The Lilly Ledbetter Fair Pay Act of 2009

by Gregory D. Stobbe, J.D., SPHR

The Lilly Ledbetter Fair Pay Act of 2009 was the first piece of legislation signed into law by President Obama. In campaigning for the White House, he championed the issue of fair pay for all workers and pledged to enact a new wage discrimination law. During the bill signing ceremony, at which Ms. Ledbetter was present, the president stated, "Lilly Ledbetter did not set out to be a trailblazer or a household name. She was just a good hard worker who did her job-and she did it well-for nearly two decades before discovering that she was paid less than her male colleagues for doing the same work."

Background

In 1979 Lilly Ledbetter began work at a Goodyear Rubber & Tire Company in Alabama. During her years there as a salaried employee, performance evaluations and recommendations formed the basis of whether or not, employees received pay increases. Nearly 20 years later in July of 1998, Ledbetter filed a formal discrimination charge with the EEOC and in November of that same year, after early retirement, she sued Goodyear. The suit was based upon her claiming pay discrimination under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Ledbetter stated that she started her employment at the same pay levels of men doing the same work, however at the time of her retirement, men performing the same work were making in the approximate range of $500 to $1500 more per month than she was earning.

U.S. Supreme Court Decision

Ultimately in 2007, the Supreme Court found in *Ledbetter v. Goodyear Tire & Rubber Co.*, by a narrow 5-4 margin, that Ledbetter's claim was barred by the 180 day statute of limitations. According to the Civil Rights Act of 1964, any allegation of discrimination must be filed within 180 days "after the alleged unlawful employment practice has occurred". The Court cited that the original incident of wage discrimination took place when Ms. Ledbetter began working for Goodyear, nearly 20 years before filing the complaint. (In jurisdictions where a local or state law exists prohibiting this same form of compensation discrimination, the standard is raised to 300 days. In Illinois, the 300 day requirement is the law.)

The Scope of the Lilly Ledbetter Fair Pay Act of 2009

This new law serves to overrule the Supreme Court's decision in *Ledbetter.* It also reinstates the pre-*Ledbetter* position of the Equal Employment Opportunity Commission (EEOC) that each paycheck which delivers discriminatory compensation is a wrong, actionable under the federal EEO statutes, regardless of when the discrimination first began. This Act applies to "a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice." Questions have already arisen as to what the term "other

practice" includes. Does it encompass any action on the part of an employer which has the potential of ultimately affecting pay on a discriminatory basis?

Consider these scenarios - An employer requires that in order to be promoted to a higher paying position, all employees who apply must attend and successfully complete a specific training program. What if such an applicant is denied participation in this training by the employer and therefore is not eligible for this new position? Additionally, would an employer's decision not to assign a certain sales territory to an employee fall under this Act, as the amount of income to the employee may be affected by this employer's decision? The degree to which this new law will impact employers is of course yet to be seen. Litigation over the coming years should better define many of the circumstances where the Lilly Ledbetter Fair Pay Act of 2009, will and will not apply.

What Can Employers Do Now?

Notwithstanding the fact that the full extent of the Ledbetter Act will not be known for some time to come, it may be prudent now for Employers to review their compensation related HR practices and policies.

Employee records retention practices are certainly an essential area to consider evaluating for sufficiency. Due to the statute of limitations now "resetting itself" in every instance an employee receives a paycheck, the amount of time the employer is exposed to claims under this new law is subject to greater duration than it was previously. Employers therefore, may find themselves as defendants in lawsuits based upon pay decisions made many years ago, or ones made very recently. Additionally, the term "compensation" could be interpreted to apply to more than just wages. Perhaps an employee's receipt of payouts from defined benefit or defined contribution plans, well after their employment relationship has ended, may also be included. Additionally, would beneficiaries receiving payments under a company sponsored life insurance policy, have standing under this law? The future is simply not clear.

What is clear, at least for the meantime, is that employers may wish to indefinitely retain any and all records relating to decisions and/or policies they have made, which could potentially be viewed as affecting an employee's compensation, as broadly defined. Record retention protocol is however, only one area an employer should consider reviewing. The breadth and depth of review measures an employer may additionally take moving forward certainly vary on an employer specific basis. However, some of these examples may include; the auditing of past decision making criteria regarding compensation, more closely monitoring pay policies and performance evaluation processes and the provision of training for supervisors and managers on appropriate compensation decision making criteria and actions.

The Future of Employment Law - Post Ledbetter

Although no crystal ball exists, I believe it is safe to say that the decision in *Ledbetter*, more likely than not, foreshadows the course our new administration is setting in regards to employee and workforce issues. Perhaps now represents a timely opportunity for employers to consider becoming

more proactive in addressing these areas. Proactive in so far as increased involvement with both the internal review of their past and current HR policies and practices, but also shaping and managing these efforts to prepare for what the future might bring.

The author may be contacted at gregstobbe@sbcglobal.net

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