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Labor & Employment
ALERT

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Flexing its Muscles – Politically Realigned Congress Approves Bill that Reverses Supreme Court's Controversial *Ledbetter* Decision

On January 22, 2009, the United States Senate voted to approve bill S. 181, known as the Lilly Ledbetter Fair Pay Act (the "Ledbetter Act") which, if signed by the president as is expected, will significantly expand the ability of employees to bring claims for pay discrimination against employers. The Senate's vote came less than two weeks after the House of Representatives approved its version of the Ledbetter Act, H.R. 11, on January 9, 2009.

The Ledbetter Act amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act, to provide, among other things, that each time an employee is paid compensation that is the result of a discriminatory decision or practice counts as a separate "unlawful employment practice" in calculating when a claim for pay discrimination accrues. Consequently, each paycheck that follows a discriminatory pay decision is deemed a new statutory violation, triggering a new 180-day limitations period in which to file a charge of discrimination against the employer. The practical effect of this amendment will be to permit employees to seek recovery for discriminatory pay disparity which may have begun decades before the employee actually discovered the discrimination.

The Ledbetter Act specifically states that the Act is aimed at reversing the United States Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). There, the Court ruled that the time limit for filing a pay discrimination charge with the Equal Employment Opportunity Commission (EEOC) starts to run when the employer makes a discriminatory decision about an employee's compensation, and not each time the employee receives a paycheck tainted by that single discriminatory decision. This is the case even where the employee had no way of detecting the discrimination until years after the discriminatory decision because of concealment by the employer. Federal judges have cited the *Ledbetter* decision in more than 300 cases asserting a broad range of discriminatory practices not limited to pay decisions. Naturally, both supporters and opponents of the Ledbetter Act therefore are concerned about the impact on employers if and when the Act becomes law.

Where the Ledbetter Act will likely swell the number of employees who could potentially file pay discrimination claims against employers, its companion bill passed by the House on January 9, 2009, H.R. 12, dubbed the Paycheck Fairness Act, would limit an employer's defenses to pay equity claims and exponentially increase the damages to which employers may be subject for violating the Equal Pay Act of 1963 (the "EPA"). The EPA makes it unlawful for employers to pay different wages to males and females for equal work. However, the EPA permits employers to justify paying women less than men by showing that the compensation disparity is based on any factor other than sex. The Paycheck Fairness Act would make it harder for employers to justify gender pay disparities by requiring employers to show that a disparity was based on "a bona fide factor" other than sex and that the factor was "consistent with business necessity."

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A "bona fide factor" and "business necessity" test dramatically increases the burden that employers will face. In particular, whether pay scales are appropriate in light of the value brought to a particular employer by a specific position and its duties would be left under the Act to the Department of Labor or a jury, as opposed to the employer, the employee and the market. Moreover, the EPA charges the EEOC with issuing regulations and guidelines interpreting the terms of the statute, which means that employers may ultimately face regulations or guidelines that will bar from consideration many factors that legitimately and necessarily drive compensation decisions, including market value, supply and demand, a company's relative position in the marketplace, an employer's varying business priorities, educational backgrounds, qualitative and quantitative experience, and regional differences.

Finally, the Paycheck Fairness Act would also amend the EPA to permit successful female plaintiffs to obtain uncapped punitive and compensatory damages from their employers for violations of equal pay law. Moreover, the Act also would increase the risk of class actions by abandoning the EPA's "opt-in" collective action procedure for the more inclusive and dangerous "opt-out" form used in other kinds of discrimination claims.

The Ledbetter Act and the Paycheck Fairness Act were originally introduced and approved by the House of Representatives in 2008, but failed to pass the Senate when supporters were unable to obtain the 60 votes needed to proceed to a vote. On January 9, 2009, the House of Representatives approved the Ledbetter Act, H.R. 11, and Paycheck Fairness Act, H.R. 12 and moved to combine the two bills. This time around the Senate approved the Ledbetter Act portion of the legislation by a 61-36 vote. Since the Senate did not act on the Paycheck Fairness Act portion of the legislation, and indicated that it does not intend to do so until later in the session, the Senate and House bills will have to be reconciled before legislation can be sent to President Obama. The president has stated that he would sign both bills when and if they reach his desk.

There are steps that employers can take to minimize their exposure before the Ledbetter Fair Pay Act and/or Paycheck Fairness Act become law. Managers and supervisors must continue to consistently maintain clear documentation of job duties and of all business reasons that support compensation decisions. Changes made to job duties also should be documented along with the reasons for the change, and any impact that change might have on the skill, effort and ability needed to perform the job and whether the compensation for the position should change, should be considered as well. The company should annually conduct a review now, and periodically in the future, which, among other things, compares compensation and duties of the same and similarly situated employees. Ideally, managers should consult with Human Resources before materially increasing or reducing an employee's duties.

As always, seeking legal counsel prior to implementing decisions that would result in differences between employees in the same position is a prudent course of conduct for any employer. ◆

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