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President Signs Ledbetter Fair Pay Act Into Law

On January 29, President Obama signed into law the Lilly Ledbetter Fair Pay Act, making it easier for employees to sue for pay discrimination. The Act effectively overturns the 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that a worker must sue within 180 days of receiving his or her *first* unfair paycheck, and that the later effects of past discrimination, such as subsequent unfair paychecks, did not restart the filing period. The new law allows employees alleging unequal pay the right to sue within 180 days of their most recent paycheck. The Act does not change current law limiting back pay for claimants to two years.

This is the first major piece of legislation Congress has sent to President Obama. Congress attempted, but failed, to update the law during the Bush Administration. Proponents for the bill argued that it was a move toward "fairness, reason and common sense." Opponents contended that the legislation would gut the statute of limitations, encourage lawsuits, and be a boon for trial attorneys. They also argued that the legislation would encourage workers to wait to file a disparate wage claim to reap a larger damage award.

Only time will tell the impact this recent legislation will have on the workforce. In the meantime, employers can take steps to minimize potential wage claims by auditing pay administration and remedying any disparities; adopting written policies and procedures for employees to report concerns regarding pay; and adopting an objective system for awarding pay increases.

Kutak Rock lawyers frequently assist employers with their pay practices. If you would like legal assistance in auditing your pay practices, please contact one of the Kutak employment law attorney listed in the column to the left.

By Alan L. Rupe, *Partner, and*
Stacia G. Boden*, Associate*

Inside:

When Eric Becomes Erica: Emerging Issues Related to Transgender Discrimination in the Workplace

Transgender employees are people whose birth sex does not match their internal perception or external expression of their gender identity. Transgender is an umbrella term which may encompass, but is not limited to, people who are transsexual. Thirteen states and approximately 90 cities and counties nationwide have outlawed discrimination against transgender employees. In 2000, approximately 20% of the American population was covered by laws prohibiting transgender discrimination. This percentage had risen to 37% in 2007, or approximately 105 million Americans. A total of 125 Fortune 500 companies have policies prohibiting transgender discrimination. On August 8, 2006, the American Bar Association House of delegates passed Resolution 122B, "which urges the protection of transgender people in employment."[1]

This issue will affect more and more employers on many fronts. Should transgender employees be allowed to use any bathroom they choose? How do you manage the relationship of the transgender employee with other employees, customers or clients? Is the transgender employee entitled to greater legal rights if she or he has undergone a sex change operation? Are employers held to a different standard if the employee is "fully committed" to being transgender, as opposed to someone who has a more blended lifestyle, assuming the traits of different genders on different days.

Legislatures and courts have taken many approaches to addressing claims of transgender discrimination. Some federal circuits that have examined the issue of whether Title VII covers transgender employees have stated that it does not. The prevailing federal approach under Title VII adheres to a traditional definition of "sex" for two reasons: the legislative history of Title VII and Congress's failure to include sexual orientation as a protected classification. However, this may provide little protection for employers if the transgender employee argues that he or she faced discrimination not because of being transgender but because of sexual stereotyping.

The seminal case is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the United States Supreme Court broadened the interpretation of "sex" to include gender stereotyping. *Id*. at 250-251. The plaintiff was not a transsexual, but rather an "aggressive" woman who was passed over for a promotion because she was too "macho." *Id*. at 234-235. The Supreme Court established that Title VII's "because of . . . sex" language included discrimination based on biological sex and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.

Last September, the District Court of the D.C. Circuit relied heavily on the *Price Waterhouse* reasoning when it ruled in favor of a transgender person whose offer of employment was rescinded after she revealed she would be transitioning from a male to a female. In *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), the plaintiff involved a highly decorated retired Army colonel who had been a U.S. Airborne Ranger-qualified Special Forces officer and who possessed the top-secret security clearance required by the Library of Congress for the position of security analyst. She received the highest scores of any of the other candidates for the position. The court found the reasons offered for rescinding the job offer were pretextual. It also said the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex have been eviscerated by *Price Waterhouse*.

Transgender employees may seek relief under state or local laws even if they do not work in one of the jurisdictions that specifically outlaws discrimination against transgender employees by claiming they are handicapped or disabled. Whether transgenderism is a personality disorder is a controversial issue. Technically, transsexualism is a psychiatric disorder known as gender identity disorder ("GID").[2] However, there is disagreement within the mental health community regarding whether GID should be listed in the

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[1] Amanda S. Eon, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 Tulsa L. Rev. 765, 770 (2008).

