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Lilly Ledbetter and the Push to Bolster Labor

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The Lilly Ledbetter Fair Pay Act and the historical background which led Congress to “restore” employee rights to challenge pay discrimination claims where there is a “continuing violation” is by now well known. The Act was the first legislation signed by President Obama (January 29, 2009) after his inauguration. The Act “clarifies” federal law by providing that “a discriminatory compensation decision or other practice” is unlawful “each time compensation is paid pursuant to the discriminatory compensation decision or other practice.” Plaintiffs may recover back pay for up to two years prior to the filing of their claim, provided that an unlawful practice occurs during the limitations period that is similar or related to discriminatory compensation practices that predate the limitations period. The limitations period is generally 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. §2000 (e)-5 (e) (1).

Lilly Ledbetter was hired by Goodyear as a supervisor in 1979 at the same salary as other supervisors. In 1985 Ledbetter was promoted to Area Manager. Later, her performance evaluations began to slide, which reduced the levels of her salary increases. In 1992, Ledbetter learned that she was paid less than other Area Managers, most of whom were men. By 1997, Ledbetter was the only woman working as an Area Manager, and her pay was the lowest of all in that position. In March of 1998, she filed a charge with the EEOC claiming, among other things, that Goodyear discriminated against women. In November of 1998, Ledbetter accepted an early retirement offer and later filed suit under Title VII and the Equal Pay Act alleging ongoing pay discrimination. The jury found for Ledbetter on the disparate pay issue and awarded over \$200,000 in back pay and \$3.3 million in punitive damages (which was reduced by the trial court to \$360,000).

The Eleventh Circuit reversed, holding that an employee has but one chance to make a complaint—“the point at which the employee’s salary is reviewed and he or she is dissatisfied with that result.” The court reasoned that there must be some limit on how far back the plaintiff can reach.

The issue in front of the Supreme Court was “Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.” The Court held that each paycheck did not constitute a separate act of discrimination and would not allow past discriminatory pay decisions to continue to affect an employee’s pay and thus support a lawsuit. Ironically, had Ledbetter not abandoned her Equal Pay Act claim, she not only presumably would have won at trial but an EPA victory would have eliminated the need for an analysis of the timeline arguments under Title VII. The EPA is a strict liability statute and the timing of when an unlawful act of pay discrimination occurs is immaterial, so long as the result is a disparity of pay between men and women.

The congressional response, The Lilly Ledbetter Fair Pay Act of 2009, highlights a view that the current Congress enjoys overruling the Supreme Court concerning opinions that are unpopular with employee advocates. The Ledbetter Act identified an illegal employment practice relating to discrimination in compensation as occurring whenever:

- 1) A discriminatory compensation decision or other practice is adopted.

- 2) An individual becomes subject to a discriminatory compensation decision or other practice.
- 3) An individual is affected by the 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 a decision or other practice.

(Continued on back)

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Lilly Ledbetter....Continued

The period in which an employee can look back to prove discrimination is without limit but any recovery is reduced to the two years preceding the charge. EEOC regional offices have been sending out "Ledbetter letters" notifying complainants that they may have Equal Pay Act as well as Title VII pay claims. In addition, the EEOC is looking at closed cases, with an eye to reopening some. (The effective date of the Ledbetter Act is one day prior to the Supreme Court's decision.)

The federal courts have already started expanding upon the Ledbetter Act's reference to "discriminatory compensation decision or other practice," broadening claims for compensation discrimination to include any adverse action, other than hiring and termination decisions, which "affect" compensation. These include performance evaluations, failure to respond to requests for raises, job assignments, pay system administration, failure to promote, demotions, denial of tenure and leave, and compensation.

What's an employer to do? While the greatest practical challenge for employers is document retrieval and witness identification concerning claims that could be many years old at the time a lawsuit is filed, proactive investigation and training is essential. The following steps are recommended:

1. **Conduct** a systematic analysis of pay equity. Corrections of pay disparities may help employers escape liability. In Chartraw v. Cascade Health Care Community, Inc., (D. Ore 3/5/09), the female plaintiff was hired at a rate lower than her male counterpart. Subsequently, the employer raised her salary above his. A charge was filed

one year later. The court found the suit to be time-barred as the claim was filed too late after the employer had rectified the pay issue. The employer should undertake periodic regression analyses to evaluate and adjust compensation for similarly situated workers. Additionally, employers should make sure that they track enough compensation-related data in order to effectively conduct regression analyses.

2. **Document.** Retain documents that capture factors such as the progression of salary negotiations; the employee's educational background and relevant work experience (as compared to similarly situated co-workers), and current market conditions that affect compensation decisions.
3. **Review** your current compensation system to ensure that discriminatory practices are not slipping undetected through the cracks. There needs to be a system of uniform (i.e. equitable) base pay levels, coupled with bonus pay that is based upon objective, incentive-based criteria as opposed to subjective determinations of employee performance. Market data needs to be carefully reviewed so that a new hire's compensation package is referenced to the pay levels of current, similarly situated employees. Again, the emphasis needs to be on an equitable and competitive pay system.
4. **Training.** Employers should train all management-level employees regarding the proper techniques for making pay-related decisions, conducting performance evaluations, and discussing evaluations with subordinates.

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