



The Rising Tide of Pay Discrimination Claims

By Adam S. Belzberg

A little more than one year ago, and just a few days after the presidential inauguration, President Obama signed into law his first piece of legislation, the Lilly Ledbetter Fair Pay Act of 2009 (H.R. 11). The Lilly Ledbetter Fair Pay Act expressly overturned the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* It extended the time for employees to bring pay discrimination claims under the federal anti-discrimination laws by treating each paycheck issued after an alleged discriminatory decision affecting compensation as a new, independent violation. The Act prohibits pay discrimination based on all of the protected statuses under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act — i.e., age, disability, color, national origin, race, and religion.

The Paycheck Fairness Act

The 111th Congress is now considering another pay-related bill, the Paycheck Fairness Act (H.R. 12), which cleared the House on the same day as the Lilly Ledbetter Fair Pay Act. The two bills were sent to the Senate as a package bill. The Senate ultimately considered the bills separately and moved quickly to pass the Ledbetter Act in early 2009. However, the Paycheck Fairness Act is currently the subject of hearings in the Senate Health, Education, Labor, and Pensions Committee. Proponents say that passage is needed to fight a persistent gender pay gap that currently has full-time female employees earning 77 cents for every dollar earned by full-time male workers. Opponents warn that no good will result from the bill's enactment, claiming that the Act "will not create jobs except for trial lawyers."

a. Expanded Penalties for Pay Violations

In its present form, the Paycheck Fairness Act would amend the Equal Pay Act of 1963 ("EPA") by imposing harsher penalties for pay 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 are performed under similar working conditions. The EPA currently provides for back pay, liquidated damages and attorneys' fees. The Paycheck Fairness Act would expand the available remedies to allow prevailing employees to recover uncapped compensatory and punitive damages, and would also make it easier for employees to bring class action suits under the EPA.

b. Heightened Burden for Employers Defending Pay Disparities

The Paycheck Fairness Act would also make it much more difficult for employers to defend disparities in pay between male and female employees. Currently, employers defending against EPA claims can prevail by proving that a disparity in pay between males and females in the same job is based on "any factor other than sex." The new legislation would significantly raise the burden of proof in defending gender-based pay discrimination claims by requiring employers to prove that a disparity in pay is based on "a bona fide factor other than sex, such as education, training or experience." The Paycheck Fairness Act further provides that the employer must prove that this factor is: (1) not based on or derived from a sex-based differential in compensation; (2) job related; and (3) consistent with business necessity. Even if the employer meets this burden, the defense is lost if an employee produces evidence that an alternative employment practice would serve the same purpose without producing the pay disparity, and the employer refused to adopt the practice.

c. Employees Must be Permitted to Discuss and Disclose their Compensation

Another significant feature of the Paycheck Fairness Act would generally prohibit employers from retaliating against employees for inquiring about, discussing, or disclosing wage information. The National Labor Relations Board (“NLRB”) has long taken the position that any rule prohibiting employees from discussing their wages or other terms and conditions of employment with co-workers violates Section 8(a)(1) of the National Labor Relations Act (“NLRA”). The Paycheck Fairness Act would extend the employee protections by, among other things, permitting uncapped compensatory and punitive damages for such retaliation.

Regardless of whether the Paycheck Fairness Act passes in its current form, employment policies that discipline employees for discussing with each other the terms and conditions of their employment may be unlawful under the NLRA, as noted. An obvious example is an employee handbook policy that prohibits employees from discussing wage rates, wage increases, and/or bonuses received. A less obvious, but equally problematic example would be an employer’s discipline of an employee after learning that s/he posted an entry on Facebook describing how the employee and her/his co-workers were upset with the ABC, Corp. for changing its employee benefits program. Distinguishing between protected concerted activities and unprotected individual actions is not always easy.

Employer Guidance and Best Practices

Employers are increasingly being called upon to defend compensation-related activities that may have occurred years ago and decisions by managers that may be long gone. Through careful planning and action, however, employers can minimize the risks and consequences of noncompliance with the pay equity laws. Among other things, employers should:

- Provide employees with an internal complaint mechanism to address any alleged inequities in pay
- Review job classifications to identify any pay differentials and the rationale for them
- Review record retention policies and procedures to ensure that information required to defend against pay discrimination suits is adequately preserved and accessible
- Review confidentiality policies and procedures to ensure they do not restrict employees from discussing their compensation and other terms and conditions of employment

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