



January 29, 2009

LILLY LEDBETTER FAIR PAY ACT BECOMES LAW

President Obama signed today The Lilly Ledbetter Fair Pay Act of 2009

(<http://www.lawmemo.com/docs/congress/s181.pdf>)

Congress passed the Act in response to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Lilly Ledbetter was an employee of Goodyear from 1979 until 1998 in Gadsden, Alabama. Because of discriminatory evaluations by supervisors in her early years of employment, Ledbetter had consistently received lower raises. By the end of her employment, this resulted in her receiving between seventy and eighty-five percent of the salary her male colleagues earned. Ledbetter only learned that she was being paid less than her male co-workers at the end of her career. The Supreme Court held that she had waited too long after the discriminatory pay decisions to assert her claim.

The Ledbetter Case

Under Title VII, a plaintiff must file his or her charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. (This would have been 300 days in a state that permits filing discrimination claims with a state or local agency. Alabama is not such a state, but a majority of states are, including Missouri, Kansas and Nebraska.) Ledbetter claimed that early discriminatory performance evaluations by her supervisors resulted in disparate pay throughout her career and should be actionable because she filed her charge within 180 days of receiving a paycheck that had been affected by the discrimination. The jury found that Goodyear had discriminated against Ledbetter on the basis of sex in violation of Title VII and awarded her backpay and damages. The United States District Court for the Northern District of Alabama entered judgment for Ledbetter. The United States Court of Appeals for the Eleventh Circuit reversed the trial court's ruling. The Court of Appeals held that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the applicable charging period, here 180 days. The Eleventh Circuit found no evidence of discrimination in the two pay increase decisions that occurred within the 180 day window.

Ledbetter asked the Supreme Court to recognize each paycheck affected by the discrimination as a separate discriminatory act for purposes of calculating the 180-day window. The Court denied Ledbetter's claim, affirmed the Court of Appeals' decision and found that each discriminatory pay increase decision triggered the 180-day statute of limitations, not the individual paychecks resulting from the decisions. The Court noted that if Ledbetter's argument were successful, a plaintiff could file a charge and lawsuit now for an alleged discriminatory pay decision or performance review that took place decades earlier.

Congressional Action

On January 22, 2009, the Senate passed the "Lilly Ledbetter Fair Pay Act of 2009." Almost two weeks earlier, the House had passed a similar bill combined with another bill amending the Equal Pay Act called the "Paycheck Fairness Act." On

January 27, the House dropped the Paycheck Fairness Act provisions and approved the Senate version of the bill. President Obama campaigned on a platform of workers' rights with Lilly Ledbetter at his side and, as he had promised, signed the bill when it landed on his desk on January 29.

The Ledbetter Act amends or modifies Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973. Each of these acts is modified to "clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs *each time compensation is paid* pursuant to the discriminatory compensation decision or other practice...." (Emphasis added.) The law states that an unlawful employment practice occurs, "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or 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 recovery or remedy period under Title VII (which is applied to other discrimination laws by reference) is different from the 180 day or 300 day time period for filing a charge. The remedy period is limited to the two years before the charge was filed where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices that occurred outside the time for filing a charge. In other words, a discriminatory pay charge that is timely filed may result in the employee's recovery of the pay differential for up to two years prior to the filing of the charge as well as any discriminatory payments that were received after the charge. Compensatory and punitive damages and reasonable attorneys' fees can also be awarded to a prevailing plaintiff.

The law has an effective date of May 28, 2007, the day before the Supreme Court decided the *Ledbetter* case. All claims of discriminatory compensation that were pending on or after that date are subject to this new analysis.

Effects of the New Law

Congress intends this Act to remedy cases of disparate pay like that of Lilly Ledbetter. Cases of disparate pay can be difficult for employees because pay rates often are not openly disclosed. It is likely that many cases, years and even decades old, will be brought under this new statute of limitations analysis when an employee in a protected class learns that his or her pay rate does not equal the pay rate of an employee outside the protected class in a similar position. Fortunately, the Ledbetter Act will not resurrect claims of former employees unless they have received some compensation within the previous 180 or 300 day period that arguably was affected by the earlier alleged discrimination.

Ledbetter Act discrimination claims are not limited to wage differentials. Benefits or "other compensation" may also be the basis for a discrimination claim. Other compensation certainly could include bonuses, whether or not the bonuses were related to wages. Benefit discrimination would more likely, though not necessarily, be connected to wage differentials and could be in the form of pension disparities, 401(k) contributions by the employee, 401(k) contributions by the employer, and any other payment that would be necessary to make the employee whole.

