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HOUSE OF REPRESENTATIVES
REPORT
110–237

LILLY LEDBETTER FAIR PAY ACT OF 2007

JULY 18, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2831]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2831) to amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973 to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lilly Ledbetter Fair Pay Act of 2007".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., No. 05–1074 (May 29, 2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charges of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of unlawful employment practices that have occurred outside the time for filing a charge of discrimination.

(4) This Act is not intended to change current law treatment of when pension distributions are considered paid.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(e)) is amended by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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.

"(B) In addition to any relief authorized by section 1977a of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(2) by striking "(d)" and inserting 11(d)(1)";

(3) in the third sentence, by striking "Upon" and inserting the following: "(2) Upon"; and

(4) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person 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.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendment made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5).

(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and (2) paragraphs (1) and

(2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) CONFORMING AMENDMENTS.—

(1) REHABILITATION ACT OF 1973.—Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended—

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e–5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e–5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsections (e)(3) of section 706 of such Act (42 1U.S.C. 2000e5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964.—Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION ACT OF 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

PURPOSE

H.R. 2831, the Lilly Ledbetter Fair Pay Act of 2007, seeks to reverse the Supreme Court's May 29, 2007, ruling in Ledbetter v. Goodyear, which dramatically restricted the time period for filing pay discrimination claims under Title VII and made it more difficult for workers to stand up for their basic rights at work. Under this bill, every discriminatory paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision or other practice would constitute an actionable violation of Title VII, the Americans with Disabilities Act, the Rehabilitation Act, and the Age Discrimination in Employment Act, regardless of whether the decision or other practice to provide the discriminatory compensation was adopted outside the filing period for a claim.

COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

110TH CONGRESS

First hearing: Ensuring equal pay for women

On April 24, 2007, the Committee on Education and Labor conducted a hearing on gender based wage discrimination. At this hearing, "Strengthening the Middle Class: Ensuring Equal Pay for Women," the Committee heard testimony describing the scope and causes of gender based wage disparity, examining why women currently earn 77 cents for every dollar earned by a man.[1] Witnesses included Representative Rosa DeLauro (D–CT); Representative Eleanor Holmes-Norton (D–DC Del.); Catherine Hill, Research Director at the American Association of University Women; Heather Boushey, Senior Economist for the Center for Economic and Policy Research; Dedra Farmer, plaintiff in the Wal-Mart sex discrimination class-action lawsuit; and Diana Furchtgott-Roth, Director of the Center for Employment Policy at the Hudson Institute.

Second hearing: Title VII and wage discrimination

On June 12, 2007, the Committee on Education and Labor conducted a hearing on the Supreme Court's decision in Ledbetter v.

[1] U.S. Census Bureau, U.S. Bureau of Labor Statistics, Annual Demographic Survey (Aug. 2006).

Goodyear Tire & Rubber Co.[2] The hearing, "Justice Denied? The Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision," examined the effects the Supreme Court's decision will have on the ability of discrimination victims to assert their rights, particularly in cases involving compensation discrimination. Witnesses testified, inter alia, that the Court's ruling ignored the realities of pay discrimination and is contrary to the intent of Title VII. These witnesses stated that Congress must develop a legislative fix to clarify that the protections under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA),[3] the Americans with Disabilities Act (ADA)[4] and the Rehabilitation Act,[5] extend not only to discriminatory pay decisions and practices, but to every paycheck that results from discriminatory pay decisions and practices. Witnesses included Lilly Ledbetter, plaintiff in Ledbetter v. Goodyear; Wade Henderson, President and CEO of the Leadership Conference on Civil Rights; Deborah Brake, professor at the University of Pittsburgh School of Law; and Neal Mollen, on behalf of the U.S. Chamber of Commerce.

Introduction of the Ledbetter Fair Pay Act of 2007

On June 22, 2007, the Ledbetter Fair Pay Act of 2007, H.R. 2831, was introduced by Representative George Miller (D–CA) and was referred to the Education and Labor Committee.

Full Committee Mark-up of the Ledbetter Fair Pay Act of 2007

On June 27, 2007, the Committee on Education and Labor met to markup H.R. 2831. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Chairman George Miller. Two other amendments were offered and debated. None of those amendments were adopted. The Committee voted to favorably report H.R. 2831, by a vote of 25–20.

