NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

THE LILLY LEDBETTER FAIR PAY ACT OF 2009: CURRENT STATUS AND EMERGING ISSUES

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009.[1] The Act overturned the disastrous Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which had severely limited workers' ability to vindicate their rights under federal anti-discrimination laws when they were subjected to unlawful pay discrimination. In *Ledbetter*, the Court held that employers could not be sued under Title VII of the Civil Rights Act of 1964 for pay discrimination if the employer's original discriminatory pay decision had occurred more than 180 days in the past.[2] This decision upset longstanding precedent under Title VII and other civil rights statutes, and posed a great hardship for plaintiffs since pay discrimination is often not immediately apparent, making it difficult for employees to know how their compensation compares to that of their colleagues.

The Ledbetter Act importantly restored the protection against pay discrimination stripped away by the Supreme Court's decision. The Act explicitly provides 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" as a result of such a practice.[3] In other words, each discriminatory paycheck (rather than simply the original decision to discriminate) resets the 180-day limit to file a claim.

There is no doubt that laws matter – since the Ledbetter Act was passed, many workers around the country have had their fair pay claims rightly restored. But it remains to be seen how courts will interpret some emerging legal issues resulting from implementation of the Act. And even once they are resolved, the fact remains that women today are still paid, on average, only 77 cents for every dollar paid to men, and women of color are paid even less than that. While the targeted steps taken in the Ledbetter Act are important, they only restored the protection against pay discrimination stripped away by the *Ledbetter* decision. More is necessary both to strengthen equal pay laws, which have been weakened over time by courts, and to require the federal government to be more proactive in preventing and battling wage discrimination. For example, the Paycheck Fairness Act, passed by the House in January 2009 and pending in the Senate,[4] would update the Equal Pay Act and close the judicially created loopholes that have undermined its enforcement.

Implementation of the Lilly Ledbetter Fair Pay Act

Over the course of the past year, courts around the country have implemented the Lilly Ledbetter Fair Pay Act as Congress intended for straightforward pay discrimination cases. In cases involving pay discrimination based on sex, race, disability, and age, courts have recognized that the statute of limitations is renewed with each paycheck marred by discrimination. For example:

- In *Mikula v. Allegheny County of Pennsylvania*,[5] on a panel rehearing, the Third Circuit made clear that following the Ledbetter Fair Pay Act, each discriminatory paycheck renewed the time for filing a pay discrimination claim. In that case, Mary Lou Mikula was hired by the Allegheny County Police Department in March 2001 as the grants coordinator. Mikula was paid $7,000 dollars less than her similarly situated male coworker from her date of hire, and she continued to be paid less despite her repeated requests for a pay increase.

- *Hester v. North Alabama Center for Educational Excellence*[6] provides another example of a claim revived by a court of appeals following the Ledbetter Fair Pay Act. Indeed, in that case, the parties agreed, and the court accepted, that Telesa Hester's Title VII claim that she was paid less than male employees engaged in substantially equal work was timely in light of the Ledbetter Act, and should be remanded back to the lower court.

- In a case involving race discrimination, *Goodlett v. Delaware Department of Elections*,[7] Randolph Goodlett, an African-American man, alleged that he and other African-American employees were paid less than similarly situated Caucasian employees by the Kent County Department of Elections. The Equal Employment Opportunity Commission (EEOC) determined that Goodlett's pay claims were time-barred following the Supreme Court's *Ledbetter* decision. But due to the passage of the Ledbetter Fair Pay Act, the court found that Goodlett's pay disparity claim survives and that "the 300 day clock for filing a Title VII pay disparity claim starts anew with each discriminatory pay period."

- Finally, in *Johnson v. District of Columbia*,[8] Paul Johnson, a 66 year-old male with blindness in one eye and insulin-dependent diabetes, had worked as an accountant for more than 17 years at the University of the District of Columbia Finance Office. He consistently received "exceeds expectations" evaluations for his work, but he was the lowest paid accountant in the office. Johnson brought discriminatory pay claims on the based on his gender, age, and disability. Relying partially on the *Ledbetter* decision, the Court dismissed several of these claims as being time-barred. After Congress passed the Ledbetter Fair Pay Act, the Court reinstated Johnson's previously dismissed discriminatory pay claims, stating that "there can be no dispute that, under the Fair Pay Act, plaintiff may seek relief under" the relevant federal laws.

Lilly Ledbetter Fair Pay Act: Emerging Issues

Not every plaintiff has had their pay discrimination case restored by the Lilly Ledbetter Fair Pay Act, and a few thorny implementation issues have emerged that courts will continue to flesh out.

