Lilly Ledbetter Fair Pay Act of 2009: What's Next for Employers?

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Introduction

Amidst what could be the worst financial crisis since the Great Depression, President Barack Obama signed into law a bill to provide fair pay in the workplace, the Lilly Ledbetter Fair Pay Act (P.L. 111-2). The law extends the time period in which employees can pursue disparate pay claims under four antidiscrimination laws: Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Rehabilitation Act (Rehab Act).

Proponents of the law see it as a critical component in stimulating the economy because it helps ensure equal pay, not just for female employees, but also for their families. However, its opponents believe that at a time when 11.6 million Americans are out of work and the unemployment rate is 7.6 percent—the highest unemployment rate in more than 16 years—the law exposes employers to expensive and frivolous lawsuits for pay disparities resulting from alleged adverse employment actions made years, or even decades, ago.

Only the beginning?

Passing the Lilly Ledbetter Fair Pay Act of 2009 is only the first in a series of legislative and regulatory actions expected from the Obama Administration on labor and employment matters. The Senate is expected to take up the House-passed Paycheck Fairness Act (H.R. 11) in the spring. The Paycheck Fairness Act would amend the Equal Pay Act (EPA) to impose uncapped compensatory and punitive damages on those who violate the Act, prohibit employers from retaliating against employees who share salary information with their coworkers and require employers who make legitimate employment decisions based on "factors other than sex" to prove those factors are "job-related" and "consistent with business necessity." In addition, the

Equal Employment Opportunity Commission (EEOC) has already confirmed that it will step up enforcement against pay discrimination.

As a result, employers must review their HR, benefits and compensation practices to ensure that they are consistently applied, both at the employee's time of hire and during tenure with the company in order to reduce the risk of any potential employer liability resulting from the Lilly Ledbetter Fair Pay Act.

The *Ledbetter* decision

Support for a legislative change in the law began after the Act's namesake, Lilly Ledbetter, lost in her appeal (*Ledbetter v Goodyear Tire & Rubber Co, Inc*, 89 EPD ¶42,827) to the Supreme Court on May 29, 2007.

Lilly Ledbetter filed a sex bias suit under Title VII against her former employer, Goodyear Tire & Rubber Company, alleging that over a span of 19 years she was paid merit increases between 15 and 40 percent lower than similarly situated and in some cases lesser qualified men.

A deeply divided US Supreme Court affirmed the Eleventh Circuit's decision, holding 5-4 that an employee must file charges with the EEOC within 180 days (or 300 days if the charge is also covered by a state or local antidiscrimination law) of a discriminatory pay decision, even if the employee is unaware of the employer's alleged unlawful employment practice; otherwise the claim is time-barred. The clock does not start running anew simply because the employer issues or the employee receives paychecks incorporating the effects of that discriminatory decision, held the Court.

Ginsburg's dissent. In a strongly worded dissent written by Justice Ruth Bader Ginsburg and read by her from the bench, she charged that "the Court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination." Ginsburg explained that a woman may not be aware of others' salaries when she first joins a company, and she "understandably may be anxious to avoid making waves" at her new workplace. The majority "immunized forever discriminatory pay differentials unchallenged within 180 days of their adoption."

In her dissent, Justice Ginsburg urged Congress to address and correct the "cramped" interpretation of the majority. "Once again, the ball is in Congress' court," concluded Ginsberg. "As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."

***Ledbetter* legislation**

Congress accepted Ginsburg's invitation, but the Lilly Ledbetter Fair Pay Act failed to pass in the 110th Congress.

Before the 111th Congress convened, House leadership announced its intention to take up the Ledbetter bill (along with the Paycheck Fairness Act) as its first order of business. The Lilly Ledbetter Fair Pay Act was reintroduced by House Committee on Labor and Education Chair George Miller (D-Cal) on January 6, 2009, and Senator Barbara Mikulski (D-Md) on January 8. The House quickly passed the measure (H.R. 11) on January 9 by a vote of 247-171, days after it convened its first session. The Senate approved the bill (S. 181) late January 22 by a vote of 61-36.