The Miller amendment in the nature of a substitute contained minor technical changes and the following modifications to H.R. 2831:

- The Short Title of the bill was modified to read the "Lilly Ledbetter Fair Pay Act of 2007."
- The provision in H.R. 2831 creating a new Section 706(e)(3)(B) of the Civil Rights Act was removed. This provision clarified that a person, after having already filed a charge of pay discrimination, would not have to keep filing new charges with each new paycheck. Upon further examination of this provision, the Committee believes it is self-evident that new charges would not need to be filed with each new paycheck or other similar or related instance of pay discrimination in order to ensure that those instances are also challengeable in the pursuit of the initial charge. Thus, this language is not necessary and was removed.
- As a result of the elimination of 706(e)(3)(B), paragraph (C), clarifying that persons bringing pay discrimination claims are entitled to up to two years of back pay recovery, was redesignated as paragraph (B).

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[2] 127 S.Ct. 2162 (May 29, 2007).
[3] 29 U.S.C. §§ 621 et seq.
[4] 42 U.S.C. §§ 12101 et seq.
[5] 29 U.S.C. §§ 791, 793–94.

• What would have been the new Section 7(d)(3)(B) of the ADEA clarifying that new charges need not be refiled with each paycheck was also eliminated for the same reasons as the Title VII provision.

• A fourth finding was added to clarify that the bill, in reversing Ledbetter, was not intended to change current law with respect to when pension distributions are considered paid.

Representative Charles Boustany (R–LA) offered an amendment in the nature of a substitute which would have amended the bill so that it applies only to cases in which the employer intentionally discriminates against an employee with regards to a discriminatory compensation decision or other unlawful practice. H.R. 2831, however, is drawn narrowly to define when—for purposes of the 180-day (or 300-day) statute of limitations [6]—an unlawful employment practice (already defined by Title VII) "occurs." The Boustany amendment was defeated by a vote of 18–24.

Representative Ric Keller (R–FL) offered an amendment in the nature of a substitute which would have struck "other practices" from the Act. H.R. 2831 refers to "decisions or other practices" related to compensation in order to capture the wide gamut of compensation practices, from single, discrete decisions about pay to arrangements, schemes, systems, or other practices related to pay. Eliminating "other practices" would have resulted in a bill that fails to reverse Ledbetter, particularly with any hairsplitting definition of "compensation decision." "Other practices" captures the fact pattern in Ledbetter, where sex-based performance evaluations were used in conjunction with a performance-based pay system to effectuate the discriminatory pay. The amendment was defeated by a vote of 20–25.

SUMMARY

The Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, would clarify that when it comes to discriminatory pay, the protections of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act [7] (ADEA), the American with Disabilities Act [8] (ADA) and the Rehabilitation Act,[9] extend to every paycheck or other compensation that results from discriminatory pay decisions and practices.

The legislation is designed to rectify the May 29, 2007, Supreme Court decision in Ledbetter v. Goodyear. Under H.R. 2831, every paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision or other practice would constitute a violation of Title VII, which guards against discrimination on the basis of race, sex, color, national origin, and religion.[10] Each discriminatory paycheck would start the clock for filing a charge. As long as workers file their charges (as Ledbetter herself did) within 180 days of a discriminatory paycheck, their charges will be considered timely.

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[6] The 180-day statute of limitations is extended to 300 days when an employee first files a charge with a state's equivalent of the Equal Employment Opportunity Commission (EEOC). While Title VII has a 180 (or 300) day statute of limitations, it allows recovery of up to two years of backpay, along with other, compensatory and punitive damages.

[7] 29 U.S.C. §§ 621 et seq.

[8] 42 U.S.C. §§ 12101 et seq.

[9] 29 U.S.C. §§ 791, 793–94.

[10] 42 U.S.C. § 2000e–2(a).

The Act also clarifies that, with pay discrimination, an employee is entitled to up to two years of back pay as provided in Title VII already—not just 180 days of back pay, as insinuated in Ledbetter and recent revisions of the EEOC compliance manual.

Finally, H.R. 2831 ensures that these simple reforms extend to the ADEA, the ADA and the Rehabilitation Act to provide these same protections for victims of age and disability discrimination.

