

The Lilly Ledbetter Fair Pay Act of 2009

September 18, 2009

On Jan. 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (Act)[1]. At the time he signed the bill, President Obama stated, "[i]t is fitting that with the very first bill I sign -- the Lilly Ledbetter Fair Pay Restoration Act -- we are upholding one of this nation's first principles: that we are all created equal and each deserve a chance to pursue our own version of happiness." The purpose of the Act is to fight pay discrimination and ensure fundamental fairness to American workers.

The Act was introduced in Congress in order to overrule the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which was issued in 2007[2]. In the opinion of Congress, the Supreme Court's decision was so contrary to justice, the decision had to be overruled. In turn, the plaintiff in the *Ledbetter* case, Lilly Ledbetter, is now the namesake of this dramatic change in the law.

The passage of the Act leads to a sweeping change in pay discrimination litigation, as it amends Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA). When bringing a claim of prohibited discrimination based upon one of these statutes, the new law resets the statute of limitations for filing a wage claim against an employer, each time that an employee receives a paycheck, benefits or "other compensation." The Act allows an employee to bring a charge for alleged discrimination based upon when he or she feels the effect of the pay discrimination, as opposed to when the discriminatory decision was made. However, in order to fully understand the ramifications of this new legislation, you must first gain a better understanding of the history of the *Ledbetter* case, and the need for change.

Ledbetter v. Goodyear Tire & Rubber, Co., Inc.

Lilly Ledbetter was an employee with Goodyear Tire & Rubber (Goodyear) from 1979 to 1998. A predominant amount of her career with the company was spent working as an area manager. The position of area manager with Goodyear was primarily filled with male employees. Ledbetter's yearly performance evaluations led to her being awarded or denied raises in compensation. Over the years, she received a high number of poor evaluations which led to her earning approximately 40 percent less than her male counterparts. After learning of this pay discrepancy, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on the basis of sex. Shortly after she filed her charge of discrimination, she retired in 1998.

After her retirement, Ms. Ledbetter filed a lawsuit in the U.S. District Court alleging pay discrimination claims under Title VII and the Equal Pay Act. Ledbetter argued that each paycheck she received constituted a new act of unlawful discrimination and reset the statute of limitations for her to bring a claim. Goodyear filed a motion for summary disposition, arguing that the statute of limitations had run as to any pay decisions that occurred 180 days before Ms. Ledbetter filed her EEOC charge. The court denied Goodyear's motion, and it was appealed to the Eleventh Circuit Court of Appeals, who agreed with Goodyear and held that Ms. Ledbetter's claims based upon pay decisions made years ago were time-barred.

The U.S. Supreme Court granted *certiorari* on the narrow issue of whether a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of discriminatory pay decisions that occurred outside the statutory limitations period.

On May 27, 2007, the Supreme Court affirmed the decision of the Eleventh Circuit, finding that Ledbetter's claim was time-barred. The court found that the statute of limitations for filing a pay discrimination claim begins to run when the discriminatory pay decision is made, and not every time the employee feels the effects of the allegedly discriminatory pay decision^[3]. In writing on behalf of the majority, Justice Alito held, "the later effects of past discrimination do not restart the clock for filing an EEOC charge," and "current effects alone cannot breathe new life into prior, uncharged discrimination." The holding of the Supreme Court significantly restricted the timeframe for potential plaintiffs to bring forward their claims of discrimination.

The Beginning Of The Lilly Ledbetter Fair Pay Act

Within 24 days of the Supreme Court's decision, Representative George Miller of California introduced the Lilly Ledbetter Fair Pay Act of 2007 into the House of Representatives. The proposed legislation passed the House, but was later blocked by a Republican Filibuster. However, never losing their resolve, the supporters of this bill reintroduced the proposed legislation into the House of Representatives on Jan. 6, 2009, and it was passed within three days. Two weeks later, the bill also passed the Senate by a vote of 61-36, and by Jan. 29, was signed into law.

The new law made wholesale reversal of the Supreme Court's holding and was made retroactive to May 28, 2009 – the day after the Supreme Court's decision.

In pertinent part, the language of the Lilly Ledbetter Fair Pay Act specifies that unlawful pay discrimination occurs when: (1) 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.^[4]

The Act restores the pre-*Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began.

