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QUARTERLY EMPLOYMENT LAW NEWSLETTER

March 2009

American Recovery and Reinvestment Act and Its Impact on COBRA

By: Lori Athmann, Attorney

On February 17, 2008, President Obama signed into law The American Recovery and Reinvestment Act of 2009. The Act establishes a federal subsidy for payment of COBRA premiums for employees who are involuntarily terminated for a period of up to nine months, or until they become eligible for coverage under another employer's plan or Medicare.

COBRA requires all employers that maintain group health plans and that have 20 or more employees to offer continuation of health insurance coverage to employees and their qualified dependants who lost coverage as a result of certain terminations of employment. Under the former COBRA laws, qualified employees, who elected COBRA continuation coverage, were responsible for the entire cost of the plan. The American Recovery and Reinvestment Act now allows qualified employees, and their eligible dependants, who are subject to an involuntary termination to pay only 35 percent of the cost of the COBRA coverage. The other 65 percent of the cost is to be paid by the federal government. This new law does not, however, change the standard COBRA window of 18 months of elected coverage.

The Act goes into effect on March 1, 2009, but applies to individuals with a COBRA-qualifying event which occurred between September 1, 2008, and December 31, 2009. This means that employees who were involuntarily terminated between September 1, 2008, and February 16, 2009, when the Act was passed, are still considered qualified employees, even if they did not elect the coverage when it was offered to them upon their termination. They can now go back to their employer and elect coverage under the Act. Those employees who are qualified and who elected coverage and paid the entire COBRA premium between September 1, 2008, and February 16, 2009, are entitled to a refund or credit against future premium payments. Employees who were involuntarily terminated who did not participate in the employer-sponsored health insurance plan, however, are not eligible for the subsidy.

Employees who were earning an adjusted gross annual income of less than $125,000.00, and couples earning less than $250,000.00, can have 65 percent of their COBRA premiums paid through the subsidy. Employees whose adjusted gross annual income is between $125,000.00 and $145,000.00, and $250,000.00 and $290,000.00 for married couples filing jointly, will receive a reduced subsidy. At this time, the reduction scale or reduction amount is not known.

The employer must pay the government's portion of the coverage up front and then claim a credit for the amount paid on its payroll tax filing (form 941). Under the Act, employers are given a grace period of two full COBRA billing cycles from and after the February 17, 2009, enactment date. Thus, by April 18, 2009, employers must notify affected former employees and their eligible dependants of their rights under the Act. The effective date for an employee who originally declined coverage through COBRA is retroactive to March 1, 2009. The employee must pay premiums back to that date. Employers must also reimburse or credit former employees who elect COBRA coverage and paid the entire premium within that 60 day grace period.

In addition to the regular COBRA notice, a supplemental notice should be given to all qualified former, present and future employees of the right to the subsidy. The Department of Labor has provided sample model notices which can be located at www.dol.gov/ebsa/COBRA. Employees may elect coverage for 60 days following the date they receive the COBRA notification. Violation of this supplemental notice requirement is a violation of the current COBRA regulations and, thus, subject to the same penalties.

The purpose of the Act is geared toward assisting employees and their dependants who lost health care coverage because of a layoff. However, the Act does not define involuntary termination. Thus, any involuntary termination is presently covered, including those for poor performance and attendance problems. It does not, however, include termination for gross employee misconduct.

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Preventing Religious Discrimination in the Workplace

By: Jessie Becker, Attorney

Note: According to the EEOC, the number of religious discrimination charges filed with EEOC has more than doubled from 1992 to 2007.

In the December 2008 employment law newsletter, the EEOC definition of "religion" as well a description of what constitutes religious harassment under Title VII of the Civil Rights Act was provided. Below is a guide to aid employers in an attempt to prevent such religious discrimination in the workplace and suggestions to follow if they are presented with religious harassment complaints.

Employers may not refuse to recruit, hire or promote individuals, or impose stricter or different work requirements, on employees because of their religious beliefs or practices. Further, employers cannot exclude an applicant or impose different requirements of employees because he or she may need reasonable accommodations based on their religious beliefs that could be provided absent undue hardship. Therefore, employers should practice equality in recruiting, hiring and promoting their employees and provide reasonable accommodations for persons practicing their religious beliefs. Consider establishing written objective criteria for evaluating applicants for hire or promotion and apply those criteria consistently. Further, carefully and timely record reasons for disciplinary or performance related actions and share these reasons with the affected employee(s).

Employers must provide equal treatment of religious expression in the workplace. Therefore, employers should allow employees to equally express different religions and provide reasonable accommodations for all persons practicing their religious beliefs. If you are confronted with customers' biases due to religious expression by your employees, consider engaging with and educating the customers regarding any misrepresentations and the equal employment opportunity laws.

