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March 2009

PRESIDENT OBAMA DESIGNATES WILMA B. LIEBMAN TO BE THE CHAIRMAN OF THE NLRB



Joe Laverty
WS Shareholder
& Senior Attorney

Note: This article reflects the personal views of Joe Laverty only and does not intend to represent the views of Wessels Sherman as a whole.

President Obama designated Wilma B. Liebman to be Chairman of the National Labor Relations Board (NLRB) on January 20, 2009. Liebman, who was originally appointed by President Clinton, has served as a member of the NLRB since November 14, 1997. The NLRB is a federal agency that decides unfair labor practice and representation cases under the National Labor Relations Act. Prior to joining the NLRB, Liebman served for two years as Deputy Director of the Federal Mediation and Conciliation Service (FMCS). She acted as the Chief Operations Officer of this federal agency, overseeing arbitrations, alternative dispute resolution and international affairs. Before joining the FMCS in January 1994, Liebman was Labor Counsel for the Bricklayers and Allied Craftsmen from 1990 through 1993. Prior to working for the Bricklayers, she served as Legal Counsel to the International Brotherhood of Teamsters for nine years.

Liebman, one of the most fiercely pro-compulsory union members ever to sit on the NLRB, testified last

year about what she described as “a loss of confidence in the Board and its processes.” What she has indicated is that she feels the NLRB is preoccupied with “freedom of choice.” Liebman believes that the Board has favored freedom of choice (the freedom to reject unionization), and that this sentiment prevails over promoting collective bargaining (promoting the acceptance of unions). It would appear that Liebman finds that the foundation of democratic freedom stands in the way of the ability of organized labor to gain membership and power. Liebman is an outspoken proponent of employees not being free to reject union representation and refrain from union activity.

In a March 2008 article in the “The Journal of Labor and Society,” Liebman stated:

“As the National Labor Relations Board, in several recent decisions, has said for the first time, that freedom of choice, which is to say, the freedom to reject union representation, prevails in the statutory scheme. It is as if the law, in abandoning the primacy of achieving economic justice through collective action has been turned inside out. The stakes for this shift in policy are great.”

The same way that the National Labor Relations Act protects employees in seeking unionization, it just as well states that employees have a right to reject a union. **Liebman, in so many words, trashes the freedom of choice for employees.** Liebman has actually stated:

“Collective action at work encourages engagement in the community and its politics. Without a functioning collective bargaining system, fundamental economic issues are placed off the table: distribution of wealth,

control, and direction of economic enterprises. What institution will be as effective in efforts to minimize the randomness of fortune of democratic capitalism? And without a strong independent trade union movement, what institution will stand effectively as a counter weight in our democracy to the growing political influence of corporations? What institution will speak for working people – indeed for the middle class – as effectively?” *The Journal of Labor and Society, March 2008.*

Clearly, Liebman promotes forced unionism over individual rights. Liebman’s appointment comes at a time when management-side labor and employment lawyers are bracing for potentially sweeping changes to labor laws and the NLRB. Undoubtedly, Liebman is a staunch supporter of the Employee Free Choice Act (EFCA). Even without the EFCA passing, obviously, with Liebman’s appointment, the NLRB’s philosophy will certainly swing toward a pro-union stance, which will have long lasting pro-union/anti-company effects into the future. Employers would be well served to recognize this pro-union change in philosophy at the NLRB from the previous administration and prepare, the best that they can, for the future. Obviously, the current administration is looking to sign into law the EFCA in the near future, which will make Liebman very happy because the legislation, most likely, will substantially reduce the freedom of choice for employees to remain union-free.

If you would like to discuss the subject matter of this article, or any other employment-related issue, please feel free to contact Senior Attorney & Shareholder Joseph H. Laverty at (563) 333-9102 or email him at lolaverty@wesselssherman.com.

SEXUAL HARASSMENT INVESTIGATIONS: TAKE CAUTION IN EVALUATING ADVERSE ACTIONS



Christina
Lopez-Nutzman
WS Attorney

On January 26, 2009, in Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, the U.S. Supreme Court held that an employee that was terminated shortly after participating in an internal company investigation of sexual harassment allegations was protected by the anti-retaliatory provisions of Title VII of the Civil Rights Act of 1964.