First, the retroactivity of the Act is uncertain in some cases. Congress made clear that courts must treat the Supreme Court's decision in *Ledbetter* as if it had never been issued and restore the claims of pay discrimination plaintiffs that had been dismissed as time-barred, as the Eleventh Circuit did correctly in *Hester*.[9] However, it is unclear what will happen in cases involving claims that were not pending in court or at the EEOC when the Act took effect. In

light of the Supreme Court's decision in *Ledbetter*, such cases may arise because plaintiffs decided not to bring their claims at all or failed to appeal claims due to the decision.

Second, it remains unclear whether the Act overturns the *Ledbetter* decision's application outside of the employment context and the express statutes identified by Congress in the Act. Before the Act, several state and federal courts had applied *Ledbetter* to restrict the time period for bringing claims outside the pay discrimination context. It was misapplied, for example, by a district court in California to a Title IX athletics discrimination case in *Mansourian v. Regents of the University of California*.[10] It has also been misapplied by state courts in a host of contexts, some of which involve pay discrimination and some of which do not. It is uncertain whether courts will discontinue their use of *Ledbetter* based on the passage of the Ledbetter Fair Pay Act. For instance, in *Johnson v. Portfolio Recovery Associates*,[11] a district court in Virginia declined to answer the question whether it would continue to apply *Ledbetter* to Section 1981 cases. A New York district court also declined to answer the same question.[12]

As for the Ledbetter Act's application to statutes not expressly identified by Congress in the Act, some courts have indicated that the issue is a non-starter. In *Johnson*,[13] the court bluntly pronounced that Section 1981 was not one of the statutes amended by Congress in the Ledbetter Act. Therefore, when it considered a Section 1981 wage discrimination claim, the court applied the 4-year statute of limitations traditionally applicable to Section 1981 claims prior to the enactment of the Ledbetter Act. Other courts have also refused to apply the Act to cases involving statutes not expressly cited in it, such as the Family and Medical Leave Act.[14]

Third, courts must still determine the meaning of the phrase "when an individual becomes subject to a discriminatory compensation decision *or other practice*."[15] The legislative history and language of the Ledbetter Act make clear that the "other practice" must in some way relate to compensation discrimination, but where courts will draw the line in terms of what "other practices" renew the statute of limitations remains unsettled. For example:

- Some courts have made clear that "**failure to promote**" claims are not the sort of "other practices" contemplated by Congress. This view is exemplified by the Texas district court in *Harris v. Auxilium Pharmaceuticals, Inc.*,[16] where the court acknowledged how district courts all over the country have grappled with the meaning of the Act but still ultimately held that the plaintiff's failure to promote claim did not constitute a "compensation decision" under the Act.[17]

- **Demotion** claims have similarly been deemed by some courts to be outside the "other practices" category,[18] as have **failure to train** claims.[19]

- In *Powell v. Duval County School Board*,[20] the **failure to pay promised wage increases** was even held to be outside the bounds of the Ledbetter Act. Additionally, in *Zimmelman v. Teachers' Retirement System of New York*,[21] a New York district court held that **retirement benefit payments** were outside the purview of the Ledbetter Act, and rejected an employee's claim that her payments were lower than those received by male State Department of Education retirees because she did not get service credit for the time she took for maternity leave.

- **Failure to hire** claims have also been held to be unaffected by the Ledbetter Act. [22] So have **retaliation claims**.[23]

However, none of these "rules" are pervasive or certain. Jurisdictions can and are expected to reach entirely different conclusions on what actions affecting compensation they think constitute a "compensation decision or other practice" under the Act. For example, in *Gentry v. Jackson State University*,[24] a Mississippi district court held that **denial of tenure** can qualify as a compensation decision or other practice if it affects the plaintiff's salary, exhibiting an entirely different viewpoint from the courts in cases like *Harris*[25] and *Schuler*.[26]

Finally, there is the emerging problem of state courts that rely on the *Ledbetter* decision to dismiss pay discrimination cases even after the passage of the Ledbetter Act. For example, in *Alexander v. Seton Hall University*,[27] the plaintiffs alleged pay discrimination based on sex and age in violation of the New Jersey Law Against Discrimination. In that case, the court held that the reasoning from the Supreme Court's decision would continue to apply to New Jersey law, despite the Ledbetter Act, and that the New Jersey Legislature must amend state law to achieve a different result.

