



Within days of his inauguration, President Barack Obama fulfilled a campaign promise to sign into law the Lilly Ledbetter Fair Pay Act of 2009. While the Act does not make any new prohibition, it does burden employers by materially expanding potential exposure to damages arising from pay discrimination claims, even if the alleged discrimination stems from a decision made years ago.



BY DOUGLAS H. DUERR

The proponents of the Act—as well as the media—focus their praise of the new law on studies showing differences in pay between men and women. But the Act itself goes beyond sex differences by also addressing pay disparities based on age, race, disability, religion and other protected

characteristics. Because such disparities can arise in pay systems that are not lock step but are intended to reward performance, seniority, etc., this new Act impacts all employers.

The Act does not change any of the current prohibitions designed to keep employers from discriminating or retaliating against employees based upon race, color, religion, sex, national origin, age or disability. Rather, it expands the time frame in which an employee may file suit and recover back pay for wage discrimination.

Under the Act, an unlawful employment practice occurs when:

- A discriminatory compensation or other practice is adopted;
- An individual becomes subject to the discriminatory decision or practice; or
- An individual is affected by the application of the discriminatory decision or practice, including each time discriminatory compen-

sation is paid.

What is the Ledbetter Fair Pay Act?

The Lilly Ledbetter Fair Pay Act of 2009 is explicitly intended to reverse a U.S. Supreme Court decision (*Ledbetter v. Goodyear Tire & Rubber Co.*) enforcing the 180-day deadline (or 300 days in “deferral jurisdiction”) for filing a wage discrimination charge as set forth by Title VII of the Civil Rights Act of 1964.

Ms. Ledbetter—who over the years of her employment with Goodyear consistently received poor performance evaluations and thus lower pay raises—alleged that her lower pay was the result of sex discrimination.

Under the Act at that time, the timing for the deadline began at the point of the initial act of alleged discrimination—which the Supreme Court determined to be the employer’s initial pay-setting decision—even if the violation continued to affect the employee’s compensation long after the 180-day period expired. Accordingly, the Court denied the plaintiff’s claims based upon wage determinations that were made more than 180 days before she filed her discrimination charge with the EEOC.

In contrast, under the Ledbetter Fair Pay Act, each and every paycheck constitutes a new and separate act of discrimination. Thus, the Ledbetter Fair Pay Act, which is retroactive to May 28, 2007—the date of the Supreme Court decision—allows an employee to file a wage claim at any time within 180 days of receiving a paycheck (or possibly any other check or payment). This significant expansion of discriminatory acts that restart the statute of limitations also is applicable to compensation claims raised under the Americans with Disabilities Act (ADA), the Rehabilitation Act and the Age Discrimination in Employment Act (ADEA).

Of some concern is the fact that the Ledbetter Fair Pay Act is not limited just to employees, as the House of Representatives specifically rejected an amendment to set forth just such a limitation. It remains to be seen whether spouses, dependents or others will be able to bring claims based on allegedly discriminatory pay practices.

There is little doubt that the Ledbetter Fair Pay Act will result in additional litigation and that it places the employer in the difficult position of having to defend against “discriminatory pay” based on a pay decision possibly made many years earlier.

In some cases, employers may have to defend not just their pay rates, but all other conditions of employment, which are impacted by pay scales (e.g. pensions, bonuses and severance pay). Employers may struggle to determine the reasons for such decisions. For example, key supervisors or other management employees who were involved in pay decisions may in fact no longer work for the employer.

Other Acts of Concern on the Horizon

Employers should proactively prepare for the significant repercussions that will flow from this new Act and other anticipated acts of Congress, such as the Paycheck Fairness Act, which provides for enhanced enforcement of equal pay requirements on the basis of gender. The Paycheck Fairness Act was originally paired with the Lilly Ledbetter Fair Pay Act, but, because it is so controversial, was separated so that President Obama could sign the Lilly Ledbetter Fair Pay Act.

In its present form, the Paycheck Fairness Act would amend the Equal Pay Act (EPA) of 1963 (EPA) by imposing harsher penalties for violations. The EPA requires employers to provide equal pay to female and male employees who perform equal work on jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions. The EPA currently provides for back pay, liquidated damages and attorney fees.

Under the Paycheck Fairness Act, employers violating the EPA could be subject to compensatory and punitive damages as well. In addition to harsher penalties, the Paycheck Fairness Act would make it more difficult for the employer to defend disparate wages for female and male employees.

Under current law, an employer can defend a disparate pay claim by showing that the difference in pay is “based on a factor other than sex.” The proposed legislation limits such factors to bona fide factors, such as education, training or experience and states that the bona fide factor defense shall apply only if the employer demonstrates that such factor is:

- Not based upon or derived from a sex-based differential in compensation;
- Job-related with respect to the position in question; and
- Consistent with business necessity.


Such defense would not apply where the employee demonstrates:

- An alternative employment practice exists that would serve the same business purpose without producing such differential; and
- The employer has refused to adopt such alternative practice.

What Can You Do?

What should the BURGER KING® franchisee do now to minimize the risks and costs of noncompliance with the Lilly Ledbetter Fair Pay Act and other pay equity laws? We recommend the following:

- Conduct periodic statistical analyses of compensation data to determine if there are any statistical disparities across sex, race, age or other protected characteristics.
- Review current pay discrepancies to determine whether there are documented, legitimate, non-discriminatory explanations.
- Update or establish written compensation policies and practices to ensure that future compensation decisions are based on legitimate, non-discriminatory factors.
- Provide employees with an internal complaint mechanism to address inequities in pay during antidiscrimination training;
- Update or establish record-retention policies and practices to ensure that appropriate documentation supporting compensation decisions is maintained so that in the event that a pay discrimination claim is filed, the information to defend the claim is preserved.
- Train those who set starting pay for new employees and those who determine pay increases for current employees, to ensure compliance with your compensation policies and practices.

While nothing short of an act of Congress can reduce the burden this legislation places on employers, taking the foregoing steps will help reduce some of the risk. 

¹ *Americans with Disabilities Act, Pub.L. 101-336, 104 Stat. 327, enacted July 26, 1990.*

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