

# ALERT

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## ADJUSTING TO THE LEDBETTER FAIR PAY LAW

It has been just over 4 months since President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (the “Act”). Court decisions are already citing to the Act, and a body of interpretative law is starting to be developed. Is your company best positioned to avoid exposure under the Act?

The Act was created in response to the United States Supreme Court’s May 29, 2007, decision in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, the Court ruled that a discrimination charge had to be filed within 180 days (or 300 days in some jurisdictions) of when a discriminatory pay decision was initially made. Many claimants were unable to promptly bring pay discrimination challenges because they were not aware of the discriminatory nature of the pay decisions until many months or years later, thus missing the short deadline. The Act restores the pre-*Ledbetter* position of the Equal Employment Opportunity Commission that the 180 (or 300)-day deadline to bring a pay discrimination claim starts anew each time a pay or benefits check is issued, irrespective of when the initial pay or benefits decision was made. Thus, an employee hired 15 years ago could bring a discrimination charge now alleging that her starting pay, and each subsequent pay check, was tainted by discrimination. The Act applies to pay discrimination based on sex, race, color, national origin, religion, disability or age and is retroactive to May 28, 2007.

For employers, the Act creates the likelihood of legal challenges to paychecks issued now that are based on pay decisions made years ago. Because most companies do not retain wage records more than a few years, and often do not retain underlying pay-justification documents at all, successfully defending a *Ledbetter* challenge may be extremely difficult, if not impossible.

Practical tips to avoid liability following *Ledbetter*:

1. Audit your pay documentation. Are you maintaining underlying documents that support the pay decisions you are making? Could you convincingly explain to a jury why Bob deserves to be making \$20 more per hour than Sue for the same position and work? Do you have objective documents to support the explanation, such as detailed, candid performance evaluations or documents showing the economics of the relevant labor markets at the time of hire?
2. Revisit your document retention practices. Employers should balance the risk of being without wage records needed to defend pay decisions versus the expense, logistics, and legal risk of keeping records for a long period. Some legal experts suggest keeping all pay and benefits records indefinitely, at least until further guidance is offered by the courts and EEOC. As a practical matter, keeping wage records during an employee’s employment and for 4 years thereafter may be sufficient.
3. Create written, objective criteria and pay scales for starting wages and all promotional and merit pay wage increases, and apply them consistently. Utilizing pay scales will compress and standardize the wages within a particular job class, thereby eliminating wages that could be deemed discriminatory.

4. Limit individual discretion by making sure that no single person has the ability to make pay decisions without feedback and oversight by others, such as a Compensation Committee. Pay decisions should receive the same heightened scrutiny as termination decisions.
5. Train supervisors, managers and hiring personnel about Ledbetter, any adopted pay criteria and pay scales, as well as the need for candid and thorough performance evaluations that support pay decisions. Ensure that they are documenting all reasons for compensation decisions.
6. Conduct a statistical and legal analysis of compensation data to see how your company currently stacks up. Are there any statistical disparities across race, gender, age or other protected lines? If so, is there a legitimate non-discriminatory defensible explanation, such as location, education or experience? If disparities exist and cannot be justifiably explained, the company should consider appropriate wage adjustments to eliminate any disparities. By using counsel to conduct a wage audit, the attorney-client privilege should attach and protect the statistics generated and conclusions reached.

The employment law team at McAngus Goudelock & Courie can assist you with these and other steps to avoid pay discrimination liability. Please contact Kris Cato at 803-227-2277 or [kcato@mgclaw.com](mailto:kcato@mgclaw.com); Amy Jenkins at 843-576-2917 or [amy.jenkins@mgclaw.com](mailto:amy.jenkins@mgclaw.com); Edward Rawl at 803-227-4930 or [erawl@mgclaw.com](mailto:erawl@mgclaw.com); or Tracey Downs at 704-405-4648 or [tracey.downs@mgclaw.com](mailto:tracey.downs@mgclaw.com) to assist you to prepare and plan proactively for your company's future.

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