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A legal update from Dechert's Labor and Employment Group

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Supreme Court Narrows Wage Discrimination Claims

On May 29, 2007, the U.S. Supreme Court resolved a circuit split in favor of employers by issuing a ruling in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* No. 05-1074, -- S. Ct. --, 2007 WL 1528298 (May 29, 2007). In this 5-4 decision, the Court agreed with the Eleventh Circuit and found that under Title VII, a plaintiff must file an EEOC charge within 180 or 300 days (depending on the state) of the discriminatory pay decision (the "charging period"). Rejecting the plaintiff-employee's claim, the Court held that paychecks issued later on as a result of a discriminatory pay decision do not "restart the clock" for filing an EEOC charge and cannot alone support a Title VII claim.

In this case, the plaintiff Lilly Ledbetter was employed by Goodyear from 1979 until she retired in 1998. As a salaried employee, her yearly salary increases were based on her performance evaluations. Ledbetter claimed that her evaluations were biased because of her sex and that her salary increases were discriminatorily lower than her male colleagues. Goodyear maintained that her lower raises were the proper reflection of nondiscriminatory performance evaluations.

The district court granted summary judgment for Goodyear on several of Ledbetter's claims, including her Equal Pay Act claim, but allowed her Title VII claim to go to trial. At trial, the jury found that Ledbetter had received pay raises each year that were lower than all of the male managers in her department because of her sex, and that the past pay decisions continued to affect her currently because they resulted in a significantly lower salary within the charging period. As a result, the jury awarded Ledbetter backpay and damages.

On appeal, the Eleventh Circuit reversed, holding that a Title VII claim cannot be based on discriminatory pay decisions which occurred prior to the charging period. The court also found that Ledbetter had not shown that the two pay decisions which occurred within the charging period (pay decisions in 1997 and 1998) were discriminatory. Thus, since Ledbetter did not allege and prove that any discriminatory acts as opposed to mere effects had occurred during the charging period, her claim failed as a matter of law.

The Supreme Court, in a closely divided opinion, agreed with the Eleventh Circuit. The only question presented on appeal was whether a plaintiff can sustain a Title VII claim when disparate pay is received within the charging period as a result of discriminatory pay decisions made outside the charging period. The Supreme Court made two significant points in its ruling. First, the Court held that in a disparate treatment pay discrimination case, a plaintiff must allege and prove that a discriminatory pay decision occurred within the charging period. To hold otherwise would be to abandon the clear time limits set forth by Congress in Title VII.

The Court noted that Ledbetter had not alleged that the paychecks she received during the charging period were issued with discriminatory intent; rather she alleged only that they were the effect of a prior discriminatory pay decision and thus carried forward the prior discrimination. This, the Court held, was simply not sufficient to support a Title VII claim—her argument was foreclosed by the Court's previous decisions which held, in the context of termination and denial of tenure, that the continuing effects of pre-charging period discrimination were not "present violations" of Title VII.

Furthermore, each paycheck could not be a separate violation because each was not accompanied by discriminatory intent, a vital requirement for a disparate treatment claim. Requiring acts actually motivated by discriminatory intent within the

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charging period serves the long-valued policy underlying all statutes of limitation, namely that justice should be meted promptly when evidence is fresh and more available.

Second, the Supreme Court rejected the plaintiff's interpretation of *Bazemore v. Friday*, 478 U.S. 385 (1986). In *Bazemore*, the Supreme Court had held that pay disparities between white and black service employees were actionable, because they resulted from a facially discriminatory pay structure which had been intentionally retained and applied within the charging period. Ledbetter argued that *Bazemore* supported her assertion that a Title VII claim could be based on disparate payments made because of discriminatory decisions outside the charging period.

The Supreme Court disagreed with her interpretation; it found that the *Bazemore* plaintiffs had asserted that the payments within the charging period were issued with discriminatory intent since they were the result of an intentionally retained, *facially* discriminatory pay structure. In contrast, Ledbetter did not allege that her paychecks were issued because of a facially discriminatory pay structure or otherwise with discriminatory intent; thus, her claim was fatally distinguishable from *Bazemore*.

The results of the Supreme Court's *Ledbetter* decision have yet to be fully realized. The decision clearly benefits employers by protecting them from stale pay discrimination claims which typically present evidentiary problems and a potential for large backpay awards. This ruling makes it more difficult for employees to win pay discrimination claims because they will have to detect and file charges on each allegedly discriminatory pay decision instead of waiting for the effects of a pay decision to accumulate into a significant pay disparity. However, it is possible that any significant benefits to employers will be short-lived; there have been indications, predicted by the *Ledbetter* dissent, that Congress may consider action to abrogate the *Ledbetter* ruling by statute.

