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EMPLOYMENT LAW DIGEST

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SUPREME COURT TIGHTENS EEOC CHARGE FILING DEADLINE

The Supreme Court of the United States recently held in *Ledbetter v. Goodyear Tire & Rubber Co.* that a plaintiff cannot successfully pursue a claim of disparate treatment for allegedly unequal pay received during the statutory limitations period when the disparity results from an intentionally discriminatory pay decision outside of the limitations period. The Court held that charges must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of each allegedly discriminatory pay decision. Because Texas is a deferral state the time period for filing a charge is actually 300 days. The period for filing a charge of employment discrimination with the EEOC begins when the discriminatory act occurs, not when subsequent nondiscriminatory acts carry forward the effects of the original, past discriminatory action.

In *Ledbetter*, Lilly Ledbetter worked for Goodyear Tire and Rubber Company from 1979 to 1998. She submitted a questionnaire to the EEOC in March of 1998, which alleged acts of sex discrimination. She filed a formal EEOC charge in July of the same year. After taking early retirement in November of 1998, Ledbetter sued, claiming Title VII pay discrimination and violations of the Equal Pay Act. Ledbetter later abandoned her Equal Pay Act claim, seeking relief under Title VII alone.

Ledbetter introduced evidence that during the course of her employment, several supervisors gave her poor evaluations because of her sex and that as a result of these evaluations, her pay was not increased as much as it would have been had she been given fair evaluations. She also presented evidence that toward the end of her employment, she was earning significantly less than her male colleagues. Goodyear maintained that the evaluations were nondiscriminatory. The jury found in favor of Ledbetter. On appeal, Goodyear argued that Ledbetter's pay discrimination claim was barred by the statute of limitations with regard to all pay decisions made before September 26, 1997—that is, 180 days before the filing of her EEOC questionnaire. The Court of Appeals for the Eleventh Circuit held that a Title VII pay discrimination claim could not be based on any pay decision that occurred prior to the last pay decision affecting the employee's pay during the EEOC charging period. The appellate court then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within the charging period.

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The Supreme Court of the United States granted certiorari to determine whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination where the disparate pay is received during the statutory limitations period, but is the result of allegedly discriminatory pay decisions made outside of the limitations period. The Court held that a plaintiff may not successfully bring such a claim.

Title VII makes it illegal for employers to discriminate against any individual because of the individual's sex among others. The statute provides that any person wishing to challenge an employment practice must first file a charge with the EEOC, and the charge must be filed within 180 days (or 300, depending on the State) after the alleged unlawful employment practice occurred. EEOC charges must be timely filed.

Ledbetter argued that each paycheck she received during the charging period was a separate act of discrimination. She also claimed that Goodyear's 1998 decision to deny her a raise was unlawful because it carried forward intentional discrimination from previous years. The Court held that both of her arguments failed because discriminatory intent is a required element of all claims based on disparate treatment, and Ledbetter did not claim that the Goodyear decision makers acted with actual discriminatory intent when they issued her paychecks or when they denied her the raise. Furthermore, Ledbetter's argument that the 1998 decision "carried forward" the effects of prior, uncharged discrimination failed.

The Court held that the EEOC charging period is triggered when a discrete, unlawful practice occurs. It held that a new violation does not occur, and a new charging period does not begin, upon the occurrence of subsequent nondiscriminatory acts that involve adverse effects resulting from the past discrimination. The EEOC charging period runs from the time when the discrete act of alleged intentional discrimination occurs, not from the date when the effects of the practice are felt. The Court clarified that because a pay-setting decision is a discrete act, the period for filing an EEOC charge begins when the act occurs. Prior Supreme Court case decisions clearly set forth the rule that the continuing effects of pre-charging period discrimination do not make out a present Title VII violation. Moreover, a discriminatory act that is not made the basis of a timely charge is merely an unfortunate event in history that has no present legal consequences.

Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. The rule is clear that when an employee alleges a series of discrete discriminatory acts, a timely EEOC charge must be filed with respect to each discrete alleged violation. Ledbetter did not do so. The fact that pre-charging period discrimination adversely affects the calculation of a neutral factor that is used in determining future pay does not mean that each new paycheck constitutes a new violation so as to restart the EEOC charging period.

