

ANDREWS AND BEARD

EMPLOYMENT LAW CLIENT ALERT

An E-Newsletter prepared for our EMPLOYMENT LAW clients presenting recent changes in the law.

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The Lily Ledbetter Fair Pay Act

The first bill signed by President Obama, on January 29, 2009, overturns the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Company*. Lily Ledbetter, the Act's namesake, was a 19 year employee of Goodyear who learned that she was paid substantially less than male colleagues in similar positions. Although a jury had ruled in her favor, the Supreme Court overturned their decision since she did not file her claim within the 180 day statute of limitations for filing discrimination claims.

Now, as a result of this statute, each discriminatory paycheck restarts the 180 day statute of limitations. A paycheck is covered under the Act if the amount of compensation resulted in whole or in part from a discriminatory decision or practice. Further, a qualifying discriminatory paycheck includes any form of compensation, including benefits or bonuses when the amount results in whole or in part from a discriminatory decision or practice. Previously, if a claim was not filed within 180 days of the issuance of the first discriminatory paycheck, the employee would have lost his or her right to sue on the claim. Employers must now be aware that each and every discriminatory paycheck extends the statute of limitations another 180 days.

A worker who has been compensated in a discriminatory manner may sue and recover up to two years in back pay preceding the filing of the charge. Further, this Act protects any employee whose pay is determined in whole or in part from a discriminatory decision or practice. The Act also applies to any claims brought under Title I of the Americans with Disabilities Act or the Rehabilitation Act regarding discriminatory pay practices. If an individual is compensated in a discriminatory manner and brings a suit under Title I, the statute of limitations will commence with the most recent discriminatory paycheck, benefit, or bonus issued resulting in whole or in part from a discriminatory decision or practice.

In order to protect themselves, Employers need to take a good look at all employees' compensation packages, including not only pay but raises and benefits as well. Employees performing the same jobs with similar qualifications should be paid at the same rate unless there is a demonstrable business reason justifying any disparity in pay. Companies should also review and update discrimination policies, pay policies, employee handbooks, and employee and supervisor training to include the new issues covered by this law.

Employers should also ensure that performance review and payroll records are complete, accurate, and completed on time in order to defend their employment decisions and practices in case of a potential suit. Any pay decision should be documented and supported by evidence. Also, due to the roving nature of the new statute of limitations in a case of discriminatory pay practices, a company should retain all payroll records and performance reviews indefinitely, as they may be integral in defending a discriminatory compensation claim.

Clarifying Everyone's Obligations: Changes to the FMLA

For the first time, Congress amended the Family and Medical Leave Act, ushering in important new changes to the law which will have a dramatic impact on employers and employees. The new regulation took effect on January 16, 2009. In addition to changes made to the regulations governing the application and use of FMLA leave time, the new amendments also added new sections allowing family members of National Guard and Reserve personnel to use FMLA to care for the consequences and incidents of deployment, calls to active duty, and injury resulting from military service. Most importantly, drastic changes have been made to the prior sections of the FMLA, which requires that Employers examine, evaluate, and update their FMLA policies for compliance.

Employers have been given some much needed clarification, some additional rights, and some additional responsibilities through these amendments and the

Department of Labor's newly published final rule. The definition of the term "serious health condition" has been given clarification, although the six original definitions have been retained and only one of the six definitions must be met. A serious health condition will qualify under the "incapacity and treatment" definition when the employee has paid two visits to a health care provider within 30 days of the beginning of the period of incapacity. Further, the first visit must have taken place in-person and within seven days of the first day of incapacity. If the employee meets this definition, or one of the remaining five definitions, he or she is entitled to FMLA leave.

Employees have gained several new protections under the new amendments. For instance, light duty time can no longer be counted against an employee's FMLA leave entitlement. Although it is not a change in the law, the Department's longstanding position was made explicit allowing employees to settle or release FMLA claims without court or Department approval. Employers are also required to give employees more detailed notification of their rights under the FMLA.

