

Fair Pay Act Revives Dead Claims, Encourages Others

“A discriminatory act not made the basis for a timely charge is... merely an unfortunate event in history, which has no present legal consequences.” United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

The first bill signed by President Obama was the Lily Ledbetter Fair Pay Act of 2009, named for the unsuccessful plaintiff who sued her former employer, Goodyear Tire and Rubber Company, for alleged violations of the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Ledbetter’s pay as a manager was comparable to that of her male colleagues when she was hired in 1979, a compensation gap developed during the course of her 21 years of employment, based on performance evaluations by supervisory personnel. In 1998, within months before her acceptance of an early retirement package, Ledbetter filed a charge of discrimination which asserted that the evaluations had been motivated by gender bias, which affected her compensation throughout her active employment, culminating in the denial of a raise in 1998 – a decision which, she claimed, “carried forward” the effects of prior discriminatory conduct.

After a jury verdict in Ledbetter’s favor on the Title VII claim, Goodyear appealed. The US Court of Appeals for the Eleventh Circuit reversed because the Evans decision, and a long line of similar rulings, had denied recovery for present effects of past discrimination in the absence of a timely charge. As such, Ledbetter was unremarkable; the 5-4 decision echoed the rationale of the 7-2 opinion in Evans – which had been authored by Justice Stevens, one of the Ledbetter dissenters. However, Lily Ledbetter became the visible symbol of a movement designed to change the law in favor of those who had not filed charges challenging ongoing compensation practices.

In January, 2009, the House of Representatives passed the Ledbetter Act along with the Paycheck Fairness Act (discussed in a separate Client Alert); the Senate followed suit on Ledbetter, but deferred action on the companion bill. On January 29, the bill was signed into law at a ceremony with Ledbetter herself sharing the dais with the president. [Because of the confusing similarity between the names of the Fair Pay Act and the Paycheck Fairness Act, this Alert refers to the new law as the Ledbetter Act.]

The Ledbetter Act amends Title VII, the Equal Pay Act, the Americans with Disabilities Act, and the Rehabilitation Act, but not the Fair Labor Standards Act or other federal statutes dealing with discrimination in compensation and benefits. It allows plaintiffs to seek redress for the present effects of past discrimination, and applies to all such claims as to which suit was filed after May 28, 2007 – the date of the Ledbetter decision. For purposes of determining timeliness, the “last discriminatory act” is the last paycheck or decision by the employer which manifests the alleged bias, including a termination or constructive discharge and possibly encompassing employee decisions such as retirement. It remains to be seen whether other, later events, such as receipt of the first pension or Social Security check reflecting the employer’s compensation practices, might allow even later charge filing.

Other novel concepts in the Ledbetter Act are an expansion of the right to sue to include those “affected by” the employer’s discrimination; and the applicability of the Act to discrimination in compensation and benefits without regard to gender. Indeed, there are arguments that the statute may not be restricted to compensation practices. These issues will be litigated for years.

In the meantime, the critical point for employers to remember is that documentation remains essential so long as the employment relationship lasts, and for at least two years afterward (there’s a statutory cap on two years’ back pay). Critical witnesses may be long gone, and may even be deceased. Broader lessons regarding record retention and preventive practices will be found in our companion piece on the Paycheck Fairness Act, passage of which seems relatively certain in the current climate.

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