Employers should have a well documented and consistently applied anti-harassment policy that covers religious harassment. This policy should set forth prohibited conduct, describe procedures for bringing harassment to management's attention, implement a prompt, effective method for investigation and corrective action should harassment occur. It should also contain language that complaints will be protected against retaliation. Along with an anti-harassment policy covering religious harassment, it may be helpful for employers to address this policy and address differing religions at monthly or yearly meetings and provide specific training to managers and supervisors of the anti-religious harassment policy and what they can and should do to assist in preventing any religious based complaints. Be sure to provide the policy to any new employees and consider asking them to acknowledge receipt of the policy in writing.

Employers and employees should discuss openly, and immediately share, any necessary information about the employees' religious beliefs and available accommodations. This should be addressed in the anti-harassment policy mentioned above. Although an employer cannot directly ask what religion an employee practices, an employer can provide guidelines informing the employees that it is their responsibility to identify the nature of any conflict between work and their religious needs and provide enough information for the employer to use in identifying and providing accommodations and why such accommodation is necessary. Also, employees should be encouraged to either confront the individual engaging in the conduct they wish to stop or report it to their supervisor. Employees should be reminded to be respectful of their coworkers and cease any conduct that is unwelcome.

Once on notice that a religious accommodation is needed to reasonably accommodate an employee's religious belief or practice, and it would not pose an undue hardship, the employer is required to comply. If the employer cannot grant the employee's preferred accommodation, it may provide an alternative accommodation whereby the employee must cooperate by attempting to meet their religious needs through this proposed accommodation if possible.

As noted in the previous article, employers do not have to provide an accommodation if it causes undue hardship. This standard is a substantially lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA). An accommodation creates an undue hardship if it imposes a "more than de minimis" (minimal) cost or burden on the employer's business. Factors to consider include the type of workplace, the nature of the employee's duties, the identifiable costs of the accommodation in relation to the size and operating costs of the employer and the number of employees who will need a particular accommodation. Employers are encouraged to be flexible in evaluating whether accommodations are feasible and not automatically assume the accommodation will create an undue hardship.

Accommodations may include modifying dress code or grooming rules, accommodating prayer and other forms of religious expression, scheduling changes, including floating or optional holidays, flexible work breaks, and change of job assignments. An employer does not have to provide an accommodation that would violate a seniority

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Supreme Court Expands Scope of Retaliation Claims

By: Paul Rajkowski, Managing Partner

Recently the United State Supreme Court expanded the scope of conduct that may result in employees being able to bring retaliation claims against employers. For years it was thought that retaliation claims involving sexual harassment could only be brought by a person who actually reported the unlawful conduct. In Crawford v Metropolitan Government of Nashville and Davidson County, Tennessee the Supreme Court expanded the ability to bring such claims to include persons who were witnesses to the unlawful conduct and who participated in the internal investigation. A co-employee of Crawford filed a sexual harassment claim against a supervisor. Crawford who worked for the Metropolitan School District of Nashville was questioned about the supervisors conduct and she reported that she too was harassed. The supervisor was never disciplined despite Crawford's testimony and instead Crawford was fired for alleged embezzlement. Crawford sued denying she embezzled and that the real reason she was fired was because of her comments made during the investigation.

The defendants brought a motion for summary judgment asserting that Crawford's claims failed since she did not fall under a protected category of the participation clause or the opposition clause of Title VII. The District Court granted defendant's motion holding that Crawford could not satisfy the opposition clause because she had not "instigated or initiated any complaint," but had "merely answered questions by investigators in an already pending internal investigation initiated by someone else." The Court also concluded that her claim also failed under the participation clause because precedent confined to protecting "an employee's participation in an employer's internal investigation…where that investigation occurs pursuant to a pending EEOC charge" which was not the case here. The Court of Appeals affirmed the District Court using the same rationale.

The Supreme Court heard arguments of the parties and reversed the lower courts decision and sent it back to the District Court for further proceedings. The Court held that the antiretaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. The Court stated because the term "oppose" is not defined by statute, it carries its ordinary dictionary meaning of resisting or contending against. Crawford's comments were disapproving of the supervisor's sexually obnoxious behavior toward her. The Court stated "oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. A person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. Because the Court concluded Crawford's conduct was covered by the opposition clause, they did not reach a decision of the participation clause.

The Court's decision in Crawford sends a message to employers that they must be cautious when dealing with all employees involved in a complaint investigation, not just the person making the allegations of misconduct. It is also a reminder that it is important to document all performance and behavioral issues of all employees in case the employer has to defend against future retaliation claims. The attorneys at Rajkowski Hansmeier are always available to advise employers in situations such as the Crawford decision.

