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### THE FAIR PAY ACT OF 2009 EXPANDS THE TIME WITHIN WHICH AN EMPLOYEE MAY FILE A CLAIM FOR DISCRIMINATORY COMPENSATION

On January 29, 2009, President Obama signed his first piece of legislation, entitled the Lilly Ledbetter Fair Pay Act of 2009 (known as the Fair Pay Act). The Fair Pay Act was enacted in response to, and overturns, the United States Supreme Court decision in Ledbetter v. Goodyear Tire and Rubber Co.<sup>1</sup>, that inhibited an employee's ability to seek redress for discrimination in compensation under Title VII of the Civil Rights Act of 1964 (Title VII), by restricting the time period within which an employee could challenge an employer's compensation decision as discriminatory. The Ledbetter decision required an employee to file a discrimination charge within 180 days<sup>2</sup> of when a discriminatory pay-setting decision had been made, whether or not the employee knew that discrimination had been a factor in that decision. The Fair Pay Act changed that and extended the time within which an employee may file a discrimination claim. Under the Fair Pay Act, each separate paycheck that reflects a discriminatory compensation decision is actionable. Therefore, an employee may file a complaint for discrimination in pay on the basis of any paycheck that reflects the discriminatory pay decision, regardless of when that decision was made, so long as the complaint is filed within 180 days<sup>3</sup> of receipt of the check.

The Fair Pay Act was made effective retroactive to May 28, 2007, one day before the Supreme Court's decision in Ledbetter, and applies to all claims of discriminatory compensation pending on or after that date, not just the Title VII claims addressed in Ledbetter.

#### Effect of Fair Pay Act

Under the Fair Pay Act, an individual subjected to compensation discrimination may file a charge within 180 days (or 300 days depending on the jurisdiction) of any of the following events:

1. When a discriminatory compensation decision or other discriminatory practice is adopted;
2. When an individual becomes subject to a discriminatory compensation decision or other practice; or
3. When an individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from the discriminating original decision or "other practice."

Because the Fair Pay Act does not include a definition of the term "other practice," employees potentially have broad latitude to argue that any adverse employment action by their employer has had a discriminatory impact on compensation.

#### What Employers Should Do

1. Develop concrete, measurable guidelines for compensation decisions and modify current policies as needed;
2. Review all compensation decisions;
3. Train those charged with compensation decisions to ensure that they understand compensation policies; and
4. Ensure all compensation decisions are properly documented and supported through performance or other evaluations. ■

<sup>1</sup> 550 U.S. 618 (2007). <sup>2</sup> Or 300 days, depending upon the jurisdiction. <sup>3</sup> See footnote 2.

## NEW JERSEY SUPREME COURT HOLDS THAT STRIKING WORKERS ARE ENTITLED TO UNEMPLOYMENT BENEFITS UNDER CERTAIN CIRCUMSTANCES

On January 27, 2009, the New Jersey Supreme Court in Lourdes Medical Center of Burlington County v. Board of Review,<sup>1</sup> held that striking nurses were entitled to receive unemployment benefits, notwithstanding the substantial economic losses suffered by their employer, Lourdes Medical Center of Burlington County (Lourdes), as a result of the strike. In so holding, the Court construed the meaning of “stoppage of work” under N.J.S.A. 43:21-5, which provides that striking workers are entitled to unemployment benefits, except when the strike causes a “stoppage of work” at their place of employment.

The case arose when approximately 240 registered nurses, who had been working without a contract for approximately two months, went on strike over work scheduling and other issues. While the labor dispute was ongoing, 97 of the striking nurses filed for unemployment benefits for the period of time they were out of work. As a result of the strike, Lourdes hired replacement nurses at an increased cost of approximately \$1.0 million per month. Moreover, Lourdes’ operational losses, which had been \$600,000.00 per month prior to the strike, rose to between \$1.4 and \$1.75 million per month. Lourdes also experienced a general increase in management costs during the strike, and its receipt of certain grant money was delayed. Lourdes remained in full operation during the strike, however, and reassured the community that there was no decline in the quality of services being offered to its patients.