The House had to vote on the bill again because in its original passage the bill was bundled together with the Paycheck Fairness Act. The House debated and approved the bill pursuant to a closed rule (H. Res. 87), which called for no amendments. The bill cleared the House for a second and final time by a vote of 250 to 177 on January 27 and was sent to President Obama, who signed the bill into law on January 29.

What does the Act require?

The Lilly Ledbetter Fair Pay Act is seen as a legislative "fix" to the US Supreme Court's controversial May 29, 2007, decision in *Ledbetter*, in which the Court limited the time in which employees can bring disparate pay claims under Title VII.

The Act expressly overrules the Supreme Court's decision in *Ledbetter* by specifying that a discriminatory pay decision, which starts the 180/300-day time period for filing an EEOC charge, occurs each time a discriminatory paycheck is issued, not just when the employer makes an adverse pay-setting decision. In finding that the limitation imposed by the Court on the filing of discriminatory compensation claims was not just unduly restrictive, but also ignored the reality of wage discrimination, Congress expanded the time period in which victims of discrimination can recover for disparate pay decisions.

Under the Act, an unlawful employment practice occurs with respect to disparate pay when:

1. a discriminatory compensation decision or other practice is adopted;
2. an individual becomes subject to a discriminatory compensation decision or other practice;
3. or 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 decision or other practice.

While the original *Ledbetter* decision only addressed sex bias under Title VII, the Lilly Ledbetter Fair Pay Act is far broader because it applies to disparate pay claims, not just under Title VII but also under the ADEA, ADA and Rehab Act. The Act also appears to apply to both intentional discrimination and disparate impact claims.

"Paycheck accrual rule" restored. The law restores the commonly used "paycheck accrual rule." Before the *Ledbetter* decision**,** if an employee brought a claim for disparate pay on the basis of race, color, religion, sex, national origin, age, or disability, both the EEOC and nine of the ten federal courts of appeal (Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and DC Circuits) that had considered the issue held that each new discriminatory paycheck was considered a separate act of discrimination, triggering a new 180/300-day charge filing period with the EEOC. In fact, the EEOC's view is memorialized in its Compliance Manual (§2-IV-C(1)(a)), where the agency states that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."

Just how broad is Ledbetter's reach?

Management-side labor and employment attorneys have taken notice of how broad the law is. An unlawful employment practice occurs when an "individual" becomes subject to or is affected by a discriminatory pay decision or other practice.

"This broad language could sanction pay discrimination charges filed by non-employees, such as the spouses of deceased workers, so long as those individuals claim they have been affected by the discriminatory practice," wrote national workplace law firm Jackson Lewis in a legal update on the Lilly Ledbetter Fair Pay Act's enactment (http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1616). "The provision suggests that family members or others might have the right to file claims against employers for whom they never work for discrimination to which they were not subject," said Hewitt Associates, Inc, an HR consulting company.

Even though an amendment was introduced during Senate debate to restrict the law's application to just employees, Senator Milkulski, who managed the legislation on the Senate floor, "made clear for the legislative record that the law was not intended to expand beyond the affected employee, the EEOC, or [Department of Labor]—the class of individuals with standing to sue for alleged pay discrimination," said international law firm Morgan Lewis & Bockius in a recent legal alert on the Lilly Ledbetter Fair Pay Act (http://www.morganlewis.com/pubs/LEPG_LillyLedbetterFairPayAct_LF_27jan09.pdf).

Of note, the EEOC's website (http://www.eeoc.gov/charge/overview_charge_filing.html) states that only the following parties can file charges of discrimination with the agency: (1) any individual who believes that his or her employment rights have been violated; and (2) an individual, organization or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

Because the term "other practice" is similarly undefined in the Act, management-side labor and employment attorneys argue that the bill could encompass nearly every conceivable adverse

employment action that potentially affects pay. However, Senator Milkulski provided assurances on the record during floor debate 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," said Morgan Lewis.

