# LILLY LEDBETTER FAIR PAY ACT

## *Proactive Steps to Reduce Liability Exposure for Compensation Practices*

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Teresa R. Tracy, Esq.
Berger Kahn, A Law Corporation
4551 Glencoe Avenue, Suite 300
Marina del Rey, CA 90292-7925
Tel. (310) 821-9000
ttracy@bergerkahn.com

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## I. OVERVIEW OF LILLY LEDBETTER FAIR PAY ACT

### E. Impact on Pension Benefits

The Act re-triggers the limitations period not only with each paycheck but also whenever "benefits" or "other compensation" are paid. While these terms arguably include the full gamut of benefits that a discriminatory system could impact, such as pensions, the Act states that it will not allow employees to rely on post-retirement pension payments to stretch the limitations period beyond the end of the employment relationship.

Specifically, Section 2(4) of the Act states that it is not intended to "change current law treatment of when pension distributions are considered paid."

Employers will certainly argue that this language retains the rule that "pension distributions are considered paid upon entering retirement and not upon the issuance of each annuity check." See H.R. Rep. No. 110-237, at 18 (2007), citing *Florida v. Long* (1988) 487 U.S. 223, 239, *Maki v. Allete, Inc.* (8th Cir. 2004) 383 F.3d 740, 744.

Unfortunately, the provision does not specifically apply to pension contributions (including contributions to a 401(k) plan), pension benefit accrual formulas, or any other type of non-pension benefit. It remains to be seen how the courts interpret the language.

Clearly, the potential impact is staggering. If an employee's pension or similar payments are based on the employee's compensation, later found to be discriminatory, pension (or similar benefit) contributions could be impacted. For example, in signing the bill, President Obama noted that Ms. Ledbetter had lost pension and Social Security benefits in addition to her lost compensation.

Furthermore, employees are certain to argue that there is no definitive language limiting the application of the new law to pension plans. They will assuredly argue that the "paycheck rule" (that starts a new limitations period with each payment) applies to each new pension payment. (Prior to the Ledbetter decision, both the EEOC and nine of the ten federal courts of appeal – all but the First Circuit – that had considered the issue held that each new discriminatory paycheck was considered a separate act of discrimination.)

Indeed, commentators continue to express concern that retirees will likely attempt to bring suits alleging pay-related discrimination that occurred decades ago if they are presently receiving benefits such as pensions that were arguable affected by the long-past discrimination.

The potential impact of the new law can be anticipated by considering a case currently pending in the United States Supreme Court. In *AT&T v. Hulteen*, argued in December 2008, the plaintiffs challenged the employer's system for setting pensions when employees took leave. In that case, the plaintiffs are employees who took pregnancy-related disability leaves before the enactment of the Pregnancy Discrimination Act in 1978. They received less seniority credit than workers who took leave for other temporary disabilities. As a result, when they retire, they will receive lower pensions than will those other workers, despite similar work histories. Thus, the case involves the proper treatment of employment decisions that result in discriminatory pension benefit levels. Arguably, the new law makes the later pension-setting decision a new act of discrimination – and one that can now be timely challenged. It is unclear what the Supreme Court will do, since the new law became effective after argument was heard.

In another case, a plaintiff in a suit that alleges that this company's pension plan discriminated against older workers is citing the new law in an attempt to get his suit reinstated. The plaintiff, Wayne Tomlinson, claims that he did not learn the details of a 1997 pension plan conversion (to a "cash balance" plan) by the El Paso Corporation until 2004. He claims that the conversion selectively froze the pension benefits of employees over 40. Although a court dismissed his suit based on the statute of limitations, he says he will take his case to the 10th Circuit if necessary in his attempt to get the suit reinstated. Tomlinson was invited to, and did, attend the signing of the new law in the White House.

Furthermore, it can be anticipated that, based on the law language that allows others "affected by" discriminatory pay systems – such as spouses or other beneficiaries – could take advantage of the new law to assert pension-based claims like those discussed above, even if the employee has died. In this regard, plaintiffs are likely to point to the fact that Senate amendments offered to delete the "affected by" language from the bill were defeated. The defeated amendment specified that only workers alleging discrimination could file charges, not family members and others. Thus, attempts made by the bill's Floor Manager, Barbara Mikulski (D-Md) attempting to assure critics during the debate that the bill did not change current law relating to individuals eligible to file pay discrimination charges are likely to carry less weight.

