

THE LILLY LEDBETTER FAIR PAY RESTORATION AND THE PAYCHECK FAIRNESS ACTS OF 2009

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The Lilly Ledbetter Fair Pay Restoration Act Nullifies the United States Supreme Court's *Ledbetter* Decision By Extending the Deadlines Employees Must Meet To File Pay Discrimination Charges

In January 2009, the Lilly Ledbetter Fair Pay Restoration Act (“Ledbetter Act”)¹ became the first legislation signed into law by President Obama. The Ledbetter Act nullifies the United States Supreme Court's (the “Supreme Court”) 2007 *Ledbetter v. Goodyear Tire & Rubber Co.*² decision that dealt with the deadline employees must meet when filing discrimination charges based upon an employer's unfair compensation practices.

In most states, employees must file a charge with the EEOC within 300 days of becoming aware of their employer's discriminatory act.³ The deadline is only 180 days in states without a state fair employment agency.⁴ For claims based upon discriminatory pay, many pre-*Ledbetter* courts treated every paycheck as a new discriminatory act, which restarted the 300 or 180 day clock for filing a charge. The Supreme Court rejected this longstanding rule in *Ledbetter*, holding instead that the statute of limitations begins running from the very first discriminatory paycheck.⁵

Lilly Ledbetter, the plaintiff in the *Ledbetter* case, worked for Goodyear Tire & Rubber Company (“Goodyear”) as a supervisor for 19 years. Although Ms. Ledbetter suspected she was paid less than her male counterparts, Goodyear's policy of prohibiting its employees from discussing their pay prevented her from having any proof until she received an anonymous note setting forth the salaries of three male supervisors. Following her retirement, Ms. Ledbetter sued Goodyear for pay discrimination. A jury agreed that she had been paid unfairly, and awarded over \$200,000 in back pay, and over \$3 million in punitive damages. A judge ultimately cut the award to only \$300,000 because of a 1991 law that limits a company's liability for damages.

¹ 111 P.L. 2 (2009)

² 550 U.S. 618 (2007)

³ 42 U.S.C. § 2000e-5(e)(1) (2009)

⁴ *Id.*

⁵ *Id.*

The Supreme Court took away every penny of back pay and damages awarded by the jury on the basis that Ms. Ledbetter's claim was untimely, insofar as she had filed her claim more than 180 days after receiving her first discriminatory paycheck. According to the Supreme Court, Ms. Ledbetter "could have, and should have, sued" when the pay decision was initially made.⁶ The fact that she suffered more than 18 years of continued pay discrimination after that initial check held no sway with the Court.

The *Ledbetter* decision caused an uproar and prompted calls for changes to the law. The result of that uproar is the Ledbetter Act, which overturns the Supreme Court's decision by amending several federal anti-discrimination laws. Specifically, the Ledbetter Act amends Title VII of the Civil Rights Act of 1964 ("Title VII")⁷ (prohibiting discrimination based upon race, color, gender, religion, and national origin), the Age Discrimination in Employment Act of 1967 ("ADEA")⁸ (prohibiting discrimination against employees 40 years of age or older), the Americans with Disabilities Act of 1990 ("ADA")⁹ (prohibiting private, state or local government employers from discriminating against qualified employees with disabilities), and the Rehabilitation Act of 1973 ("Rehabilitation Act")¹⁰ (prohibiting discrimination on the basis of disability in programs conducted by Federal agencies, in programs receiving Federal financial assistance, in Federal employment, and in the employment practices of Federal contractors).

The Ledbetter Act amends these laws by providing that an employer's discriminatory compensation decision or other unlawful practice occurs each time an employee receives compensation affected by that decision or practice. Pursuant to the Ledbetter Act, an employee, who is subjected to an employer's discriminatory compensation practice in violation of Title VII, the ADEA, the ADA, or the Rehabilitation Act, suffers discrimination (which in turn starts the 300 or 180 day charge filing deadline period) when:

- (1) the employer adopts the discriminatory compensation practice,
- (2) the employee becomes subject to the discriminatory compensation practice, or
- (3) each time the employee is affected by the application of the discriminatory practice (including each time the employee is paid wages or other forms of compensation).¹¹

Thus, contrary to the Supreme Court's *Ledbetter* decision in 2007, now an employee's 300 or 180 day charge filing deadline restarts with each discriminatory pay check.

The Ledbetter Act allows employees to recover two years of back pay preceding their discrimination charge filing date.¹² Employees can recover such back pay where the employer's unlawful compensation practices that occurred during the charge filing period are similar or related to the unlawful compensation practices that occurred outside charge filing period.

⁶ 550 U.S. 618, 632, n.3 (2007)

⁷ 42 U.S.C. § 2000e-5 (3)(A) (2009)

⁸ 29 U.S.C. § 626(d) (2009)

⁹ 42 U.S.C. § 12117(a) (2009)

¹⁰ 29 U.S.C. § 791, 794 (2009)

¹¹ 42 U.S.C. § 2000e-5 (3)(A) (2009)

¹² *Id.* at § 3

In order to ensure the nullification of the Supreme Court's *Ledbetter* decision, the Ledbetter Act's effective date is retroactive to May 28, 2007 (the day before the *Ledbetter* decision went into effect) and applies to all compensation discrimination claims pending either on or after that date.¹³

The United States Supreme Court's Recent Ruling On the Ledbetter Act's Applicability to Current Retirement Benefits Based On Previously Lawful Employer Decisions

On May 18, 2009, the Supreme Court issued its decision in the *AT&T Corp. v. Noreen Hulteen*¹⁴ case which presented the issue of whether female retirees may use the Ledbetter Act to bring discrimination claims based on retirement benefits affected by an employer's decision that was not discriminatory at the time it was made because it pre-dated the passage of the Pregnancy Discrimination Act of 1978 ("PDA").¹⁵ The PDA amended Title VII to include the prohibition of employment discrimination based upon pregnancy.