Despite the legislative history, the Morgan Lewis firm believes that plaintiffs' attorneys will attempt to argue that the term "other practice" includes promotion or initial job placement decisions. The issue could be the subject of litigation. Plaintiffs' attorneys 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," said Morgan Lewis.

Not to leave employers totally without a rope, Senator Mikulski clarified that there was no intent to displace existing equitable defenses to stale claims such as estoppel, laches or waiver doctrines, confirmed Morgan Lewis. "These equitable defenses will become critical under the … 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."

Back pay. The Act provides that, in addition to other relief provided under Title VII and the ADA (42 USC Section 1981a), an aggrieved person may obtain back pay for up to two years preceding the filing of the charge where the unlawful employment practices occurring during the charge filing period are "similar or related" to the unlawful employment practice occurring outside the time for filing a charge. Morgan Lewis said, "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."

Evidence. The Act's findings also state that with regard to any charge of discrimination under any law, nothing in the 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.

Pensions. In addition, while it appears that the law applies to retirement payments (*i.e.*, annuity checks or other retirement benefits), the Act's findings state there is nothing in it intended to change current law treatment of when pension distributions are considered paid.

Effective date also has a broad reach. The Act and its amendments take effect May 28, 2007 (one day before the Supreme Court's decision in *Ledbetter*), and apply to all Title VII, ADEA, ADA and Rehab Act disparate pay claims that are pending on or after that date. "This means that

the law will change the rule of decision for any case in which a final judgment has not yet been entered," said law firm Morgan Lewis, "including cases currently on appeal." However, the firm verified that the law cannot authorize the reopening of final judgments (see *Plaut v Spendthrift Farm, Inc*, 514 US 211, 225 (1995), holding that Congress lacks constitutional authority to retroactively alter the final judgments of Article III courts).

The Lilly Ledbetter Fair Pay Act can be found at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s181enr.txt.pdf.

Don't forget about the Equal Pay Act

Remember, employees can also file pay disparity suits under the Equal Pay Act (EPA). The EPA, which was passed in 1963 as an amendment to the Fair Labor Standards Act and is administered and enforced by the EEOC, prohibits wage differentials because of sex. The law requires that men and women be given equal pay for equal work on jobs requiring equal skill, effort and responsibility, which are performed under similar working conditions in the same establishment. The jobs need not be identical, but they must be substantially equal.

It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply.

In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased. The EPA applies only to employees, not job applicants.

Unlike under Title VII, the EPA does not require employees to prove discriminatory intent. In fact, the EPA focuses on disparity in pay for substantially similar work; in contrast, Title VII focuses on the adverse employment action that causes the pay disparity. Consequently, when the employee is paid less than similarly situated employees of the opposite sex, an EPA claim can arise without showing that the employer intended to discriminate.

Is Paycheck Fairness Act far behind?

Although it likely will not be acted on by the Senate until the spring, another disparate pay bill, the Paycheck Fairness Act (H.R. 12) passed the House on January 9, 2009, by a vote of 256-163. This bill could also land on President Obama's desk.

The Paycheck Fairness Act would allow prevailing plaintiffs to recover compensatory and punitive damages under the EPA, which currently provides only for liquidated damages (fixed and limited) and back pay awards. To recover punitive damages, however, a plaintiff must show intent (*i.e.*, malice or reckless indifference). In addition, the bill would allow EPA lawsuits to proceed as class actions, as governed by the Federal Rules of Civil Procedure. The bill also would modify the EPA's requirement that men and women receive equal pay for equal work in the "same establishment." It clarifies that employees will be deemed to work in the "same establishment" if they work for the same employer at workplaces located in the "same county or similar political subdivision of a state."

Employers would be prohibited from retaliating against employees who have "inquired about, discussed or disclosed the wages of the employee or another employee." But the retaliation provision does not apply to instances where an employee who has "access to the wage information of other employees as a part of that employee's essential job functions" discloses those wages to individuals who do not otherwise have access to such information (*i.e.*, HR professionals). Disclosures can be made in response to a complaint or charge or in furtherance of an investigation.

