HUNTON& WILLIAMS

CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

January 2009

Contacts

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The Lilly Ledbetter Fair Pay Act Is Signed into Law and Paycheck Fairness Act Expected to Follow Shortly

There is a new administration in place in Washington with a large majority in the Congress, anxious to effect change in the American workplace. They have taken aim at the employment relationship and are enacting measures that will pose substantial challenges to employers in the coming years. The first of these is scheduled for enactment by President Obama on Thursday, January 29, 2009. More will follow in the coming weeks.

On January 27, 2009, the House passed the "Lilly Ledbetter Fair Pay Act," which effectively abolishes the statute of limitations for disparate pay claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act. The Senate passed the bill on January 22, 2009. President Obama will sign it into law January 29, 2009.

The Ledbetter Act has retroactive effect to May 28, 2007, the day before the decision of the Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), the decision Congress intends to reverse by this legislation. The law will make it significantly more difficult for employers to defend pay discrimination cases. Evaluation of risk by employers will be challenging because of the possibility that decisions long forgotten in the workplace will become the subject of litigation for plaintiffs taking advantage of this legislation.

In the legislative wings is the Paycheck Fairness Act, passed by the House on January 9, 2009 and awaiting action in the Senate. That law would ease burdens of proof for women suing under the Equal Pay Act of 1963, enable broader class action procedures and expand available damages. The President has said he would sign that bill into law as well.

These promise new challenges for employers who are also bracing for the possibility that Congress will enable secret-card-check organization by unions and mandatory arbitration of bargaining impasses in the proposed Employee Free Choice Act.

Ledbetter v. Goodyear Tire & Rubber Co., Inc.

In *Ledbetter*, the Supreme Court held that an Alabama plaintiff must file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of a decision that resulted in disparate pay, and that an employee cannot resurrect a stale claim by asserting that each paycheck is a new manifestation of the initial act of discrimination.

Lilly Ledbetter worked for Goodyear from 1979 to 1998. According to her testimony at the trial of her Title VII claim, in the "early 1980s" and again in the "mid-1990s," a supervisor penalized her for failing to accede to sexual advances. The supervisor then retaliated against her by giving her performance evaluations that led to lower pay raises, which were aggravated by an atmosphere inhospitable to women and ultimately resulted in a greater than $500 to $1000 per month disparity between her compensation and that of men in the same job by the time

she finally reported it to the EEOC in 1998. There was no intentional act of discrimination alleged within the 180 days prior to that report.

When she brought her claim in district court, the court granted summary judgment, dismissing her Equal Pay Act ("EPA") claim, and Ledbetter did not appeal. (That was significant because there is no charge-filing requirement under the EPA.) She tried her Title VII claim to a jury verdict. The jury heard no testimony from the offending 1980s supervisor because he had died. The jury found in her favor and awarded Ledbetter back pay and damages.

On appeal, Goodyear argued that any pay decisions it made prior to September 26, 2007 — 180 days before she filed her EEOC questionnaire — were barred by the requirement that they be made the subject of a charge to EEOC within that period. The Eleventh Circuit agreed, holding that a Title VII pay discrimination claim must be based on a decision, affecting the employee's pay, which occurred during the EEOC charging period. The Court also concluded that there was insufficient evidence to establish that any decision made during the charging period was discriminatory.

The Supreme Court affirmed, holding that Ledbetter's pay differential was the ultimate result of discrete acts that were never made the subject of a charge to the EEOC and that they were therefore beyond the reach of Title VII.

The Court based its holding on two principles. *First*, because statutes of limitations "serve a policy of repose," "[t]he EEOC filing deadline 'protects employers from the burden of defending claims arising from employment decisions that are long past.'" *Second*, the Court recognized that disparate pay claims require a showing of discriminatory intent, which "can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened."

Justice Ginsburg's dissent prompted legislative action. Hence, the Ledbetter Act.

Provisions of the Lilly Ledbetter Fair Pay Act

The Ledbetter Act expressly overturns the *Ledbetter* decision. Under this statute, an unlawful employment practice occurs: (a) when a discriminatory compensation **decision or other practice is adopted**; (b) when an individual **becomes subject to a discriminatory compensation decision** or other practice; or (c) when an individual is **affected by application of a discriminatory compensation decision** or other practice.

