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Making Ledbetter Better, or at Least Less Bad

Andrew M. Grossman

The Lilly Ledbetter Fair Pay Act (H.R. 11, S. 181) would allow pay discrimination lawsuits to proceed years or even decades after alleged discrimination took place, opening the courts to stale claims and discouraging individuals from taking prompt action to end discrimination. In this way, its effects would be far broader than to remedy the perceived injustice of *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Supreme Court held that an allegedly discriminatory pay decision made 15 years prior to filing suit did not satisfy Title VII's 180-day limitations period. If Congress wishes to open the door to more pay discrimination claims, it ought to do so in a way that minimizes the likelihood of abuse of the law.

Better. The most thoughtful alternative to the Ledbetter Act's approach is embodied in an amendment (SA 25) proposed by Senator Kay Bailey Hutchison (R–TX) and based on her Title VII Fairness Act (S. 166). Rather than allowing any claim—no matter how old, no matter if the plaintiff delayed filing just to gain an upper hand—this amendment would start the limitations period running only when an employee reasonably suspects, or should reasonably suspect, that he or she has been discriminated against.

This kind of filing deadline, known as a "discovery rule," protects employees who are kept in the dark about pay disparities and the like while preventing stale claims and gaming of the system. It also preserves the incentive to bring claims quickly so that discrimination is halted sooner, to the benefit not just of the plaintiff but also other potential victims and the public. That, in the end, is what Title VII is all about: ending discrimination.

The Ledbetter Act, in contrast, has less to do with stamping out discriminatory practices than making money for plaintiff's attorneys. By eliminating the filing deadline, it would actually undermine the law's strong incentive to resolve cases quickly and instead encourage savvy parties to strategically delay suit. While they sit on their claims, the passage of time would drive up damages available in court and allow defensive evidence to fade. In this way, other victims who are unaware of discrimination would continue to suffer its effects while the would-be plaintiff games the law for private gain.

The easiest and most straightforward way to avoid these consequences is to retain a strict limitations period. Two amendments (SA 28, SA 29) sponsored by Senator Mike Enzi (R–WY) would accomplish this by limiting the Ledbetter Act to when a discriminatory compensation decision is adopted or when an employee becomes "subject" to a such a decision, but not when an employee is "affected" by it—a much vaguer standard. This approach would retain a clear limitations period, blocking stale claims and abusive legal tactics.

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Less Bad. The Ledbetter Act is so alluring to trial lawyers because Title VII claims, unlike those under other laws, allow for punitive damages in addition to make-up pay. (Indeed, Lilly Ledbetter actually abandoned an easier-to-prove and not-time-limited claim under the Equal Pay Act, which does not offer punitives.) There is also the possibility of follow-on lawsuits. 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 evidenced by the previous lawsuits.

In particular, three words in the legislation that have received little attention would be particularly conducive to this sort of abuse. Rather than focusing on discriminatory pay decisions, the Ledbetter Act would include within the definition of an unlawful employment practice "a discriminatory compensation decision or other practice." This loose language would allow trial lawyers to channel potentially all discrimination claims, no matter how tenuously related to compensation, through the Ledbetter Act, thereby evading Title VII's and the Age Discrimination in Employment Act's (ADEA) limitations periods entirely. In this way, nearly any alleged discrimination could be the subject of claims brought years after the fact—a recipe for abuse.

To prevent such abuses, Congress should strike the "or other practice" language each time that it appears in the Ledbetter Act. An amendment (SA 27) brought by Senator Arlen Specter (R–PA) adopts this approach.

Another amendment (SA 26) by Specter is specifically targeted at preventing gaming of the statute. It would make clear that the Ledbetter Act does not preclude certain defenses to strategic behavior such as laches, waiver, and estoppel. Though inferior to a clear limitations period, these defenses provide at least some protection against legal abuses such as delaying suit to gain an advantage, destroying defensive evidence, and running up damages.

Protecting Workers from Discrimination. If Congress is serious about protecting workers from discrimination, it should consider more thoughtful proposals than effectively eliminating Title VII's and the ADEA's limitations periods, which could actually be counterproductive to achieving equality. But if its primary aim is to line trial lawyers' pockets, that is probably the course it will take.

—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.

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