

## Lilly Ledbetter – Giving More Time to Employees to File Discrimination Claim

In January, 2009 the Lilly Ledbetter Fair Pay Act was signed into law, significantly expanding the time within which an employee has to file a wage discrimination claim. Under prior Supreme Court precedent, an employee had 180 (or 300, in some circumstances) days from the time of the initial discriminatory decision to file a wage discrimination claim and the 180 (or 300) days did

not start over when the discriminatory decision was subsequently applied to the employee. Under the new amendments - which effect Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 - an unlawful employment practice occurs not only upon adoption of a discriminatory compensation decision but also each time the discriminatory decision is applied to the individual. Thus, under the new amendments the 180 (or 300) day statute of limitations is extended every time the discriminatory practice is applied, including the issuance of a paycheck. Additionally, the amendments apply retroactively, meaning that they apply to all claims of discriminatory compensation pending on or after May 28, 2007.

Although the law is retroactive and expands the statute of limitations, the new amendments did not alter other key aspects of the law and an employer's liability exposure is still limited in several respects. First, the new amendments apply to allegedly discriminatory pay decisions, not all adverse employment actions. Second, an employee is still required to bring suit within 180 (or 300) days of a discriminatory compensation decision or when the discriminatory decision is applied to the employee (for example, the issuance of discriminatory paycheck). Third, the statutory caps on liability for compensatory and punitive damages found in Title VII and the ADA and the two-year limitation for lost wages remain in effect.



## Employee Free Choice Act – Back Again

On March 10, 2009, the Employee Free Choice Act ("EFCA") was introduced in both houses of Congress. The EFCA is of special importance to employers because it provides an additional method of certifying labor representation for employees without a secret ballot vote, the so called "Check Card" provision. Under the current version of the National Labor Relations Act, safeguards are in place to ensure a full and frank discussion - both pros and cons - of union organization. Currently, following submission of a petition for representation, a secret ballot election is scheduled. Prior to the secret ballot election, however, the employer has knowledge of the real possibility of unionization and is permitted to provide factual information to employees explaining the employer's position and the potential disadvantages of unionization. The secret ballot election is then conducted by government representatives - only limited observers from the employer and the potential union may be present, and certification of representation only occurs if a majority of valid ballots cast are in favor of certification.

The EFCA would amend the NLRA so that whenever a petition is filed indicating that a majority of employees in an appropriate bargaining unit have signed valid authorization cards for representation, the NLRB is obligated to certify the employee labor representative indicated on the cards. This provision thus eliminates post-petition campaign time and secret ballot elections where authorization cards for a majority of employees are received by the NLRB.

Additionally, the EFCA provides for binding government arbitration over stalled collective bargaining between employee representatives and employers. Currently, the employer and the employee representative have an obligation to confer in good faith to bargain collectively and may utilize a Federal Mediation and Conciliation Service, to reach a non-binding agreement. The EFCA provides a much more onerous schedule for parties to establish an initial collective bargaining agreement. Indeed, the employer and employee representative must meet within ten (10) days after the employer receives a written request for collective bargaining and must reach a collective bargaining agreement within ninety (90) days of initiating the collective bargaining process. If no agreement is reached, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. At the expiration of thirty (30) days

from the date that mediation is requested, if an agreement has not been reached, an arbitration board will hear and render a decision settling the dispute that is binding upon the parties for two (2) years, unless both parties consent in writing to amend the agreement.

Finally, the EFCA provides additional enforcement provisions and penalties against employers who engage in unfair labor practices during the time when employees are seeking initial representation by a labor organization, or during the period after representative has been recognized until the first collective bargaining contract is entered. The additional enforcement provision and penalties include injunctions, increased back pay (instead of standard back pay, awards for unfair labor practices will be three times the employee's back pay), and increased civil penalties of up to \$20,000 for each willful violation. There is little doubt that the EFPA, if passed, will have a significant impact on employers and should not be taken lightly.

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plan, or insurer, as the case may be. That entity will then "cover" the federal government's subsidy amount until the government reimburses it through credits against payroll taxes when the entity files its IRS Form 941. Other than completing Form 941, no additional information needs to be submitted to the IRS. However, entities claiming the credit must maintain supporting documentation for the credit claimed, including:

- dates and amounts of the eligible individual's 35% share of the premium;
- in the case of an insured plan, a copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier;
- in the case of a self-insured plan, proof of the premium amount and proof of the coverage provided to eligible individuals;
- attestation of involuntary termination, including the date of termination;
- proof of eligibility for COBRA coverage and the eligible individual's election of COBRA coverage;
- a record of the SSN's of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for 1 individual or 2 or more individuals; and

- any other documents necessary to verify the correct amount of reimbursement.

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programs and early retirement programs, which give employees a sense of control over their future. Considering implementation alternatives may decrease potential litigation costs for the employer.

Second, if a RIF is necessary, it is crucial for the employer to develop a written selection process prior to a RIF. Any RIF policy should, at a minimum, include the selection criteria to be utilized to eliminate positions and to select employees for involuntary termination. The criteria must be based on non-discriminatory factors and ensure that facially neutral factors do not inadvertently have a disparate impact on a protected class. It is also important that the policy establish a selection process containing a reasonable review process and if possible, including multiple levels of management review of all job positions that will be eliminated and all employees selected for the reduction. The protocol should also include reminding all decision-makers that the company complies with applicable civil rights laws. In addition to developing appropriate selection criteria, all decisions should comport with the protocol and once the decisions are made, the company should document who was selected, why they were selected, who made what decisions, and what factors were considered for each selection made. The more documentation available, the easier and less expensive it will be to convince employees and courts that the company's decisions were non-discriminatory.

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