

Ledbetter Act – Assessing Your Risks

On January 29, 2009, the Lilly Ledbetter Fair Pay Act was enacted. The details of the Act are provided at the end of this update.

On March 11, 2009, the U.S. Equal Employment Opportunity Commission announced that workplace discrimination charges filed with the federal agency nationwide soared to an unprecedented level of 95,402 in fiscal year 2008 (which ended on September 30). This represents a 15 percent increase from the previous fiscal year.

Putting Things in Perspective

The new Ledbetter Act raises many questions for human resources professionals about the need to conduct pay audits and/or review pay practices that may adversely impact employees based upon legally protected characteristics. Each organization should assess the fairness and consistency of its pay practices and evaluate potential vulnerabilities for compensation discrimination claims. In particular, employers should look for seemingly neutral pay practices and procedures that have a disparate impact on employees in protected categories.

A full-blown pay audit or statistical analysis of your organization's compensation practices might be an ideal approach to determine if you have discrimination issues but may be perceived as impractical given the cost, time and data requirements necessary to conduct a study.

There are less costly and time-consuming initial steps you can take to minimize your organization's legal exposure to discrimination claims. Start with a

basic review of your policies and procedures for determining compensation. It's quite possible your organization has guidelines or policies for setting hire-in rates for non-management or at least non-exempt employees. You may also have policies and processes for determining market adjustments and merit wage increases. Such standards should make clear that pay decisions must be made without consideration of race, color, national origin, sex, religion, age, or disability.

Guidelines alone cannot protect your organization from discrimination claims. Your vulnerability increases if front-line managers have wide discretion in granting exceptions and deviations. Standards for determining compensation, in all cases, should be based on objective and quantifiable measures that are applied consistently throughout your organization. And these need to be supported by reliable documentation.

Where Are You Vulnerable?

It's important to remember that the Ledbetter case involved a charge of gender discrimination at a management level—where starting pay or promotional increases are often negotiated. Research has demonstrated that individuals from different cultures may not negotiate in the same way as others e.g., women may not negotiate as effectively as men. Therefore, outcomes of these negotiations may produce unintended disparities in salaries. In the healthcare environment, which tends to employ more women and a growing percentage of people in protected categories, this issue presents significant risk.

Of course, there are a number of defensible reasons for pay differences, such as experience, tenure, education, and scope of responsibility, all of which are concrete and typically well documented. Performance can be another factor if it is objective and well documented. If you are like many HR professionals, however, you may not want to rely on performance reviews. All too often poor performance isn't well documented or communicated. Consider the following case study.

Mary had been the accounting manager at XYZ for 25 years and had just not kept up with changes in the organization or her profession. In fact, she wasn't a fully functioning accounting manager any longer, so XYZ didn't adjust her pay in keeping with the competitive market, and the issue of performance or pay suppression was never communicated to Mary. In fact, her performance reviews generally rated her good to excellent.

Once she retired, the organization hired Bob, a truly competent accounting manager, and paid him more than Mary, in line with the competitive market, despite his fewer years of experience.

The ensuing discrimination suit was ultimately settled in Mary's favor.

What Should You Do?

- Establish clear and objective standards for determining pay and benefits that ensure fairness and consistency across your organization.
- Provide training for directors, managers and supervisors involved in performance and compensation-based decisions regarding your organization's standards and associated risks of discrimination claims.
- Develop procedures that provide for secondary review of decisions affecting pay and benefits.
- In conducting compensation analyses or audits, look for patterns:
 - Compare hire-in rates for protected classes to market norms.
 - Compare promotional and/or merit increases for similar jobs.
 - Identify whether there are unintended adverse impacts on protected employee groups.
- In situations where pay or benefit decisions result in an adverse impact on employees in a protected category, conduct a more detailed analysis to assess the business needs associated with the particular decision.
 - To perform detailed audits, you will need to conduct a multiple regression analysis.
- In performing assessments, whether internally through HR or with a third party, consider involvement of legal counsel.
 - This is particularly important to create an attorney-client privilege regarding the findings.
- Reevaluate policies and procedures for retention and electronic retrieval of documentation supporting decisions and processes used in determining hire-in rates, benefit changes, market-based and performance-based increases.

- Such policies and procedures should fit the culture and resources of your organization, while providing sufficient defense for challenges to compensation-based decisions that may arise long after the actions have been taken.

The Ledbetter Act, by drawing attention to issues of pay discrimination and extending the filing time for claims, may increase the risk of discrimination claims. Employers now face special challenges in gathering evidence to defend against discrimination lawsuits involving events/decisions occurring years before a claim is made. The statute of limitations for claims

varies by employer and state. It is therefore best to determine the time period during which you need to maintain documentation based on your particular circumstances.

By reviewing and revising, as needed, your policies and procedures for determining pay and benefits, you can limit your organization's legal risks and ensure greater consistency in your compensation program.

If you'd like to learn more about best practices related to compensation and benefit program design and management, or on conducting audits, please contact your SullivanCotter consultant.

The Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act of 2009 (Public Law No. 111-2) ("the Act") reverses the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which found that a charge of compensation discrimination must be filed within 180 days (or 300 days in jurisdictions with a state or local discrimination referral law) of when discrimination first occurred. The major objective of the Act is to restore the pre-Ledbetter position of the Equal Employment Opportunity Commission (EEOC) that discrimination occurs each time a paycheck is issued, regardless of when the discrimination first occurred.

Under the Act, an individual subjected to compensation discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, or the Rehabilitation Act of 1973 may file a charge within 180 (or 300) days of any of the following:

- 1 when a discriminatory compensation decision or other practice affecting compensation is adopted;
- 2 when the individual becomes subject to a discriminatory compensation decision or other practice affecting compensation; or

- 3 when the individual is affected by the application of a discriminatory compensation decision or other practice, including each time the individual receives wages, benefits or compensation that is based in whole or in part on such compensation decision or other practice.

The Act has a retroactive effective date of May 28, 2007 and applies to all claims of discriminatory compensation pending on or after that date. Employees can seek back pay and other relief for up to two years prior to the filing of a charge.

The Act leaves unanswered questions, such as whether non-employees (e.g., spouses and heirs of former employees) can assert claims and whether the law covers employment decisions that indirectly affect compensation, such as promotions, transfers and terminations.

In a related matter, the Act did not modify the Equal Pay Act. The House version of the law, known as the "Paycheck Fairness Act," would have also amended the Equal Pay Act, but this version was not adopted in the final Act. This much more expansive change to the law may, however, be enacted later this year.

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