

President Obama Signs Ledbetter Fair Pay Act: Expect More Pay Discrimination Claims

On January 29, 2009, President Obama signed his first bill into law. The Lilly Ledbetter Fair Pay Act of 2009 (the "FPA") is expected to increase the number of pay discrimination claims against employers because it relaxes the statute of limitations (time limit) for employees to bring claims of pay discrimination based on any of the protected categories under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act (*i.e.*, sex, gender, race, color, religion, age, national origin, and disability).

More specifically, the FPA expressly overturns the United States Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). In *Ledbetter*, the Supreme Court rejected the so-called "paycheck rule." Under the paycheck rule, each and every paycheck issued by the employer is viewed as a separate and distinct incident of discrimination, so long as the paycheck can be traced back to a discriminatory decision setting the employee's

rate of pay. In other words, by invoking the paycheck rule, an employee can bring a claim for pay discrimination even if the alleged discriminatory decision setting the employee's rate of pay took place years -- even decades -- earlier. The employee's claim would be timely if it is filed within 180 days (or in some states such as Massachusetts 300 days) of the issuance of the employee's last paycheck. In *Ledbetter*, the Supreme Court rejected the paycheck rule and held that employees are required to file pay discrimination claims within 180 days of the *discrimination decision setting the employee's rate of pay*.

In legislatively overruling the *Ledbetter* decision, the FPA states that with respect to pay discrimination, an unlawful employment practice occurs: (1) when a discriminatory compensation decision or other practice is adopted; (2) when an individual becomes subject to a discriminatory compensation decision or other practice; or (3) when an individual is affected by application of a discriminatory compensation decision or

other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. The full text of the FPA is available on the White House's website at: http://www.whitehouse.gov/briefing_room/LillyLedbetterFairPayActPublicReview/.

The upshot of the FPA is that many future pay discrimination claims may be based on pay-setting decisions made years ago. Moreover, the FPA is retroactively effective to May 28, 2007 (the day before the Supreme Court issued its decision in *Ledbetter*), so claims that were not pursued (because of the *Ledbetter* ruling) may now be brought.

Given the publicity surrounding Lilly Ledbetter during the presidential campaign, and the attention given to the FPA as President Obama's first law, employers should expect to see an



increase in the number of pay discrimination claims. Indeed, the United States Equal Employment Opportunity Commission (the “EEOC”), the federal agency that investigates claims of pay discrimination in employment, issued a press release praising the FPA and stating: “The EEOC receives upward of 5,000 wage bias charge filings nationwide each year . . . The EEOC *intends to enhance enforcement in this area.*”

Some good news is that the FPA does not require employers to repay employees for all of the years any discriminatory pay difference was in effect; Congress limited back pay recovery to two years prior to the filing of the employee’s complaint.

Although the FPA is being celebrated by the EEOC as: “a victory for working women and all victims of pay discrimination . . . who are shortchanged by receiving unequal pay for performing equal work,” the FPA raises troubling questions for employers. For example, how will employ-

ers effectively be able to defend against pay discrimination claims that may date back to pay-setting decisions made years before? Indeed, Justice Alito, writing for the majority of the Supreme Court in *Ledbetter*, rejected the paycheck rule in part because the 180-day statute of limitations contained in Title VII was intended to protect employers from defending claims from employment decisions that are long past (and decisions made by managers who may no longer be available to provide evidence concerning the reasons for disparities in pay).

Faced with the demands of the current economic recession and the myriad federal, state and local laws and regulations governing the employment relationship, the FPA increases the risk of liability for employers. Due to the expected increase in the number of pay discrimination claims as a result of the FPA, employers are advised to:

- Review current employee compensation plans

and procedures to identify disparities and to ensure that any disparities are based on legitimate, non-discriminatory factors;

- Ensure that managers adequately document the legitimate, non-discriminatory reasons for pay differences among employees who perform similar work (recognizing that these managers may not be available to assist in defending a future claim); and
- Encourage and respond to internal complaint procedures for employees who believe their terms and conditions of employment may be impacted by discrimination.

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