* * *

In this economy, it is clear that women and their families simply cannot afford to be shortchanged in the workplace. The Lilly Ledbetter Fair Pay Act was a critical first step in addressing pay discrimination, but the fight to achieve wage equality is far from over. Congress is currently considering the Paycheck Fairness Act, which would help address many of the gaps in existing federal equal pay laws by updating and strengthening the Equal Pay Act in several important ways. The Paycheck Fairness Act would broaden the available class of comparators by modifying the "establishment" requirement of the Equal Pay Act to allow comparisons to be made between employees in some commonsense circumstances that are not currently permitted. It would also close a gaping loophole in the Equal Pay Act by tightening the "factor other than sex" defense so it would excuse pay differentials only where employers show that the differential is related to job performance and consistent with business necessity; currently, the defense is so broad it can encompass factors that may themselves be "based on sex," such as a male worker's stronger salary negotiation skills or higher previous salary. It would also improve remedies by allowing plaintiffs to recover full compensatory and punitive damages instead of just liquidated damages and back pay awards, as plaintiffs claiming discrimination based on race are already permitted to recover. The Paycheck Fairness Act would also help facilitate class action Equal Pay Act claims by automatically considering class members part of the class until they opt *out*, as opposed to *in*, as is the current rule, as well as enable easier identification of discriminatory pay systems by prohibiting employer retaliation against employees who share salary information with their co-workers. Passage of the Paycheck Fairness Act will help ensure that employees are being paid based on the value of their work, rather than their sex.

[1] Public Law No. 111-2, 123 Stat. 5 (2009).

[2] Under Title VII, a plaintiff seeking to bring an employment discrimination suit must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days (depending on state law) after the unlawful employment practice occurred.
[3] 42 U.S.C. § 2000e-(5)(e)(3)(A).
[4] Pursuant to the provisions of H.R. Res. 5, the text of the Paycheck Fairness Act, H.R. 12, was passed by the House and appended to the end of the Ledbetter Fair Pay Act, H.R. 11. The Senate bill, S. 182, has not yet passed.
[5] 583 F.3d 181 (3rd Cir. 2009).
[6] 353 F. App'x 242 (11th Cir. 2009).
[7] 2009 WL 585451 (D. Del. Mar. 6, 2009).
[8] 632 F. Supp. 2d 20 (D.D.C. 2009).
[9] *Hester*, 353 F. App'x at 1.
[10] 2007 WL 3046034 (E.D. Cal. Oct. 18, 2007).
[11] 682 F. Supp. 2d 560 (E.D. Va. 2009).
[12] *Aspilaire v. Wyeth Pharm., Inc*., 612 F. Supp. 2d 289 (S.D.N.Y. 2009).
[13] 682 F. Supp. 2d at 586.
[14] *Maher v. Int'l Paper Co*., 600 F. Supp. 2d 940 (W.D. Mich. 2009).
[15] 42 U.S.C. § 2000e-(5)(e)(3)(A) (emphasis added).
[16] 664 F. Supp. 2d 711, 745 (S.D. Tex. 2009).
[17] *See also Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370 (C.A.D.C. 2010); *Barnabas v. Bd. of Trs.*, 2010 WL 692785 (D.D.C. Mar. 1, 2010); *Lipscomb v. Mabus*, 2010 WL 1198891 (D.D.C. Mar. 30, 2010); *Ekweani v. Ameriprise Fin., Inc*., 2010 WL 749648 (D. Ariz. Mar. 3, 2010).
[18] *See, e.g., Pratesi v. N.Y. State Unified Court Sys.*, 2010 WL 502950 (E.D.N.Y. Feb. 9, 2010); *Tryals v. Altairstrickland, LP*, 2010 WL 743917 (S.D. Tex. Feb. 26, 2010).
[19] *See, e.g., Moore v. Napolitano*, 2009 WL 4723169 (E.D. La. Dec. 3, 2009).
[20] 2009 WL 3157588 (M.D. Fla. Sept. 28, 2009).
[21] 2010 WL 1172769 (S.D.N.Y. Mar. 8, 2010).
[22] *See, e.g., Joseph v. Pa. Dep't of Envtl. Prot.*, 309 F.App'x 636 (3rd Cir. 2009).
[23] *See, e.g., Rzepiennik v. Archstone-Smith, Inc* , 331 F. App'x 584 (10th Cir. 2009).
[24] 610 F. Supp. 2d 564 (S.D. Miss. 2009).
[25] *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 745 (S.D. Tex. 2009).
[26] *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (C.A.D.C. 2010).
[27] 983 A.2d 1128 (N.J. Super. App. Div. 2009).