When Eric Becomes Erica: Emerging Issues Related to Transgender Discrimination in the Workplace, cont'd.

DSM as a mental disorder. Also, transgender advocates argue that it gives a misleading picture of transgender people and their lives because not all transsexual people have mental health problems.

Fortunately, employers do not need to be concerned about a transgender employee filing a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990), or ("ADA"). ADA Section 12208 specifically states the ADA does not apply to transvestites. And the applicable federal regulation states in Section 1630.3 that disability does not include "transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." It also says that homosexuality and bisexuality are not impairments and so are not disabilities under the ADA.

The enhanced protection available to employees under state and local laws requires employers to be particularly sensitive to the evolving issues surrounding transgenderism and to be more open-minded regarding how they view gender restrictions. The recent changes in the law and the uncertain judicial landscape behoove employers to err on the side of caution and treat issues involving transgender employees with the same diligence as they would show employees in any protected class. Most importantly, when in doubt, employers should make no adverse employment actions involving transgender employees until they have consulted with their attorneys at Kutak Rock LLP.

By Eric Kendall Banks,
Of Counsel

[2] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

Proposed Employment Legislation

If adopted, the following pieces of legislation will significantly affect employers. Please contact your Kutak Rock employment lawyer to monitor upcoming changes and help your business prepare for any new regulations.

Employee Free Choice Act

The Employee Free Choice Act, S. 1041, 110th Cong. (2007) (the "EFCA"), is proposed legislation that would affect the way unions receive support from employees. It amends the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935) (the "NLRA"), in three ways. First, the EFCA would require employers to honor a "card check" system whenever required by employees. The existing system allows employers to choose between the card check system or a secret ballot election process. Second, the EFCA would require "interest arbitration" to determine the terms of employment. Finally, the EFCA would increase monetary penalties for violations of the NLRA.

"Card check" systems entail workers completing a signed writing to indicate their preference regarding union representation. The EFCA would require the National Labor Relations Board (the "NLRB") to certify a labor organization as the representative of a group of employees if signed authorizations are received from a majority of employees. Previously, employers could demand secret ballot elections even if a majority of employees had signed authorization cards. Opponents of the Act claim that it removes employees' ability to vote anonymously for union representation because authorization cards are not kept private. The absence of a defined election period also deprives employers of the opportunity to present a formal case against union organization.

The EFCA also provides for federal dispute resolution at the request of either party if the parties are unable to reach an agreement within 90 days. The dispute is then heard by the Federal Mediation and

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Conciliation Service ("FMCS"). If the FMCS cannot help the parties reach an agreement within 30 days, the dispute goes to arbitration. The results of the arbitration are binding for two years.

Finally, the EFCA provides for increased penalties for employers who discriminate against employees who participate in the union-selection process. First, the EFCA requires the NLRB to seek a federal injunction when it appears that employers are engaged in inappropriate conduct. Second, the EFCA provides for liquidated damages of three times back pay if an employer wrongfully terminates pro-union employees. Finally, the EFCA provides for up to $20,000 in civil fines for willful violations.

Opponents of the EFCA have made strong arguments against the EFCA's passage from both the employers' and employees' perspective. However, it is supported by President Obama and will likely become law. Therefore, employers and employees must be prepared for the prospect of union voting without the option of a secret ballot election.

Paycheck Fairness Act

In tandem with the Ledbetter Act, the Paycheck Fairness Act, H.R. 1338, 110th Cong. (2008), would increase damages available for plaintiffs in Equal Pay Act cases and would allow Equal Pay Act-based class-action suits. It also prohibits employers from disciplining employees who communicate pay salary information to coworkers. 29 U.S.C. § 206(d) (1963).

Employment Non-Discrimination Act

The Employment Non-Discrimination Act, H.R. 3685, 110th Cong. (2007) (the "ENDA"), would provide penalties against employers who make decisions based on the sexual orientation of applicants or employees in much the same way that the Civil Rights Act of 1964 punishes employers who make decisions based on race and other characteristics. Civil Rights Act of 1964, U.S. Code §§ 2000-200h-6 (1964).