Ledbetter's attempts to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision did not work. To do so would shift the intent from the original intentionally discriminatory action to a later one that was carried out without discriminatory intent. The focus must be on current violations, not on the carrying forward of past acts of discrimination. An action not comprising an employment practice with discriminatory intent is not separately chargeable just because it is related to some past discrimination. Any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period proscribed by statute. Because Ledbetter did not timely file EEOC charges relating to her employer's discriminatory pay decisions in the past, she cannot now maintain a suit based on that past discrimination. (*Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (U.S. 2007).)

This decision is an interesting one from the standpoint that the Court's ruling could apply to all forms of discrimination under Title VII which is race, national origin, religion, not just gender. The decision could also apply to other statutes which is the Age Discrimination Employment Act and the Americans With Disabilities Act. This does not mean, however, that employers can relax and do what they want if they have "gotten away" with a questionable employment decision whose adverse affects are just now being felt years after the fact. There are plenty of courts in Texas which could allow an aggrieved employee to go forward with their discrimination claim even if they have not timely filed there EEOC charge.

Uniform Enforcement of Absence Control Policy is Not Retaliatory Discharge

After an employee was terminated in accordance with an absence control policy that allowed employees a certain number of absences in excess of FMLA leave during each twelve month period, the employee brought a retaliatory discharge claim under Chapter 451 of the Texas Labor Code.

The terminated employee had exceeded the absence limit because of a disabling, work-related injury, and he claimed that he was fired for filing a workers' compensation claim. The court of appeals recognized a well-established Texas law that an employer's uniform application of an absence control policy is not unlawful retaliation even if it results in the termination of an employee disabled because of a work-related injury for which he is receiving benefits. Under the Texas Labor Code, if a defendant employer shows that the plaintiff employee's discharge resulted from the uniform enforcement of its reasonable absence control policy, then there is no retaliatory discharge as a matter of law.

The court held that the employer conclusively proved that the termination was required by the uniform enforcement of a reasonable absence control policy. While the plaintiff employee argued that the employer had to establish the "reasonableness" of the policy, the court disagreed, stating that an absence control policy is facially reasonable so long as it does not discriminate between absences due to injuries covered by workers' compensation and absences due to other causes. In this case, the employer's policy did not discriminate, and the court upheld the employer's action in terminating the employee. (*Ramirez v. Encore Wire Corp.*, 196 S.W.3d 469 (Tex. App.-Dallas 2006).)

Employees claiming to be retaliated against for filing a workers' compensation claim continue to be one of the more common claims seen by this firm. One of the most effective ways to defend this type of claim is to have a uniformly applied absence control policy which places a cap or maximum amount of time that an employee can be away from work before they are taken off the payroll. The key concept however is the fact the policy must be *uniformly* applied – that is any employee regardless of the reason for their absence who is gone from work more than the designated number of days must be taken off the payroll even if they are your best or most popular employee. Otherwise, your own policy could be used against you in court.

"Negative Attitude" Not Sufficient for Retaliatory Discharge Claim

A school bus driver filed a workers' compensation claim after she was injured on the job but failed to file an application form for placement on a list to return to duty, which was required under her employer's absence control policy. Her employer placed her on indefinite leave, and thereafter she brought suit claiming the employer retaliated against her for filing a workers' compensation claim in violation of the Texas Labor Code.

The court concluded that the employee had failed to raise a fact issue regarding the employer's reason for placing her on leave and presented no evidence that her filing of the workers' compensation claim was linked to such placement. Furthermore, the alleged "negative attitude" of certain personnel toward her workers' compensation claim was not enough to raise the issue of whether retaliatory intent was the cause of her discharge because the personnel in question had no authority over the plaintiff employee's employment status.

The court also concluded that the employer's policy of placing employees on indefinite leave after being absent for more than fifteen days was not a violation of the Workers' Compensation Act or public policy since the policy was uniformly applied to all employees, regardless of the reason for their absences. (*Williams v. Corpus Christi Indep. Sch. Dist.*, 2006 WL 2022502 (Tex. App.-Corpus Christi 2006).)

