

Employment Law & HR Update

by

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FEDERAL MINIMUM WAGE INCREASES

On Friday, May 25, 2007, President Bush signed into law an amendment to the Fair Labor Standards Act that will increase the federal minimum wage rate. This is the first time increase to our federal minimum wage in over 10 years.

The new law will raise the minimum wage in three \$.70 increments, or a total of \$2.10 over a 26 month period until it caps out at \$7.25 per hour. The first increase, which is scheduled to take effect on July 24, 2007, will raise the federal minimum wage rate to \$5.85. The second increase will raise the federal minimum wage rate up to \$6.55 in July 24, 2008 and the third increase will raise the rate to \$7.25 on July 24, 2009.

In addition, the new law contains \$4.84 billion of tax relief for small businesses to help offset the cost of the mandated wage increase to employers. These tax law changes include a three-and-a-half year extension of the Work Opportunity Tax Credit (WOTC), which gives employers tax credits for hiring individuals from one or more of nine targeted groups.

Also, disabled veterans were added as a targeted group under WOTC.

Interestingly, the new federal minimum wage increase does not change the \$2.13 per hour minimum that must be paid to tipped workers. Instead, the increase in minimum wage will only increase the “tip credit” that an employer is allowed to take, which is difference between the federal minimum wage and the \$2.13 per hour they must pay their employees in cash.

However, if the “tipped” employee’s earnings do not equal at least the new federal minimum wage after receiving both their \$2.13 per hour and their tips combined, the employer must make up that difference in cash to the employee.

For those of us who work in Ohio, this change in the federal minimum wage rate will not affect us. In January 2007, minimum wage under Ohio law was increased to \$6.85. As of July 24, 2007, the federal minimum wage rate will be raised to only \$5.85. Therefore, since Ohio’s minimum wage rate is already higher than the federal rate, Ohio employers

should already be in compliance. (Employers must always check on what the minimum wage rate is for both the federal law and their applicable state’s law. Employers must then pay the higher of the two in order to remain in compliance with both.)

Of course, since Ohio’s minimum wage is indexed to account for inflation, it is important for Ohio employers to check every January to see whether or not minimum wage has increased under Ohio law.

PERSONAL LIABILITY TEST IN FLSA CASES

In Chao v. Hotel Oasis, No. 06-1021 (1st Cir 06/28/2007), Oasis operated a hotel and restaurant facility in southwestern Puerto Rico. Dr. Lionel Lugo-Rodríguez (“Lugo”) was the president of the corporation, which in this case meant he ran the hotel and managed its employees. Oasis’s records and employee testimony showed that between October 3, 1990 and June 30, 1993, Oasis had been investigated twice before, and violations of minimum wage and overtime laws were found on both occasions. Oasis agreed both times to pay the back wages and comply in the future.

Later, however, the Department of Labor discovered that employees were still paid less than minimum wage, they were not paid for training time or meetings held during non-working hours, they were paid in cash “off the books,” and they were not paid appropriately for overtime. Oasis also maintained two sets of payroll records for the same employees, covering the same time periods, one showing fewer hours at a higher rate, and the other showing more hours at a sub-minimum wage rate. Oasis contended that two sets of books were necessary, one for temporary employees and one for permanent employees.

On April 5, 1994, the Secretary of Labor (the “Secretary”) filed a complaint against Oasis and Lugo personally (collectively, “Defendants”), alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act (“FLSA”).

On June 21, 2005, the court ordered Oasis and Lugo personally to pay \$141,270.64 in back wages and an equal amount in liquidated damages to 282 current and former employees.

Oasis appealed the court’s decision to hold Lugo personally liable for these violations. Lugo claimed that he should not be held personally liable as an employer under the FLSA, arguing that the FLSA does not contemplate holding corporate officers individually liable for the corporation’s statutory violations.

However, the appeals court reasoned that under the FLSA, an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”

In a previous decision, Donovan v. Agnew, the appeals court acknowledged that:

“[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation’s covered enterprise *is an employer* along with the corporation, jointly and severally liable under the FLSA for unpaid wages.” (emphasis added.)

The court then looked to another previous decision in Baystate Alternative Staffing, 163 F.3d 668. In that case, the Department of Labor’s Administrative Review Board held two corporate officers and managers personally liable for FLSA violations because “they had the authority to manage certain aspects of the business’s operations on a day-to-day basis.”

The court then held that not every corporate employee who exercises supervisory control should be held personally liable. Instead, the court identified several factors that were important in determining an individual’s personal liability, such as:

- The individual’s degree of ownership interest in the organization,
- Degree of control over the corporation’s financial affairs and compensation practices the person exercises, and
- The role the individual played in “caus[ing] the corporation to compensate (or not to compensate) employees in accordance with the FLSA.”

Based on the above considerations, the court found that Lugo could in fact be held personally liable for Oasis’s illegal compensation decisions. Lugo was not just any employee with some supervisory control over other employees. He was the president of the corporation and he had ultimate control over the business’s day-to-day operations.

In particular, it is undisputed that Lugo was the corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees’ wages and schedules. As a result, Lugo was instrumental in “causing” the corporation to violate the FLSA and therefore personally liable for damages in this case, even though he did not hold any ownership interest in Oasis. The court reasoned that Lugo’s personal responsibility in this case outweighed any ownership considerations.