Although similar legislation was introduced as early as 1974, Congress has thus far declined to make sexual orientation a protected class. The current bill, which excludes "gender identity," is an attempt to establish penalties for decisions based on sexual orientation without having to support the more controversial issues surrounding gender identity. This latest version of ENDA passed 235-184 in the House this November and now moves on to the Senate.

Healthy Families Act

The Healthy Families Act, S. 1085, 109th Cong. (2005), would require employers with 15 or more employees to provide a minimum paid sick leave of seven days annually for employees who work at least 30 hours per week and a prorated number of days for employees who work between 20 and 30 hours per week. The bill is intended to allow employees to meet their own or their families' medical needs. However, the bill would also "suggest" that employers consider more generous leave policies than those mandated by the Health Families Act. The bill has been in the House Subcommittee on Workforce Protections since 2005, but may see renewed interest with the new administration.

Family Leave Insurance Act

The Family Leave Insurance Act, H.R. 5873, 110th Cong. (2008), would establish a mandatory Family and Medical Leave Insurance Program for certain covered employers. The Family Leave Insurance Act would set up a fund in the Treasury, establish penalties for prohibited acts by employers, and entitle eligible employees to benefits, including specific percentages of their daily earnings for 12 weeks of leave under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1993). To pay for this program, the Family Leave Insurance Act would impose a premium on all individuals and employers. Small employers and employers with voluntary plans could be exempted. This bill was introduced in April of 2008 and has been referred to the Federal Workforce Subcommittee.

Working Families Flexibility Act

The Working Families Flexibility Act, H.R. 1982, 107th Cong. (2001), would give employees the right to apply for modifications in work hours, scheduling or work location on an annual basis. Employers would be required to meet with employees within 14 days after the request and to provide a written explanation of the employer's decision within an additional 14 days. If the employee is unhappy with the employer's decision, the

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Proposed Employment Legislation, cont'd.

Working Families Flexibility Act would require additional meetings. The Working Families Flexibility Act would also prevent adverse actions against employees who attempt to take advantage of the Act and would allow employees who feel they have been wrongfully deprived of opportunities to file a complaint with the Wage and Hour Division of the Department of Labor. Violations of the Working Families Flexibility Act could result in fines of up to $5,000 as well as equitable relief such as reinstatement, promotion or back pay. The bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions.

Patriot Employers Act

The Patriot Employers Act, S. 1945, 110th Cong. (2007), introduced in August of 2007, would designate a 1% tax credit for companies that the government deems "patriot employers." To obtain the distinction of "patriot employer," a company must comply with the following mandates: (1) it must keep its headquarters in the United States, (2) it must pay at least 60% of the health care premiums of its employees, (3) it must comply with government-approved labor policies, (4) it must maintain or increase its ratio of workers within the United States versus those outside the United States, (5) it must provide full differential pay for National Guard and Reserve employees called to active duty, and (6) it must provide employees with government-approved compensation and retirement benefits. Although the name of this Act and some of its provisions appear benign or even positive, its passage would entail an additional layer of government control over employers and would provide a checklist for compliance which the government could use to impose additional regulation or penalties in the future. Employers should consider whether the 1% tax credit would be worth this additional government intervention.

Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act

The Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers Act, S. 969, 110th Cong. (2007), or "RESPECT" would overturn the National Labor Relations Board's interpretation of the term "supervisor" in the *Oakwood Healthcare* decisions. *Oakwood Healthcare, Inc.,* 348 N.L.R.B. 37 (2006). There, the NLRB broadly interpreted what constituted a "supervisor" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935). Because supervisors are not protected from retaliation for forming unions, many unions have lobbied to restrict that interpretation. The RESPECT Act would therefore increase the number of employees protected by labor laws by reducing the number who qualify as supervisors.

By Mark Pemberton*,*
Associate

Is Your Company Ready for the New FMLA Regulations?

The United States Department of Labor ("DOL") promulgated new regulations applicable to the Family and Medical Leave Act ("FMLA"), effective January 16, 2009. The new regulations impose additional rights and responsibilities on employees and employers. Additionally, the DOL has published new FMLA forms and postings. Kutak Rock has been working with employers to update their policies and procedures to ensure that they fulfill their obligations to publish, post and distribute the correct information and forms. If you would like assistance with bringing your practices into compliance with the new FMLA regulations, you may contact Alan Rupe or Stacia Boden at (316) 609-7900 or Alan.Rupe@KutakRock.com; Stacia.Boden@KutakRock.com.