The potential scenario becomes even more uncertain when one considers the large numbers of mergers, acquisitions, and other business entity sales that occur every year. If the new employer continues to make compensation practices based on an employee's current compensation – which is later found to have been discriminatory on the part of the predecessor employer – is that new employer then liable for differences in pension levels not only for the past but well into the future?

Plan administrators have cause for their nightmares. Under the new law, the actual obligations of some plans might exceed the predicted obligations that were anticipated at the time of funding, once required benefits have been recalculated based upon a finding of underlying discrimination. Furthermore, if there are successive lawsuits, each new employee victory will require the recalculation of these obligations, leading not only to increased concerns of insolvency, but increased administrative costs.

Some commentators have gone so far as to suggest that the implications of this law are one more nail in the coffin of employer-provided pensions, and that it will provide additional incentive for employers to abandon such benefits. This may be particularly true because the new law applies to both intentional discrimination and "other practices" which is broad enough to potentially include disparate impact claims. This is one more issue that will have to be interpreted by the courts.

### F. Who Can File a Claim

Controversy also exists with respect to who can file a claim under the new law.

Under the new law, an unlawful employment practice occurs with respect to disparate pay or benefit when:

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

Since it amends Title VII as well as the ADA, ADEA and Rehabilitation Act of 1973, it is clear that an employee with a claim under any one (or combination) of these laws can now bring a claim, i.e., a claim based on race, color, religion, sex, national origin, age, or disability.

To the extent that these laws require a claimant to file an administrative claim prior to a lawsuit, the new law can reasonably be interpreted as only allowing an employee who has filed such an administrative claim to bring suit.

Indeed, the EEOC's Notice concerning the new law (available on its website at www.eeoc.gov) suggests that the EEOC believes that the new law continues the prior scope of the laws to encompass only the traditional claimants of applicants and employees.

However, the language of the new law has been interpreted by some to potentially extend the class of plaintiffs far beyond these traditional limitations. This is because Section 3(A) extends the class to any individual who is "affected by" unlawful discrimination. Indeed, since the new law also gives rights to those who are "subjected" to a discriminatory practice, it is conceivable that such an employee could bring a case even if the employee was unable to show he/she was directly affected by it! Such is the uncertainty employers face in light of the rather broad and undefined terms of the new legislation.

Employers are understandably concerned that this language will be construed to allow individuals who were never victims of discrimination to become plaintiffs on behalf of, or derivatively through, others, e.g., a widower suit on behalf of his deceased wife/employee, or a child suing based on discrimination towards a deceased parent/employee). Indeed, one scenario posed is an individual who applies for a position but is rejected, only to re-apply and be hired years later. If he can successfully persuade the court that the original refusal to hire was discriminatory, he may be able to also successfully argue that upon hiring he is continuing to be discriminated against due to lost compensation increases, vacation accrual, bonuses, etc. – and he would have the entire time of his employment and perhaps beyond to bring his claim! (Although he could not recover damages for the refusal to hire he could recover damages for the current "effects" of that decision on his compensation and benefits, plus attorneys' fees, emotional distress and punitive damages!) Clearly, the employer would be at an extreme disadvantage since it may not have records of the application, much less witnesses who could testify about non-discriminatory reasons for the refusal to hire.

This is just one more way in which employers may find it very difficult to defend against claims based on decisions made decades ago.

The new law extends the law beyond strictly compensation decisions to any decision or "other practice" affecting compensation "in whole or in part that may have influenced the compensation received." Therefore, employers are clearly concerned that the provisions of the new law will be applied to any employment action, e.g., hiring decisions, transfers, evaluations, promotions, demotions, discipline, compensation and benefits decisions, potentially even decisions regarding shift assignments and sales territories that might have impacted compensation in any way.

While the 180/300 day EEOC claims-filing limitations period served to stem the tide of stale claims, as discussed in connection with the statute of limitations, the extension of the filing trigger to encompass not only the time that a discriminatory compensation decision or other practice is adopted, or an individual becomes subject to a discriminatory compensation decision or practice, but also to any time an individual is "affected by" a discriminatory compensation decision or practice "including each time wages, benefits or other compensation is affected by that decision or practice is paid"

exponentially increases the group of potential claimants to potentially include those inactive employees, retirees, former employees, and even non-employees (e.g., spouses) to bring claims decades after important employer witnesses have moved on or even died.

Furthermore, because the effective date of the new law was made retroactive to May 28, 2007 (the day before the Ledbetter decision was issued, and applicable to all pay discrimination claims pending on or after that date), claims made after May 28, 2007 – which would have been untimely because the decision – may now be viable and claims that were previously dismissed on timeliness grounds may be able to be reasserted.

