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MSK Client Alert

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Lilly Ledbetter Fair Pay Act

Just nine days after taking office, President Obama signed the first piece of legislation to reach his desk: the Lilly Ledbetter Fair Pay Act ("Ledbetter Act"). This was hardly a surprise. During the campaign, Senator Obama repeatedly invoked Lilly Ledbetter's name, told her story, and pledged to sign her bill. Ledbetter also spoke at the Democratic National Convention and campaigned on Obama's behalf. Her story inspired considerable sympathy, both in Congress and on the campaign trail.

Ledbetter worked at Goodyear for 19 years. Just before retiring, she learned that, as a result of sex discrimination, various supervisors had given her poor performance evaluations during her employment. Because annual raises were tied to these evaluations, by the time of her retirement, there was a significant gap between Ledbetter's wages and those of her male co-workers. She brought suit under Title VII. Although the last decision made about her rate of pay occurred outside of the time limit for filing a charge with the EEOC, because she had only recently discovered the discrimination, she argued that each paycheck inflicted new injury upon her, keeping her claim alive.

The U.S. Supreme Court disagreed. In its 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court ruled that her claim was time-barred and that, like all other discrimination charges brought under Title VII, wage discrimination claims must be filed with the EEOC within 180 or 300 days of the discriminatory *decision*. (In states without their own anti-discrimination laws, the filing deadline is 180 days; in California and other states with their own anti-discrimination procedures, the filing deadline is extended to 300 days.)

In response to the *Ledbetter* decision, Congress passed and President Obama signed the Ledbetter Act, which amends Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973, making it clear that, with respect to wage discrimination claims, the limitations period begins again *each time an employee receives a paycheck affected by a discriminatory decision.*

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For employers, the Ledbetter Act means there is no effective statute of limitations for wage discrimination, as long as an employee continues to receive arguably discriminatory paychecks. A decision made years or even decades earlier - by personnel who have long since left the company - can now become the focus of wage discrimination litigation. Employers will obviously find such claims difficult to defend. In addition, the Ledbetter Act is retroactive to the day before the Supreme Court decided the Ledbetter case, meaning that the new law could revive claims dismissed under the Supreme Court's *Ledbetter* decision.

Paycheck Fairness Act

The Ledbetter Act is already law, but the Paycheck Fairness Act looms on the near horizon. It has already passed the House of Representatives - by nearly a hundred votes - and is currently waiting in line at the Senate.

Unlike the Ledbetter Act, which affects pay discrimination claims brought under any of the various federal anti-discrimination laws, the Paycheck Fairness Act zeros in solely on pay disparities between men and women. It updates the Equal Pay Act in four significant ways.

First, and most importantly, if enacted, the Paycheck Fairness Act will sharply curb the ability of an employer to defend pay differentials. Currently, employers can defeat claims under the Equal Pay Act by showing that disparities result from any "factor other than sex." Under the new law, employers would have to show that the pay disparity is the result of a "bona fide factor other than sex, such as education, training, or experience," is "job-related with respect to the position in question," and is "*consistent with business necessity.*" These are significant obstacles for an employer to overcome. For example, even if an employer shows that the employee's wages were lower for a bona fide reason other than sex, an employee could still prevail by showing that an alternative practice would have served the same business purpose, and that the employer refused to adopt it. In other words, the Paycheck Fairness Act empowers employees, judges, and juries to second-guess reasonable, *nondiscriminatory* management decisions.

Second, the proposed law would enhance the remedies available under the Equal Pay Act. Under the current version of the Equal Pay Act, plaintiffs can only sue for back pay and liquidated damages. The Paycheck Fairness Act adds compensatory and punitive damages to this list and could subject employers to punitive damages *even when they did not intentionally or knowingly discriminate*.

Third, the Paycheck Fairness Act would facilitate class actions. So far, class action suits have been difficult to maintain under the Equal Pay Act, which requires plaintiffs to affirmatively opt *in* to the case. The new law makes class membership automatic, unless members take action to opt *out*.

Finally, the proposed law would also prohibit employers from retaliating against workers who discuss their wages and salaries. This is designed to help employees identify possible discriminatory pay disparities. (California employers should note that the Labor Code already makes it unlawful to discipline or discharge an employee for discussing her/his wages or other terms and conditions of employment.)

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In light of the Ledbetter Act and the likely enactment of the Paycheck Fairness Act, particularly in these tough economic times, employers should expect to see a significant increase in wage discrimination claims coming down the pike.

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899