson Cty., Tennessee, in which the USSC court held that an employee's filing of an internal complaint with an employer constitutes "protected activity" under the opposition clause of Title VII's anti-retaliation provision, protecting employees who disclose sexual harassment in such a manner from retaliatory conduct by the employer. In particular, the Crawford Court held that protection under the "opposition clause" of anti-retaliation statutes is not limited to cases where an employee initiates an internal complaint protesting sexual harassment. The Crawford Court found that the "opposition clause" extends protection to an employee who opposes sexual discrimination stemming from sexual harassment, not by initiating a complaint, but by answering questions posed to him or her during an employer's internal investigation.

The court also cited Ohio Supreme Court case precedent, including Ohio Civ. Right Comm. v. Akron Metro. Hous. Auth., which held that Ohio law proscribes certain unlawful discriminatory practices by employers who fail to take corrective action in response to an employee's opposition to a co-employee's sexual harassment. The court also cited Ohio Civ. Rights Comm. v. Lysyj which held that R.C. 4112.02(G) and 4112.01(I) are remedial statutes, which are to be construed "liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation." The court finally held that the defendant's counterclaim against the plaintiff was a "protected activity" under Ohio law, even though it would have been dismissed under federal law.

The decision in Hughes v. Miller highlights the subtle but profound distinction between Ohio and federal law retaliation based claims. Employers must understand that retaliation based claims under Ohio law are broader and more liberally construed than those under federal law.

***Lois A. Gruhin,** a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment discrimination matters. For more information about retaliation or any other employment or labor issues, please contact Lois at 614.224.4411 or lag@zrlaw.com.*

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What Employers Should Do Now

Not surprisingly, the broadened statute of limitations for wage disparity claims will prompt increased litigation. Employers wishing to minimize the risks of liability should consider the following:

Audit Current Pay Documentation Practices: Employers should audit their compensation practices to determine whether sufficient documentation exists to support compensation decisions. Employers will need performance-based specifics underlying such decisions to defend wage disparity claims.

Develop Specific Criteria for Compensation Decisions: Employers should develop objective, measurable guidelines for compensation decisions and apply those guidelines consistently and uniformly within job classifications, work, groups, departments or business units.

Review Compensation Decisions: Employers should create a process to ensure that managers and supervisors do not have unfettered discretion when making compensation decisions. Rather, employers should consider adopting a review system to ensure rigorous scrutiny of compensation decisions similar to those employers already use when considering terminations, discipline, or other adverse actions.

Revise Document Retention Practices: Employers should review their current document retention policies to determine how long they maintain documentation regarding compensation decisions. In the post-Ledbetter world, employers likely will need to retain such information for as long as the employee receives any form of payments from the employer or any of its benefit plans (e.g., 401(k), etc.). Employers may need to consider electronic archiving given the voluminous nature of pay-related records.

Train Supervisors and Managers: Employers should train all supervisors and managers regarding any post-Ledbetter policy modifications to ensure that they understand those policies and, most importantly, the need to support objectively all compensation decisions.

Conduct Periodic Statistical Analysis of Compensation Data: Employers should analyze compensation data to determine if any statistical disparities exist across gender, race and ethnic lines. Once identified, an employer can make appropriate adjustments to eliminate any unexplained disparities.

***Stephen S. Zashin,** an OSBA Certified Specialist in Labor and Employment Law, has extensive experience defending employers involved in individual, class and collective employment litigation. For more information about the Fair Pay Act or any other employment or labor issue, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

Z & R SHORTS

George Crisci

Rick Hanrahan

George Crisci and Rick Hanrahan will present on developments in SERB decisions and COBRA respectively at the Cleveland Metropolitan Bar Association's 9th Annual Labor and Employment Law Conference on June 25 and 26. Please contact CMBA at (216) 696-2404 for details and to attend.

Summer Is Near

Summer is quickly approaching and the weather is improving by the day making it the ideal time for employers to review their dress code and attendance policies with employees. Employers hiring seasonal help for the summer (*e.g.*, students) also need to consider the impact the Fair Labor Standards Act has on such hiring including potential seasonal and recreational exemptions and the youth minimum wage.

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UNION NONMEMBERS CAN BE CHARGED A FEE

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locals or the national organization itself. The petitioners, *i.e.*, nonmembers of the local, argued that the First Amendment prohibits charging them for any portion of the service fee that represents "national litigation," that does not directly benefit the local.

The issue before the Court is whether the First Amendment permits a local union to charge nonmembers a fee to help pay for national litigation activities, some of which do not directly benefit the local union but rather directly benefit other locals or the national organization itself.

The U.S. Supreme Court reasoned that the same standard should apply to national litigation expenses as to other national expenses. In particular, the Court found no basis for holding that national social activities, national convention activities, and activities involved in producing the nonpolitical portions of national union publications all are chargeable but litigation activities are not. The Court stated that a local nonmember can benefit from national litigation aimed at helping other locals if the national or those other locals will similarly contribute to the cost of litigation on the local union's behalf should the need arise.

This case demonstrates that employers must understand the subtle nuances in the law in their administration of collective bargaining agreements.

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