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****** EMPLOYMENT LAW ALERT ******

By: S. Whitney Rahman

Lilly Ledbetter Fair Pay Act Signed Into Law

President Barack Obama has signed into law the Lilly Ledbetter Fair Pay Act of 2009, abrogating the United States Supreme Court case of Ledbetter v. Goodyear Tire & Rubber Co., 530 U.S. 618 (2007), and virtually eliminating statutes of limitations for certain kinds of employment discrimination cases. The Ledbetter case had held that the statute of limitations for a pay discrepancy claim began running when the pay discrepancy was implemented.

The new law clarifies that a discriminatory compensation decision or other practice that is unlawful under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes. Therefore, as long as the employer continues to issue paychecks that can be traced back to a discriminatory compensation decision, a claim based on the underlying decision will continue to be viable, no matter how long a period of time has passed.

Moreover, the law contains broad and undefined language suggesting that it will be applied to many circumstances other than compensation differentials. It remains to be seen how broadly the law will be applied.

The law goes into effect retroactive to May 28, 2007, the day before the Ledbetter decision was decided. Because of the law's broad implications, employers may expect an increased potential for claims generally, and, in particular, an increased potential for class action law suits.

Practical Considerations: Employers would be well advised to review their compensation structures for any indications of discriminatory treatment with respect to any protected category, and to correct any problems found. It is no longer wise or prudent to assume that passage of time will insulate an employer from potential claims. Moving forward, employers should make sure to document the reasons for discrepancies in pay to be able to show they are based on legitimate, nondiscriminatory reasons.

Supreme Court Expands Definition of “Protected Activity” for Retaliation Claims.

On January 26, 2009, the United States Supreme Court decided Crawford v. Metropolitan Government, No. 06-1595 (Jan. 26, 2009). The Court held that an employee could establish a claim of retaliation even when the employee had not engaged in any affirmative protected activity.

To establish a prima facie case of retaliation, a claimant is required to show that: (1) he or she engaged in protected activity; (2) the employer was aware of the protected activity; (3) the claimant thereafter suffered an adverse employment action; and (4) a nexus exists between the protected activity and the adverse employment action. Under the law, protected activity includes opposing any unlawful employment practice.

In Crawford, the plaintiff was questioned as part of the employer’s internal investigation into rumors of sexual harassment by an employee. The plaintiff responded to questions by indicating that the employee had harassed her. She did not affirmatively come forward with this information; instead, she offered it only in response to employer questioning. The Court held that, despite the lack of affirmative action, the plaintiff had engaged in protected activity.

The Crawford case involved an employee’s response during an internal investigation. It does not address a situation where a manager or supervisor fails to report discrimination until questioned during an internal investigation. Knowledge of a manager or supervisor may be imputed to the employer. Therefore, it is very important that management and supervisory personnel know that they must report unlawful activity, and that they will be disciplined for failure to report. If an employer takes an adverse action against a manager or supervisor because he or she failed to report discriminatory or harassing activity until questioned during an internal investigation, rather than because of the report of discriminatory or harassing behavior itself, it would appear that such a situation would not give rise to a viable claim of discrimination, but employers are cautioned to be careful in such situations.

Practical Considerations: Employers should keep in mind that, to the extent any employee brings forth issues of discrimination or harassment, whether as part of an internal investigation, or otherwise, he or she is protected against retaliation. Employers should carefully review any adverse employment decisions against such individuals.

If you have any questions about the above matters or any other labor or employment law concerns, please contact Whitney Rahman or John Roland at 610-372-5588, or by e-mail at swrahman@rolandschlegel.com or jroland@rolandschlegel.com. If you would prefer to receive these updates by e-mail, please contact Kim Bonsall or Becky Thompson at 610-372-5588 to provide your e-mail address.