

Morgan Lewis

Ledbetter Fair Pay Act of 2009:
Brace for the Next Wave of Discrimination Litigation

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AGENDA

- Summary of *Ledbetter v. Goodyear*, 127 S. Ct. 2162 (2007)
- The Lilly Ledbetter Fair Pay Act of 2009
 - New statute of limitations for pay discrimination claims
 - Back pay period
 - Scope of new limitations and application of the Act’s reference to “other practices”
 - Remaining defenses available to employers
- Consequences of the Ledbetter Act
- Steps to Prevent Pay Discrimination Claims

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. ___, 127 S. Ct. 2162 (2007)

- Lilly Ledbetter alleged that her manager gave her a poor performance rating 10 years earlier resulting in lower merit raise.
- Alleged that that pay differences grew larger over time because subsequent merit increases were based on a percentage of base pay.
- Ledbetter argued for a “paycheck accrual rule,” under which each paycheck that carries forward the adverse effects of a prior discriminatory decision is actionable under Title VII.

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. ___, 127 S. Ct. 2162 (2007)

- *Ledbetter* made clear that a plaintiff must challenge a pay decision within the statutory period, *i.e.* 180 or 300 days for Title VII.
- Current effects of past discrimination were not actionable, *i.e.*, each paycheck does not cause a new claim to accrue.
- Focus is on decisions affecting pay within the charge-filing period.
- *Ledbetter* provided useful defenses against class action pay discrimination claims.

Lilly Ledbetter Fair Pay Act of 2009

- Signed by President Obama on January 29, 2009
- Designed to legislatively overturn *Ledbetter*
- Amends Title VII and ADEA; applies to ADA and Rehabilitation Act

Lilly Ledbetter Fair Pay Act

- For discrimination in compensation, an unlawful employment practice occurs:
 - when a discriminatory compensation decision or other practice is adopted;
 - when an individual becomes subject to a discriminatory compensation decision or other practice; or
 - 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 a decision or other practice.

Limitation on Back Pay Period

- Plaintiff may seek “recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”

“Other Practices”

- Performance ratings in performance-based pay system
- Pay grade assignments
- Location assignment under geographic pay structure
- Department assignments

Not “Other Practices”

- Discrete employment actions:
 - Hiring
 - Promotion
 - Termination

“Other Practices” – Legislative History

- Senator Mikulski:

- Ms. Ledbetter’s case—and many others—show that salary determinations often rely on other discriminatory actions. Unfair differences in pay may be brought about not only by discriminatory job evaluations, but also by discriminatory decisions to classify a job in a particular way, or by discriminatory assignments to a particular location. See, e.g., *Parra v. Basha’s, Inc.*, 536 F. 3d 975, 9th Cir. 2008, Latino workers were paid up to \$6,000 less annually than other employees performing the same duties based on their assignment to a store location with a predominately Latino workforce; *Moorehead v. UPS*, 2008 WL 4951407, employer claimed that differences in starting salaries for men and women were due to its evaluation system. Because the factors that contribute to pay scales are solely within employers’ discretion, we must not adopt a rule that encourages employers to link pay setting decisions to other personnel actions, such as evaluations, in order to avoid the civil rights laws. That would create an unacceptable loophole in what is intended to be a comprehensive solution of the problems created by the *Ledbetter* case.

155 Cong. Reg. at S757 (Jan. 22, 2009).

Available Equitable Defenses: Laches

- General Rule: Defendant has burden of showing that (1) there was inexcusable delay on the part of the plaintiff in bringing the claim and (2) there is prejudice to the defendant resulting from the delay. *Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983); *Santana v. Bobrick Washroom Equip.*, 401 F.3d 123, 138 (3d Cir. 2005); *Miller v. Glenn Miller Productions*, 454 F.3d 975, 997 (9th Cir. 2006).
 - In some circuits, the plaintiff bears the burden of showing that her delay in bringing the suit is excusable and the defendant has the burden of showing that the delay resulted in prejudice. *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7th Cir. 2002).
- The time for calculating "inexcusable delay" generally starts when the plaintiff had knowledge, notice, or reasonable suspicion that he might have a claim. *Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983); *New Era Publishing v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989); *Santana v. Bobrick Washroom Equip.*, 401 F.3d 123, 138 n.16 (3d Cir. 2005); *Cook v. City of Chicago*, 192 F.3d 693 (7th Cir. 1999); *Jarrow Formulas v. Nutrition Now*, 304 F.3d 829, 838 (9th Cir. 2002).

Preserving Equitable Defenses – Legislative History

- Senator Mikulski:

- Parties have been able to raise equitable claims in employment discrimination cases, and nothing in the pending legislation would change that. Courts will be able to decide equitable claims under the same circumstances as they do now. I am going to repeat that. Courts will be able to decide equitable claims under the same circumstances as they do now, regardless of whether this legislation is passed. The bill does not mention equitable doctrines, and nothing in its language could fairly be implied to suggest that parties may not raise equitable claims. . . . The Supreme Court ruled long ago that the time limit in job discrimination cases is subject to equitable doctrines, and this legislation does not upset that ruling. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 1982.

155 Cong. Rec. at S756 (Jan. 22, 2009).

Waiver and Settlement Considerations

- Title VII claims are subject to knowing and voluntary waiver of claims with regard to past or current paychecks
- Tension between waiver and paycheck accrual rule
- Special settlement considerations:
 - *Use pay adjustments instead of lump-sum payments*

Special Rules For Pension Payments

- “Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.”
- H. Rep. 110-237:
 - [T]his bill does not change current law treatment of when pension distributions are considered paid. While the bill includes benefits as a form of compensation which could trigger the statute of limitations when paid, the bill does not intend to alter how current law treats the question of when such benefits are considered paid. For example, case law treats the receipt of repeated pension checks under a defined benefit plan to be qualitatively different from the receipt of paychecks. See, e.g., *Florida v. Long*, 487 U.S. 223, 239 (1988). One court has explained: “Paychecks are payments for a prior term of work. For example, an employee works for a week, then the salary structure is applied and the paycheck is issued. Pension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application.” *Maki v. Alleto, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004). Accordingly under this rule, pension distributions would be considered paid upon entering retirement and not upon the issuance of each annuity check.

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Consequences of Lilly Ledbetter Fair Pay Act of 2009

- More pay discrimination claims
 - Easier to bring pay discrimination claims and harder to defend them
 - Publicity around the legislation, such as President Obama's signing ceremony
 - Removes defenses that had proven effective against class action claims
- Greater exposure as plaintiffs can reach back to challenge essentially any decision affecting current paychecks

Steps to Prevent and Prepare for Pay Discrimination Claims

- Consider revisions to pay system:
 - Move to lump sum payments or more incentive bonus pay rather than significant adjustments to base pay.
 - Consider EEO review when revising grade system or assigning jobs to pay grades under new system.
 - Obtain waiver of pay claims in exchange for equity adjustments.
- Review performance management systems to ensure defensibility of ratings that drive merit pay awards.

Steps to Prevent and Prepare for Pay Discrimination Claims

- Review recordkeeping around pay decisions:
 - Performance reviews
 - Merit pay decisions
 - Starting pay decisions
 - Market adjustments
 - Historical pay grades and ranges

Steps to Prevent and Prepare for Pay Discrimination Claims

- Conduct a privileged, internal equity study:
 - Perform a statistical analysis of pay and personnel data including performance evaluations
 - Ensure that actual pay practices reflect policies (e.g., employees paid within pay ranges for their positions).
 - Make equity adjustments where there are unexplained disparities.

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