

Fight For Equal Pay Continues 10 Years After Ledbetter Act

By **Terese Connolly and Mishell Kneeland**

As we close in on the end of 10 full years since the passage of the Lilly Ledbetter Fair Pay Act of 2009,[1] an amendment to the Equal Pay Act of 1963, we can see that what was heralded as a watershed moment for equal pay and fairness when it was signed has not had the significant impact that its supporters had hoped.

It has, however, resulted in a patchwork of legislation at the state and local levels, which has served to muddy the waters for multistate employers. These state initiatives, and pressure from businesses forced to deal with them, does send a message to Congress — it is time to pay attention and act.

Ledbetter passed in the Senate on Jan. 22, 2009, and President Barack Obama signed it on Jan. 29, fulfilling a campaign promise to overturn Ledbetter v. Goodyear Tire & Rubber Co.[2] The Ledbetter Act's goal was to reset the 180-day statute of limitations for filing an equal pay lawsuit regarding pay discrimination with the issuance of each new paycheck affected by that discriminatory action.[3] While it met this goal, gender pay disparities continue.

One major driver of the wage gap is pay discrimination. Pay discrimination is among the most difficult to detect and address because of a culture of secrecy around pay and the legacy of discrimination that is transferred to a new job when an employer relies on prior salary information in setting pay for a new hire.

Yet Congress has failed to pass the Paycheck Fairness Act, despite its introduction in every session since 1997.[4] This act would prohibit employers from relying on salary history to set pay when hiring new employees; close a loophole in the employer affirmative defense under the Equal Pay Act that has enabled employers to pay women less than men for the same work without a legitimate business reason related to the job; and promote pay transparency by barring employer retaliation against employees who voluntarily discuss or disclose pay. It would also require employers to report pay data to the U.S. Equal Employment Opportunity Commission.[5]

Recognizing the importance of pay equity, several states and localities have taken on the task and broadened their own equal pay acts where Congress has not.[6] Each state and local equal pay law differs slightly and, in some cases, conflicts with another making it difficult for multistate employers to manage.

As the Paycheck Fairness Act would have accomplished if it were passed, some states' equal pay laws fundamentally alter how equal pay claims are analyzed, lowering the bar for an equal pay lawsuit. For example, under the California Fair Pay Act, which amended the California Equal Pay Act several times, employees no longer need to demonstrate that their comparators engaged in the same or substantially equal work, rather that they are merely engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." [7]



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Both the California Fair Pay Act and New York's Achieve Pay Equity Act shift the burden to employers to prove pay differences[8] and many other states have also narrowed the factors employers can use in their defense.[9] In California, the old defense of "any factor other than sex" was swapped out for "a bona fide factor other than sex, such as education, training, or experience." [10]

A wage differential based on any bona fide factor will only be successful if an employer can show that the factor is job-related, is consistent with business necessity, and is not based on sex.[11] However, employees can defeat this if they can show that an alternative practice could serve the same business purpose without producing a wage differential.[12]

Many states' laws also expand employee protections by prohibiting employers from soliciting historical pay data during the preemployment process. Inquiries into a candidate's previous salary perpetuates wage inequality because women and minorities historically earn less than men.

Those states and territories that have some form of a salary history ban applicable to private employers include Alabama, California, Colorado (effective Jan. 1, 2021), Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, Vermont and Washington. Most of these went into effect in 2019, and they just keep coming.

Like prohibitions under the National Labor Relations Act, many states' equal pay laws allow employees to discuss and disclose their compensation, as well as the compensation of others.[13] Other ways that states' amendments to their equal pay laws increase protections include expanding the geographical area for comparators from the same work location to the same county, region or even state,[14] expanding the protected classes beyond just gender,[15] and providing safe harbors or incentives for employers who conduct equal pay audits.[16] Maryland even prohibits employers from "providing less favorable employment opportunities" based on sex or gender identity.[17]

It is not just our state and local governments changing the pay equity landscape, employers are figuring out that efforts to attain true pay equity can go a long way to recruiting and retaining quality candidates. Even where not required by state or local law, many companies, particularly in the tech industry, have stopped asking applicants about their current pay.

These include Amazon.com Inc., Google Inc., Facebook Inc. and others.[18] Even shareholders got in on the action by submitting proposals that require public companies to disclose the pay gap percentage between the genders with 2019 proposals representing half of all shareholder human capital proposals.[19]

Where is equal pay heading?

