

Employment Edge 93rd Edition - Congress Overrules U.S. Supreme Court Decision on Wage Bias Claims

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On January 29th, 2009, President Obama signed into law a bill, the “Lilly Ledbetter Fair Pay Act of 2009” that amends federal employment discrimination laws to make clear that a violation of the anti-discrimination laws occurs each time a paycheck that is the product of illegally discriminatory practices is issued. This is true even if the actual discriminatory decision or program affecting the computation of the paycheck was made or set up in the past. As a result, Employers should take care to review all compensation and the decisions that established the compensation and modify record retention policies relating to documents reflecting compensation decisions.

The new law overturns the effect of the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber*. In the *Ledbetter* case, an employee whose pay had gradually, and regularly, slipped below the pay of her male peers, filed a Charge of Discrimination after almost twenty years of employment. She sued with the assistance of the EEOC and won a substantial damage award after trial. On appeal, the 11th Circuit Court of Appeals substantially reduced her damage award. The U.S. Supreme Court threw her case out entirely, ruling that the discrimination that resulted in her pay being consistently lower than her male peers had occurred when the discriminatory disparity first appeared years ago and that the 180 day statute of limitation applicable in her particular case began running when the discrimination first occurred. Thus, held the Court, *Ledbetter’s* Charge was untimely and her case was dismissed. The Court was sharply divided and the decision was by a 5-4 vote. There was a very vocal dissent from Justice Ruth Bader Ginsberg—who expressly alerted Congress that the ball was in their court on this issue.

After an unsuccessful effort to pass the amendments in 2008, both the House and the Senate quickly passed legislation in January, 2009, making clear that a new act of discrimination occurs each time a paycheck based on a discriminatory bias or program is issued. The new law is effective retroactive to May 28, 2007, the day before the decision in the *Ledbetter* case was issued.

The law specifically amends Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Rehab Act and the Age Discrimination in Employment Act making clear that an unlawful employment practice occurs when:

1. A discriminatory compensation decision or practice is adopted;
2. An individual becomes subject to the decision or practice; or
3. An individual is affected by the decision or practice, specifically including each time compensation is paid.

Consistent with current application of discrimination laws, an individual may only seek back pay damages for the two year period preceding the filing of a Charge of Discrimination.

For employers, enactment of the new law means that compensation programs, pay rates and individual decisions about compensation matters should be regularly and routinely reviewed to flag and correct any disparities that could be the result of improper motives or flawed programs that may have been in place in the past. And because this new law will allow legal challenges to alleged discrimination occurring many, many years in the past, employers may want to consider the importance of documenting and retaining paperwork related to compensation decisions even beyond the mandatory document retention periods established by regulation.

If you have any questions about the Lily Ledbetter Fair Pay Act of 2009 or steps your organization should take to reduce the legal risks of discrimination claims, please contact a member of the Gray Plant Mooty Employment and Labor Law practice group.

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