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# LILLY LEDBETTER FAIR PAY ACT

Proactive Steps to Reduce Liability Exposure
for Compensation Practices

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# Ledbetter Fair Pay Act

The complete and wide array of remedies available under the statutes modified by the Lilly Ledbetter Fair Pay Act remains unchanged.

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- More specifically:
  - **Backpay** – The Fair Pay Act confirms that recovery of backpay is limited to two (2) years preceding the filing of a charge under Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. The Fair Pay Act did not expressly modify the Age Discrimination Employment Act ("ADEA"); courts may well adopt the Title VII two-year limitations period, but this issue is not totally free from doubt *See* 2 C. Sullivan & L. Walter, *Employment Discrimination: Law and Practice* §13.09[C] at 864-65 (4th ed. 2009).
  - **Compensatory and punitive damages** - Can be recovered under Title VII and ADA subject to applicable statutory damage caps. Liquidated damages can be recovered for "willful" violations of the ADEA.


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- **Fringe Benefits** – The full panoply of benefits offered by employers is potentially recoverable, including, but not limited to, benefits such as: health insurance, vacation pay, stock options, bonuses, sick leave, profit-sharing benefits, and pension and retirement benefits.
  - Front pay may be in play in appropriate cases.
  - Injunctive relief
  - Attorneys' fees

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- The Third Circuit recently held that a "district court may, pursuant to its broad equitable powers granted by the [ADA], award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create." *Eshelman v. Agere Systems, Inc.,* 2009 U.S. App. LEXIS 1947 at *37 (3d Cir. Jan. 30, 2009).

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## Relief under other complementary statutes

- **The Equal Pay Act ("EPA")** – The current EPA statute of limitations for back pay and liquidated damages recovery is two years prior to the date of the filing of a court complaint, or three years in the event of a "willful" violation.
- **42 U.S.C. §1981 –** Monetary relief is available for wage-discrimination claims based upon race, color or national origin without Title VII damage caps. The four-year statute of limitations most likely applies after the decision in *Jones v. R. R. Donnelley & Sons Co.,* 541 U.S. 369 (2004).


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## Relief under other complementary statutes

- State anti-discrimination statutes may have their own arsenal of remedies.

- More exotic ancillary courses of action – ERISA and RICO. Causes of action under these statutes are being tacked on to collective actions under the Fair Labor Standards Act ("FLSA"). Will they be "in terrorem" appendages to wage discrimination actions?

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## Effective Date of the Fair Pay Act

- By its terms, the Fair Pay Act is retroactive to May 28, 2007—the day before the Supreme Court's decision in *Ledbetter*—and applies to all claims of discrimination in compensation under Title VII, the ADEA, the ADA, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

- The Fair Pay Act should not serve as a mechanism to reopen cases in which a final judgment has been entered. *See Plaut v. Spendthrift Farm Inc.,* 514 U.S. 211 (1995).

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# Policy and Systems Review in light of the Lilly Ledbetter Fair Pay Act

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## The Goal—Eliminate Discriminatory Policies, Practices, and Systems

- As a starting point, compile and review documents that discuss and reflect compensation policy and the setting of compensation. Does the employer's documentation reflect actual employer practice?

- Pay particular attention to organization charts, job descriptions, and any "job evaluation studies, reports, or other analyses made by or for the employer with respect to its method of compensation and pay rates." *See* EEOC Compliance Manual §10-III A.1.a. (discussing EEOC initial requests for information when the agency begins an investigation into alleged compensation discrimination).

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- Create an accurate employee database.
- Implement and follow a carefully, crafted, comprehensive, consistent compensation policy.

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## Delineate the Relevant Factors

- What factors definitively pay a role in compensation decisionmaking?
- What factors are discretionary?
- Are these factors different in different locations or segments of the employer?
- What exceptions exist?
- Both objective and subjective measures can be legitimate.

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## Potentially Relevant Factors

- Experience
- Responsibility
- Training
- Seniority
- Performance evaluations
- Other objective criteria relevant to job performance
- Market surveys and starting salary

  Will their use be adversely impacted if the Paycheck Fairness Act passes?
- Weighting of relevant factors

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## Implementation of Additional Protective Measures

- Accountability of Managers and Supervisors
- Human Resources Review
- Internal Complaint and Appeal Procedures

  *See, e.g., Donaldson v. Microsoft Corp.,* 205 F.R.D. 558 (W.D. Wash. 2001) (approving presence of Employer's appeal procedures)
- Diversity Initiatives

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## Documentation of Past Decisions

- Determine how far back the employer can and should go.
- For many employers, despite the scope of the Fair Pay Act, two to three years may be an appropriate yardstick, at least initially.
- The creation of any documentation of past decisionmaking should be interwoven into the self-audit process with attendant attention to privilege protection.