Employers have also gained some additional rights as well under the new amendments. Employers may now offer perfect attendance awards without excluding FMLA leave time so long as the Employer is holding employees who have taken FMLA to the same standard as employees who have not taken FMLA leave. In other words, these programs are legitimate so long as they are not retaliatory.

Employers are also now able to require employees to take any accrued paid vacation, personal, sick, or other leave offered to the employee by the Employer concurrently with FMLA leave. Any paid leave taken by the employee by his or her own election may only be taken according to the Employer's conditions for taking the selected form of paid leave. However, if the employee cannot meet those conditions the employee is still eligible to take the unpaid FMLA leave. Employees must also comply with company rules regarding call-in procedures for reporting absences unless there are unusual circumstances sufficient to justify non-compliance.

Certification requirements have also been clarified, and many of these changes are in the Employer's favor. Employers may now contact an employee's health care provider so long as the contact is made by a health care provider, human resource professional, a leave administrator, or a management official, but under no circumstances may the employee's direct supervisor contact the employee's health care provider. Under the new rule, employers may request clarifying information from the employee's health care provider to the extent required by the certification form. The employer may now also request recertification of an ongoing medical condition every six months in conjunction with an employee's absence.

Employers may now require that fitness-for-duty certifications specifically address the employee's ability to perform the essential functions of the employee's job. Further, the Employer may also require that the fitness-for-duty certification be provided even for intermittent leave where there is a reasonable job safety concern. The new regulations regarding certification allow the Employer to ensure that leave is being used appropriately while also maintaining and protecting general workplace safety.

Notice requirements have been extended in order to provide the Employer with more time to properly and better inform employees about their rights and responsibilities under the FMLA. Employers now have 5 days instead of 2 days to inform employees of a variety of notifications required by the law. Employers have 5 days to request certification, to provide the rights and responsibilities notice, to provide the eligibility notice, and to provide the designation notice. However, Employers are required to share more information with employees than they were previously. Also, in order to simplify the process for Employers, the employee notification requirements are all contained in one regulation.

These new changes will have a major impact on the administration of FMLA leave; as a result Employers should review and update their FMLA policies and employee handbooks. Further, human resources and management personnel should be trained on the changes implemented by these amendments and their attendant regulations. Also, all certification documents, posters, and other documentation used for processing FMLA leave should be reviewed for compliance and to determine that the Company is receiving all information it is entitled to under the law for making a determination regarding FMLA leave. Employers should also ensure that they are in compliance with HIPAA when requesting any medical information through the certification, recertification, or fitness-for-duty certifications.

Expanding the Definition of Disabled: Changes to the ADA

In 2008 President Bush signed the Americans with Disabilities Act Amendments Act, which significantly expanded the coverage of the ADA and presented new challenges to Employers and businesses. The ADA Amendments Act has expanded the "major life activities" that can be affected to constitute a disability and also provided an explicit list of non-restrictive examples. Under the new law, impairment of the operation of a variety of major bodily functions, such as the neurological, brain, respiratory, circulatory, endocrine, and reproductive functions has been included in the list of major life activities. Other major life activities explicitly mentioned in the Amendments include (but are not limited to) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Amendment also requires that determinations regarding whether or not an impairment substantially limits a major life activity be made without regard to the ameliorative effects of mitigating measures. Mitigating measures which the Employer cannot consider when determining if an impairment substantially limits a major life activity include: medication; medical supplies, equipment, and appliances; low vision devices; prosthetics; hearing aids; mobility devices; oxygen therapy equipment and supplies; assistive technology; auxiliary aids or services; and learned behavioral or adaptive neurological modifications. This definition is so expansive that anyone taking medication could be considered disabled under the ADA. There are only two exceptions to this requirement, the Employer may consider ordinary eyeglasses or contact lenses in making this determination.

Congress explicitly states in the Amendment that disability is to be interpreted broadly, which means there will be a large influx into the class of individuals that can qualify as disabled as a result of these Amendments and Congress's interpretive instructions to the courts. Congress explicitly rejected the United States Supreme Court's holding in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, which required that "substantially" and "major" be interpreted strictly to create a demanding standard to qualify as disabled. Further, Congress has explicitly required that the individual must demonstrate only that one major life activity is substantially limited in order to be disabled under these Amendments.

