

# THE LILLY LEDBETTER FAIR PAY ACT OF 2009: LILLY'S LEGACY IS ALIVE - AND STAY TUNED FOR MORE TO COME

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The Lilly Ledbetter Fair Pay Act of 2009 (the "Act") was the first piece of legislation signed by President Barack Obama. There was much anticipation and fanfare surrounding the Act's inception, passage and enactment. Many organizations and individuals were quite outspoken in their support or criticism of the law. Alarms were sounded and employers were fearful about the potential impact. The Act was widely billed as "Granting Equal Pay to All Women" even though it applies to compensation decisions alleged to have been based on other protected categories including age, disability, religion, national origin, race and color.

Lilly Ledbetter herself became quite a celebrity. Although the outcome of her case was not affected by the Act, she championed a cause and attracted much attention. In October 2008, Michelle Obama said Lilly has "long since lost her ability to gain any financial return from her Supreme Court loss, but she is out on the road, fighting hard to make sure that our daughters and granddaughters get paid equally for the work that they do."

One of the uncertainties about Lilly Ledbetter involves the spelling of her first name. You can find articles with the correct spelling used by the Court (Lilly), many with spellings of "Lily" or "Lillie" and even some using different spellings in the same document! Aside from that there is uncertainty about more important issues including just how far this new law will reach in its elimination of the statutory limitations period for claims of discrimination in cases involving wages, benefits or other compensation. While the

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Ledbetter Supreme Court decision dealt with disparate treatment of an individual, the provisions of the Act removing the statutory limitations bar will apply to disparate impact and class-action cases as well.

Today, some nine months after the law took effect, we look with the benefit of hindsight at whether the panic was warranted, and at what likely future effects the law will have based on recent application and emerging issues as courts have considered and applied the new law. We also look at provisions in the original House bill that did not pass in the Senate, and at other legislation currently being considered to make those and other significant proposals law.

Passage of the Act as the first piece of legislation and the first of many new employment law changes promised by the new administration may be a good thing for employers who did not want to see other more sweeping reform. The hotly contested Employee Free Choice Act has already stalled out in Congress. There are currently more than forty federal labor and employment laws proposed, many of which deal with pay issues in ways potentially much more significant than the Ledbetter Act. These include the Fair Pay Act of 2009 which would prohibit sex, race or national origin discrimination in the payment of wages and the Paycheck Fairness Act which would broaden the scope of the Equal Pay Act.

There is also action in Congress aimed at reversing other pro-employer Supreme Court decisions. The Senate Judiciary Committee is holding hearings to look at *Gross v. FBL Financial Systems, Inc.* which raised the standard of proof for age discrimination cases, and *Circuit City v. Adams* which extended the Federal Arbitration Act to employment contracts.

While employers should continue to watch how the Ledbetter Act develops and is applied by courts, they should also carefully watch other developments as Congress considers and introduces new legislation. Actions taken by employers to educate the public and call attention to potential problems with proposed legislation this past year has resulted in more debate and a delay in the passage of bills such as the Employee Free Choice Act.

Employers must remain proactive, adapting to changes in the way the Ledbetter Act is applied by courts and developing internal strategies to deal with the changes

brought about by the removal of the statute of limitations in compensation discrimination and other claims affected by the Act. Additionally, employers must continue to watch for and oppose legislation that would remove protections and alter standards currently in place where such proposals would likely have a negative impact on employees and employers alike.

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