STATUTE OF LIMITATIONS FOR FILING AN EEOC CHARGE

In Ledbetter v. Goodyear Tire & Rubber Co., (No. 05-1074), salaried employees at the Goodyear plant where Rita Ledbetter worked were given or denied raises based on their performance evaluations. Since Ledbetter was a salaried employee, her raises were also based upon her performance appraisals. Rita Ledbetter had worked under this system at Goodyear for 19 years.

However, in March 1998, Ledbetter filed an intake questionnaire with the EEOC regarding a potential sex discrimination charge. In July 1998, Ledbetter filed a formal EEOC charge against Goodyear claiming sex discrimination based upon the performance appraisals she had received while working at Goodyear. After she retired in November 1998, she filed suit against Goodyear, asserting, among other things, a sex discrimination claim under Title VII of the Civil Rights Act of 1964.

At trial, Ledbetter claimed that several supervisors had in the past given her poor evaluations because of her sex. As a result, her pay had not increased as much as it would have if she had been evaluated fairly. Ledbetter claimed that as a result of those past performance appraisals and their subsequent influence on her raises, her pay was reduced throughout her employment because of her sex. By the end of her employment, Ledbetter was earning significantly less than her male colleagues.

Goodyear argued that Ledbetter's evaluations had been nondiscriminatory. Still the jury found for Ledbetter, awarding her backpay and damages.

On appeal, Goodyear contended that Ledbetter's pay discrimination claim was time barred. Goodyear argued that Title VII requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within 180 days, or 300 days in a "deferral" state where the investigation is deferred by the EEOC to the appropriate state agency. In this case, the proper statute of limitations was 180 days from the alleged illegal event.

Goodyear therefore contended that the statute of limitations for Ledbetter to file her claim under Title VII began to run when the discriminatory decision was originally made, which in this case were Ledbetter's performance appraisals and their subsequent pay increases. Goodyear argued that the statute of limitations does not, as Ledbetter argued, continue to run years later merely because the effects of that decision may still be felt in future paychecks.

The 11th Circuit Court of Appeals agreed with Goodyear and overturned the trial court's holding for Ledbetter. Ledbetter then appealed to the United State Supreme Court. Unfortunately for Ms. Ledbetter, the U.S. Supreme Court held for Goodyear.

The Court reasoned that anyone wishing to bring a Title VII lawsuit must first file an EEOC charge within 180 days, as was the situation in this case, “after the alleged unlawful employment practice occurred.”

Ledbetter contended that Title VII's statute of limitations period (180 or 300 days) began to run when “each allegedly discriminatory pay decision was made and communicated to her.” The Court rejected Ledbetter’s argument that each subsequent paycheck was a separate act of discrimination. Instead, in addressing when a charge is filed in a timely manner with the EEOC, the Court stated that a new violation does not occur, and a new charging period does not commence, simply because the victim suffers the natural consequences of a discriminatory act.

On the other hand, if an employer engages in a series of **separately actionable** and **intentionally discriminatory acts**, then a **fresh violation** does indeed take place when each illegal act is committed.

However, Ledbetter did not argue that any **separately actionable** and **intentionally discriminatory acts** were committed by Goodyear other than the original performance appraisals upon which her raises were based. Instead, Ledbetter simply argued that that Goodyear’s on-going discriminatory pay practices gave her a renewed statute of limitations period with each occurrence, which in this case was with every paycheck. Unfortunately for Ledbetter, the current effects of past illegal discrimination alone cannot breathe life back into a previous act of illegal discrimination wherein no timely filing had been made.

In short, Ledbetter should have filed an EEOC charge within 180 days after each discriminatory employment decision was made and communicated to her. Therefore, the Court held that because the later effects of past discrimination do not restart the clock for filing an EEOC charge, Ledbetter’s claim is untimely.



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Scott Warrick's Human Resource Consulting, Employment Law and Training Firm specializes in:

- ❖ **PREVENTING Employee Problems from happening and**
- ❖ **Training Managers and Employees ON-SITE in over 35 topics and**

2007, 2006 and 2003 SHRM National Diversity Conference Workshop Presenter

Scott travels the country presenting his revolutionary “**ANTS, Trolls And Emotionally Intelligent Communicators**” and his “**Intolerance of Intolerance Skill-Based Diversity/Tolerance Program,**” which focuses on the **FOUR BASIC SKILLS** needed to combat **ANY** type of bigotry/bullying employees encounter in the workplace, rather than the traditional “Cultural-Based” types of programs that focus on only a few select different cultures.

Scott's clients include Ohio Department of Administrative Services, The Gap, Area Agency on Aging, Skyline Chili, The Ohio Supreme Court, Heinz Frozen Foods, Fayette County Hospital, Honeywell, Carastar International, Utah State Workforce Development, etc.

Scott's academic background and awards include:

- Masters degree in Labor and Human Resources: The Ohio State University
- Capital University College of Law (Class Valedictorian (1st out of 233))
- Lifetime Senior Professional in Human Resources (SPHR) accreditation
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

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