

CLIENT ALERT: President Obama Signs Ledbetter Fair Pay Act Expanding Scope of Claims of Discriminatory Compensation

On January 29, 2009, President Obama signed his first piece of legislation into law, the Lilly Ledbetter Fair Pay Act of 2009 (the "Ledbetter Act"). The Ledbetter Act effectively reinstates the "paycheck" rule and expands the scope of compensation-based discrimination claims under federal law. The Ledbetter Act was passed to overturn the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* Under the Ledbetter Act, employers may be required to defend against decades-old discrimination claims if the claim alleges that this past discrimination has an effect on a recent pay check.

Factual Background

Lilly Ledbetter worked as a supervisor for almost two decades at the Goodyear plant in Gadsden, Alabama. Ms. Ledbetter suspected that she was getting fewer and lower pay raises than her male peers, but she had no proof until she received an anonymous note revealing the salaries of three of male supervisors. Upon learning of the disparity in her pay, Ms. Ledbetter filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging gender discrimination. Following a jury trial in Court, she was awarded \$360,000, plus attorneys' fees and costs. Goodyear appealed.

In a 5-4 decision, the U.S. Supreme Court, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), held that the time limit for filing a discrimination complaint with the EEOC starts to run when an employer makes the discriminatory pay decision, and does not recur each time a paycheck is issued. Ms. Ledbetter's failure to file a timely discrimination complaint with the EEOC (normally 300 days from the discriminatory act, or 180 days in those states which have no employment discrimination agency) mandated dismissal of her Title VII claim.

Effect of the Ledbetter Act

The Ledbetter Act amends Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973 to provide that the limitations period for filing an EEOC charge starts to run when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to the decision or practice; or 3) an individual is affected by an application of a discriminatory compensation decision or practice - including each time wages, benefits, or other compensation is paid. In essence, the statute of limitations period restarts each time an employee receives a paycheck based on a previous discriminatory compensation decision.

The Ledbetter Act applies to discriminatory compensation decisions and "other practices" based on race, sex, religion, age, and disability under Title VII, the ADEA, ADA and the Rehabilitation Act. The Ledbetter Act further limits recoverable damages for back pay to two years preceding the filing of the charge, so long as "the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge." Employers should be aware that gender-based discriminatory pay claims may also be brought under the Equal Pay Act, which is part of the Fair Labor Standards Act of 1938, and provides a two year statute of limitations (or a three year period for willful violations).

In addition, the Ledbetter Act provides that an unlawful employment practice occurs when "a person" is "affected by" a discriminatory compensation decision or "other practice." This broad language may allow an argument for plaintiffs' attorneys to argue that almost any discrimination claim impacts

compensation under the Ledbetter Act, thereby effectively removing any time limits on such lawsuits. It could also result in pay discrimination charges filed by non-employees, such as the beneficiaries of deceased workers, so long as those individuals claim they have been affected by the discriminatory practice. We will have to wait and see how the EEOC and federal courts apply and interpret this language.

The Ledbetter Act is retroactive to May 28, 2007 and applies to all pay discrimination claims pending on or after that date. The consequences of the retroactive effective date are uncertain, but may allow plaintiffs whose cases were dismissed on statute of limitations grounds after the Supreme Court's decision in *Ledbetter* to reassert their claims. It may also cause employees who decided against filing compensation discrimination claims during the 20-month period since *Ledbetter* to proceed with litigation.

What Employers Should Do To Limit Risks Associated With the Ledbetter Act

Until the EEOC and federal courts begin applying and interpreting the Ledbetter Act's provisions, it is difficult to know what precautions will prove most effective in avoiding liability for past employment decisions. In the meantime, employers that wish to lessen exposure to liability should consider taking the following proactive steps:

- Review and consider the modification of compensation practices to guarantee sufficient documentation exists to support compensation decisions for all employees, especially where the compensation decisions are performance-based.
- If sufficient documentation of compensation practices does not exist under an employer's current practice, employers should develop objective guidelines for compensation decisions and ensure supervisory personnel charged with making those decisions are doing so uniformly among job classifications and are properly trained to apply the measures consistently among job classifications.
- Review and consider the modification of document retention policies to reduce the likelihood that important compensation documents, including termination, promotion, and benefits-related documents, may be lost which may be needed for defense purposes.
- Any revision of your document retention policies must be completed in a thorough and careful manner because many issues may arise regarding document storage, maintenance, and retrieval, which is particularly important with respect to electronically stored documents and information.
- Perform an internal review of past compensation decisions, to the extent historical compensation records exists. Consider whether such a review should be conducted through counsel so as to allow the review to be protected by the attorney-client privilege or work product doctrine.
- Take corrective action if you become aware of past company policies or practices that may have discriminated against a currently protected class, including but not limited to, wage increases, back pay, and modifications to seniority systems.

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