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The Lilly Ledbetter Fair Pay Act of 2009: Compensation Decisions of Years Gone by Can Now Come Home to Roost

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The first piece of legislation that newly-elected President Barack Obama will be asked to sign will most likely affect employers significantly. On January 22, 2009, the United States Senate passed S. 181, The Lilly Ledbetter Fair Pay Act of 2009, which allows a virtual never-ending timely filing period for wage discrimination claims brought under Title VII (race, color, religion, sex, or national origin), the ADEA (age), the ADA (disability) and the Rehabilitation Act of 1973 (disability). Although slightly different than the Bill passed by the House a few short weeks ago, the House is expected to pass the Senate version and President Obama is expected to sign the legislation. The legislation overturns the United States Supreme Court decision in *Ledbetter v. Goodyear*, which refuted Lilly Ledbetter's argument that a separate act of wage discrimination occurred each time she received a pay check based upon a prior alleged discriminatory decision.

According to the new legislation, a new period for filing an EEOC Charge begins each time an employee receives a paycheck resulting from an alleged discriminatory pay decision - a decision that may have been made many years, even decades, in the past. As a result, any employee who wants to allege a wage discrimination claim will be able to timely file a Charge of Discrimination with the EEOC, irrespective of when the actual alleged discriminatory compensation decision was made, if he or she received a paycheck within 300 days (or 180 days in a few jurisdictions, such as Alabama) of the time the charge is filed with the agency. Even though this legislation has been a priority for several years for women's groups seeking to narrow the wage gap between men and women, the legislation is gender neutral and applies to wage claims based on any alleged protected characteristic (race, color, religion, sex, national origin, age, and disability).

Under the new legislation, a successful employee litigant will be able to recover back pay for up to two years preceding the filing of the Charge and any other Title VII relief to which he or she may be entitled. Although an employer can begin (and now should begin) to cut off liability by remedying wage disparities (because of the "rolling" limitations period), under the new legislation an affected employee will still have 300 (or 180) days after receiving his or her last alleged discriminatory paycheck to recover the full array of Title VII damages.

In addition to the expanded period to timely file a Charge with the EEOC, there are two other particularly alarming aspects of this legislation. First, the legislation is retroactive to May 28, 2007, meaning that it applies to all claims of discrimination that were pending on or after that date. Consequently, this may cause many claims that had previously been dismissed as untimely filed to be revived, as well as the filing of new claims by individuals who may have thought their wage claims were stale. Second, part of the "Findings" in Section 2(3) states: "With regard to *any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination*." How this statement will affect other non-compensation claims of discrimination will remain to be seen. In employment discrimination cases, Courts typically limit the discovery of evidence to events which occurred within one to five years of the alleged discriminatory act; however, the language in this statute appears to give employees ammunition to try to uncover evidence of discrimination for an unfettered time period even if their claim is not one based on compensation.

Although the House of Representatives had packaged the Ledbetter Bill with another piece of legislation titled the Paycheck Fairness Act (PFA), employers at least got a reprieve for the time being because the Senate

passed on considering the PFA. The PFA would significantly amend the Equal Pay Act and greatly enhance penalties against employers for alleged violations, including, for example, punitive damages, and also allow for class actions. It would also add some burdensome compensation reporting requirements for employers. Nevertheless, this legislation, which has been introduced in Congress each of the past several years, will likely be re-considered and, with the current Administration, stands a good chance of becoming law.

In light of these developments, employers should take a fresh look at their compensation practices to ascertain whether any significant (or even not so significant) disparities exist between employees performing similar jobs. A word of caution: before undertaking any kind of compensation analysis, employers should consult with their in-house counsel or knowledgeable outside counsel to be fully informed of the legal ramifications in such an undertaking.