



# *SBLC WEEKLY*

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## **PAY DISCRIMINATION**

The House of Representatives wasted no time in moving on some of organized labor's issues, approving two bills, H.R. 11, Lilly Ledbetter Fair Pay Act, and H.R.12, Paycheck Fairness Act, by substantial margins.

The topic of equal pay discrimination is a complicated one. There are actually four federal laws in play, the Equal Pay Act (EPA,) Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). The EPA requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement under Title VII, the ADEA, or the ADA that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class, nor do these statutes require the claimant to work in the same establishment as a comparator. Claims based on sex discriminations can be brought under Title VII and the EPA.

H.R. 11 would amend Title VII, the ADA, and the ADEA to clarify that compensation discrimination occurs each time compensation is paid even

though the original discriminatory decision was made many years ago. Under current law, there is a 180-day window for filing discrimination charges after the act of discrimination. In 2007, the U.S. Supreme Court ruled that Lilly Ledbetter, who had filed a complaint many years after the initial compensation decision, was prevented from filing a claim. Under the proposed legislation, an employee could file a discrimination claim any time the employee receives a new paycheck, thus rendering moot any statute of limitations.

H.R.12 revises the EPA's "any factor other than sex" defense by requiring employers to provide non-gender reasons for the difference in wages based on a business justification. An employer would have to demonstrate that the disparity is based on a bona fide factor other than sex, such as education, training, or experience that is (1) not based upon or derived from a sex-based differential, (2) related to the position in question, and (3) consistent with business necessity. The bill would also lift the caps on punitive and compensatory damages in suits brought under the EPA.

The House engaged in a parliamentary maneuver that has us a bit perplexed. They adopted a rule before the debate that said if both bills were passed, they would be combined into one bill before it is sent over to the Senate. It is not clear whether the Senate would consider the two bills as a single

measure. In the last Congress, the bills followed much different tracks in the Senate after House passage. The Ledbetter bill failed to advance when the proponents came up three votes short on cloture. The Paycheck Fairness bill was never considered by the full Senate. That suggests to us different levels of support. However, this time around there may be enough votes in the Senate to overcome a filibuster on both of these bills. These are not pure party line issues.

## **THE SMALL BUSINESS IMPACT**

The coverage threshold for a business for Title VII and the ADA is fifteen or more employees and the ADEA threshold is twenty or more employees. Most folks do not realize it, but the Equal Pay Act amended the Fair Labor Standards Act (FLSA). For the most part, almost all businesses that have an employee are covered by the FLSA and thus subject to the EPA but, because the evidentiary requirements of the EPA are so technical, not many claims are filed against small businesses. (There are also some very limited exemptions from the FLSA and EPA for certain types of businesses such as small intrastate-only retailers.)

Because of the coverage thresholds, fewer small businesses might be subject to a Ledbetter claim but a Title VII case is more subjective than an EPA claim and a business potentially covered by both might have more exposure in the Title VII claim.