



Maryland Chamber of Commerce

Legislative Position

**SB 368
OPPOSE
Judicial
Proceedings
Committee
02/26/09**

SB 368

Lilly Ledbetter Fair Pay Restoration Act of 2009

Brief Summary of Bill:

SB 368 expands the time period for which an employee may seek relief for an unlawful employment practice in certain circumstances. Specifically, the bill authorizes the recovery of back pay for up to two years preceding the filing of a complaint for employment discrimination based on an unlawful employment practice that occurred outside the statute of limitations for filing a complaint, but was similar or related to an unlawful practice with regard to discrimination in compensation that occurred during the complaint filing period. The bill specifies that an unlawful employment practice with respect to discrimination in compensation occurs when (1) a discriminatory compensation decision or practice is adopted; (2) an individual becomes subject to a discriminatory compensation decision or practice; or (3) an individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting wholly or partly from the discriminatory decision or practice. In uncodified language, the bill specifies that a specific Supreme Court ruling regarding discriminatory pay disparity is not to be applied to discrimination cases brought under State law.

Maryland Chamber's Position:

On January 29, 2009 the President signed it into law (S. 181) Lilly Ledbetter Fair Pay Act of 2009, where it purports to overturn the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, Ct. 2162 (2007). *Ledbetter* rejected the "paycheck theory" of compensation discrimination that would permit claims to be filed many years after an alleged act of discrimination occurred. The passage of this legislation at the Federal level brings to question the rationale or necessity for similar state law.

Regardless of how the *Ledbetter* decision is viewed SB 368 could not reverse the decision, and has far broader implications and applications even if it could. Applying the paycheck rule broadly would permit decade old claims to be filed. Also, by applying the rule to pension annuities as well, a cause of action could arise decades after the individual ceased to work for an employer.

The Maryland Chamber of Commerce does not support this legislation for three reasons:

1. **The *Ledbetter* decision was consistent with Supreme Court precedent.** Critics of *Ledbetter* suggest that it departed from precedent. This is simply not the case. Cases in this area have always emphasized the distinction between decisions and consequences. *Ledbetter* is a relatively straightforward application of this long-recognized distinction.

The claim that there should be a distinction created in “pay” cases is a false one. Nearly every form of adverse employment action will have an impact on compensation — denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline — all have the potential to affect pay. Ms. Ledbetter complained that her low salary could be attributed to low evaluations she received over the years. She tried to make a distinction between the consequences of those evaluations and the evaluations themselves. However, a compensation consequence of any otherwise discrete employment decision will appear in an employee’s paycheck as long as that employee is with the same employer.

By creating a separate rule of limitations for “pay” cases, nearly every discrimination case would become a “pay” case, and the exception would swallow the rule. Employers would be forced to defend otherwise untimely claims regarding discrete actions because those discrete decisions ultimately led to a paycheck disparity.

2. **SB 368 would permit employees to sleep on their rights and file charges of discrimination many years later.** The enforcement tools provided through voluntary cooperation, through the Maryland Human Relations Commission, and through private litigation as is available under federal law when those efforts fail is now established in Maryland. *Ledbetter* endorsed resolution of workplace discrimination issues through voluntary cooperation and conciliation.

If an employee believes that he or she has been treated in a discriminatory manner by an employer, that matter should be raised internally and then with a fair employment practice agency (the EEOC, the MHRC or a local agency) promptly and confronted forthrightly. Only in this way can the processes of investigation and voluntary cooperation and conciliation be expected to work. When disagreements and disputes in the workplace fester and potential damage amounts increase, compromise, cooperation and amicable resolution become far more difficult to achieve.

3. **SB 368 would have a significant and negative impact on employers, and particularly on small businesses.** The Fiscal and Policy note on the Bill recognizes that the effect on small businesses would be “meaningful.” It could, in fact, be far more significant and detrimental. If the legislation is enacted, it is not clear how an employer would defend itself from virtually any claim without the ability to go back in time and analyze decisions made years before. Federal and State recordkeeping rules require employers to maintain most employment

records for only three or four years. Under the proposed legislation, a former employee - even a retiree - could come back years later with a claim. The employer would have legally and appropriately destroyed all records of the employment relationship; the decision makers might have also retired, have died, or be otherwise unreachable. Even if they were still available, however, being able to reconstruct decisions made years earlier would be next to impossible to accomplish.

Yet, another example of the bill's overreach is language suggesting that anyone "affected by" discrimination could bring a claim. Proponents of the recently passed bill in Congress have indicated that they interpret this language to mean that family members, not just an employee, would have standing to file a claim. This interpretation represents a radical departure from established principles of anti discrimination law, and it would make cases even more difficult to settle.

The Maryland Chamber of Commerce supports equal employment opportunity for all and appropriate mechanisms to achieve that goal. Enormous progress has been made by employers in assuring that workplace discrimination is eliminated is equally undeniable. This bill would not further the goal of eliminating workplace discrimination in Maryland.

For these reasons, the Maryland Chamber respectfully requests that the Committee give SB 368 an unfavorable report.

If questions please contact Allyson Black, ablack@mdchamber.org