

Employer Liability in Compensation-Based Discrimination Cases Could Be on the Rise

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Breaking Developments In Labor and Employment Law
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New Legislation Expands the Time Period for Employees to Raise Pay Claims

Considered a top priority for labor and women's rights groups, President Barack Obama just signed the Lilly Ledbetter Fair Pay Act of 2009 ("Act") into law today, January 29, 2009. The Act was passed by both houses of Congress as a direct response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which restricted the time period in which employees could file a discriminatory compensation lawsuit.

Background. In *Ledbetter*, the Supreme Court held that, in order to be actionable, compensation-based discrimination claims under Title VII or the Equal Pay Act had to be filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days (or 300 days in a dual-filing state) of an employer's discriminatory act itself, regardless of whether the act had a continuing discriminatory effect. Thus, the employee in *Ledbetter* had no cause of action against her employer for an allegedly discriminatory performance evaluation given outside of the 180-day claim period, notwithstanding the fact that it had the ongoing effect of reducing her pay each and every pay period.

Congress found the Court's interpretation of the statutory claim period to be overly restrictive and "at odds with the robust application of the civil rights laws that Congress intended." Accordingly, the Ledbetter Fair Pay Act amends the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, and it vastly expands the claim period for discriminatory compensation claims.

How the Ledbetter Fair Pay Act Changes the Law. Now the clock for an employee's claim of discriminatory compensation starts ticking when:

- A discriminatory compensation decision is made or other practice is adopted;
- An individual becomes subject to a discriminatory compensation decision or other practice; or

- An individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation are paid, resulting in whole or in part from such a decision or other practice.

Now, each payday essentially renews the statutory claim period for a compensation discrimination claim *regardless of when the original alleged unlawful discriminatory action occurred*. Thus, employees can seek redress for the current impact of allegedly discriminatory performance evaluations that occurred years earlier. What's more, the legislation applies retroactively to actions dating back to May 28, 2007.

Additional Legislation Pending. More legislation affecting compensation-based discrimination claims may be on the way. In a closely related bill intended to reduce the ongoing pay disparity between men and women performing equal work, Congress is considering the Paycheck Fairness Act. This legislation amends the portion of the Fair Labor Standards Act of 1938, known as the Equal Pay Act, relating to sex discrimination in the payment of wages. Noteworthy aspects of the bill, which already passed the House and is currently under consideration in the Senate, include:

- Uncapped compensatory and punitive damage awards;
- An expanded definition of "same establishment" for wage comparison purposes to include all employees within the same county or political subdivision of the state working for the same employer even though dispersed among several locations; and
- Automatic inclusion of prospective class members in a class action lawsuit unless they affirmatively opt-out.

Without a doubt, employers will be watching Congress as this proposed legislation progresses.

What This Means for Employers

Under the Ledbetter Fair Pay Act, employers may find themselves stuck in an endless cycle in which potential discrimination claims are never time-barred. Indeed, given the legislation's retroactive application, claims previously time-barred are once again open and subject to endless renewal with each pay cycle. As a result, employers are strongly encouraged to review their compensation policies and establish protocols to ensure consistent application among employees, regardless of race, age, sex or any other category protected by applicable federal law.

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