July 2007 Newsletter

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SUPREME COURT CLARIFIES WHEN STATUTE OF LIMITATIONS TOLLS FOR EEOC CHARGES

On May 29, 2007, the Supreme Court held that the later effects of past discrimination do not reset the 180 day statutory limitation period for filing an EEOC charge. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, No. 05-1074 (S. Ct. May 29, 2007).

Petitioner Ledbetter was employed by Goodyear for nineteen years. During this time, Goodyear either gave or denied pay raises to salaried employees based on supervisor evaluations. Ledbetter claimed that she received poor evaluations because of her sex and, thus, her salary, which was significantly less than her male colleagues, was the result of sexual discrimination. In March 1998, she submitted a questionnaire to the EEOC in which she claimed acts of sexual discrimination. In July 1998, she filed a formal charge and in November of that year filed suit against Goodyear, asserting pay discrimination under Title VII and the Equal Pay Act of 1963. The Title VII claim was tried to a jury and Ledbetter was awarded back pay and damages. The Eleventh Circuit Court of Appeals reversed.

On appeal to the United States Supreme Court, Ledbetter asked the Court to consider whether a plaintiff has a cause of action for discrimination under Title VII when an employee receives disparate pay during the 180 day charging period, but the decisions resulting in disparate pay occurred outside the charging period. In a 5-4 decision, the United States Supreme Court held that an employee did not have a cause of action under those circumstances.

Under 42 U.S.C. § 2000e–2(a)(1), an employee wanting to file a Title VII suit must first file a charge with the EEOC within 180 days after the alleged discriminatory action occurred. Ledbetter did not claim that any intentional discriminatory acts occurred during the 180 day charging period. Instead, she argued that each paycheck she received, which was lower than her male counterparts, was the result of past discrimination in her evaluations. Under this "paycheck accrual rule," each paycheck issued to her was an act of discrimination and, thus, should have tolled a new 180 day charging period.

Because Ledbetter filed the EEOC questionnaire in March 1998, the Court held that it could only consider discriminatory pay decisions that occurred in the 180 days prior to the filing. Goodyear made these alleged discriminatory decisions outside the 180 day limitations period, and the paychecks it issued to Ledbetter during the charging period did not toll a new charging period. Thus, the Court held that the 180 day statute of limitations barred Ledbetter's Title VII discrimination claim.

USCIS FEES TO INCREASE

On May 29, 2007, the U.S. Citizenship and Immigration Services (USCIS) issued a Press Release announcing a new fee structure to begin on July 30, 2007. Applications or petitions postmarked or filed on or after July 30, 2007 must include these new fees. The USCIS anticipates that the revenue from these significant increases in immigration fees will result in an overall reduction in application processing times by the end of fiscal year 2009, as well as a reduction by the end of fiscal year 2008 for the following common petitions: Renewal/Replacement of Permanent Resident Cards (I-90), Immigration Petition for Alien Workers (I-140), Adjustment of Status (I-485), and Naturalization (N-400). The USCIS website, http://www.uscis.gov/, contains a chart that outlines the new fees that are being implemented. If you have any questions regarding these fees, or any other immigration-related issue, please contact Donna Galchus, Missy Duke, or Danna Young.

CONGRESS INCREASES FEDERAL MINIMUM WAGE

On May 25, 2007, President Bush signed the Iraq Accountability Appropriations Act of 2007 which included the first increase in the federal minimum wage in nearly a decade. Over the next two years, the minimum wage will increase incrementally from $5.15 to $7.25 an hour. Employers are required to begin paying $5.85 an hour as of July 24, 2007 (60 days following the signing of the bill), $6.55 an hour as of July 24, 2008 (one year and 60 days following the signing of the bill), and $7.25 an hour as of July 24, 2009 (two years and 60 days following the signing of the bill). Regarding posting requirements, employers will be required to update their employment postings to comply with these changes. Updated federal minimum wage posters should be available from the Department of Labor. It is important to note that Arkansas currently has a higher minimum wage than federal law requires. Despite the minimum wage in Arkansas ($6.25 an hour), federal law requires that employers post the federal minimum wage poster at all times, even if the amount of the federal minimum wage is less than that required by state. Employers should be sure to post both the state minimum wage poster, as well as the federal minimum wage poster, at all times.