The legislation:

- Applies to compensation claims stemming from alleged violations of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act.
- Effectively abolishes the statute of limitations with respect to disparate pay claims by instituting a "paycheck rule" under which a charge of discrimination is timely if it is filed within 180 days of an employee's receipt of an alleged disparate paycheck or retirement benefit check, regardless of when the decision that resulted in the pay discrepancy was made. Attempts at a compromise, grounded in common law principles in which employees would be required to file a charge within 180 days of the date they became aware or should have become aware of the alleged discrimination, were defeated.
- Potentially applies to claims beyond pay discrimination by referring to "other practices." Many types of discrimination ultimately affect employee compensation, *e.g.*, failure to promote. Attempts to amend the bill to clarify that it was limited to pay discrimination claims were defeated.
- Potentially expands the pool of eligible plaintiffs by extending protection to individuals "affected by" discrimination, *e.g.*, spouses, widows. While proponents of the Act claim that it does not alter current law with respect to those eligible to file discrimination claims, *i.e.*, employees, attempts to clarify this point in the legislation itself were defeated.
- Provides back pay for up to two years preceding the charge if the unlawful employment practice(s) during the charging period was similar or related to the practice(s) that occurred outside the charging period. Compensatory damages are not so limited.
- Applies retroactively, effectively reviving all claims that existed on the day before the Supreme Court's decision.

Paycheck Fairness Act

Also before the Senate is the Paycheck Fairness Act. This bill, which the House passed on January 9, 2009 in conjunction with the Ledbetter Act, would amend the remedial provisions of the Equal Pay Act, limit the defenses available to employers who happen to pay men and women at different wage rates, and increase the frequency and scope of class action litigation. President Obama has indicated his intent to sign this bill into law. The legislation would:

- Strike the "any factor other than sex" defense to differential pay and substitute a "bona fide factor other than sex" (*i.e.*, education, training or experience) defense. Employers may use the "bona fide factor" defense only if the factor: (i) "is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity." These defenses are not available, however, where an employee is able to demonstrate that an alternative employment practice exists that would serve the same business purpose without disparate effect.

- Remove the statutory cap on compensatory and punitive damages for private employers and allow the Secretary of Labor to file suit seeking additional compensatory and punitive damages under appropriate circumstances.
- Expand the likelihood and scope of class action litigation through an "opt out" provision. Under current law, employees must affirmatively choose to be included in "collective" action litigation under the Equal Pay Act. The Paycheck Fairness Act would remove this requirement and allow inclusion of employees in class action litigation unless they state in writing that they do not want to participate.
- Prohibit retaliation against employees who share salary information, *i.e.*, employers will no longer have the right to insist that employees keep their salary information confidential.
- Expand the definition of "same establishment" by including "workplaces located in the same county or similar political subdivision of a State."
- Provide funding to "eligible entities" (*i.e.*, public agencies) for "negotiation skills training for girls and women."
- Require the EEOC and other government agencies to collect, use and disseminate employment data.

Proactive Assessment

This legislation creates the potential for significant expansion of litigation over years-old (perhaps decades-old) compensation decisions. It comes at a time when employers are struggling for their economic lives and throws over the initial legislative objective of Title VII in requiring prompt report of discrimination in the interest of timely remediation. Because the new statute of limitations offers little repose, there will be a high premium on record keeping and on the substantial documentation of decisions.

In addition, these developments will raise statistical audits to a new level of importance. An employer trying to assess risk or simply make adjustments out of positive policy concerns — or perhaps to head off interest in union organizing — might audit payroll distribution for gross disparities. Then, if appropriate, this could lead to a series of regression analyses to evaluate what action to take either defensively or proactively. Economists and attorneys who have done compensation analyses in the context of affirmative action plans are well-suited for these audits, and under certain circumstances, they might be protected attorney-client or work product output.

