



LABOR & EMPLOYMENT DEPARTMENT

ALERT

OBAMA SIGNS LILLY LEDBETTER FAIR PAY ACT

By David Garraux and Darren Rumack

President Obama has signed the Lilly Ledbetter Fair Pay Act (Act), which substantially eases restrictions on employees suing for wage discrimination. Overturning the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, the Act signals a major change in the calculation and interpretation of the statute of limitations applicable to allegations of discrimination-based pay disparity.

Of principal importance is the Act's effect on the statute of limitations associated with discriminatory compensation claims. Prior to the Act, employees had a single 180-day period following the occurrence of a discriminatory pay practice within which to file a lawsuit. The Supreme Court's decision in *Ledbetter* defined the occurrence of an unlawful pay practice, establishing that each paycheck or retirement benefit did *not* constitute a separate discriminatory practice. Accordingly, employees claiming they were unfairly compensated on account of their race, color, religion, sex, national origin, age or disability were essentially limited to filing their claim within 180 days following an employers' compensation decision.

The Act effectively reverses the *Ledbetter* decision, retroactive to May 28, 2007, the day the Supreme Court announced the ruling. Affording employees a number of theories under which to sue, the Act states that an unlawful employment practice occurs 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 application of the decision or practice, including each time there is a payment of compensation.

The effect of the Act is to permit the filing of a pay discrimination suit following the issuance of each paycheck or subsequent to any pay period. As a result, every paycheck issued can constitute its own violation of pay discrimination laws. Accordingly, employees are now able to bring a claim within 180 days of the last-issued "discriminatory" paycheck.

Of further significance is the fact that the Act applies each time "benefits or other compensation is paid, resulting in whole or in part from such a decision or other pay practice." Under the Act, employees receiving retirement benefits based upon their prior compensation are eligible to bring an action for discriminatory compensation following their receipt of each monthly benefit check. This may very well lead to pay discrimination charges being filed even when the alleged discriminatory decision occurred years, or even decades, prior to the suit.

Further, the Act ambiguously extends its protections to include an individual "affected" or who "becomes subject" to a discriminatory compensation decision. While Congress has elected not to define these parties, there is a possibility that caselaw will determine that spouses or even children may have a cause of action under the Act.

While effectively rewriting the statute of limitations applicable to wage discrimination claims, the Act permits employees to seek up to two years of back pay following the filing of a charge. Understanding that each individual paycheck represents its own cause of action, employees may "look back" two years for additional compensation what would have been paid in the absence of the alleged discrimination.

As the Act applies retroactively to May 28, 2007, the new law impacts all claims of discrimination in compensation filed under Title VII, the ADEA, ADA and the Rehabilitation Act pending on or after that date.

In light of this new employee-friendly legislation, employers should take immediate action to protect themselves from litigation. It is imperative that employers review their compensation and merit-increase structures to identify any pay discrepancies that affect protected classes. Employers should be able to clearly articulate and document justifications for any differentials that may exist.

Additionally, as the Act permits pay discrimination claims that may date back many years, it is imperative to document (and retain documentation) relative to all pay practices so that employers will be able to defend their decisions where discrepancies may exist. Performance reviews, pay scales and disciplinary records are all relevant in the defense of a wage discrimination claim.

The Act relaxes restrictions on pay disparity litigation and is certain to lead to a marked increase in litigation over pay discrimination claims.

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