Before the PDA's passage, AT&T made the then lawful decision to award female employees less service credit for pregnancy leaves than for other temporary disability leaves for the purpose of determining retirement benefits. Noreen Hulteen, an AT&T employee receiving retirement benefits reduced by AT&T's pre-PDA service credit policy, challenged her current receipt of reduced benefits as a violation of Title VII and sued AT&T. Eventually, Hulteen's case made its way to the United States Court of Appeals for the Ninth Circuit which decided that her receipt of such reduced retirement benefits violated Title VII. AT&T sought the Supreme Court's review of the Ninth Circuit's decision, which the Supreme Court granted.

The Supreme Court held an employer does not necessarily violate the PDA when it pays pension benefits calculated in part under a service credit accrual rule applied before the PDA's passage that gave less retirement credit for pregnancy than other medical leaves.¹⁶ The Supreme Court found such pension payments are insulated from challenge under § 703(h) of Title VII, which allows employers to apply different standards of compensation pursuant to a bona fide seniority system provided such differences are not the result of an intention to discriminate because of sex.¹⁷

According to the Supreme Court, the only way to conclude that § 703(h) does not protect AT&T's pension system would be to apply the PDA retroactively to re-characterize AT&T's actions as illegal at the time it made its service credit policy. Since there is a presumption against laws being applied retroactively and no evidence Congress intended the PDA to be retroactive, AT&T cannot be held liable for adopting a service credit system which was lawful at the time.¹⁸

¹³ 111 P.L. 2, § 6

¹⁴ No. 07-543, slip op. (U.S. May 18, 2009)

¹⁵ 42 U.S.C. § 2000e-(k)

¹⁶ No. 07-543, slip op. at pp.4-13

¹⁷ *Id.*

¹⁸ *Id.* at pp. 10-12

The Supreme Court further held the Ledbetter Act's recent amendment to Title VII did not help Hulteen's claim. The Ledbetter Act makes each wage payment an employee receives based upon an employer's discriminatory compensation decision an unlawful employment practice which resets the employee's charge filing deadline. The Supreme Court found that because AT&T's pre-PDA service credit policy was not discriminatory at the time, Hulteen had not been affected by the application of a discriminatory compensation decision.¹⁹

The Paycheck Fairness Act of 2009 Proposes to Strengthen the Equal Pay Act

The Paycheck Fairness Act of 2009 ("PFA")²⁰ was passed by the United States House of Representatives (the "House") on January 9, 2009, but has yet to be voted on by the Senate. Although the PFA was initially attached to the Ledbetter bill when it passed the House, the Senate deleted the PFA from the Ledbetter bill and passed the Ledbetter Act by itself. The PFA's purpose is to strengthen the Equal Pay Act of 1963 ("EPA")²¹ (requiring employers to provide men and women working in the same establishment with equal pay for equal work) by amending the EPA to:

- Allow women suing under the EPA to seek the same type of compensatory and punitive damages employees may recover for discrimination under Title VII [currently, the EPA only allows awards of back pay and liquidated damages (i.e., additional monies equal to the amount of back pay recovered) for cases involving willful violations];
- Allow women the option to proceed in EPA class action law suits with opt-out options under Rule 23 of the Federal Rules of Civil Procedure;
- Broaden the definition of the term "same establishment" by deeming employees to work in the "same establishment" if they work for the same employer at workplaces located in the same county or similar state subdivision;
- Make it more difficult for employers to defend EPA cases by replacing the EPA's current "any other factor other than sex" defense with a "bona fide factor other than sex" defense that would require employers to prove that differences in pay between men and women performing the same work have business justifications that are truly a result of factors other than sex, such as education, training, or experience;
- Allow employees to disprove an employer's "bona fide factor other than sex" defense by showing an alternative employment practice exists that would serve the employer's business purpose which would not produce differences in pay and that the employer has refused to adopt these alternative practices;
- Prohibit employer retaliation against employees who make inquiries about their employers' wage practices or disclose their own wages to other employees;

¹⁹ *Id.* at pp. 13-14

²⁰ 111 Bill Tracking S.182 (2009)

²¹ 29 U.S.C. § 206(d) (2009)

- Increase the EEOC's ability to enforce the EPA by authorizing additional training for EEOC staff to better identify and handle wage claims, and requiring the EEOC to develop regulations directing employers to collect wage data reported by their employees' race, sex, and national origin;
- Require the United States Department of Labor (“DOL”) to reinstate activities that promote employee equal pay such as directing educational programs and technical assistance to employers, formally recognizing businesses that address the wage gap between men and women, and conducting and promoting research regarding pay disparities between men and women; and
- Improve the DOL's collection of pay information by reinstating the Equal Opportunity Survey which would enable the DOL to increase its enforcement efforts by requiring all federal contractors to submit data on employment practices such as hiring, promotions, terminations, and pay. The Equal Opportunity Survey, first used in 2000, was developed over two decades and three presidential administrations, but was rescinded by the DOL in 2006.

It is not clear when the Senate will next take action regarding the PFA.