



U . S . S E N A T E R E P U B L I C A N P O L I C Y C O M M I T T E E

Legislative Notice

No. 1

January 14, 2009

S. 181—Lilly Ledbetter Fair Pay Act of 2009

Calendar No. 14

S. 181 was read twice and placed on the Calendar on January 9, 2009.

Noteworthy

- Cloture was filed on the motion to proceed to S. 181, the Lilly Ledbetter Fair Pay Act of 2009, on January 13, 2009. A vote on the motion to proceed is expected to occur on Thursday, January 15, 2009.
- No Senate committee will be able to hold hearings in this Congress before the vote.
- The House of Representatives passed a companion bill, H.R. 11, the Lilly Ledbetter Fair Pay Act of 2009, on January 9, 2009 by a vote of 247-171. H.R. 12, the Paycheck Fairness Act, as passed by the House, was added as a new matter at the end of H.R. 11.
- During the 110th Congress, cloture on the motion to proceed was not invoked by the Senate on a similar predecessor bill, H.R. 2831, by a vote of 56-42 on April 23, 2008.
- The legislation responds to the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618, 127 S. Ct. 2162 (2007).
- Lilly Ledbetter was a Goodyear employee from 1979 to 1998. About the time she retired from the company, she filed a charge with the Equal Employment Opportunity Commission alleging pay discrimination because from time to time over the course of her career she received lower pay increases than male co-workers.
- The Supreme Court ruled that Ledbetter was required to bring suit within 180 days of the act of discrimination (each decision by her employer to pay her less) and rejected her argument that each paycheck should restart the clock with respect to filing her discrimination lawsuit involving events that happened many years prior.
- S. 181 would overturn *Ledbetter* and specify that the statutes of limitations under four discrimination statutes—protecting classes such as age, disability, race, color, religion, sex, and national origin—begin anew each time an individual is compensated (if the compensation was affected), essentially eliminating time limits for many claims.
- S. 181 would also expand the class of potential plaintiffs to anyone “affected by” discrimination. A plausible reading of this language means a spouse or heir who receives pension checks and was not a victim of discrimination would have standing to file a lawsuit.

Background

Discrimination statutes like Title VII of the Civil Rights Act of 1964 (hereinafter referred to as Title VII) reflect a strong public policy preference to resolve employment discrimination allegations quickly and, if possible, through voluntary settlement and cooperation between the employer and the employee, with the Equal Employment Opportunity Commission (EEOC) acting as facilitator. For this reason the statute requires individuals—before filing a lawsuit—to file a charge with the EEOC.¹ Title VII charges must be filed within 180 days (up to 300 days in some states) of an unlawful employment practice.² After a charge is received by the EEOC, efforts are undertaken, for meritorious claims, to avoid the courtroom through discussions and potential settlement. As part of that process, the EEOC works with the employer to facilitate any relevant corrective or preventative action to cure the source of discrimination.³ If efforts to settle the matter fail, then the EEOC can decide to sue or it will issue a notice closing the case, allowing the aggrieved individual to file a lawsuit in court.⁴ These procedures often lead to prompt resolution of claims and quick corrective or preventative actions on the part of the employer.

*Ledbetter v. Goodyear Tire and Rubber Company*⁵ involved Lilly Ledbetter, a Goodyear employee from 1979 to 1998. Near the end of her tenure with the company she filed a charge with the EEOC alleging pay discrimination because from time to time over the course of her career she received lower pay increases than male co-workers.⁶ Ledbetter argued that each paycheck she received constituted an unlawful employment practice and therefore reset the clock with regard to filing a claim under Title VII.⁷

The Supreme Court, relying on Title VII's unique purpose and preference for prompt resolution of claims, held that Ledbetter had to file within the time period after the discrete unlawful practice (in Ledbetter's case the decision to pay her less than her male counterparts because of her sex).⁸

The Court did not address whether a “discovery rule”—a doctrine that delays the statute of limitations from starting until the plaintiff discovers or reasonably should have discovered the injury giving rise to the claim⁹—would be appropriate in Ledbetter's case because she “[did] not argue that such a rule would change the outcome in her case[.]”¹⁰ Indeed, she testified that she

¹ See http://www.eeoc.gov/charge/overview_charge_filing.html (“All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court.”) (visited 1/11/2009).

² See http://www.eeoc.gov/charge/overview_charge_filing.html (“This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law.”) (visited 1/12/2009).

³ See www.eeoc.gov/charge/overview_charge_process.html.

⁴ See http://www.eeoc.gov/charge/overview_charge_filing.html.

⁵ 550 U.S. 618, 127 S.Ct. 2162 (2007).

⁶ See *Ledbetter*, 127 S. Ct. at 2165-2166.

⁷ See *Ledbetter*, 127 S. Ct. at 2167.

⁸ See *Ledbetter*, 127 S. Ct. at 2177.

⁹ See Black's Law Dictionary 7th Ed. 1999.

¹⁰ See *Ledbetter*, 127 S. Ct. at 2177 n.10.

knew she was making less than her male counterparts up to six years before she filed a charge with the EEOC in 1998.¹¹

Legislative History

In the 110th Congress

House of Representatives. H.R. 2831, a bill to overturn *Ledbetter*, was introduced on June 22, 2007, about three weeks after the Supreme Court’s decision. The bill was marked up by the House Committee on Education and Labor five days later. H.R. 2831 passed the House on July 31, 2007 on a mostly party-line vote of 225 to 199.

