

DAILY REPORT

AT ISSUE

Congress took the ball from Ginsburg and ran with it, passing the Lilly Ledbetter Fair Pay Act in the first weeks of Obama's presidency.



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First 100 days and labor law

OBAMA'S FAIR PAY ACT, trio of orders come to labor's aid, but Congress drags feet on Employee Free Choice

PRESIDENT BARACK OBAMA'S first 100 days have been a mixed bag of success for both organized labor and business groups. On the one hand, Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 and issued four pro-labor executive orders. On the other hand, much to organized labor's dismay and much to business groups' delight, organized labor has failed to get passed the Employee Free Choice Act—its top legislative priority.

The Lilly Ledbetter Fair Pay Act, signed Jan. 29, was the first major bill signed into law by the president. The Fair Pay Act is Congress' response to the U.S. Supreme Court's 5-4 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in which the court held that Lilly Ledbetter, who worked for 20 years before discovering that she was paid less than her male counterparts, could not maintain a claim for wage discrimination against Goodyear because she did not file her claim within the applicable 180-day statute of limitation. According to the court, the statute of limitation for Ledbetter's claim had run from the date Goodyear made the discriminatory pay-setting decision and not from each subsequent discriminatory payment. Justice Ruth Bader Ginsburg dissented, stating

that "the ball is in Congress' court . . . to correct this Court's parsimonious reading of Title VII."

Congress took the ball from Ginsburg and ran with it, passing the Lilly Ledbetter Fair Pay Act in the first weeks of Obama's presidency. The act's key feature allows employees to file claims for wage discrimination within 180 days from "each time wages, benefits, or other compensation is paid" pursuant to a discriminatory pay-setting decision or practice, regardless of when the initial pay-setting decision occurred.

With the law's passage, which is retroactively effective as if enacted on May 28, 2007, each time an employer pays an employee pursuant to a discriminatory pay-setting decision or practice, the 180-day statute of limitation starts anew to recover up to two years of back pay from the date they file their claim if the wage discrimination that occurred during the charge filing period, i.e., 180 days from each time an employee is paid, is similar or related to wage discrimination that occurred outside the charge filing period, and the employer subjects itself to up to two years of back pay.

The day after signing the Fair Pay Act into law, Jan. 30, Obama issued a triumvirate of pro-labor executive orders. The first of these orders,

Executive Order 13494, provides that federal contracting departments and agencies will no longer allow the costs of any activities undertaken to persuade employees, whether employees of the recipient of the federal disbursements or of any other entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing.

Examples of those activities the costs of which are no longer allowable include: (a) preparing and distributing materials; (b) hiring or consulting legal counsel or consultants; (c) holding meetings (including paying the salaries of attendees at meetings held for this purpose); and (d) planning or conducting activities by managers, supervisors or union representatives during work hours. While these types of costs are unallowable, Executive Order 13494 also provides that costs incurred in maintaining satisfactory relations between contractors and their employees are allowable.

The second, Executive Order 13495, generally requires a successor contractor to a service contract to offer a right of first refusal of employment to the predecessor contractor's employees. Until this right of first refusal is provided, the successor contractor cannot advertise employment openings under the contract. As a practical matter, nonunion federal contractors who are awarded new services contracts are more likely to be deemed "successors" to the prior contractor's collective bargaining agreement with its employees' union, meaning that, under the National Labor Relations Act, the successor contractor would be obligated to negotiate with the union over a new collective bargaining agreement.

The third, Executive Order 13496, requires federal contracting departments and agencies to include a provision in all government contracts more than \$100,000 requiring contractors to post conspicuously a notice of employee rights under the federal labor laws. Under Executive Order 13496, employers will no longer be required to inform employees that they cannot be required to join a union as a condition of employment—a so-called Beck Notice.

A week after issuing the triumvirate of pro-labor Executive Orders, on Feb. 6 the president issued Executive Order 13502 encouraging executive agencies to require the use of project labor agreements on large-scale construction projects—those projects where the total cost to the federal government is \$25 million or more. A project labor agreement is a prehire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

Project labor agreements are designed to address difficulties that are inherent in construction projects, such as the lack of a permanent workforce, which makes it difficult for contractors to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Additionally, construction projects often involve multiple employers at a single location, which makes it likely that a labor dispute involving even just one employer could delay the entire project.

The Employee Free Choice Act, which organized labor groups hoped would pass during Obama's first 100 days in office, has not been introduced in either chamber of Congress, and its future remains uncertain. The

act, which if passed in its current form, would do away with secret ballots and allow unions to form once a majority of employees in a collective bargaining unit signed valid authorizations designating the union as their bargaining representative, the so-called card-signing or card check provision.

It would also require employees and employers to engage in mandatory, binding arbitration if negotiations for an initial collective bargaining agreement stalled. While Obama supports the act, the Senate is split down party lines, with Democrats generally supporting the act and Republicans generally opposing it. The Democrats hold 59 seats in the Senate following Pennsylvania Sen. Arlen Specter's decision this week to switch from the Republican Party to the Democratic Party. That's one vote shy of the 60 votes needed to avoid a Republican filibuster. If Al Franken is confirmed as the winner of the Senate race in Minnesota, that would give the Democrats 60 votes, a filibuster-proof majority. A filibuster-proof majority doesn't ensure passage of the act, however, as Specter announced prior to switching parties that he would not support the Employee Free Choice Act, reversing his earlier position and placing the act's future in limbo.

Specter emphasized that his change in party affiliation does not affect his position on the act. Following in Specter's footsteps, Sens. Dianne Feinstein, D-Calif., and Blanche Lincoln, D-Ark., also indicate that they will not support the act in its current form. In light of Feinstein, Lincoln and Specter withdrawing their support, whether or not the Employee Free Choice Act passes depends on the ability of the two sides to reach a compromise on the act's provisions. 🗣️