STATEMENT AND COMMITTEE VIEWS

The Committee on Education and Labor of the 110th Congress is committed to protecting the rights of American workers and to ensuring that they have adequate remedies if they are discriminated against in the workplace. More than 40 years after the passage of the Civil Rights Act of 1964, the Supreme Court has weakened the nondiscrimination protections afforded to American workers through its decision in Ledbetter v. Goodyear. The Congress must respond.

In Ledbetter, the Court held that under Title VII, employees must file a claim of discrimination within 180 days of the alleged unlawful employment practice, which runs from the initial decision to pay an employee less because of his or her race, color, religion, sex or national origin. The result is fundamentally unfair to victims of pay discrimination who may lose their right to challenge a discriminatory compensation action even though it is on-going but may be unknown. While workers know immediately when they are fired, refused employment or denied a promotion or transfer, the secrecy and confidentiality associated with employees' salaries make pay discrimination difficult to detect.

The Lilly Ledbetter Fair Pay Act of 2007 seeks to reverse the Supreme Court's decision and restore prior law. The Act clarifies that when it comes to discriminatory pay, the protections of Title VII of the Civil Rights Act, the ADEA, the ADA and the Rehabilitation Act, extend not only to these discriminatory pay decisions and practices but to every paycheck that results from those pay decisions and practices. Finally, the Act ensures that anyone alleging discriminatory pay can recover up to 2 years of back pay, as already provided under Title VII, regardless of whether the back pay accrued outside of the statute of limitations for filing the charge.

IMPLICATIONS OF LEDBETTER FOR WORKERS' CIVIL RIGHTS

Title VII makes it an "unlawful employment practice" for an employer to discriminate "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex or national origin."[11] Individuals challenging an employment practice as discriminatory are required to file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days, or 300 days depending on the state, "after the alleged practice occurred."[12] Failure to timely file a charge with the EEOC constitutes a forfeiture of an employee's right to raise a claim in court.

[11] 42 U.S.C. § 2000e–2(a).
[12] Id.

In fiscal year 2006, individuals filed over 800 charges of unlawful, sex-based pay discrimination with the EEOC.[13] If Congress does not act to overturn the Ledbetter decision, it will become more difficult for employees to bring pay discrimination claims under Title VII, and countless meritorious claims will never be adjudicated.[14] By holding that the original discriminatory decision "triggers" the EEOC charging period (i.e. statute of limitations), and a new charging period does not commence upon the receipt of each and every paycheck perpetuating the past discrimination, the employer is forever insulated from liability once the initial 180-day period has passed even though it continues to pay discriminatory compensation.[15] Consequently, the rule adopted by the Court leaves victims of pay discrimination without recourse, even though they continue to receive discriminatory pay for work currently performed.[16]

Under Ledbetter, victims of pay discrimination, unless they file within 180 days of the initial discriminatory pay decision, are forced to live with discriminatory paychecks if they want to keep their job. Ledbetter requires that a victim of pay discrimination must quickly perceive that a discriminatory decision was made and promptly report it, within the 180-day statute of limitations.

Pay discrimination is difficult to detect

The Ledbetter decision ignores the reality that pay discrimination is incredibly difficult to detect. Employees often have no access to the kinds of information necessary to raise a suspicion of pay discrimination, including company-wide salary data. In fact, workplace norms often discourage conversations among employees about salaries. One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers.[17] Only one in ten employers has adopted a pay openness policy.[18]

In addition, pay discrimination is rarely accompanied by circumstances suggestive of bias.[19] In fact, a discriminatory pay gap may begin not with a change in a female employee's pay, but rather with a decision to increase the pay of male colleagues. Unlike hiring, firing, promotion and demotion decisions where an individual immediately knows that she has suffered an adverse employment action, there is often no clearly adverse employment event that occurs with a discriminatory pay decision. A pay-setting decision, unless it implements a pay cut, is unlikely to be viewed as discrimination at the time that it occurs. For example, an employee who learns that she is about to receive a four-percent raise

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[13] The Lilly Ledbetter Fair Pay Act of 2007, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, at 6) [hereinafter Henderson Testimony].

[14] Id.

[15] The Lilly Ledbetter Fair Pay Act of 2007, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Deborah Brake, Law Professor at the University of Pittsburg Law School, at 4) [hereinafter Brake Testimony].

[16] Ledbetter, supra note 2 at 2184 (Ginsburg dissent). See also, Brake Testimony at 12. Brake notes that "employers would be hard-pressed to complain that overturning the Ledbetter decision would place unfair burdens on employers, since employers have lived with the paycheck accrual rule until this very decision."