Crawford, a 30-year employee, was approached by someone in management investigating rumors of sexual harassment by the Employee Relations Director and was asked to cooperate in an internal investigation. Crawford reported that she observed and

experienced a number of inappropriate acts, such as, the director grabbing her head and pulling it to his crotch. No action was taken against the director, however, Crawford and two other women interviewed were terminated shortly after they were questioned. Crawford was terminated for alleged embezzlement. **Crawford filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging her termination was in retaliation for having reported sexual harassment, behavior that violates Title VII of the Civil Rights Act.**

The lower courts initially ruled in favor of the employer, holding that Crawford was not protected by the anti-retaliation provisions of Title VII because she did not raise a charge of discrimination with the company or with the EEOC and **merely cooperated in a company initiated investigation.** The Supreme Court did not agree.

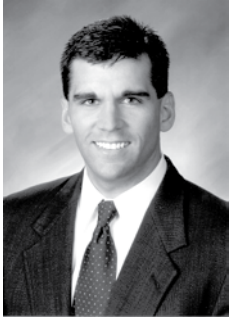
The Supreme Court held that Title VII’s anti-retaliation provision’s protection extends to employees who speak out about discrimination, even if not on their own initiative. Employees answering questions during an employer’s internal

investigation are protected because participation that leads to disclosing acts of harassment qualifies as opposition to an unlawful practice.

Despite the expanded reading of what constitutes opposition according to Title VII, **employers must continue to fulfill their strict obligation to investigate and remedy complaints of sexual harassment.** The message this case sends to employers is that employers must now be more aware of the employees they ask to cooperate in an internal investigation. Now, knowing that employees who participate in an internal investigation are protected from retaliation for participating in such investigations, employers should be mindful to take caution in evaluating any adverse action taken against cooperating employees as that action may give rise to a retaliation claim.

Questions? Please contact WS Attorney Christina Lopez-Nutzman in the firm’s Chicago, IL office at (312) 629-9300, or chnutzman@wesselssherman.com.

PRESIDENT OBAMA'S ECONOMIC BAILOUT FOR THE TRIAL LAWYERS: THE "LILLY LEDBETTER FAIR PAY ACT" BREATHES NEW LIFE INTO DEAD CLAIMS



Jeffrey A. Risch
WS Shareholder
& Senior Attorney

*On January 29, 2009, President Obama signed his very first piece of federal legislation. This legislation, known as the **Lilly Ledbetter Fair Pay Act**, directly impacts the workplace by substantially broadening the timetable for suing one's employer for pay discrimination claims.*

The Lilly Ledbetter Fair Pay Act nullifies the prior May 29, 2007 U.S. Supreme Court decision of Lilly Ledbetter v. Goodyear Tire & Rubber Co. In Goodyear, the U.S. Supreme Court held that the decision to set Ledbetter's pay rate lower than her male counterparts was a separate/discrete act so that the period for filing a discrimination charge began when the decision to set the pay rate took place.

In March 1998, Ledbetter submitted a questionnaire to the Equal Employment Opportunity Commission (EEOC) and a formal EEOC charge was issued in July 1998 relating to her belief that she was being paid less than her male counterparts at a particular Goodyear facility. However, only after her November 1998 retirement did she file a lawsuit asserting sex discrimination under Title VII of the Civil Rights Act as well as unequal pay under the federal Equal Pay Act. The district court allowed her Title VII pay discrimination claim to proceed to trial, but dismissed her Equal Pay Act claim. Ledbetter abandoned her Equal

Pay Act claim even though federal Equal Pay Act claims enjoy a two- or three-year statute of limitations. Ledbetter continued to pursue her sex discrimination claim under Title VII.

