

# The Litigation Angle of the Lilly Ledbetter Fair Pay Act

By Paul R. Dorf, APD

President Barack Obama signed the Lilly Ledbetter Fair Pay Act on January 29, 2009 (see *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)). This law applies to discriminatory pay complaints and remedies under several current laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), as well as parts of the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973.

The legislation basically cancels out a Supreme Court ruling last year that declared plaintiffs had to file wage claims within 180 days of a company's decision to pay a worker less than a counterpart doing the same work. The new law extends the filing deadlines for pay-bias complaints and clarifies the definition of a discriminatory employment practice. As long as the employee is still employed with a company, he/she may file a complaint, since it may take years to uncover the discriminatory practice.

As it's new legislation, there is not yet any case law available relating to cases that have been considered under Ledbetter. However, prior suits focused on wage discrimination can be used as the basis for preparing a proper defense.

Compensation consultants who are hired as expert witnesses to assist attorneys with research and expert testimony on wage discrimination claims can follow a number of steps to properly prepare for this type of action. First and foremost, it is critical to undertake a systematic and methodical process that explores all avenues related to the claim. There is no "silver bullet" nor is there any guarantee that any fact or piece of evidence will easily exonerate or condemn a party. Finding the right material requires considerable time and effort to identify the details surrounding the events that impacted the potential wage discrepancy.

The following is a list of some of the areas that need to be explored during the course of the research:

1. What was the company's written policy pertaining to setting wage/salary rates?
2. Were these policies followed exactly and consistently?
3. What was the basis for assigning wage/salary grades, ranges, levels, and/or steps to new hires and/or promoted employees?
4. What factors were used by the company to establish an individual's wage/salary?
5. What were the individual's duties and scope of responsibilities as compared with others in the same job title or category?
6. What were the individual's duties and scope of responsibilities as compared with individuals in higher or lower positions and wage/salary grades?
7. How did the wage/salary levels, amounts, increases, and bonus/incentives of the individual relate to similarly situated individuals in the same race, gender, age or other protected classes?

8. How did the wage/salary levels, amounts, increases, and bonus/incentives of the individual relate to similarly situated individuals in other race, gender, age or other protected classes?
9. How did the individual's performance evaluation rating relate to similarly situated individuals in the same race, sex, age or other protected classes?
10. How did the individual's performance evaluation relate to similarly situated individuals in other race, sex, age or other protected classes?

The new legislation will change the way employers manage compensation decisions, including the manner in which they may establish, intentionally or not, disparate pay between men and women and protected classes. The legislation is expected to cause many companies to examine their processes for making compensation decisions to ensure that pay actions are justifiable based on merit. Employment attorneys can address the following actions with their corporate clients in light of this legislation and proactively address any compensation issues that may relate to Ledbetter:

- Review existing pay administration policies, including recordkeeping.
- Consider new policies to make sure any existing pay inequities are corrected and supervisors and managers are trained to avoid them in the future.
- Review all job descriptions so that they are not biased towards one gender.
- Implement training for managers on effective hiring decisions, especially with regard to pay.
- Fully engage Human Resources in the hiring process to monitor and ensure fairness and equity.
- Review any closed or pending charges and lawsuits, and consult with and use outside legal counsel.
- Review related company policies to ensure that they clearly reflect the employer's commitment to fair employment practices.
- Reaffirm company compliance with all applicable federal and state regulations regarding fair pay.

The manner in which Ledbetter will be litigated, and the litigation angle that is eventually utilized, are yet to be tested in the courts. The bottom line, for both attorneys and their corporate clients, is to conduct thorough research on the pay practices within the organizations they are examining. Although these actions are not a guarantee under Ledbetter, they will provide sufficient information to aid in evaluating claims of unfair pay, and, in the case of corporate clients, may help to reduce a company's risk and exposure.

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