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PRESIDENT OBAMA KEEPS CAMPAIGN PROMISE IN SIGNING FAIR PAY ACT, DRAWING PRAISE AND CRITICISM

by SAMEENA MOHAMMED

In January 2008, then-Senator Barack Obama was one of several co-sponsors of the Lilly Ledbetter Fair Pay Act (Act).¹ One year later, in his new role as President of the United States, he has signed the legislation that he helped introduce.² The Act was proposed to overturn the Supreme Court's ruling in *Ledbetter v. The Goodyear Tire & Rubber Co.*, in which the Court held that a timely wage discrimination complaint under Title VII must be filed within

180 days (or 300 days, depending on the state) of an employer's discriminatory decision to pay less, not from the time discrimination is discovered.³ In the year and a half since the decision, over 1,300 courts, including 12 of the 13 federal Courts of Appeals, have cited *Ledbetter* in some capacity.⁴

When this legislation was introduced in previous terms, President Bush threatened to veto it, and when it came up for consideration in the Senate in April 2008, it fell four votes short of overcoming a filibuster.⁵ President Obama often referenced Lilly Ledbetter, the plaintiff in the case, during his debates and campaign stops.⁶ On January 28, 2009, Congress passed the Act with a largely party-line vote, and the next day, as promised, President Obama signed the legislation into law, proclaiming that "making our economy work means making sure it works for everyone."⁷

The Act begins by finding that the Supreme Court in *Ledbetter* undermined Title VII protections by narrowly construing the statute of limitations period in which plaintiffs can bring pay discrimination claims.⁸ Under *Ledbetter*, a plaintiff would have 180 or 300 days from the time her employer made a discriminatory decision about her compensation to bring a claim.⁹ The problem with this, proponents of the legislation contend, is that potential plaintiffs often do not discover until years later that their employer is paying them less than their colleagues, due to the taboo on discussing salaries with co-workers.¹⁰ The Act takes this problem into account by providing that the 180 or 300 day claim-filing period would start anew every time plaintiffs receive a paycheck – every time they are affected by their employer's decision to pay them less.¹¹

Supporters of the Act included Speaker of the House Nancy Pelosi, Democrat of California, and Senator Barbara A. Mikulski, Democrat of Maryland, the chief sponsor of the bill. The Equal Employment Opportunity Commission's (EEOC) Acting Chairman, Stuart Ishimaru, also supported this legislation, noting, "The act is a victory for . . . all workers across the country who are shortchanged by receiving unequal pay for performing equal work."¹² Plaintiff-side labor and employment attorneys in Chicago, including Marvin Gittler and Lori Deem, note that the EEOC and the courts had been interpreting Title VII as this legislation requires for years prior to *Ledbetter*.¹³ Ms. Deem

explains, “The Court [in *Ledbetter*] really unsettled what was settled law,” and this Act has a restorative effect.¹⁴



2009 AP Photo/Ron Edmonds

President Obama center, signing Fair Pay Act. Standing from left are: House Majority Leader Steny Hoyer of Maryland, Sen. Barbara Mikulski, D-Md., Sen. Olympia Snowe, R-Me., Lilly Ledbetter, D.C. Delegate Eleanor Holmes Norton, and Senate Majority Leader Nancy Pelosi of California.

available at: http://www.jcfloridan.com/jcf/news/politics/national_govtpolitics/article/obama_signs_equal-pay_bill/57013/

A “TRIAL LAWYER GIVEAWAY?”¹⁵

While some praise the Act as restoring the status quo, not everyone shares in celebrating the realization of President Obama’s campaign promise. Senator Jim Inhofe, Republican of Oklahoma, argues that the bill essentially eliminates the statute of limitations on employment discrimination claims.¹⁶ Representative Howard P. McKeon, Republican of California, and a ranking member of the House Education and Labor Committee, has also been a vocal opponent of the bill, characterizing it as an “economic stimulus” for trial lawyers.¹⁷ The U.S. Chamber of Commerce shares his concern about the increase in litigation this legislation could spawn.¹⁸ Ms. Deem, however, dismisses these concerns as “overblown” because of the difficulties that persist in obtaining proof of wage discrimination.¹⁹

