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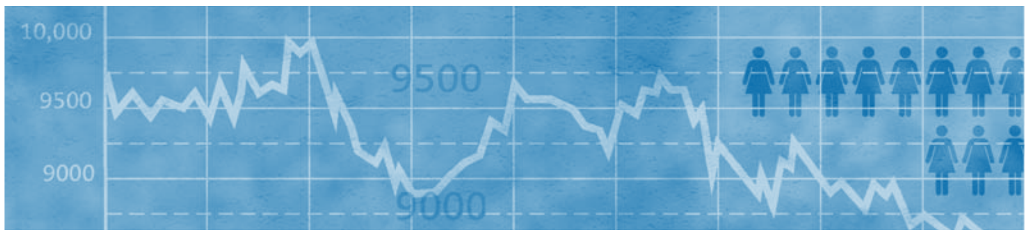
Implications of the Fair Pay Act for Statistical Analysis in Wage Discrimination Suits

By Dr. Christopher Erath, Dr. Denise Martin, and Dr. Elizabeth Newlon[1]



On 29 January 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act. The bill was drafted to reverse a mid-2007 US Supreme Court decision that had denied Ms. Ledbetter back pay for an allegedly discriminatory series of evaluations that had taken place decades earlier.[2] Using a discrete decision that impacted compensation as the tolling event, the Court concluded that her claim was barred because she failed to point to a discriminatory act that occurred during the six-month statutory period (the "charge filing period") for filing an Equal Employment Opportunity Commission ("EEOC") claim. The Fair Pay Act reverses that conclusion, codifying that even in situations where the decision causing the discrimination was made prior to the 180-day window, each newly issued paycheck or other payment that embodies the effects of that discriminatory decision violates Title VII of the Civil Rights Act and triggers a new charge filing period.[3]

Numerous commentators have predicted that the Fair Pay Act itself, along with the associated publicity, will increase the number and type of discrimination suits and hence increase the exposure that companies face in this area. Against that backdrop, it is prudent for companies to take a fresh look at comparative pay statistics, as well as statistics on factors that can affect pay outcomes (such as qualifications, performance evaluations, and promotion histories). But attorneys and companies may question whether the statistical approach to identifying and estimating differences in compensation will also change with the Fair Pay Act. Below, we first review the circumstances that gave rise to the Fair Pay Act, as well as its key provisions and expected impact in more detail. We then discuss why the Fair Pay Act does not change the economic approach to the assessment of alleged discrimination, which generally draws on regression analysis. Finally, we provide

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2 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 US 618 (2007).

3 Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

examples that show why such analyses must be conducted carefully and rigorously if they are to provide reliable information to companies about the equity of historical decisions and the potential need for any remedial action.

Overview of the Fair Pay Act

In 1998, just prior to taking early retirement, Lilly Ledbetter, who had worked at Goodyear since 1979, filed a charge with the EEOC alleging sex discrimination.[4] Specifically, in her lawsuit, she claimed that her discriminatory evaluations resulted in lower raises than similarly situated male employees and, ultimately, in a significantly lower salary at her retirement. Counsel for Ms. Ledbetter argued that those allegedly discriminatory decisions caused her to earn an estimated $200,000 less than her male counterparts by the end of her career. A jury in the District Court of the Northern District of Alabama decided in Ms. Ledbetter's favor and awarded her back pay and more than $3 million in punitive damages.[5]

The Court of Appeals for the 11th Circuit reversed this decision, holding that the District Court should have granted Goodyear's Motion for Summary Judgment because a Title VII pay discrimination claim could not be based on pay decisions made and implemented prior to the charge filing period.[6] More specifically, according to the Court of Appeals, Ms. Ledbetter had not established that Goodyear had acted with discriminatory intent in either of the pay decisions it had made within 180 days of her charge.

On 29 May 2007, the Supreme Court affirmed the Court of Appeals in a 5-4 decision, concluding that a pay-setting decision is a discrete act that occurs at a particular point in time, and that it is that discrete decision which triggers the tolling for the statute of limitations. It expressly rejected the argument that each paycheck embodying that discriminatory decision was itself a new discriminatory act. In her dissenting opinion, Justice Ruth Bader Ginsberg argued that the six-month rule was a "cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose." She noted that pay discrimination usually occurs in small increments, such that awareness only develops over time. She invited a Congressional remedy to "correct the Court's parsimonious interpretation" of Title VII.

