

## LEDBETTER LAW REVERSES EMPLOYERS' WIN IN EQUAL PAY SUITS

*On January 29, 2009, President Obama signed his first bill into law, the Lilly Ledbetter Fair Pay Act of 2009. This law reverses an injustice that Congress believed was created by the U.S. Supreme Court in a 2007 case involving the law's namesake.*

### THE LITIGATION

Lilly Ledbetter sued her employer of nearly 20 years, Goodyear Tire Co., claiming gender-related pay discrimination under Title VII. Ledbetter alleged that Goodyear had been motivated to give her poor performance evaluations in order to keep her salary below that of her male counterparts. She claimed this had been going on since early in her tenure at Goodyear, entitling her to a sizeable monetary award from years of backpay.

Ledbetter got her wish, convincing a jury that Goodyear had discriminated against her because of her sex and was awarded nearly \$4 million dollars. The judge reduced that award to \$360,000, however, to comply with the Title VII's statutory cap on damages. That was just the beginning of Ledbetter's tortured path to her recent moment in the spotlight.

On appeal to the 11th Circuit Court of Appeals, Goodyear succeeded in getting the verdict overturned. They pointed out that Ledbetter waited to bring her claim until she retired, many years after the allegedly discriminatory pay practices began. In so doing, she missed the deadline for filing discrimination claims under the federal law, which is 300 days in states with their own discrimination laws (including Minnesota).

It was then Ledbetter's turn to appeal, and she took the case to the U.S. Supreme Court. Ledbetter argued that the discrimination in her pay was repeated with each paycheck she received, and therefore the statute of limitations was renewed each payday. Since her claim was timely in relation to her last paycheck, she met her obligations under the law. Ledbetter's position was amply supported by a long line of decisions in various federal courts, including the 8th Circuit Court of Appeals, which

includes Minnesota. Goodyear countered that Ledbetter was simply complaining about the effects of a past discriminatory act, similar to a terminated employee claiming that he still had the right to sue many years later because he was "still fired." Goodyear's position also had been accepted by a number of federal courts, thereby establishing the sort of discrepancy that the Supreme Court often is called upon to resolve.



The U.S. Supreme Court did just that, issuing a 5-4 decision on May 29, 2007, affirming the decision of the Appeals Court. They ruled that the statute of limitations began to run at the time that the allegedly discriminatory act occurred (the issuance of unequal pay) such that Ledbetter missed her filing deadline by waiting so long to pursue her claim. Ledbetter's case was over and she had lost.

Without further legal recourse, Ledbetter turned to Congress which wrestled with the issue for eighteen months. Finally, with so many newly seated Democrats and a more sympathetic president, Congress finally passed the Lilly Ledbetter Fair Pay Act, which President Obama signed with Lilly Ledbetter standing at his side.

### THE LAW

Although Ledbetter won't benefit directly, the new law amends Title VII's definition of "unlawful employment practice" to include "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time...compensation is paid." This effectively overturns the Supreme Court's decision and codifies Ledbetter's position that the statute of limitations under Title VII restarts each time compensation is paid.

It is important to note that this new law is not limited to gender-based claims. If an employee believes that

## EMPLOYERS OWE CONTINUING DUTY TO LAID OFF H-1B WORKERS

*With the American economy in a tailspin, employers are increasingly resorting to reductions in force (RIF) to preserve their ability to operate. Few people know, however, that RIFs present special obligations on the part of employers who utilized the H-1B visa to hire foreign workers. The following is a recap of those obligations.*

### EMPLOYER'S OBLIGATION TO EMPLOYEE

When an H-1B worker is terminated before the end of the authorized period of stay, the employer is required to: (1) provide reasonable costs of return transportation to the H-1B employee's home country; and (2) notify United States Citizenship and Immigration Services ("USCIS") of the H-1B employee's termination to avoid liability for back-pay.

The transportation obligation requires an employer to provide an amount equal to the reasonable return costs of returning the employee to their home country, and obtain a written release from the terminated H-1B employee. In the alternative, the employer can provide the H-1B employee with a one-way return air ticket with a reasonable time for departure following the termination. The only exception to this requirement is in situations where the employee chooses to remain in the United States.

Interestingly, the transportation obligation is actually assumed when the petition for an H-1B visa is filed. To secure H-1B status for an employee, an employer must file Form I-129, Petition for a Nonimmigrant Worker, and an H Classification Supplement to Form I-129. In the H Classification Supplement, the employer "certif[ies] that [it] will be liable for the reasonable

costs of return transportation of the [H-1B employee] abroad if the [H-1B employee] is dismissed from employment by the employer before the end of the period of authorized stay."