At trial Ledbetter presented evidence alleging that several supervisors had in the past given her poor evaluations because of her sex; and as a result, her pay had not increased as much as it would have if she had been evaluated fairly --- causing her earnings to be significantly less than her male colleagues. Goodyear maintained that the evaluations were legitimate. **A jury found for Ledbetter awarding her \$3 million in backpay and other damages.**

On appeal, Goodyear contended that the pay discrimination claim was time barred with regard to all pay decisions made before September 26, 1997 (precisely 180 days before Ledbetter filed her EEOC questionnaire). Because the applicable statute of limitations under Title VII was 180 days from the date of the alleged discriminatory practice, Ledbetter could not be successful with her case since she filed her EEOC charge years after the alleged discriminatory decisions took place. In other words, any decision occurring before September 26, 1997 was, in effect, time barred under the applicable statute of limitations. Ledbetter did not assert that Goodyear acted with discriminatory intent when it issued her paychecks or when it denied her a raise in 1998. **Rather, Ledbetter's central theory of liability against Goodyear was that the pay disparities should be viewed as taking place within the statute of limitations because each paycheck issued by Goodyear was an "effect of prior discriminatory conduct" from years gone by.**

The U.S. Supreme Court ultimately rejected Ledbetter's contention and reasoned that "effects alone cannot breathe new life into prior, uncharged discrimination." *The Lilly*

Ledbetter Fair Pay Act completely reverses this decision and makes it so that effects alone shall breathe new life into otherwise non-actionable, time-barred claims.

The Lilly Ledbetter Fair Pay Act not only covers Title VII of the Civil Rights Act, but also amends the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the federal Rehabilitation Act. Consequently, employers can now be sued for actions on the part of supervisors, managers and other decision makers made several years ago. **With each new paycheck, employees now have the opportunity to sue their employers for discrimination related to compensation.**

This new law establishes an effective date of May 28, 2007. Accordingly, the law will be administered and enforced as if it has been in place immediately prior to the *Ledbetter* decision rendered on May 29, 2007. It should be no surprise to anyone that the Lilly Ledbetter Fair Pay Act will cause an absolute explosion of employee driven litigation. What remedies were not available to employees due to a defined statute of limitations are now readily available. The surge in employment-related lawsuits will, no doubt, rise substantially.

If you would like to know what steps employers should take to diminish liability under the new law, please contact Attorney Jeffrey Risch and he would be happy to send you his 10-Step process.

Questions? Please contact Senior Attorney & Shareholder Jeffrey A. Risch at (630) 377-1554, or jerisch@wessels Sherman.com.

CUT YOUR LEGAL COSTS FOR 2009: JOIN WESSELS SHERMAN'S PHONE PROGRAM!

Companies do not need to be told that the economics of running a business in 2009 will likely be more challenging than running a business has been in recent years. In fact, companies are in greater need than ever for sound legal guidance on issues of firing workers, renegotiating benefits, negotiating severance agreements, and tip-toeing through the myriad of state and federal anti-discrimination laws, all of which must be well-understood by companies looking to cut costs.

The question is: How can your company cut legal costs during a time period when sound legal advice is more important than ever?

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What is the Phone Program? The Phone Program is a membership-based program that allows its members to call any one of our law firm's attorneys an unlimited number of times to

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What does it cover? The Phone Program includes legal advice over the phone in the area of the law that we regularly advise companies on—the spectrum of employment, union, immigration, employee benefits, and workers' compensation-related matters. Wessels Sherman focuses its practice on representing companies

on all matters dealing with their employees. Anything within our practice area is covered by the Phone Program.

What's the catch? No catch. No contract. No obligation of any kind. **It truly is \$50 a month for unlimited use.**

Basically, the Phone Program is one of the many legal services that Wessels Sherman offers to companies to provide quality legal guidance on sometimes simple, but often times complicated, legal issues that companies confront every day.

How do you become a member?

Just call Attorney Nancy E. Joerg at (630) 377-1554 or email her at najoerg@wessels Sherman.com. Tell her that you read this article and that you would like to try the Phone Program. Remember, you get two (2) months for free, so if you do decide to stay on the program there will be no \$50 bill for several months.



2009 Popular Seminars Return - BREAKFAST SEMINAR SERIES

Jam-packed 1-hour information roundtable for HR managers, business owners, supervisors, and office managers devoted to providing practical advice on a variety of hot employment-related issues. Beginning February 2009 and continuing through June 2009, Wessels Sherman attorneys will be presenting a series of 1-hour breakfast meetings with coffee, juice, bagels, and valuable handouts included.