Congress may attempt to enact a discovery rule in pay discrimination cases, or may statutorily categorize these claims as cumulative harms similar to hostile work environment claims to allow claims based on pay decisions outside the charging period. In addition, employees may attempt to challenge pay decisions in a number of different ways, many of which have longer limitations periods. Some possible avenues are claims under the Equal Pay Act, Section 1981, state law, and claims based upon a disparate impact theory of liability.■

EEOC Offers Guidance on Treatment of Workers with Caregiving Responsibilities

In a newly released Enforcement Guidance, entitled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities," the Equal Employment Opportunity Commission ("EEOC") offers assistance to employers confronted with a workforce that is increasingly seeking to balance the competing demands of work and family. Specifically, the EEOC identifies for employers circumstances under which they may unknowingly be discriminating against workers with responsibilities for caring for family members, such as young or disabled children or elderly parents, in violation of already existing federal laws, such as Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans With Disabilities Act ("ADA").

The EEOC stressed that it is not creating a new protected category of workers, but rather is illustrating situations in which stereotypical thinking on the part of the employer could result in the unlawful disparate treatment of employees actively caring for others, such as young children, aging parents, or disabled family members. Though the Enforcement Guidance does not carry the same force as the law, courts will often look to such interpretive guidelines for direction in making their decisions. More importantly, the EEOC will certainly rely on this new Enforcement Guidance when reviewing the claims of employees with caregiver responsibilities. As such, employers should familiarize themselves with its provisions to ensure proper compliance and better assess potential areas of liability.

The Enforcement Guidance identifies various circumstances under which an employer's actions towards an employee with caregiving responsibilities, even if well-intentioned, could constitute unlawful discrimination in violation of Title VII or the ADA. Some of the potential areas of unlawful discrimination include:

- **Discrimination under the ADA.** While most employers are familiar with the ADA's prohibition on discrimination against individuals with disabilities, the statute also makes it unlawful for an employer to discriminate against a worker because of his or her association or relationship with an individual

with a disability. In this regard, the EEOC advises employers that they may not treat a worker (or even an applicant) less favorably because of stereotypical assumptions about the worker's ability to perform his or her job while caring for a disabled individual, such as a child, spouse, or parent.

- **Gender discrimination against caregivers.** Employers can run afoul of Title VII's prohibition against disparate treatment by treating a worker with caregiver responsibilities, whether male or female, differently because of his or her gender. As Title VII does not prohibit discrimination against an employee based solely on his or her status as a caregiver, an employer will not be in danger of violating the statute if its treats all employees with caregiving responsibilities, regardless of their gender, the same, even if it is in a manner less favorable than other similarly situated employees without such responsibilities. Similarly, an employer does not commit unlawful discrimination when it bases its employment decisions on actual work performance, even where a worker's poor performance can be attributed to caregiving responsibilities.
- **Gender-based stereotyping.** Employers can violate Title VII if they make employment decisions about caregivers in reliance upon gender-based stereotypes. For example, an employer cannot grant a woman's request for leave to care for a child but deny a male worker's request to do the same because the employer harbors certain beliefs about the proper roles of men and women in the workplace and the home. Likewise, an employer cannot deny a working mother a promotion that could significantly increase her hours because he believes that she should spend more time with her family. Similarly, an employer can engage in unlawful stereotyping violative of Title VII when it makes gender-based assumptions about a worker with caregiving responsibilities ability to perform and be dedicated to his or her job.
- **Pregnancy discrimination.** The EEOC warns employers that making assumptions about a pregnant worker's commitment to her job, or her ability to perform certain physical tasks related to that job, could violate Title VII. Employers can also violate Title VII by treating pregnant employees less favorably than other similarly situated employees with respect to the granting of leave or light duty work. Additionally, to avoid violating Title VII and the ADA, employers should refrain from making pregnancy-related inquiries or conducting pregnancy tests.
- **Hostile work environment.** The EEOC reminds employers that they can be liable for a hostile work environment if an employee with caregiving responsibilities, including a pregnant worker, is subjected to sufficiently severe or pervasive harassment because of, among other things, his or her race, sex, or association with an individual with a disability.
- **Retaliation.** Employers cannot retaliate against employees who engage in statutorily protected activity, such as complaining of unlawful discrimination or participating in the EEOC charge process. This prohibition is equally applicable to those with caregiving responsibilities. In fact, according to the EEOC, caregivers may be particularly susceptible to unlawful retaliation given the difficulties they confront in balancing the demands of work and family. That is, a young working mother might be less likely to complain of unlawful discrimination than an employee who does not have significant caregiver responsibilities.