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## Record Retention Issues

- One size does not fit all.
- Internal Revenue Service regulations require that all employment tax records be kept for at least four years after the date that the tax becomes due or is paid, whichever is later. Fair Labor Standards Act ("FLSA") regulations impose a three-year recordkeeping requirement on many payroll-related records.
- Practically, therefore, many employers likely are maintaining compensation-related records beyond narrow regulatory discrimination recordkeeping mandates of one year for records pertaining to hiring, accommodations, promotions, demotions, discipline, and discharge or two years for federal contractors with more than 150 employees, or more than $150,000 in government contracts. ERISA and state law record retention requirements may be longer.

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## Record Retention Issues

- Many employers maintain certain employment records at least for the length of an individual's employment.

- In the wake of the Fair Pay Act, employers must consider whether to retain documents that impact compensation on a permanent basis. That does not mean, however, that every e-mail or other electronic workplace communication must be saved forever.

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## Record Retention Issues

- A thoughtful balance must be struck and the right systems must be in place.
- Create and maintain meticulous personnel files.
- Employers should begin consideration of record-retention issues now and involve counsel. Development and implementation of, and compliance with, formal internal recordkeeping policies will be more critical than ever to the successful defense of wage discrimination actions.

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# On the Horizon-- Additional Compensation Legislation and Increased Enforcement Activity

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- The Fair Pay Act is only the first of in a series of legislative initiatives that employers may have to confront later in 2009 and in 2010.

- The Paycheck Fairness Act
  - Would alter key provisions of the Equal Pay Act ("EPA")
    - Modification of the "any other factor other than sex" defense—employers would have to show that any sex-based pay differentials are based upon a "bona fide factor other than sex, such as education, training, or experience." Further, the bona fide factor cannot be "based upon or derived from a sex-based differential in compensation and,

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among other things, must be "consistent with business necessity." Finally, this defense would not apply if "an alternative employment practice exists that would serve the same business purpose…"

- Unlimited EPA punitive and compensatory damages
- Fed. R. Civ. P. Rule 23 class actions, not "opt-in" FLSA-type collective actions
- Expansion of FLSA nonretaliation protections in most instances to an employee who "has inquired about, discussed or disclosed the wages of the employee or another employee."
- A broader definition of "establishment"—a relevant establishment for EPA purposes would encompass "workplaces located in the same county or similar political subdivision of a state."


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- Legislative Modification of Enforcement Activities of the Office of Federal Contract Compliance Programs ("OFCCP")
  - The return of the much-maligned Equal Opportunity Survey
  - Mandated modification of OFCCP compensation enforcement guidelines and protocol

- The Paycheck Fairness Act passed the House in January and has been introduced in the Senate. Some iteration of this legislation may well make its way through the Senate and be signed by the President in 2009.

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- Arbitration Fairness Act
  - May forestall efforts of employers to implement mandatory pre-dispute arbitration mechanisms to resolve discrimination and other workplace issues.
  - Passage of such legislation in 2009 remains uncertain. Support in the Senate may be problematic.

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- Additional Civil Rights Legislation
  - Some portions of the Civil Rights Act of 2008 may be reintroduced in 2009. Among other things, there likely will be legislative proposals to eliminate Title VII and ADA statutory damage caps and to prohibit discrimination on the basis of sexual orientation.

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- The Employee Free Choice Act ("EFCA")
  - As currently drafted, EFCA would amend the National Labor Relations Act ("NLRA") to:
    - Take away employee rights to secret ballot elections and require union recognition by card check.
    - Require binding arbitration of first-time collective-bargaining agreements after 120 days so that an arbitrator (not the employer) sets employee wages and benefits.
    - Stiffen the penalties for employers who misstep during a union organizing drive or a first contract negotiation.

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- EFCA likely will be debated within the next few months. This proposed legislation is producing the most impassioned labor relations debate of the last thirty years.

- Wage discrimination claims and issues are likely to be raised as part of union organization efforts and could surface in interest arbitration.

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## A Revitalized EEOC

- As reported in the *Daily Labor Report,* EEOC Acting Chairman Stuart Ishimaru has said that he will try to make the Commission's program targeting systemic discrimination "the centerpiece of our enforcement system." Chairman Ishimaru also noted that, unlike counsel in private practice, the EEOC need not focus on "the economics of bringing a case." *See* "EEOC Chief, Private Lawyers Discuss Commission's Emphasis on Systemic Cases," 27 Daily Labor Report at A-9 (Feb. 12, 2009).

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## A Word about OFCCP

- OFCCP has made clear that it is focused on systemic discrimination in the federal government contractor community, with an emphasis on compensation discrimination.

- More aggressive OFCCP enforcement and a concomitant increase in litigation is almost a certainty.