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Firms could unknowingly fall foul of pay discrimination laws

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The new federal administration has brought about sweeping changes to labor laws.

These changes are particularly challenging for small businesses that often lack the resources to interpret and implement them.

This article, the second in a series focusing on those changes, explores the impact of the newly enacted Lilly Ledbetter Fair Pay Act, which expands the liability facing employers for gender-based claims of discriminatory pay practices.

Lilly Ledbetter, a female employed with Goodyear Tire & Rubber Co. for 19 years, sued her employer in 1998 claiming she was paid less than equally qualified men.

The case went all the way to the Supreme Court where her claim was denied.

The Supreme Court decision was not based on whether or not her pay was discriminatory, but rather on whether her claim was barred by statute of limitations. According to the Supreme Court, her claim should have been filed within 180 days of being hired rather than years later as she approached retirement.

The Lilly Ledbetter Fair Pay Act essentially reverses the Supreme Court decision by resetting the statute of limitations with each discriminatory paycheck. Obviously, this greatly expands the time frame for making gender-based claims of discriminatory pay.

The next article in this series will address the Paycheck Fairness Act, another bill that greatly expands the remedies available to claimants while limiting the defenses available to employers.

As a result of these new laws, the risk of noncompliance has increased exponentially.

In many cases, discriminatory pay occurs without any malicious intent but rather happens unknowingly over time. Many small businesses lack a formal compensation policy and those that have one, don't always ensure adherence by managers.

Consider this. Your company hired a female employee 10 years ago and since that time, has hired and promoted numerous employees of varying skill, experience and education levels. After 10 years, she files a claim alleging pay discrimination dating back to the date of hire. This claim is now allowed as long as one or more paychecks within the last 180 days reflected the alleged discriminatory pay practice.

In order to assert a viable defense, you likely will be required to produce documents dating all the way back to the date of hire. This means maintaining employment applications, reference information, work history, testing and/or screening results, education information, and other data if you are to defend your pay decisions.

So what should employers do in response to the Lilly Ledbetter Fair Pay Act? I recommend the following:

- A review of pay policies. Develop a policy, or review your current policy, relating to starting pay, promotional pay increases and merit pay increases to ensure equality. Set limits to control managers' discretion when making pay decisions. Train your managers on these policies and implement safeguards to ensure they follow them.
- Record retention. Maintain all records that support your compensation and promotion decisions. The Ledbetter Act suggests the need for very long record-retention periods. Consult your labor attorney in order to determine which records to keep and for how long.
- A statistical self-audit. Conduct a statistical self-audit by analyzing starting pay, promotional pay increases and merit pay increases over the last two years to identify possible patterns of discrimination. It's also wise to include all protected classes (race, color, religion, sex and national origin) in your analysis, as Title VII of the Civil Rights Act addresses each of these.

Most importantly, take immediate action to address any problems and repeat this process periodically to ensure that your compensation policy is working effectively.

To learn more about the Lilly Ledbetter Fair Pay Act, visit www.odysseyone.com/Ledbetter or consult your legal adviser.

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