John Ensign, Chairman
Pamela Thiessen, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

U.S. SENATE REPUBLICAN POLICY COMMITTEE

January 21, 2009

S. 181 Will Endanger Jobs and Damage the Cause of Justice

Trial Lawyer Bailout Bill is Wrong Approach to Protect Employees

Executive Summary

- S. 181, the Lilly Ledbetter Fair Pay Act, is pending before the Senate. Instead of facilitating job growth in a time of economic distress, the bill would actually add burdens on America's employers by restarting the statute of limitations for many discrimination claims any time compensation (affected by discrimination) is paid to an employee.

- The bill would increase employer costs dramatically, especially those of small businesses, leading to more job losses during a down economy.

- S. 181 could allow third parties such as spouses and others who may be affected by the lower compensation to bring a claim (including after the employee's death) even if the employee never thought she was a victim of discrimination. Current law allows only the individual who was discriminated against to file a claim. Without the employee as a witness such cases could be decided on the slimmest of evidence.

- S. 181 would also incentivize employers to either keep excruciatingly detailed employment records, which would be expensive, or stop linking pay to performance, hurting efficiency and making companies less competitive.

- S. 181 could also endanger salary-linked pensions if they are faced with numerous claims.

- S. 181 would allow an employee to sit on a claim as part of a litigation strategy, allowing workplace discrimination to fester even though our discrimination laws are crafted to facilitate early settlement and remediation of discrimination complaints.

- S. 181 would also make the truth more difficult to discover in those cases involving facts from many years, even decades, ago because witnesses can become unavailable, memories can fade, and records may be lost or discarded.

- Senator Hutchison's substitute bill, S. 166, the Title VII Fairness Act, is carefully tailored to protect employees who did not know they were discriminated against, without the negative consequences of essentially eliminating the statute of limitations and harming small and large businesses during a down economy.

Introduction

S. 181, the Lilly Ledbetter Fair Pay Act, would threaten jobs and increase employer costs, allow discrimination to fester, interfere with juries' ability to discern truth, and apply an overbroad approach to the problem of workplace pay discrimination.[1] A substitute amendment offered by Senator Hutchison, on the other hand, carefully protects both employees and employers.

S. 181 Will Threaten Jobs—Increase Employer Costs

With millions of Americans looking for work, encouraging job growth and getting our economy on track must be a top priority. But S. 181 will do nothing to spur economic growth and help create jobs. Instead the legislation would likely hurt the economy and discourage job growth by increasing costs to the employer, including litigation costs, record keeping costs, and, potentially, pension costs.

More Lawsuits, Many of Them Expensive, Would Cost Jobs, Not Create Them

S. 181 would increase litigation costs in several ways. First, it may allow individuals who were never discriminated against to file lawsuits. Second, the more generous statute of limitations may apply even in cases where the employer did not have any intent to discriminate.

A plausible reading of S. 181 would reverse current law that generally does not allow third parties to sue on behalf of an aggrieved employee.[2] S. 181 specifies that an unlawful employment practice occurs when "an individual is affected by application of a discriminatory compensation decision or other practice."[3] That provision could be interpreted to allow spouses and others who may be affected by the lower compensation to bring a claim. One could imagine a scenario of a woman who worked for a company for thirty years and then died, leaving a life insurance award and pension (both linked to her final salary) to her husband or children. The family members could then allege that discrimination caused the final salary, and therefore the linked benefits, to be lower. Even if the woman knew she was not discriminated against and other witnesses were unavailable because of the passage of time, a plausible reading of S. 181 would give the family members standing to sue. Without the employee and other key witnesses to testify, such cases could be decided on the slimmest of evidence. Under this interpretation, a company could face claims by former employees until after the Title VII charging period (180 to 300 days)[4] after it stopped providing benefits to the worker's family.

