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ALERT

## President Obama Signs Ledbetter Fair Pay Law Creating Greater Potential Liability for Employers

By Bennett Pine

Fulfilling a campaign promise, the first bill President Obama signed into law, the Lilly Ledbetter Fair Pay Act of 2009, (i) extends the time for employees to file federal claims alleging unlawful pay discrimination and (ii) creates substantial potential liability and headaches for employers.

### *The New Law*

The Ledbetter Act—named after a former female employee who had sued Goodyear after learning that male employees in similar positions were paid substantially more than she was over the course of her nineteen year Goodyear employment—effectively overturns a Supreme Court decision and significantly extends the time by which employees can sue their employers for pay discrimination.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) the Supreme Court ruled that the statute of limitations for asserting a wage difference discrimination claim began to run from the *initial* decision to pay a female worker less money than her male counterpart, even if the pay disparity continued for years. Federal anti-discrimination laws require employees to file an administrative “charge” of discrimination within 180 days of the alleged discriminatory conduct or practice (300 days in states with their own anti-discrimination machinery). The requirement is a prerequisite to filing a federal lawsuit. Since Ledbetter did not file her discriminatory pay claim until after leaving her Goodyear employment, the Supreme Court ruled that her claim was time barred.

The *Ledbetter* decision was met with strong opposition by employee groups and many members of Congress, who argued that employees often do not learn of pay inequality until after the passage of substantial periods of time. That reality placed such employees outside the statute of limitations to claim discriminatory pay disparity under the Court’s *Ledbetter* ruling.

To address this, the Ledbetter Act effectively restarts the 180 (or 300) day statute of limitations clock each time a worker receives a paycheck which reflects a pay disparity. Thus, each paycheck would become the basis of a potential discriminatory violation of law, thereby greatly

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extending the time in which a worker may bring a claim against the employer alleging a discriminatory pay practice.

It is worth noting that, although the *Ledbetter* case dealt only with sex-based pay disparity, the new law is not limited to pay discrimination based on gender. It also includes claims based on protected characteristics such as race, age, religion and disability as well. In addition, some commentators have noted that, under the new law, each pension payment also may provide the basis for an actionable claim if the *pension* amount was determined by a discriminatory pay practice.

Under the Ledbetter Fair Pay Act and existing law, successful claimants can recover up to two years of back pay from the date the discrimination charge is filed.

In signing the law, President Obama stated: "While this bill bears her name, Lilly knows this story isn't just about her. It's the story of women across this country still earning just 78 cents for every dollar men earn—women of color even less—which means that today, in the year 2009, countless women are still losing thousands of dollars in salary, income and retirement savings over the course of a lifetime. In signing this bill today, I intend to send a clear message: that making our economy work means making sure it works for everyone." He added: "That there are no second-class citizens in our workplaces, and that it's not just unfair and illegal – but bad for business—to pay someone less because of their gender, age, race, ethnicity, religion, or disability. And that justice isn't about some abstract legal theory, or footnote in a casebook—it's about how our laws affect the daily realities of peoples lives: their ability to make a living and care for their families and achieve their goals."

The practical effect of the Ledbetter Fair Pay Act is that employers will face a significant increase in potential liability. Each paycheck may provide the basis of current liability even where pay differentials are the result of long forgotten pay decisions.

Employers therefore are well advised to review their pay practices to ensure that all pay decisions are based upon or explained by such "objective" factors as quantifiable job performance, seniority, or other legitimate non-discriminatory business reasons. Unexplainable pay disparities should be addressed. Those responsible for conducting performance reviews and charged with making compensation decisions should do so based upon legitimate non-discriminatory business factors. Finally, the reasons for those decisions should be well articulated and documented.

### Conclusion

With the passage of the Ledbetter Fair Pay Act, many more claims of discriminatory pay disparity likely will result. Accordingly, it is imperative that employers examine their compensation practices and structure in order to identify and address potentially discriminatory pay disparities, thereby limiting their financial exposure. ▲