



# New Law, New Recordkeeping Headaches

Insights

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Under recently-enacted legislation, educational institutions may find themselves defending discrimination claims arising from tenure or other types of employment decisions made long ago.

The Lilly Ledbetter Fair Pay Act expands the time period in which employees can pursue discrimination claims related to employment compensation. The Act is named for Lilly Ledbetter who sued Goodyear Tire and Rubber Company, claiming that she was paid less money than equally or lesser qualified men over a span of nearly 20 years. Goodyear argued that Ledbetter's lawsuit was time-barred since the time limits for filing a charge of discrimination had long expired. The U.S. Supreme Court ruled in favor of Goodyear, holding that the time limits on Ledbetter's claim began to run when her employer made the allegedly discriminatory compensation decision.

Congress responded by enacting the Ledbetter Fair Pay Act, which expressly overrules the Supreme Court's decision. An unlawful employment practice occurs not only when an employer makes the initial allegedly discriminatory compensation decision but also "each time wages, benefits, or other compensation is paid." That means that, under this Act, each individual paycheck can now be considered a distinct unlawful employment act and restart the limitations period. The Act applies to claims of discriminatory compensation based on gender, age, race, disability and other protected classes.

## Tenure Decision As A Discriminatory "Other Practice"

In the months following the enactment of the law, courts across the country have begun demarcating the scope of its protections. The Act provides that a violation occurs when a person becomes subject to a discriminatory compensation decision "or other practice." Two recent court decisions interpret "other practice" in ways schools will need to become familiar with.

In the first, a physician was offered a non-tenured position with a state university in 2002. At the time he was offered the position, he was promised that he would be recommended for tenure after one year and would be "fast tracked" to a tenure position. After serving as an assistant professor for one year, the doctor was not proposed for tenure.

In April of 2007, the university notified the doctor that his appointment as an assistant professor would not be renewed at the end of its term. In 2008 he sued, alleging that he had been

discriminated against on the basis of age, race and religion. The university argued that because the alleged discrimination took place several years prior to his filing a charge of discrimination with the EEOC, the doctor's claims were time-barred and should be dismissed.

The court rejected the university's argument in light of the recently enacted Fair Pay Act. The court reasoned that, while his claims of wage discrimination were based on the university's decision not to propose him for tenure several years prior to his charge of discrimination, the professor's claim was not time-barred because that decision impacted his later compensation. The rationale behind the court's decision was that the wage-discrimination claim presumably included, or was tainted by, the university's earlier refusal to consider him for tenure. *Rehman v. SUNY*.

In a similar decision, a professor was denied tenure by a university in 2004, but did not file a charge of discrimination until 2006. The university sought to have her later lawsuit dismissed on the ground that she filed her charge well after the EEOC's limitation period expired.

The court disagreed, holding that the denial of tenure qualified as a "compensation decision" or "other practice" within the Fair Pay Act, because it affected compensation. As in the *Rehman* decision, the court allowed what would otherwise be a time-barred claim – not because of the act of discrimination itself, but because of the adverse affect of the earlier alleged discrimination on her later wages. *Gentry v. Jackson State*.

### **What Does This Mean for Your School?**

The new law is primarily a procedural change, and does not impose any new substantive requirements. As a best practice you should already be frequently evaluating compensation and maintaining good records to justify compensation decisions. But as this Act gains notoriety, you should ensure that you have established appropriate guidelines for *all* compensation decisions, including those, such as tenure decisions, that will have an impact in the future.

The Act will also have a significant impact on recordkeeping. Because the Act references benefits and is not strictly limited to paychecks, even inactive employees on leave, retirees, or any other inactive or former employee who still receives some form of compensation from the organization may be entitled to the Act's protections. That means you will need to maintain records of all compensation and benefits – including promotions, bonuses, stipends, for example – as well as tenure decisions and performance evaluations for these individuals as far back as possible.

### ***Related People***





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