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The Lilly Ledbetter Fair Pay Act, which Congress made retroactive to May 28, 2007, extends the time period for employees to assert pay discrimination claims by making each paycheck a discriminatory act; not just the initial pay determination.

## Paycheck Rule Revived for Pay Discrimination Claims with Signing of the Lilly Ledbetter Fair Pay Act

By Alison N. Davis, Stephanie L. Hankin and Tyree Ayers Jackson

The first workplace bill to reach President Barack Obama's desk is a pay-related law. Just days after the inauguration, on January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act into law, which is retroactively effective May 28, 2007. The swift enactment of the Ledbetter Act is not surprising since Lilly Ledbetter was a fixture in the Obama campaign. The Ledbetter Act expressly overturns the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). In that case, the U.S. Supreme Court expressly rejected the "paycheck rule," *i.e.*, that every paycheck issued was a separate act of discrimination. By doing so, the Supreme Court decision established a limited timeframe in which employees could bring pay discrimination claims. The Supreme Court decided that employees were required to file pay discrimination claims with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the original discriminatory pay-setting decision, even if the violation continued to affect the employee's compensation long after the 180-day period expired.

The Ledbetter Act broadens the type of occurrences that are unlawful employment actions for purposes of triggering a pay discrimination claim. Under the Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid. With the "paycheck rule" now in effect, employees may seek to reclaim lost compensation, no matter when the initial discrimination took place, as long as the claim is filed with the EEOC within 180 days (or 300 days in some states) of the receipt of any compensation affected by the violation. Moreover, although combating gender-based pay discrimination was the impetus for the legislation, the Ledbetter Act prohibits pay discrimination based on all of the protected categories under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, *i.e.*, race, color, religion, national origin, age, and disability.

## Impact of the Ledbetter Fair Pay Act

The Ledbetter Act is likely to trigger a surge in pay discrimination claims, and unanticipated liability. The statutory enactment of the paycheck rule will allow employees to challenge pay-related decisions years after they occurred. Significantly, Congress made the effective date of the Ledbetter Act retroactive to May 28, 2007, the day before the Supreme Court issued the *Ledbetter* decision. As a result, claims made after May 28, 2007, which would have been untimely because of the Supreme Court's rejection of the paycheck rule, now become viable.

The Ledbetter Act, however, does not require employers to repay employees for decades of discriminatory pay differentials. Congress limited the amount of lost income that an employee can recover to no more than back pay for two years prior to when the employee filed the discrimination claim.

## Other Pay-Related Legislation Is on the Horizon

It is anticipated that Congress will pass another pay-related bill, the Paycheck Fairness Act, in the next six months. The House of Representatives had considered the Ledbetter Act and the Paycheck Fairness Act as a package. The Senate, however, moved quickly to pass the Ledbetter Act while choosing to wait to consider the Paycheck Fairness Act separately.

In its present form, the Paycheck Fairness Act would amend the Equal Pay Act of 1963 (EPA) by imposing harsher penalties for violations. The EPA requires employers to provide equal pay to female and male employees who perform equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. Currently, the EPA provides for back pay and liquidated damages in an equal amount, and attorneys' fees. However, the Paycheck Fairness Act would expand the available relief to allow prevailing employees to recover potentially unlimited compensatory and punitive damages, and expert fees.

The Paycheck Fairness Act also contains several provisions that will affect government contractors under the Office of Federal Contract Compliance Programs' (OFCCP) jurisdiction because it proposes to reinstate the use of the Equal Opportunity Survey and to revive the pay grade theory OFCCP used to use in evaluating contractors' compensation practices.

If passed, the Paycheck Fairness Act would make it much more difficult for employers to defend disparities in pay between female and male employees. Under the Paycheck Fairness Act, employers would be required to establish that the pay differential is caused by a "bona fide factor other than sex, such as education, training, or experience," and that such a factor is job-related and consistent with business necessity. Even if the employer comes forward with a bona fide factor, an employee could still prevail where there is an alternative employment practice that would serve the same business purpose without producing a pay differential, and the employer refused to adopt such an alternative practice.

The Paycheck Fairness Act would also make it easier for employees to bring class actions under the EPA. Employees could claim pay differentials with regard to employees at their workplace and those who work at another work location so long as the workplace is located "in the same county or similar political subdivision of a State" as the employee's workplace. In addition, as now drafted, the Paycheck Fairness Act would prohibit employers from retaliating against employees for sharing compensation information with their coworkers.

## Steps Employers Can Take to Minimize Exposure to Pay-Related Claims

The impact of the Ledbetter Act, and if passed, the Paycheck Fairness Act, will be an increase in pay discrimination claims and greater oversight by the EEOC and the U.S. Department of Labor. There is the chance that employers will be called upon to defend activities and decisions that occurred years, and even decades, ago by unknown and long gone managers. In some cases, employers may have to defend not just their pay rates, but all other conditions of employment, which are impacted by pay scales, e.g. pensions, bonuses, and severance pay. With no apparent end in sight to the economic meltdown, as employers assess various cost cutting strategies, the potential risk of pay discrimination claims must be considered.

While the balance seemingly has tilted in favor of employees on pay-related issues, through careful planning, employers can minimize the risks and costs of noncompliance with pay equity laws. Some of the steps that employers can take are the following:

1. Review all compensation-related policies, procedures, and programs with employment counsel.
2. Conduct a self-audit of all job classifications to determine whether there are pay differentials and, if there are any, the rationale for the pay differential.
3. Ensure supervisors and managers sign a document to acknowledge their understanding of any pay adjustments awarded based upon performance evaluations.
4. Emphasize to employees the availability of an internal complaint mechanism to address inequities in pay during antidiscrimination training.
5. Examine existing record retention and litigation protocols to ensure that, if a pay discrimination lawsuit is filed, the information required to defend the claim is accessible and preserved.

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