

OPINION

Employment litigation to rise under Ledbetter Act

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On January 29, 2009, with Lilly Ledbetter at his side, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, the first legislation passed by both the House and Senate under the new president.

The law is noteworthy not only because it is Obama's first, but because it promises to vastly increase litigation, including class action litigation, against employers for discriminatory compensation practices.

As a direct result of this new law, we expect the number of compensation-related disparate treatment and disparate impact claims to explode, and long-stale claims will now find their way to suit.

More time

The Ledbetter Act gives claimants significantly more time to file claims alleging violations of several federal discrimination

laws, including Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act.

It effectively eliminates the traditionally applicable statute of limitations period. Adopting the so-called "pay-check rule," the Ledbetter Act re-sets the limitations period in cases where an employee alleges that her employer implemented discriminatory practices that affected her compensation.

Examples of these cases include discriminatory pay claims and challenges to a discriminatory demotion or failure to promote that resulted in a lower salary. Claimants no longer must file these claims within months of the employer's discriminatory decision or its implementation of the challenged compensation practice.

Now, the act states that an unlawful employment practice occurs whenever "an employee is *affected* by application of a discriminatory compensation decision or practice, including each time wages, benefits or other compensation are paid."

This means that the limitations period begins to run again *each time* an employee feels the discriminatory effect of lower pay and receives a paycheck tainted by the alleged unfairness.

For example, a woman who claims she was denied an incremental pay raise because of her gender can now wait years before bringing suit, because she will feel the effect of that denial in every subsequent paycheck.

Claims will live on

In 2007, the U.S. Supreme Court held in a 5-4 split decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, that employees cannot bring

Title VII disparate pay claims alleging discrimination occurring outside the 180/300-day statute of limitations period, even though the claimant received a paycheck during the period.

The plaintiff in that case, Lilly Ledbetter, waited until she retired to challenge her employer's allegedly discriminatory compensation decisions, which, she claimed, caused her to receive less pay than her male colleagues for many years.

In *Ledbetter*, the Supreme Court rejected the "paycheck rule" and held that if an employee believes that her employer discriminated against her in making decisions affecting compensation, then she must promptly raise her concern with the EEOC or a similar state agency such as the MCAD.

The Ledbetter Act is Congress' deliberate effort to overturn this Supreme Court decision and provide employees more time to bring actions to remedy past discrimination.

While most employers agree that equal pay opportunities should be available to everyone, they argue that there are good reasons for the relatively short limitations period under federal employment discrimination laws.

For example, a period of repose is critical in these cases, which often come down to "he said/she said."

In addition, the limitations periods under Title VII and other federal discrimination statutes carefully balance giving a plaintiff a reasonable time to assert her claims against an employer's right to defend itself, before evidence supporting the reasons for the allegedly discriminatory decision becomes stale. Memories fade, businesses reorganize, witnesses disperse and evidence is lost —

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particularly granular and often poorly documented evidence regarding why a particular incremental pay increase went to one employee over another.

Because of the Ledbetter Act, employers may be deprived of their ability to effectively defend serious claims of wage inequities since plaintiffs now may allow years to pass before calling on their employer to explain its reasons for compensation decisions.

The Ledbetter Act effectively eviscerates the statutes of limitation on employment practices that impact compensation, allowing employees to characterize pay-related claims as "continuing violations."

The claims will live on as long as the employee continues to receive a paycheck impacted by the decision and thereafter. For instance, where an employee feels the discriminatory effects of a decision after her retirement, such as when she receives retiree benefits calculated from a salary that allegedly was discriminatory, she may find herself in a new class of Ledbetter Act plaintiffs.

'Double whammy' for Massachusetts

In Massachusetts, the MCAD and the courts already have been liberal in applying the continuing violations doctrine in discrimination cases brought under G.L.c. 151B, particularly those alleging unequal pay claims.

In fact, courts in Massachusetts and the MCAD already have found that each discriminatorily low paycheck can constitute a

new violation of Chapter 151B, anchoring earlier violations.

The Ledbetter Act ensures, however, that this liberal interpretation of limitations periods under state law now will apply with equal force to claims brought under the federal law.

Above all, the act illustrates how fertile the area of compensation-related litigation has

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become. This is perhaps most true in Massachusetts, where the Ledbetter Act represents a double whammy for employers still reeling from last year's passage of the treble damages law, which made the commonwealth the only jurisdiction where courts will impose strict liability for even inadvertent violations of state wage laws.

The Ledbetter Act allows prevailing employees to recover up to two years of back pay and indicates that its effective date is retroactive to May 28, 2007, the date of the Supreme Court's decision in *Ledbetter*.

Employers likely will challenge the constitutionality of the act's stated retroactivity, and we expect to see significant wrangling in litigation over the meaning and application of the act.

In the meantime, employers should prepare for an increase in compensation-related litigation, especially in this economy where employers are cutting costs in all areas, including payroll.

Starting now, employers should review current practices for documenting compensation decisions and ensure that they are effectively maintaining documented support for the legitimate business-related reasons for their decisions.

Employers should evaluate record-keeping policies to ensure that they can document the reasons for their compensation decisions throughout employees' tenures. Employees responsible for setting compensation should be trained to understand how critical it will be for them to support the reasoning for their compensation decisions, perhaps years after the fact.

Finally, employers should consider assessing whether actual or perceived pay inequities may exist in their organizations and take affirmative steps to rectify them. **MLW**

