

The Equal Employment Opportunity Commission Revises Its Compliance Manual to Conform to the Lily Ledbetter Fair Pay Act

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The Equal Employment Opportunity Commission (EEOC) recently revised its Compliance Manual to implement the Lilly Ledbetter Fair Pay Act (the Act). The Act overturned the U.S. Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007), that a charge of compensation discrimination under Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act (ADA), the Rehabilitation Act or the Age Discrimination in Employment Act (ADEA) must be filed within 180 or 300 days of the first alleged "discriminatory" paycheck depending upon whether the state has a state fair employment practice ("deferral") agency. Under the Court's decision, subsequent "discriminatory" wage payments did not resuscitate the prior filing period under the so-called "continuing violation" theory. The Act, which significantly expanded the relevant statute of limitation, is retroactive to May 28, 2007 and permits suit as to pay discrimination claims pending on or after that date.

The Compensation Discrimination section of the EEOC's revised Compliance Manual modifies the period for submitting a claim of pay discrimination under Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Rehabilitation Act or the Age Discrimination in Employment Act (ADEA) and explains that the period begins when any of the following occurs:

- the employer makes a discriminatory compensation decision or adopts a discriminatory practice affecting compensation;
- the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- the charging party's compensation is affected adversely by application of a discriminatory compensation decision or other discriminatory practice, e.g., each time wages, benefits, or other compensation is paid.

To illustrate the change in the EEOC's enforcement position, the revised Manual provides the following example of an actionable claim:

After working for the Respondent for nearly 10 years as a production supervisor, CP learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based

wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

Not surprisingly, the expanded statute of limitation for wage discrimination claims is expected to spur increased litigation. Employers wishing to minimize the risks of liability should consider the following:

- audit in a manner which preserves the attorney/client privilege current pay practices to identify and develop strategies to remedy potential pay disparities;
- develop written and precise criteria for making compensation decisions;
- revise document retention practices to ensure that the employer will have access to documentation regarding compensation decisions;
- train supervisors and managers to support objectively-based compensation decisions; and,
- conduct periodic statistical analysis of compensation data to identify potential adverse impact concerns.