

The 2009 WMACCA  
Employer  
Presented by Littler  
Mendelson



**The Return of the Pay  
Discrimination Class Action**  
– How Should Employers  
Evaluate Their  
Compensation Practices in  
the Wake of New Federal  
Laws

**CHANGE**

**You Must Manage**

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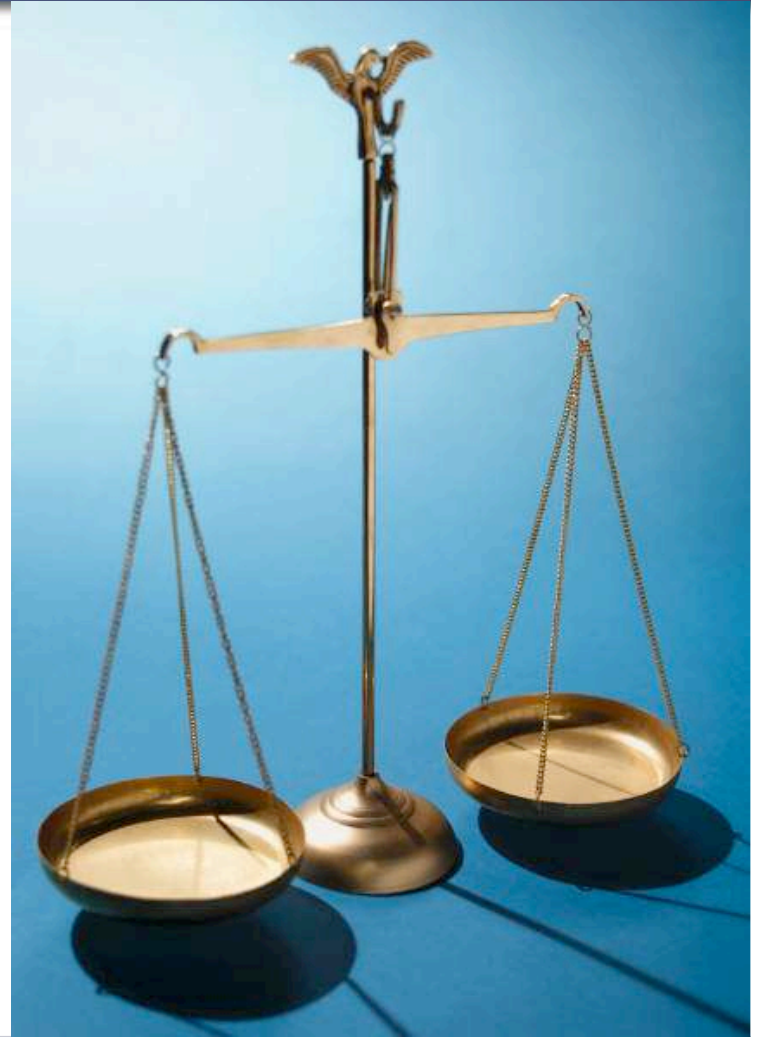
**Alison Davis, Esq.**  
[adavis@littler.com](mailto:adavis@littler.com)

**Josh Roffman, Esq.**  
[jroffman@littler.com](mailto:jroffman@littler.com)

LITTLER MENDELSON, P.C.

# Session Overview

- **Pay Discrimination Law Before 2009**
- **Lilly Ledbetter Fair Pay Act**
- **Paycheck Fairness Act**
- **Why New Laws Make Companies More Likely to Be Subject to Class Pay Discrimination Claims**



# Session Overview

- **What Should Employers Do to Minimize Risk and Exposure to Class Claims?**
  - Improve documentation of employment decisions that directly and indirectly affect pay
  - Consider making changes to recordkeeping practices
  - Tighter controls on managerial discretion in compensation decisions
  - Conduct pay equity analyses to eliminate and preempt claims under both statutes
- **Issues in Conducting Pay Equity Analyses**

