

Brunini Employment and Labor News

Defenses to Fair Pay Claims Eliminated & Employers Instructed Not to Use Proposed New I-9 Forms

LEDBETTER FAIR PAY ACT

On January 29, 2009, President Obama signed into law the Ledbetter Fair Pay Act. This Act will require employers to redouble their efforts to ensure that their pay practices are non-discriminatory and to make certain that they keep the records needed to prove the fairness of their pay decisions.

The new law allows individuals to file charges of alleged pay discrimination under Title VII of the Civil Rights Act of 1964, under the Age Discrimination in Employment Act, under the Americans With Disabilities Act, and under the Rehabilitation Act without regard to the normal 180 day statutory charge filing period. The law declares that an unlawful employment practice occurs when (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by the application of the decision or practice, including each time there is a payment of compensation.

By eliminating the normal 180 day deadline relating to the compensation decision, the statute allows the filing of charges of pay discrimination with the issuance of each paycheck allegedly tainted by the pay discrimination. Thus, each new paycheck or post-retirement benefits check serves as a potentially unlawful employment practice for which an employee may file a charge of pay discrimination, even if the allegedly discriminatory pay decision occurred years before.^[1] Because current and former employees can now challenge pay decisions made in the distant past, employers must modify their record retention policies and begin retaining records surrounding pay decisions indefinitely. Employers should examine their written policies to make certain that there are proper limits to a manager's discretion in setting compensation, and should also consider a statistical analysis of starting pay, promotional pay increases, and merit raises. If problems are identified, employers should move quickly to take remedial action. **However, before commencing a self-audit, employers should also consult with legal counsel to determine how to protect the disclosure of the results of the audit.**

[1] The new law overturns the U. S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 550 U.S. 618 (2007) which upheld the now defunct 180 day filing period.

Attorney Contacts

Steve Carmody

*Employment and Labor
Practice Group Chair*

E: scarmody@brunini.com

P: 601-960-6890

Anne Sanders

E: asanders@brunini.com

P: 601-960-6893

Ken Rogers

E: krogers@brunini.com

P: 601-960-6876

Sharon Bridges

E: sbridges@brunini.com

P: 601-973-8736

John Hall

E: jhall@brunini.com

P: 601-960-6933

Claire Ketner

E: cketner@brunini.com

P: 601-973-8714

Scott Singley

E: ssingley@brunini.com

P: 662-240-9744

Chris Fontan

E: cfontan@brunini.com

P: 601-973-8753

Federal I-9 Alert

The United States Citizenship and Immigration Services (USCIS) announced Friday a delay of 60 days, until April 3, 2009, for the implementation of an interim final rule entitled "Documents Acceptable for Employment Eligibility Verification" published in the Federal Register on Dec. 17, 2008. The rule streamlines the Employment Eligibility Verification (Form I-9) process.

The purpose of the delay is to provide an opportunity for further consideration of the rule and also to allow the public additional time to submit comments. A notice announcing the delay was transmitted February 3, 2009 to the Federal Register. In addition, USCIS has reopened the public comment period for 30 days, until March 4, 2009.

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CAUTION: Employers who use the new form prior to the April 3, 2009 effective date may be subject to civil monetary penalties.

The Employment Newsletter is a publication of the Employment Law Group of the law firm of Brunini, Grantham, Grower & Hewes located in Jackson, Mississippi. The Employment Newsletter is not designed or intended to provide legal or professional advice, as any such advice requires the consideration of the facts of the specific situation.

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