[17] Henderson Testimony at 3.

[18] Id.

[19] Brake Testimony at 4.

would have no reason to suspect pay discrimination when she does not know about the raises her colleagues earned.[20]

If uncorrected, pay discrimination worsens over time

Discriminatory pay decisions are not separate and distinct from the paychecks that follow them.[21] In her dissent, Justice Ginsburg noted that "case law demonstrates that it is not unusual for employees to work for an employer for quite some time before learning of a gender disparity in pay."[22] Each pay decision builds on the prior one, and unless corrected, discriminatory pay decisions can be magnified by subsequent percentage-based adjustments. Consequently, what would at first appear to be a minor pay disparity could expand over the course of an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion.[23] By the time the discrimination becomes apparent and unmistakable, under Ledbetter, the victim of pay discrimination would find her Title VII claims foreclosed.[24]

Employees lose their rights if they assert a pay discrimination claim too early

The Ledbetter decision creates a Catch-22 for employees. If an employee does not file a charge within 180 days of a discriminatory pay decision, she loses the right to challenge it. But if an employee complains to an employer too soon—that is, without adequate factual and legal foundation[25]—she can be fired with no legal recourse. In Clark County School District v. Breeden,[26] the Supreme Court held that an employee who opposes what she believes to be unlawful discrimination is protected only if she has a "reasonable belief" that the practice she opposes in fact violates Title VII. Otherwise, Title VII's retaliation protections do not reach her, and she may be fired. To avoid this situation after Ledbetter, an employee should file directly with the EEOC as soon as possible, without talking to the employer, despite the fact that the law tries to encourage informal conciliation between employer and employee to avoid conflict and litigation. Neither employers nor employees benefit from such a post-Ledbetter scheme.

Other implications of the Ledbetter decision

The Ledbetter decision extends to Title VII pay discrimination cases affecting not only women, but also those involving race, color, national origin, and religion. If undisturbed, the Ledbetter decision may also affect pay discrimination under parallel employment dis-

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[20] Id. at 5.
[21] Brake Testimony, at 1.
[22] Ledbetter, supra note 2 at 2181. See also, Brake Testimony, at 6.
[23] Brake Testimony, at 2.
[24] See also Linda Babcock and Sara Laschever, "Women Don't Ask: Negotiations and the Gender Divide" (2003) (demonstrating how a discriminatory pay decision can continue to produce an increasing pay disparity throughout an individual's career). See also, Brake Testimony, at 2.
[25] Ledbetter, supra note 2, at 2182. To establish a pay discrimination claim, it may take a pattern of substantial pay disparities and time to investigate the relevant facts in order to demonstrate a legally sufficient inference that the gap is due to gender bias, rather than to some legitimate nondiscriminatory reason such as performance or experience. In an effort to meet the 180-day statute of limitations, an employee may be motivated to complain to her employer at the first sign of a pay gap; however she may lack an adequate foundation for a reasonable belief that the gap is because of gender discrimination.
[26] 532 U.S. 268 (2001).

crimination statutes that are patterned on Title VII, such as the ADEA or the ADA.[27]

Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, testified before the Education and Labor Committee's June 12, 2007 hearing and stated that while the Ledbetter decision is part of the Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination,[28] the Ledbetter decision on its own weakens basic protections in ways that Congress never intended.

For example, Henderson notes the case Goodwin v. General Motors Corporation.[29] In Goodwin, an African-American woman was promoted to a labor representative position with a salary that was approximately $300 to $500 less than other similarly situated employees. The pay disparity increased over time, until she was being paid $547 less per month than the next lowest paid representative. Due to the company's confidentiality policy, Goodwin did not discover the disparity until she was anonymously given a printout of the salary roster. While the district court initially dismissed her Title VII race discrimination claim, the Tenth Circuit reversed and remanded the case, holding that discriminatory salary payments constitute fresh violations of Title VII and each action of pay-based discrimination was independent for purposes of the statutory time of limitations.[30] Under Ledbetter, Goodwin would have been barred from raising her claim.

