WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK

PRESIDENT OBAMA IMPLEMENTS NEW PRO-LABOR EXECUTIVE ORDERS

Thomas M. Lucas

On January 30, 2009, President Obama demonstrated his commitment to support organized labor by signing three new Executive Orders which will have dramatic impact on labor relations policy of contractors performing on federal contracts. In fact, one of these new Orders will dictate who a contractor must hire when assuming performance as a successor on a federal service contract.

The *Notification of Employee Rights under Federal Labor Laws* reversed a prior Order of the Bush Administration which required contractors to post notices which advised employees of their right *not* to join a union, and *not* to pay certain union dues used by labor unions for political activities. The first of the new Obama Administration Executive Orders requires all federal contractors to post a workplace notice advising employees of their right under the National Labor Relations Act to form or join unions and to engage in collective bargaining. The Order cites the federal labor policy *encouraging* collective bargaining and the right of workers to exercise their freedom of association, self-organization, and to designate a union representative of their choosing. In other words, a notice to employees must be posted to affirmatively advise them of their right to join unions; a measure which for years had been imposed as a remedial measure if an employer had been found by the National Labor Relations Board to have interfered with those employee rights. The Department of Labor will design a new notice within 120-days, and contractors will be required to post the notices, under penalty of possible debarment.

The *Nondisplacement of Qualified Workers under Service Contracts Executive Order* dictates a dramatic change in labor relations policy for contractors performing as a successor on a federal service contract. For years, the law has been that a successor, or "follow-on" contractor, was free to hire the workforce of its choice; from among the former contractor's employees or any other source. Now when a service contract expires and the follow-on contract is awarded for the same services at the same location, the employees of the prior contractor will have a "right of first refusal" in positions for which they are qualified. Supervisors and managers will not have this right.

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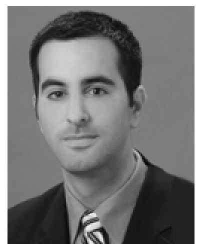
PRESIDENT OBAMA SIGNS THE LILLY LEDBETTER FAIR PAY ACT

David A. Kushner



On January 29, 2009, President Obama signed into law the "*Lilly Ledbetter Fair Pay Act of 2009*" (the "Ledbetter Law"), which responds to and rejects the United States Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire and Rubber Co*. As discussed more fully below, the Ledbetter Law is likely to lead to a significant increase in lawsuits alleging that a plaintiff was paid less because of his or her race, gender or other protected classification.

Background

In our 2007 summer issue of the *Employment Law Outlook*, we included an article about the Supreme Court's decision in *Ledbetter*. We were pleased to report on the *Ledbetter* case because it appeared obvious that the decision would limit our clients' exposure to wage disparity lawsuits. Unfortunately, with the passage of the Ledbetter Law, which specifically rejects the *Ledbetter* decision, our 2007 good news appears to have been short lived.

In the *Ledbetter* case, the plaintiff had worked as a manager in an Alabama tire plant for approximately 20 years. Goodyear adjusted the plaintiff's salary annually based on her supervisor's subjective rankings of her performance. Unbeknownst to the plaintiff, her performance reviews generally placed her near the bottom of the rankings, and she therefore received smaller salary increases than many of her male co-workers. By the date of her retirement in 1998, these smaller annual raises resulted in a large pay disparity between the plaintiff's compensation and the wages received by virtually all of her male co-workers.

After retiring from Goodyear, the plaintiff filed a charge of discrimination with the EEOC in which she alleged that Goodyear had unlawfully discriminated against her based on her gender by paying her less than similarly situated men. The case went to trial, and the jury returned a large verdict for the plaintiff. The jury made clear that it intended its verdict to compensate plaintiff for every lower paycheck she received dating all the way back to 1979.

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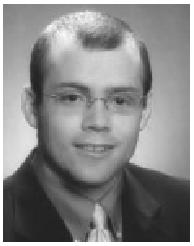
THE VALUE OF WORKERS' COMPENSATION COVERAGE FOR INDEPENDENT CONTRACTORS

Robert L. Foley & Stephen R. Jackson



Companies often utilize independent contractors to address rarely occurring tasks and issues. These often take the form of small maintenance and construction projects such as painting of the interior or exterior of company facilities or minor construction projects such as renovation to a workspace or minor additions. Problems may arise for small business owners in these situations, especially when they do not maintain Workers Compensation insurance coverage. Generically, Virginia law requires companies employing more than three employees to maintain insurance for Workers Compensation claims. Independent contractors, such as the painter who is hired once every few years or the guy hired to power-wash the side of your building, do not usually qualify as employees for purposes of calculating the number of employees regularly employed by a business.