Seminar Details: 7:45am Registration, 8:00am - 9:00am - Program **COST: \$35.00 per person**

Topics for each month:

March 19, 2009 – ADA Amendments, Reasonable Accommodations and Leaves of Absences

May 21, 2009 – Health and Welfare Summary Plan Documents 101

April 16, 2009 – Employee Free Choice Act: How to Stay Union-Free

June 18, 2009 – Document and Discipline: Handling Terminations & Minimizing Potential Litigations Risks

*Presented by Wessel Sherman's St. Charles Office - Location: 2035 Foxfield Rd., St. Charles, IL 60174
Contact Jackie Boos at 630-377-1554 or email jaboos@wessels Sherman.com*

OMINOUS EMPLOYMENT LEGISLATION ALSO LOOMS IN WISCONSIN HORIZON

Government in Wisconsin reflects the current federal government in more ways than one. For example, Democrats now occupy the Governor's office and maintain majorities in the State House and Senate. Also, just like in the federal government, Wisconsin legislators are working to pass laws that will drastically change the employment landscape.

One example is Senate Bill 20, which is currently pending before the State Senate Judiciary Committee. **SB 20**

proposes to amend the Wisconsin Fair Employment Act to allow victims of employment discrimination, or the Department of Workforce Development (DWD) itself, to appeal the Department's findings to circuit court. If the court finds that an employer violated the Act, it is required to order the employer to pay the person discriminated against compensatory and punitive damages, and a 10% surcharge to be paid to the State. If passed, Wisconsin employers will be exposed to potential liability for compensatory and punitive damages in state

employment discrimination claims – and will be financing the State action against them. We encourage you to call your State Senator today and request that he/she oppose SB 20.

Questions? Please contact Senior Attorney and Shareholder Alan Seneczko in our Oconomowoc, WI office at (262) 560-9696, or aes@seneczkolaw.com.

POTENTIAL LEGISLATIVE CHANGES IN IOWA

Governor Culver is going to be fiercely lobbied in 2009 to make sweeping changes regarding the Iowa labor laws. The debated items heading into the legislative season will likely be the following:

1. Expand "open scope" collective bargaining for public employees, which would expand the topics that public employee unions can raise during bargaining;

2. Allow negotiated "fair share" provisions whereby non-union workers would help pay to secure and enforce bargaining contract

benefits;

3. Set a "prevailing wage" floor on public sector projects based on local pay scales; and

4. Permit workers injured on the job to choose the doctors who will treat them.

Opponents to these legislative changes say that it will be devastating to Iowa's Right-to-Work law and will drive up taxes, as well as being costly to local government and

increasing workers compensation costs while reducing the quality of care to injured employees.

Employers should be on alert for these potential changes and contact their representatives to voice their opinions.

If you would like to discuss the subject matter of this article, or any other employment-related issue, please feel free to contact Senior Attorney & Shareholder Joseph H. Laverty at (563) 333-9102 or email him at jlaverty@wesselssherman.com

LEGISLATION PROPOSED TO ALLOW PREJUDGMENT INTEREST IN ILLINOIS

On February 3, 2009, Illinois Senate Bill 184 was introduced, which proposes to add a prejudgment interest provision to the Illinois Code of Civil Procedure. As proposed, the provision applies to actions at law and to arbitrations. The Illinois State Bar Association (ISBA) prompted this legislative proposal to encourage quick evaluation and early settlement of civil cases. **If adopted, the law will provide that prejudgment interest be awarded from the date the party from whom monetary damages are sought is given written notice of the claim for monetary damages or the action or arbitration is filed (whichever is earlier), until the award or judgment is entered.**

Defendants may directly benefit from the statute when filing counterclaims, third-party claims, or contribution claims. However, in most cases, a defendant will be pressured to make a settlement offer to avoid the risk of paying prejudgment interest. That is, a defendant may avoid paying prejudgment interest by making a written offer of settlement to the plaintiff at any time after that defendant has filed

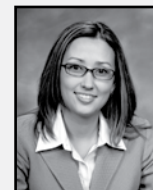
an answer to a complaint, petition, or demand for arbitration, but no later than 120 days after filing an answer (however, the parties may agree in writing to extend the 120 days). If the plaintiff does not accept that offer of settlement in writing within 30 days of receipt, and the plaintiff's award or judgment against that defendant is less than or equal to the offer of settlement, no prejudgment interest may be awarded against the defendant.

