The Lilly Ledbetter Fair Pay Act of 2009

Laws

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 ("Act"), which had the effect of overturning the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Ms. Ledbetter had been a long-time employee, who sued the company for wage discrimination when she learned that she had been paid considerably less than a male counterpart. However, she did not learn of this until several years had passed and after she had retired. Although a jury found in her favor, ultimately the Supreme Court ruled that Ms. Ledbetter's claim against the company was time-barred. The Court interpreted the time limits in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), to begin running when the allegedly discriminatory pay decision is made. With the relatively short statute of limitations under Title VII (180 days in some jurisdictions; 300 days in others), Ms. Ledbetter was late in bringing her claim. The Act signed by the President overturns this. It amends Title VII (and several other statutes) so that the statute of limitations begins to run with, among other acts, the receipt of each paycheck that reflects the discriminatory pay practice. The impact on employers will be great since, so long as an individual is currently employed and receiving a regular paycheck, there is in effect no statute of limitations.

The new law amends not only Title VII, which was at the heart of the *Ledbetter* case, but also the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12110 *et seq.* ("ADA") and the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*. ("Rehabilitation Act"). While the Act may not have a direct impact on state anti-discrimination laws, some states have enacted their own versions of the Act. For example, Maryland recently passed the *Lilly Ledbetter Civil Rights Restoration Act of 2009*, which will become effective October 1, 2009. That law follows the language of the federal Act. Depending on the circumstances of a particular case, an individual could bring suit under several federal and state statutes, which are not mutually exclusive. As the Act is interpreted by various courts, time will tell what relationship the Act will have on other federal and state statutes.

As a result of the Act, the above-mentioned amended federal laws now provide that an unlawful discrimination occurs when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to a discriminatory compensation decision or other practice; or 3) an individual is affected by application of a discriminatory compensation decision or other practice, including each time that wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. The new law applies retroactively to May 27, 2007.

Since Congress chose to make the amendments to the aforementioned statutes retroactive to the day before the Supreme Court's *Ledbetter* decision, the Act affects all

discriminatory pay claims pending on or after May 27, 2007. Accordingly, claims which, would have been untimely under prior law, may now be submitted. Further, plaintiffs who had their cases dismissed as untimely may now be able to resubmit those cases for adjudication. Employers' attorneys are counseling their clients to be ever more vigilant in their pay practices and to take necessary preventive steps to defend against what is expected to be an avalanche of lawsuits.

Perhaps the most significant criticism from the employer's perspective is that, under the Act, there is essentially no limitation of time by which a complaining party may bring a claim, provided that the complaining party received some sort of compensation from the employer within the last 180 days (or 300 days in some jurisdictions). If the employer has no evidentiary support to explain the reasons for any discrepancy in compensation to the complaining party, *e.g.*, because the person who made the decision affecting compensation is no longer controlled by the employer or no documentary record was made to support a legitimate, objective reason for the decision, a jury may be inclined to award back pay to individuals even where discriminatory practices may not exist.

Also of significance to employers, however, is the broad base of potential plaintiffs: current and former employees, retirees, surviving spouses of former employees, and those who may have sought redress against an employer and whose case was pending as of May 28, 2007 but whose case may have been dismissed based on the Supreme Court's decision in *Ledbetter*, as well as those bringing claims under Title VII, the ADEA, ADA and Rehabilitation Act on or after that date.

The uncertainty of the Act's seemingly far-reaching effects may embolden plaintiffs' counsel to push a litigation farther than it otherwise would have before the Act, and it may cause employers, especially in the current economic climate, to attempt to mitigate their potential exposure by entering into early settlements upon notice that a charge is filed against them for alleged acts of discriminatory compensation practices.

In the near future, the potential exposure to employers may also result in an increase of employers who routinely seek severance and release agreements by and between the employer and rank-and-file at-will employees. This may change, however, once employers become more confident about their practices and the manner in which they make and document their compensation-related decisions.