### EMPLOYER'S OBLIGATION TO NOTIFY USCIS OF TERMINATION

An employer's obligation to notify USCIS of an H-1B employee's termination stems from the employer's filing of a Labor Condition Application ("LCA") with the Department of Labor ("DOL") as part of the H-1B visa process. In the LCA, the employer agrees to pay the H-1B employee the prevailing wage for the duration of the H-1B petition. Under the DOL's regulations, an employer's obligation to pay the employee's salary continues as long as the employer's LCA for the position remains valid, and its H-1B nonimmigrant petition for the employee has not been revoked. In fact, the DOL's Administrative Review Board ("ARB") has held that an employer's obligation to pay the offered salary continues up until the date the employer sends notice of termination to USCIS. Therefore, it is imperative that an H-1B employer notifies USCIS of the H-1B employee's termination as soon as possible.

RIFs obviously present a number of legal challenges to employers. The H-1B issue is just one more reason why careful advance planning is critical to anyone considering a RIF.



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# OSHA PENALTIES ESCALATE FOR PROTECTIVE EQUIPMENT VIOLATIONS

*In these troubled economic times, the Occupational Safety and Health Administration (OSHA) has hit upon a sure fire way to increase government revenues without any extra work or change in procedures. If it wasn't so ominous for employers, we might be tempted to applaud their ingenuity and audacity.*

## CHA-CHING!

On January 12, 2009, the Occupational Safety and Health Administration (OSHA) published a final rule which, as a practical matter, significantly increases the monetary penalties for certain personal protective equipment (PPE) and hazards training violations.

Depending on the employee's job duties and position, OSHA regulations require the employer to provide PPE to each employee. PPE includes a wide range of items, from respirators to flame resistant clothing. Training requirements under OSHA regulations are also broad, but generally apply to employees exposed to toxic substances such as asbestos, vinyl chloride, and lead.

The final rule is titled "Clarification of Employers' Duty to Provide Personal Protective Equipment and Train Each Employee." The "clarification" is a simple one: each violation of the PPE and/or training requirement results in a per-employee penalty.

In the past, failure to provide required training to a large team of employees was frequently penalized as a single violation. Thus, if the penalty for failing to provide certain PPE was \$1,000, the employer might have been assessed a \$1,000 penalty, even if 200 employees were not provided with the required PPE. Now, the final rule amends OSHA's regulations to clarify that such grouping of violations is not allowed. Instead, each employee who is not provided the required PPE or training is treated as a separate violation for which a separate penalty will be assessed. In essence, the fines increase exponentially under the "clarified" rule. Using the example above, the penalty under the final rule would be \$200,000 – not \$1,000.

Thomas M. Stohler, the Acting Assistant Secretary of Labor for OSHA, explained the new rule as a "technical correction to the PPE standard [that] brings it in line with other OSHA safety and health standards. By making this change, those few employers who egre-

giously violate the OSHA PPE standard can be held fully accountable for violations affecting each employee who is not provided proper PPE. This kind of vigorous enforcement is a vital component of OSHA's balanced approach toward workplace safety and health."

## PROTECTION FOR EMPLOYERS

The good news for employers is that the final rule does not add new compliance obligations. As set forth in the preamble to the final rule, "Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than is already required. The amendments simply clarify that the standards apply to each employee."

If ever there was a time to review your OSHA compliance in the areas of providing PPE to your employees and training them with the necessary training in hazardous materials, it is now. While you are doing that, perhaps you can come up with a similar scheme that will allow you to grow your revenues by leaps and bounds by only "clarifying" the way you run your business.

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their compensation has been impacted by a discriminatory act based on their protected classification (e.g. gender, race, age, disability, color, religion and national origin), the statute of limitations will start to run each time they are paid. The Ledbetter Act also expands the class of potential litigants to include anyone who is “affected by” a discriminatory compensation decision which might include a spouse or child impacted by the unlawful employment act. A successful claimant may receive back pay for up to two years under the new Act. Interestingly the effective date of the Act is May 28, 2007 and will apply to all compensation discrimination claims that are pending on or after that date, except ironically for Lilly Ledbetter’s claim.

**LEDBETTER LESSONS FOR EMPLOYERS**

The Equal Employment Opportunity Commission (EEOC), which supported this legislation, has already cautioned employers that they intend to increase their enforcement of discriminatory compensation claims.

Employers are advised in this new climate to take a close look at their compensation policies including all pay increases. For those employees who perform the same work and have the same qualifications, employers must assure that they are being paid the same salary. If not, they need to be certain that there are justifiable reasons for the disparity (e.g. seniority, performance), and that the reasons are well documented. Managers and supervisors should be trained on all of the anti-discrimination laws and insure that their compensation decision will stand up. Good advice in any event but now just a little more urgent!



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