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Pay Equity After 'Goodyear': Can Employers Afford to Relax?

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While U.S. employers continue to make strides in paying female employees equitably, women still earn only 81 cents for every dollar earned by men. In Massachusetts, they fare even worse, earning about 78 cents per dollar.

Pay equity has received a great deal of media and congressional attention recently on the heels of the U.S. Supreme Court's May 30 decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. __ (2007).

The plaintiff, Mrs. Ledbetter, worked as a supervisor at Goodyear's Gadsden, Ala., plant from 1979 until she retired in 1998. A number of times after 1979 she was the victim of intentional discrimination when she received smaller raises than comparable male employees. Flowing from these acts of discrimination, every paycheck she subsequently received carried forward the effects of that discriminatory conduct.

Ledbetter contended that each paycheck she earned over the many years of her employment, even if unaccompanied by any intent by Goodyear to discriminate, would trigger a new filing period in which she could challenge discriminatory action that had occurred many years before, action that affected her rate of pay over the years.

Siding with Goodyear, the Supreme Court (sharply divided voting 5-4 along political lines) decided that the filing period in a Title VII Federal Civil Rights Act (42 U.S.C. Sect. 2000e-2(a)(1)) unequal pay case does not begin anew with each check an employee receives unless the employer has intended to discriminate in determining that rate of pay or in making the particular payment.

Instead, it begins to run when an employer intends to discriminate in compensation and an unequal paycheck results. As Ledbetter's claim was filed too late under this standard, her damages award of $3.36 million plus attorneys' fees and costs was vacated.

Some observers have implied that employers can afford to relax their efforts to bridge the pay gap, given the strict limits the court put on the time in which an employee may bring an unequal pay claim under Title VII. That would be foolhardy, we believe. Rather, a review of the complete legal landscape should compel businesses to redouble their efforts to ensure that their employees receive equitable compensation.

Federal, state statutes

Title VII is only one of four major laws — two federal and two state — regulating pay equity in private businesses in Massachusetts. The others include the federal Equal Pay Act, 29 U.S.C. Sect. 206(d) (EPA); a state version of Title VII, G.L.c. 151B (Chapter 151B); and the Massachusetts Equal Pay Act, G.L.c. 149, Sect. 105A (MEPA).

Each statute sets forth its own coverage definitions, its own procedures, its own statute of limitations and its own unique rules as to damages.

For example, both the EPA and the MEPA cover only pay disparities based on sex, while Title VII and Chapter 151B cover a broad range of discriminatory conduct based on sex, as well as a number of other protected classes including race.

Title VII and Chapter 151B require that the complainant first file a complaint with state and federal anti-discrimination agencies, whereas the equal pay provisions do not. The latter also provide more limited remedies than the civil rights laws.

Indeed, the Goodyear case itself is a stark illustration of the differences between the provisions of these statutes. Had the case been tried as a claim under the EPA rather than Title VII, instead of losing at the Supreme Court, Ledbetter would have been home spending her money (albeit, a smaller sum due to the EPA's more limited remedies).

The EPA has a no "intent" requirement, and, therefore, a new claim of denial of equal pay accrues with every paycheck a potential plaintiff receives. 29 U.S.C. Sect. 206(d)(1). (It is telling that when asked by Justice Ruth Bader Ginsburg why he did not pursue the claim under the EPA, Ledbetter's attorney stammered: "We should have … we didn't think it was important at the time.")

Caveats to consider

While observers have argued that Goodyear is the product of the new

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conservative majority on the Supreme Court, it is worth noting that the more liberal Supreme Judicial Court in Massachusetts, in strong dicta in Silvestris v. Tantasqua Regional School District, 446 Mass. 756 (2006), has stated that the MEPA statute of limitations begins to run when an unequal paycheck is received that is the product of intentional discrimination, and no new claim accrues when the effects of the initial discrimination results in continuing unequal pay.

Given the Silvestris court's citation to Chapter 151B and pre-Goodyear lower federal court Title VII cases in which the courts took a similar view, it is fair to say that — at least in 2006 — the SJC would have decided a Chapter 151B case the same way.

Regardless of the state and federal decisions limiting the filing period for unequal pay claims, Goodyear should not be seen as a boon for employers that will limit such claims.

It is true that, since Goodyear and Silvestris, Massachusetts employers who ensure that current pay decisions are equitable are freed from liability under Title VII and state law even though effects of past discrimination on pay continue. However, several caveats, in addition to EPA issues, must be noted.

First, the "discovery" rule may assist plaintiffs in bringing what otherwise might be stale claims. Under this rule, a filing period does not begin to run until an employee knows or should know he has a claim. Massachusetts has adopted a discovery rule for cases filed under the state anti-discrimination laws. Wheatley v. American Tel. Co., 418 Mass. 394 (1994).

In fact, in Silvestris, 446 Mass. at 776-778, the court stated that the statute of limitations would not begin to run until the plaintiffs knew, or should have known, that they were harmed by the defendant's discrimination. The 1st U.S. Circuit Court of Appeals, however, does not apply it. Marrero-Gutierrez v. Molina, 491 F.3d 1 (1st Cir. 2007). Until the Supreme Court takes up the discovery issue, the federal courts in this circuit will not apply the mitigating rule.

Second, federal legislation has passed in the U.S. House of Representatives and is pending in the Senate to amend Title VII to provide that every paycheck flowing from earlier discrimination constitutes a new violation. (Should this occur, the irony would be that Massachusetts, applying Silvestris, would have a much more conservative filing period rule than that under federal law.)

Third, and most importantly, paying employees equitably makes good economic sense. Our experience has been that employees who believe they are paid fairly are vastly more productive than those who do not. Most employers will also find that paying employees equitably will cost them less than dealing with disgruntled workers, grievance procedures and litigation, win or lose. Experience teaches that these claims tend to mushroom in the same way as do claims for overtime and failure to pay minimum wage.

Perhaps Goodyear could afford to take its case through the entire trial and appellate system and air publicly that a jury found it to have discriminated in pay over the years. Most employers would prefer a less costly and less public solution.

Ensuring pay equity requires that employers take three important actions.

First, conducting regular pay equity audits is essential.

Second, employers are well advised to give pay equity training to all managers and supervisors who participate in the compensation process.

And, third, counsel should advise employers as to what pay records to retain and for how long in order to comply with applicable laws and defend unequal pay claims. MLW