While the provisions of the Virginia Workers' Compensation Act only apply to businesses employing three or more employees, and independent contractors do not count as part of that total, small business owners often end up entangled in the legal minefield of Worker's Compensation law if an independent contractor, or an independent contractor's employee, suffers an injury on the job site. Instead of having the planned monthly expenditure of paying for Workers Comp insurance, small business owners end up faced with a significant expense of defending the meritless claim, while facing the potential of having to pay compensation to the injured worker for up to 500 weeks! However, had these same small business owners maintained a Workers' Compensation insurance policy, the insurance company takes the responsibility for covering the costs associated with defending the claim. Given the risks associated with failure to maintain Workers' Compensation insurance coverage, every small business owner should consider maintaining a Workers' Compensation insurance policy.

Some small business owners insist upon contractual agreements with their independent contractors that explicitly acknowledge that the responsibility for maintaining Worker's Compensation insurance lies solely with the independent contractor. This is not a fool-proof defense to a potential claim for Workers' Compensation coverage from an independent contractor, or the independent contractor's employees, but will offer a good first line of defense to such claims. However, such a contractual agreement will not prevent the small business owner from expending valuable time and money defending a claim brought by an injured independent contractor.

Virginia law applies a four-part test to determine whether or not an individual is an employee or an independent contractor. While a written agreement between the parties certainly factors into a court's determination, the most important factor is the hiring party's degree

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SUPREME COURT EXPANDS RETALIATION PROTECTION TO INTERNAL INVESTIGATIONS

Bryan C. R. Skeen

Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against an employee for either (1) opposing workplace discrimination or harassment ("opposition protection"), or (2) participating in an investigation into reported discrimination or harassment ("participation protection"). Until recently, however, several circuit courts held that an investigation had to be pursuant to an official pending charge of discrimination from the Equal Employment Opportunity Commission ("EEOC"). This limited interpretation of Title VII's retaliation protection meant that employees who participated in a company's own internal investigation were not eligible for statutory protection.

On January 26, 2009, the United States Supreme Court expanded Title VII's antiretaliation protection and ruled unanimously that participation in an employer's internal investigation, regardless of the pending status of an EEOC charge, was protected action as it would constitute an opposition to workplace discrimination or harassment. The Court did not address whether such action would also be protected under Title VII's participation protection.

In *Crawford v. Metro Gov't of Nashville & Davidson County, Tenn.*, Crawford, a 30-year-old school district employee, alleged that she was discharged in retaliation for cooperating in her employer's internal investigation against the school district's employee relations director. In response to direct questions from her employer, Crawford reported several specific instances of sexual harassment against her and other employees on the part of the director. Although the school district determined that the director engaged in inappropriate and unprofessional behavior, he was never disciplined. Conversely, the school district terminated Crawford shortly thereafter for embezzlement and drug use, charges that were never proved.

In reversing the decision of the Sixth Circuit Court of Appeals, the Supreme Court held that statements made by an employee during the course of an internal investigation constituted "opposition" to workplace discrimination and harassment. Basing this conclusion on a lengthy analysis of the word "oppose," the Court found that opposition was not limited to affirmative acts instigated by the employee, but that opposition also included "someone who has taken no action at all to advance a position beyond disclosing it." The Court noted that a rule that would protect an employee who reports discrimination on her own initiative but not the same employee who reports the same discrimination in the same words when asked a question by her employer would be "freakish."

Now more than ever, employers should analyze carefully any prospective disciplinary actions to be taken against individuals who participated in investigations, both internal and external, related to workplace discrimination or harassment. ■

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Goodyear appealed the decision based on Title VII's requirement that a plaintiff file an EEOC Charge of Discrimination within 180 days of the date on which a discriminatory action occurs. (Courts in some jurisdictions, including Virginia, require that a Charge be filed within *300* days of a discriminatory act.) According to Goodyear's argument, the multiple decisions to set the plaintiff's pay were all made outside of this 180-day window, and were therefore barred by the statute of limitations. The Eleventh Circuit Court of Appeals agreed with Goodyear and reversed the trial court's decision, and the plaintiff appealed the decision to the Supreme Court.

In an extremely close decision which was decided along party lines, the Supreme Court agreed with Goodyear, holding that every company decision to award an employee a smaller annual pay increase is a discrete and separate act of discrimination. According to the Supreme Court, each such decision triggers its own 180-day statute of limitations, and if the plaintiff fails to file an EEOC charge within 180 days of each decision to give her a lower pay increase, the plaintiff forever loses her right to bring suit based on this decision.

