



# New Pay Laws Will Lead to More Litigation

Insights

2.01.09

*(Labor Letter, February 2009)*

A new year, coupled with a new administration, means new legislation. Even though 2009 is barely a month old, the House of Representatives has already approved two bills which are significant to employers and their workforce. The Lilly Ledbetter Fair Pay Act and the Paycheck Fairness Act passed the House in January, and are aimed at reducing the discrepancy in employment compensation between women and men.

Supporters of these bills cite statistics that women, on average, are paid 77 cents for every dollar earned by men. Detractors argue that each piece of legislation will not have the remedial effect intended by Congress, and will only lead to increased litigation.

## The Lilly Ledbetter Fair Pay Act

If enacted, the Ledbetter Fair Pay Act will amend Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the American with Disabilities Act, and the Rehabilitation Act by re-defining the charge-filing and limitations periods in cases alleging discriminatory employment compensation.

Support for the Act began when its namesake, Lilly Ledbetter, sued her former employer claiming that she was paid less money than equally qualified, and in some cases less qualified, men over a span of almost twenty years. Although a jury found in favor of Ms. Ledbetter, the case was appealed to the U.S. Supreme Court which ruled that the claims were time barred. Time limits for filing a discrimination charge begin to run when the employer made the allegedly discriminatory compensation decision, not, as Ms. Ledbetter argued, every time she received a lesser paycheck. In other words, the Court concluded that Ms. Ledbetter needed to bring her claim twenty years ago.

In response to the Supreme Court's decision, sponsor's drafted the Ledbetter Fair Pay Act, which states that an unlawful employment practice occurs not only when the employer makes the initial allegedly discriminatory classification (most commonly upon hiring), but also upon "the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." In short, every time an employee receives an allegedly discriminatory paycheck, the limitations period starts anew.

The Act also expands the remedies available to aggrieved parties, and allows complainants to seek back pay for a period of two years predating their charges, as long as the past violations are "similar or related" to those that occurred during the charge period. By its express terms the Ledbetter Act amends Title VII, ADA, the Rehabilitation Act, and ADEA and will therefore affect compensation claims based on age, race, disability, and other statutorily protected classes.

### **The Paycheck Fairness Act**

While the Ledbetter Act makes it easier for employees to proceed with their claims, the Paycheck Fairness Act makes those claims more attractive to potential plaintiffs by amending the Equal Pay Act to allow class action suits, and for recovery of compensatory, and in some cases punitive damages in addition to the traditional remedies of back pay and injunctive relief.

The Act also contains a comprehensive anti-retaliation provision, which prohibits retaliating against an employee who discussed or disclosed their own wages, or the wages of a co-worker. The Act also authorizes programs to provide training for women to improve their negotiating skills, rewards employers who comply with the Act's provisions, and increases the EEOC's enforcement power. Unlike the Ledbetter Act, the scope of the Paycheck Fairness Act is essentially confined to sex discrimination.

These laws do not require that all employees be paid equally. The current law prohibits unlawful discrimination in compensation decisions, and neither of these bills changes that fact. Most employers are likely already in compliance with their legal obligations relating to employment compensation. But as these laws gain publicity, employees (and their attorneys) will be scrutinizing your compensation policies, so it's a good idea that you do the same.

We recommend that you not only revisit your compensation policies, but also make sure that employee files are properly documented and maintained. With a little foresight and a regular review of your policies, you can rest assured that you are in compliance with all of your obligations under the law.