

## Lilly Ledbetter Fair Pay Act of 2009 Becomes Law

President Barack Obama has signed into law the “Lilly Ledbetter Fair Pay Restoration Act of 2009,” the first piece of legislation signed by the President. The new law, signed on January 29, 2009, rejects the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, holding that the charge-filing deadline on Title VII compensation discrimination claims begins to run on the date of the first allegedly discriminatory pay decision.

In the *Ledbetter* case, the plaintiff worked for about 20 years as a manager until accepting early-retirement. During most of that time, her salary was determined annually and was low, based on her supervisor’s ranking of her performance. In her last two years of employment, she was in a job slated for layoff and, consistent with company policy, did not receive any raises. By the time of her retirement, her annual raises resulted in a large pay gap between her compensation and that of her male coworkers. She filed an EEOC charge, and then a lawsuit. A jury returned a verdict in her favor and awarded her \$223,776 in back pay, \$4,662 for mental anguish and \$3,285,979 in punitive damages. In moving for judgment despite the verdict, the employer argued that the claim was barred by Title VII’s charge-filing deadline. The Court denied the employer’s motion, but reduced the award and entered judgment for \$360,000, plus attorneys’ fees and costs. The employer appealed. The Eleventh Circuit Court of Appeals reversed the district court’s denial of the employer’s motion for judgment as a matter of law. The appellate court concluded that the plaintiff’s pay at the time she filed her EEOC charge was the result of long-past decisions that she could not challenge, outside of Title VII’s charge-filing time period. The plaintiff appealed. The U.S. Supreme Court affirmed the Eleventh Circuit’s decision and held that a pay-setting decision, like a termination or demotion, is “a discrete act” forming the basis of a Title VII claim and thus triggering the 180-day period to file a charge.

The new law amends Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1967 to provide that the charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) would commence when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid). Thus, the statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.

In addition, the new law provides that an unlawful employment practice occurs when “a person” is affected by a discriminatory pay decision or other practice. This broad language could sanction pay discrimination charges filed by non-employees, such as the spouses of deceased workers, so long as those individuals claim they have been affected by the discriminatory practice. The House of Representatives rejected an amendment that clearly would have restricted the law’s application only to employees. It remains to be seen how the EEOC and the courts interpret this language.

The law is retroactive to May 28, 2007, the day before the *Ledbetter* decision, and applies to all pay discrimination claims pending on or after that date. Attempts made in the Senate to amend the bill to change the effective date so that the law would apply only to claims arising after its enactment were debated extensively, but failed.

The implications of the retroactive effective date are uncertain. The legislation could cause individuals who had refrained from filing compensation discrimination claims in the 20-month period since *Ledbetter* to proceed with litigation. The legislation could increase potential liability for damages. The legislation may permit plaintiffs whose cases were dismissed on statute of limitations grounds after the Supreme Court’s decision in *Ledbetter* to reassert their claims.

Not surprisingly, the broadened statute of limitations for wage disparity claims is expected to prompt increased litigation. Employers wishing to minimize the risks of liability should consider the following: *Audit Current Pay Documentation Practices*: Employers should audit their compensation practices to determine whether there is sufficient documentation supporting compensation decisions. Performance-based specifics underlying such decisions will be essential to defending a wage disparity claim.

*Develop Specific Criteria for Compensation Decisions*: Employers should develop objective, measurable guidelines for compensation decisions to be applied consistently and uniformly with job classification, work group, department or business unit.

*Review Compensation Decisions*: Employers should create a process to ensure that managers and supervisors do not have unfettered discretion when making compensation decisions. Rather, employers should consider adopting a review system so that compensation decisions are subjected to the same rigorous scrutiny that terminations, discipline, or other adverse actions typically receive.

*Revise Document Retention Practices*: Employers should review their current document retention policies to determine how long they maintain documentation regarding compensation decisions. In the post-Ledbetter world, employers likely will need to retain such information for significantly longer than they may have in the past. Employers may need to consider electronic archiving given the voluminous nature of pay-related records.

*Train Supervisor and Managers*: Employers should train all supervisors and managers regarding any post-Ledbetter policy modifications to ensure that they understand those policies and, most importantly, the need to support objectively all compensation decisions.

*Conduct Periodic Statistical Analysis of Compensation Data*: Employers should analyze compensation data to determine if any statistical disparities exist across gender, race and ethnic lines. Once identified, an employer can make appropriate adjustments to eliminate any unexplained disparities.

David B. Lichtenberg, Esq. (VP Legislative Affairs)  
James M. McDonnell, Esq.  
Morris County SHRM  
Jackson Lewis LLP  
(973) 538-6890 (phone)  
[lichtend@jacksonlewis.com](mailto:lichtend@jacksonlewis.com)  
[mcdonnej@jacksonlewis.com](mailto:mcdonnej@jacksonlewis.com)

## **White House Issues Four Pro-Labor Executive Orders**

On January 30, 2009, President Barack Obama signed three (3) pro-labor Executive Orders explaining that he views organized labor as “part of the solution.” The Executive Orders apply to federal contractors, i.e., companies contracted by the federal government to perform services.

The first Executive Order, “*Economy in Government Contracting*”, makes union avoidance costs a disallowed expense. Government contracts are increasingly awarded on a cost-reimbursement basis. Previously, contractors received reimbursement for activities—such as union avoidance programs—designed to control costs. Accordingly, contractors will now be required to cover all costs associated with the preparation of materials, retention of legal counsel and execution of campaigns against unions.

The second Executive Order, “*Nondisplacement of Qualified Workers under Service Contracts*”, requires a successor contractor to offer employment to its predecessor’s employees. In short, a successor

contractor may be awarded a bid and be required to bargain with a union established during its predecessor's tenure. The Order enables unions to maintain consistent representation of a workforce regardless of the employer.

The third and perhaps most troubling Executive Order, "*Notification of Employee Rights under Federal Labor Laws*", requires federal contractors to post notices advising employees of their rights to, among other things, bargain collectively and organize. The Order further requires prime contractors to include clauses in every subcontract.

On February 6, 2009, President Obama issued a fourth Executive Order, "*Use of Project Labor Agreements for Federal Construction Projects*", that authorizes federal agencies to require every contractor or subcontractor on large-scale construction contracts to become a party to a Project Labor Agreement ("PLA"). A PLA is a pre-hire collective bargaining agreement between contractors and one or more unions that establishes the terms and conditions of employment for a specific construction project. This Executive Order may effectively require a company performing work under a federal contract to have a unionized workforce—at least for the duration of the company's work on the specific project.

David B. Lichtenberg, Esq. (VP Legislative Affairs)  
James M. McDonnell, Esq.  
Morris County SHRM  
Jackson Lewis LLP  
(973) 538-6890 (phone)  
[lichtend@jacksonlewis.com](mailto:lichtend@jacksonlewis.com)  
[mcdonnej@jacksonlewis.com](mailto:mcdonnej@jacksonlewis.com)