PERSPECTIVES

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Significant Changes Made in Iowa's "Wage Discrimination" Law

by RUSSELL L. SAMSON

On April 28, 2009, Governor Culver signed into law Senate File 137. The legislation is titled "a bill to provide that wage discrimination is an unfair employment practice under the Iowa Civil Rights Act, and providing an enhanced remedy."

Employers with any degree of familiarity with the provisions of the Iowa Civil Rights Act may have wondered about the need for legislation to add "wage discrimination" to the types of employment discrimination protected under the state law. In fact, such discrimination had been prohibited for years. This law, however, takes the general standards of the federal Equal Pay Act and incorporates them into a new "Section 6A" of the Iowa Civil Rights Act.

Specifically, the new legislation, which will take effect on July 1, 2009, incorporates the familiar "paying wages to such employee at a rate less than the rate paid to other employees who are employed within the same establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" language that has been in the federal law for many years. The provision that is being added to the Iowa Civil Rights Act is not, however, limited to "sex," as is the federal Equal Pay Act. Rather, the prohibition extends to all classes or bases protected under the state law: age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability.

More than ten years ago, the Iowa Supreme Court explained the difference between the "no discrimination in pay" requirements of the federal and state civil rights acts and the federal Equal Pay Act:

> *Unless the employer establishes one of the affirmative defenses* recognized in the statute, a showing of wage disparity between employees of different gender performing the same tasks *establishes liability as a matter of law*. Unlike Title VII and the employment discrimination provisions of chapter 216, which require a showing of intent to discriminate based on gender, the *Equal Pay Act requires no showing of discriminatory intent.*

Bd. of Supervisors v. State Civ. Rights Comm'n., 584 N.W.2d 252, 256 (Iowa 1998). That is, assuming the Iowa Supreme Court will turn to constructions under the federal EPA in construing the new provisions of the Iowa Civil Rights Act, it will no longer be sufficient for a defendant employer to articulate a legitimate, non-discriminatory reason for the employment action. Rather, the defendant employer *must prove* that the pay differential was based on a factor other than one protected under the state civil rights act. This suggests there will be fewer cases decided on summary judgment under this amended law.

In Iowa there is no legislative history – no committee reports, no records of debates, etc. Thus, there is an assumption that the Iowa Supreme Court will turn to construction of the federal Equal Pay Act when attempting to ascertain the intent of the Iowa General Assembly. On that assumption, employers should be mindful that the word "equal," as used in the EPS's standard of "*equal* work on jobs . . . *equal* skill, effort and responsibility," has been consistently interpreted by state and federal courts to mean that the jobs do not need to be identical, but rather only "substantially equal." Jobs may be compared even if they are not identical.

Is the job of University of Iowa head women's basketball coach Lisa Bluder "substantially equal" to that of University of Iowa head men's basketball coach Todd Lickliter? S.F. 137 adds a provision to the Iowa Civil Rights Act with regard to "wage discrimination" claims that the employer "shall not remedy the violation by reducing the wage rate of any employee." Are coaching salaries going to increase markedly? The law does require that the individuals be employed at the "same establishment." But Iowa State's "Cyclone Athletics" website indicates that head women's basketball coach Bill Fennelly is chronologically older than head men's basketball coach Greg McDermott. Athletics may be a facetious example, but consider how many individuals may claim that the skill, effort and responsibility of their jobs is "substantially equal" to someone else's at their place of employment. The point of these questions is that in the future an employer is going to be required to "plead and prove" one of the affirmative defenses listed in the statute.

The second aspect of S.F. 137 is a change in what some have called the "statute of limitations" for allegations of wage discrimination. With regard to claims of "wage discrimination" under "new" Iowa Code Section 216.6A(2), S.F. 137 provides that an unfair or

discriminatory practice occurs, in part, "when an individual is affected by application of a discriminatory pay decision or other practice, *including each time wages, benefits, or other compensation is paid,* resulting in whole or in part from such a decision or other practice."