Because the language of the Act is so broad, litigation will surely help to define the parameters of its reach. For example, the limitation of those who may have standing to sue an employer for discriminatory compensation practices is not delineated in the Act; however, case law will determine what kinds of third parties, whether intended beneficiaries of employer compensation or not, may file a charge against the employer. Case law may also define whether or not the Act limits back pay for discrimination claims arising out of the ADEA, the ADA or the Rehabilitation Act, since the Act's language with respect to non-Title VII claims lends itself to various interpretations. In addition, there is much anticipation as to what the term "other practice" means.

Also, because of the Act's broad language, case law will refine the way that the terms "compensation decision" or "other practice" affecting compensation are interpreted. Case law will also refine whether or not the interpretation and application of the Act in Title VII cases will be adopted in the courts' analyses of statutes not specifically referenced in the Act, but which have been analyzed under similar frameworks in the past, such as the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

There is no bright-line test to determine what is or what is not considered a "compensation decision" or "other practice." Each court reviewing an argument from a plaintiff that the event complained of falls within the scope of the Act will have to undergo a fact-intensive analysis.

Since the signing of the bill, there have been perhaps little more than two dozen federal court decisions referencing the Act. Therefore, there has been little development of law to date. For example, the U.S. District Court for the Southern District of New York discussed, *but did not decide*, the possible application of the statute of limitations provisions of the Act to an action brought under § 1983 (Civil Rights Act of 1871) 42 U.S.C. § 1983 *et seq*. *See Aspilaire v. Wyeth Pharmaceuticals, Inc.*, 2009 U.S. Dist. LEXIS 35523, at **30-31 (S.D.N.Y. Mar. 30 2009). The U.S. District Court for the Southern District of Mississippi concluded that the denial of tenure to a university professor qualifies as "compensation decision" or "other practice" under the Act since it had a negative impact on earnings. *See Gentry v. Jackson State University*, 2009 U.S. Dist. LEXIS 36271, at *3 (S.D. Miss. Apr. 17, 2009*)*.

Most notably, the U.S. Supreme Court itself had a chance to interpret the Act in a case involving the AT&T Corporation. *See AT&T Corporation v. Hulteen, 2009 U.S. LEXIS 3470* (May 18, 2009). AT&T for years had based pension calculations on a seniority system that gave less credit for pregnancy leaves than leaves for other disabilities – which was lawful prior to the enactment of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) ("PDA"). *Id*. at *8. From 1978 forward, AT&T changed its practice to coincide with the PDA, but did not make any retroactive adjustments to the pension calculations. *Id.* at *9. Thus, upon retiring, certain female employees received lower pension payments. *Id.* at **9-10. The Court considered the impact of the Act on Ms. Hulteen and others similarly situated, who argued that, under the Act, each pension payment marked the point when "an individual is affected by application of a discriminatory compensation decision or other practice". *Id.* at *27. The Court ruled that that quoted provision from the Act did not apply since the pre-PDA compensation decision (treating pregnancy leave less favorably than other disability leave) was not unlawful at the time it was made. *Id.* at *6.

In many respects, the investigation into a discriminatory compensation claim will mirror investigations prior to the Act. However, in the past, especially after *Ledbetter*, the investigation could be cut short if defense counsel determined that the employer had a concrete statute of limitations defense. The Act has changed all that. In many, if not most, cases that defense will not be available. Therefore, the employer will have to delve

into its past records at least as far back as the initial discriminatory compensation decision, if not further.

The most obvious and likely consequence to an employer who loses an employment case involving the Act is that the Court will award back pay to the prevailing plaintiff. Under Title VII, as amended by the Act, back pay is limited to two years from the date of the filing of a charge with the Equal Employment Opportunity Commission ("EEOC"). However, the same limitation does not apply clearly and unequivocally to the ADEA, for example, and various other state and federal anti-discrimination statutes. Moreover, depending on the facts and circumstances giving rise to an initial claim against a particular employer, that employer may soon thereafter face a large amount of claims or a class action suit by persons similarly situated to the plaintiff, but who were unaware of the employer's discriminatory pay practices until a lawsuit against the employer was filed.