Senate. The Senate Committee on Health, Education, Labor and Pensions held hearings on S. 1843, the Senate version of H.R. 2831, on January 24, 2008. On April 23, 2008, cloture on the motion to proceed was not invoked on H.R. 2831 by a vote of 56-42. The Senate Judiciary Committee held a hearing on H.R. 2831 and S. 1843 on September 23, 2008.

In the 111th Congress

House of Representatives. H.R. 11, a companion bill to S. 181, passed the House of Representatives on January 9, 2009 by a vote of 247-171. The text of H.R. 12, the Paycheck Fairness Act, was added to H.R. 11 as a new matter after the passage of both bills.

Senate. S. 181 was placed on the Calendar via Rule XIV on January 9, 2009. Cloture was filed on the motion to proceed on January 13, 2009. A vote on the motion to proceed is expected to occur on Thursday, January 15, 2009.

Bill Provisions

Sections 1 and 2. These sections provide a short title of the “Lilly Ledbetter Fair Pay Act of 2009,” and make findings addressing the background for this legislation.

Section 3. This section amends Title VII by explicitly including within the definition of “unlawful employment practice”—the trigger for the statute of limitations to run—“when an individual is affected by application of a discriminatory compensation decision or other practice, including each time ... compensation is paid[.]”

Section 3 overturns the *Ledbetter* decision by resetting the statute of limitations under Title VII each time compensation is paid, if that compensation was less because of the discrete discriminatory practice. So, for example, if an employee alleged that 15 years before filing a charge she received a raise that was less than male co-workers because of discrimination, each

¹¹ See Joint Appendix (JA) filed in the *Ledbetter* case at 233 (“Q: So you knew in 1992 that you were being paid less than your peers? A: Yes, sir.”); See also JA at 231-232.

paycheck since that occurrence would be a new unlawful employment practice and reset the statute of limitations under Title VII. (Under *Ledbetter* the employee would need to file within 180-300 days of the decision to give the raise.)

Section 3 goes beyond overturning *Ledbetter* in two ways. First, it extends the class of plaintiffs to any individual who is “affected by” unlawful discrimination. The language could allow individuals who never were victims of discrimination to become plaintiffs on behalf of others (for example, by allowing a widower to sue on behalf of his deceased wife). Second, Section 3 essentially eliminates time limitations for claims of employment discrimination in many cases because non-pay discrimination claims (including, for example, a wrongful denial of a promotion) often have some effect on compensation. (Under current law the employee would need to file within 180-300 days of the denial of the promotion.)

Section 3 also provides for recovery of back pay for up to two years preceding the filing of the charge if the unlawful employment practices during the charging period were similar or related to the practices that occurred outside the time for filing a charge.

Section 4. This section amends the Age Discrimination in Employment Act of 1967 (ADEA) in a similar manner as the amendment to Title VII.

Section 5. This section amends, in instances in which a compensation claim is brought, the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 in the same manner as the amendment to Title VII.

Section 6. This section indicates that the amendments by the act take effect on May 28, 2007 (the day before the *Ledbetter* decision) and apply to all claims of compensation discrimination under the relevant sections of Title VII, ADEA, ADA and the Rehabilitation Act that are pending on or after that date.

Amendments

Hutchison Alternative. Senator Kay Bailey Hutchison has introduced S. 166, the Title VII Fairness Act, which could act as an alternative. The bill would directly address the issue of concealed discrimination (a major purported reason for S. 181) by codifying the discovery rule that is prevalent in the common law. Under S. 166, the statute of limitations for discrimination cases under Title VII, ADEA, and ADA would commence when the aggrieved person has, or should be expected to have, enough information to support a reasonable suspicion of the discrimination (as long as the aggrieved person can demonstrate she did not have, and should not have been expected to have, enough information to support a reasonable suspicion of such discrimination on the date on which the alleged discrimination occurred). S. 166 would provide a targeted remedy instead of essentially eliminating the statute of limitations in a wide variety of discrimination cases, including those where an employee had information to suspect discrimination but did not file because of a litigation strategy.

Paycheck Fairness Act. Because the House of Representatives already passed the Paycheck Fairness Act (H.R. 12) and it is substantially related to S. 181, it is possible that an amendment to include that legislation, also introduced in the Senate as S. 182, will be offered.

This amendment would amend the Equal Pay Act by permitting compensatory and punitive damages in cases of sex discrimination in the payment of wages and would permit unlimited recoveries for these damages (unlike Title VII which has caps going up to \$300,000). The amendment would also restrict and make it more difficult for an employer to assert defenses and allow a plaintiff to negate defenses if the plaintiff can show a different business practice would work just as well and the employer refused to adopt it.

It would also redefine “establishment” to include workplaces of the employer within the same county and it invites the EEOC to redefine the term again in an even broader way. It also would revise the prohibition against employer retaliation against employees for filing pay claims by also including retaliation for talking about workplace wages.

The amendment would also allow the Secretary of Labor to file suit for additional compensatory and punitive damages when appropriate and require various government agencies to collect, use and disseminate certain employment data.