Max G. Brittain Jr., an employment lawyer practicing for over thirty years, also believes this legislation is redundant.²⁰ According to Mr. Brittain, the Equal Pay Act is already in place as “a means by which a female [can] challenge pay decisions,” with a longer statute of limitations.²¹ Mr. Brittain further expressed concern at the difficulty employers may face in defending decades-old claims against supervisors who may have left the company or passed away.²² In response to such fears, Mr. Gittler notes that “courts have always stepped in” when plaintiffs are intentionally dilatory in exercising their rights.²³

This controversial Act is significant not only as a realization of President Obama’s campaign promise, but because it signals the administration’s commitment to ensuring equal pay for equal work. Pending legislation, such as the Paycheck Fairness Act,²⁴ which passed the House on January 9, 2009, is further evidence of the commitment by President Obama and his supporters to eliminate wage discrimination.²⁵ Opponents, meanwhile, wary of increased litigation, will have new opportunities to issue challenges and amendments to the next wave of fair pay legislation.

NOTES

1 Robert Pear, *Justices’ Ruling in Discrimination Case May Draw Quick Action by Obama*, N.Y. TIMES, Jan. 5, 2009, at A13.

2 *Supporters Cheer, Critics Brace for Litigation as Obama Signs Ledbetter Measure into Law*, 18 Daily Lab. Rep. (BNA), at A-1 (Jan. 30, 2009).

3 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-5, 2009 U.S.C.C.A.N. (123 Stat. 5); *Ledbetter v. The Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007).

4 Nancy Zisk, *In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rules to Determine the Start of the Limitations Period for Pay Discrimination Claims*, 16 Duke J. Gender L. & Pol’y 137, 138-39 (2009);

5 Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

6 The Third McCain-Obama Presidential Debate (Oct. 15, 2008), <http://www.debates.org/pages/trans2008d.html>.

7 Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009.

8 Fair Pay Act of 2009, *supra* note 3.

9 *Ledbetter*, 127 S. Ct. at 2179.

10 *The Lilly Ledbetter Fair Pay Act of 2007: Hearing before the H. Education and Labor Comm.*, 110th Cong., 1st Sess. (2007) (testimony of Wade Henderson, President and CEO, Leadership Conference on Civil Rights); *see also* Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way”: Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 171 (2004).

11 Fair Pay Act of 2009, *supra* note 3.

- 12 Daily Labor Rep., *supra* note 2.
- 13 Telephone Interview with Lori Deem, Partner, Abrahamson Vorachek & Levinson, in Chi., Ill. (March 5, 2009); Telephone Interview with Marvin Gittler, Partner, Asher, Gittler, Greenfield & D'Alba, Ltd. in Chi., Ill. (Feb. 5, 2009).
- 14 *Id.*
- 15 Congressional Documents, Democrats Lock Down House Floor, Send Trial Lawyer Give-away to President Without Serious Debate (Jan. 27, 2009) (2009 WLNR 1630289).
- 16 Government Press Release, Inhofe Voices Support for Balanced Approach to Workplace Discrimination (Jan. 23, 2009) (2009 WLNR 1363688).
- 17 Derrick Cain, *Ledbetter, Paycheck Fairness Measures Win House Approval*, 60 Human Resources Rep. (BNA), at 2 (Jan. 13, 2009); Congressional Documents, *supra* note 15.
- 18 Daily Labor Rep., *supra* note 2.
- 19 Interview with Deem, *supra* note 13.
- 20 Telephone Interview with Max J. Brittain, Jr., Partner, Schiff Hardin, in Chi., Ill. (Feb. 27, 2009).
- 21 *Id.*
- 22 *Id.*
- 23 Interview with Gittler, *supra* note 13.
- 24 Paycheck Fairness Act, H.R. 12, 111th Cong. (1st Sess. 2009).
- 25 Robert Pear, *House Passes 2 Measures on Job Bias*, N.Y. TIMES, Jan. 10, 2009 at A13.