On June 15, 2004, a Deputy Director of the New Jersey Division of Unemployment Insurance found that the striking nurses were eligible for unemployment benefits. Lourdes appealed, claiming the striking nurses should have been denied benefits because they were participating in a labor dispute. During the hearing conducted by an Appeals Examiner, Lourdes argued that because a hospital is highly regulated by the state, it could not simply close its doors as a result of its substantial financial losses without first going through complex and lengthy regulatory channels. Lourdes further argued that it should not be forced to “subsidize” a strike that was placing it in “severe financial distress.” In reaffirming that the striking nurses were entitled to benefits, the Examiner analyzed N.J.A.C. 12:17-12.2(a)(2), which defines a “stoppage of work” as a “substantial curtailment of work which is due to a labor dispute[,]” and a “substantial curtailment of work” as occurring “if not more than 80% of the [employer’s] normal production of goods or services is met.” The Examiner also considered the “great cost” to Lourdes that was caused by the strike.

The New Jersey Superior Court, Appellate Division, reversed the Board of Review, and remanded to the Board for consideration of whether the substantial financial expense to Lourdes in maintaining normal levels of service and Lourdes’ loss of revenue during the strike constituted a “stoppage of work” within the meaning of the Workers Compensation Statute and Regulations. The New Jersey Supreme Court granted the Board of Review’s petition and Lourdes’ cross-petition for certification.

The Supreme Court, in a 6-1 decision, reversed the Appellate Division, holding that loss of financial revenue is not a test to determine whether there has been a “stoppage of work” under N.J.S.A. 43:21-5(d). The Court reasoned that the Legislature understood when they enacted the statute that a strike would have a negative affect on an employer’s revenue, as “[t]he very purpose of a strike is to inflict sufficient financial pain on an employer to accomplish the goal of the striking workers.” The Court also noted that if loss of financial revenue were the test to determine a work stoppage under the statute, “there would be a work stoppage in almost every case.”

This case clarifies that so long as an employer is able to maintain 80 % of its normal production of goods and services while its employees strike, those striking employees generally will be entitled to receive unemployment benefits. The financial ramifications on a unionized employer as a result of this case are substantial. Employers are advised to review their strike contingency plans and consider preventive measures to avoid a strike. ■

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<sup>1</sup>197 N.J. 339 (2009).

## **CONSIDERATIONS FOR IMPLEMENTING A REDUCTION IN WORK FORCE**

Due to the current economic down turn, employers are in the unfortunate position of having to consider a number of measures such as mass layoffs, plant closings or transfers of operations (collectively referred to as a “Covered Event”), as the means by which to cut costs and maintain profitability. As a result of the “NJ WARN Act”<sup>1</sup>, New Jersey employers considering a Covered Event have more substantial notification obligations than those already imposed by the federal Worker Adjustment and Retraining Notification Act (the “federal WARN Act”). Accordingly, an employer should proceed cautiously in implementing a Covered Event, and should do so only after careful planning.

### **THE FEDERAL WARN ACT**

The federal WARN Act applies to employers with 100 or more full-time employees, or employers with 100 or more employees (including part-time employees) who in total work at least 4,000 hours per week, excluding overtime. Under the federal WARN Act, covered employers are required to provide 60 days advance notice of any plant closings or mass layoffs. This 60 day notice requirement is designed to provide employees with a transitional period so that they may adjust to the prospective layoff and seek and obtain other work. Notice must be written and provided to the chief elected officer of the exclusive representative or bargaining agent of the affected employees or, if there is no such representative as of the date notice is required to be served, to each affected employee. Notice must also be served upon the State dislocated worker unit and the chief elected official of the unit of government within which a closing or layoff is to occur. In addition, the notice must contain certain required information, including a statement regarding the temporary or permanent nature of the planned action, the expected dates that the plant closing or mass layoff will commence and each employee’s expected termination date, the existence of any bumping rights, and the name and telephone number of a company official to contact for further information. Employers who violate the federal WARN Act are liable to aggrieved employees for back pay and benefits as specified in the Act.