The Court's analysis in Ledbetter also stands contrary to the EEOC's interpretation and application of Title VII, which previously permitted employees to challenge continuing pay discrimination as long as one paycheck that pays the employee less because of sex falls within the limitations period.[31]

It is true that victims of sex-based pay discrimination can alternatively raise a claim under the Equal Pay Act (EPA). However, utilizing the EPA is not a solution to the loss of rights presented by Ledbetter. First, under the EPA plaintiffs have a different evidentiary standard than under Title VII.[32] An EPA claimant must rely on an opposite sex comparator—that she performed the same work or "equal" work as higher paid males—while Title VII claims do not require comparators so long as there is other evidence of discrimination such as that the female worker would have been paid more had she been a man.[33] Furthermore, the remedies under Title

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[27] Henderson Testimony, at 4.

[28] Id. at 6. In his testimony, Henderson highlights that under recent Supreme Court rulings: older workers can no longer recover money damages for employment discrimination based on age if they are employed by the state (Kimel v. FL. Board of Regents, 528 U.S. 62 (2000)); state workers can no longer recover money damages if their employers violate minimum wage and overtime laws (Alden v. Maine, 527 U.S. 706 (1999)); and workers can now be required to give up their right to sue in court for discrimination as a condition of employment (Circuit City Stores v. Adams, 532 U.S. 105 (2001)).

[29] 275 F.3d 1005 (10th Cir. 2002).

[30] Id. See also, Henderson Testimony at 5–6.

[31] EEOC Compliance Manual, Sec. 2–IV–C(1)(a). See also, Ledbetter supra note 2, at 2185. (Ginsburg dissent) (citing EEOC administrative rulings and litigation positions permitting employees to challenge any discriminatory paychecks received within the limitations period).

[32] "Overview of the Equal Pay Act," American Association of University Women (AAUW), available at: http://www.aauw.org/laf/library/payequity_epa.cfm. Employers can affirmatively defend and justify unequal pay if it is based on: (1) seniority systems; (2) merit systems; (3) systems that measure earnings by quality or quantity of production; or (4) "any factor other than sex." Historically, courts have interpreted the "any factor other than sex" criteria so broadly that it embraces an almost limitless number of factors, so long as they do not involve sex.

[33] Id.

VII are more comprehensive than those under the EPA. While the EPA allows recovery of two years of backpay, or three years where the pay disparity was willful, Title VII allows two years of backpay, compensatory damages, and punitive damages. Moreover, the EPA is not available to victims of race, color, national origin, religion, age, or disability discrimination.

Under H.R. 2831 employers will continue to have adequate legal protections against employees who unreasonably delay filing a pay discrimination suit and they do not need the protections of the Ledbetter decision.[34] Opponents of H.R. 2831 allege that it is necessary to treat pay discrimination as a discrete act to protect employers from the burden of defending claims arising from employment decisions that are long past.[35] This argument is fundamentally flawed. First, pay discrimination like the kind Lilly Ledbetter suffered is not long past. With each paycheck that Ledbetter was paid less, she was a victim of discrimination. Second, employers who allege that they are disadvantaged by an unreasonable or prejudicial delay have adequate legal protections.

As Justice Ginsburg notes in her dissent, "doctrines such as waiver, estoppel, and equitable tolling allow [the Court] to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give notice to the employer.[36] Furthermore, employers can raise a defense of laches. Professor Brake notes that, "lower courts have applied the defense of laches to cut off a plaintiff's right to sue where the employee has delayed unreasonably in filing her claim, even if the employee has met the filing requirements for Title VII." [37]

Victims of pay discrimination have no incentive to delay filing a charge under H.R. 2831. Opponents of this legislation argue that it would encourage plaintiffs to sit on their right to sue, and put the employer at a disadvantage when a case is finally filed. This assertion is entirely without merit. A victim of discrimination has no incentive to delay in ending that discrimination. Opponents argue that a victim will allow discrimination to continue for years, and make it difficult for an employer to defend against old claims of discrimination. It would be nonsensical for a victim to allow discriminatory paychecks to pile up over years. In the example of a ten year old claim, since the back pay award is limited to two years, a victim would have to decide to forfeit eight years of back pay. Furthermore, there is no merit to the argument that a delay in bringing charges unfairly disadvantages the employer. It is the employee who bears the burden of proof. The passage of time only makes that burden of proof more difficult for the employee.