Secondary consequences to the employer include loss of business, decrease in employee morale and public scrutiny. The employer may face these consequences irrespective of the outcome of a challenge of an award for back pay on appeal. Further, although the impact to the business may vary greatly depending on the size and type of business in which the employer is engaged, negative publicity about the lawsuit may have more far-reaching and far more lasting effects to the employer than the financial burden that an award of back pay may impose.

To date, a review of relevant case law reflects that there do not yet exist any reported decisions involving awards under the Act. Back pay (and/or other monetary compensation depending on the nature of the case) will be the most common outcome, although in rare circumstances an employer may face compensatory and/or punitive damages. In an effort to reduce the cost of litigation and contain the ripple effect of any negative publicity about the lawsuit, employers may preemptively conduct a thorough audit of its compensation and benefits practices and proactively address any seemingly unjustified and illegitimate discrepancy in pay, benefits or other form of compensation to any protected class. If an employer does not have a written employment handbook or policy and procedures manual, it may endeavor to create one to provide greater transparency concerning management level decisions affecting wages, benefits and other forms of compensation.

Employment lawyers should incorporate the Act's implications into the training provided to clients on equal employment opportunity matters. This may give rise to an opportunity to assist clients in taking the preventive steps discussed elsewhere in this chapter, including conducting an audit of client compensation practices and decision-making procedures. Employment lawyers may want to offer "best practice" tips or circulate a general newsletter or personalized letter to existing and prospective clients about the implications of the Act and what steps employers can take to mitigate potential exposure to liability.

Compliance

Very notably, the Act does not refer to "employees" but rather to "individuals." Congress could have used the former term, but specifically decided against it. Which "individuals" will have rights under the Act will certainly be the subject of considerable litigation. Very possibly included within the group of prospective plaintiffs will be the spouse of a deceased former employee, complaining of pay that employee received while still employed, or the retirement benefits. Another element could be the interrelation of Title VII with the ADA or the Rehabilitation Act. For example, as a reasonable accommodation to a disabled employee, an employer may reassign that employee to a lower paying job. Years later, that employee may allege that that lower pay is a result of a discriminatory pay practice. While an employer may feel some comfort that under Title VII back pay is limited to two years, there is no such clear cap under the ADEA or some of the other anti-discrimination laws. Finally, what the term "other practice" is defined to be remains to be seen in future litigation.

The compliance costs will range greatly, depending on the size of the employer, how well-organized and documented its current employment practices are and the extent to which its management or human resources personnel is trained on labor and employment law.

Once clients understand how important it is to create consistent and transparent employment practices and they undertake the initial burden of creating written policies that management implements and of which employees have knowledge, the cost to employers to maintain detailed personnel files is likely to be minimal. Additionally, employers should ensure that its management and human resources personnel are adequately trained and sensitive to labor and employment issues. If the training is performed on an annual basis and is contained to one seminar for all such recommended personnel, the cost to the employer should be relatively small.

Although an initial audit may require substantial effort and cost to the employer with the assistance of employment counsel, ongoing organization and consistent training of appropriate personnel will help to limit the need to undergo a future overhaul of policies, procedures and practices.

It is not possible to fully insulate an employer against discriminatory compensation claims. However, it is possible for an employer to be better able to defend against those claims if certain preventive steps are taken. These would include:

1) **Management Training:** Besides understanding the Act and its implications, managers, supervisors and any other individuals involved in compensation matters should be thoroughly trained in how to objectively make compensation related decisions.

2) **Audit Company Compensation Practices:** While this always has been a necessary and desirable step, it is ever more so now that there is in many respects no effective statute of limitations. The key to successfully defending an equal pay suit will be convincingly to establish that all compensation decisions were based on objective criteria and not on any of the protected categories. To successfully move forward, an employer must establish, or modify, as the case may be, objective, defensible compensation practices.

