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Re: Fair Pay and Pay Check Fairness Acts

Background:

The Fair Pay Act is just the first part of legislation designed to combat discrimination in compensation. This legislation is sure to cause employers headaches and increased litigation. The Fair Pay Act also known as the Ledbetter Act expressly overturns the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). In *Ledbetter*, the Supreme Court ruled that employees were required to file pay discrimination claims within 180 days of the discriminatory pay decision, even if the violation affected the employee's compensation in the future, and despite the fact that the employee(s) may not have been aware of the discrimination until a later date. Thus, the Supreme Court held there was no rule tolling the statute of limitations until the plaintiff became aware of a discriminatory compensation decision. Under the Fair Pay Act employees who claim compensation discrimination will have a more expansive opportunity to commence suit.

Overview of Fair Pay Act:

The Fair Pay Act expands the definition of an unlawful employment action for purposes of triggering a pay discrimination claim. Under the Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid. With the "paycheck rule" now in effect, employees may file discriminatory compensation claims as long as the claim is filed with the EEOC within 180 days (or 300 days in some states) of the receipt of any compensation affected by the violation. The Fair Pay Act also covers all protected categories under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, *i.e.*, race, color, religion, national origin, age, and disability.

Recovery under the Fair Pay act is limited to back pay for two years prior to the filing of the claim. While the Fair Pay Act opens up virtually limitless claims against employers, it at least limits the damages.

The Fair Pay Act will undoubtedly trigger an increase in pay discrimination claims. Although, it is unclear how many claims will be filed in the future, it is certain that the claims will be tough for employers to defend. Obtaining summary judgment arguing that a pay differential between a complainant and his/her co-workers is not discriminatory will be difficult as there are many factual issues impacting salaries of employees.

The Paycheck Fairness Act:

The Paycheck Fairness Act is pending companion legislation to the Fair Pay Act, which is intended to amend the Equal Pay Act of 1963. The Equal Pay Act provides that employers may not pay female and male employees differently who perform work on jobs that require equal skill, effort, responsibility and performed under similar conditions. Currently, exceptions to this prohibition may be based upon: seniority, merit, quantity or quality of production, or any other factor not related to sex. The EPA currently only provides damages in the form of back pay, which is relatively small.

The Paycheck Fairness Act would amend the Equal Pay to include among other things:

- **Increase Penalties:** allow plaintiffs to recover compensatory and punitive damages
- **Prohibit Retaliation:** prohibit employers from punishing employees who share pay information, thereby allowing employees better access to information necessary to determine pay disparities.
- **Eliminate Affirmative Defense:** Currently, the main affirmative defense is that the pay difference is related to a factor not related to sex. Employers will no longer be able to defend pay disparity claims by pointing to things like greater negotiation skills. The act will replace "any other factor not related to sex" language with "a bona fide factor other than sex, such as education, training or experience."
- **Class Actions:** The act will now class action lawsuits.

Consequences of New Pay Legislation:

With the passage of the Fair Pay Act and the potential passage of the Paycheck Fairness Act, employers need to re-evaluate current employee

compensation and internal compensation policies. Because of the potential for litigation based on unintentional and intentional past practices, employers will face a double edge sword – fix sex based pay discrepancies, thereby potentially alerting female employees to potential lawsuits or hope female employees do not learn of pay discrepancies.

At the very least, employers must implement procedures and policies aimed at defending future suits based on compensation decisions. Employers should consider taking the following action:

- Review compensation policies, procedures and programs;
- Evaluate all job classifications to determine whether any pay disparities exist and document the rational for the disparity;
- Ensure that managers are basing compensation decisions upon merit, seniority, education, skill, training, or other bona fide factors;
- Ensure that managers are adequately documenting the rationale behind pay decisions;
- Consider implementing internal complaint procedures; and,
- Re-evaluate record retention policies.