

# THE DAILY RECORD

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## CivilLITIGATION

### Unequal pay litigation revitalized

According to the U.S. Census Bureau, women now earn 78 cents for every dollar earned by a man.

That statistic indicates roughly a half-penny-per-year increase — totaling 19 cents — in the 44 years since the Equal Pay Act passed in 1963, when women earned 59 cents for every dollar earned by a man.

The remedies for disparate pay available under the Equal Pay Act and other anti-discrimination statutes such as Title VII of the Civil Rights Act simply have not served as catalysts to closure of the wage gap between the sexes or any other protected groups.

In an effort to improve the efficacy of disparate pay claims, on Jan. 29, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which amends Title VII of the Civil Rights Act, as well as the Age Discrimination in Employment Act and Americans with Disabilities Act to ease the statute of limitations requirements for compensation discrimination claims.

The Ledbetter Act overturns the much publicized U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that an affected employee must file a charge of discrimination in pay within 180 or 300 days (depending on whether their state has an agency with jurisdiction over employment discrimination claims) of the actual alleged discriminatory decision. The Ledbetter Act allows an employee to file a charge of discrimination in pay within 180 or 300 days of the date the employee is affected by a discriminatory wage decision or practice. Because an affected employee arguably is affected by a discriminatory wage decision or practice every time a paycheck is received, employers now are subject to claims that previously were time-barred.

Although the Ledbetter Act, which is retroactive to May 28, 2007 (the date the decision in *Ledbetter* was handed down), limits potential awards of back pay to two years, employers may find themselves accountable for pay decisions or practices instituted many years ago.

Not surprisingly, the Ledbetter Act already has spawned a rash of new lawsuits and a resurrection of previously dismissed disparate pay claims. Whether the trend is here to stay remains to be seen.

Two recent decisions potentially signal a wave of litigation based on promotion and bonus-related decisions. On Feb. 2, the U.S. District Court for the Middle District of Florida issued a

decision in *Bush et al. v. Orange County Corrections Department*, which found that plaintiffs' wage discrimination claims, based on demotions that occurred 16 years before the complaint was filed, no longer were barred for untimeliness. Although the court also ruled that the plaintiffs' claims failed on the merits, its interpretation of the Ledbetter Act as applied to promotion decisions could be significant.

Likewise, on Feb. 4, the U.S. District Court for the District of New Jersey issued a decision in response to the court's own motion in *Gilmore v. Macy's Retail Holdings* to reconsider its earlier decision to dismiss all but one of the plaintiff's disparate treatment claims in light of the passage of the Ledbetter Act. That court ruled that, although the claims were dismissed properly for lack of evidence, the Ledbetter Act nevertheless applied to the surviving compensation claim based on an allegedly racially discriminatory decision not to provide bonus opportunities to the plaintiff. The decision will increase the potential back pay the plaintiff may recover.

The U.S. Supreme Court will be examining a case to determine the applicability of the Ledbetter Act. In *AT&T Corp. v. Hulteen*, No. 07-543, the U.S. Supreme

Court recently approved a request from a group of female AT&T employees to file a supplemental brief regarding the issue of whether the Pregnancy Discrimination Act may be applied retroactively in light of the of the Ledbetter Act after oral arguments were held on the issue in December 2008. The high court also is permitting AT&T Corp. to file a supplemental brief. The disparate pay claims asserted by the group of employees are based on the theory that they are being shortchanged on pension benefits because they were penalized for taking maternity leave more than 30 years ago, just prior to the enactment of the Pregnancy Discrimination Act.

The employees argue that the Ledbetter Act is applicable because they are being affected adversely in their pension benefits by discriminatory decisions made decades ago. AT&T Corp. argues that the Ledbetter Act is applicable only to conduct that was illegal when it was taken — in this case, the discriminatory pay decision was permissible at the time it was made.

Most legal experts agree that the Supreme Court likely will remand the case to the Ninth Circuit for further proceedings to determine what effect, if any, the Ledbetter Act should have on

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the parties' claims.

Although the impact of the Ledbetter Act on unequal pay claims already is significant, such impacts undoubtedly will be dwarfed by the Paycheck Fairness Act — H.R. 12, S.182, 111th Congress — should it become law, which many agree is probable.

The Paycheck Fairness Act would amend the Equal Pay Act to allow for compensatory, punitive damages, and opt-out class actions. The Paycheck Fairness Act also would bar retaliation against workers for sharing information about wages with one another and narrow available defenses to employers. The Act's

passage could unleash a flood of class action litigation that would rival the surge of wage-and-hour class action litigation seen in recent years.

The Ledbetter Act and the Paycheck Fairness Act (if it passes) have and will continue to change the practice of employment discrimination law. Whether the laws ultimately will prove to be effective tools for plaintiffs and achieve the Congress's intended goals remains to be seen.

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