Additionally, S. 181 would increase litigation costs even in cases where the plaintiff does not allege any intentional discrimination but argues that an employer's neutral policies have a disparate impact on protected classes. S. 181 states that the statute of limitations change applies

[1] For background on S. 181, the Lilly Ledbetter Fair Pay Act, please see the Senate Republican Policy Committee's Legislative Notice, which can be found at: http://rpc.senate.gov/public/_files/L1LedbetterFairPay011409.pdf.
[2] See Employment Discrimination Law, Fourth Edition, Volume II, Lindermann & Grossman, p. 1866 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).
[3] S. 181, Sec. 3.
[4] 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).

generally to "discrimination in compensation."[5] One plausible reading of this language is that the bill would extend the period for filing a discrimination claim based on policies or practices that are neutral on their face but have a disparate impact. As with intentional discrimination under the bill, these claims also could be brought years or decades after the policy or practice was put in place. This is another way in which S. 181 goes beyond one of the major public arguments for the bill, that employers who intentionally discriminate against unsuspecting employees should not be able to hide behind the statute of limitations. An amendment to clarify that the bill applied to intentional discrimination only was rejected during the House Education and Labor Committee markup of a similar bill in the 110th Congress.[6]

Increased Record Keeping Costs and Creating Poor Incentives Would Not Create Jobs

It is instructive to consider how employers would likely react if S. 181 became law. Under current law employers are required to maintain personnel files covering one year, in part because such a time period would include the charging period under Title VII.[7] Instead of keeping records for one year, under the regime envisioned by S. 181 employers would presumably need to keep records on all current and former workers in perpetuity because anyone "compensated" by the company could allege that at some point in time in their career an employer's discriminatory action negatively affected their most recent compensation amount (e.g. salary, pension, health care, etc.). Such an administrative burden would be enormous.

The increased liability exposure will also incentivize employers going forward to either: 1) record, in excruciating detail, their reasons for compensation decisions, or 2) stop making individualized, performance-based compensation decisions for fear of future lawsuits. The first option would increase costs, causing employers to cut costs elsewhere, and the second option would be inefficient and harm the economy. Employers may also conclude that individuals covered by discrimination laws are too risky to hire. Although such discrimination itself would be illegal, such claims can often be difficult to prove. If employers reacted in this way, S. 181 would end up hurting those it is designed to help.

Endangering Our Pensions Would Not Increase Economic Security

S. 181 could also have unintended consequences such as endangering the soundness of our nation's pensions. The bill could allow retired employees who draw a pension, the amount of which could have been affected by the alleged discrimination, to bring a charge years or even decades later. America's already burdened pension plans may discover they are underfunded if faced with numerous claims.

---

[5] S. 181, Sec. 3.
[6] See House of Representatives Report 110-237.
[7] See Statement of the U.S. Chamber of Commerce before the House Education and Labor Committee, dated June 12, 2007, p. 7 (citing 29 C.F.R. § 1602.14).

S. 181 Could Allow Discrimination to Fester

Discrimination claims should be resolved and remedied as quickly as possible. Title VII and other discrimination statutes have promoted quick resolution of discrimination claims with an eye toward settlement whenever possible for decades.

Discrimination Is Best Remedied Promptly

First, under current law charges must be filed with the Equal Employment Opportunity Commission (EEOC) within 180-300 days after an employer's unlawful employment practice. In that charge the employee simply includes "the event that caused the complaining party to believe that his or her rights were violated"[8]—a significantly lower threshold than what is required for filing a civil lawsuit in Federal court.[9] This time limit and low filing threshold reflects a strong public policy preference to resolve employment discrimination allegations quickly. These procedures are designed to lead to prompt resolution of claims and quick corrective or preventative actions on the part of the employer to cure the source of any discrimination.[10] This policy benefits others in the workplace, including those who were unaware of the discriminatory practices. S. 181, by contrast, would allow some aggrieved employees—those who know they have a good claim and are waiting for an opportune time to file—to sit on their claims while the discrimination of other, less savvy employees continues.