The bill would also clarify when employers may assert as an affirmative defense that a pay differential (unequal pay for equal work) is based on "factors other than sex." Employers asserting the affirmative defense must prove those factors are "job-related" and "consistent with business necessity."

If enacted, the bill would also mandate that the EEOC and Department of Labor's (DOL) Office of Federal Contract Compliance Programs train employees and other affected individuals on matters involving wage discrimination. Within 18 months of the bill's enactment, the EEOC would be required to complete a survey about pay information and to issue regulations providing for the collection of pay information data from employers as described by the sex, race and national origin of employees. In addition, the bill would require the DOL to make competitive grants available that would help provide "effective negotiation skills training" for girls and women (and the bill expressly prohibits grant programs created by the EPA from being used for Congressional earmarks). Further, nothing in the Paycheck Fairness Act would affect the obligation of employers and employees to fully comply with all the nation's immigration laws.

The Paycheck Fairness Act, which can be found at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h12ih.txt.pdf, would take effect six months after the date it is enacted.

What should employers do?

Following the enactment of the Lilly Ledbetter Fair Pay Act, the EEOC announced that it intends to enhance enforcement in the area of pay discrimination. In a January 29, 2009, press release,

the agency confirmed that it receives upwards of 5,000 wage bias charge filings nationwide each year under all the statutes it enforces. The Lilly Ledbetter Fair Pay Act will only increase these charges before the EEOC.

While the Act's proponents believe that the Act simply rolls back the law to what many lawyers and courts understood it to be pre-*Ledbetter*—the return of the "paycheck accrual rule"—employers will likely be called upon to defend against actions and decisions made by retired managers and supervisors that occurred years, and even decades, ago. In some cases, employers may have to defend not just their pay rates, but other compensation decisions (*i.e.*, certain retirement benefits, bonuses, severance pay).

Regardless of how the Lilly Ledbetter Fair Pay Act is viewed, with the economic downturn continuing and employers assessing various cost-cutting strategies, the potential risk of disparate pay claims asserted by current and former employees must be considered.

Law firm Jackson Lewis recommends the following actions to minimize employer liability:

Audit current pay documentation practices. Employers should audit their compensation practices to determine whether there is sufficient documentation supporting compensation decisions. Performance-based specifics underlying such decisions will be essential to defending a disparate pay claim.

Develop specific criteria for compensation decisions. Employers should develop objective, measurable guidelines for compensation decisions to be applied consistently and uniformly within job classification, work group, department or business unit.

Review compensation decisions. Employers should create a process to ensure that managers and supervisors do not have unfettered discretion when making compensation decisions. Rather, employers should consider adopting a review system so that compensation decisions are subjected to the same rigorous scrutiny that terminations, discipline, or other adverse actions typically receive.

Revise document retention practices. Employers should review their current document retention policies to determine how long they maintain documentation regarding compensation decisions. In the post-Ledbetter world, employers likely will need to retain such information indefinitely. Despite the expense, employers may need to consider electronic archiving given the voluminous nature of pay-related records.

Train supervisors and managers. Employers should train all supervisors and managers regarding any post-Ledbetter policy modifications to ensure that they understand those policies and, most importantly, the need to support objectively all compensation decisions.

Conduct periodic statistical analysis of compensation data. Employers should analyze compensation data to determine if any statistical disparities exist across gender, race and ethnic lines. Once identified, an employer can make appropriate adjustments to eliminate any unexplained disparities.

Morgan Lewis additionally suggests that employers engage in a comprehensive audit of their current compensation practices to 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.

Being able to sidestep the timeliness defense, while essential to making a disparate pay claim, is just an employee's first step in proving such a claim. While the Lilly Ledbetter Fair Pay Act has the potential of exposing employers to more dated claims of discrimination, employees still need to prove their employer intended to discriminate under Title VII, the ADEA, the ADA and the Rehab Act. Further, employees will not succeed in reviving a disparate pay claim without a recent discriminatory paycheck to accompany that allegation.