Who In The Heck Is Lilly Ledbetter?

Insights
5.01.09

(Dealership Update, No. 2, May 2009)

In recent weeks, there has been a lot of media attention given to the new "Lilly Ledbetter Fair Pay Act." Who is Lilly Ledbetter and what, if anything, does this Act mean for dealerships?

The Dispute
Lilly Ledbetter started working for Goodyear Tire & Rubber in 1979 at its plant in Alabama where she was one of only a few female managers. Over the years, Ledbetter was paid progressively less than the men in the same position, and by 1997, her male colleagues were paid 15 percent to 40 percent more than she. After learning about the pay differences, Ledbetter filed a charge of sex discrimination in July 1998. She took early retirement, and sued Goodyear in November, 1999.

At trial, the jury ruled in her favor and awarded her $223,776 in back pay, $4,662 in compensatory damages, and $3,285,979 in punitive damages. The trial court applied the $300,000 statutory damages cap and reduced the award to a total of $360,000. Goodyear appealed.

The U.S. Court of Appeals for the 11th Circuit overturned the entire verdict, finding that the act of discrimination is the *decision* about what to pay the employee, not the *act* of issuing paychecks. Therefore, the appeals court looked only at Goodyear's 1997 and 1998 decisions (two years prior to filing her charge) and found no evidence that sex discrimination had occurred during that period. Therefore, it found that Ledbetter was not entitled to any damages.

The U.S. Supreme Court agreed with the 11th Circuit and by a vote of 5-4 upheld the decision, ruling that an employee must file a charge within either 180 days or 300 days, depending on the state, after each allegedly discriminatory pay decision or forever lose the claim.

The New Law
The Supreme Court's decision outraged women's groups and a number of members of Congress vowed to overturn the decision with new legislation. The Lilly Ledbetter Fair Pay Act was that legislation. It amended all of the major discrimination laws – Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act – to provide that the charge-filing period would be triggered each time an employee is "affected" by the application of a discriminatory compensation decision or practice.

Note that the new Act is not limited to gender-based pay disparities. It applies to *any* individual who is claiming discrimination in compensation on any basis: race, sex, religion, age, national origin, disability, etc. Supporters argued that if an employer could hide a discriminatory pay decision for as little as 180 days, it could never be sued over that discriminatory act, even though the employee continued to receive lower compensation for years.

Under the new law, employees who believe that they are victims of discrimination with respect to pay at any time during their employment may file a discrimination charge, as long as the discriminatory pay decision continues to have an effect on their pay. If the employee can prove that the pay decision was discriminatory, the court can award back pay going back two years from the date the charge is filed (or the date the lawsuit is filed in the case of an Equal Pay Act claim) to correct the discrimination. The court can also consider evidence of discrimination in compensation occurring *prior* to that period in determining the amount of damages.

The Fallout

Although this case has received much publicity, it is not actually a significant change in the law. Prior to the Supreme Court's decision, nine of the ten U.S. Courts of Appeals that had faced this question had already taken the position espoused by Ledbetter, that each pay check tainted by discrimination constituted a new act of discrimination, enabling employees to sue for up to two years of back wages. The bigger danger that we see is that the law has focused new attention on the issue of pay discrimination and this will no doubt lead to an increase in claims and lawsuits against employers across the country.

We recommend that dealerships take a close look at job categories which are particularly susceptible to wage discrimination. These are jobs where diverse employees are performing substantially similar duties at the same location. Sales positions are rarely a problem because everyone is paid off the same sales-pay plan. But there are a number of other positions where dealerships can run into problems.

Finance Managers and Finance Assistants

Most Finance Managers are paid a salary or draw and a commission based on finance profits. If your dealership has two or more Finance Managers who are paid different salaries or commission rates, you should be able to show that any difference is based on some legitimate factor other than race, sex, age, etc. For example, you could show that your "senior" Finance Manager spends a significant amount of time negotiating with lenders, solving problems and maintaining the dealership's relationship with them, while the "junior" Finance Manager only processes deals and does not deal with senior personnel at the lenders.

Similarly, one Finance Manager could be paid more if the difference is based on length of service. But if their relative experience and seniority is similar, a difference in pay would be harder to justify.