This case illustrates the danger of off-hand comments made by non-management personnel. Even though the employer prevailed in this case, it undoubtedly spent tens of thousands of dollars in attorney's fees and many hours defending a claim that could have been avoided. Off-hand comments about injured workers such as "they are faking it" or "I can't believe how much premiums are going to go up" as a result of the claim may be used as evidence of a discriminatory animus especially if it is made by management personnel.

DOL Guidelines Regarding Wage Deductions for Exempt Employees

The Department of Labor has made clear that employers who fine exempt employees for damaging company equipment or discipline exempt employees for not working a required number of hours per week risk losing the employees' exemption from overtime under the Fair Labor Standards Act.

Wage & Salary Deductions for Damaged Equipment

Under the FLSA, most employees must be paid at least the federal minimum wage for all hours worked and overtime pay of at one and one-half times the regular rate of pay for all hours worked in excess of 40 hours in a single workweek. However, there are certain exemptions from these requirements under the FLSA for employees who are employed in bona fide executive, administrative, or professional capacities.

In order to qualify for such exemptions, employees are required to meet primary duty requirements and be compensated on a salary or fee basis at a rate of not less than $445 per week. A "salary basis" employee is one who is paid a predetermined amount per pay period that is not subject to reduction based on variations in the quantity or quality of work performed. Additionally, with certain limited exceptions, exempt employees must receive their full salary in any week in which they work.

Improper deductions from the salaries of exempt employees can result in the loss of their exempt status. Such deductions are permissible in limited circumstances. Under the FLSA, these kinds of deductions are allowable only (1) when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability, (2) when an exempt employee is absent for one or more full days because of sickness or disability if the deduction is made in accordance with a bona fide policy, plan, or practice of providing compensation for salary lost because of illness, (3) to offset amounts employees receive as jury or witness fees or for military pay, (4) for penalties imposed in good faith for infractions of safety rules of major significance, or (5) for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. (29 C.F.R. § 541.602(b))

The Department of Labor has recognized that while deductions from the salaries of exempt employees are permissible in very limited situations, deductions for the loss, damage, or destruction of employer property are not permissible and will violate the salary basis requirement. This is true even in spite of agreements the exempt employees may have signed with their employers to authorize such deductions. Similarly, this rule also holds when an exempt employee is paid his or her full salary and is then required to make out-of-pocket reimbursements. These types of deductions or required reimbursements are impermissible salary deductions and may cause the loss of exempt status.

The bottom line is that when an employer provides equipment to employees to aid them in performing their jobs, the employer may not make salary deductions or require reimbursement from exempt employees for damage to that equipment and keep the exempt status of the employee. On the other hand, in terms of nonexempt employees, employers are allowed to require them to authorize deductions for damage, but deductions cannot be made if they will reduce the employees' wages below the required minimum.

Disciplinary Suspensions for Exempt Employees

One situation in which making deductions from the salaries of exempt employees is permissible is where there are unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. The DOL has clarified that a "workplace conduct rule" is a rule relating to workplace conduct rather than performance or attendance that applies to all employees regardless of exempt status.

According to the DOL, the number of hours worked by an exempt employee is a matter that can be agreed on by the employer and employee. Therefore, an employer can require an exempt employee to work more than 40 hours per week without jeopardizing his exempt status. Moreover, the employer can require an exempt employee to make up work time lost because of personal absences of less than a full day. However, the DOL makes clear that such rules are not considered "workplace conduct rules" because they do not apply to all employees and they relate to attendance rather than actual workplace conduct. This means that if an exempt employee fails to work the required number of hours or make up time missed under the employer's policy, the employer may not impose disciplinary suspension of one or more full days.

To summarize, employers can require exempt employees to work more than 40 hours in a week and make up time missed because of personal absences of less than a full day, but they may not impose unpaid full-day suspensions on such employees for violation of either of those rules without jeopardizing the employees' exempt status.

PREGNANCY DISCRIMINATION CLAIMS BECOMING MORE COMMON

Pregnancy discrimination claims are on the rise; in fact, studies show that pregnancy bias charges with the Equal Employment Opportunity Commission rose 39 percent from 1992 to 2005. Some legal experts blame the rising number of this kind of claim on "oversolicitous" employers who impose superfluous limitations on their pregnant employees. Many pregnancy discrimination claims are based on well-intentioned policies set by employers seeking to protect pregnant employees from too much physical strain or stress by limiting their business travel or by placing them in less physically demanding positions in the workplace.

The Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights Act of 1964, prohibits employers from such discrimination by refusing to hire or by discharging pregnant workers. Employers are also required under the Act to provide health care benefits to pregnant employees equal to those that are provided to other employees who are temporarily disabled.

Employers must understand that they cannot force a pregnant woman to take a less strenuous job just because she is pregnant. Furthermore, employers are not allowed to modify a pregnant worker's job unless there is a specific request from the pregnant woman herself or a doctor's note.

As many of you are painfully aware, times have changed and no good deed goes unpunished. Trying to help a pregnant female by giving her an easier job may actually land you in court. Treat any pregnant employee the same as you would any other employee unless that employee has requested an accommodation or provided a doctor's note placing restrictions on her work activities.

UPCOMING SEMINAR:

Human Resource Audits in Texas
August 10, 2007

Hilton San Antonio Airport Hotel
611 Northwest Loop 410
San Antonio, Texas

Registration: 8:00 a.m. – 8:30 a.m.
Session: 8:30 a.m. – 4:30 p.m.
Lunch Break: 12:00 pm – 1:00 pm (on your own)
Sponsor: Lorman Education Services

Reminder: Minimum Wage Increases

The federal minimum wage will increase to $7.25 per hour in three steps of seventy cents each beginning on July, 24 2007 as follows:

- Present minimum wage $5.15 hr.
- Effective 7/24/07—$5.85
- Effective 7/24/08—$6.55
- Effective 7/24/09—$7.25

According to the Texas Restaurant Association, the tip credit wage will not increase with any of the scheduled minimum wage increases and will remain at $2.13 hour.

New posters will be available from the Department of Labor's website which can be found at www.DOL.gov. Of course, posters will also be available from any of the numerous poster companies which will undoubtedly be contacting you in the very near future.

The July 24th date will most likely not be the first day of your pay period. Unfortunately, it is our understanding that even though the 24th may fall in the middle of your pay period, you must begin paying $5.85 for all minimum wage employees on that date.

EEOC Restoring Focus on Race Discrimination and Other Systemic Bias

The new chair of the Equal Employment Opportunity Commission, Naomi Earp, warns that employers should anticipate aggressive investigations of systemic bias and expect litigation by the commission. The EEOC is renewing its focus on systemic discrimination and will target its litigation on cases with broad impact.

Race and color discrimination will be a priority for the agency with the advent of a campaign known are ERACE—eradicating racism and colorism in employment. Earp notes that racial discrimination continues to be the primary allegation in EEOC charges.

Since 1992, retaliation charges have doubled. While employers often prevail on unsubstantiated claims of discrimination, they frequently lose on retaliation claims. In reacting to charges of discrimination, employers sometimes take action against the employee who made the allegation, which is then used as evidence of retaliation. One-third of all EEOC charges filed in 2005 included some element of retaliation.

Other trends the EEOC has noticed include an increased number of charges from immigrant workers and teenagers. Pregnancy discrimination claims are also on the rise, even in spite of a declining number of pregnancies among women in the workforce overall. Furthermore, disability and age discrimination claims are also increasing in frequency.

In its new approach to eradicating systematic discrimination, the EEOC plans to follow a "national law firm approach" after identifying a systematic discrimination case for litigation. This approach relies on expertise from EEOC lawyers across the nation. In order to avoid EEOC litigation, the agency advises that employers conduct self-audits and seek to uncover and avoid unintentional or hidden biases. EEO training for supervisors should include not only sexual harassment issues but also race, age, and disability discrimination issues. Moreover, employers must be cognizant of retaliation claims and seek to avoid retaliatory behavior.

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—management counseling

—review and preparation of personnel policy and procedures including employee handbooks;

—representation in administrative matters before the Equal Employment Opportunity Commission;

—representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—protection of trade secrets and other confidential information through the use of covenant not to compete and non-interference agreements;

—preparation of arbitration agreements, non-subscriber programs and waivers of jury trial agreements;

—management training on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general human resource audits to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—wage/hour compliance audits and defense of FLSA collective actions.

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Keeping Employers Out of the Courtroom for over 18 Years