Congress has also rejected the interpretation of the courts that medical conditions which are in remission do not cause the individual to be disabled. Now, the law states that episodic impairments and/or impairments in remission constitute disabilities if they would substantially limit a major life activity when active.

Along the same lines, Congress has also expanded the coverage of the "regarded as" disabled language. Under the Amendment, an individual meets the requirements of "regarded as" disabled if the individual can establish that he or she has been subjected to discrimination because of an actual or perceived physical or mental impairment. The most important change in this section of the law is that now, when making this determination, courts will no longer consider whether or not the perceived physical or mental impairment limits or is perceived to limit a major life activity, the sole consideration revolves around whether or not the individual was discriminated against based upon the perceived impairment.

This new direction is consistent with Congress's larger goal for the Amendment, as Congress wants the focus to be on discrimination and not the presence of a disability. The ADA Amendments Act was intended to fundamentally reframe the focus of the ADA as interpreted by the courts. No longer is the ADA about disabilities, it is about discrimination based upon a disability. As a practical matter, this means that

there will be fewer discrimination lawsuits won by Employers with a Motion to Dismiss or a Motion for Summary Judgment.

In order to protect themselves, Employers should take several steps in response to the new requirements imposed by the ADA Amendments Act. Employers should have a written policy coordinating procedures for processing and evaluating requests for reasonable accommodations through a central human resources office. Companies should also thoroughly train HR and management personnel on the interactive process for determining a reasonable accommodation. Also, each step in the interactive process should be adequately documented.

Employers should also train their HR and management personnel to make disability determinations without regard to the ameliorative effects of mitigating measures. It is also important that the Employer request all pertinent information from the employee seeking an accommodation and document this request. The Employer should also never automatically accept a simple, undetailed medical excuse as a reason to accommodate an employee without thoroughly investigating the medical condition. Finally, it is always a good idea to seek a second opinion where the Employer has reason to doubt the veracity of the employee's claim, but the Employer should always spend the money on a board-certified specialist. If the claim should go to litigation, a good expert goes a long way.

Practically speaking, the effect of this new law is that virtually any employee with any medical condition can demonstrate that he or she is covered under the ADA. As a result, Employers must take every precaution to protect themselves from an inadvertent ADA discrimination claim, as the potential pool of claimants has swelled dramatically. Proper procedures, training, and consistent policies and practices are the best methods of combating potential violations. Employers should review their policies, handbooks, procedures, and training programs in order to ensure that their employees, management, and other personnel are fully informed and in compliance with the dictates of the ADA as amended.

Rising Tide of Retaliation and Non-Sexual Harassment Claims

Retaliation claims have risen by over 46.5 percent since 1997 and now constitute around one-third of all claims filed with the EEOC. In that vein, on January 26, 2009, the United States Supreme Court issued a decision which will expand the definition of retaliation even further than the 2006 decision in *Burlington Northern v. White*. In that case, the Court stated that the language of Title VII did not limit the definition of retaliation solely to compensation and the terms and conditions of employment. Any Employer action which would have the effect of deterring a reasonable employee from filing a claim would qualify as a materially adverse action.

In the decision handed down on January 26, 2009, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the United States Supreme Court held that Title VII's anti-retaliation provisions apply to employees who speak out about discrimination in response to questions during an internal investigation. In this case the employee did not speak out on her own initiative, but only responded to an internal investigation of sexual harassment. After she reported her own experience of harassment at the hands of the supervisor being investigated, she was fired for alleged embezzlement. The company also fired the other two accusers after finishing the investigation.

The company's action in this case serves as an excellent example of how not to handle employees alleging harassment. The termination of all three employees in close temporal proximity is a strong indicator to a court or the EEOC that the employees were not terminated for the stated reasons. In fact, temporal proximity between the filing of a complaint and termination are often high hurdles to overcome in explaining why an adverse employment action was not discriminatory. This further highlights the need for companies to keep accurate employment records and to ensure that these records agree with the reasoning provided for taking an adverse employment action.

