

## **D.C. Circuit: Ledbetter Law Does Not Apply to ADEA Promotion Claims**

**February 23, 2010**

Last week, in *Schuler v. PricewaterhouseCoopers, LLP*, Civ. No. 08-7115 (Feb. 16, 2010), the Court of Appeals for the District of Columbia Circuit held that the Lilly Ledbetter Fair Pay Act of 2009 (FPA), Pub. L. No. 111-2, does not apply to promotion claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. This confirmation that the FPA does not apply to discrete employment actions such as promotions is an important victory for employers.

### **“Other Practices” under the FPA**

By way of background, on January 29, 2009, President Obama signed the FPA into law. The FPA overruled the Supreme Court’s 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007), and effectively restarts the statute of limitations for filing a claim regarding a compensation decision or “other practice” each time an employee receives a paycheck, benefits, or “other compensation.” The FPA applies to alleged discriminatory pay practices based on all federally protected categories, including race, sex, age, color, disability, national origin, and religion, and is retroactive to the day before the Supreme Court’s decision in *Ledbetter*.

The reach of the FPA, however, continues to trouble many employers, as the law fails to define what specifically constitutes a “discriminatory compensation decision” or more importantly, what “other practices” may fall under the ambit of that law. While Senator Barbara Mikulski (D-Md.)—the floor manager for the legislation as it moved through the Senate—provided assurances for the legislative record during the floor debates that the term “other practice” was intended to apply to direct inputs into compensation outcomes, such as performance ratings under a performance-based pay system, job classification decisions, and work assignment decisions under a geographic pay structure, it was not hard to predict that plaintiffs would attempt to argue that the term “other practice” includes promotion or initial job placement decisions—which is precisely what happened in *Schuler*.

### ***Schuler* Decision**

In *Schuler*, two employees claimed that their employer, PricewaterhouseCoopers LLP (PwC), refused to consider them for promotion to partnership because of their age, in violation of the ADEA. *Schuler*, Civ. No. 08-7115, at 2. PwC moved to dismiss their age claims, in part, because the plaintiffs failed to file timely charges challenging the decisions to deny them partnership (in other words, they failed to file a complaint with the Equal Employment Opportunity Commission within 300 days of the alleged

discriminatory action). *Id.* The district court agreed, and dismissed as untimely plaintiffs’ ADEA claims. *Id.* at 4.

On appeal, plaintiffs claimed that the FPA, which by its terms applied to claims pending on or after May 28, 2007, revived their claims, making them timely. *Id.* at 6–7. In short, they argued, PwC’s failure to promote them was an “other act” under the FPA, because they received significantly less compensation than they would have received had PwC promoted them to partnership. *Id.*

The Court of Appeals rejected plaintiffs’ argument wholesale, and found that the FPA did not apply in this case. *Id.* at 7. First, the court held the FPA applies only to claims “involving compensation discrimination” that point to a “discriminatory compensation decision or other practice.” *Id.* Plaintiffs, the court found, did not meet either prong. *Id.* “Discrimination in compensation,” explained the court, “means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position.” *Id.* at 7.

Second, the court was careful to explain how its decision was consistent with the intent of Congress in passing the FPA, finding that Congress specifically intended to direct the protections of the FPA to a specific type of discrimination—compensation discrimination—not to other alleged discriminatory actions in the employment context. *Id.* at 9. In fact, the court went further, anticipating its critics, stating that the court’s interpretation does not read the “other practice” provision of the FPA out of the law, since actions such as using a poor performance evaluation based upon sex to determine a rate of pay would still fall in this prong of the statute. *Id.*

## Conclusion

The *Schuler* decision confirms that discrete employment actions like promotions are not subject to the FPA—but it also confirms, as we suspected after the FPA’s passage, that plaintiffs nonetheless would attempt to bootstrap promotion and other discrete claims to the FPA’s “other practice” prong to revive what would otherwise be untimely discrimination claims. Until additional courts of appeal weigh in on the issue, employers will continue to face these kinds of challenges, testing the boundaries of the FPA.

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