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EMPLOYMENT AND LABOR EXECUTIVE ALERT

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# LEDBETTER ACT EXPANDS STATUTES OF LIMITATION, EXPOSES EMPLOYERS TO LIABILITY FOR DECISIONS MADE MANY YEARS EARLIER

On January 27, 2009, the House of Representatives passed the Lilly Ledbetter Fair Pay Act of 2009, which now heads to President Obama for signature.

The Ledbetter Act extends statutes of limitation for most federal anti-discrimination laws, allowing an employee to file suit for discriminatory decisions made long ago if the employee's pay is still affected by the results of the decision.

Although recovery of back pay is limited to two years, other remedies are also available, including punitive damages, emotional distress damages and injunctive relief. Injunctive relief may include a court order to reinstate or promote an aggrieved employee.

The effect of the Ledbetter Act, whether intended or not, is that employers may now be held liable for employment decisions made years or even decades earlier, if the effects of those decisions are still reflected in employees' compensation.

## New Language Expands the Definition of an Unlawful Employment Practice

Under federal anti-discrimination law, an unlawful employment practice "with respect to discrimination in compensation" will now be deemed to occur:

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

These changes apply to Title VII (prohibiting discrimination based on race, color, religion, sex, and national origin), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The changes are retroactive to May 28, 2007.

The first subpart reflects existing law. The second subpart reflects a modest expansion of existing law. The third subpart, however, will likely have far-reaching consequences, forcing employers to defend employment decisions many years after they have occurred and providing aggrieved employees a wide range of available remedies.

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Under previous interpretations of federal law, each discriminatory paycheck constituted a new discriminatory action under the Equal Pay Act only, but not under Title VII, the ADEA, the ADA or the Rehabilitation Act. *See Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007). Under the Ledbetter Act, each discriminatory paycheck will now constitute a new potential violation of these other federal statutes as well. The significance of this change is twofold.

First, remedies for a violation of the Equal Pay Act are limited to two years of back pay (three years if the violation was willful). Thus, before the Ledbetter Act, employers could be forced to defend ancient decisions, but their potential liability would be limited to two years of back pay -- i.e., the difference over the past two years between the employee's actual compensation and the compensation she would have received but for the discrimination. Remedies under Title VII, the ADEA, the ADA and the Rehabilitation Act, however, are more expansive and may include punitive damages, emotional distress damages and injunctive relief. Under the Ledbetter Act, aggrieved employees whose paychecks are still affected by years-earlier employment decisions now have the right to seek all of the remedies available under these more expansive federal laws, rather than being limited in their recovery to the two years of back pay that would be available under the Equal Pay Act.

Second, the Equal Pay Act protects against discrimination based on sex only. It does not prohibit unequal pay based on race, color, religion, national origin, age, or disability. Although unequal pay based on these other characteristics was illegal before the Ledbetter Act, any claim for unequal pay under these statutes had to be brought within 300 days (180 days in states without an anti-discrimination agency) *of the discriminatory decision.* Now, after passage of the Ledbetter Act, an aggrieved employee may bring a claim within 300 days of any paycheck that reflects the results of any prior discriminatory decision, no matter how long ago the decision was made and regardless of whether the prior decision was based on sex, race, color, religion, national origin, age, or disability.

## Employers Must Now Be Prepared To Defend Employment Decisions Indefinitely

Because aggrieved employees are no longer required to challenge discriminatory employment decisions within 300 days of the decision, employers must be prepared to defend indefinitely employment decisions that affect compensation.

As an example, a promotion decision made in 2009 may be the subject of litigation in 2029, if in 2029 the employee who was not selected can prove that the decision twenty years earlier was discriminatory and that her compensation in 2028 and 2029 would have been higher if she had received that promotion and raise in 2009.

Employers, therefore, must be prepared to defend many of their employment decisions years after they occur. Because memories fade and witnesses become unavailable, employers should take extra care to document the reason for decisions that affect employees' compensation. The precise steps to be taken will depend upon the employers' human resources systems, both paper and electronic, the type of decision (such as promotion, cost-of-living adjustment, change in union contract, etc.), and practical concerns relating to the quality of the data and the expense of storing and retrieving it.

A more problematic aspect of the Ledbetter Act is the expanded availability of other remedies, including injunctive relief. Employees who can prove they were victimized by unlawful discrimination may seek a court order reinstating them to the position they were unlawfully denied. When the discrimination occurred relatively recently, this type of relief is more practical. When the discrimination occurred many years earlier, however, and the suit is allowed to proceed only because the effects of the decision persist in more recent paychecks, equitable remedies like reinstatement (or promotion) may prove highly problematic for employers. It remains to be seen whether courts will impose such relief and under what circumstances, but this type of relief is among the potential remedies that are available.

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