It is not clear what the litigation profile will be. But as the economy recesses and then rebounds, this legislation reopens old decisions thought to be safely in repose. The president has said he would sign the bill, presumably reinstating Ms. Ledbetter's judgment against Goodyear and opening a new era in employment litigation.

These developments come as organized labor is intensifying its push to abolish secret ballot elections and to require mandatory arbitration of impasses in bargaining as it pushes the proposals for an "Employee Free Choice Act" onto the congressional docket. Reports of differences in pay rates between women and men in the popular press or in efforts at political action do not often discuss distinctions in conduct or choices that lead to apparent disparities. But the recent "action alert" from the Center for Economic Policy Research has already begun to connect these initiatives, arguing that "unions give women an edge when it comes to pay," and urging passage of the law.

The potential connection of these issues requires new strategic thinking by employers as they face the enormous challenges of the faltering economy and the movement of thousands of American workers through displacement and, hopefully, reinstatement. In 2016, it is easy to imagine that a misstep in this environment may revive claims thought to be extinct.

See Related Alerts:

The Obama-Biden Administration's Effect on the American Workplace

Twelve Things You Can Do Today To Prepare For the Employee Free Choice Act

Hunton & Williams Labor and Employment Team Contacts

Practice Leaders

L. Traywick Duffie
tduffie@hunton.com
(404) 888-4004

Laura M. Franze
lfranze@hunton.com
(213) 532-2131

Gregory B. Robertson
grobertson@hunton.com
(804) 788-8526

Atlanta

W. Christopher Arbery
carbery@hunton.com

Kenneth L. Dobkin
kdobkin@hunton.com

L. Traywick Duffie
tduffie@hunton.com

Kurt A. Powell
kpowell@hunton.com

Robert T. Quackenboss
rquackenboss@hunton.com

Brussels

Hervé Cogels
hcogels@hunton.com

Charlotte

A. Todd Brown
tbrown@hunton.com

Wood W. Lay
wlay@hunton.com

Dallas

G. Allen Butler
abutler@hunton.com

W. Stephen Cockerham
scockerham@hunton.com

Laura M. Franze
lfranze@hunton.com

William L. Keller
bkeller@hunton.com

David C. Lonergan
dlonergan@hunton.com

Alan J. Marcuis
amarcuis@hunton.com

Julie I. Ungerman
jungerman@hunton.com

Houston

Fraser A. McAlpine
fmcalpine@hunton.com

Kevin J. White
kwhite@hunton.com

Holly Williamson
hwilliamson@hunton.com

Los Angeles

Phillip J. Eskenazi
peskenazi@hunton.com

Laura M. Franze
lfranze@hunton.com

Roland M. Juarez
rjuarez@hunton.com

McLean

Jeffrey B. Hardie
jhardie@hunton.com

Michael F. Marino III
mmarino@hunton.com

Thomas P. Murphy
tpmurphy@hunton.com

Miami

Terence G. Connor
tconnor@hunton.com

Juan C. Enjamio
jenjamio@hunton.com

New York

Michael F. Marino III
mmarino@hunton.com

Norfolk

Sharon S. Goodwyn
sgoodwyn@hunton.com

James P. Naughton
jnaughton@hunton.com

Raleigh

Thomas J. Manley
tmanley@hunton.com

Richmond

Patricia K. Epps
pepps@hunton.com

Patricia S. Gill
pgill@hunton.com

Anne Gordon Greever
agreever@hunton.com

Gregory B. Robertson
grobertson@hunton.com

Marguerite R. (Rita) Ruby
rruby@hunton.com

C. Randolph Sullivan
rsullivan@hunton.com

Hill B. Wellford, Jr.
hwellford@hunton.com

Paul M. Thompson
pthompson@hunton.com

San Francisco

M. Brett Burns
mbrettburns@hunton.com

Fraser A. McAlpine
fmcalpine@hunton.com

Washington, DC

Ian P. Band
iband@hunton.com

Frederic Freilicher
ffreilicher@hunton.com

Michael J. Mueller
mmueller@hunton.com

Susan F. Wiltsie
swiltsie@hunton.com

Richard L. Wyatt Jr.
rwyatt@hunton.com