



Ten Years After Ledbetter - Why Employers Need to Worry about Gender Pay Equity

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Almost ten years to the day after the Lilly Ledbetter Fair Pay Act of 2009 went into effect, Congress may be working towards another development in pay equity. On January 30, 2019, House Speaker Nancy Pelosi announced the reintroduction of the Paycheck Fairness Act. Originally introduced back in 1997, the proposed Paycheck Fairness Act represents an attempt to close any gender earnings gap that may still exist more than 50 years after the Equal Pay Act made pay disparities on the basis of gender illegal. While previous iterations of the Paycheck Fairness Act have passed a Democrat-controlled House of Representatives, none of the proposed versions have been able to overcome Republican majorities or filibusters in the Senate. The current bill was introduced in the House by Representative Rosa DeLauro, D-Conn., and in the Senate by Senator Patty Murray, D-Wash. The bill has 240 co-sponsors in the House, and 45 co-sponsors in the Senate. There is little indication, however, that any Republican Senators will cross party lines to enact this Congress's proposed legislation.

History of Equal Pay Laws

A precursor to the wide-sweeping Civil Rights Act of 1964, President John F. Kennedy signed the federal Equal Pay Act ("EPA") into law in 1963. The law made pay disparities between women and men who perform the same work illegal. Specifically, the EPA requires that employees who perform substantially equal work in the same establishment for positions that require equal skill, effort, and responsibility and are performed under similar working conditions must be compensated equally. Pay equity includes not only base wages, but also bonuses, benefits, overtime pay, etc. Many states have their own laws that mimic the federal EPA, and some go further by requiring even more stringent justifications for pay differences between men and women.

In the 2007 case of *Ledbetter v. Goodyear Tire and Rubber Company*, the Supreme Court interpreted the EPA's statute of limitations in a way that would have precluded many claims under the EPA. The EPA requires employees to file suit within 180 days of an alleged discriminatory act. In *Ledbetter*, the Court held that the 180-day period ran only from the first day the discriminatory pay decision was made. Under that ruling, any employee who did not discover discriminatory pay within six months could no longer bring suit under the EPA. Ms. Ledbetter, who worked for Goodyear for nearly 20 years before learning that her male counterparts were being paid between 15 and 40 percent more than her, was denied relief on the grounds that she failed to file a timely claim. The decision created a difficult hurdle

for challenging pay decisions in the requisite time period when the employee is not aware of the differences in pay, particularly because many employers discourage their employees from discussing wages with their co-workers.

In 2009, President Obama signed the Lilly Ledbetter Fair Pay Act. The Act revised the interpretation of the EPA's statute of limitations, effectively mooting the *Ledbetter* decision. Under the 2009 Act, each paycheck that reflected an earlier discriminatory pay decision renewed the statute of limitations. Accordingly, an employee like Ms. Ledbetter, who was receiving less pay than her male counterparts for the same work, could sue within 180 days of any paycheck that was the result of an earlier discriminatory decision. The Act essentially restored the prior position of the Equal Employment Opportunity Commission that each paycheck delivering discriminatory compensation is an actionable wrong, regardless of when the discrimination began.

The Paycheck Fairness Act of 2019

The Paycheck Fairness Act is intended to provide added protections in areas not addressed by the EPA. These include allowing workers to sue for damages in cases of pay discrimination, providing more training for employers on collecting pay gap information and eliminating pay disparities, prohibiting employers from inquiring about salary history with applicants, banning salary secrecy, and increasing penalties for employers who retaliate against employees for sharing wage information with their co-workers. Ledbetter, now an activist for wage equity, has pushed for the law along with a wide range of unions, women's groups, and a sizable group of Democratic lawmakers.

The potential success of the bill appears to come down to party politics. Although many Democrats continue to push for the passage of the Paycheck Fairness Act, many Republicans have raised concerns that the bill would increase litigation by making it too easy to sue an employer and actually discourage employers from hiring women to prevent potential exposure to litigation. With some limited exceptions, votes on previous versions of the Act have gone along party lines.

