

Compensation Claims in Wage-Hour Litigation

Labor & Employment Law Seminar
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A Changed Landscape for Employers:



The Ledbetter Fair Pay Act

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Lilly Ledbetter Fair Pay Act of 2009

- Overturns *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618 (2007)
- Amends Title VII, ADEA, ADA, and Rehabilitation Act
 - ***Each allegedly discriminatory paycheck triggers a new 180/300 day filing period***

The Ledbetter “Issue”

- Prior to the Ledbetter decision in the Supreme Court, there were two competing approaches to the Title VII statute of limitations for compensation discrimination claims
- In *Bazemore* (1986) the Supreme Court suggested that each paycheck is a new violation
- But in *Evans* (1977), *Ricks* (1980) and *Lorance* (1986) the Court said claims must be filed within 300 days of the original discriminatory act

The Ledbetter “Issue” (cont.)

- So, if a discriminatory decision was made in 1978, and it resulted in lower pay in 2008, was there a claim in 2008?
- Under *Bazemore*, yes, because the paycheck in 2008 was a violation
- Under *Evans/Ricks/Lorance*, no, because the original discriminatory act in 1978 was outside the statute of limitations and nothing new happened in 2008

The Ledbetter “Issue” (cont.)

- In the Ledbetter decision in 2007, the Supreme Court resolved the issue in favor of the *Evans/Ricks/Lorance* approach
- Ledbetter had argued that discriminatory performance reviews years ago had resulted in lower current pay
- The Supreme Court adopted the *Evans/Ricks/Lorance* view, said each paycheck is *not* a new violation, and rejected Ledbetter’s claim because the discriminatory performance reviews were more than 300 days before she filed her lawsuit.

The Ledbetter Fair Pay Act

- The new legislation, the Ledbetter Fair Pay Act (“FPA”), explicitly overturns the Supreme Court decision
- Under the FPA, every paycheck is a new violation
- The law is retroactive to the date of the Ledbetter decision, and amends Title VII, the ADA and ADEA, and the Rehabilitation Act

The Ledbetter Fair Pay Act (cont.)

- It is important to note that the FPA is not limited to “pure” compensation, but extends to “practices” that “affect” compensation or benefits
- The FPA does not resurrect acts that were **completed** in the past—there must be a *current* effect
- The FPA does not permit unlimited recovery—recovery is limited to two years

FPA Examples—Number One

- Assume Employer followed a policy of paying women less than men for a specific job A
- Assume the policy was in place from 1960 until 1975
- Assume that in 1975, Employer adopted a completely neutral rule—all employees in A received the same 3% raise every year
- Jane Doe worked for Employer from 1972 until 2006 and then retired—does she have a claim under the FPA?

FPA Examples—Number One (cont.)

- No, she doesn't
- The policy does indeed create a present disparity between men and women
- Applying a neutral percentage to already discriminatory wages will *increase* the disparity
- But Jane's last discriminatory paycheck was more than 300 days ago—her claim is time-barred under the FPA

FPA Examples—Number One (cont.)

- But Jane's colleague, Becky Roe, is still employed and started work during the discriminatory period in 1968
- Becky has received the same raise as male employees in job A since 1975, but because she started behind, she is way behind today
- **And because every paycheck is a new violation, she has a timely claim today and could recover for the past two years of wage disparity**

FPA Examples—Number Two

- Assume Employer followed the same discriminatory policy until 1975, but in that year completely revamped its compensation system
- In the new system, pay between men and women was fully equalized
- A new performance evaluation system was instituted, and all pay from 1975 on was based on performance reviews
- Do Jane or Becky have claims if their pay was lower after 1975?

FPA Examples—Number Two (cont.)

- Jane's claim is still time-barred for the same reason
- Becky now has no claim based on the old discriminatory system, because her current paychecks are not based on the past discriminatory acts prior to 1975
- She has a claim if she can show that her performance reviews were discriminatory, even if the discrimination was many years ago, but otherwise, she has no FPA claim

FPA Examples—Number Three

- Assume that Employer determined service credit for pension by giving less credit for pregnancy leave than for all other types of leave
- Assume Employer abandoned this policy in 1978 when it was outlawed by the Pregnancy Discrimination Act
- Assume that the employer continues to use the service credit determinations made before 1978 when computing current pension eligibility
- Does a female employee retiring today have an FPA claim if she lost service credit in 1977?

FPA Examples—Number Three (cont.)

- These are essentially the facts of *AT&T v. Hulteen*, which was recently before the Supreme Court
- *Hulteen* was filed before the Ledbetter Act, so the issue originally was largely whether the Pregnancy Discrimination Act was retroactive or not

FPA Examples—Number Three (cont.)