# Pay Discrimination Law Before 2009

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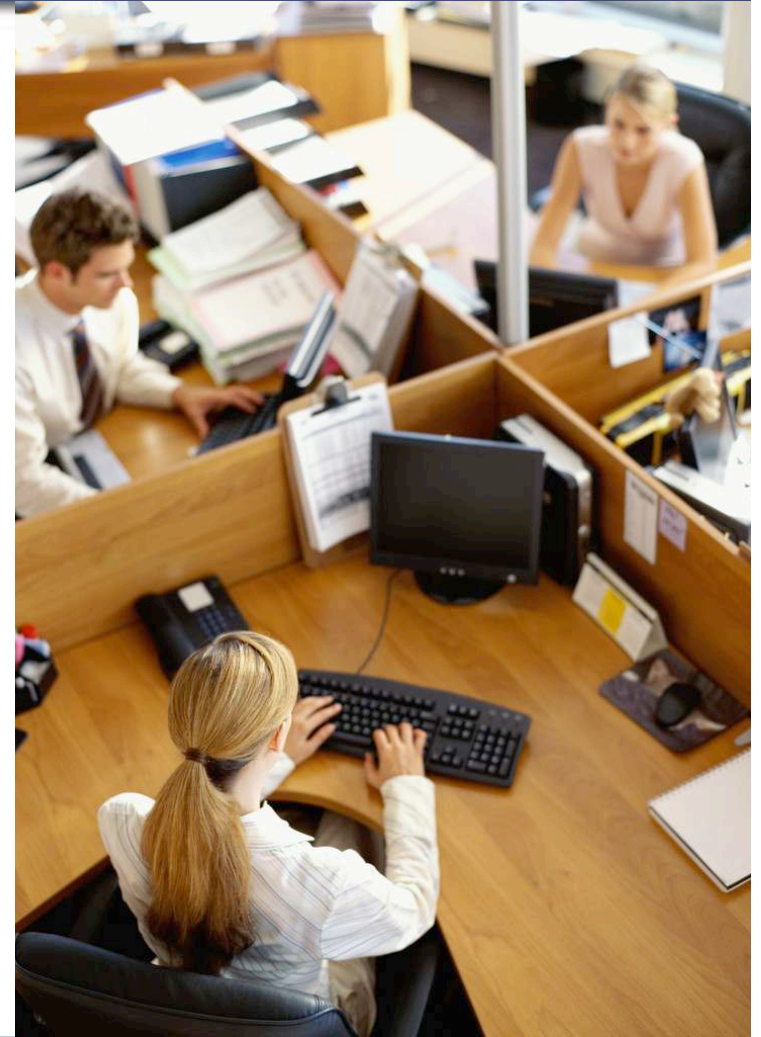


## Pay Discrimination Law Before 2009: *Title VII Ledbetter v. Goodyear Tire & Rubber Co.*

- **Plaintiff alleging pay discrimination under Title VII must point to a specific discriminatory decision that occurred within the Title VII statute of limitations period (180 or 300 days)**
- **The existence of a pay disparity does not give rise to a Title VII pay discrimination claim**
- **Pay disparity must be tied to a specific decision made within the limitations period**
- **Made Title VII pattern or practice class discrimination claims less attractive because it preempted employees from pointing to current pay inequities as a basis for a claim**
- **Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin**

# Pay Discrimination Law Before 2009: *Equal Pay Act*

- **Prohibits paying employees differently on the basis of sex if the employees work at the same establishment and perform equal work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions**



# Pay Discrimination Law Before 2009: *Equal Pay Act*

- **Exceptions allowed when payment is made pursuant to:**
  - A seniority system
  - A merit system
  - A system which measures earnings by quantity or quality of production
  - A differential based on any other factor other than sex

# Pay Discrimination Law Before 2009: *Equal Pay Act*

- **Equal Pay Act has narrow scope of comparator employees**
- **Law is based on disparities; not decisions**
- **Only addresses discrimination by gender**
- **Statute of limitations is two years  
(three years for willful violations)**
- **No compensatory or punitive damages under the current law**



# Lilly Ledbetter Fair Pay Act

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# Lilly Ledbetter Fair Pay Act



- **An unlawful employment practice occurs, with respect to compensation:**
  - when a discriminatory compensation decision or other practice is adopted;
  - when an individual becomes subject to a discriminatory compensation decision or other practice; or
  - when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice

# Lilly Ledbetter Fair Pay Act

- **Act still requires that a plaintiff point to a discriminatory decision or practice**
- **Time period to file a charge remains 180 or 300 days, but plaintiffs can reach back to older discriminatory decisions / practices if they affect current pay**
- **Statute has retroactive effective date to May 28, 2007—the day before the U.S. Supreme Court’s *Ledbetter* decision**
- **Applies to claims based on race, color, religion, sex, and national origin, as well as age (ADEA) and disability (ADA and Rehabilitation Act)**
- **Despite ability to point to old decision if it is affecting current pay, back pay period still limited to two years prior to the filing of the charge**

# Paycheck Fairness Act

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# Paycheck Fairness Act

- **Law pending before Congress**
- **Employers will no longer be able to defend claims simply by pointing to “any other factor other than sex”**
- **Instead, employers must show “a bona fide factor other than sex, such as education, training, or experience”**
- **Employer will have to demonstrate that the bona fide factor is:**
  - not based upon or derived from a sex-based differential in compensation;
  - is job-related with respect to the position in question; and
  - is consistent with business necessity
- **Employee, in turn, can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing the sex-based gender differential and that the employer refused to adopt that alternative practice**



# Paycheck Fairness Act



- **New law, as with Equal Pay Act that it would amend, focuses on disparities, not decisions**
- **Definition of same establishment expanded to include employees who work in the same county or similar political subdivision of a State**
- **Paycheck Fairness Act will replace current “opt-in” class claims under the Equal Pay Act with more plaintiff-friendly “opt-out” class actions**
- **Statute of limitations remains two years (three years for willful violations)**
- **Plaintiffs can get back pay and an equal amount in liquidated damages**
- **Paycheck Fairness Act would add compensatory and punitive damages, which are not available under the current Equal Pay Act**

Why New  
Laws Make  
Companies  
More Likely  
to Be Subject  
to Class Pay  
Discrimination  
Claims

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# Why New Laws Make Companies More Likely to Be Subject to Class Pay Discrimination Claims

- **Ledbetter Fair Pay Act**

- Employees can reach to old decisions if they affect current pay
- Employees no longer limited to showing recent pay decision
- Before the U.S. Supreme Court's 2007 decision, Title VII pattern and practice claims had been the preferred approach by plaintiffs in bringing pay discrimination class actions
  - Allowed plaintiffs to reach across multiple locations and look at larger groupings of employees than under the Equal Pay Act
  - Some courts allowed disparities to be the basis for a Title VII pay discrimination claim



# Why New Laws Make Companies More Likely to Be Subject to Class Pay Discrimination Claims

## ▪ **Ledbetter Fair Pay Act**

- New law potentially could allow current disparities as a vehicle to get to pattern or practice of past discriminatory compensation decisions
- Nonetheless, under the new law, plaintiffs must show both a discriminatory decision and that the decision is affecting current pay if the basis of their claim is a decision or other practice that was made or adopted prior to the relatively short limitations period
- Availability of back pay, compensatory and punitive damages attractive
- Allows claims based on categories other than gender

# Why New Laws Make Companies More Likely to Be Subject to Class Pay Discrimination Claims

## ▪ **Paycheck Fairness Act**

- Employer defenses much more demanding
- Plaintiff can point to less discriminatory alternative to meet business purpose
- Expands scope to locations in the same county; not just a single employer location
- Addition of punitive and compensatory damages
- Replaces opt-in vehicle for class claims with opt-out vehicle
- No need to point to a discriminatory decision or practice; existence of a pay disparity is sufficient

