

# Fenwick Employment Brief

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[Victor Schachter](#)

Editor

650.335-7905

[Mary Wang](#)

Contributor

650.335-7154

Fenwick  
FENWICK & WEST LLP

## Fair Pay Act of 2009 is Enacted

President Obama has signed into law the Lilly Ledbetter Fair Pay Act of 2009 (“Fair Pay Act”), which provides that an unlawful employment practice occurs not only when an employer makes a discriminatory decision about the employee’s compensation, but each time an employee receives a paycheck or other compensation affected by the discrimination. The new law would allow plaintiffs to potentially bring pay discrimination claims years after an initial pay decision by starting a new statute of limitations each time an employee receives compensation affected by the initial pay decision.

The Fair Pay Act specifically overturns the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Company* (2007) (reported in the June 2007 FEB) [<http://www.fenwick.com/publications/6.5.4.asp?mid=24>]. In *Ledbetter*, the Court held that the time limits for filing a discrimination charge with the Equal Employment Opportunity Commission (EEOC)—300 days in most states and 180 days in the few states that do not have a fair employment agency—commenced when the employer made the discriminatory compensation decision about plaintiff’s compensation, not each time she received a paycheck affected by the discrimination.

Under the newly enacted law, however, a fresh discriminatory offense occurs each time an employee is impacted by a discriminatory practice, including each time an employee receives a paycheck or other compensation affected by the discriminatory decision. The law, which amends Title VII of the 1964 Civil Rights Act as well as other major federal anti-discrimination statutes, provides that plaintiffs may recover back pay for up to two years preceding the filing of a charge of discrimination.

In light of this new law, employers should carefully review their current compensation programs to clarify and remedy any potentially unlawful disparate pay practices. Employers should exercise caution in conducting this analysis as such investigations may not be protected from disclosure in litigation unless legal counsel is involved in privileged communications.

## Supreme Court Rules that Anti-Retaliation Protection Extends to Employee Witnesses in Harassment Investigations

The U.S. Supreme Court has unanimously ruled that Title VII of the Civil Rights Act of 1964 protects an employee from retaliation even when the employee merely reports discrimination in response to an employer’s questions during an internal investigation of harassment complaints made by others.

In *Crawford v. Metropolitan Government of Nashville*, a school district was investigating complaints of harassment by several employees against its employee relations director, Gene Hughes. During the investigation, a human resources representative interviewed several employees who worked with Hughes, including plaintiff. When asked whether plaintiff had ever seen Hughes act inappropriately, plaintiff replied that Hughes asked to see her breasts on numerous occasions, grabbed his genitals in front of her, and once pulled her head toward his crotch. Although the school district did not take any disciplinary action against Hughes as a result of the investigation, a few months later, plaintiff was suspended and subsequently fired for alleged drug use and embezzlement. The school district also terminated two other women who complained about sexual harassment by Hughes.

The lower appellate court had found that plaintiff was not protected against retaliation under Title VII because she did not instigate or initiate any complaint prior to answering questions in the employer’s internal investigation, and did not take any further action to oppose discrimination prior to her termination. The U.S. Supreme Court disagreed, reasoning that an employee can “oppose” activity that is illegal under Title VII “by responding to someone else’s questions just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”

This decision underscores the need to ensure that there is no retaliation against an employee who participates in investigations into allegedly unlawful workplace conduct, whether or not the employee is the original complainant.

## **WARNINGS ABOUT WARN**

### **Company Layoff of 200 Employees Because of “Unforeseeable Business Circumstances” Held Not A Violation of Federal Warn**

In one of the few cases addressing the “unforeseeable business circumstances” exception to the federal Worker Adjustment and Retraining Notification Act (WARN), the U.S. Court of Appeals for the Tenth Circuit (Denver, CO) held in *Gross v. Hale-Halsell Co.* that the company did not have to comply with the 60 days notice requirements of WARN when it laid off approximately 200 workers three working days after learning of the loss of its largest customer. The federal WARN Act requires that employers with at least 100 employees provide at least 60 days of prior notice of a plant closing or mass layoff. However, the statute creates an exception to this notice requirement if the mass layoff or plant closing is caused by business circumstances that were not reasonably foreseeable at the time notice would have been required.

Hale-Halsell Co., a wholesale grocery warehouse and distribution center, had a longstanding relationship spanning over 30 years with its largest customer, United Supermarkets, which accounted for approximately 40 percent of Hale-Halsell’s orders. The court found that, although Hale-Halsell had been suffering from financial troubles for months, the company did not decide to lay off employees until it received a letter from United Supermarkets announcing that United would stop using Hale-Halsell as its primary supplier. The court ruled that the company met the exception for unforeseeable business circumstances.

