

Labor & Employment Client Service Group

To: Our Clients and Friends

October 8, 2009

CONGRESSIONAL LEADERS INTRODUCE LEGISLATION ON OCTOBER 6 TO OVERTURN AGE DISCRIMINATION OPINION

In June 2009, the United States Supreme Court issued an opinion in *Gross v. FBL Financial Services, Inc.*, that has been viewed as a victory for employers. The Court held in *Gross* that, in a case alleging disparate treatment of an older worker in violation of the Federal Age Discrimination in Employment Act (ADEA), the employee has the burden to prove by a preponderance of the evidence that age was the determining factor in the challenged employment decision. In other words, even if there is some evidence that age was a motivating factor in the employment decision, the burden will remain on the employee to prove that the decision would not have been made “but for” the employer taking the employee’s age into account.

Like the victory in *Lilly Ledbetter v. Goodyear Tire & Rubber Co.* (the 2007 Supreme Court pay discrimination decision that was expressly overturned by the Lilly Ledbetter Fair Pay Act, which was signed into law earlier in 2009), however, the victory in *Gross* may be short-lived.

On October 6, Congressional leaders from both the Senate and House introduced legislation that is designed to overturn the *Gross* opinion. According to its proponents, the bill, entitled “Protecting Older Workers Against Discrimination Act” [H.R. 3721, S. 1756], “restore[s] fundamental fairness” by:

- reversing the *Gross* decision by indicating that, when an employee shows that discrimination was a “motivating factor” behind an employment decision, the burden is on the employer to show that it complied with the law; and
- clarifying that this “motivating factor” framework - which was codified by the Civil Rights Act of 1991 for claims involving race, sex, national origin and religion discrimination claims under Title VII of the Civil Rights Act of 1964 - applies to all anti-discrimination and anti-retaliation laws.

The anticipated bill was introduced by three Democratic Committee Chairmen (Sen. Tom Harkin, D-Iowa; Sen. Patrick Leahy, D-Vt; and Rep. George Miller, D-Calif.), and is supported by such organizations as the AARP, the Leadership Conference on Civil Rights, the National Senior Citizens Law

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Center and the National Women's Law Center. The introduction of the proposed legislation preceded a hearing held on October 7 by the U.S. Senate Judiciary Committee to examine workplace fairness. In addition to addressing the *Gross* opinion, the hearing addressed the 2001 United States Supreme Court opinion in *Circuit City Stores Inc. v. Adams*, which held that employees could be bound by pre-dispute arbitration clauses. Bills designed to overturn *Circuit City* were introduced earlier in this Congressional session. Quick action on the Protecting Older Workers Against Discrimination Act has been urged by lawmakers.

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