Discrimination *continued from page 2*

system or collective bargaining agreement. An employer also need not provide for an accommodation if it conflicts with a legally mandated security requirement or impairs workplace safety. If you can provide a reasonable alternative solution, to eliminate any conflict between work and a religious practice under existing policies and procedures, than this should be done.

Employers should immediately intervene when they learn of religious harassment conduct. Even if conduct is objectively abusive or insulting at the time, the employer should take steps to end the conduct reported because it may rise to severe or abusive conduct if it continues. As part of this, employers should be aware that the EEOC places an affirmative obligation on the employer to address possible harassment even before an employee complains of said harassment. This means the employer must keep a close eye on their employees at all time and should also train any supervisors or managers to watch for potentially actionable conduct and report it immediately. Encourage managers to intervene proactively and discuss whether particular religious expression is welcome if such expression is felt it may be construed as harassing to a reasonable person.

An employer should take prompt and appropriate corrective action when it knows, or suspects religious harassment. By providing a policy addressing religious discrimination, documenting any meetings addressing this policy, keeping an open relationship with your employees, and keeping a watchful eye for possible discriminatory conduct, an employer can attempt to avoid religious discrimination in their workplace. Further, keep in mind that religious discrimination can occur whether the difference is motivated by bias against, or preference toward, an employee, or potential employee, due to their religious beliefs, or lack thereof.

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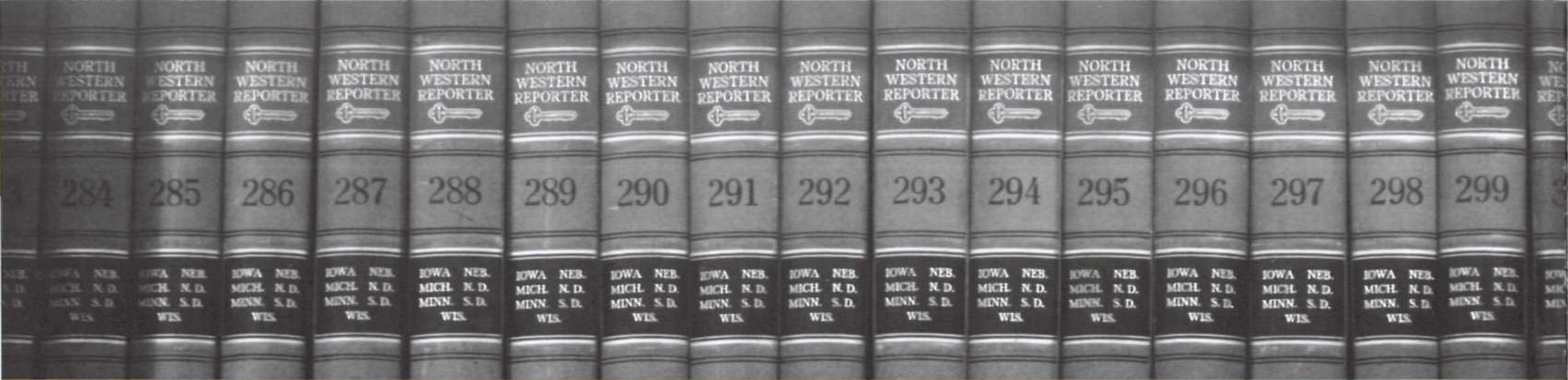

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Lilly Ledbetter Fair Pay Act of 2009 Overrules Supreme Court Decision

By: Tom Jovanovich, Attorney

On January 29, 2009, President Obama signed the "Lilly Ledbetter Fair Pay Act of 2009," which supersedes the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Company. The Supreme Court's decision in Ledbetter had required a compensation discrimination charge to be filed within 180 days of a discriminatory pay-setting decision even though an individual received compensation each pay period that was based on the initial pay-setting decision. The Act restores the pre-Ledbetter position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable act under the Federal EEOC statutes, regardless of when the discrimination began.

The Ledbetter Decision

In July, 1998, Ledbetter filed a charge with the EEOC claiming that she was unlawfully discriminated against on account of sex because she received lower pay from Goodyear than her male coworkers, in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court concluded that Ledbetter's pay at the time she filed her EEOC charge was a result of long past decisions that she could not challenge because they were outside the 180 day statute of limitations in which to file a charge.

The Ledbetter Legislation

The new law amends Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 to provide that a person may file a charge within 180 days of any of the following: (1) when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted; (2) when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; (3) when the individual's compensation is affected by the application of a discriminatory decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice made in the past.

The Act has a retroactive effective date of May 28, 2007 (the day before the Supreme Court Ledbetter decision) and applies to all claims of discriminatory compensation pending on or after that date.

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