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LEGAL ALERT

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Lilly Ledbetter Fair Pay Act of 2009

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 ("Act"). The Act, aimed at addressing pay inequity, allows workers to file a claim for pay discrimination without regard to when the initial violation took place, effectively eviscerating the statute of limitations with regard to pay discrimination claims. The new law therefore requires employers take additional steps to ensure that their pay practices are non-discriminatory and that they properly maintain pay records needed to prove the fairness of their pay decisions.

The Lilly Ledbetter Fair Pay Act – What does the Act do?

The Act allows individuals to file charges of alleged pay discrimination under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, without regard to the traditional 180/300-day statutory charge filing period. The law declares that an unlawful employment practice occurs when: (a) a discriminatory compensation decision or other practice is adopted; (b) an individual becomes subject to the decision or practice; or (c) an individual is affected by application of the decision or practice, including each time there is a payment of compensation.

The Act allows an employee to file a pay discrimination charge within 180/300 days of the issuance of each paycheck affected by past discrimination. Accordingly, each new paycheck or post-retirement benefits check is a potentially unlawful employment practice for which an employee may file a charge, even though the employer may have made the discriminatory wage determination years, or even decades ago.

The Act expressly overrules a 2007 U.S. Supreme Court decision that limited the scope of wage discrimination claims. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 500 U.S. 618 (2007), Lilly Ledbetter had sued her employer for sex-based pay discrimination. The Supreme Court ruled that she was not entitled to back pay in her Title VII discrimination case

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because the alleged initial violation took place decades prior to the 180-day statute of limitations, and therefore her claim fell outside the window of the statute of limitations. Ledbetter would have had to file a charge with the EEOC within 180 days of each allegedly discriminatory pay decision made and communicated to her. However, she did not do so. Further, the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge did not provide a basis for overcoming that prior failure.

The new Act will be retroactive to the date of the Supreme Court's controversial decision – May 28, 2007. The Act may also have an impact on the outcome of pending pay discrimination claims that might have otherwise been dismissed on a motion.

One consequence of the Act is that employees may now sit on their claims of pay discrimination for years in an effort to hike up potential damages. While the Act caps compensation damages at two years back pay, an employee can maximize potential punitive damages by "sleeping on their rights" without having to worry that the statute of limitations will run.

It is expected that the Act will result in an increase in pay discrimination claims. At the same time, the Act presents some major obstacles for employers, as they will now be forced to defend claims of pay discrimination based on decades-old wage decisions and policies, and long after documents have been destroyed, relevant witnesses have moved on, and memories have faded.

Response to the Act - Best Practices for You

Employers should prepare themselves for the expected increase in litigation by taking the following steps:

Employers should modify their record retention policies and indefinitely keep documents on file relating to pay decisions.

Employers should comb through years of past pay records and conduct a thorough audit of wages and job descriptions to ensure that any pay differentials can be justified. Employers should also be prepared to take appropriate action to correct any discovered problems. Before doing so, however, employers should consult with their attorneys to determine if they can protect the results of the audit with a privilege.

Managers and supervisors should be mindful of the new law when conducting performance evaluations and considering pay-raise requests.