The Impact of the New Law

With the passage of the Act, employers face many new issues. The statute of limitations now resets each time an employee receives a paycheck, benefits or other compensation, potentially holding employers liable for pay decisions made decades ago. In addition to expanding the statute of limitations for a claim of pay discrimination, the Act also dramatically expands the pool of potential plaintiffs. Also, the Act may have consequences that will impact other employment laws.

The Act resets the statute of limitations for a claim of pay discrimination with each paycheck, but also with each receipt of benefits or “other compensation.” Therefore, any number of employee benefits could implicate the statute of limitations of a pay discrimination claim, including the receipt of healthcare benefits, bonuses and the benefits from an employer-sponsored retirement plan. Given the significant number of supervisors, managers and other employees who are involved in making decisions regarding these varied topics, employers are going to have to maintain greater oversight of all decisions that affect compensation and benefits.

Additionally, the language of the Act goes well beyond the Supreme Court’s decision in expanding the number of potential plaintiffs. Since the Act amends Title VII, as well as the ADEA and ADA, potential claims of pay discrimination are not limited solely to gender, but can now be brought on the basis of race, national origin, age, religion and disability.

What’s more, the Act extends protection to any individual who is “affected by” unlawful discrimination. In turn, individuals who were never direct victims of discrimination could now potentially bring claims, such as a widow filing a claim on behalf of her now-deceased husband – as long as she is within the statute of limitations triggered by his last paycheck or receipt of benefits.

Where an employer is required to defend claims of pay discrimination, they will be at a severe disadvantage. In most cases, although a plaintiff will bring his or her claim within the statute of limitations period based upon a recent paycheck, the allegedly discriminatory pay decision would have occurred a number of years prior. In turn, the employer will be forced to defend stale claims without the benefit of documentation, which will likely have been discarded or destroyed, or witnesses, who will no longer be available. Therefore, employers are going to be forced to overhaul their document retention methods and keep track of employees who may be witnesses in future litigation for an extensive number of years. However, even though the pay decision leading to discrimination may be decades old, the new law still maintains the cap of only two-years of back pay from the filing of the charge of pay discrimination.

THE LILLY LEDBETTER FAIR PAY ACT OF 2009 Cont.

Also, some have surmised that due to the breadth of the language in the Act, there may be some unintended consequences on other areas of employment law. By way of example, the Act may essentially eliminate the traditional statute of limitations for other claims of employment discrimination. Since other “non-pay” discrimination claims frequently have some effect on compensation, the traditional statute of limitations can be ignored, and a potential plaintiff can rely upon the elongated statute of limitations under the Act. For example, a traditional “failure to promote” claim of discrimination would have its statute of limitations period triggered at the time of the denial of the promotion. Now, the traditional limitations period can be ignored, and the potential plaintiff has 180-300 days from the receipt of each ongoing paycheck to file his or her charge of discrimination, in perpetuity.

Recommendations For Employers

The EEOC receives approximately 5,000 wage bias charge filing per year and has warned employers that in light of the new law, enforcement of pay discrimination will be increased.

In effort to combat claims of pay discrimination and to defend against future lawsuits, there are a number of steps that an employer can take to protect itself. First and foremost, all employers should revisit their pay practices to ensure they are compliant with the law and continue to revisit on a regular basis. Also, review your records retention policy to ensure that all records related to compensation and benefit decisions are being retained for the proper amount of time.

Additionally, an employer should ensure that proper documentation is being kept for all compensation decisions by all parties involved, including the rationale for each decision. All supervisors, managers and other decision-makers should be trained and/or retrained on proper documentation, conducting performance evaluations, setting employee salaries and the manner in which promotions and compensation increases should be granted. Where an employer has confidence in its pay system and in the documentation maintained by its employees within the pay system, they are in a much better position to defend a pay discrimination lawsuit under the Lilly Ledbetter Fair Pay Act.

Gary W. Francis is an associate in the law firm of Plunkett Cooney, and is a member of the Labor and Employment Law Practice Group. He focuses his practice on traditional labor law, employment law and employment litigation. He can be reached at (248) 901-4045; fax (248)901-4040; or gfrancis@plunkettcooney.com.

[1] Pub. L. No. 111-2

[2] *Ledbetter v. Goodyear Tire & Rubber, Inc.*, 550 U.S. 618 (2007).

THE LILLY LEDBETTER FAIR PAY ACT OF 2009 Cont.

[3] The court did not address whether a “discovery rule” would be appropriate in Ledbetter’s case because she did make the argument that the application of a “discovery rule” would alter the outcome in her case.

[4] Pub. L. No. 111-2