# EMPLOYMENT LAW:
# RECENT SIGNIFICANT DEVELOPMENTS

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## I. GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008

The Genetic Information Non-discrimination Act of 2008 (GINA) was signed into law on May 21, 2008 and is designed to protect individuals from discrimination based on their genetic information. Title I of GINA applies to health insurance companies. It prevents insurance companies from asking or requiring insureds or potential insureds to undergo genetic testing and limits how health insurers may use genetic information in making decisions about plan enrollment and premiums. Title I will take effect on May 21, 2009. Title II prohibits genetic discrimination by employers and regulates how employers may use and store genetic information. Title II will take effect on November 21, 2009.

### A. Title I - Insurance (Effective May 21, 2009):

Title I of GINA amends ERISA and the Public Service Health Act to prohibit a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, from adjusting premium or contribution amounts on the basis of genetic information.[1] (GINA does not apply to life or long term care insurance.) GINA also prohibits a group health plan, or health insurance issuer offering health insurance coverage in connection with a group health plan, to "request or require an individual or a family member of such individual to undergo a genetic test."[2] The Department of Labor, the Department of the Treasury, and the Department of Health and Human Services are responsible for enforcing Title I of GINA.

The health insurance provisions of GINA do not cover a genetic disease or a condition that has already manifested itself, such as where the individual is experiencing symptoms, is being treated for, or has been diagnosed. Thus, a health insurance premium can be increased if a covered individual actually manifests a genetic disorder or disease.

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[1] 29 U.S.C. 1182(b)(3)

[2] 29 U.S.C. 1182(c)

 

Exceptions to Title I of GINA include:

1. Federal employees obtaining healthcare through the Federal Employees Health Benefits Plans, members of the US military, veterans obtaining healthcare through the Veteran's Administration, or to the Indian Health Service.

2. Incidental acquisition by a group plan of genetic information in the course of seeking, requiring, or buying other lawful information about an individual if such information is not used for underwriting purposes.[3]

3. For research. A group insurer that wishes to obtain genetic data for research purposes may ask, but cannot compel, a participant or beneficiary to undergo a genetic test provided the issuer: (1) complies with all federal, state, and local laws or regulations for the protection of human subjects in research; (2) makes the request to the participant or beneficiary in writing; (3) plainly states that compliance is voluntary and that a refusal will have no effect on enrollment status or premium or contribution amounts; (4) does not use any genetic information it receives for underwriting purposes; and (5) informs the Secretary of Health and Human Services in writing of its specific request and agrees to abide by any other regulations that the Department of Health and Human Services may require.

**B. Title II- Employment Discrimination (Effective November 21, 2009):**

Title II of GINA prohibits employers, labor unions, employment agencies and training programs (collectively, "Employers") from discriminating on the basis of genetic information and prohibits Employers from acquiring genetic information. The employment provisions of GINA apply to those Employers covered under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 and thus it does not cover employers with fewer than 15 employees or members of the US military.

The anti-discrimination portion of the law essentially creates another protected class under Title VII and makes employment discrimination based on genetic information unlawful. It prohibits discrimination in hiring, discharge, compensation, terms, or privileges of employment. Title II also

[3] 29 U.S.C. 1182(d)(3) This provision is designed to protect health plans in cases where genetic information is provided to them incidentally. In other words, the health plan did not go out and seek the information, but it was provided to them in conjunction with a lawful request or purchase of other information.

contains an anti-retaliation provision protecting those who make complaints or who assist in investigations into GINA violations.[4]

Further, it is unlawful for Employers to acquire genetic information about an employee or an employee's family member, except under certain conditions. Employers who acquire or possess confidential genetic information about an employee are required to treat the genetic information as part of a confidential medical record and maintain it separately. Employers may not disclose genetic information, except to the employee at the employee's written request or in certain other limited circumstances.[5]

An Employer may only acquire or purchase the genetic information of its employees:

1. Where an employer inadvertently requests or requires family medical history of the employee or family member of the employee.[6]

2. Where health or genetic services are offered by the employer, including such services offered as part of a wellness program if the employee provides prior, knowing, voluntary, and written authorization and only the employee (or family member) and the licensed health care professional receive individually identifiable information concerning the results of such services; and that information is not disclosed to the employer except in aggregate terms.[7]