Employers should review all harassment policies and their employee handbook to ensure that their policies clearly define and prohibit retaliatory behavior. The EEOC has also complained that too many anti-harassment policies focus solely on sexual harassment while ignoring other problematic forms of harassment in the workplace. Therefore Employers should review whether or not their harassment policies prohibit non-sexual harassment in addition to sexual harassment. Finally, management personnel should be trained to recognize retaliatory behavior and to prevent and respond to such behavior.

Getting Paid for Suiting Up

In *Lugo v. Farmer's Pride, Inc.*, the Superior Court of Pennsylvania held that the state's Minimum Wage Act requires that hourly workers be paid for time spent at the workplace preparing for their shift. The appellants' were employees at a chicken rendering and meat production plant. Before and after each shift or break, the employees were required to put on or take off, and sanitize protective gear before and after entering the production area. The protective gear and the sanitation process was necessary to prevent the cross-contamination of the facilities products and for the health of the employees.

The appellants' complained that Farmer's Pride, Inc. failed to pay them for all hours worked when they did not pay them for the time spent putting on, removing, and sanitizing their protective gear. The Superior Court agreed with the employees, holding

that the definition of “hours worked” in the Pennsylvania Minimum Wage Act required the Employer to pay the employee for all time that the Employer *requires* the employee to be on the premises, time travelling as part of their work duties, and time during which work is actually performed.

Since the employees must put on, remove, and sanitize their protective equipment at the workplace, the Superior Court held that Farmer’s Pride must compensate the employees for this time. As a result of this holding, Employers should take care to ensure that employees, who are required to put on, remove or otherwise care for their protective equipment or uniforms at the workplace, are being compensated for this time. Employers should review their protective equipment and uniform policies as well as their time entry policies for applicable hourly employees. Further, management should be trained to permit employees to clock in to put on personal protective equipment and uniforms that must be donned or removed only at the workplace.

Free Choice for Employees?

The last Congress considered, and the House passed, the Employee Free Choice Act, but, the bill died in the Senate when there was not sufficient support to invoke cloture. President Obama has stated during his campaign that he was committed to enacting this piece of legislation. It is very likely this bill will re-emerge at some point this year, and with the increasing amount of debate and discussion, that time may come sooner rather than later.

This Act will have a dramatic impact on all non-unionized Employers, as several protections for Employers and employees will be removed from the organization process. This Act, heavily favored by unions, will eliminate private ballot elections for unionization, impose federal mediation after only 90 days, impose binding government arbitration after only 120 days of negotiations, and impose major new penalties for Employers. This bill is commonly known as the “card check” legislation, but the card check is not the most perilous of these provisions for the well-being of American businesses.

The Employee Free Choice Act will allow the NLRB to certify a union in a workplace when 50% plus one employee sign cards in support of organization. As a result, it will be much easier for unions to organize. Currently, after 30% of employees sign cards in support of unionization, the NLRB holds a secret ballot election after a period of campaigning by the union and the Employer. The Act will eliminate this campaign period as well. The current election system is monitored and supervised by the NLRB.

The new binding arbitration provisions are extraordinarily threatening to a company's ability to be profitable, but they also pose a dramatic risk to management prerogatives as well. The arbitration process allows the government to create a collective bargaining agreement between the parties from whole cloth. Therefore the binding arbitration process could force management to pay well over the value they are willing to pay for labor.

Further, it is possible that the arbitrator could create contractual provisions that will impact or even capture common management prerogatives such as subcontracting and control over personnel. Management and labor both also lose a key bargaining chip, as no party is allowed to walk away from the negotiations over this first agreement if they are not satisfied with the position taken by the other party. Because arbitration is mandatory (as long as the parties do not agree to a longer timeline) after 120 days have passed without achieving a contract, the parties cannot walk away. To walk away would be completely ineffective, as the parties would still be forced into an agreement by the federal arbitration panel, placing the agreement in the hands of appointed bureaucrats while losing valuable time attempting to get an agreement on terms the company can control and which will be calculated to allow the company to remain in business.

