

**President Obama Expected to Sign  
the Lilly Ledbetter Fair Pay Act of 2009 Today or Tomorrow**

***House and Senate Passage Clears Way for Enactment of Ledbetter Law  
That Will Eliminate Many Statute of Limitations Defenses to Pay Discrimination Claims***

**January 27, 2009**

On January 27, 2009, the House passed the Lilly Ledbetter Fair Pay Act of 2009 (which was passed in the Senate as S. 181 on January 22, 2009), clearing the way for President Obama to sign the legislation into law, which is expected to occur today or tomorrow. This new law will eliminate many statute of limitations defenses to pay discrimination claims, including defenses that have proven effective in defeating class certification of pattern or practice pay discrimination claims. In light of this legislative development, plaintiffs' lawyers are likely to have renewed optimism about pay discrimination claims, leading to more frequent filings and class actions. The new law will allow plaintiffs to revive previously time-barred claims and the publicity around the legislation likely will encourage some employees who had not previously considered bringing pay discrimination claims to do so.

Passage of the Lilly Ledbetter Fair Pay Act of 2009 is but one of a series of legislative and regulatory actions expected from the Obama administration as it delivers on its campaign promises of vigorous efforts to eliminate pay discrimination. The Senate is also considering the Paycheck Fairness Act, which was voted out of the House (H.R. 11). That legislation would amend the Equal Pay Act to reduce employer defenses, add uncapped compensatory and punitive damages, and permit mandatory or opt-out class actions under Federal Rule of Civil Procedure 23 (as opposed to the current Equal Pay Act enforcement regime, which requires absent class members to affirmatively opt in to participate in the action). In addition, the Obama administration is expected to step up enforcement against pay discrimination through the EEOC and the OFCCP.

**The Current Statute of Limitations for Pay Discrimination Claims Under Title VII**

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. 2162 (2007), the Supreme Court ruled that pay decisions constitute discrete employment actions and that disparate treatment claims challenging pay disparities caused by such decisions are timely only if the plaintiff files a charge within the normal 180/300-day charge-filing period beginning with notice of the pay decision. 127 S. Ct. at 2165. The Court expressly rejected the so-called "paycheck accrual rule" under which each new paycheck could be the basis for a new claim of pay discrimination, even if the adverse pay differential was caused by actions well outside of the charge-filing period. 127 S. Ct. at 2167.

## **Revised Statute of Limitations Under the Lilly Ledbetter Fair Pay Act of 2009**

The Lilly Ledbetter Fair Pay Act of 2009 will legislatively overturn the Supreme Court’s *Ledbetter* decision by amending Title VII to provide that “an unlawful employment practice occurs, with respect to discrimination in compensation . . . 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.” The critical change is that an unlawful employment practice occurs each time an employer issues a paycheck that has been impacted by a prior discriminatory pay decision, regardless of when that initial alleged discriminatory pay decision was made.

By its terms, the new law will apply to “compensation decisions or other practice,” which clearly includes decisions such as starting pay, merit pay determinations, or performance reviews under a performance-based pay system. Although the statutory term “other practice” is undefined in the legislation, Senator Mikulski—the floor manager for the legislation in the Senate—provided assurances for the legislative record during the floor debates that the term “other practice” was intended to apply to direct inputs into compensation outcomes, such as performance ratings under a performance-based pay system, job classification decisions, and work assignment decisions under a geographic pay structure. However, the term “other practice” is not designed to reach promotion, hiring, or termination decisions that impact compensation levels only indirectly by affecting the position an employee holds. Despite this legislative history, it is likely that plaintiffs will attempt to argue that the term “other practice” includes promotion or initial job placement decisions and that this issue will be the subject of litigation. Plaintiffs may also assert that “other practice” covers allegations that employers’ actions, such as failure to provide mentoring or training opportunities, impacted their ability to earn more under production-based pay systems.

Senator Mikulski also made clear for the legislative record that the new law was not intended to expand beyond the affected employee, the EEOC, or DOJ—the class of individuals with standing to sue for alleged pay discrimination. Finally, Senator Mikulski clarified that there was no intent to displace existing equitable defenses to stale claims such as the laches or waiver doctrines. These equitable defenses will become critical under the new law and may provide employers with arguments against class certification of Title VII pay discrimination claims based on the individualized proof necessary to resolve such defenses.

The new law will allow plaintiffs to recover back pay and damages for unlawful wage disparities occurring 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.” Thus, employers may be able to assert statute of limitations defenses to back pay for some prior pay differences premised on the fact that those prior pay differences were not caused by unlawful employment practices that are “similar or related to” the practices that caused pay differences during the charge period. The terms “similar or related to” are not defined in the legislation and litigation regarding the appropriate application of these terms is likely.

The law also will apply to claims of pay discrimination on the basis of age under the Age Discrimination in Employment Act and on the basis of disability under the Americans with Disabilities Act and the Rehabilitation Act.

## Impact of the New Law

The law will apply retroactively to all claims pending on or after May 28, 2007—one day before the Supreme Court issued the *Ledbetter* decision. This means that the law will change the rule of decision for any case in which a final judgment has not yet been entered, including cases currently on appeal. However, the law could not authorize the reopening of final judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (holding that Congress lacks constitutional authority to retroactively alter the final judgments of Article III courts).

The new law will be a major victory for plaintiffs' lawyers. They will no longer have to contend with most statute of limitations defenses, including defenses that were effective in defeating class certification of pattern or practice pay discrimination claims. Because the new legislation exposes employers to potential liability for accumulated pay differences that emerged over an extended timeframe—during which a variety of legitimate factors may have accounted for each incremental pay difference—determining whether significant pay disparities exist now becomes more complicated. Employers should consider conducting a compensation risk assessment to evaluate their potential exposure and to identify measures that will reduce the risk of pay discrimination claims. Morgan Lewis regularly assists clients with these privileged, internal audits, relying on sophisticated statistical analyses of pay and personnel data.

Examples of risk mitigation steps that may be recommended as a result of a compensation risk assessment include (1) collecting data on factors, such as prior work experience, that may be critical in explaining the historical development of current pay differences; and (2) revising pay systems, as permitted by business considerations, to emphasize incentive or bonus payments instead of large base pay increases and thereby avoid accumulation of pay differences over time.

If you have any questions about the information contained in this LawFlash, please speak with any of the members of the firm's Labor and Employment Practice, or with one of the following attorneys:

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