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"Lilly Ledbetter Fair Pay Act of 2009: Employers, Fasten Your Seatbelts"

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The Act

Although the Lilly Ledbetter Fair Pay Act of 2009 ("Act") was signed by President Obama on January 29, 2009, the effective date of the Act is May 28, 2007. The Act does the following:

- extends the time period in which employees can pursue disparate pay claims under four anti-discrimination laws: Title VII; the Age Discrimination in Employment Act (ADEA); the American's with Disabilities Act (ADA); and the Rehabilitation Act (Rehab Act)
- amends the Equal Pay Act (EPA) by providing for uncapped compensatory and punitive damages for violators; prohibiting employers from retaliating against employees who share salary information with co-workers; and requiring employers who make legitimate employment decisions based on "factors other than sex" to prove these factors are "job-related" and consistent with business necessity

Concurrently, the Equal Employment Opportunity Commission (EEOC) has announced it will place more emphasis on enforcement against pay discrimination.

Under the Act, a discriminatory pay decision, which starts the 180/300-day period to file an EEOC charge, occurs each time a discriminatory paycheck is issued. For example, unlawful conduct occurs when:

- a discriminatory compensation or other practice is adopted
- an individual becomes subject to a discriminatory compensation decision or other practice
- an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, which results in whole or in part from the decision or other practice

The Lilly Ledbetter Fair Pay Act also appears to apply to both intentional discrimination and disparate impact pay claims and revives the "paycheck accrual rule" whereby each new discriminatory paycheck is considered a separate act of discrimination, triggering a new 180/300-day charge filing period with the EEOC if an employee brings a claim for disparate pay on the basis of race, color, religion, sex, national origin, age, or disability. The EEOC and nine of the ten federal courts of appeal (Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and DC Circuits) that have considered the issue already follow this "rule." The EEOC has stated that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."

An unlawful employment practice occurs when an "individual" becomes subject to or is affected by a discriminatory pay decision or other practice. This language may be so broad that it includes pay discrimination charges of non-employees, such as the spouses of deceased workers, who claim they have been affected by the discriminatory practice. An amendment was introduced during Senate debate to restrict the law's application to just employees and it was "made clear for the legislative record that the law was not intended to expand beyond the affected employee, the EEOC, or [Department of Labor] – the class of individuals with standing to sue for alleged pay discrimination." The EEOC's website states that only the following parties can file charges of discrimination with the agency: (1) any individual who believes that his or her employment rights have been violated; and (2) an individual, organization or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

The term "other practice" is not defined in the Act. Management-side labor and employment attorneys have expressed concern that the term is so broad that it could encompass nearly every conceivable adverse employment action that potentially affects pay. However, there is commentary that the term "other practice" is intended to apply to "direct inputs into compensation outcomes, such as performance ratings under a performance-based pay system, job classification decisions

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and work assignment decisions under a geographic pay structure."

Equitable defenses to stale claims (such as estoppel, laches or waiver) appear to still be available. Such defenses may provide employers with arguments against class actions for Title VII pay discrimination claims which require individualized proof.

The Act provides that, in addition to other relief provided under Title VII and the ADA (42 USC Section 1981a), an "aggrieved person" may obtain back pay for up to two years preceding the filing of the charge where the unlawful employment practice(s) during the charge filing period are "similar or related" to the unlawful employment practice(s) occurring outside the charge filing period. Employers may be able to assert statute of limitations defenses to back pay for some prior pay differences where those prior pay differences were not caused by unlawful employment practices that are "similar or related to" the practices that caused pay differences during the charge period. The terms "similar or related to" are not defined in the legislation, so litigation regarding the appropriate application of these terms is anticipated.

While it appears that the law applies to retirement payments (i.e., annuity checks or other retirement benefits), the Act's findings state there is nothing in it intended to change current law treatment of when pension distributions are considered paid.

The Act and its amendments take effect May 28, 2007 and apply to all Title VII, ADEA, ADA and Rehabilitation Act disparate pay claims that are pending on or after that date.

Employees can also file pay disparity suits under the Equal Pay Act (EPA), which prohibits wage differentials because of sex and requires that men and women be given equal pay for equal work on jobs requiring substantially equal skill, effort and responsibility, which are performed under similar working conditions in the same establishment. The jobs need not be identical. The EPA was passed in 1963 as an amendment to the Fair Labor Standards Act and is administered and enforced by the EEOC. Note that job content, not job titles, determine whether jobs are substantially equal.

Pay differentials are allowed when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. The employer has the burden to prove the differentials are not discriminatory. No employee's pay may be reduced for the purpose of correcting a pay differential. Rather, the pay of the lower paid employee must be increased.

Although Title VII focuses on the adverse employment action that causes pay disparity, the EPA focuses instead on disparity in pay for substantially similar work and does not require employees to prove discriminatory intent. Consequently, when the employee is paid less than similarly situated employees of the opposite sex, an EPA claim can arise without showing that the employer intended to discriminate. The EEOC has announced that it intends to enhance enforcement in the area of pay discrimination.

Employers may be called upon to defend against actions and decisions made by retired managers and supervisors that occurred years, and even decades, ago. In some cases, employers may have to defend not just their pay rates, but other compensation decisions (i.e., certain retirement benefits, bonuses, severance pay).

Steps to Take

Review Practices. Employers should review their compensation practices to determine whether there is sufficient documentation supporting compensation decisions as the performance-based specifics underlying compensation decisions will be essential to defending a disparate pay claim.

Develop Criteria for Compensation Decisions. Employers should develop objective, measurable guidelines for compensation decisions to be applied consistently and uniformly within job classification, work group, department or business unit.

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Monitor Compensation Decisions. Employers should ensure that managers and supervisors do not have unfettered discretion when making compensation decisions by, for example, implementing a review system that subjects compensation decisions to rigorous scrutiny.

Update Document Retention Practices. Employers may need to retain information concerning compensation decisions for longer periods and consider electronic archiving.

Train Personnel. Supervisors and managers should understand any policy modifications and be able to objectively consider and support all compensation decisions.

Analyze Compensation Practices. Employers should evaluate compensation data to determine if any statistical disparities exist across gender, race and ethnic lines and make any appropriate adjustments to eliminate unexplained disparities.

While the Lilly Ledbetter Fair Pay Act has the potential of exposing employers to more claims of discrimination, the employee still needs to prove the employer intended to discriminate under Title VII, the ADEA, the ADA or the Rehabilitation Act. Further, it appears that employees will not succeed in reviving a disparate pay claim without a recent discriminatory paycheck to accompany that allegation.