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Client Bulletin #403

Obama Signs Lilly Ledbetter Fair Pay Act

GOODBYE, STATUTE OF LIMITATIONS!

By Robin Shea
Winston-Salem, NC

President Barack Obama, in the first such act of his term, has signed into law **the Lilly Ledbetter Fair Pay Act**, which will dramatically lengthen the statute of limitations in certain discrimination cases.

The Ledbetter Act amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973 (a precursor of the ADA, which applies to federal contractors and is enforced by the U.S. Department of Labor) to provide that each of the following is an “unlawful employment practice” that triggers the time for filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission:

* “When a discriminatory compensation or other practice is adopted”;

* “When an individual becomes subject to a discriminatory compensation or other practice”;

*** OR “when an individual is affected by application of a discriminatory compensation or other practice, including each time wages, compensation, or other benefits is [sic] paid, resulting in whole or in part from such a decision or other practice.”**

The time limit for filing a charge of discrimination under Title VII, the ADEA, and the ADA is 180 days from the date of the unlawful employment practice, or 300 days in states that have human rights agencies. The Ledbetter Act does not directly change these time limits, but by defining each (lower) paycheck as an “unlawful employment practice,” the Act has the effect of giving employees a “perpetual” statute of limitations as long as they remain employed.

This part of the Ledbetter Act is a repudiation of the Supreme Court’s 2007 decision in **Ledbetter v. Goodyear Tire and Rubber Co.**, which held that the charge-filing period under Title VII began when the allegedly discriminatory decision was made or communicated, not when its effects were felt.

The Ledbetter Act also provides that an aggrieved plaintiff can recover up to two years of back pay and other relief under these laws (and up to four years, in race, color, or national origin claims brought under 42 U.S.C. §1981) if discrimination that occurred during the EEOC charge-filing period is similar to discrimination that occurred outside

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the charge-filing period. This is an expansion of the Supreme Court's 2002 decision in **National RR Passenger Co. v. Morgan**, which held that the charge-filing period might be tolled in harassment cases under similar circumstances.

The Ledbetter Act, **which will apply retroactively to May 28, 2007 and to all claims for compensation that are pending on or after that date**, will obviously have a dramatic impact on the timeliness of discrimination charges, particularly those filed by *current* employees who are continuing to draw paychecks that might have been "affected" by a long-past discriminatory decision, including a failure to promote, an unfavorable performance evaluation or pay decision, or discriminatory "steering" into positions based on – among other characteristics – race, sex, age or disability. It is expected to have a lesser impact on failure-to-hire claims and claims by terminated employees because such individuals will not be receiving paychecks that "perpetually" extend the statute of limitations. However, the inclusion of "benefits" in the statutory language means that severance or other benefits that could arguably be tied to a past discriminatory practice will presumably extend the charge-filing period. Even if the employee has signed a release in exchange for the receipt of severance pay, the employee normally has the right to file a charge of discrimination although he or she may be limited to non-monetary relief.

The impact of the Ledbetter Act on ADA and Rehabilitation Act claims is particularly troubling. Those laws allow an employer, as a reasonable accommodation, to transfer a disabled employee to a lower-paying position (including a part-time position, with loss of pay and benefits) if it is not possible to accommodate the employee in his or her current, or an equivalent, position. Thus, presumably, if an employee disagrees with the employer's accommodation decision, the employee will have the benefit of the "perpetual" statute of limitations for the duration of his or her employment.

The Ledbetter Act will also potentially dramatically broaden the scope of audits of federal contractors by the Office of Federal Contract Compliance Programs.

Last week, while the bill was in the Senate, Sen. Kay Bailey Hutchison (R-Texas) proposed an amendment to provide, among other things, that the charge-filing period began to run when the charging party "discovered" the discriminatory decision. Her proposal was rejected. Sen. Arlen Specter (R-Pa.) had proposed deleting "and other practices" from the bill (in effect, limiting its application to compensation decisions) and providing that equitable defenses such as laches would be available to employers. Specter's proposals were tabled, and were never incorporated into the bill.

Earlier this week, we reported that employers "will face a different world under the Obama Administration." The balance of power has indeed shifted, and will be shifting a great deal more.

Constangy Recommends. Employers will have to be much more vigilant about regularly auditing their compensation practices and correcting the "effects" of allegedly discriminatory employment decisions made in the past. Constangy attorneys have breadth and depth of experience assisting employers with "preventive" compensation analysis, and with defending employers' pay decisions before the courts, the EEOC, and the OFCCP. If you would like our assistance, please contact any member of Constangy's **Litigation** or **Affirmative Action** practice groups, or the Constangy attorney of your choice.

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