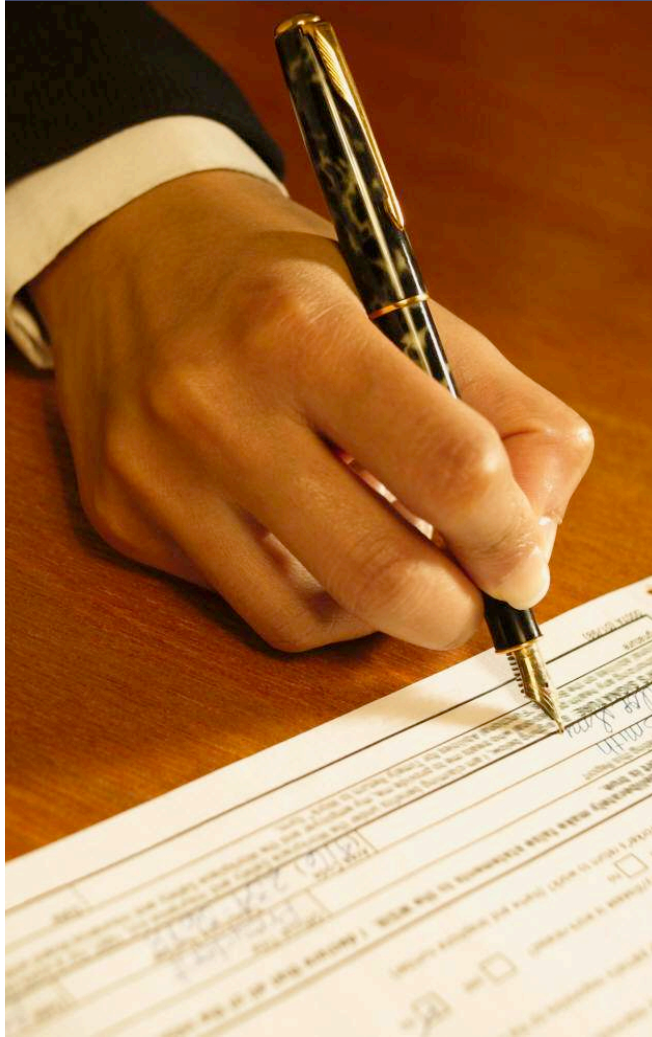
# What Should Employers Do to Minimize Risk and Exposure to Class Claims

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# What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Improved Documentation of Decisions*



- **Improve documentation of employment decisions that directly and indirectly affect pay**
  - Setting of initial pay
  - Annual pay adjustments
  - Performance evaluations
  - Connection between performance evaluations and pay adjustments
  - Explanation of promotion decisions

# What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Recordkeeping*

- **Consider making changes to recordkeeping practices**
- **Law does not change recordkeeping requirements**
- **Employers fixated on recordkeeping because of potential under the Lilly Ledbetter Fair Pay Act for a plaintiff to reach back to old decisions**
  - REMEMBER: plaintiff must point to both a discriminatory compensation decision or other practice and the current effect of that decision
  - If current effect is addressed, claim is preempted

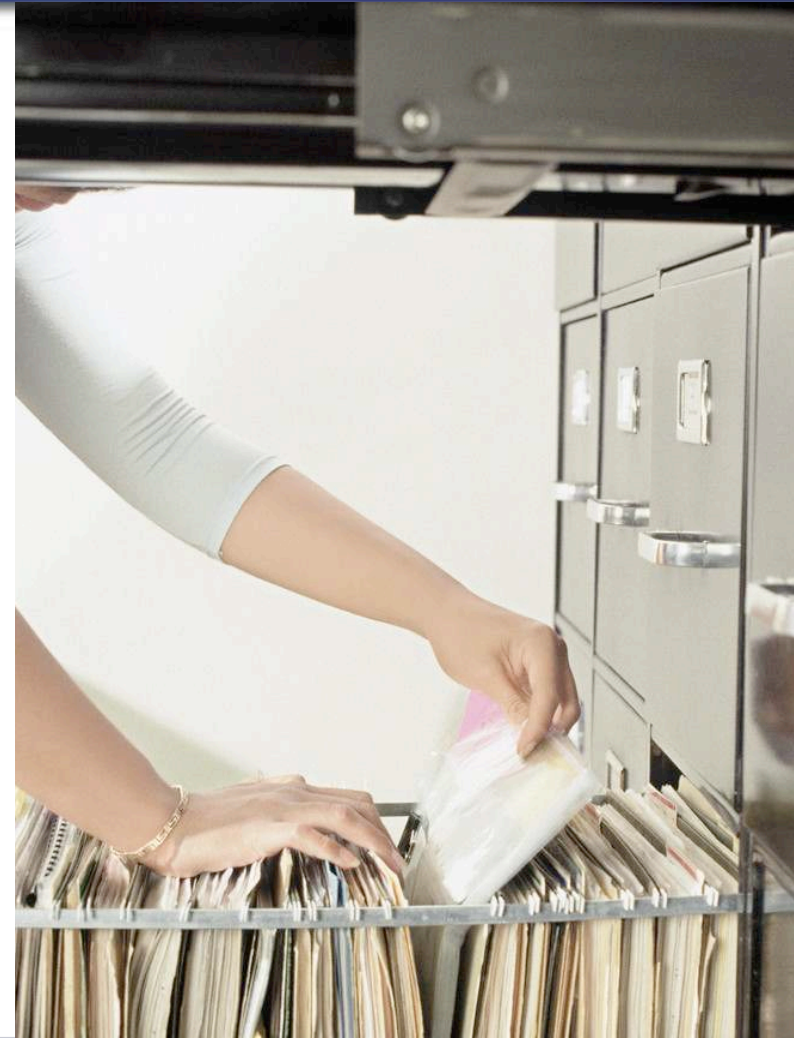
# What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Recordkeeping*