As we have seen with other federal laws that began because state and local governments (and sometimes employers of their own volition) stepped in to fill the void left by Congress' inaction, eventually Congress will need to pay attention. In addition to the #MeToo movement, which has generated a cry for equality across the board — literally in the case of gender quotas for boards of directors — the legal action by U.S. Women's National Soccer Team is likely to have a significant impact on the future of equal pay because of the global attention this matter has received.

Since their recent mediation with U.S. Soccer ended in a disappointment, the U.S. Women's National Soccer Team will be heading to court soon — currently scheduled for May 5, 2020. The team, by standing up for pay equity, has raised awareness and everyone with a television or internet access is paying attention.

Indeed, this issue was discussed at the July 31, 2019, Democratic presidential debate where Sen. Kamala Harris, D- Calif., said, "I'm done with the conversation. ... It is time for action." She proffered that corporations would be required to post pay differentials on their website and would be fined 1% of previous years' profits for each 1% pay differential.[20] Perhaps even more telling — 57 years after the Equal Pay Act was passed — one of the hold-out states, Alabama, finally passed the Clarke-Figures Equal Pay Act effective Sept. 1, 2019.

What is clear is that this is not an issue that is going away. If Congress continues to avoid making much-needed changes, employers concerned about their brand as well as hiring and retaining quality candidates will take it upon themselves to be proactive. Good employers know the cost of not doing so in the current cultural and political climate.

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[1] Pub.L. 111-2, S. 181.

[2] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Supreme Court held that employers cannot be sued under Title VII of the Civil Rights Act of 1964 over race or gender pay discrimination if the claims are based on decisions made by the employer 180 days ago or more. The Court rejected *Ledbetter's* argument that each paycheck received by a plaintiff did not constitute a discrete discriminatory act, even if affected by a prior decision outside the time limit.

[3] Statute of limitations provisions amended by the Lily Ledbetter Act include Title VII, 42 U.S.C. § 2000e-5(e) and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(d). The powers, remedies, and procedures of 42 U.S.C. Section 2000e-5(e) apply to the Americans with Disabilities Act, see 42 U.S.C. § 12117(a), and the Rehabilitation Act (through the ADA), see 29 U.S.C. § 791(g), 794(d), 29 U.S.C. § 794a(a). Thus, the "paycheck" rule applies to claims of discrimination in pay on basis of age, religion, national origin, race, sex, and disability.

[4] 105th Congress, H.R. 2023, S. 71; 106th Congress, H.R. 541, H.R. 2397, S. 74; 107th Congress, H.R. 781, S. 77; 108th Congress, H.R. 1688, S. 76; 109th Congress, H.R. 1687, S. 841; 110th Congress, H.R. 1338, S. 766; 111th Congress, H.R. 12, S. 182, S. 3772; 112th Congress, H.R. 1519, S. 797, S. 3220; 113th Congress, H.R. 377, S. 84, S. 2199; 114th Congress, H.R. 1619, S. 862; 115th Congress, H.R. 1869, S. 819; 117th Congress, H.R. 7.

[5] 117th Congress, H.R. 7.

[6] Mississippi is the only states without an equal pay law. See NBCNews.com, "The good news about equal pay laws."

[7] Cal. Lab. Code § 1197.5; see also N.Y. Exec. Law § 296(1)(a) to (1)(c).

[8] Cal. Lab. Code § 1197.5; NY EPA N.Y. Lab. Law §§ 190.

[9] Amendments to the California, Colorado, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Washington states' pay equity acts limit employer defenses justifying pay differentials.

[10] Cal. Lab. Code § 1197.5 (a)(1)(D).

[11] Id.

[12] Id.

[13] See generally Cal. Lab. Code § 1197.5; Colo. Rev. Stat. § 24-34-402; Conn. Gen. Stat. § 31-40z; 820 Ill. Comp. Stat. 112/10 (2019 Ill. Laws 101-0177 (H.B. 834)); N.Y. Lab. Law § 194; N.Y. Comp. Codes R. & Regs. tit. 12, §§ 194-1.1 to 194-1.4.

[14] e.g., Cal. Lab. Code § 1197.5; N.Y. Exec. Law § 296(1)(a) to (1)(c).

[15] N.Y. Exec. Law § 296(1)(a) to (1)(c).

[16] Ann. Laws of Mass. Gen. Laws ch. 149, § 105A(d).

[17] MD Labor and Empl. Code Sec. 3-304 (a)-(e).

[18] See, e.g., Laszlo Block, How the "what's your current salary?" question hurts the gender pay gap, Washington Post, Op. Ed. (April 29, 2016).

[19] Many of these proposals never make it to vote because the proponents of the proposals engage in private talks with the companies.
See <https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-proposals/>.

[20] CNN, Democratic Presidential Debate, July 31, 2019.