On 22 June 2007, the Fair Pay Act was introduced to the House of Representatives.[7] The Fair Pay Act amends Title VII, as well as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. As a result, it covers claims alleging compensation-implicated discrimination based on sex, age, race, color, religion, national origin, and disability. As before, back pay can only be recovered for up to two years preceding the filing of the EEOC charge. However, other remedies are available, including punitive damages, emotional distress damages, and injunctive relief (e.g., a court order to reinstate or promote an aggrieved employee). The Act applies to both intentional discrimination and disparate impact claims and applies retroactively to claims pending on or after 28 May 2007, one day prior to the historical Supreme Court decision.

The Fair Pay Act was signed into law by President Obama on 29 January 2009.

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4 *Ledbetter v. Goodyear Tire & Rubber Co*., 550 US 618 (2007).

5 *Ledbetter v. Goodyear Tire & Rubber Co*., 2003 WL 25507253 (N.D. Ala. 2003). Specifically, the jury recommended $223,776 in back pay, $4,662 for mental anguish, and $3,285,979 in punitive damages.

6 *Ledbetter v. Goodyear Tire & Rubber Co*., 421 F.3d 1169, 1173 (11th Cir. 2005).

7 Ledbetter Fair Pay Act, H.R. 2831 110th Cong. (2007).

Expected Impact of the Fair Pay Act

Effect on Number and Type of Cases

Employment lawyers generally anticipate that the passage of the Fair Pay Act will increase the number of discrimination cases being filed.[8] While most Courts historically have ruled consistently with the Act, they have not done so uniformly.[9] As a result, some cases that were previously rejected on statute of limitations grounds will now be allowed to proceed. The widespread publicity of the Act is also expected to increase filings, with commentators noting that it may cause more people to suspect that they are the victim of discrimination.[10]

An important corollary to the anticipated increase in filings is the expected increase in claims based on discriminatory actions that took place many years ago. Such cases are likely to be more difficult for companies to defend because the relevant manager or other involved personnel may have since departed, and documentation may not have been preserved. Suppose, for example, that a woman hired in 1994 received lower pay than men hired at the same time into the same job title. At the time of her hire, the woman had chosen to accept a lower-paying position in a department that required she take on fewer responsibilities and so offered her greater flexibility. Over time, her pay then remained below that of her male colleagues even though all had received the same five percent pay increases per year. Eventually, a reorganization combined the departments and the woman filed suit alleging discrimination. Under the Fair Pay Act, the firm would be required to defend the initial pay decision, which would be more difficult given that the manager of the former department might no longer be with the company and the personnel records might not cleanly reflect the reason for her reduced pay.

Employers may also face an increased variety of claims under the Fair Pay Act because the Act allows for more ways that an individual or group can be affected by a discriminatory decision. More specifically, the Act covers not just pay raises, but any discriminatory compensation decision or "other practice." As such, plaintiffs may argue that the Act encompasses any condition of employment that is impacted by the pay scale, such as pensions, bonuses, and severance.

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8 According to the law firm Jones Day, the Fair Pay Act will "vastly broaden the scope of potential damages for pay-related discrimination claims by expanding the definition of an unlawful employment discrimination act… [which] would, in turn, weaken standing requirements and increase significantly both the settlement value of such lawsuits and the frequency with which they are filed." (See "Significant Labor and Employment Initiatives of the Obama Administration and 111th Congress," *Jones Day Commentary*, January 2009.) Littler Mendelson attorney Alison Davis says "I think we're going to see an increase in claims, especially in this climate where employers are making tough decisions to cut costs, including labor costs." (See "Lawyers Warn of Litigation Boom with Ledbetter Act," Christine Caulfield, *Law360*, 23 January 2009.)

9 In *Bazemore v. Friday*, 478 US 385 (1986), the justices agreed that "Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern [of wage discrimination] was begun prior to the effective date of Title VII." This ruling could be understood to allow plaintiffs to challenge ongoing pay discrimination regardless of when the decision to discriminate was made. However, in *National Railroad Passenger Corporation v. Morgan*, 536 US 101 (2002), the Court held that discrete forms of discrimination must be challenged within 180 days of when they occur, thereby rejecting the "continuing violations doctrine" under which courts had sometimes permitted plaintiffs to reach prior discriminatory acts if similar acts occurred within the limitations period.