3) **Audit All Prior Compensation Decisions:** This will obviously be the most time-demanding project as part of an overall preventive process. It is very sensible to perform this "discovery" when there is no ongoing litigation in order for the company to determine its vulnerability and to make adjustments to correct matters going forward. As we have observed before, there is in effect no statute of limitations with the Act for current employees. However, at least under Title VII, the employee can only recover back pay for the two-year period prior to file her charge with EEOC. Thus, changes made today will begin creating insulation today and, in two years hence, the company would have negated its liability under Title VII for what would have been an otherwise unlawful practice in the past.

4) **Review and Adjust Current Documentation Retention Practices:** It is imperative that employers retain all necessary documentation to establish a defense to a discriminatory compensation claim.

Under the Act, so long as an individual is currently employed and, consequently, still receiving a regular paycheck, there effectively is no statute of limitations. Whereas under *Ledbetter* an employer could often overlook pay decisions and documents years or decades old, that is no longer the case. An employer will have to preserve and audit all payroll records for current employees, retirees receiving retirement benefits, and other recent retirees. To be prudent, an employer should retain all documents and electronically stored data for all employees – past and present. While a particular former employee may no longer have a statutory claim, your pay practices for that individual may help to serve as a defense to an action by another individual.

Generally speaking, all documents and electronic data relating to payroll decisions should be retained for all current and former employees. These would include payroll action forms reflecting the amount and date of any increase in pay and/or benefits, as well as supporting documentation, such as performance evaluations. If an employee's disciplinary record formed any basis for a performance evaluation or pay status, these records should also be retained. Similarly, all records regarding retirement benefits should be retained. Likewise, any records supporting other decisions that could impact pay increases (*e.g.*, promotions/demotions) should be retained. In short, the employer should retain all records that touch on monetary compensation, including wages, paid leave, retirement benefits, health benefits, stock options, *etc*. When the courts start interpreting the meaning of the phrase "other practice," employers and their employment counsel will be in a better position to determine what other records will need to be retained.

Until the legal community has an opportunity to review and digest the various courts' interpretations of the Act, the prudent employer will retain more, rather than less, documents and electronically stored information. As stated earlier, it will be difficult enough for an employer to establish a viable defense to discriminatory compensation claims based on the fading memories of decision makers. At the very least, it is hoped that an appropriate "paper trail" will be beneficial. Of course, after conducting the review recommended above, with the advice of employment counsel, the employer may decide to discard certain compensation-related documents if it has a legal basis to do so. It will only be after several years under the new law that employment counsel can better evaluate perhaps what additional documents can be discarded.

No strategy will fully insulate a company against discriminatory compensation claims. However, by taking the steps recommended above, an employer can begin to limit its financial exposure for what may later be found to be unlawful compensation policies and practices. While there may in effect be no statute of limitations, a successful litigant can only obtain in a Title VII action two years of back pay. Correcting improper compensation practices today will reap financial benefits for an employer tomorrow.

Strategies

Obviously, where employment lawyers were basing their strongest arguments on a statute of limitations theory, in light of the Act, they would have to re-think their strategy. Is that argument still viable in light of the Act? If not, then counsel will have to dig into the case, review records and interview witnesses to determine the strengths and weaknesses of the substantive aspects of the case.

Besides the effective elimination of the statute of limitations in most cases, three other very important changes need to be considered. The Act appears to expand the coverage of the law to individuals other than employees or former employees. Thus, where an employer might have thought that a possible cause of action expired with the death of the employee or former employee, it is quite possible that the cause my live on, for example, through the widow or widower. The second and third strategic features will depend on how the courts interpret "other practice" and "compensation decision."

The best defense is always a good offense. Employment lawyers should work with each of its clients before litigation ensues to conduct an audit of its existing personnel and those continuing to receive some sort of benefit from the company, to identify and address any seemingly illegitimate and unjustified discrepancies in compensation. To the extent that there are any legitimate and justified discrepancies, the employer and its lawyer ought to work to sufficiently document the rationale behind the decision for the discrepancy and maintain adequate proof of that in an employee's personnel file. This will help to reduce the exposure to potential liability, if and when such a claim for discriminatory compensation practices arises.