The Supreme Court specifically rejected the plaintiff's argument that a gender-based wage disparity constitutes a continuing violation and that each lower paycheck is a separate act of discrimination which restarts the statute of limitations. Thus, the Supreme Court's decision made it virtually impossible for a plaintiff to establish a Title VII pay discrimination case based on a pay disparity which resulted from a decision made more than 180 (or 300) days before the plaintiff filed her EEOC charge. Writing in dissent, Justice Ginsberg argued that the unlawful practice under Title VII should be considered "the *current* payment of salaries infected by gender based discrimination" even if the initial "infection" occurred long before the plaintiff filed a charge. In her dissent, Justice Ginsberg specifically invited Congress to correct the Court's "parsimonious reading of Title VII."

> **The Ledbetter Law provides that the statute of limitations restarts every time an employee receives a pay check.**

The Lilly Ledbetter Fair Pay Act of 2009

In 2009, Congress answered Justice Ginsberg's call by passing the Ledbetter Law. The Ledbetter Law amends the major discrimination statutes, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, to provide that the statute of limitations restarts every time an employee receives a pay check which is based on a discriminatory compensation decision, *regardless of when that decision occurred*.

Thus, if an employee can prove that a now deceased manager gave her a lower pay increase in 1980 because of her gender, and that her pay is still lower than similarly situated males as a result of this 1980 discriminatory decision, that employee is *not* barred by the statute of limitations, because each pay check is considered a separate discriminatory act. This creates a potential nightmare for the employer, which likely does not maintain pay records from 1980, and is unlikely to know why a particular pay decision was made at that time.

Impact on Employers

The Ledbetter Law is certain to lead to an increase in wage disparity litigation. Moreover, employers can now expect to be confronted with lawsuits which are based (at least in part) on pay decisions made years or even decades before the lawsuit was filed. It is now more important than ever that employers train their managers to document the specific reasons for every pay decision or evaluation which affects pay. We also suggest that employers conduct a routine statistical analysis of the wages paid to employees within the same job classifications to ensure that no artificial disparities exist for any particular protected class. ■

THE VALUE OF WORKERS' COMPENSATION COVERAGE FOR INDEPENDENT CONTRACTORS

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of control over how the individual performs the tasks assigned. The scope and nature of the required control depends on the type of tasks allocated to the individual. Weighing those factors necessitates a detailed and expensive review of the underlying facts to determine whether or not the individual counts as an independent contractor or an employee for the purposes of Workers' Compensation coverage. Thus, even with a written agreement between the small business owner and the independent contractor, Virginia law could still assign responsibility for the independent contractor's Workers' Compensation claim to the small business owner.

When examining the scope of control exerted over an individual, the Commission will examine such issues as who has the ability to fire the individual, who provides the orders on specific tasks to be performed by the individual in order to achieve their ultimate goal, how the individual is paid, who supplies the tools and materials of that individual, and who decides the hours that such an individual performs his tasks. The burden of such a lengthy and costly review of the underlying facts to determine whether or not the individual should be classified as an independent contractor or an employee can be removed from the shoulders of a small business owner if the business maintains Workers' Compensation insurance. In such a case, the burden to defend the Workers' Compensation claim falls to the insurance company and not to the small business owner. By maintaining such insurance, the small business owner can control and budget the costs associated with potential Workers' Compensation claims. Through proper planning and forethought, small business owners can better allocate their costs and avoid the risk of a significant expenditure in defending, and potentially paying a claimant for, a Workers' Compensation claim. ■

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On service contracts where the predecessor's employees were represented by a union, this Order will almost certainly result in that bargaining relationship being "transferred" to the new contractor. The labor law doctrine of "successorship" provides that if a majority of the new workforce is hired from the former contractor's unionized workforce, the obligation to recognize and bargain with the union follows those employees to their new employment. This Executive Order creates employment security for qualified employees working on government service contracts, but also serves to protect their bargaining representatives as well.

Finally, the *Economy in Government Contracting Executive Order* declares that any costs incurred by a federal contractor to "persuade" employees in a union organizational context may not be reimbursed under the contract. For example, the costs of preparing and distributing materials, employees' time spent in meetings, fees of consultants or legal counsel, or planning or conducting campaign-related activities by managers will not be allowable expenses. This Order will mean that virtually no expenses incurred in activities by management to convey a "union-free" message will be an allowable expense under federal government contracts. This may effectively extinguish employers' right to discuss these issues with employees while at work, unless the contractor pays employees out of their own pocket for everyone's time, or employees agree to voluntarily remain at work off-the-clock.

Practice Pointer: These Orders do not have the widespread impact of the provisions of the much-anticipated Employee Free Choice Act, but are obviously designed to promote union organizing, curtail federal contractors' right of 'free speech' under the National Labor Relations Act, and to extinguish follow-on service contractors' right to select their own workforce. They may also be a sign of legislative action to come from this Administration showing its commitment to assist labor unions to regain a stronger presence in the economy. ■

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