10 According to Andrea Johnson, a management-side lawyer and partner at Burleson Cooke, "[the Fair Pay Act is] going to reinvigorate people to look for claims that perhaps they would not have thought about in the past." (See "Equal-Pay Measures Will Ignite Litigation," Tresa Baldas, *The National Law Journal*, 23 January 2009.) Labor and employment lawyer George Lenard says "Certainly, the publicity effect of the President signing a bill with great fanfare will stimulate interest in litigating fair pay claims." (See http://www.employmentblawg.com/2009/lilly-ledbetter-fair-pay-act-signed-by-president-obama.)

Because the language of the Act resets the statute of limitations with every application of the discriminatory decision to an individual's compensation, a retiree who believes that he or she is a victim of discrimination can file a claim after receiving each pension check.

Finally, the enhanced scope of discrimination claims offered under the Act and the increased difficulty of defending claims arising from misconduct that occurred many years ago may increase the confidence plaintiffs' attorneys have that a case will end in a profitable outcome, with a positive feedback effect on the incentive to file.

Effect on Statistical Assessment of Alleged Discrimination

While filings and case variety are expected to increase under the Fair Pay Act, there are some constants. First, as noted above, despite the nearly-constantly resetting statute of limitations, a plaintiff is not able to recover damages beginning with a discriminatory decision that may have occurred many years ago, but only for the most recent two-year period.

The economic and statistical analyses done at the merit and damage phases should not substantially change, either. Experts will still compare the allegedly discriminated individual or group to similarly-situated employees, generally through the use of regression analysis. In this setting, regression analysis estimates the average difference in current compensation between two groups after controlling for other employee characteristics that may affect compensation such as tenure with the company or education. In a proper study, this same analysis would have been conducted both before and after passage of the Fair Pay Act.

To demonstrate this, let's return to the example of the woman who started in 1994 with lower pay than her male colleagues, but assume she is a part of a large class action alleging that the company pays women less than comparable men. The ostensible class would include all female employees working at the company during the two-year statutory period. Prior to the passage of the Act, regardless of whether a discriminatory act had occurred during the 180-day charge period, a proper analysis of compensation would have compared the current compensation of all women to men working at the company during the two-year statutory period. Additionally, the analysis would have tried to explain why she, and possibly others, ended up with a lower pay rate. As such, the average difference in compensation measured would be the same both before and after the passage of the Fair Pay Act.

The Act has also not changed the fact that there is a right way and a wrong way to do a compensation analysis. Experts should strive to incorporate in their models as many facets of the employer's compensation practices as possible, lest the measure of alleged discrimination be picking up other benign differences across groups. Studies published in economic literature demonstrate the importance of accurately controlling for the characteristics of employees. For example, a recent paper uses the British Household Panel Survey to investigate the reasons for what appears to be a premium paid to tall people previously observed by researchers.[11] Such purportedly scholarly research has concluded that tall people are paid, on average, 1.5 percent more per inch of height, and a cursory reading of such findings could lead one to conclude that there is discrimination against shorter people. However, after examining a range of employee characteristics, they find that half of the so-called height premium can be explained by the association between height and educational attainment (i.e., taller people tend to have greater

[11] "Making Sense of the Labor Market Height Premium: Evidence From the British Household Panel Survey," Anne Case, Christina Paxson, and Mahnaz Islam, NBER Working Paper, May 2008.

education) and the other half can be explained by taller individuals selecting into higher status occupations and industries (i.e., the tall tend to select into higher-paying occupations). With this closer look, it is clear that there is no statistical evidence consistent with an allegation of discrimination against the short, whatever Randy Newman may think.[12]

Other illusory findings in academia have claimed to conclude that wage premiums are paid to those who drink more, are more attractive, or have better dental work. This same kind of misleading evidence has been presented again and again in employment discrimination litigation, and the anticipated uptick in such litigation caused by the Act suggests that employers need to be vigilant in defending themselves against such baseless claims.

A Real World Example

A recent NERA case illustrates the misuse of regression analysis in litigation. A major city agency was sued for race discrimination in, among other things, compensation. The plaintiffs engaged a statistician who presented a report containing a regression analysis purporting to study pay as a function of a number of employee characteristics, including total labor market experience, job tenure, job, and total city tenure, as well as race. Based on this analysis, performed over a seven-year period, the expert concluded that African-Americans were paid statistically significantly less than whites and opined as to the degree of the difference, i.e., damages.

