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Special Issue



Anti-Discrimination Legislation

by John T. Landwehr and Lynn Vuketich Luther

President-elect Obama championed several key pieces of anti-discrimination legislation while in the Senate and on the campaign trail. This article summarizes proposed legislation and explains how it will affect employers if it becomes law under the Obama administration.

LILLY LEDBETTER FAIR PAY RESTORATION ACT

Federal anti-discrimination laws provide that an instance of discrimination must be reported within 180 days of its occurrence. Plaintiff Lilly Ledbetter (*Ledbetter v Goodyear Tire & Rubber Co.*) alleged that over the course of 20 years, her supervisors gave her bad evaluations because she was a woman, thus suppressing her wages. Ms. Ledbetter sought damages for the entire period of her employment. The United States Supreme Court rejected her claims, holding that only decisions made within 180 days of filing the claim were actionable. The court held that Ms. Ledbetter needed to bring charges at the time decisions about her rate of pay were made.

The Lilly Ledbetter Fair Pay Restoration Act of 2007 would amend federal law to allow claims brought within 180 days of receiving any paycheck affected by a discriminatory pay decision, no matter how far in the past an act of discrimination allegedly occurred.



This bill was cosponsored by President-elect Obama and forty-six other senators and passed the House. This legislation, though possibly well-intended, will allow plaintiffs who have sat on their claims for several years to file claims after evidence has gone stale or disappeared. Despite the looming unfair evidentiary issues and the prospect of windfall profits for plaintiff's attorneys, the majority in Congress appears poised to pass the bill during the next term.

EQUAL REMEDIES ACT AND CIVIL RIGHTS ACT OF 2008

The Equal Remedies Act and the Civil Rights Act of 2008, address a variety of damage-related issues of significant consequence to employers. Current law imposes a \$300,000 cap on compensatory damages and punitive damages for violations of many federal anti-discrimination laws. The Equal Remedies Act proposes to lift that cap, thereby exposing employers to the often irrational decision-making of juries. These Acts also revise the Age Discrimination in Employment Act to permit older workers to file long-forbidden disparate impact claims. The Acts would prohibit mandatory arbitration clauses in employment contracts and authorize compensatory and punitive damages for claims of retaliation in wage and hour disputes as well. Finally, the Acts would amend immigration laws to permit undocumented workers to pursue back pay awards in termination cases.

FAIR PAY ACT OF 2007

The Fair Pay Act greatly expands existing law governing wage discrimination. The legislation creates an "equal worth" system. Under this system, employers must pay employees in a job dominated by employees of a particular sex, race or national origin at the same wage rate at which the employer pays employees in another job dominated by employees of a different sex, race or national origin where the jobs are equivalent. The notion of "equivalent" jobs is amorphous at best and invites protracted, frivolous and expensive litigation. While employers will be able to vary wage rates based on seniority systems, merit systems, quality standards and production standards, every instance of wage differential becomes suspect. Aggrieved employees will have the choice of filing a charge with the Equal Employment Opportunity Commission (EEOC) or proceeding directly to federal court. The bill will permit compensatory and punitive damages, permit the recovery of expert witness fees and allow plaintiffs to pursue traditional class actions instead of the more restrictive opt-in collective action mechanism currently used for Equal Pay Act and Fair Labor Standards Act actions.

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EMPLOYMENT NON-DISCRIMINATION ACT OF 2007

The Employment Non-Discrimination Act of 2007 (ENDA) would prohibit employment discrimination on the basis of sexual orientation. ENDA prohibits employers from discriminating against an individual on the basis of actual or perceived sexual orientation, including actions based on the actual or perceived sexual orientation of a person with whom the individual associates or has associated. Mark A. Shaw and Holly L. Papalia address this legislation and how it may affect employment policies and procedures in a separate article entitled "2009 Employment Policies and Procedures Update." It is available on our web site.

Should you have any questions or would like more information on these legislative matters, please contact Mr. Landwehr or Ms. Luther at our Toledo office (419-241-6000).



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