3. Where an Employer requests or requires family medical history from the employee to comply with the certification provisions of FMLA or similar state law.[8]

4. Where an Employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history;[9]

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[4]42 U.S.C. § 2000ff-8(a)(1)

[5]42 U.S.C. § 2000ff-5

[6]42 U.S.C. 2000ff-1(b)(1)

[7]42 U.S.C. 2000ff-1(b)(2)

[8]42 U.S.C. 2000ff-1(b)(3)

[9]42 U.S.C. 2000ff-1(b)(4)

5. Where the information is used for genetic monitoring of the effects of toxic substances if: (1) written notice is provided to the employee; (2) the employee provides voluntary, written authorization or the monitoring is required by law; (3) the employee is informed of individual results; (4) the monitoring is in compliance with applicable regulations; and (5) the Employer receives results only in aggregate form.[10]

6. Where the Employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification.[11]

Title II of GINA will be enforced by the Equal Employment Opportunity Commission (EEOC) through corrective action and monetary penalties. Under Title II of GINA, individuals may also have the right to pursue private litigation.

Similar to the enforcement and remedies of Title VII and the American with Disabilities Act, an employee may seek reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary damages, and attorney's fees and costs. The cap on compensatory damages ranges from $50,000 for employers with 15-100 employees to $300,000 for employers with more than 500 employees.[12]

## II. AMERICANS WITH DISABILITY ACT (ADA) AMENDMENTS 2008

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA) that took effect on January 1, 2009.[13] The purpose of the 2008 amendments was to "level the playing field" for those with disabilities in direct response to several recent United States. Supreme Court cases significantly narrowing the definition of "disability" under the ADA. The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals and should not require an extensive analysis.

Prior to enactment of the ADAAA, the Supreme Court of the United States limited or narrowed the definition of disability by holding that limitations on the ability to perform manual

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[10]42 U.S.C. 2000ff-1(b)(5)

[11]42 U.S.C. 2000ff-1(b)(6)

[12]U.S. Equal Employment Opportunity Commission, Background Information for EEOC Notice of Proposed Rulemaking On Title II of the Genetic Information Nondiscrimination Act of 2008, available at http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html (last visited May 5, 2009).

[13] ADA Amendments Act of 2008, Pub. L. No. 110-325, 83 Stat. 3553 (2008).

tasks at work, in and of itself, are not sufficient to qualify as a "disability" under the Act.[14] Thus, according to the Supreme Court of the United States, employees must prove they were unable "to perform a variety of tasks central to most people's daily lives" in order to qualify as "disabled" under the ADA.[15] This placed a higher burden on employees seeking leave.

The ADAAA leaves in tact the definition of disability, defined to include injuries or conditions which "substantially limit" or prevent at least one "major life activity," but changed the standard for determining disability. The ADAAA overrules the Supreme Court of the United States decisions, by providing "an impairment that limits one major life activity need not limit other major life activities in order to be considered a disability."[16] The new standard significantly lowers the threshold of evidence required to establish what constitutes a disability under the ADA, and instructs courts to interpret the term "substantially limits" consistent with the "broad remedial purposes" of the ADA. This new standard will place a lower burden on employees seeking leave.

For example, under the previous standard promulgated by the United States Supreme Court decisions, conditions such as cancer, diabetes, cerebral palsy, epilepsy, and other like diseases or conditions were not "disabling" under the ADA. Under the new standard, these diseases or conditions which, inevitably, "limit one major life activity need not limit other major life activities in order to be considered a disability."[17]

In addition, under the ADAAA, the determination of whether an impairment "substantially limits" a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; the use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.[18] In addition, the ADAAA clarifies that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[19]

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[14] *Toyota Motor Mfg., Ky v. Williams* (2002), 534 U.S. 104. See also *Sutton v. United Air Lines Inc.* (1999), 527 U.S. 41.

[15] *Toyota Motor Mfg., Ky v. Williams* (2002), 534 U.S. 104.

[16] ADA Amendments Act of 2008, Pub. L. No. 110-325, §(4)(a), 83 Stat. 3553 (2008).