In its Enforcement Guidance, the EEOC suggests that employers adopt "best practices" in an effort to assist the growing population of employees who struggle to balance their work and familial responsibilities. Still, employers are not obligated to implement such work-life policies. They should, however, carefully scrutinize their polices and procedures in light of the Enforcement Guidance to ensure that all employment decisions, including those relating to hiring, the granting of leave, the allowance of flexible working arrangements, scheduling of work shifts, assignment of light duty work, transferring, promotion, and termination, are based on legitimate, nondiscriminatory business reasons, and not on an employee's membership in a protected class.

In addition, an employer may want to include in its management training a discussion on issues specifically relating to the treatment of workers with caregiving responsibilities. Finally, employers should generally be cognizant of these issues as they are likely here to stay.■

NLRB Faults Employer for Unilateral Policy Requiring Employees be Reachable During Off Hours

The National Labor Relations Board ("NLRB"), in a split decision rendered in *California Offset Printers, Inc.,* 349 N.L.R.B. No. 71 (Apr. 12, 2007), ruled that an employer violates the National Labor Relations Act when it unilaterally requires employees to be reachable by telephonic messaging devices and available to be called to work during time off or face discipline when the employer did not first bargain with the union.

The collective bargaining agreement between California Offset Printers, Inc., and the Graphic Communications Union contained a management rights clause allowing the employer to establish and enforce "shop rules," provided that an employee be deemed available to work during time off, and granted the employer the right to discharge or discipline an employee for cause, which included absence without notification to the employer in excess of three days. During the term of the agreement, California Offset Printers issued a directive requiring that all bindery and mailing employees be reachable by a telephonic messaging device and respond to requests to return to work during time off as a condition of continued employment or face discipline.

Reasoning that the directive established new conditions of continued employment and grounds for discipline, both subjects of mandatory bargaining, the NLRB agreed with the union that California Offset Printers violated the National Labor Relations Act by unilaterally implementing the directive absent a clear and unmistakable waiver by the union of its right to negotiate such changes. The Board reaffirmed that to meet the "clear and unmistakable" waiver standard, the contract language must be specific, or it must be shown that the parties fully discussed the matter and the party alleged to have waived its rights consciously yielded its interest, both of which were absent in the present case.

The two-member majority reasoned that the collective bargaining agreement was silent regarding the employer's right to establish new conditions of continued employment or new grounds for discipline. In fact, the majority reasoned that allowing discipline in such cases would lower the bar set forth in the agreement, which provided that employees be disciplined for absences in excess of three days. The majority also read the provision allowing the employer to enforce "shop rules" narrowly, construing the term "shop rules" to refer to practice and procedure within an employer's shop, not to rules applicable to employees away from the work site during off-duty time. The one-member minority filed a dissenting opinion, arguing that the directive was permissible because the provisions of the collective bargaining agreement, read together, covered the subject at issue.

This decision highlights the hurdles that an employer will face in attempting to unilaterally implement a change in employee work rules or discipline, given the strict approach of the NLRB in finding a waiver by a union of its right to bargain. Employers should take care to consider including in collective bargaining agreements specific and detailed references to foreseeable changes that an employer may wish to make during the term of an agreement, as well as to document all discussions between it and the union regarding such changes. If forced to defend unilateral actions, such evidence will help employers to overcome the Board's reluctance to find a waiver of a union's right to bargain regarding work rules and employee discipline.■

Third Circuit Courts Issue Favorable Decisions Regarding Accrual of Claims Under ERISA

Among the most complex and frequently litigated issues under the Employee Retirement Income Security Act of 1974 (ERISA) are those relating to the timeliness of claims brought against employers and benefit plans to recover benefits, for alleged breaches of fiduciary duties, and for employment actions allegedly taken to interfere with employees' benefit entitlements. A number of recent decisions from courts in the Third Circuit have attempted to address some of these thorny issues, although the debate is far from over.

