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Lilly Ledbetter Strikes Back: President Obama Signs New Fair Pay Act Into Law

On January 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (the Ledbetter Act), which amended Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disability Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Rehabilitation Act of 1973 (Rehabilitation Act).

The Ledbetter Act was the first bill signed by President Obama, and signals a likely shift in favor of pro-employee legislation under the new Congress and administration. In fact, shortly after signing the Ledbetter Act, President Obama issued three pro-labor Executive Orders that will have a significant impact on the business practices of government contractors (and that will be the subject of a forthcoming *GT Labor & Employment Alert*). The Ledbetter Act expressly overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) by expanding the statute of limitations for a plaintiff to file a lawsuit for alleged discrimination under the above statutes in the provision of pay, benefits or other compensation. The Act will substantially increase employers' exposure to liability for the continuing effects of past acts of discrimination.

Background on the Supreme Court's *Ledbetter* Decision

Plaintiff Lilly Ledbetter worked for Goodyear for almost 20 years before retiring in 1998. She filed a Title VII gender discrimination lawsuit against Goodyear for allegedly failing to pay her wages comparable to similarly situated male employees throughout her employment. Ledbetter argued that the cumulative effect of the alleged discrimination over many years led to her being paid significantly less than her male counterparts by the time she retired from Goodyear. She claimed, and the trial court assumed as true, that she did not become aware of this alleged pay discrimination until she received an anonymous tip about the pay differential shortly before she retired. Goodyear argued that Ledbetter's claims were time-barred because they were predicated on decisions that occurred more than 180 days before she filed her EEOC charge.¹ Ledbetter countered that the issuance of each paycheck constituted a distinct discriminatory act that should trigger a new statute of limitations period.

The Ledbetter Act expressly overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* by expanding the statute of limitations for a plaintiff to file a lawsuit for alleged discrimination in the provision of pay, benefits, or other compensation and will substantially increase employers' exposure to liability for the continuing effects of past acts of discrimination.

In a 5-4 decision, the Supreme Court rejected Ledbetter's argument and held that "a pay setting decision is a discrete act that occurs at a particular point in time." Thus, according to the Court, Goodyear's initial decision to pay Ledbetter less than her male counterparts was the discriminatory act that triggered the 180-day filing requirement with the EEOC, and Ledbetter's claims were therefore time-barred.

The Court expressly held that the subsequent acts of issuing paychecks to Ledbetter did not constitute a new Title VII violation and did not commence a new charge-filing period because the issuance of the paychecks were not, by themselves, discriminatory acts. (For a more detailed discussion of the Supreme Court's *Ledbetter* decision, please see the June 2007 *GT Alert*, [Supreme Court Limits Title VII Pay Discrimination Claims Against Employers.](#))

The Ledbetter Act Overturned the Supreme Court's Decision and More

The Ledbetter Act overturned the Supreme Court's decision by providing that an employer engages in a new act of discrimination each and every time it issues a paycheck for a deficient amount based on a prior discriminatory pay decision. Because, according to the reasoning behind the Act, each disparate paycheck constitutes a new discriminatory act, each paycheck triggers a fresh charge-filing period. The Act focuses on the perceived inequity of the Supreme Court's *Ledbetter* decision by expressly stating that "[t]he Ledbetter decision undermines [the statutory protections against discrimination in compensation] by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."

But the Ledbetter Act goes beyond simply overturning the Court's decision and providing a longer period in which to bring a discrimination claim. It provides employees with new substantive protections by broadening the definition of an unlawful employment practice to include any occurrence "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." Furthermore, the Act applies retroactively to any Title VII, ADA, ADEA, or Rehabilitation Act claim filed on or after May 27, 2007 (that is, two days before the Supreme Court issued the *Ledbetter* decision).

How the Ledbetter Act Affects Employers

Employers should expect to see an increase in litigation resulting from passage of the Ledbetter Act, and should audit their pay practices and compensation scales to minimize the risks of such litigation. The Ledbetter Act makes clear that employers have an affirmative duty to ensure an employee's current pay is not adversely affected by past discriminatory actions. As an example, if an employer hired a female employee 10 years ago at a discriminatorily low wage rate and, for every subsequent year, gave her and each similarly situated employee a non-discriminatory four percent pay raise, the Ledbetter Act provides that each paycheck for the last ten years constituted a separate actionable act of discrimination (although, under Title VII, a plaintiff can only go back two years in the collection of back pay damages).

Employers also need to be mindful that the Ledbetter Act applies to benefits and other forms of compensation, not just wages. Although the Act has a provision stating that it does not change the current law as to when "pension distributions" are deemed paid, that provision does not apply to pension *contributions* (including contributions to a 401(k) plan), pension benefit accrual formulas, or any other type of non-pension benefit. We

will have to see how the courts construe the Ledbetter Act as it applies to pension benefits, but employers should assume that pension contributions and welfare benefits will be subject to the Ledbetter Act and audit their plans accordingly.

Employers also should take care in how they proceed in auditing their plans and pay practices. They should consider using in-house or outside legal counsel to review the plans and practices and for legal advice that will be protected by a legal privilege. Employers who find, and wish to correct, any past discriminatory pay or benefits practices also should work with legal counsel in designing and implementing changes. There are several options for fixing past problems, and employers should be careful to choose an option that does not invite litigation.

Because a provision limiting the Act to claims filed by employees was considered, but not included, in the final language of the Act, employers also should be aware that other plaintiffs, such as a deceased employee's relative, may have colorable claims under the Act.

This *GT Alert* was prepared by **Todd Wozniak** and **Tiffany Fordyce**. Greenberg Traurig's [Labor and Employment Group](#) is available to help employers comply with the Lilly Ledbetter Fair Pay Act of 2009 and to address any other labor and employment questions and concerns. Questions about this *Alert* can be directed to:

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¹Under Title VII, individuals must file an administrative charge with the EEOC and receive a "Right to Sue" notice before they are permitted to file suit in federal or state court. In this case, Ledbetter was required to file her charge within 180 days of the discriminatory act, although in "deferral" states, plaintiffs generally have a 300-day period in which to file an administrative charge.

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