

# WebMemo



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## The Lilly Ledbetter Fair Pay Act: The Heritage Foundation 2009 Labor Boot Camp

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### What Is the Lilly Ledbetter Fair Pay Act?

- The act would allow pay discrimination lawsuits to proceed years or even decades after alleged discrimination took place.
  - Under the act, employees could sue at any time after alleged discrimination occurred, so long as they have received any compensation affected by it in the preceding 180 days.

### Policy Objections

- Since ancient Roman times, all Western legal systems have featured statutes of limitations for most legal claims.
- Statutes of limitations perform several important functions that would be sacrificed by the Ledbetter Act, including:
  - Furthering justice by blocking suits where defensive evidence is likely to be stale or expired;
  - Preventing bad actors from continuing to harm the plaintiff and other potential victims;
  - Preventing gaming of the system (such as destroying defensive evidence or running up damages);
  - Promoting the resolution of claims.<sup>1</sup>
- The Ledbetter Act would allow cases asserting extremely tenuous links between alleged discrimination and differences in pay, which may result from any number of non-discriminatory factors, such as experience.<sup>2</sup>

- In addition to investigatory and legal expenses, employers will face the risk of punitive damages and the difficulty of rebutting assertions of discriminatory acts from years or decades ago.<sup>3</sup>
- The Ledbetter Act may actually harm those it is intended to protect.
  - In making employment decisions, businesses would consider the potential legal risks of hiring women, minorities, and others who might later bring lawsuits against them and, as a result, hire fewer of these individuals.<sup>4</sup>
  - Other employers might simply fire employees protected by Title VII—and especially those who are vocal about their rights under the law—to put a cap on their legal liabilities.<sup>5</sup>

### Economic Effects

- The Ledbetter Act would hand a major victory to trial lawyers seeking big damage payoffs in stale suits that cannot be defended.
  - A single legal victory against an employer could provide the fodder for scores of lawsuits by similarly situated employees and former employees receiving benefits, each alleging a pattern of discrimination affecting pay, as evi-

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denced by the previous lawsuits. In this way, each lawsuit becomes easier and cheaper to bring than the last.<sup>6</sup>

- Employers can be expected to change their hiring, firing, and wage practices to reduce the risk of lawsuits.
  - If, as suggested by Eric Posner, businesses “start paying workers the same amount even though their productivity differs because they fear that judges and juries will not be able to

understand how productivity is determined,” the law would impose significant costs on businesses and, by extension, consumers and the economy.<sup>7</sup>

- o The result would be a hit to employment and wages, combined with higher prices for many goods and services.

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1. Andrew M. Grossman, “The Ledbetter Act: Sacrificing Justice for ‘Fair’ Pay,” Heritage Foundation *Legal Memorandum* No. 34, January 7, 2009, at <http://www.heritage.org/Research/LegalIssues/lm34.cfm>.
  2. *Ibid.*, fn 23.
  3. *Ibid.*
  4. *Ibid.*
  5. *Ibid.*
  6. *Ibid.*
  7. Eric Posner, “Pay Equity and the Ledbetter Act, Slate Convictions, April 27, 2008, at <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/27/pay-equity-and-the-ledbetter-act.aspx> (January 12, 2009).