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# Lilly Ledbetter Fair Pay Act

## Proactive Steps to Reduce Liability Exposure for Compensation Practices

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# Overview of the Lilly Ledbetter Fair Pay Act of 2009

- Signed by President Obama on Jan. 29, 2009
- Overturned *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)*
- Retroactive to May 28, 2007, the day before the Supreme Court issued the *Ledbetter* decision
- Allows claims for pay discrimination that first began based upon discriminatory actions that occurred prior to the statutory limitations period

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# Overview

- The statute of limitations for alleged discriminatory compensation practices begins to run every time the employee receives wages, benefits or "other compensation".
- Therefore, unlawful discrimination occurs when:
  - "a discriminatory compensation decision or other practice is adopted."
  - "when an individual becomes subject to 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 wage, benefits, or other compensation is paid, resulting in whole or in part from such a decision of other practice."

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# What the Act Provides Cont.

- Major Provisions
  - Exposes employers to pay discrimination liability for alleged discriminatory decisions, even though they may have been made years earlier, based on whether they have continuing impact on an employee's compensation.
  - Applies to claims of pay discrimination under Title VII, the ADA, the Rehabilitation Act, and the ADEA, the Act is not limited to claims based on gender discrimination, but also applies to pay discrimination based on race, national origin, religion, age and disability.
  - The Act re-triggers the limitations period with each paycheck, and whenever "benefits" or "other compensation" are paid.
  - The Act also prohibits discriminatory compensation decisions as well as "other practices" that affect compensation.

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## Getting to the Fair Pay Act: The Paycheck Accrual Rule

- Recognized by the EEOC, and the majority of the federal circuit courts of appeal prior to the Supreme Court's decision in *Ledbetter*, the "paycheck accrual" rule provides that each paycheck, impacted by a past adverse pay-setting decision, is considered a separate act of discrimination, triggering a new filing period with the EEOC.

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# Relevant Pre-*Ledbetter v. Goodyear* Case Law

- *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam) (disparate pay claim case where the court held that an employer violates Title VII and triggers a new EEOC charge-filing period whenever the employer issues paychecks using a discriminatory pay structure).

- *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002)(holding that where an African American railroad employee sought to recover for discrete acts of alleged discrimination, only those acts occurring within 300 days of date that the employee filed his charge with the EEOC were actionable under Title VII).

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# *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).*

- Plaintiff Lilly Ledbetter worked for Goodyear from 1979 to 1998. After retirement, she filed a gender discrimination claim against Goodyear on the grounds that she received smaller annual pay increases than her male counterparts throughout her employment.
- In a 5-4 decision, the Supreme Court held that her claim was time-barred and that an employee must file charges with the EEOC within 180 days (or 300 days if the charge is also covered by a state or local antidiscrimination law) of a discriminatory pay decision, even if the employee is unaware of the employer's alleged unlawful employment practice.
- The Supreme Court construed Title VII's statute of limitations for equal pay claims to require that the time for filing a claim begins to run when the discriminatory pay decision is made, rather than each time an employee receives a paycheck affected by the initial decision, rejecting the "paycheck accrual" rule.

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# History of Legislation

- 110th Congress
  - On June 2, 2007, the House Committee on Labor and Education introduced the Ledbetter Fair Pay Act (H.R. 2831). On July 31, 2007, the bill passed in the House. However, the bill sat in the Senate until late April of 2008 and was not passed because the Senate did not have the necessary votes to overcome a filibuster (56-42).
- 111th Congress
  - The Lilly Ledbetter Fair Pay Act was reintroduced by House Committee on Labor and Education Chair George Miller (D-Cal) on January 6, 2009, and Senator Barbara Mikulski (D-Md) on January 8, 2009. The House quickly passed the measure (H.R. 11) on January 9 by a vote of 247-171, just days after it convened its first session. The Senate approved the bill (S. 181) on January 22 by a vote of 61-36.

## Legislative History

- The House had to vote on the bill again because in its original passage, it was bundled with the Paycheck Fairness Act. The bill (H. Res. 87) cleared the House for a second time on January 27 and President Obama signed it into law on January 29.

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# What the Act Provides

- Congressional findings
  - Congress found that the Supreme Court's decision in *Ledbetter* significantly impaired statutory protections against discrimination in compensation and unduly restricted the time period in which victims of discrimination could challenge and recover for discriminatory compensation decisions or other practices.
  - *Ledbetter* ignores the reality of wage discrimination and is at odds with the application of civil rights laws.

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# What the Fair Pay Act Does Not Change

Nothing in the Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a discrimination charge.

Nothing in the Act is intended to change the current legal treatment of when pension distributions are considered paid.

The Act does not amend the limit on recovery of back pay to a maximum of two years prior to the filing of a charge under Title VII.

Employers may still assert such equitable challenges to the timeliness of a charge based on waiver, estoppel or laches.

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# What the Fair Pay Act Does Not Change

- Standards of proof in discriminatory compensation cases
- The requirements of the Equal Pay Act

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# What the Statute Leaves Open

- The Act prohibits discriminatory compensation decisions as well as "other practices" that affect compensation. This language suggests that any practice that affects compensation – not just discrete decisions – may trigger a claim.
- Who is "an individual" that becomes subject to a discriminatory pay decision or practice?

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# What the Statute Leaves Open

- Expands the pool of potential plaintiffs by re-triggering the limitations period with each paycheck, and whenever “benefits” or “other compensation” are paid – which include the full scope of entitlements that could be impacted by a discriminatory decision (health benefits, paid leave, bonuses, stock options, pension payments – although the Act clarifies that it will not permit employees to rely on post-retirement pension payments to extend the limitations period).

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# Cases Construing the Fair Pay Act

- *Rehman v. The State University of New York at Stony Brook*, No. 08-CV-0326 (ADS)(MLO), 2009 WL 303830 (E.D.N.Y. Feb. 6, 2009)(holding that, according to the terms of the Act, the plaintiff's wage discrimination claims based upon actions occurring on or after April 13, 2005, two years prior to his EEOC charge, were timely).

- *Vuong v. New York Life Insurance Co.*, No. 03-Civ. 1075 (TPG), 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009)(holding that the plaintiff’s claim of discrimination was timely by virtue of the Act, even though the alleged discriminatory pay decision was made in 1998).

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# Cases Construing the Fair Pay Act

- *Bush v. Orange County Corrections Dept.*, No. 6:07-cv-588-Orl-28DAB, 2009 WL 248230 (M.D.Fla. Feb. 2, 2009)(holding that Plaintiff's claims regarding demotions and pay reductions that occurred in 1990 - sixteen years before this suit was initiated, were not time barred because of the Act).
- *Gilmore v. Macy's Retail Holdings*, No. 06-3020 (JBS), 2009 WL 305045 (D.N.J. Feb. 4, 2009)(holding that the Act applies to the plaintiff's EEOC claim that was filed on July 7, 2005, and that back pay may be awarded for discrimination in compensation taking place as early as July 7, 2003, so long as such alleged discrimination is "similar or related to unlawful employment practices" at issue).

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# Best Practices in Light of the Fair Pay Act

## Training of supervisors and managers

- Compensation policies and procedures, and changes resulting from the Act
- Performance documentation
- Record retention
- Objective evaluations
- Uniformly applied performance criteria
- Setting compensation
- Dividing up a finite compensation “pie”
- Saying stupid things

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