One such decision, *Keen v. Lockheed Martin Corporation*, Nos. 05-4478, 05-6211 (E.D. Pa. April 30, 2007), in which Dechert represented Lockheed Martin and a number of its benefit plans and alleged fiduciaries, attempted to deal with some of the many open issues raised by cases in which workers who had never been considered (by employer and worker alike) to be eligible for employer-provided benefits, such as temporary employees and independent contractors, seek to obtain such benefits, often many years after the fact and on a class-wide basis.

In *Keen*, the plaintiffs asserted claims for benefits and breach of fiduciary duty on behalf of an alleged class of subcontractors and other contingent workers who had previously performed services at a facility operated by

General Electric and, subsequently, Lockheed Martin. By definition, none of the putative class members had worked for either company for at least seven years, and, in many cases, had had no relationship with the companies for decades. Nevertheless, they alleged that the defendants had wrongfully denied them the benefits to which "employees" were entitled under the plans, and had breached their fiduciary duties by failing to identify the class members as being eligible for benefits.

In response to motions for summary judgment, the court found that all of the plaintiffs' claims were barred by ERISA's various statutes of limitations. In reaching this conclusion, the court first held that under Third Circuit law a claim for benefits can accrue prior to the formal denial by the employer of a claim by an alleged participant. The court then went on to note that a "clear repudiation" of benefits that starts the statute of limitations running does not require that an alleged participant have knowledge of the precise terms of the plan under which he or she seeks benefits. This is because "plaintiffs do not need notice of plan terms to understand that a denial [of benefits] constitutes an injury."

Moving on to the plaintiffs' fiduciary duty claims, the court held that a similar analysis applies. Cutting through the plaintiffs' rhetoric, the court held that the alleged breach of fiduciary duty occurred when defendants made the decision that contingent workers were not eligible for benefits under the relevant plants. Thus, ERISA's residual six-year statute of limitations for fiduciary duty claims began to run as soon as each contingent worker began working, but did not receive benefits. The court also rejected the plaintiffs' argument that the defendants had engaged in "fraud or concealment" by failing to inform the members of the class of their theoretical entitlement to benefits. The plaintiffs have appealed the court's judgment.

In *Jakimas v. Hoffman-LaRoche, Inc.*, No. 06-2399 (3d Cir. May 14, 2007), the Third Circuit addressed the accrual of claims under § 510 of ERISA, which prohibits interference with employees' benefit entitlements. The case arose when Hoffman-LaRoche made the decision to outsource a number of its departments, and arranged for employees in those departments to be rehired by a new service provider who did not provide the same pension benefits as Hoffman-LaRoche. More than two years after the outsourcing decision was announced, a class of plaintiffs filed suit alleging that Hoffman-LaRoche's decision violated § 510. Relying on the Supreme Court's precedents under Title VII, the court held that "when an employee is terminated in violation of § 510 of ERISA the claim accrues when the decision to terminate is made and the employee is informed of the pending termination," not when the termination actually occurs. Accordingly, the plaintiffs' claims were barred by the statute of limitations.

In conclusion, while a myriad of issues regarding ERISA's statutes of limitations remain unanswered, decisions such as those discussed here seem to reflect a long-needed recognition of the burden that stale benefits-related claims place upon employers and plan fiduciaries.■

Implementing Whistle-Blowing Schemes in France

Section 301(4) of the Sarbanes-Oxley Act of July 30, 2002, ("SOX") has come into conflict with EU Directive 1995/46 and French data protection and labor law, in particular insofar as U.S. companies have in practice expanded their internal codes of conduct to implement whistle-blowing measures and include provisions requiring employees to report all types of behavior proscribed by codes of conduct or other breaches of company rules.

French Data Protection Position

The French Data Protection Authority (so-called CNIL) issued on November 10, 2005, a number of guidelines in order to enable subsidiaries in France of U.S. public companies and French companies listed in the U.S. to establish computerized alert procedures which comply at once with EU and French data protection law and with SOX. By a decision dated December 8, 2005, the CNIL also adopted a blanket authorization to enable companies which comply with its requirements to simply and quickly declare their alert procedures on the CNIL's website by undertaking to conform to such requirements, without the need to obtain a specific authorization from the CNIL. This blanket authorization has been used by 600 companies so far.

