



Legal Alert: Calling the Ledbetter Act a "First Step," Sponsors Urge Senate to Pass Paycheck Fairness Act

2/2/2010

On the first anniversary of the Lilly Ledbetter Fair Pay Act, Congresswoman Rosa DeLauro and Senator Chris Dodd celebrated by calling for Congressional action on the Paycheck Fairness Act (PFA) (S 182).

This Act would amend the Equal Pay Act (EPA) provisions of the Fair Labor Standards Act to prohibit retaliation against employees for sharing salary information with co-workers, allow prevailing plaintiffs to recover compensatory and punitive damages in EPA cases, and facilitate the filing of class actions lawsuits under the EPA.

Perhaps more significantly, the PFA would make it easier for complaining employees to establish a pay discrimination claim. Currently, an employer can defend a pay discrimination claim under the EPA by showing that a differential in pay is based on any factor other than sex. Thus, for example, if an employer pays a male employee more than a female employee who performs the same job, the employer can defend this difference by showing that it is based on a factor other than sex, such as because the male employee has a college degree and the female employee does not.

Under the PFA, the employer would be required to show that the pay difference is based on a bona fide factor other than sex (such as education or training). Additionally, the employer would have to show that this factor "is not based upon or derived from a sex-based differential in compensation" **and** that it is job-related with respect to the position in question and consistent with business necessity. Thus, it would not be sufficient for the employer to show that it pays the male employee more because he has a college degree; it would also have to show that the college degree is necessary to the performance of the job and that the requirement of a college degree is consistent with business necessity. Additionally, even if the employer makes this showing, the female employee could still prevail if she can demonstrate that "an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."

Thus, under the PFA, a court would be permitted to second guess an employer's legitimate, **nondiscriminatory** business reason for paying the male employee more than the female employee by finding that the employer could have chosen a different standard upon which to base the employees' pay.

Senator Dodd called the Ledbetter Act a "first step" towards ensuring that men and women are treated equally in the workplace. Further, Senator Dodd stated, "Where the Lilly Ledbetter Fair Pay Act was designed to ensure that women have a right to hold their employers accountable for gender discrimination in wages, the Paycheck Fairness Act seeks to ensure that they won't have to."

The House combined this Act with the Lilly Ledbetter Fair Pay Act and sent it to the Senate; however, it was not included in the final version of that Act. The PFA was scheduled for a hearing before the Senate Health, Education, Labor, and Pensions (HELP) Committee on February 4; however, the hearing has been postponed.

We will continue to keep you updated on the status of this legislation. If you have any questions about this legislation or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or David Prather, dprather@fordharrison.com.