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## Ledbetter Legislation Enacted — Now What?

*Law360, New York (January 30, 2009)* -- Yesterday, President Obama signed the Lilly Ledbetter Fair Pay Act ("Ledbetter Act") into law making it the first piece of legislation the president signed in his new administration.

The law overturns the highly publicized U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which required an affected employee to file a claim within 180 or 300 days (depending on whether their state has a fair employment agency) of the actual alleged discriminatory decision.

The Ledbetter Act amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973 to allow an employee to file a charge for discrimination in pay within 180 or 300 days of the date when the employee is affected by a discriminatory wage decision or practice.

The Ledbetter Act effectively eviscerates the statute of limitations for wage discrimination claims because employees are arguably affected by a discriminatory wage decision or practice each time they receive a paycheck.

For example, if an employer discriminatorily sets an individual's pay upon hire, every pay decision that builds on that initial decision — merit increases, for instance — and every paycheck received by the employee after that time newly "affects" the employee.

Consequently, the new law subjects employers to claims that were previously time-barred. Notably, an amendment aimed at striking a compromise between these two extremes, which would have required employees to bring a charge within 180 or 300 days of the date they knew or should have known of the discriminatory action, was defeated in the Senate.

Although the Ledbetter Act does not alter the current two-year limit for potential back pay recovery, the law requires employers to retain records relating to any decisions

regarding pay differentials between groups of employees for a much longer period of time.

Additionally, employers will now be required to defend previously time-barred decisions although the records relating to these decisions were likely destroyed and the individuals involved in the decisions have long since left the company. Further, the new law is retroactive to May 28, 2007 — the day before the Ledbetter decision was handed down. Thus, claims that may have otherwise been dismissed in accordance with the Ledbetter decision will now be revived by this new law.

The Ledbetter Act is sure to result in increased litigation over pay issues, and re-opens the door to class action litigation over pay claims. As a result, employers should take steps, including the following, to best enable them to defend their compensation decisions:

- Conduct a holistic privileged review of compensation practices and policies, including how salaries are set at the time of hire
- Conduct privileged analyses of compensation decisions, including real-time analyses in connection with pay increases, bonuses and stock allocations
- Capture prior relevant experience at the time of hire
- Capture salary demands made at the time of hire
- Assess compensation of similarly situated incumbents when hiring a new employee
- Assess the impact of leaves of absence on compensation decisions

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