Thus, it is clear that the new law provides a "back door" to challenge personnel actions that would otherwise have been time-barred, as long as the claimant can show that he/she is still affected by the action through the receipt of depressed compensation and/or benefits.

One group of plaintiffs in Florida federal court reportedly has already used the new law to persuade the court to allow them to challenge demotions that occurred 16 years before they filed an EEOC complaint. (Although the original decision itself would not be the subject of damages, it would result in continuing liability for any compensation-implicated result.)

The impact of the law is unclear with respect to employees who have signed releases in the past. However, to the extent severance is linked to compensation, employees who are receiving severance payments or benefits may still be able to bring a claim. Furthermore, it is reasonably foreseeable that these claims will become the new "darlings" of the plaintiff's bar (a major supporter of the new law), and that they scrutinize the compensation history of every potential plaintiff who comes through their front door, even if the individual did not originally suspect discrimination.

Employers still have equitable defenses available, such as estoppel, laches, and even a due process argument. It remains to be seen whether –either as a general rule or in individual cases – how successful these defenses will be.

## II. BEST PRACTICES TO AVOID OR MINIMIZE LIABILITY

### A. Audit Compensation Systems And Practices For Disparities In Pay And Benefits

- If compensation and/or benefits have been frozen due to the current economic conditions, make sure that such actions apply equally to employees without disparities based on factors covered by the new law;
- Ensure that there are procedures in place for setting and reviewing all pay decisions, including merit-based decisions arising from performance evaluations;
- Document the reasons for all employment decisions, including pay decisions, evaluations, and discipline if they might affect compensation or benefits in the future;
- Pay particular attention to possible pay discrepancies not attributable to legitimate non-discriminatory reasons.

In conducting an audit, the employer is faced with a multiplicity of issues. It is relatively easy to state "compare pay and benefits differentials between similarly-situated employees." The devil is in the details of designing and conducting such an audit. Cases involving historical comparisons of this type usually pit experts against each other, and involve heated arguments about who is "similarly situated" and whether and to what extent variables along the way have impacted the outcome, and use complicated statistical procedures.

At its most "simplistic," an audit could assess current employee wage structures and corresponding job descriptions to identify discrepancies between pay and job duties; disparities should be reviewed to ensure they are the result of legitimate, nondiscriminatory factors.

At a minimum, employees performing the same job could be compensated within a relatively narrow band of compensation.

A more complicated audit could compare current employees, and compare compensation and benefits between the employees in various protected and unprotected groups (e.g., disabled and non-disabled, those over and under 40, males and females, and among each racial/ethnic group and each other racial/ethnic group). Even under this approach, one employee would be analyzed in multiple different ways.

Employers are faced with a dilemma in proceeding with attempts to audit their compensation, benefits, and other personnel practices: how to do this without pleading themselves "guilty" if problems are found.

The best way to protect the confidentiality of any audit is to use in-house or outside legal counsel to review the plans and practices so as to protect the audit and its results under the attorney-client privilege and potentially the attorney work product doctrine.

Employers should not rely on the so-called "self-audit privilege" as many states do not recognize this privilege.

In addition, employers should be aware that if they use the "reliance on advice of counsel" defense, they may well be waiving all attorney-related privileges.

Therefore, in addition to using counsel during the audit, any employer who finds and wants to correct any past discriminatory pay or benefits should also work with legal counsel in designing and implementing changes so as to minimize the invitation to file litigation.

Given these obstacles, an employer can legitimately question the wisdom of conducting an audit, particularly one that goes into historical matters. If a pay or benefit disparity is equalized at some point outside the limitations period for damages, the case presumably will be time-barred.

Furthermore, prevention is always the best alternative to expensive litigation. With or without an audit, for example, an employer could decide to award uniform wage increases unrelated to performance reviews (e.g., cost-of-living increases), and reward good performance with one-time bonuses that do not perpetuate decisions that implicate compensation and/or benefits and are subject to later challenge as discriminatory.

Any audit program should include future audits to periodically review compensation and employment decisions to ensure that any disparities in compensation or benefits are documented in detail or eliminated.

In short, the new law may represent a "full employment act" for attorneys, compensation analysts and consultants.

### F. Ensure That All Future Compensation Analyses With Counsel Are Privileged

As discussed above, future compensation and practices audits should be similarly done so as to protect not only the audit but its results and conclusions through the attorney-client privilege and work product doctrine.

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