COMPANY OWNER SENTENCED TO 27 MONTHS FOR HARBORING UNDOCUMENTED ALIENS

Alejandro Arevalo-Mendez, a Mexican citizen and the owner of Arevalo Construction Company in Springdale, Arkansas, pleaded guilty to recruiting and harboring undocumented workers earlier this year. Arevalo-Mendez was sentenced to 27 months in prison and fined $4000 by the U.S. District Court for the Western District of Arkansas on March 6, 2007. Arevalo-Mendez admitted to entering the United States illegally, hiring undocumented workers, and providing undocumented workers with housing and transportation. Arevalo-Mendez could have received a maximum of 10 years in prison and a maximum civil penalty of $250,000. *United States v. Arevalo-Mendez*, 5:06-CR-50044 (W.D. Ark. March 6, 2007).

In addition, Arevalo-Mendez's brother, Rodrigo, pleaded guilty to identity theft and was sentenced to a year in jail. He was also ordered to pay a fine of $2000. Rodrigo Arevalo-Mendez was a crew leader for Arevalo Construction Company. *Id.*

This case illustrates that employers can be held criminally liable, in addition to receiving civil monetary fines, for failing to verify the work eligibility of employees and for hiring employees with actual or constructive knowledge that the employees do not have authorization to work in the United States. If you have any questions regarding this case, or would like to inquire about an I-9 audit, please contact Donna Galchus, Missy Duke, or Danna Young.

UPDATE ON COMPREHENSIVE IMMIGRATION REFORM

Senate Bill 1348, known as The Comprehensive Immigration Reform Act of 2007, was introduced in the Senate on May 9, 2007 by Senators Harry Reid (NV), Edward Kennedy (MA), Patrick Leahy (VT), Robert Menendez (NJ), and Ken Salazar (CO). Since that time, there has been much debate on the bill, as well as consideration of numerous proposed amendments. On June 7, 2007, two motions to invoke cloture and end debate failed, resulting in the withdrawal of the comprehensive immigration reform bill from consideration on the Senate floor. Subsequently, President Bush met with Republican Party leaders in an attempt to revive the bill. On June 15, 2007, an agreement was reached whereby the bill would be revived and returned to the Senate floor for a final round of debate at the end of June.

On Thursday, June 28, 2007, a motion to limit Senate debate on the bill, thus bringing the bill to final vote, was defeated 46 to 53. It is not anticipated at this point that an immigration bill of any kind will be introduced by either the Senate or the House prior to the 2008 general election.

AMENDMENTS TO MECHANIC'S AND MATERIALMEN'S LIEN NOTICE REQUIREMENTS

The Arkansas General Assembly recently amended the notice requirements for filing a mechanic's and materialmen's lien under A.C.A. § 18-44-117. The amendments to A.C.A. § 18-44-117 become effective July 31, 2007. These amendments require the filer of the lien to attach an affidavit of notice to the statement of account, i.e. the lien document. The affidavit of notice must contain a sworn statement evidencing compliance with the notice provisions of lien statues A.C.A. § 18-44-114 through A.C.A. § 14-44-116, and a copy of each notice given under these provisions. The clerk must refuse to file a lien that does not contain the required affidavits and attachments.

It seems certain that the amendments to A.C.A. § 18-44-117 will create much confusion. For instance, it is not clear as to how the clerk will determine if an attachment qualifies as a notice under this statute's notice provisions. Also, the amendment does not require the clerk to notify the lien filer of any notice deficiencies. Moreover, the amendments appear to conflict with the notice exceptions of A.C.A. § 18-44-115(d), which eliminates a contractor's notice requirements if the contractor supplies a performance and payment bond or the transaction is a direct sale to the property owner.