By Alan L. Rupe, *Partner, and*
Stacia G. Boden*, Associate*

Employee Stock Ownership Plans

An Employee Stock Ownership Plan ("ESOP") is an employee benefit plan which makes the employees of a company owners of stock in that company. ESOPs have several unique features that make them different from other employee benefit plans. An ESOP is the only employee benefit plan required by law to invest primarily in the stock of the employer. The ESOP structure is also advantageous from a financial perspective. First, ESOPs are unique in their ability to borrow money. Second, ESOPs have been granted a number of tax benefits that go beyond those available for other employee benefit plans. ESOPs are simple to create and are most suitable for closely held corporations.

Ability To Borrow Money

ESOPs are unique in their ability to borrow money for the purpose of acquiring new shares, creating a "leveraged ESOP." Most commonly, ESOPs are used to buy the shares of a departing owner of a closely held corporation. In addition, family-owned companies often use ESOPs as a ready market for their shares. ESOPs can also purchase newly issued shares with the borrowed funds. The company may use the proceeds of the sale for any legitimate business purpose. For example, the company may use this money to buy another company or new equipment or to refinance a debt.

Tax Advantages

ESOPs create tax advantages for the company and its shareholders. The ESOP structure allows the company to take tax deductions for contributions that are made to the plan. These contributions can be made in the form of cash or company stocks. When contributing company stocks, the employer may take a deduction for the full value of the stock contributed and increase its cash profits by the value of the taxes saved through the deduction.

A "leveraged ESOP" is especially attractive because the employer may deduct contributions that are made to the ESOP which are used to repay the interest and the principal on the loan. Specifically, a C corporation can deduct contributions up to 25% of covered payroll, plus any dividends paid on ESOP shares (25% limit does not include interest payments). S corporations can also deduct contributions up to 25% of covered payroll.

Another tax advantage is that C corporation shareholders are able to sell stock to the ESOP and defer taxation on any gain resulting from the sale, as long as certain requirements are met.

Creating an ESOP

To create an ESOP, the company can contribute its own shares to the plan or contribute cash to buy its own stock. However, most commonly, the "leveraged ESOP" will borrow money for the purpose of acquiring company stock. As the loan is repaid, the ESOP shares are allocated to individual employee accounts based on relative compensation. An employee will receive his or her vested shares upon departure from the company. In a privately held company, the company is obligated for a certain period of time to repurchase the employee's shares for fair market value. In a publicly traded company, employees may sell their distributed shares on the market.

Suitability

There are several factors to consider in determining whether a company will benefit from an ESOP. The cost to set up an ESOP is typically $30,000 to $40,000. The 25% payroll limit on contributions should be considered with the dollar amount that the ESOP would need to borrow to obtain the company shares. In addition, management must be comfortable with a collective ownership environment. These employee benefit plans are most often used in small to midsized privately held companies with at least 15 employees. Today there are approximately 10,000 ESOPs in place covering over 11 million employees.

***By John E. Schembari**, Partner*

Implementation of Revised Employment Eligibility Verification Form I-9 Delayed

U.S. Citizenship and Immigration Services (formerly INS) ("USCIS") recently released a new version of Form I-9, Employment Eligibility Verification. The new form is the result of regulations changing the types of documents acceptable for employment verification purposes. The regulations as originally written required employers to begin using the new Form on February 2, 2009. On the day of President Obama's inauguration, however, Chief of Staff Rahm Emanuel issued a memorandum directing department and agency heads to consider extending the effective date for any regulations that have yet to take effect so that President Obama's appointees and designees may review them. On January 30, 2009, USCIS did just that. Implementation of the new I-9 regulations is officially delayed until April 3, 2009 to allow the Department of Homeland Security time to further review the revised rule. Until that time, employers should continue using the previous Form.

Although the effective date is delayed, now is a good time to become familiar with the soon-to-be-implemented changes. The most noteworthy change to the new Form I-9 is the addition and deletion of several documents from the Lists of Acceptable Documents. Specifically, after April 3, 3009, employers will no longer be able to accept Forms I-688, I-688A and I-688B (Temporary Resident Card and older versions of the Employment Authorization Document) and will no longer be able to accept expired documents. The revisions also add to List A foreign passports containing specially marked machine-readable visas and documentation for certain citizens of the Federated States of Micronesia ("FSM") and the Republic of the Marshall Islands ("RMI"). Other than the types of documents that employers may accept, the updated Form I-9 should be completed in the same manner as the previous version.