The blanket authorization requirements include in particular:

- a limit on the scope of the whistle-blowing schemes to (i) breaches of French legal or regulatory obligations relating to internal control procedures in financial, accounting, or banking matters or to fight against corruption, or (ii) fraud or questionable ac-

counting or auditing matters, as provided by Section 301 (4) of SOX;

- the identification of the person filing the alert, which identity shall remain confidential, anonymous reports being the exception (as opposed to the anonymity provided by SOX);
- a limit on the data collected and processed via a French alert system and on the recipients of such data;
- the implementation of specific protective measures if data is transferred outside the EU (i.e., safe-harbor certification, agreement based on the European Commission model contractual clauses, or binding internal corporate rules); and
- information to the users of the whistle-blowing scheme prior to its implementation and to the person subject to the alert so that s/he may rectify or eliminate incorrect or incomplete information.

French Labor Law Position

Although several cases have addressed the question of implementation of codes of conduct, no general recommendations or guidelines have been elaborated from the French labor law perspective relating to codes of conduct and whistle-blowing measures, as such recommendations and guidelines exist with regard to the CNIL. A report commissioned by the French Labor Ministry was, however, recently issued by Labor and Employment Law Professor Paul-Henri Antonmattei and by Group HR Director of Areva Philippe Vivien. It sets forth the following general recommendations on the implementation of codes of conduct and whistle-blowing measures.

Codes of Conduct

- Implementation of codes of conduct are subject to the prior information-consultation of the works council (Article L.432-1 § 1 of the French Labor Code);
- Whether or not codes of conduct constitute an addendum to internal regulations is not clear-cut and depends on the type of clause: clauses which provide for the application of disciplinary sanctions in the event of violation of a rule (e.g., such violation constitutes a serious fault) would be considered as forming part of internal regulations, whereas clauses merely setting forth rules of ethics would not (e.g., not accepting presents from suppliers);
- In any event, the authors of the report are of the view that requiring the prior consultation of the health, safety and work conditions committee (so-called CHSCT) and maintaining the labor inspector's potential scrutiny of such codes is, however, not necessary to implement codes of conduct. They therefore suggest that this matter be clarified by legislative reform.

Whistle-blowing measures

- Use of whistle-blowing measures should not be mandatory;
- The scope of the CNIL's blanket authorization could be extended to include (i) situations which may seriously harm the company's functioning, (ii) violations of the rights of persons and individual freedoms, which are not justified by the nature of the task to accomplish, and (iii) violations of the law which may affect the physical and mental health of employees;
- Whistle-blowing measures should not be included in codes of conduct. Their implementation should, however, be subject to (i) the prior information and consultation of the works council or of personnel delegates (but not the CHSCT), (ii) the labor inspector's information (but not control) and (iii) the employees' prior information. Such measures may further be implemented by collective, group, company or site agreement;
- The measures should determine the scope of the alert procedure, the persons likely to use such procedure, the persons who may be subject to the alert, the conditions of collection and processing of information gathered pursuant to the alert procedure and name of the persons processing such information, the information to the person subject to the alert, the anonymous and/or confidential character of the alert and measures relating to the whistle-blower's protection;
- The person filing the alert should benefit from the same protection measures as those provided by the French Labor Code in

the event of moral or sexual harassment, and should not be sanctioned, terminated, or subject to a discriminatory measures for having in good faith used the whistle-blowing measure.

The French Labor Ministry's report presents a more flexible approach in certain regards to the implementation of whistle-blowing measures (e.g., scope, anonymous alerts) than that adopted by the CNIL. Nevertheless, unless and until the measures recommended by the authors of the report are adopted and the CNIL has reviewed its blanket authorization, the requirements of the CNIL's blanket authorization should be followed.■

Federal Minimum Wage Increased

On May 25, 2007, President Bush received from Congress and signed into law an emergency war supplemental spending bill (H.R. 2206) which included a provision to increase the federal minimum wage, while affording $4.8 billion in tax relief to businesses that will be affected by the increase. A stand-alone minimum wage measure failed earlier this year.

Under the measure, the federal hourly minimum wage will increase for the first time in ten years from the current $5.15 to $5.85, effective July 25, 2007. After one year, the rate will further increase to $6.55 and ultimately in 2009 to $7.25. The bill also extends the federal Fair Labor Standards Act in phases to the U.S. territories of American Samoa and the Commonwealth of the Northern Mariana Islands.

Further efforts by Congressional Democrats to increase the minimum wage are expected. A primary sponsor of minimum wage legislation, Sen. Edward Kennedy (D-Mass.) plans to soon introduce a new bill that would ultimately restore minimum wage purchasing power to its historic level, which currently would be approximately $9.50 per hour.■

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If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

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