Lilly Ledbetter: A Look at Her Impact on Pay Equity and What Employers Need to Know About Equal Pay

By MEETA T. DAMA

Nine years after the Lilly Ledbetter Fair Pay Act was signed into law, pay equity remains a hot topic. The recent national #MeToo movement not only triggered a nation-wide discussion about sexual assault and harassment in the workplace, it also created a demand for more transparency in the workplace and pushed equal pay back in the spotlight. While pay equity and sexual harassment are separate issues, the attention being paid to both stem from the same conversations happening across the country. In January 2018, the #TimesUp movement and legal defense fund were started by a group of women in Hollywood to address harassment and safety in the workplace, as well as equality. News headlines followed highlighting the difference in the amount female actresses were paid compared to their male counterparts for equal work.

Today, headlines continue to feature equal pay actions filed across the country against employers in a variety of industries. In the nine years since the enactment of the Lilly Ledbetter Fair Pay Act, employees continue to push for equal pay, both inside and outside of the legal system.

Ledbetter v. Goodyear Tire & Rubber Company

Lilly Ledbetter worked for Goodyear Tire & Rubber Company's plant in Gadsden, Alabama from 1979 until 1998 as an overnight shift supervisor. When Ms. Ledbetter was hired, Goodyear paid all its managers the same rate. At some point during Ms. Ledbetter's tenure, however, Goodyear moved to a performance-based compensation system for managers and forbid Ms. Ledbetter and other managers to discuss their pay rate. After working for Goodyear for 19 years, Ms. Ledbetter received an anonymous note revealing that despite years of positive performance reviews, she was being paid thousands of dollars less than her male colleagues with similar responsibilities, seniority, and experience. Specifically, at the end of the two-decades she spent working for Goodyear, Ms. Ledbetter earned $3,727 per month while the lowest-paid male area manager received $4,286 per month and the highest-paid male received $5,236. In other words, her salary was between 15 and 40 percent lower than her male counterparts. Armed with this information, Ms. Ledbetter filed a charge of discrimination with the Equal Employment Opportunity Commission alleging sex discrimination concerning the disparity in her pay.

Ms. Ledbetter's resulting legal battle took her all the way to the United States Supreme Court. The central issue in Ms. Ledbetter's equal pay case was the timing of her claim because she did not become aware of the difference in pay until she was nearing retirement. In 2007, the U.S. Supreme Court held that for the purposes of the 180-day time period to make a complaint of employment discrimination based on unequal pay, the clock started ticking on the day the employer makes the relevant wage decision, not the day the wage is paid. Therefore, the U.S. Supreme Court held that Ms. Ledbetter could not challenge pay decisions that occurred years ago and could only challenge decisions regarding her pay made within 180 days of the filing of her charge of discrimination.

The Lilly Ledbetter Fair Pay Act

In response to the U.S. Supreme Court's decision, the Lilly Ledbetter Fair Pay Act was signed into law in 2009. The Act allows workers to file suit 180 days after the last pay violation and not 180 days after the pay decision causing the pay disparity. The law overturned the U.S. Supreme Court's ruling in Ms. Ledbetter's case and effectively makes it illegal each time an employer writes a paycheck that fails to provide equal pay for equal work. Thus, with each paycheck, the clock restarts and the employee is given a new 180 day period within which to challenge pay decisions that impacted the amount of the paycheck.

The Significance of the Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act was a significant step in addressing pay disparity. The Lilly Ledbetter Fair Pay Act clarified the time frame within which a federal complaint could be made to recover lost wages. In doing so, the Act increases the potential liability employers may face in equal pay claims. The longer time frame has significant consequences for a single employee complaining of unequal pay, and exponentially increases the stakes in collective actions for pay violations brought on behalf of "similarly situated" employees. Since the Lilly Ledbetter Fair Pay Act was enacted, there has been a significant increase in collective actions filed by female employees who assert that they are paid less than their male counterparts.

The Lilly Ledbetter Fair Pay Act was also a symbolic statement reflecting the popular sentiment that unequal pay would not be tolerated. In the years since the Lilly Ledbetter Fair Pay Act was enacted, several states have followed suit to pass broad legislation directed at closing the gender pay gap. Pay equity legislation varies greatly at the state level. Several states prohibit employers from inquiring about a prospective employee's salary history. Other state laws and precedent from the National Labor Relations Board restrict the rights of employers to maintain policies that prohibit employees from discussing or disclosing their salary information with their coworkers, similar to the policy Ms. Ledbetter encountered. Damages available to plaintiffs under state laws are comparable to those available under federal law, and in some instances more generous.

Even where there is no state-level pay equity legislation, employers should be aware that previously acceptable justifications for wage differentials between male and female employees are coming under scrutiny by courts as public sentiment shifts. For example, in a strongly-worded decision by the United States Court of Appeals for the Ninth Circuit published on April 9, 2018, the court found that that a worker's prior salary, alone or in combination with other factors, cannot be used to justify a disparity between male and female employees' wages. *Aileen Rizo v. Jim Yovino,* Case No. 16-15372 in the U.S. Court of Appeals for the Ninth Circuit. As the nation-wide discussion about workplace equity continues, management decisions will continue to undergo additional scrutiny as demands for more transparency in the workplace increase.

Looking Ahead

Going forward, pay equity will continue to be a hot topic. Both the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance Programs have indicated that review of pay related employment practices will be a priority in the coming year. The ongoing spotlight on gender issues in the workplace is likely lead to increased complaints and litigation concerning pay equity in the workplace. As employees see discussions of wage gaps in the news, they are more likely to raise these issues in the workplace. Human resources departments and employers need to be ready for that discussion.

Employers should consider undertaking a proactive, pay equity analysis to ensure their practices are compliant with the law and that they are prepared to defend against potential claims of discrimination. In doing so, companies should analyze data not only by gender, but also by race, disability and other protected categories. A pay equity analysis should include a comparison of job duties, responsibilities, and the entire compensation package. Employers should consider consulting an attorney to design an audit that evaluates each of the relevant factors in their jurisdiction and to allow an attorney to conduct the internal audit so that the results and analysis of the audit remain privileged.

Employers must be able to provide legitimate factors to explain disparities in pay such as qualifications, skills, education, merits, or other factors. Companies may need to make corrections, where appropriate, to address any unexplained pay disparities and modify existing compensation policies and procedures to prevent future pay disparities. In some instances, evidence that an employer conducted an internal audit and engaged in reasonable efforts to correct unexplained pay disparities can be used as a defense to pay disparity claims.

Following an audit, companies should provide decision makers with guidelines on determining the pay of their employees, coupled with an approval process or other oversight, to help reduce or eliminate pay disparities that cannot be explained for employees performing equal or substantially similar work. Human resources and management level employees need to understand pay equity and the requirements of all applicable state and federal laws. In addition, they need the tools to engage in a thoughtful and careful investigation of claims of unequal pay to evaluate the basis of any disparity and avoid a claim of retaliation. Documentation of any resulting discussion, investigation, and consideration of an equal pay complaints is vital to ensure equal treatment and to reduce the likelihood of prolonged litigation.

Employers may also choose to review their company culture to evaluate whether it promotes equal pay for equal work. This may include a review of employment applications and employment policies, as well as training for management level employees.

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