Many dealerships also employ Finance Assistants (usually female) to perform many of the routine clerical tasks associated with financing a vehicle. They are typically paid clerical wages, far less than a Finance Manager is paid. Over time, as these employees become more familiar with finance department functions, some take on more responsibilities and can even begin performing a number of the duties of a Finance Manager. In some cases, they are even given "Finance Manager" business cards and allowed to close deals when the Finance Manager is off.

Blurring the line between Finance Manager and Finance Assistant can give rise to pay discrimination claims. Dealerships need to take a close look at these assistants to ensure that they are only performing clerical functions. While a job description highlighting duties different from the Finance Manager is very helpful, the realities of the employee's day-to-day duties will control. If the assistant has morphed into a "junior" Finance Manager, then the dealership should recognize this in her compensation.

Service Writers/Service Advisors

Service writers are likely candidates for pay discrimination claims. These employees typically perform identical work, so all an employee has to do is to show that they are paid less than another service writer of a different gender, race or age. The burden is then on the dealership to show that the difference in pay is based on some legitimate factor other than race, sex, age, etc. If the service writers are paid off identical pay plans based on their own productivity or paid bonuses based on their CSI scores, the employer would have a defense to such a claim, even if one writer receives a lower compensation.

Unfortunately, many Service Managers set service writers' initial compensation on an *ad hoc* basis, without fully considering the applicant's prior experience and the experience of the incumbents. Some managers will even admit to paying minorities or women less because they are "willing" to work for less. As result, if a new female or minority or over-40 service writer with prior writing experience is paid a lower salary or a lower percentage commission than a male or white or young writer, a dealer may have a difficult time explaining the business reason.

Similarly, if a white, male or under-40 service writer is hired after a minority, female or over-40 service writer but is paid more, the dealership might be called on to explain the business reason for that pay decision. You can avoid these kinds of problems by formalizing the factors that go into setting a writers initial pay as well as any subsequent increases. Legitimate factors are things such as productivity, CSI, prior writing experience and length of service with the dealership.

Parts-counter employees

Parts-counter employees are also candidates for pay discrimination claims. They, too, are performing identical duties at the same location. Therefore, a dealership should be able to justify any difference in their compensation pay plans. Certainly length of service with the dealership, prior parts experience with the manufacturer, even productivity (if provable) may be taken into account provided you can show some logic to the system.

If the counterperson's salary increases a set amount or percentage based on their length of service with the dealership that would be a legitimate explanation. But the defense that a female counterperson is paid less than a male counterperson simply "because he has been here longer" may not be enough to convince a jury where he has been there six years and she has been there five and one-half, or if she is paid the same as a newly hired male.

Porters, car wash and get-ready employees

All of these entry level employees are also candidates for pay discrimination claims. The nature of the duties they perform make it difficult to use objective numbers to measure their relative performance. They are rarely given formal evaluations making it difficult to prove that one is "better" than the others other than through a manager's subjective judgment. Nevertheless, managers understandably tend to favor the employees they perceive as more reliable and more industrious by giving them more frequent or larger raises.

Some dealerships employ one or more long-term minority porters who, in the manager's judgment, are performing at an adequate level and are fairly compensated. A new white or young porter may be hired at or even above the rate the minority is paid because he would not take the job for less or because the manager feels that he has "potential" to move up within the dealership. Such a situation could give rise to a discrimination claim. The safest approach for these employees would be to structure a pay system based solely on length of service or one based on an incentive system where differences in pay would be the result of measurable differences in productivity.

Our Advice

Audit your pay plans for each of the positions listed above as well as any other position where you have more than one incumbent performing the same duties. Make sure that you have a legitimate – and provable – basis for any pay disparity you find. If you do not feel that you can defend a difference in pay plans with *objective* evidence (such as seniority, experience, productivity or provable merit), then work toward eliminating the disparity.

Consider tying your pay plans to length of service or some other measurable criteria or adopting a formal evaluation system. Consider using a structured-incentive system. But do not continue to do business as usual, assuming that because you have not been sued yet that you do not have any problems. The world is changing and dealerships must adapt to new challenges.

This article was reprinted in the May 13, 2009 issue of Open Road, an e-newsletter published by the Colorado Automobile Dealers Association.