[17] ADA Amendments Act of 2008, Pub. L. No. 110-325, §(4)(a), 83 Stat. 3553 (2008).

[18] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 83 Stat. 3553 (2008).

[19] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 83 Stat. 3553 (2008).

Finally, the ADAAA expands the definition of "major life activities" by adding new activities such as reading, bending, and communicating and by adding a list of "major bodily functions."[20] Thus, if an individual can prove that she or he has a physical or mental impairment that "substantially limits" any "major life activity" or "major bodily function" on the new list, she or he will be considered disabled.

This expansion of the definition of "disability" under the ADAAA will likely have a broad impact on both employment and workers' compensation claims. Litigation will increase, and employers must be prepared to defend a refusal of requests for accommodations. Releases and settlement agreements should also contain language incorporating the ADAAA.

## III. FAMILY MEDICAL LEAVE ACT (FMLA) UPDATES 2009

The FMLA has been revised for the first time since the regulation became effective in 1995. While the revised regulations are over 750 pages long, the following is a summary of significant changes. The revisions include military caregiver leave provisions, qualifying exigency leave provisions, and new FMLA notification requirements for both employees and employers.[21]

### A. Family Military Caregiver Leave Revisions:

Eligible employees will be able to take up to 26 weeks of leave in a 12 month period to care for a covered service member.[22] The act expressly states that an employee can either use all 26 weeks to care for a covered service member, or take 12 weeks to care for a covered service member and use the other 12 weeks for any other FMLA leave.[23]

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[20] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 83 Stat. 3553 (2008).

[21] Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, as amended by Section 585 of the National Defense Authorization Act for FY 2008, Pub. L. No. 110-181 (enacted January 28, 2008), available at http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm (last visited May 5, 2009).

[22] FMLA, Pub. L. No. 103-3, §102(a)(3)-(4), as amended by Section 585 of the National Defense Authorization Act for FY 2008, Pub. L. No. 110-181 (enacted January 28, 2008), available at http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm (last visited May 5, 2009).

[23] FMLA, Pub. L. No. 103-3, § 102(a)(1) allows employees 12 workweeks of leave during any 12- month period for one or more of the following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

This portion of the FMLA and the new qualifying exigency leave provisions[24] were revised pursuant to the enactment of the National Defense Authorization Act (NDAA) of Fiscal Year 2008, Pub. L. No. 110-181, § 585 (2008). Eligible Employees include a covered service member's spouse, son, daughter, parent, or next-of kin (next of kin now includes siblings). Covered service members extends to National Guard or Reserves who are undergoing medical treatment, recuperation, or therapy, or outpatient treatment for a serious medical problem that occurred in the line of active duty.

**B. FMLA Qualifying Exigency Leave:**

The purpose of this new section of the FMLA is to provide leave assistance to families who have a service member in the National Guard or is being called to active duty from the Reserves as a result of a federal action declared by the President. This provisions entitles employees to 12 work weeks of leave.

**C. FMLA Notice Requirements:**

Similar to the ADA interactive dialogue requirements, an employer and employee must attempt to resolve a dispute over whether a leave is covered by FMLA. The employee must always provide sufficient information to employers so that the employer can determine that the leave is covered by the FMLA. If the employee has previously had FMLA leave for the same reason, the employee may refer to the prior leave. Employees are obligated to respond to employer's reasonable

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> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
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> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
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> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
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> (E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

[24] FMLA, Pub. L. No. 103-3, § 102(a)(1)(E) (see footnote 3 for text of subsection (E)).

questions to determine whether leave is covered by the FMLA.[25] In addition, FMLA requires that employees and employers comply with specific notice requirements discussed below.[26]

Generally, Employers are required to post a notice approved by the Secretary of Labor explaining rights and responsibilities under the FMLA. The notice must either be in a handbook or distributed to each new employee upon hire. In addition, if a significant portion of the employees do not speak English then the notice must be translated.