The claimant in a compensation discrimination dispute establishes a prima facie case by showing protected status and a lower compensation than another employee in the same job who is outside the protected group. Then the burden shifts to the employer to present evidence that the pay decision was not discriminatory. If the employer can present no evidence, the plaintiff will win. An inability to provide records and witnesses justifying a compensation differential will be a serious issue for employers.

Employers will be forced to look for records that have long been forgotten or may never have existed to defend cases they thought would never be filed. Even more difficult to find than old pay data will be reliable evidence of job descriptions, job duties, performance records and how and why pay decisions were made. Additionally, as the length of time after a pay decision increases, the difficulty of finding management witnesses who recall the events will increase.

Practical Steps Going Forward

There are a variety of measures an employer may want to consider in light of the uncertainties of the Ledbetter Act. Some of these include:

- Analyze your present compensation system including salary/wage ranges and rates, bonuses and benefits. Your compensation system will be far easier to defend if compensation is set for the "position" rather than the "individual."
- If length of service or experience is to be a factor in compensation decisions, it will be best to use a uniform approach at least within a job classification. Define what the term "relevant experience" means (e.g., total years performing a specific and related jobs at your organization, outside similar experience, time in position, etc.).
- If merit or performance is a factor in compensation determinations, it will be helpful to have a documented evaluation process that uses objective measurements to the greatest extent possible and that requires specific examples and documentation in subjective areas. Make sure disciplinary action for an employee is reflected on the employee's performance evaluation. Review performance evaluations to ensure that the comments are consistent with any disciplinary action imposed during the review period.
- Managers should be trained to review evaluations and compensation decisions by their supervisors very carefully for consistency and documentation. It would be helpful to have a centralized final review (e.g., by the HR department) to further ensure consistency and appropriate documentation.
- All managers and supervisors having input into evaluations and compensation decisions should be trained on the non-discrimination laws.
- Perform any analysis of a potentially discriminatory compensation level for one or more employees with great care. It is usually best that such an analysis be done by counsel or at the direction of counsel to attempt to maintain attorney-client confidentiality.
- Conduct regular analyses of compensation within a job title to identify if there are disparities that cannot be justified. Consult with counsel about how best to approach correction.
- Be careful about using overly broad job titles that cover a wide range of duties and differing pay rates. Such a system may make it more difficult to prove the particular duties assigned to various employees within the job title as a justification for the pay differences.
- Adopt an internal process that would allow employees to raise concerns about compensation so that issues can be addressed early on, or expand an existing EEO policy to include specific procedures for filing internal complaints about compensation discrimination.
- Maintain all compensation plans and supporting data (e.g., salary/wage administration plans and procedures; bonus, commission, incentive and other supplemental compensation plans; calculations of such compensation, etc.). Make sure each document includes the date it became effective so that it will be easy to determine the time period to which it applies. Keep records of the criteria used to determine the amounts and recipients of any discretionary bonuses.
- Reconsider your records retention policy to determine how it will impact any evidence of past and current compensation, how and why compensation decisions were made, job descriptions or other evidence of the duties and responsibilities of positions and individual employees, performance evaluations, disciplinary records, and any other documentary evidence related to individual compensation issues. You may want to consult with counsel about appropriate changes to the records retention policy for your particular situation.
- In responding to charges of discrimination in general, be careful when producing compensation information on employees similarly situated to the charging party, even if the charge is not a compensation discrimination charge. If you furnish information that indicates that the charging party was paid less than others, it could prompt an investigation into compensation discrimination.

About the Authors

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Dave is a partner in the firm's labor and employment law group. He has been named to The Best Lawyers in America in the area of labor and employment. He is listed in the employment lawyers section of Chambers USA - America's Leading Lawyers for Business and also Missouri Superlawyers. Dave represents management in connection with a wide variety of labor and employment issues including union avoidance, union campaigns and elections, arbitrations, collective bargaining, unfair labor practice proceedings, discrimination claims and litigation, other employment disputes in administrative proceedings or litigation, and consultations on employment policies, investigations and procedures to reduce litigation risks. Dave is a University of Kansas School of Law graduate and former judicial clerk for Judge Earl E. O'Connor in the District of Kansas and for Judge James K. Logan in the United States Tenth Circuit Court of Appeals. He is a frequent speaker at employment relations and health care seminars on current personnel and employment issues.

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