Document Retention Vs. Document Creation: Which Is More Important?

Insights
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For many years, wage-discrimination claims brought under Title VII have not been prevalent. In fiscal 2009, only 1% of charges filed with the EEOC included an Equal Pay Act claim. In lawsuits, wage-discrimination claims are normally seen only as an appendage to termination claims. This may be because wage differentials often are small and do not create significant monetary damages. For example, a $1.00 an hour wage differential will create only $2000.00 in economic damages each year. That may now change.

Enter Ms. Ledbetter

Signed into law in January 2009, the Lilly Ledbetter Fair Pay Act allows employees to file discrimination charges and sue for wage discrimination for an indefinite period of time between the allegedly discriminatory decision and the employee's date of termination. Following termination, from the date they last received a paycheck, employees have 180 or 300 days (depending on whether there is a state discrimination agency) in which to file an EEOC charge, and either two or three years (depending on whether the violation was "willful") to file an Equal Pay Act claim.

While the enactment of the Lilly Ledbetter Act probably will not result in a host of new lawsuits based solely on wage discrimination, it will make appending a wage discrimination claim to a termination claim much easier as it will not matter when, over the course of the employee's employment, the allegedly discriminatory wage decision occurred. In the case leading to the passage of the legislation, the allegedly discriminatory decisions were made almost 20 years prior to the employee's filing of an EEOC charge. This legislation demands that employers think carefully about how to prepare now to defend claims when they arise five, ten, or twenty years from now.

The Role Of Documentation

Having records establishing what comparable employees were paid during a particular time frame is certainly the first step. But keeping all payroll records forever is an impractical solution. More importantly, payroll records are dry recitations of numbers, and numbers without explanations can be manipulated to show almost anything. In today's economy, the chance of a decision maker remembering the details of his decision five years ago to pay a male store manager $25 more a week than his female counterpart, is pretty small – if he's even still employed.

Another critical point to understand is that pay claims often will challenge a series of decisions made over many years by different people that gradually increases the disparity in pay. What may start out as a small disparity hardly worth a claim may well increase over time. When deciding that Ms. Ledbetter's suit was untimely, the Supreme Court noted that her claim mainly involved the actions of one supervisor in the early 1980s and then in the mid-1990s. That supervisor had died prior to the time of trial and the employer was deprived of being able to put the supervisor on the stand to refute Ms. Ledbetter's testimony.

Compounding these issues is the fact that setting wages is a process designed to obtain employees and incentivize and reward profitable behavior. This process can include components ranging from what wages the market demands for the particular skills needed, whether the position is a profit generator or overhead, the value of experience with the organization, and whether the position comes with benefits. It is also a primary concern that the wage system be designed to avoid discrimination on the basis of any protected class. But these goals do not necessarily result in decisions that can be easily defended in litigation.

The retail setting magnifies many of these problems. Flexibility is needed because wage environments vary drastically among different geographic locales. Store sizes and profitability differ. This can occur even within the confines of a single district comprised of ten stores or a region comprised of one hundred. Nor does seniority equate to performance, meaning that the newest manager may outperform those with longer tenures. The responsibility for applying all these variables often rests in the hands of the district or regional managers. In addition to employee turnover, in many companies, areas of responsibility often change, and store mangers can have a new supervisor almost every year. When it comes time to defend wage discrimination claims, tracking down all the former decision makers will likely be impossible.

In light of all these considerations, changing a document-retention policy to make sure that payroll records are being kept is not enough. A better path is to examine the wage system in place from the top down for purposes of evaluating what measures are in place to avoid discriminatory decisions and what evidence is *created* in that process to justify the decisions. This must be done in light of the evidence that employees need to prove their cases and the jurisprudence dictating what an employer can use to defeat those claims.

What Does It Take To Show Discrimination?

Long gone are the days of "You are a woman and don't need to support a family" comments. No manager ever (well, hardly ever) actually *says* the wrong thing. That means that wage discrimination is ordinarily proved through circumstantial evidence. As with most discrimination claims, motions for summary judgment are where the battle over circumstantial evidence is fought. In this context, the employee starts by putting on evidence that she was paid less than a similarly situated male employee. While there are some slight variations in proof between an Equal Pay Act claim and a Title VII wage discrimination claim, both require that the comparative position in question be very similar to the one held by the complaining party. Other factors included in the assessment of similarity are the locations where the employees worked, the identity of the decision maker, relevant experience, and market conditions at the time of hire.