1. *FMLA Individual Employee Notice Obligations:*

   Employee notice obligations require employees seeking foreseeable FMLA leave to comply with the employer's usual and customary notice and procedural requirements for requesting leave. The FMLA requires, if possible, that employees provide 30 days advance notice of the need for leave. The situations where 30 days advance notice would be possible would include leave for the birth or adoption of a child, the employee's serious health condition, or if leave is required to care for a family member with a serious health condition. If the employee is having a planned medical treatment then the employee must make a reasonable effort to schedule the treatment so as not to disrupt the employer's operation.[27]

   When employees seek FMLA leave for unforeseeable reasons, the employee must give employers notice as soon as possible. The 1995 FMLA regulations defined "as soon as possible" as verbally informing the employer within one or two business days of when the employee knows of the need for the leave. The new regulations require an employee to provide notice to the employer as soon as practicable under the specific circumstances. While employees must still comply with the employers customary notice procedure, when the leave is unforeseeable in unusual circumstances, the failure to follow the

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[25] The Family Medical Leave Act: Final Rule, 73 Fed. Reg. 68041 (Nov. 17, 2008) (29 C.F.R. pt. 825), available at http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763 (last visited May 5, 2009) (Page 68041 contains a chart identifying the different provisions of the FMLA notice provisions and the applicable regulatory citations within 29 CFR 825).

[26]The Family Medical Leave Act: Final Rule, 73 Fed. Reg. 68041 (Nov. 17, 2008) (29 C.F.R. pt. 825), available at http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763 (last visited May 5, 2009) (Page 68041 contains a chart identifying the different provisions of the FMLA notice provisions and the applicable regulatory citations within 29 CFR 825).

[27] Department of Labor Opinion Letter FMLA2009-1-A, available at http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.pdf (last visited May 26, 2009).

customary notice procedure will not result in the denial of FMLA leave. Thus, an employee having emergency surgery need not follow the employer's established call-in procedure for leave until the employee's condition is stabilized and employee is reasonable able to call the employer.[28]

2. *FMLA Employer Notice Obligations to Individual Employees Seeking Leave:*

Once an employer knows, or should know, that an individual employee may need leave, the employer must provide one of the following within five days:

a. Provide the employee with an eligibility notice. The eligibility notice must state whether the employee met the eligibility requirement, i.e. the employee worked the requisite 1,250 hours during the prior 12-month period.

b. If the employer knows that the employee is not eligible for leave, the employer must state the reason(s) for ineligibility in the notice.

c. Employers must always provide the employee with a notice of "rights and responsibilities" with either an eligibility notice or an ineligibility notice.

3. *FMLA Medical Certification Notice Requirements*

The FMLA states that employers may require medical certification from health care professionals in support of an employee's request for FMLA leave. The medical certification forms previously authorized by the Department of Labor have also been amended. The medical certification process requires both employers and employees to obtain and approve the medical certification within a specific time frame.

a. Employers have five business days after the employee gives notice of the need for leave, or, if leave is for an unforeseeable reason, then after the leave commences, to request medical certification in writing.

b. Employees have fifteen calendar days to obtain the medical certification and provide it to the employer. If the employee does not obtain certification within the fifteen days, but made a good faith

[28] Department of Labor Opinion Letter FMLA2009-1-A, available at http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.pdf (last visited May 26, 2009).

effort to obtain the certification, then the employee may get an extension beyond the fifteen days to obtain the medical certification.

c. Employers must identify specific shortcomings in incomplete or insufficient certifications in writing and provide the employee with seven business days to cure the shortcoming. The employee may allow the employer to contact their health care provider directly. Employers may never contact an employee's health care provider without the employee's permission. The employer may never ask the employee's health care provider for additional information, but may only ask for clarification or verification of the information.

Whether leave is foreseeable or unforeseeable, employers may deny FMLA coverage until medical certification is provided. In addition, if an employee needs re-certification, FMLA coverage may be denied until the required re-certification is provided by the employee.

4. *FMLA Fitness-For-Duty Certification Notice Requirements:*

Employers must notify employees of fitness-for-duty requirements at the beginning of FMLA leave period. This notice must include that employees will be assessed on their essential job functions. An employer may delay restoration until required certification is provided. If the fitness-for-duty certification is never provided and the employee does not seek an extension of FMLA coverage then the employee may be terminated.

**D. Proposed FMLA Legislation:**

Two new bills were introduced to the House of Representatives that would expand FMLA coverage even further.