The Gender Pay Gap Today

While women's earnings as a percentage of men's have risen over the last several decades, certain statistics make clear that an earnings gap still exists. The extent of the gap varies, but it exists in most industries, across all educational levels, and in every state in the country, ranging

from Vermont, where, according to the U.S. Bureau of Labor Statistics in 2016, women's earnings were roughly 90% of men's earnings, to Utah, where that number was below 70%.

Opponents of the Paycheck Fairness Act point to research indicating that factors other than gender contribute to a difference in earnings between men and women. For instance, different occupational patterns and the impact of decisions related to caregiving for dependents also create discrepancies in earnings between men and women in the workforce. Proponents' response to that point is that the provisions of the legislation that prohibit inquiring about pay history and banning salary secrecy are designed to not only correct any intentional gender discrimination that occurs, but also some of the other factors that lead to unintentional systemic discrimination.

Advice to Employers

The contentious debate over equal pay has existed for decades and will likely continue into the foreseeable future. Regardless of whether the Paycheck Fairness Act passes this year, employers should recognize the importance of and heightened attention to gender pay equity issues. Employers are advised to proactively examine their compensation practices to find and remediate any illegitimate pay discrepancies. If an employer discovers different compensation for employees who perform the same job that cannot be justified by factors such as education, seniority, experience, or responsibility, the employer should take steps to correct these disparities. Because pay equity is an ongoing issue, employers should frequently conduct internal audits to identify any potential areas where pay disparity may exist. The need for ongoing

review is of particular importance since the passage of the Lilly Ledbetter Fair Pay Act, because the discriminatory decisions of predecessors may be the subject of future liability for an organization until any pay discrepancy is corrected. One action that no employer should take in response to any changes in pay equity laws is to hire fewer women in an attempt to avoid exposure to pay-disparity litigation. Such a policy would be in clear violation of Title VII of the Civil Rights Act of 1964.

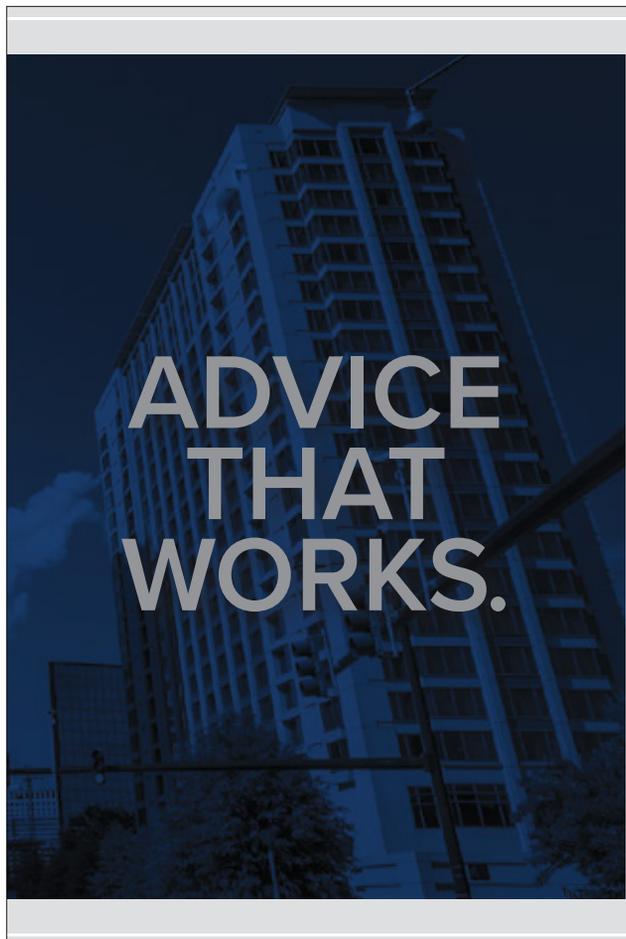
Even though it appears that the current iteration of the Paycheck Fairness Act is unlikely to be enacted in the near future, employers should be aware that many of the proposed protections, in particular prohibitions on asking about salary history, have already been made law in several states. Employers who wish to maintain best pay equity practices and legal compliance in their state should consult with an attorney. Furthermore, any decision-makers within a company should be consistently trained on how to make appropriate pay decisions.



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