OSHA COMMISSION REVERSES MULTI-EMPLOYER WORKSITE DOCTRINE

The Occupational Safety and Health Review Commission ("Review Commission") reversed a long-standing precedent in a recent decision regarding multi-employer worksites. For three decades, the Review Commission had upheld citations issued to "controlling employers" at multi-employer worksites for violations of Occupational Safety and Health Administration (OSHA) standards even if it neither created the hazardous condition nor exposed any of its own employees to the hazard. In *Summit Contractors, Inc.*, OSHRC Docket No. 03-1622 (2007), the Review Commission held that 29 C.F.R. § 1910.12(a) precludes OSHA from holding an employer engaged in construction work responsible for failing to ensure that other employers at the worksite comply with occupational safety and health standards.

Summit Contractors, the prime contractor for construction of a college dormitory in Little Rock, Arkansas, contracted with another construction company to perform exterior masonry work on the building. An OSHA compliance officer visited the worksite and observed masonry workers working from scaffolds without appropriate fall protection. OSHA issued a citation to Summit Contractors even though no Summit Contractors employees were exposed to the fall hazard. Applying the multi-employer worksite doctrine, OSHA contended that Summit Contractors, as a controlling employer, failed to ensure that the other construction company used appropriate fall protection. The masonry construction company was also cited for the violation.

Summit Contractors appealed the citation to the Review Commission, who concluded that an employer engaged in construction work does not have a duty to ensure that other employers at the

worksite comply with construction safety and health standards. The Review Commission based its decision on the plain language of 29 C.F.R. § 1910.12(a), which states that "Each employer shall protect the employment and places of employment of each of *his* employees engaged in construction work." (Emphasis added.) The phrase "his employees," according to the Review Commission, means that an employer engaged in construction work is only responsible for the safety and health of its own employees.

OSHA plans to appeal the decision of the Review Commission to the Eighth Circuit Court of Appeals, and will continue to issue citations to controlling employers under the multi-employer worksite policy in those circuits that have endorsed this policy. In addition, twenty-two states have opted to operate their own safety and health programs pursuant to the Occupational Safety and Health Act. Review Commission decisions are not binding authority in these "state plan" jurisdictions. OSHA may have a difficult time enforcing the citations before the Review Commission because *Summit Contractors* will remain Commission precedent unless it is reversed by the United States Supreme Court, or unless the Commission overrules itself in a future case. Employers with questions about OSHA compliance should contact any member of the firm.

NEWS AROUND THE FIRM

Danna Young spoke at the Arkansas Bar Association's State Convention on "Legally Hiring Foreign Workers." She will speak in Little Rock at the Statehouse Convention Center on August 9th at a seminar on the "The Family Medical Leave Act."

Carolyn Witherspoon spoke at the 2007 Arkansas Human Resources State Conference and Expo on "You Can't Afford a Wipe Out." She also gave a presentation at the Central Arkansas Human Resource Association Supervisor's Seminar on May 9th on "Back to Basics."

Allen Dobson was named to a 2-year term on the Governing Council of Construction Law Section of the Arkansas Bar Association.

Scotty Shively spoke at the Medical Group Management Association on June 1st on "The Summit on Security."

Mark McCarty presented at the Pulaski County Medical Society on June 20th on "How to Avoid Retaliation Claims."

Donna Galchus spoke at the Arkansas Association of College and Employers Summer Conference on June 8th on the legalities of on-line recruiting.

Mark McCarty presented a "75 Medical Minutes" seminar at the Little Rock offices on May 15th on Corporate Compliance.

Ben Shipley presented a seminar in Springdale on May 16th on "Employment-Related Records."

Russell Gunter will be presenting a lunch program for the Rogers-Lowell Chamber of Commerce on July 18th for the Large Industry Council.

Mark McCarty was named Chair of the Health Law Section of the Arkansas Bar Association.