



CLIENT MEMORANDUM

President Obama Signs Fair Pay Act Extending Time for Filing Pay Discrimination Claims

March 9, 2009

INTRODUCTION

The first law signed by President Barack Obama transforms the landscape for claims of pay discrimination. The Lilly Ledbetter Fair Pay Act, signed into law on January 29, 2009, amends prior civil rights legislation to hold that the statute of limitations begins to run each time an individual is affected by a discriminatory compensation decision, i.e., each time an employee receives a paycheck tainted by the original decision, no matter how far removed in time from that decision. This removes a substantial barrier to filing pay discrimination claims and could result in a significant increase in compensation claims against employers.

THE SUPREME COURT HAD IMPOSED STRICT LIMITS ON FILING PAY DISCRIMINATION CLAIMS

The new law overturns the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* Plaintiff Lilly Ledbetter worked at a Goodyear plant for almost twenty years, until 1998. In 1998, she filed a charge with the Equal

Employment Opportunity Commission (EEOC) and then commenced a lawsuit asserting a Title VII pay discrimination claim. Ledbetter claimed that during the course of her employment, several supervisors had given her poor performance evaluations based on her sex, and that, as a result of these evaluations, her pay did not increase as much over the years as it would have if she had been evaluated fairly. Because these past pay decisions affected the amount of her pay throughout her employment, by the end of her tenure with Goodyear, she was being paid significantly less than her male colleagues.

Goodyear argued that Ledbetter's pay discrimination claim was time barred because all pay decisions were made more than 180 days before Ledbetter went to the EEOC.¹ Ledbetter argued that her claim

¹ In order to challenge an employment practice under Title VII, an individual must file a charge with the EEOC within 180 (or, depending on the state, 300) days after the employment practice occurred. A 300 day period applies in New York.

was timely because although the pay decisions occurred outside the limitations period, she received the resulting disparate pay during the limitations period, and each paycheck was a separate act of discrimination. The Court sided with Goodyear, noting that the time for filing an EEOC charge begins when any "discrete act" of discrimination occurs and concluding that a pay-setting decision qualifies as a discrete act that begins the filing period. Justice Ginsberg wrote a sharp dissent in which she invited Congress to act, stating: "[T]he ball is in Congress' court. . . . [T]he Legislature may act to correct this Court's parsimonious reading of Title VII."

THE FAIR PAY ACT REPUDIATES THE LEDBETTER DECISION

In accepting Justice Ginsberg's invitation, Congress ensured that claims like Ms. Ledbetter's could proceed. The Lilly Ledbetter Fair Pay Act amends Title VII to clarify that an unlawful employment practice occurs with respect to discrimination in compensation (i) when a discriminatory compensation decision or other practice is adopted, (ii) when an individual becomes subject to a discriminatory compensation decision or other practice, or (iii) when an individual is affected by 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 such decision or other practice. Though publicized as a law regarding sex discrimination because of Ms. Ledbetter's well-known case, the Act actually sweeps much further, extending to all forms of pay discrimination under Title VII (based on race, national origin, religion, etc.) and similarly amending the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Rehabilitation Act with respect to pay discrimination claims.

The Act also authorizes a successful claimant to recover back pay for up to two years preceding the filing of the

charge, if the unlawful employment practices that occurred during the filing period are similar or related to unlawful employment practices that occurred outside the filing period. The Act is effective retroactively to May 28, 2007 and applies to all pay discrimination claims pending on or after that date under Title VII, ADEA, the ADA or the Rehabilitation Act.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

Because the Act extends the time in which employees may bring pay discrimination claims, employers face the threat of increased litigation under all the major civil rights laws and should take appropriate steps to protect themselves. Employers should conduct an audit of their compensation practices to ensure they are based on objective, non-discriminatory factors. Statistical analyses can help identify disparities that require stricter scrutiny and potential modification. In addition, managers should be trained to avoid pay inequities based on prohibited factors.

Perhaps the biggest challenge facing employers is the potential for lawsuits based on decisions that were made years or decades before a claim is brought. To use Ms. Ledbetter as an example, her employer would have had to defend performance evaluations and resulting compensation decisions made over the twenty-year period that preceded her claim. To mitigate this risk, employers should revisit their document retention policies and consider retaining personnel files – or at least performance and compensation-related documents – for as long as possible, including those documents relating to terminated or retired employees. Employers also should assess the content of their compensation records. Because potential witnesses, such as managers who made challenged compensation decisions, may have left the employer long ago by the time a claim is brought, employers should institute a practice of keeping contemporaneous written records detailing performance issues and setting forth the basis for compensation decisions with specificity.

For further information about this Act and further development, please feel free to contact any member of the Firm's Labor and Employment Group, including

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