Employers should be mindful, however, that California as well as several other states, have analogous state laws governing mass layoffs and plant shutdowns, which in some instances impose stricter requirements than the federal WARN. For example, under the California WARN Act there is no “unforeseeable business circumstances” exception to the notice requirements. For a comparison of the Federal and California WARN statutes see the December 2008 FEB. [[http://www.fenwick.com/docstore/Publications/Employment/Comparison\\_Chart\\_Federal v Cal WARN.pdf](http://www.fenwick.com/docstore/Publications/Employment/Comparison_Chart_Federal_v_Cal_WARN.pdf)]

## **New York WARN Act Goes Into Effect**

Beginning February 1, 2009, employers in New York must comply with the newly enacted New York Worker Adjustment and Retraining Notification Act (NY WARN). Although modeled on the federal WARN, the New York law is more expansive in that it covers more employers, is more easily triggered and requires more advance notice than the federal law. For example, the NY WARN covers employers with 50 or more employees (compared with 100 under federal law). The state law also requires 90 days’ written notice of a mass layoff, plant closing, or relocation (compared with 60 days’ notice under federal law). In addition, under the NY WARN, a “plant closing” occurs when a shutdown of a single site of employment results in the loss of 25 employees (50 employees under Federal WARN), and a “mass layoff” occurs when there is an employment loss of 25 employees and 33% of the workforce or at least 250 employees at a single site of employment (federal WARN requires 50 or more full-time employees representing 33% of the workforce or at least 500 employees).

## **NEWSBITES**

### **Employers May Not Prohibit Employees From Discussing Workplace Concerns**

In *Ashley Furniture Industries, Inc., and Voces de la Frontera*, the National Labor Relations Board (NLRB) ruled that the employer acted unlawfully when it instructed employees not to discuss various workplace issues. Section 7 of the National Labor Relations Act gives employees the right to engage in concerted activity for mutual aid and protection, including communicating among themselves about wages or other common concerns in the workplace. Federal law prohibits employers (**both union and non-union companies**) from interfering with, restraining, or coercing employees in the exercise of these rights. In this case, the company’s human resources representative instructed certain employees that they could not discuss with anyone (inside or outside the company) the following: (1) a disciplinary infraction, (2) the receipt of a “no-match” letter from the Social Security Administration, and (3) the expiration of the employee’s work permit. The NLRB found that

the company did not have a legitimate and substantial interest in the confidentiality of the information and therefore held that the company's gag rules were an unlawful interference with the employees' rights to discuss workplace concerns.

### **California Court of Appeal Applies Shorter Statute of Limitations On Labor Code §203 Waiting Time Penalties**

The California Court of Appeal recently held in *Pineda v. Bank of America* that where an employer has paid all wages due upon termination before the filing of a lawsuit, a plaintiff's claim for waiting time penalties is governed by a one year statute of limitations. In *Pineda*, the employer paid plaintiff his final wages four days after his termination. More than a year and a half later, the employee filed a lawsuit seeking recovery solely for waiting time penalties under California Labor Code §203. Plaintiff also alleged that the employer's failure to timely pay final wages was an unfair business practice under Business and Professions Code §17200.

The Court of Appeal found that, where there is no concurrent claim for unpaid wages, an employee's claim for Labor Code §203 waiting time penalties is governed by the one year statute of limitations under Code of Civil Procedure section 340. The three year statute of limitations under Labor Code §203 is only available if the plaintiff is seeking recovery of unpaid wages along with waiting time penalties (*i.e.* if the employer has not paid all wages due upon termination at the time of the filing of the lawsuit). Significantly, the court also held that, since Business and Professions Code §17200 does not provide for damages or penalties (only restitution), plaintiff could not invoke the four year statute of limitations on his claim for waiting time penalties.

### **Federal Court Holds Pharmaceutical Salespersons Are Exempt From Overtime under California and Federal Law**

A federal district court judge in New York held that sales representatives working for Novartis Pharmaceuticals Corp. are exempt from overtime pay under the outside sales and administrative exemptions under the federal Fair Labor Standards Act (FLSA), as well as under California and New York wage and hour laws. Novartis' sales representatives visit doctors to educate them about the company's products and receive commissions tied to the number of prescriptions written by doctors within the sales representative's assigned territory. Ruling for the company, the court found that the

sales representatives came under the outside sales exemption even though they did not (and could not) make sales directly to the doctors they visited. The court considered the unique characteristics of the pharmaceutical industry and found that by educating the doctors about the products and urging them to write prescriptions when suitable to address patients' needs, the sales representatives could be considered to be making sales within the context of the pharmaceutical industry. The court also found that the sales representatives were covered under the administrative exemption because they performed work that is ancillary to production, directly related to the company's general business operations, and also used discretion and independent judgment in their interactions with doctors by tailoring their presentations with the goal of increasing the number of prescriptions written for the drug.

### **San Francisco Employers: New Commuter Benefits Ordinance**

Effective January 19, 2009, San Francisco employers with 20 or more employees are required to offer commuter benefits to encourage employees to use public transit or vanpools. Employers must offer one or more of the following benefit options:

- (1) **Pre-Tax Benefits:** Set up a pre-tax deduction program under current federal tax law allowing employees to use up to \$115 per month in pre-tax wages to purchase transit passes or vanpool services.
- (2) **Employer Purchased Benefits:** Pay for employee transit passes or offer vanpool reimbursements to employees in an amount at least equal to the value of the San Francisco MUNI pass (currently \$45).
- (3) **Employer Provided Transit:** Provide free shuttle services on a company-funded bus or van to transport employees between their homes and workplaces.

Covered employers have 120 days from the effective date of the ordinance to implement a transportation benefit program in compliance with the ordinance.

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