

New Law Gives Employees More Time to File Wage Discrimination Claims

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On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The Act overturns a 2007 decision by the U.S. Supreme Court that the time limit for filing a charge of pay discrimination begins when the employer makes the decision that results in the wage difference. That time limit is 300 days in most states, including Colorado, but only 180 days in states which do not have their own laws and agencies prohibiting employment discrimination.

In the Supreme Court case, which was brought by Lilly Ledbetter against Goodyear Tire & Rubber Co., the Court ruled that Ms. Ledbetter was too late in filing her charge of discrimination, even though she had continued to receive lower paychecks within the 180-day period before she filed her E.E.O.C. charge. The Supreme Court ruled that the alleged discriminatory act was the employer's decision regarding the pay differential, and the ongoing effect of that decision on each paycheck received by Ms. Ledbetter did not restart the clock for filing an E.E.O.C. charge. This ruling followed previous Supreme Court decisions, not involving compensation, that the time limit begins to run when the discriminatory decision is made, not when its effects are felt.

Congress has now reversed the Court's ruling as to claims of discrimination in compensation. A pay discrimination charge now will be timely if it is filed within 180/300 days after: (i) the decision is made; (ii) the individual becomes subject to the decision; OR (iii) when the individual is affected by the decision, including each time wages, benefits, or other compensation is paid resulting from that decision. For employers, this presents a significant new risk of liability for decisions made far in the past.

For example, an employer may have decided in 1995 that a female employee should receive a lower raise than a male employee in the same position because of differences in their job performances. If both employees then received annual 5% pay increases, the female employee can still sue for pay discrimination in 2009 (as long as she files an E.E.O.C. charge within 180/300 days of her last paycheck), because she will still be making less money than the male employee as a result of that 1995 decision. By the time suit is filed, the supervisors who based the 1995 pay decision on performance differences may be long gone, and it may be very difficult for the employer to show that the decision was made for lawful, nondiscriminatory reasons.

Employers wanting to protect themselves from claims based on decisions made many years earlier

should consider two courses of action. First, looking prospectively, employers should more carefully document the nondiscriminatory reasons for any compensation decisions which adversely affect, or in the future might adversely affect, any employees in a protected group. Second, to help protect against claims based on pay decisions already made, employers may want to undertake a careful review of their compensation rates now in effect to identify and remove any pay differentials that cannot be supported by good evidence of nondiscriminatory reasons. If a pay differential is removed, the employer should then be protected if the employee does not file a charge within the following 180/300 day period.

Although an employee might be able to sue in 2009 based on a pay decision made in 1995, as discussed above, liability does not extend back that far. Employees can only recover back pay for the two-year period preceding the filing of an E.E.O.C. charge. Also, charges based on discrete discriminatory acts not involving compensation must generally still be filed within the 180/300 day period following the decision itself, even if the effects of that decision continue to be felt by the employee for a long time afterwards.

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