H.R. 2161 was introduced by Rep. Carol Shea-Porter of New Hampshire.[29] H.R. 2161 will reverse certain regulations issued by the Department of Labor effective January 16, 2009. In a press release Rep. Shea-Porter stated that H.R. 2161 would do the following:[30]

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[29] The Family and Medical Leave Restoration Act, H.R. 2161, 111th Cong. (2009).

[30] Shea-Porter Introduces Bill to Help Protect Workers and Families, April 28, 2009, available at http://www.shea-porter.house.gov/index.php?option=com_content&task=view&id=330&Itemid=67 (last visited May 13, 2009).

1. Restore protections that prevent an employer from forcing an employee to use more incremental FMLA leave than is medically necessary;

2. Reverse limitations placed on the use of accrued paid leave while on FMLA;

3. Restore the prohibition on denying attendance bonuses as a consequence for taking FMLA leave;

4. Restore protections that prohibit the waiving of an employee's FMLA rights without review and approval by the DOL or the courts;

5. Restore protections that prohibit an employer from approving or denying FMLA leave based on compliance or non-compliance with employer leave request policies;

6, Restore employee privacy by reversing regulations that would allow an employer to directly contact an employee's medical provider;

7. Restore previous "fitness-for-duty" certification rules for employees who take intermittent leave;

8. Direct the Secretary to revise the Bush regulations to revisit the new, burdensome treatment and recertification time lines imposed by the previous Department of Labor, and

9. Direct the Secretary to revise the provided medical certification template to include the definition of a "serious health condition."

H.R. 2131 will expand FMLA to include leave to care for a domestic partner as well as other individuals in an employee's extended family, including adult child, parent-in-law or sibling.[31] Rep. Carolyn Maloney of New York reintroduced H.R. 2131, which was original introduced in 2007 without success. [32]

[31]Family and Medical Leave Inclusion Act, H.R. 2132, 111th Cong. (2009).

[32] Maloney reintroduces Family and Medical Leave Inclusion Act, April 28, 2009, available at http://maloney.house.gov/index.php?option=com_content&task=view&id=1838&Itemid=61 (last visited May 13, 2009).

## IV. LILLY LEDBETTER FAIR PAY RESTORATION ACT OF 2009

On January 29, 2009, President Barack Obama signed the "Lilly Ledbetter Fair Pay Restoration Act of 2009"[33] rejecting the decision of the Supreme Court of the United States in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), 550 U.S. 618, which held that the deadline for filing a Title VII compensation discrimination claim begins to run on the date of the first allegedly discriminatory pay decision. The Act states "[t]he *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[34]

In *Ledbetter*, the plaintiff argued that the issuance of each paycheck based on an allegedly discriminatory pay decision made outside of the statutory charging period (years in the past) resulted in a continuing violation of Title VII, i.e., her current pay was lower as a result of past discriminatory pay decisions. The Supreme Court rejected this argument holding that each paycheck was a discrete act triggering a new limitations period.[35] In the dissent, Justice Ginsberg argued that the unlawful practice under Title VII was the "current payment of salaries infected by gender-based (or race-based) discrimination," even if the "infection" occurred long before a charge of discrimination was filed.[36]

The new law adopts the argument set forth in the *Ledbetter* dissent, amending Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 to provide that the limitation for filing a charge commences 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 an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid).[37]

Thus, the limitation period for filing a charge restarts each time an employee receives a paycheck or pension check tainted by alleged past discrimination. Employees may timely file a

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[33] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009).

[34] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[35] *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), 550 U.S. 618 (requiring a compensation discrimination charge to be filed within 180 days of a discriminatory pay-setting decision (or 300 days in jurisdictions that have a local or state law prohibiting the same form of compensation discrimination)).

[36] *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), 550 U.S. 618

[37] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009).

charge of discrimination upon receipt of the pay check or pension check even if the allegedly discriminatory pay decision occurred years or decades prior to the issuance of the check.

In addition the Act allows an aggrieved person to recover back pay for up to two years preceding the filing of the charge if 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."[38] Thus, employers will not be liable for more than two years of back pay if an employee wins a charge filed in 2009 based on discriminatory employment decision made, for example, in 1980.

The law also potentially expands who may file pay discrimination claims beyond employees to "individual[s] affected by an application of a discriminatory compensation decision or practice."[39] It will be up to the EEOC and courts to interpret this perceived expansion of possible claimants.