Further, as mentioned above, the employment lawyer should review the current employment practices to determine if management has developed clear guidelines to measure performance of its employees, and whether or not it has instituted consistent procedures to reward or penalize its employees. If certain procedures are not carried out uniformly or seem to result in a disparate impact on certain classes of employees, the employment lawyer should work with the client to develop a procedure that avoids that result.

What information will be researched and reviewed will depend on the nature of the claim(s) presented. If, for example, an employer is presented with a claim similar to that presented by Ms. Ledbetter, defense counsel would probably want to start with the plaintiff's date of hire and track the pay increases going forward from that point. Her performance evaluations, her discipline record, and any related information would be reviewed to determine what criteria were used in making the compensation decisions affecting her. Then, counsel would research and review the same types of documents and information for the plaintiff's male counterparts. Where there are differences in pay, the employer would attempt to establish a non-discriminatory basis for the pay. For example, in all the media attention given to the Act, there is little, if any, mention of the fact that Ms. Ledbetter' performance evaluations placed her near the bottom of the rankings with her co-workers. Obviously, besides documentary evidence, the employer and its counsel will want to interview any and all available witnesses that can offer information relating to the compensation decisions.

Using *Ledbetter* as an example, any and all documents that could establish the basis for why Ms. Ledbetter was paid less than her male counterparts would be beneficial for the defense. For example, if the reason for her lower pay was her performance evaluations, key to the defense would be her evaluations and those of the other employees who were receiving higher pay.

Perhaps the most daunting obstacle employers face in defending claims of discriminatory pay practices will be explaining policies and decisions made years or even decades earlier. Compounding this will be reliance on the memories of executives where accurate memories have faded, coupled with the possibility of defense witnesses no longer being employed by the employer, available or even alive. Another intriguing issue will be the potential claims of retirees that their retirement benefits, being based on their earnings while actively employed, are the result of a discriminatory pay practice.

Education

On the management side of the legal spectrum, one could fairly assume that employers are at least aware of the existence of the Act, as it was the first bill signed by President Obama, and thus received perhaps an inordinate amount of media attention. In addition, employers likely have been counseled by their employment lawyers on the implications of the new law. The level of awareness of the Act is likely markedly different with respect to employees. Unless they are members of a union and have been notified about the Act through their union and the union's attorneys, rank-and-file employees are much

less likely to be aware of their newfound rights unless they diligently follow the news and related developments.

Employment lawyers have always encouraged their clients to conduct regular periodic audits of their labor and employment policies and practices to assure compliance with numerous federal and state laws. The Act does not change this general advice. However, the general consensus among employment attorneys is that the Act will surely give rise to increased litigation. Accordingly, management-side lawyers will re-double their efforts to have clients actively implement the suggestions and recommendations set forth above.

Employment counsel will advise clients that the Act may present companies with the threat of litigation like they possibly never have seen before. First, for existing employees, unlike any other employment law applying to companies, there is, in effect, no statute of limitations. This is unprecedented. Secondly, unlike other employment laws, one cannot at this stage predict with any certainty *who* exactly may be potential plaintiffs.

One possible impact of the overall client employment law strategy will be the diversion of human resources to the preventive measures discussed above to insulate, to the extent possible, the company against the expected onslaught of litigation spawned by the Act. Obviously, unless a client has unlimited resources, this will likely have a negative impact on other worthy human resources functions.

Management side employment attorneys can educate their clients through direct mailings and seminars. As for potential clients, they too could become educated through direct mailings and seminars. Attorneys representing employers can most readily keep their clients apprised of developments under the Act, as well as related laws, through regular client advisories and newsletters. Similarly, attorneys representing unions can advise the membership of their rights in the unions' monthly reports.