By Ashley J. Shaneyfelt,
Associate

About This Edition's Authors

Eric Kendall Banks, of counsel, primarily represents clients with labor and employment problems. He has successfully defended numerous corporate and institutional clients involved in complex cases. Mr. Banks has appeared in state and federal trial and appellate courts throughout the United States.

Stacia G. Boden focuses on disputes involving allegations of discrimination, harassment and retaliation and often counsels employers on day-to-day employment issues. Most recently, she has defended employers in wage-and-hour and FLSA violations.

Mark A. Pemberton focuses his practice on employment law, employment litigation and general civil litigation.

Alan L. Rupe is a trial lawyer certified by the National Board of Legal Specialty Certification (formerly known as the National Board of Trial Advocacy) and a member of the American Board of Trial Advocates and the Litigation Council of America. He chairs Kutak Rock LLP's National Employment Practice Group. Recognized for his distinctive courtroom style, skilled advocacy and personal involvement in his clients' cases, Mr. Rupe brings to the table more than 30 years' experience in advising clients and in litigation. He has served as lead counsel in more than 120 civil jury trials.

John E. Schembari, Chair of the Employee Benefits Practice Group, concentrates his practice primarily in ERISA and employee benefits law. He works with retirement plans, employee stock ownership plans, health plans, fiduciary issues, executive and incentive compensation, ERISA litigation, Taft-Hartley funds, governmental plans and general retirement plan and welfare plan compliance/administrative matters.

Mr. Schembari has been selected by his peers since 2007 for the Best Lawyers In America listing for Employee Benefits Law and also has a peer review rating of "AV" by Martindale-Hubbell.

Ashley J. Shaneyfelt focuses her practice on employment litigation and general civil litigation. Prior to attending law school, Ms. Shaneyfelt worked in human resources, gaining experience in workers' compensation, avoidance and defense of discrimination claims, Family Medical Leave Act, employee counseling and other HR activities. She is an associate in the Wichita office.

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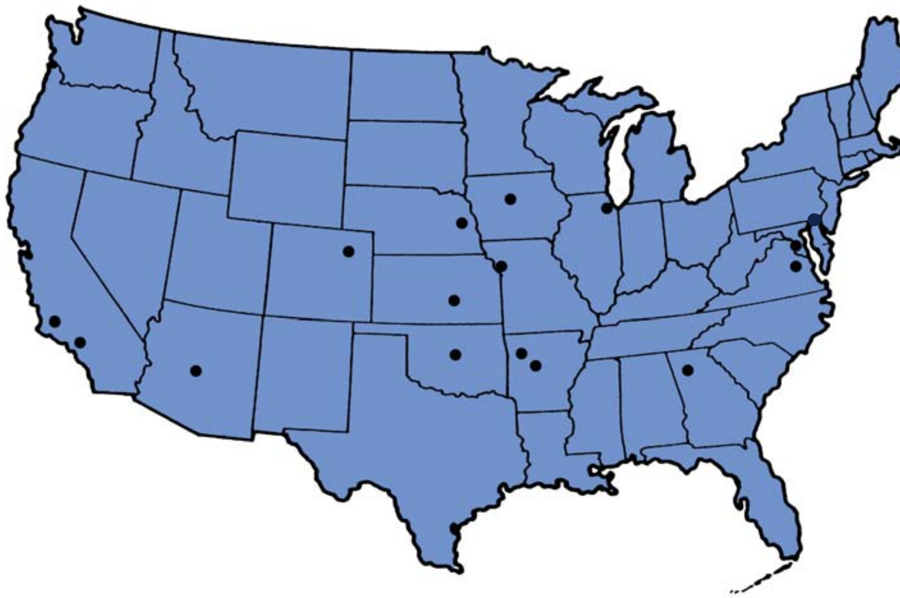

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Kutak Rock LLP's law practice embraces a wide array of legal disciplines, including general corporate practice, litigation, tax, government relations, corporate finance, banking, real estate, telecommunications, health care, bankruptcy, insurance, public finance and environmental law. Founded in Omaha in 1965, the firm has expanded to 16 offices nationwide. The firm's more than 400 attorneys direct their individual professional skills toward the common goal of providing the firm's clients with excellent, comprehensive legal services.

For more employment law news and information, check our Web site: www.KutakRock.com.

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