In the retail setting, the similar positions are normally equated with job titles that reflect truly different job responsibilities. Store managers, assistant store managers, leads, and sales associates would normally have enough distinct responsibilities to not be considered comparators. But it is those duties – not the titles – that control the comparison . In other words, the more job titles you use, the more likely it becomes that some of those jobs will have such similar duties that they can be considered comparable. This can complicate establishing which positions are truly comparable and can assist employees in finding more examples of individuals who are paid higher wages.

The scope of the decision maker's responsibility also plays a significant role in the similarly situated aspect of litigation because that scope can define relevant comparators. If a regional manager is involved in the wage decisions regarding all store managers in a region, discovery will likely encompass wage decisions about *all* store managers in that region. This can greatly expand upon the amount of information that needs to be produced. Thinking about this in advance may suggest ways of maintaining information about wage decisions to lessen future potential discovery costs.

When an employee establishes a prima facie case of discrimination, the employer is obligated to proffer a legitimate non-discriminatory reason for the disparity. This is where delving into the distant past becomes a real problem. At the time raises are granted, the decision maker could very likely articulate reasons for giving one employee a greater raise than another. But that thought process is rarely being recorded. If the decision maker is not available to explain that reasoning at the time of the claim, the case will not be resolved at summary judgment, at least not in the favor of the employer.

To protect against this eventuality, requiring decision makers to provide written explanations for their wage decisions is a critical practice. The practice must be done routinely so as to become a business record, which is admissible without the testimony of the decision maker. Even if the decision maker is available, the written explanation should assist in refreshing his recollection of the reasons for his decision. These written explanations should not simply address the individual; they should address the disparities, i.e., Tom is being given a higher raise than Sue because Tom's store's shrink level was 1% and Sue's shrink level was 3%.

The Object Of Being Objective

The more objective criteria that can be included in the process, the easier it will be for the employer to proffer the legitimate reason for the wage disparity. For example, where wages of a store employee are based on a relationship to the employee's sales volume, it is easy to establish the distinction of sales volume between two employees. Other objective measures might include total store sales volume, control of labor costs, damage merchandise cost, etc. These also protect against on-the-spot decision making about wages resulting in disparities that have no reasoned basis. But if these objective criteria are included in the decision making process, they become more records to maintain for litigation. These records then need to be identified for purposes of safekeeping.

Including objective criteria in the process also helps in the final stages of the motion-for-summary-judgment battle. If the employer produces a legitimate non-discriminatory reason for the wage disparity, the burden returns to the employee to show either that the employer is lying about its reason or otherwise show that a protected characteristic such as race or sex, was the reason for the decision. Objective criteria proven by the company's business records are easier to defend than a decision maker's subjective opinion that one store was kept cleaner than another.

The employer must also pay close attention to evaluations prepared by the decision maker. The easiest means of undermining a decision maker's explanation is to show that the explanation is found nowhere in the evaluation he prepared prior to making the decision on the raise. Sometimes a manager will give employees with identical ratings on their evaluations different raises thinking the "message" sent by the low raise is better than explaining the employee's deficiencies. Again, this suggests something other than performance was the reason for the disparity.

Take The Initiative
The most important step of all is to be proactive in preventing discrimination in wages. While not discriminating does not mean you will never be sued, it goes a long way to minimizing lawsuits. Here are some suggestions for proactive steps that will serve well on all these fronts.

· Provide employees an outlet to challenge wage decisions on the basis of discrimination just as they have an avenue to challenge harassment. This will both help prevent discrimination as well as provide the employer the ability to create a record at the time of the decision.

- Add objective factors to the decision making process that allow decisions to be defended with records of performance rather than subjective evaluations.
- Set a baseline for all raises and require written documentation and review for any deviation from the baseline, up or down.
- Provide decision makers with forms that guide them in explaining their decisions.
- Create summary forms that show an employee's hours, wages, leave, etc. on an annual basis so that the entire year's weekly payroll records can be discarded if need be.
- Conduct legal audits to look for problem areas that should be addressed immediately.

The Bottom Line
In our view, preparing to defend these old claims now made possible by the Lilly Ledbetter Act is more about document creation than it is about document preservation. It requires a fresh look at compensation decision making and instituting practices that record not just what was done, but why it was done.

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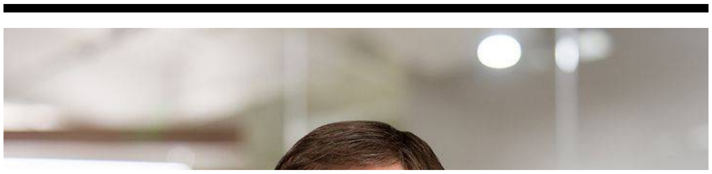

Edward F. Harold
Regional Managing Partner
504.592.3801
Email