### **THE NJ WARN ACT**

The NJ WARN Act is similar to the federal WARN Act, including the threshold numbers that trigger notification obligations. However, in addition to plant closures and mass layoffs which are covered events under the federal WARN Act, the NJ WARN Act also requires notice when there is a transfer of operations to another location, either inside or outside of New Jersey. Moreover, the federal notice requirements are enhanced by the NJ WARN Act, which requires notice to be provided on a specific form provided by the New Jersey Department of Labor and Workforce Development, and requires the disclosure of information in the notice beyond that which is required under the federal WARN Act. The NJ WARN Act also limits the exceptions to the required 60 day notice period, which are otherwise available to covered employers under the federal WARN Act<sup>2</sup>. Importantly, the NJ WARN Act does not limit or modify any provision of a collective bargaining agreement which requires notification, severance payment or other benefits on terms which are more favorable to employees than those mandated by the NJ WARN Act.

Under the NJ WARN Act, an employer is required to provide written notice of a Covered Event not less than 60 days before the first termination of employment occurs, to the Commissioner of Labor and Workforce Development, the chief elected official of the municipality where the establishment is located, each employee whose employment is to be terminated and any collective bargaining units of employees at the establishment. Not only must the written notice be on the form required by the Department of Labor and Workforce Development, the notice must include certain required information. Although not addressed in the NJ WARN Act, WARN Act notices should be delivered through any reasonable method, which is designed to ensure receipt of the notice at least 60 days before separation (i.e., first class mail or personal delivery with optional signed receipt), as provided under the federal WARN Act.

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## CONSIDERATIONS FOR ... A REDUCTION IN WORK FORCE *(continued from page 3)*

The NJ WARN Act provides for a state response team within the New Jersey Department of Labor and Workforce Development, which is charged with the responsibility of working with both the affected employees and the employer. The response team is required to offer to meet with the representatives of the management of the establishment to discuss available public programs which may delay or prevent the termination of operations. The response team is also required to meet on site with workers and provide information, referral and counseling regarding: available public programs that may make it possible to delay or prevent the termination of operations; public programs or benefits which may be available to assist the employees; employee rights with respect to wages, severance pay, benefits, pensions or other terms of employment, as they relate to termination of employment.

The NJ WARN Act has the potential to create more liability for covered employers than its federal counterpart. Unlike the federal WARN Act, an employer's liability is not diminished based upon the amount of advance notice given prior to the Covered Event. For example, under the federal WARN Act, an employer who provides 50 days notice is only subject to 10 days of back pay and benefits, whereas the NJ WARN Act is an all or nothing statute. An employer found to have violated the NJ WARN Act will be liable to present and/or former employees for costs, including reasonable attorneys' fees, and compensatory damages, including lost wages, benefits and other remuneration. ■

<sup>1</sup>Formally referred to as the Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-1 et seq.

<sup>2</sup>The federal WARN Act provides notice exceptions for unforeseeable business circumstances (29 U.S.C. 2102(b)(2)(A)), and faltering businesses (29 U.S.C. 2102(b)(1)), as well as for natural disasters (29 U.S.C. 2102(b)(2)(B)). The NJ WARN Act, however, provides exceptions only for layoffs and closings resulting from fire, flood, natural disaster, national emergency, acts of war, civil disorder, industrial sabotage, the revocation of a license, or decertification from Social Security programs. N.J.S.A. 34:21-1.

