LILLY LEDBETTER FAIR PAY ACT OF 2009: STATUS QUO OR CAUSE FOR CONCERN?

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The Lilly Ledbetter Fair Pay Act of 2009 (the "Fair Pay Act") was signed into law on January 29, 2009. The law establishes the statute of limitations for claims brought by employees alleging pay discrimination under Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act (Rehab Act). Many believe that the Fair Pay Act will increase litigation and allow employees to pursue stale discrimination claims, while expanding the scope of those with standing to file suit.

OVERVIEW OF LEDBETTER V. GOODYEAR TIRE & RUBBER CO.[1]

Lilly Ledbetter was a female supervisor at a Goodyear plant in Alabama, and worked there for nearly 20 years. Salaried employees at the plant were given or denied raises based on performance evaluations. Ledbetter submitted a questionnaire to the EEOC in March 1998 and a formal EEOC charge in July of 1998. A few months later, she retired and filed suit, asserting, among other things, sex discrimination under Title VII of the Civil Rights Act of 1964. Ledbetter alleged that several supervisors had in the past given her poor evaluations because of her sex; that as a result, her pay had not increased as much as it would have if she had been evaluated fairly; that those past pay decisions affected the amount of her pay throughout her employment; and that by the end of her employment, she was earning significantly less than her male colleagues. At trial, the jury awarded back pay and approximately $3.3 million in compensatory and punitive damages.

The Eleventh Circuit reversed holding that a pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the EEOC charging period.[2] In a 5-4 decision, the Supreme Court upheld the Eleventh Circuit decision and ruled that later effects of past discrimination do not restart the limitations period. Rather, the time for filing a charge begins when the employer makes a discriminatory decision about the employee's compensation. Ledbetter, therefore, should have filed with the EEOC within 180 days after each allegedly discriminatory pay decision was made and communicated to her. The court found that because discriminatory intent is an

[1] 550 U.S. 618 (2007).

[2] Generally, a charge with the EEOC must be brought within 180 days of the discriminatory employment practice. Because Alaska has an equivalent state discrimination statute the period of time in which to bring a claim is 300 days. A claim filed with the Anchorage Equal Rights Commission must be brought within 180 days.

essential element of a disparate treatment claim, the employee must present evidence of a discrete act of discrimination. The subsequent paychecks resulting from the discriminatory decision did not constitute a discrete act such to begin the statute of limitations.

In a strongly worded dissent, Justice Ginsberg encouraged Congress to correct the Court's decision stating, ". . . [o]nce again, the ball is in Congress' court . . . As in 1991, the Legislature may act to correct the Court's parsimonious reading of Title VII."

HIGHLIGHTS OF THE FAIR PAY ACT

The 111th Congress reintroduced the Fair Pay Act as its first order of business.

The Act expressly overrules the Supreme Court's decision in Ledbetter by providing that a discriminatory act occurs each time a discriminatory paycheck is issued, which starts the 180/300 day time period for filing an EEOC charge. The Act specifically provides that an "unlawful employment practice" occurs when: (1) a discriminatory decision or other practice affecting compensation is adopted; (2) an employee becomes subject to the decision or practice; or (3) an employee is affected by application of a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such decision or other practice.

- The Act permits the 180-day limitation period to restart each time the employee receives a paycheck or post-retirement benefits check based on an allegedly discriminatory decision affecting the employee's compensation.

- The broad language "affecting employee compensation" likely includes claims concerning promotions, demotions, training opportunities and employee benefits.

- The potential exposure for Fair Pay Act claims will continue for years or even decades (undoubtedly increasing the expense and complexity of otherwise routine employment discrimination claims).

- Some believe the Act's reference to "individuals" will allow family members to file claims as well.

- No relief for employers who did not know of the alleged discriminatory conduct.

- Allows for recovery of back pay for the two year period preceding filing of the charge.

- The Act takes effect as if enacted on May 28, 2007, and applies to all claims of discrimination in compensation pending as of that date.

THOUGHTS ON MINIMIZING EMPLOYER EXPOSURE

The EEOC announced that it intends to enhance enforcement in the area of pay discrimination. Some believe that the Act reinstates the law the most courts applied under the "paycheck accrual rule." Others caution that the Act will increase litigation and require employers to defend employment decisions (bonuses, severance pay, etc.) made by management years, or even decades ago. While the Ninth Circuit applied the paycheck accrual rule, the following deserves some thought given the anticipated increase in enforcement efforts and litigation:

- Review current compensation practices & documentation
- Implement compensation criteria
- Review compensation decisions
- Review documentation policies
- Look at statistical analysis of compensation data
- Revisit document retention policies