This standard appears to be patterned after the one contained in the first piece of legislation signed by President Obama after he was sworn into office, Public Law 111-2 – the "Lilly Ledbetter Fair Pay Act of 2009."

Given the lack of any meaningful debate in the Iowa General Assembly while the legislation was pending, one wonders if the proponents of the legislation appreciated what they were doing, or what they may have thought the appropriate response of employers should be. Does an employer have to pay employees lockstep pay and completely abolish "percentage pay" increases? If two people are rated today identically but have different rates of compensation, is the employer to increase one more than another so they are paid exactly the same?

On December 10, 2008, the United States Supreme Court heard oral arguments in a case concerning several females who were denied pension service credits for periods when they were on pregnancy leave of absence between 1968 and 1976 – a period prior to the passage of the federal Pregnancy Discrimination Act. Following the passage of that federal legislation, their employer immediately changed its pension plan to credit time off taken for pregnancy leaves just as it had for other temporary disability leaves. Literally decades later, their employer calculated the pensions due these female former employees based on the years of service that had been credited. The plaintiffs in the case are now collecting pension benefits.

Following the enactment of the federal Lilly Ledbetter Fair Pay Act of 2009, the plaintiffs argued to the United States Supreme Court that the passage of the federal LLFPA now requires that each payment received under the pension benefit plan constitutes a new violation of the non-discrimination laws. One can appreciate similar types of arguments being made against, for example, IPERS, where benefits are calculated based on earnings while actively employed.

On May 18, 2009, the United States Supreme Court issued its decision. The justices split seven to two, with the majority decision written by retiring Justice David Souter. The majority concluded that the pension payments were made in conformity with a bona fide seniority system, and that the employer's actions in not giving service credits for time not worked while on pregnancy leave were lawful at the time they were undertaken. (That is, the seniority system is "bona fide" – there were no discriminatory terms either at the time of the action of not giving credits or at the time of calculating pensions, which was done solely on service credits accumulated). Quoting from the language of the LLFPA, the Court responded to the argument that the federal statute revived the plaintiff's cause of action:

> For the reasons already discussed, AT&T's pre-[federal Pregnancy Discrimination Act] decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been "affected by application of a discriminatory compensation decision or other practice." §3(A), 123 Stat. 6.

That certainly suggests that an action that *was* unlawfully discriminatory at the time could be revived by, for example, receipt of a pension payment, where the calculation of the pension was in some manner based upon the alleged discriminatory decision.

The federal Ledbetter legislation, the LLFPA, contains a provision that liability may accrue and an aggrieved person may obtain relief *"including recovery of back pay for up to two years preceding the filing of the charge,* where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge." S.F. 137 does *not* contain a similar provision. Indeed, S.F. 137 appears to leave the door open completely.

S.F. 137 adds a new subparagraph to Section 216.15(8), which defines "damages" for an injury caused by "wage discrimination." It provides that a plaintiff will recover (in addition to court costs and reasonable attorney fees), an "amount equal to *two times the wage differential* paid to another employee compared to the complainant *for the period of time for which the complainant has been discriminated against."* That is, the period of time appears to be completely open-ended. If, however, the plaintiff proves a "willful violation," that multiplier for damages goes from two to three times the wage differential – again, "for the period of time for which the complainant has been discriminated against."

It would appear that any time there is a wage disparity between two individuals of different ages (so long as both are over 18), or two individuals of different religions, or two individuals who have some difference in some basis protected under the Iowa Civil Rights Act, the potential for a lawsuit exists. An employer may be called upon to plead and prove one of the affirmative defenses listed. And that "plead and prove" may be required literally decades after decisions were made – and the people who made the decisions are not only no longer employed, but may no longer be living.

Documentation may become extremely important for employers in the future. An employer with foresight would today be seeking to assure that what is done today, and why, is well documented in records that may be required in the future, and that those records are available in the future.

If you have questions regarding wage discrimination laws, please contact a member of the Firm's Employment and Labor Law Group or the Dickinson attorney with whom you normally work.

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