

LEDBETTER FAIR PAY ACT EXPANDS EMPLOYER LIABILITY

On January 29, 2009, President Obama signed the Ledbetter Fair Pay Act (the "Act") into law. Notably, this was the first piece of legislation signed by the new President. Although the Act's supporters claim it is specifically targeted to provide a remedy for discriminatory pay practices, consequences for America's employers will likely be more extensive.

WHY WAS THE ACT CREATED?

The Act was drafted to legislatively overturn the 2007 decision of the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* Under our government's system of checks and balances, new legislation is the remedy for addressing a judicial ruling that Congress views as incorrect. The Act specifically provides that the *Ledbetter* decision, which restricts the time frame for an employee to bring a wage discrimination claim, "significantly impairs statutory protections against discrimination in compensation...."

Lilly Ledbetter, the Act's namesake, was a supervisor at a Goodyear tire plant in Alabama. After working at the plant for approximately 20 years, she received an anonymous note stating that male supervisors at the same plant were paid more than she was. Ms. Ledbetter filed a discrimination lawsuit against her employer, and claimed that the time period for filing a discrimination charge started anew each time she received a paycheck.

Although Ms. Ledbetter was awarded damages, the Supreme Court overturned the judgment. A majority of the Court held that the time period for filing a discrimination charge started on the date the discriminatory decision was made, not each time the employee received a paycheck. The decision was based on the principle that the limitations period "protect[s] employers from the burden of defending claims arising from employment decisions that are long past."

Members of Congress had unsuccessfully attempted to pass a version of the Act during the past term. As a result of the shifting balance of power during the most recent election, the Act enjoyed a more favorable reception during the current term of Congress as well as the support of the President. After House and Senate passage, it was quickly signed into law.

WHAT DOES THE ACT DO?

The Act amends Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Age Discrimination in Employment Act, and the Rehabilitation Act to provide that the time period for filing a charge of compensation discrimination begins each time an individual is affected by the application of a discriminatory compensation decision or practice. Essentially, Congress trumped the Supreme Court's ruling in *Ledbetter*. Now, each time an employer issues a paycheck to an employee, the employee has a new 180-day (in North Carolina) or 300-day (in South Carolina) period to file a discrimination charge.

While the amount of back pay that can be recovered is still limited to two years, the Act also provides that nothing therein was intended to prevent a claimant from introducing evidence of a discriminatory practice that occurred outside the time period for filing a discrimination claim. The practical effect of the Act is to expose employers to liability for decisions made 10, 20, or even more years ago.

Moreover, the Act does not appear to limit recovery to the aggrieved employee. Instead, the right to sue could be extended to individuals "affected" by the discriminatory compensation decision or practice. This could potentially include family members of the employee or other third parties, even after the employee has died.

The new law does not limit this potentially indefinite exposure period to claims related solely to wages. Based on the wording of the Act, "compensation" also includes benefits "or other compensation." As the Act does not define what might constitute "other compensation," this is an issue that will be left up to the courts to decide. However, it may include annuity payments to retired employees, which could increase an employer's liability to encompass retirees as well.

Lastly, Congress chose to make the Act apply retroactively to all claims arising on or after May 28, 2007 – the day before the Supreme Court decided *Ledbetter*.

WHAT CAN EMPLOYERS DO NOW?

The most immediate consequence of the Act is the increased amount of litigation it will likely engender. One senator predicted that it would create "massive new opportunities to sue" and would precipitate large amounts of "trivial" litigation.

As noted above, decisions made by employers many years ago could be called into question. This presents new challenges for employers seeking to minimize their potential exposure for discrimination claims. Suddenly employers are faced with the potential need to explain decisions that may have been made by individuals who (1) are no longer employed by the company; (2) do not remember why they were made; or (3) have died. Although the employment records of claimants and similarly situated individuals may be helpful to explain disparities in compensation, many employers have disposed of old records pursuant to a record retention policy.

Moving forward, employers should consider modifying their record retention policies to account for the extended liability created by the Act. This may include exploring options for digital storage of old records. In addition to modifying their current storage protocols, employers may also consider expanding documentation used to support current compensation decisions.

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