Everyone is Better Off When Discrimination Cases Are Settled Early and Not Allowed to Fester

Second, under current law claimants—before resorting to litigation—must cooperate with the EEOC. After receiving a charge from an employee, the EEOC conducts an investigation into the facts alleged to determine if there is a reasonable cause for the case to proceed. The EEOC resolved 72,442 charges in fiscal year 2007.[11] Of the 22.9% of claims that had merit, more than half were settled.[12] Statistics from prior years are similar. For those charges with merit, the EEOC tries to resolve the complaints through voluntary conciliation and cooperation before the controversy makes it to Federal court.[13] If the controversy is settled to everyone's satisfaction, the Federal courts have one less case to deal with. The EEOC will also work with the employer to develop a remedy to cure any discrimination.[14] If the controversy cannot be settled, or if the EEOC does not believe there is reasonable cause to believe that discrimination occurred based on its investigation, then an aggrieved individual can file a lawsuit in Federal court.[15] S. 181 would allow an individual who has reason to believe she has been discriminated against to sit on a

[8] http://www.eeoc.gov/charge/overview_charge_filing.html (visited 1/12/2009).
[9] See Federal Rules of Civil Procedure, R. 8.
[10] www.eeoc.gov/charge/overview_charge_processing.html (visited 1/10/2009).
[11] FY 2007 enforcement statistics (www.eeoc.gov/stats/all.html) (visited 1/10/2009).
[12] FY 2007 enforcement statistics (www.eeoc.gov/stats/all.html) (visited 1/10/2009).
[13] http://www.eeoc.gov/charge/overview_charge_processing.html (visited 1/12/2009) ("If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.").
[14] Id.
[15] http://www.eeoc.gov/charge/overview_charge_filing.html (visited 1/11/2009) ("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.").

claim, allowing the workplace atmosphere to become poisoned—even if, as is often the case in the employment discrimination context, the two parties have simply had a misunderstanding.

Without Time Limits on Claims, Truth Becomes Difficult to Discover

Statutes of limitations provide a claimant adequate time to assert claims while also advancing the search for truth by protecting against the loss of evidence that is inevitable regarding lawsuits that concern events from many years prior. *Ledbetter v. Goodyear Tire and Rubber Company*[16] is instructive. The case 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. 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.

The Supreme Court held that employees must file within the time period after the unlawful practice (in this case each decision to compensate Ms. Ledbetter less than male peers because of her sex). The Supreme Court considered how allowing claims involving long past employment practices would harm the cause of justice.

> [I]n a case such as this in which the plaintiff's claim concerns the denial of raises, the employer's challenged acts (the decisions not to increase the employee's pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.[17]

With the passage of time, witnesses can become unavailable, memories fade, and records may be lost or destroyed.[18] This very issue arose in the *Ledbetter* case. Ms. Ledbetter's claims were largely based on the actions of a single male supervisor but the jury was unable to weigh his testimony because the supervisor was dead by the time she ultimately filed her suit.[19] In such

[16] 550 U.S. 618, 127 S. Ct. 2162 (2007).
[17] *Ledbetter*, 127 S. Ct. 2162, 2171 (citations omitted).
[18] This problem would be aggravated in the instance of a company that has recently been sold. A new small business owner, for example, who buys a company with an employee who asserts a discrimination claim that she had been sitting on, would be put in a very difficult position: start her tenure with a lawsuit involving facts that happened long ago that she knew nothing about, or settle a case that could be unworthy.
[19] See *Ledbetter*, 127 S. Ct. at 2171, n.4.

cases, where intent is critical and inferred from circumstantial evidence, allowing a jury to assess the credibility of witnesses is especially important.

