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EEOC Revises Its Compliance Manual to Conform to Ledbetter Fair Pay Act

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The Equal Employment Opportunity Commission has revised its Compliance Manual to implement the Lilly Ledbetter Fair Pay Act. The Act, passed earlier this year, overturned the U.S. Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007), which held that a charge of compensation discrimination under Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act or the Age Discrimination in Employment Act must be filed within 180 or 300 days of the first alleged "discriminatory" paycheck, depending upon whether the state has a state fair employment practice ("deferral") agency. Under the Court's decision, subsequent "discriminatory" wage payments did not resuscitate the prior filing period under the "continuing violation" theory. The Act, which significantly expanded the relevant statute of limitation, is retroactive to May 28, 2007, (the day before the Supreme Court's decision) and permits suit as to pay discrimination claims pending on or after that date.

The *Compensation Discrimination* section of the EEOC's Compliance Manual denotes the period for submitting a claim of pay discrimination under Title VII, the ADA, the Rehabilitation Act or the ADEA. It explains that the period begins when any of the following occurs:

- the employer makes a discriminatory compensation decision or adopts a discriminatory practice affecting compensation;
- the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- the charging party's compensation is affected adversely by application of a discriminatory compensation decision or other discriminatory practice, e.g., each time wages, benefits, or other compensation is paid.

Courts interpreting the Act now are faced with deciding what qualifies as a compensation decision for purposes of calculating the statute of limitations. According to a recent decision by the United States Court of Appeals for the Third Circuit, the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. *Mikula v. Allegheny County of Pennsylvania,* No. 07-4023 (3d Cir. Sept. 10, 2009). However, the Court found an internal investigation into an employee's complaint relating to a pay disparity does not constitute a compensation decision or other practice.

To illustrate the change in the EEOC's enforcement position, the revised Manual provides the following example of an actionable claim:

> After working for the Respondent for nearly 10 years as a production supervisor, CP [charging party] learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

Not surprisingly, the expanded statute of limitation for wage discrimination claims is expected to spur increased litigation. To minimize the risks of liability, employers should consider:

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Practices

Litigation

- auditing in a manner which preserves the attorney/client privilege current pay practices to identify and develop strategies to remedy potential pay disparities;
- developing written and precise criteria for making compensation decisions;
- revising document retention practices to ensure that the employer will have access to documentation regarding compensation decisions;
- training supervisors and managers to support objectively-based compensation decisions; and
- conducting periodic statistical analysis of compensation data to identify potential adverse impact concerns.

Jackson Lewis attorneys are available to assist employers with this and other workplace requirements.