Unions and supporters of the Employee Free Choice Act argue that management is harassing and threatening employees who support or participate in organization campaigns. They argue that as a result, the secret ballot process does not allow the employees to freely choose because Employers threaten employees and inform them of the potential negative consequences of unionization. But the current system ignores the reality of organization campaigns and the tactics used by unions to get signatures on these cards. The union tactics run the gamut, but common tactics include getting the employees out drinking and having them sign cards while intoxicated, to open acts of intimidation.

The Employee Free Choice Act is a serious detriment to economic recovery, the right of management to direct their business, and will negatively impact American industry as a result. It is important that Employers stay ahead of this legislation and educate their employees about the impact of unionization on the workplace. Employers should also be in contact with their federal representatives to let them know the impact the Employee Free Choice Act will have on their business. Employers should also follow the example of companies such as Wal-Mart, which are being proactive and getting out in front of any potential labor conflict which could motivate employee organization. Employers should be reviewing their policies and practices for fairness and any other concerns that would lead employees to prefer to be represented by a union. By addressing these issues now, the company may save itself higher costs in the future.

Verdicts and Settlements

The EEOC announced a settlement in a discrimination suit against Merrill Lynch & Co., where the Company was accused of passing over and terminating an Iranian Muslim employee based upon his religion and natural origin. The suit was settled for \$1.55 million dollars. Merrill Lynch's management had told the employee that he was not allowed on the trading floor because of his nationality, which made him a "risk factor and a threat."

A verdict against Tyson Foods, Inc. in a sexual harassment case was recently upheld. A female employee recovered against Tyson Foods when the company failed to intervene as employees commented inappropriately about the female employee's body and made lewd invitations to her for participation in various sexual acts. When she spoke to her supervisor, he promised to investigate, but failed to follow through. In fact, he commented that she had to understand that the employees meant this behavior as a compliment, and she should expect attention because "you are hot." After she was groped and followed to her vehicle by two different employees, she never returned to work. The Company failed to follow its own harassment policy and failed to take appropriate action in response to the employee's complaints, and as a result, the verdict was upheld because of Tyson Foods' "reckless indifference" to this employee's federally protected civil rights.

A California grape grower paid \$1.68 million to settle an EEOC claim which alleged that the company refused to hire women. According to the EEOC, the company hired no women from 1998 until 2002 across 300 seasonal positions filled yearly. The Employer maintained that the company did not discriminate, but simply wanted to put the issue behind them.

A Pittsburgh company which terminated a female employee and based the determination upon her pregnancy was forced to pay a \$1.8 million dollar verdict by a jury. The jury awarded her \$600,000 in compensatory damages and \$1.2 million in punitive damages; although the punitive damages will be reduced to comply with the Title VII cap on punitive damages. Her Employer terminated her when she failed to return to work when instructed to; however, her return to work was set before her 4 weeks of leave provided for in the company policy expired. Her physician ordered an extra month of time off work, which she was eligible to apply for under company policy as well, but this request was denied. In 2007, after she filed a lawsuit, the Employer offered her an unconditional reinstatement, but in a lower position with a different title. This, combined with the record supporting her description of the facts over the company's contributed to the large award, according to her attorney.

A PLRB hearing examiner held that an Employer who institutes a policy at odds with the terms of a settlement agreement violates the Pennsylvania Public Employees Relations Act. The Pennsylvania Game Commission instituted a policy regarding employee use of the cafeteria during the workday; however, the parties had previously entered into a settlement agreement that the cafeteria facilities would be available for breaks and lunch unless the Game Commission was conducting training classes there or using the cafeteria for meetings. This policy was in direct contravention of this agreement, and was therefore in violation of Sections 1201(a) (1) and (5) of the Public Employees Relations Act.

This E-Client Alert is designed to provide general information relating to new developments in Employment Law. It should not be construed as comprehensive coverage, or as legal advice concerning any specific factual issue. A legal opinion should be sought from an attorney of choice regarding any specific factual situation.

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