Proponents of S. 181 rightly point out that employees are not well positioned to know what their co-workers' salaries are or the reasons for any differences. In addition, proponents point out that small discrepancies can increase to large gaps over time, especially in the salary context where compensation is typically a percentage increase from a baseline of the previous year's salary.[20] While these arguments have merit, they were not before the Supreme Court in *Ledbetter*. The Court did not address whether a discovery rule—a doctrine that stops the statute of limitations from starting until the plaintiff discovers or reasonably should have discovered the injury giving rise to the claim—would be appropriate in Ms. Ledbetter's case because she "[did] not argue that such a rule would change the outcome in her case[.]"[21]

Indeed, she indicated she knew her pay was lower than her male peers several years prior to filing the charge in 1998.[22] She said she knew her co-workers were paid more in the early 1990s[23] and she testified, "I told him at that time [1995] that I knew definitely that they were all making a thousand at least more per month that [sic] I was and that I would like to get in line."[24]

The Court also noted that Ms. Ledbetter could have pursued her claim under the Equal Pay Act (EPA) which has a longer statute of limitations period that begins anew with each paycheck, and that if she had done so, "she would not face the Title VII obstacles that she now confronts."[25] Several commentators have noted that the EPA is not as popular among plaintiff's attorneys because it does not allow compensatory and punitive damages, whereas Title VII does.[26] It is important to note, however, that EPA applies only to cases of sex discrimination.

The Senate Should Carefully Address the Concern of Employee Rights

Proponents of S. 181 claim it will allow employees who did not know they were being underpaid for years to file suits when they become aware. S. 181 will solve this problem, but it will do much more than that, with many negative consequences.

Some proponents like to point out that pay decisions are not discrete and have continuing consequences and are therefore different from other instances typically challenged under Title VII such as hiring, firing, promotion,, or demotion decisions.[27] But while they argue pay discrimination should be treated differently because it is not discrete, S. 181 treats all the types of cases the same—as long as the plaintiff can show that the actions had an effect on pay. Hiring,

---

[20] See, e.g., Testimony of Professor of Law Deborah Brake of the University of Pittsburgh before the House Education and Labor Committee on June 12, 2007.
21 Ledbetter, 127 S. Ct. at 2177, n.10.
22 See Joint Appendix filed in the Ledbetter case ("JA"), p. 231-234.
23 JA 233 ("Q: So you knew in 1992 that you were being paid less than your peers? A: Yes, sir.").
24 JA, p. 231-232.
25 Ledbetter, 127 S. Ct. at 2176.
26 See, e.g., Grossman, Andrew: The Ledbetter Act: Sacrificing Justice for "Fair" Pay, Legal Memorandum #34, dated January 7, 2009, Heritage Foundation (available at http://www.heritage.org/Research/LegalIssues/lm34.cfm) (visited 1/11/09).
[27] See, e.g., Testimony of Professor of Law Deborah Brake of the University of Pittsburgh before the House Education and Labor Committee on June 12, 2007.

firing, promotion and demotion decisions are quintessential "discrete acts" after which the employee traditionally only has a few months to file a charge with the EEOC.

While S. 181 uses the idea of concealed discrimination as a pretext to eliminate a filing period for many discrimination claims, the statutes of limitations begin at a different time under an alternative bill proposed by Senator Kay Bailey Hutchison, S. 166 (the Title VII Fairness Act). That bill has been filed as a substitute amendment to S. 181. The statutes of limitations begin under her amendment when an employee "has, or should be expected to have, enough information to support a reasonable suspicion of such discrimination."[28] This is a codification of the discovery principle prevalent in common law. Senator Hutchison's amendment is a much better vehicle to protect unknowing victims of discrimination because it avoids the negative consequences of essentially eliminating the statute of limitations.

Conclusion

Proponents of S. 181 want to protect employees who were not aware of their employer's discrimination within the time allowed to file a claim, a noble goal. As explained above, however, there are real costs with the overbroad approach contemplated by S. 181—including burdening employers with costs during one of the worst job markets in the past century, discouraging employees who know they are being discriminated against from filing timely claims, and encouraging the litigation of claims involving events that have long past. To avoid the overly burdensome approach of S. 181 but still protect unsuspecting employees, the Senate should carefully consider Senator Hutchison's thoughtful substitute amendment. It would more precisely accomplish the stated goal of proponents of S. 181 without effectively eliminating the statute of limitations for discrimination cases and inflicting significant damage on the job prospects of American workers, discouraging early resolution of discrimination claims, and encouraging lawsuits that will be decided on less than the best evidence.

[28] S. 166, Sec. 3.