The law is retroactive to May 28, 2007, the day before the *Ledbetter* decision, and applies to all pay discrimination claims pending on or after that date.

Because current and former employees can now timely file charges based upon pay decisions made in the past, it is imperative that employers keep thorough and accurate records of all pay related decisions. Employers should also analyze their document retention policies to ensure that should they be sued (possibly decades after a pay decision was made) sufficient documentation remains to justify the decision.

## V. EXPANSION OF TITLE VII RETALIATION PROTECTION

On January 26, 2009, the Supreme Court of the United States expanded the types of employee conduct that can trigger protection under Title VII for employees retaliated against after participating in an internal harassment investigation. In *Crawford v. Nashville and Davidson County, Tennessee*, Slip Op. No. 06-1595, the plaintiff, a longtime employee with above average pre-investigation reviews, was interviewed as part of an internal investigation into sexual harassment allegations made by a coworker. During the interview, she described several incidences of sexually harassing behavior by a director, the accused, against her and other employees. After the investigation, Plaintiff and other employees providing unfavorable testimony about the director were fired. Plaintiff filed suit under Title VII, claiming she was fired in retaliation for participating in the harassment inquiry.

The District Court and Sixth Circuit Court of Appeals concluded that Plaintiff could not establish a claim for retaliation under Title VII. The Supreme Court of the United States agreed to

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[38] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009).

[39] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009).

hear the case and held that employee "opposition" to discrimination can take many forms, including answering questions. To hold otherwise, the opinion concluded, would have a chilling effect on workers who witness discrimination. The Court also noted that employers have a "strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." As a result the Court was not convinced by Defendant's argument that the lower bar for retaliation claims will make it less likely that employers would investigate discrimination complaints.

## VI. THE PROTECTION OF WHISTLEBLOWER IN CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

Due to the large number of consumer product recalls in 2007, Congress expanded the whistleblower protection given to employees in the retail and manufacturing sectors under the new Consumer Product Safety Improvement Act of 2008.[40] The whistleblowers will be protected from retaliation for making good faith reports of product safety concerns. The Secretary of Labor can pursue the complaint or it may be filed by the employee directly in court. The Act allows employees to recover back pay, reinstatement, compensatory damages, and attorney's fees for violations.

## VII. EEOC GUIDANCE TO AVOID CAREGIVER BIAS CLAIMS

The EEOC suggests employers adopt "best practices" that are proactive measures that go beyond federal non-discrimination requirements to address unlawful discrimination against caregivers.[41] Best Practices include an EEO policy that defines the types of conduct that may constitute discrimination against caregivers. The policy should include a definition of "caregiver" and "caregiver responsibilities" as well as "family." "Family" should be defined broadly and should include individuals outside of the traditional nuclear family.

The policies should inform all employees, and specifically managers, of the type of stereotypes, biases, and prohibited conduct that may result in unlawful conduct in regard to caregivers. Examples include, but are not limited to, assuming female workers with caregiving responsibilities are less capable than other works; maintaining a compensation and performance appraisal system that is based on job performance and considers stereotypes about caregivers; and refusing to consider otherwise qualified job candidates that have taken medical leave or maternity leave.

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[40] 15 U.S.C. 2051 (2008).

[41] See, The U.S. Equal Employment Opportunity Commission, Employer Best Practices for Workers with Caregiving Responsibilities, available at http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited May 5, 2009).

In accordance with all EEO policies, policies against caregiver discrimination should prohibit retaliation against individuals who report discrimination or harassment based on caregiving responsibilities or who participate in an investigation of a complaint. The policy should also identify the individual employees can contact if they questions or need to file a complaint. All complaints should be investigated promptly and corrective action taken immediately. Employers should adopt additional preventive measures to curb future complaints as necessary.

The best practices also include flexible workplace policies. Studies have shown that the adoption of flexible workplace policies not only decrease discrimination complaints but also increases productivity of all workers as well as increasing the performance of a company as a whole through the increased job satisfaction of individual workers.[42]

[42]See, The U.S. Equal Employment Opportunity Commission, Employer Best Practices for Workers with Caregiving Responsibilities, available at http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited May 5, 2009).