

LABOR AND EMPLOYMENT LAW UPDATE



PRESIDENT BARACK OBAMA SIGNS NEW WAGE DISCRIMINATION LAW

As previously observed in this firm's September 2008 Labor and Employment Update, presidential administration changes have historically had a profound and immediate impact upon federal labor and employment law. The transition from the administration of George W. Bush to that of Barack Obama has already proven to be no exception.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. The new law not only extends the deadlines for filing wage discrimination claims, but may also implicitly impose new affirmative duties upon employers. This legislation had previously been stalled in Congress by a threatened veto by former President Bush.

WHICH WAGE CLAIMS ARE AFFECTED? The new law impacts claims brought under four statutes:

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("Title VII") bans employment discrimination on the basis of race, color, sex, national origin and religion.

AMERICANS WITH DISABILITIES ACT ("ADA") protects persons with disabilities and persons known to have a relationship or association with a disabled person.

THE REHABILITATION ACT OF 1973 sets forth additional requirements, including affirmative action, for federal contractors and programs receiving federal financial assistance with regard to the employment of persons with a disability.

AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") outlaws employment discrimination against persons over the age of 40.

WHAT WAS THE IMPETUS FOR LEGISLATION?

In a May 29, 2007 decision, the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* found that, as to a claim for pay discrimination under Title VII, the unlawful employment practice is the pay-setting decision, not the payment itself. The Court determined that the deadlines for taking legal action began with the date of the pay-setting decision only, and did not begin anew with each paycheck which followed the decision.

WHAT DOES THE NEW LAW DO? The new law takes effect as if enacted on May 28, 2007 and nullifies the *Ledbetter* decision. The deadline for taking legal action alleging wage discrimination under each of the aforementioned statutes now begins anew each time allegedly discriminatory "wages, benefits or other compensation" are paid by an employer.

WHICH DEADLINES ARE AFFECTED? Charges of discrimination under Title VII, the ADA, the Rehabilitation Act and the ADEA must be filed with the Equal Employment Opportunity Commission or its state counterpart:

Within 180 days of the alleged unlawful employment practice; or

Within 300 days of the alleged unlawful practice if the charge is also covered by a state or local discrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.

A claimant may seek recovery of back pay for up to two years preceding the filing of a charge under Title VII, the ADA and Rehabilitation Act. The failure to file a timely charge precludes legal action in court.

WHAT NEW CHALLENGES ARE FACED BY EMPLOYERS? Employers may now be potentially liable for discriminatory paychecks which are separated from a pay-setting decision by months or even years. Assuming a claimant has sufficient evidence to state a *prima facie* case of wage discrimination, an employer may not always be able to readily articulate a legitimate reason for a pay-setting decision made long ago. Amongst the challenges which may hinder an employer under such circumstances are:

- * Record retention policies which call for the periodic destruction of documents and electronic data.
- * Lost or misplaced documents or electronic data.
- * Documents, such as subjective performance evaluations, which require further explanation by their authors.
- * Faded memories of decision-makers, witnesses and authors of documents.
- * Unavailability of decision-makers, witnesses and authors of documents due to their death or unknown location.
- * Unwillingness of decision-makers, witnesses and authors of documents to cooperate after a separation from the employer.

WHAT NEW DUTIES MAY BE IMPOSED UPON EMPLOYERS? Although the new law does not expressly impose any new responsibilities upon employers, avoidance of a circumstance in which an employer may not be able to effectively defend itself against a claim of wage discrimination may impliedly impose such responsibilities. Amongst the duties which may be impliedly imposed are:

- * Meticulous documentation by decision-makers of the legitimate reasons underlying pay-setting decisions.
- * Periodic audits to ensure these requirements are being met.
- * Periodic audits of employee compensation, including wages and benefits, to identify pay differentials which warrant further explanation or redress.

- * Meticulous documentation of such audits.
- * Preservation and back-up of documents relevant to pay-setting decisions and audits.
- * Agreements by decision-makers to cooperate with litigation after termination.

QUESTIONS: Questions regarding wage discrimination or any other labor and employment issues can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

CAMPBELL & CHADWICK

A PROFESSIONAL CORPORATION

BRUCE A. CAMPBELL
ROBERT G. CHADWICK, JR.*
TIMOTHY B. SOEFJE
KAI HECKER
JOHN A. KOWTUN, JR.

4201 SPRING VALLEY ROAD, SUITE 1250
DALLAS, TEXAS 75244
TELEPHONE: 972.277.8585
FACSIMILE: 972.277.8586
WWW.CAMPBELLCHADWICK.COM

* BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

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