The prejudgment interest provision is not intended to apply to units of local government, school districts, community college districts, or any other governmental entities. Actions for small claims, punitive damages, and/or those governed by a more specific state statute are also excluded from the proposal.

Questions? For questions or comments concerning this topic, please contact Attorney Jon D. Hoag in our St. Charles office at (630) 377-1554, or johoag@wesselssherman.com.

New I-9 Regulations Postponed!
The government announced Friday, January 30th, that the new I-9 regulations, including implementation and use of the new Form I-9, has been postponed until April 3, 2009.

THE BENEFITS CORNER



WS Attorney
Rebecca Dobbs

Welcome to **The Benefits Corner**, featuring the insights of WS Benefits Attorney Rebecca Dobbs!

If there is a topic of interest to you, please contact Attorney Dobbs at redobbs@wesselssherman.com (630)377-1554.

Supreme Court Clarifies Effect of Beneficiary Designation

William Kennedy, a participant in an employer-sponsored pension plan, designated his spouse as his beneficiary upon their marriage in 1974. Mr. Kennedy did not name a contingent beneficiary in the event his spouse should disclaim her interest. Approximately 20 years later, Mr. Kennedy and his wife divorced. A Qualified Domestic Relations Order (QDRO) was not submitted to the plan administrator. Rather, the divorce decree included a general waiver by Mrs. Kennedy of any claim she may have in regards to amounts held in a retirement or pension plan by Mr. Kennedy as a result of his past or future employment. **Mr. Kennedy did not fill out the appropriate forms to alter the designation of Mrs. Kennedy as his beneficiary under the pension plan at issue.**

On January 26, 2009, the Supreme Court held that the plan administrator acted properly when it disregarded the divorce decree and paid out benefits to Mrs. Kennedy upon Mr. Kennedy's death in 2001. Because the divorce decree did not qualify as a QDRO, it did not have an effect on the plan administrator's obligation to act in strict accord with the documents and instruments governing the plan. In the absence of a QDRO, Mr. Kennedy had to submit a properly executed written designation pursuant to the terms of the plan in order to effectively alter the beneficiary he had previously designated.

SWEARING IN WORKPLACE NOT A "GOOD REASON" TO QUIT IN MINNESOTA

A recent appellate court decision in Minnesota found that an employee did not have a good reason for quitting his job because his co-worker engaged in a profanity-laden tirade against him. Responding to some rumors that his sales territory was going to be split up, Joseph Hodge contacted a co-worker to discuss the rumors. Upon hearing the information, however, the conversation became animated and Hodge's co-worker began swearing at Hodge extensively. Hodge never informed his supervisor of this conversation and shortly thereafter he quit.

Under Minnesota law employees who quit their jobs are generally not entitled to unemployment compensation benefits. One exception to this rule, however, is where an employee quits for a "good reason." The unemployment compensation law defines good reason as "(1) directly related to the employment and for which the employer is responsible; (2) that is adverse to the worker; and (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment." The statute goes on to further state that before an employee can quit because

of adverse working conditions (and receive unemployment benefits) **he must first notify the company (i.e. management) and give the company a reasonable opportunity to correct the situation.**

Here, the court found that Hodge was not entitled to unemployment benefits because he never told management about the profane comments directed at him by his co-worker, and therefore he never gave the company the chance to make his working conditions not adverse. Minnesota employers facing situations where the employee quits and then argues that he quit as a result of adverse working conditions should investigate thoroughly to see whether the employee ever gave the company the chance to correct any perceived problems. If the employee failed to do so, the employer should raise this failure as a defense in unemployment compensation hearings.

Questions? Please contact WS Senior Attorney and Shareholder Kevin M. Mosher in the firm's Minneapolis office at (952) 746-1700.

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Richard H. Wessels has also been named by Illinois Super Lawyers magazine as one of the top attorneys in Illinois for 2009. Only five percent of the lawyers in the state are named by *Super Lawyers*.



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