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## THE HONORABLE JEROME B. SIMANDLE, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY, IS ONE OF THE FIRST DISTRICT JUDGES TO APPLY THE LILLY LEDBETTER FAIR PAY ACT OF 2009

By his decision in *Gilmore v. Macy's Retail Holdings*<sup>1</sup>, the Honorable Jerome B. Simandle, U.S.D.J., became one of the first district judges in the country to construe the impact of the Lilly Ledbetter Fair Pay Act of 2009 (the Fair Pay Act or the Act) on plaintiff Janice Gilmore's Title VII claim. Plaintiff was a longtime employee of Macy's and had been employed in the store's Fine Jewelry Department since February 2001. On July 7, 2005, plaintiff filed a charge with the United States Equal Employment Opportunities Commission (the EEOC) alleging racial discrimination. Following the EEOC's issuance of a Dismissal and Notice of Rights, plaintiff commenced an action against defendant on May 10, 2006, alleging discrimination based upon defendant's failure to promote her, and also asserted a disparate treatment claim premised upon a number of alleged instances whereby defendant had treated plaintiff differently from her colleagues on the basis of her race.

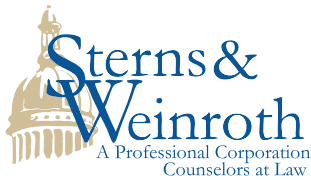
On March 11, 2008, Judge Simandle granted in part and denied in part defendant's motion for summary judgment. With respect to plaintiff's failure to promote a claim, Judge Simandle entered summary judgment in defendant's favor, finding that plaintiff's evidence failed to support her claims. With respect to a single aspect of plaintiff's disparate treatment claim, however, Judge Simandle denied defendant's motion for summary judgment. A jury trial thereafter commenced on February 2, 2009 as to plaintiff's claim, asserted under Title VII and the New Jersey Law Against Discrimination, that as an associate in the Gold Bay of the Fine Jewelry Department, she was denied the opportunity to fill in for absent Diamond Bay associates on account of her race, and was thereby deprived of the opportunity to earn bonuses on the sales of more expensive merchandise. Considering *sua sponte* the impact of the Fair Pay Act on plaintiff's claims, Judge Simandle found that the Act had no impact on the Court's prior summary judgment ruling because the ruling turned on the sufficiency of plaintiff's evidence, not on the timeliness of her claims or the accrual of the charging period. As to plaintiff's remaining Title VII claim<sup>2</sup>, Judge Simandle found that the Act clarified plaintiff could recover back pay for defendant's alleged discriminatory compensation practices starting as early as July 7, 2003, provided that the discriminatory compensation was similar or related to the alleged race based limitation upon plaintiff's ability to fill in for sales associates in the Diamond Bay. Citing section 706(e)(3)(B) of the Act, Judge Simandle noted that the Act permits an award of back pay for "up to two years preceding the filing of the [EEOC] charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge." ■

<sup>1</sup> 2009 WL 305045 (February 4, 2009, D.N.J.).

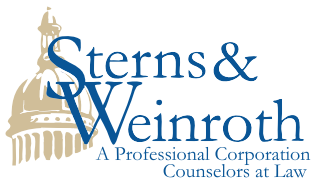
<sup>2</sup> Judge Simandle noted that the Fair Pay Act did not have any impact on plaintiff's claim under the New Jersey Law Against Discrimination, which is governed by a separate statute of limitations period.

### General Considerations Prior to Implementing a Reduction in Force

- Review all handbook policies that pertain to terminations, layoffs, rehires and benefits;
- Review all union contracts (including any that have been negotiated, but not yet reduced to writing) for specific notice procedures and/or benefit negotiation provisions;
- Review all employment contracts to determine whether any contract includes specific provisions that may affect termination notice or layoff benefits;
- Identify and establish objective criteria for employees, if any, who will continue to work after the shutdown;
- Notify insurance plan administrators;
- Ensure that all required labor postings are in place concerning worker benefits;
- Prepare standard termination notices with reference to COBRA and the forms to apply for unemployment benefits;
- Even if the employer does not have a formal ERISA severance plan, review whether the employer has a practice or policy of offering severance that could trigger a finding that it has a de facto plan. To the extent that the employer offers severance, the severance agreement should include an appropriate release of all claims;
- Determine final wage payment amounts, including payments for accrued but unused vacation, if that is a policy;
- Develop a plan for communications with employees during the pre-termination period; and
- Monitor employees' access to confidential company information.



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