- **Best practice will be company specific**

- If decisions were well documented, retaining records will help defend Ledbetter Act claims and also help explain disparities under Equal Pay Act / Paycheck Fairness Act claims
- If records do not explain why decisions were made, they may actually provide evidence a plaintiff would need to show a past discriminatory decision. Absent a company explanation of why past pay decisions were made the way they were, records potentially help establish the existence of past discriminatory decisions. If that decision is impacting current pay, the plaintiff's case is made.

# What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Recordkeeping*

- **Employer could potentially preempt the recordkeeping issue by ensuring that any effects on current pay are eliminated. If old decision is no longer affecting current pay, then the plaintiffs have no claim under the Lilly Ledbetter Fair Pay Act**



## What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Tighter Controls on Managerial Discretion in Compensation Decisions*

- **Initial setting of pay**
- **Annual pay increases**
- **Performance reviews**
- **Award performance via bonuses**
  - Eliminates perpetual nature of discretionary pay decisions
- **Training on performance ratings, pay decisions, and proper documentation of same**



# What Should Employers Do to Minimize Risk and Exposure to Class Claims – *Conduct Pay Equity Analyses to Eliminate and Preempt Claims under Both Statutes*

- **Addresses both statutes:**
  - Effect on current pay of past practices under the Lilly Ledbetter Fair Pay Act
  - Pay disparities under the Equal Pay Act / Paycheck Fairness Act
- **Emphasis on correcting things now that addresses both current problems and any past potentially discriminatory decisions**
- **Less burdensome approach than auditing every single compensation decision, performance evaluation, promotion decision, etc. that the company ever made. Very likely to be nearly as effective in preempting both single plaintiff and class pay discrimination claims. Also, better suited for doing so for Equal Pay Act / Paycheck Fairness Act claims**

# Issues in Conducting Pay Equity Analyses

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# Issues in Conducting Pay Equity Analyses

- **Maintaining the attorney-client privilege**
  - Two phase process
    - Diagnostic
    - Correctional
- **Establishing appropriate comparator groups**
  - Avoid establishing classes that are broader than how your business operates
  - Avoid one size fits all groupings for the entire company
  - Potential for employers to concede larger classes of employees in litigation than truly fit how they conduct their business and make employment decisions

# Issues in Conducting Pay Equity Analyses

- **Establishing appropriate explanatory variables**
  - Will likely be different for different employee groupings
  - What data is maintained; how challenging will it be to get relevant explanatory information into a useable database
- **Cohort non-statistical analyses versus multiple regression analysis**





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**THANK YOU**

**Alison Davis, Esq.**  
**adavis@littler.com**  
**202-772-2533**

**Josh Roffman, Esq.**  
**jroffman@littler.com**  
**202-414-6852**

**The 2009 WMACCA Employer**

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