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Conflicting Returns on the New *Ledbetter Act*

On January 29, 2009, President Obama signed into law the *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. 111-2, 123 Stat. 5 (the FPA), undoing a significant victory for employers in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

The FPA, which “clarif[ies] that a discriminatory compensation decision ... occurs each time compensation is paid pursuant to the discriminatory compensation decision ...,” affords relief for pay claims without regard to how promptly employees bring their claims. It deprives employers of their principal defense to stale claims—timeliness.

While too early to fully gauge the FPA’s impact, for employers, the early returns have not been encouraging. As presaged, employers are being compelled to defend pay decisions made many years in the past. For example, courts construing the FPA have:

- permitted an employee to proceed on a pay decision made four and one-half years prior to the filing of his charge of discrimination. *Vuong v. New York Life Ins. Co.*, No. 03CIV1075(TPG), 2009 U.S. Dist. LEXIS 9320, at *24-25 (S.D.N.Y. Feb. 6, 2009);
- allowed employees to proceed on claims based on a pay decision made by their employer in 1990—16 years prior to filing their charges of discrimination. *Bush v. Orange County Corr. Dep’t*, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009).

Disposing of compensation cases on timeliness grounds has likely become a relic of the past and employers will undoubtedly have to continue defending claims based on years’ old pay decisions.

Are Promotions and Other Decisions Covered?

The FPA provides that an “unlawful employment practice occurs...when a discriminatory compensation decision *or other practice*” is adopted or affects an employee. Attorneys for plaintiffs

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are arguing that this language encompasses any discriminatory decision that affects an employee's pay, including promotions.

Rejecting this argument, a number of courts have recently held that the FPA applies only to claims of pay discrimination. See *Richards v. Johnson & Johnson, Inc.*, No. 05-3663 (KSH), 2009 U.S. Dist. LEXIS 46117, at *30-31 (D.N.J. June 2, 2009) (the FPA “does not purport to overturn *Morgan*, and thus does not save otherwise untimely claims outside the discriminatory compensation context”); *Rowland v. Certain Tweed Corp.*, No. 08-3671, 2009 U.S. Dist. LEXIS 43706, at *18 (E.D. Pa. May 21, 2009) (Congress limited the FPA to claims of “discrimination in compensation”); *Arters v. Univision Radio Broad. TX, LP*, No. 3:07-CV-0957-D, 2009 U.S. Dist. LEXIS 39924, at *25-26 (N.D. Tex. May 12, 2009) (The FPA “pertains to the timeliness of *discriminatory compensation* claims.”).

However, in *Gentry v. Jackson State Univ.*, No. 3:07CV584TSL-JCS, 2009 U.S. Dist. LEXIS 35271, at *3 (S.D. Miss. April 17, 2009), the court held that the denial of tenure to a university professor, which resulted in her not receiving a salary increase, qualified as a “compensation decision” or “other practice” affecting compensation within the FPA. The plaintiff was denied tenure in 2004, but did not file an EEOC charge until 2006. The *Gentry* decision is very troubling to employers, who fear it could signal a trend in some courts toward an expansive reading of the FPA.

The FPA is likely to spawn a significant amount of litigation, and there will continue to be inconsistent rulings on how broadly the words “other practice[s]” should be interpreted. We will continue to monitor the impact of the *Lilly Ledbetter Fair Pay Act of 2009*. Please contact us to discuss the Act further.

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