



Alert

Labor & Employment Client Service Group

To: Our Clients and Friends

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Supreme Court Expands Time Period for Filing Title VII Disparate Impact Charges

In Lewis v. City of Chicago, the US Supreme Court ruled that the period in which to file an EEOC charge alleging that an employment practice has a disparate impact commences anew whenever that practice is applied, not when that practice was first adopted. The Lewis decision sharpens the dilemma created by last summer's Ricci v. DeStefano decision, which held that an employer's changing an employment practice based on its fear of possible disparate impact claims could be a basis for disparate treatment claims. Lewis also reaffirmed that disparate treatment charges must be filed within 300 days of an employer's challenged decision, rather than the date of the alleged harm resulting from that decision.

The Lewis Decision

In 1995 the City of Chicago administered a written test for firefighter job applicants. In 1996, the city divided the applicants into three groups based on their scores. The two highest scoring groups were "well qualified" and "qualified" and the lowest scoring group was rejected for consideration. In May 1996, the City randomly selected candidates from the "well qualified" group for consideration as positions became available. It continued that process nine more times over the next six years until it reached candidates from the "qualified" group.

African American candidates from the "qualified" group filed EEOC charges alleging that the City's practice of first considering "well qualified" candidates had a disparate impact on African Americans. The charges were filed more than 300 days after the City announced the results of the examination and how it would use those results, but within 300 days of the second time that "well qualified" candidates were selected for consideration.

Writing on behalf of a unanimous Court, Justice Scalia noted that unlawful disparate impact discrimination is established "if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . ." and the respondent fails to demonstrate that the practice is job-related and consistent with business necessity. 42 U.S.C. §2000e-2(k) (emphasis added). The Court held that each use of an employment practice (rather than

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the initial adoption of the practice) constitutes an unlawful act of discrimination for purposes of determining when an EEOC charge must be filed.

Lewis also reaffirmed that the period for filing an EEOC charge alleging disparate treatment begins when an employer makes an unlawful decision, rather than the later date when the complaining employee is adversely affected by that decision. The Court reconciled this with Lewis by reference to the principle that a complaining party “must show a ‘present violation’ within the limitations period.” Where proof of discriminatory intent is required (as in disparate treatment cases), a present violation occurs when an employer makes a discriminatory decision. Where no proof of intent is required (as in disparate impact cases), then a present violation occurs when the employer uses a practice that causes a disparate impact.

The Consequences of the *Lewis* Decision

Following Lewis, employers should review existing policies, such as educational qualifications, job testing or other apparently neutral practices, to determine whether there is a disparate impact risk, and if there is, whether the policy is job-related and consistent with business necessity. But employers must also consider Ricci v. DeStefano, since changing policies because of unsupported disparate impact concerns may give rise to disparate treatment liability.

Bryan Cave lawyers are ready to provide assistance in designing or reviewing employment policies. Feel free to contact us if you have questions about the impact of *Lewis* on your business.