



The Fair Pay Restoration Act

ABA Urges Prompt Passage of S. 1843

Since its passage in 1964, Americans have relied on the Title VII of the Civil Rights Act of 1964 for fair redress of gender-based wage discrimination claims under the Equal Pay Act of 1963. Recovery for damages under Title VII requires claims be filed within 180 days of the unlawful employment action. In the case of pay discrimination, the vast majority of appeals courts have used the paycheck accrual rule that deems each instance of disparate payment resulting from uncorrected discrimination, such as each subsequent paycheck that relied upon the initial discriminatory payment formula, as a fresh act of discrimination.

On May 29, 2007, the Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* interpreted Title VII to require employees to file claims for pay discrimination within 180 days of an employer's initial decision to discriminate or, in most cases, be barred from pursuing future challenges. The ABA believes that this rejection of the paycheck accrual rule upends the balance in Title VII between employee's rights and employer's accountability and is contrary to the original intent of the act. Congress is empowered by the U.S. Constitution to fix this and Senator Ted Kennedy (D-MA) has introduced S. 1843, the Fair Pay Restoration Act. **The ABA urges prompt passage of the Fair Pay Restoration Act because:**

- **The Act promotes voluntary compliance.** Under the *Ledbetter* decision, employers have an incentive to hide unfair pay scales after the initial decision to discriminate because they are rewarded with immunity once the 180 day period for filing complaints has run its course. Employers may then reap an unfair financial windfall with every paycheck they issue that pays an employee less than he or she is due. The Fair Pay Restoration Act would reinstate the current strong incentive for voluntary compliance; employers are encouraged to regularly examine pay scales for inequities and to correct for fairness over time.
- **The Act effectuates the language of federal antidiscrimination laws.** Title VII and the Americans with Disabilities Act contain a provision allowing impacted employees to receive backpay for a period dating back two years before a complaint is filed. This limitation in current law demonstrates that Congress intended for an employee to be able to file a charge *more* than two years after the discriminatory act began. The rule applied in the *Ledbetter* decision conflicts with that intent by ignoring patterns of discrimination in pay. Passing the Fair Pay Restoration Act supports Congress' original intent in passing the Civil Rights Act of 1964.
- **The Act responds to workplace realities.** Few employees can access information about the decisions underlying their own compensation, let alone the compensation of their coworkers; employers generally keep compensation records confidential. As a result, an employee may be discriminated against each pay period for years before learning of the initial harm. Moreover, pay disparities may start small but may accumulate over time, since raises, bonuses and retirement contributions are generally calculated in proportion to earlier compensation. The *Ledbetter* rule ignores this reality, while the Fair Pay Restoration Act would take it into account by reinstating the more realistic paycheck accrual rule.
- **The Act allows employees to assess the validity of their claims before challenging compensation discrimination.** The Act sets the right balance between premature and stale claims. Under the paycheck accrual rule, employees have every incentive to challenge compensation discrimination as promptly as possible, but will also have the time necessary to evaluate and confirm that they have indeed been subject to discrimination without risking their right to file a timely claim. The rule under the *Ledbetter* decision places a time burden upon plaintiffs that may force employees to file preemptive suits – a result that would serve none of the parties involved.
- **The Act will restore certainty to employers and employees alike.** The Act reinstates the long-standing, clear, and well-understood paycheck accrual rule, which, prior to the *Ledbetter* decision, was applied by nine of the ten federal circuits that had considered this issue. Restoring the rule restores balance and certainty to this area of the law.