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EVERYTHING OLD IS NEW AGAIN - THE LILLY LEDBETTER FAIR PAY ACT BECOMES LAW

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On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act into law. The Ledbetter Act is the first piece of legislation that President Obama has signed since taking office, and was presented to him after having been passed by the House of Representatives and Senate by wide majorities. The worker-friendly Act, hailed by the President as a "simple fix to ensure fundamental fairness for American workers," is likely to trigger a sharp increase in pay discrimination claims.

The Ledbetter Act is Congress' direct response to the Supreme Court's May 28, 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* The Court held that the employee, Lilly Ledbetter, was not entitled to back pay in her pay discrimination case because the allegedly discriminatory decisions affecting her pay had taken place years earlier, outside the statute of limitations. The Court determined that the time limit for bringing a claim of discriminatory compensation (180 or 300 days, depending upon the state) does not restart each time an employee receives a paycheck. The Lilly Ledbetter Fair Pay Act expressly

contradicts the Supreme Court's decision, and is retroactive to May 28, 2007 so that it applies to all claims pending on or after the date of the Court's decision.

The Ledbetter Act amends Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. For claims of discriminatory pay based on race, national origin, color, religion, gender, age, or disability, it states that an "unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, *including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice.*"

The effect of the Ledbetter Act is that an employee may now bring a discrimination claim relating to compensation within 180 or 300 days of receiving each wage or benefit payment affected by an employer's

allegedly discriminatory compensation decision, no matter when that decision was made. Each time the employee receives compensation, including retirement benefits, the clock for filing a charge will restart. An employee or retiree may, therefore, base his or her discrimination claim on a decision or "other practice" that occurred decades earlier, or on multiple decisions made over time that had a cumulative effect on the employee's current compensation or benefits.

Employees' ability to bring claims based on decades-old compensation decisions raises a number of practical concerns for employers.

- Supervisors should be made aware of the Ledbetter Act's far-reaching potential and keep it in mind when making compensation decisions and evaluating performance, because the cumulative effects of seemingly inconsequential decisions now have the potential to subject employers to liability indefinitely.

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- Employers should consider whether their document retention policies need to be revised. Normally, employee records are maintained at least until the statute of limitations for potential claims has expired. The Ledbetter Act effectively eliminates the statute of limitations for any employee who is still employed or receiving benefits.
- Employers should consider reviewing their current pay structure for anomalies that may need to be addressed.

Employers can take some consolation in the fact that the Ledbetter Act limits the amount of back pay an employee may be awarded to two years from

the date the charge was filed.

Unfortunately, the Act places no express cap on the recalculation of benefits found to be discriminatory.

If you have any questions about the Lilly Ledbetter Fair Pay Act, please contact David M. Wissert, Chair of the Lowenstein Sandler Employment Litigation Group, or Joy N. Eakley, an associate in the Employment & Labor Practice Group, at 973.597.2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

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