- But the plaintiffs received permission from the Supreme Court to file supplemental briefing based on the FPA
- The FPA forbids “practices” that affect “benefits” so it arguably would extend to discriminatory determinations of service credit
- And because the pension eligibility is determined today, just like a current paycheck, arguably the FPA permits a claim

FPA Implications

- It is far too early to tell what the full implications of the FPA are
- *Hulteen* turned out not to be very informative, but it remains possible that the breadth of the FPA will be stunning
- Employers are therefore strongly considering what assessments of current practices should be undertaken, and what process changes might be wise

Areas of Focus for Prevention

1. Advance planning and managing expectations
2. Actual analysis of compensation results
3. Realistic protection of the analysis
4. Remediation, where appropriate
5. “Process” enhancement to prevent relapse
6. A final word on record and data retention

Advance Planning

- Advise legal counsel, either inside or outside, before commencing any compensation study
- Consider efforts to protect the fact and content of the analysis in the event of litigation
- Consider options for action and their practical feasibility
- Advise high-level stakeholders; make sure there is a consensus on potential action plans
- Make sure you can answer the question: “WHY ARE WE DOING THIS?”

Analysis of Compensation

- Get expert help, either inside or outside the company
- Make a critical assessment of available data—don't commit to an analysis if the lack of data is likely to produce inconclusive or misleading results
- Use your data assessment to determine the proper scope of the study

Analysis of Compensation (cont.)

- In particular, make sure you consider how to group employees in your study
- Balance the need to compare apples to apples with the need to have groups large enough to “compute”
- Consider the appropriate regression variables, in light of both their importance and their availability

Protection: Privilege and Work-Product Doctrines

- Is your study part of a defense in existing or clearly threatened litigation or regulatory action?
- If so, work with counsel to create a record supporting privilege and work-product protection
- **AND DON'T LOSE PROTECTION BY USING THE STUDY CARELESSLY**

Protection (cont.)

- Remember, protection can be lost if study results are
 - Disclosed outside the attorney-client relationship
 - Converted to a non-privileged use
- Be especially careful of
 - Email distribution of results
 - Incorporation of parts of study into presentations
 - Actual use of study for normal business purposes like process improvements

Protection (cont.)

- If there is no litigation or regulatory action extant or threatened:
 - Make sure your study is framed (and documented) as being for the purpose of legal advice
 - The study should be commissioned, overseen by, and delivered directly to counsel (inside or outside)
 - Results should be retained by counsel and shared with management under tightly controlled circumstances

Protection (cont.)

- **Remember!**
 - A study commissioned by an internal human resources or diversity organization just to “see how things look” will NOT be protected
 - This is true even if the HR or diversity concern is compliance with legal/regulatory obligations
 - Note that if you are a government contractor, a special set of OFCCP regulations will be applicable

Remediation

- If you conclude there are compensation differences you can't explain based on neutral factors, what should you do?
- First and foremost, make sure you first determine *the actual scope of the apparent problem*

Remediation (cont.)

- For example, are the significant differences spread uniformly?
- Very unlikely... So, are they concentrated by
 - Job Classification or subclassification?
 - Geography or specific facility?
 - Tenure/experience/seniority?
 - Particular protected classes?
 - Combinations of some or all of these variables?

Remediation (cont.)

- If so, isolate the significant groups for further examination
- Within significant groups, identify outliers that might be affecting the results
- Examine particular outlier circumstances—use individual files and interviews if necessary
- If you can explain the outlier results, you can often clear the group

Remediation (cont.)

- Follow these steps to explain differences in as many significant groups as possible
- If none remain, document results carefully and retain
- If some significant groups remain, pursue and document your action plan

Remediation (cont.)

- Action may involve compensation adjustments, either on-or off-cycle
- Examine raw differences
 - The “Law of Large Numbers”
- Consider the scope of adjustments
 - Are you “going to zero”?
 - Going to “significance”?
 - Going somewhere else?

Remediation (cont.)

- Implementing Compensation Adjustments
 - The “Peanut Butter Spread” approach
 - The “Targeted” Approach
 - The “Pool” Approach

Remediation (cont.)

- Internal Communications Issues
 - The danger of “Stealth”
 - Remediation described in terms of risk management
 - Reverse discrimination concerns

Process Enhancement

- Starting salary
- Promotional Increases
- Annual (or periodic) compensation exercises

Process Enhancement

- Starting salary
 - Be sure written guidelines control process
 - Consider formulas to evaluate and value experience consistently
 - Tie salary offers to existing peer salaries
 - Maintain oversight to compare offers to peers
 - Consider bonus strategies to manage market salary issues

Process Enhancement

- **Promotional Increases**

- Be wary of straying from existing classification matrices
- Require management review of promotional increases for consistency
- Where variations occur, document the reasons

Process Enhancement

- **Annual or Periodic Compensation Adjustments**

- Be sure written guidelines control the process
- Incorporate performance review data
- Consider “real-time” reviews of protected class impacts
- Document any variation from the formula-driven results

A Few Words on Records and Data

- Record retention is an extensive topic unto itself and beyond our current scope
- Assuming pay and job classification data is already being routinely retained, what useful information might your company *not* be collecting?

Records and Data (cont.)

- **Starting salary information**
 - Do you collect, in electronic form, any information about relevant prior experience of applicants to whom offers are made?
 - Do you collect, in electronic form or *any* form, information about salary negotiations?
 - Do you collect information about peer salaries?

Records and Data (cont.)

▪ Annual Salary Exercises

- Do you collect and retain information explaining the basis for annual salary increases and bonus payments?
- Do you collect and retain performance review data utilized in compensation review?
- If higher management makes final adjustments to a proposed compensation plan, is the rationale for those adjustments captured and retained?

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