Experts who perform such analyses typically claim to have found the "effect" of race on compensation after "controlling" for the other characteristics in the model. In this case, the expert asserted that there was a significant difference in pay by race after controlling for experience, job, and even experience in the job—in other words, that a difference existed even after taking these characteristics into account.

We examined the data for this city agency, and found that in the majority of jobs, pay was governed by a union contract that specified precisely what pay was for each job and by experience within each job.[13] Racial differences in pay cannot exist in such jobs if, as was the case here, all were paid per the terms of the union contract. Why, then, did plaintiffs' expert reach such an unrealistic and obviously erroneous conclusion?

The answer, simply, is that he looked only at correlations in the data, equivalent to assuming tall people earn more because they are tall, and failed to create an accurate model. The most obvious example of this failure involved the very different effects of time in job for union and non-union positions, as pay in union positions frequently contained seniority bumps that were absent from non-union positions.

Consider a simple example where a job has two pay rates: an entry rate and a higher experienced rate, which is reached after two years of service. Assume that in this job, whites are more likely to have reached the experienced rate. If compensation is studied within this job without regard to experience in the job, the conclusion will be reached that whites, on average, are paid more.

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[12] Newman composed the song "Short People" which, per Wikipedia, became a subject of controversy, as Newman's ironic depiction of bigotry aimed at the short was taken literally by some listeners. In 1978, legislation was introduced to make playing the song on the radio illegal in Maryland. (See http://en.wikipedia.org/wiki/Randy_Newman.)

[13] For instance, some jobs would have an "entry" and "experienced" rate that the employee would attain after one or two years of service.

Alternatively, if the model includes experience in the job but does so in an inaccurate way—such as claiming that each year of experience is equally valuable—the conclusion will again follow that whites are paid more than minorities even though, within both the entry and experienced positions, everyone is paid exactly the same amount.[14] In either case, the divergence between the statistical model and reality leads directly to an impossible conclusion of global pay differences where none exist.

The model plaintiffs' expert put forward also contained a requirement that any racial difference in compensation was identical across all jobs; that is, whatever difference in pay existed between whites and minorities in job 1 had to also exist in job 2 and every other job. Instead of even considering the possibility that racial differences in pay might vary by job, plaintiff's expert mandated that each and every job must feature exactly the same gap by race. Were it the case that one job paid minorities less, or appeared to, while all others paid identically, such a model would report the highly misleading conclusion that all jobs featured a difference in pay.

Together, these errors—failing to capture how in-job experience actually worked and assuming each and every job had to show an identical pay disparity—led the expert to reach the implausible conclusion that pay discrimination existed in a largely union environment where pay was per the union contract. The moral of the story is that despite the virtues of a tool like regression analysis, as with any other tool, it can be used to obscure rather than reveal the truth. With the likely advent of additional compensation-based lawsuits brought on by the Fair Pay Act and its progeny, the danger of being confronted by such analyses only increases. But a carefully constructed analysis will correctly identify that, for example, a lack of height is not a characteristic punished by the labor market and that there can be no pay disparity when all workers at the same title and tenure are paid the same amounts.

Conclusion

The passage of the Fair Pay Act provides companies with a renewed incentive to examine their pay and promotion statistics. The Act is expected to generate increased filings and an increased variety of cases, making it a prudent time for companies to conduct internal assessments to ensure their personnel decisions are being made fairly. A properly conducted study can provide a company with reassurance that it is complying with the Fair Pay Act, or can highlight areas that it should address. Having taken such steps can provide a safeguard in litigation, as the company can then demonstrate it has carefully monitored its pay and promotion practices.

However, to provide reliable information, such statistical reviews—typically done by way of regression analysis—must reflect the internal decision-making processes. A poorly-conducted compensation analysis could lead a company to conclude it needed to address a problem that doesn't actually exist or could cause a company to remain ignorant of a problem that does. In addition, if such flawed analysis generated illogical conclusions of problems that the company chose to ignore, it would run the risk of having such analysis discovered later and used to assert "willful" behavior.

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[14] In this example the only job seniority that matters is whether the employee has two years of job tenure or not, a system poorly captured by an assumption that each year is equally valuable.

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Contacts

For further information and questions, please contact:

Dr. Christopher Erath
Senior Vice President
+1 617 927 4559
chris.erath@nera.com

Dr. Denise Martin
Senior Vice President
Employment and Labor Practice Chair
+1 212 345 5296
denise.martin@nera.com

Dr. Elizabeth Newlon
Senior Consultant
+1 213 346 3019
elizabeth.newlon@nera.com