H.R. 2831 maintains the 180/300 day statute of limitations for filing discrimination charges. It does not extend that time limit. To have a viable claim, a victim of pay discrimination must file a charge within 180/300 days of receiving discriminatory pay. If the discriminatory pay was received more than 180/300 days ago—because, for example, the employee left employment and is no longer receiving compensation from this employer or because the employer rectified the discriminatory pay and now has been paying the em-

[34] Brake Testimony, at 10.
[35] Ledbetter, supra note 2 at 2185.
[36] Id. at 2186.
[37] Brake Testimony, at 11.

ployee in a nondiscriminatory and lawful fashion for at least 180/300 days—a charge would be untimely under this bill. Rather than encouraging employers to hide the ball, run out the clock, and continue reaping the financial rewards of paying someone less for discriminatory reasons, as is the incentive under the Ledbetter decision, H.R. 2831 is designed to encourage employers to stop paying individuals in an unlawful, discriminatory fashion. Such incentive to stop discrimination existed in law prior to Ledbetter.

PAY DISCRIMINATION CASE LAW PRIOR TO THE LEDBETTER DECISION

The Supreme Court in Ledbetter rejected prior law that every discriminatory paycheck is a new violation. The Court replaced it with a rule requiring that employees challenge each and every discriminatory pay decision within Title VII's short statutory limitation period, or lose forever the ability to challenge ongoing pay discrimination that results from an earlier decision.[38] Until the Ledbetter case, lower courts across the country had allowed plaintiffs to challenge discriminatory paychecks received within the limitations period, regardless of when the discriminatory pay decision was first made, in cases involving pattern-or-practice claims and individual claims.[39]

The Supreme Court in Bazemore v. Friday—Each week's paycheck is actionable

In 1986, the Supreme Court decided the case of Bazemore v. Friday,[40] which involved unequal pay for black and white employees. Despite the fact that the discriminatory pay decision was made before the passage of Title VII, the Court found a violation of Title VII because the employer had perpetuated the unequal pay and "was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII."[41] The Court held that each and every paycheck that perpetuated the past discrimination was actionable not because the paychecks were 'related' to the decision made outside the statute of limitations, but because they discriminated each and every time they were issued. According to the Court, "each week's paycheck that delivered less to a black than to a similarly situated white is a wrong actionable under Title VII . . ."[42]

The circuit courts of appeal—Each new paycheck is a separate wrong

Under Bazemore and until Ledbetter reached the Eleventh Circuit, circuit courts understood Title VII to prohibit discriminatory disparities in pay occurring within the statute of limitations, even if the disparity began outside that statute of limitations. This was true for both pattern or practice cases and individual cases of pay disparity.[43]

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[38] Id. at 1.
[39] Id. at 13.
[40] 478 U.S. 385 (1986). This case was decided Per Curiam.
[41] Id. at 397.
[42] Id. at 395.
[43] See e.g., Brindley-Obu v. Hughes Training, Inc. 26 F.3d 336 (4th Cir. 1994); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995) (en banc); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396 (9th Cir. 1986); Goodwin v. GMC, 275 F.3d

Continued

In 2002, the Supreme Court decision in National Railroad Passenger Corp. v. Morgan, a hostile work environment case under Title VII, distinguished between "hostile work environment" cases and "discrete act" cases. The Court explained that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" A hostile work environment claim, however, is of a different nature from these discrete acts. According to the Court, "[i]t does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim falls within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."

With Morgan, the circuits found further support for the rule that every discriminatory paycheck is a new violation of the law. The Second Circuit, for example, explained that "discriminatory pay scales are not continuing violations . . . Instead, such scales involve a number of individual and separate wrongs rather than one course of wrongful action . . . And, each repetition of wrongful conduct may, as Morgan taught, be the basis of a separate cause of action for which suit must be brought within the limitations period beginning with its occurrence. A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period."[44]

Likewise, the Seventh Circuit found that a discriminatory pay claim was timely, based on paychecks received during the statutory time period derived from a failure to grant a raise that occurred three years prior, explaining: "We conclude that the rule of Bazemore . . ., to the effect that each new paycheck is a separate wrong (recently affirmed in . . . Morgan . . .), governs this case . . ."[45] Other circuits applied Bazemore and Morgan in the same way.[46]

The EEOC—Repeated discriminatory paychecks can be challenged

The EEOC's compliance manual reflects the pre-Ledbetter rule on pay discrimination. Its latest revision following Morgan explained:

> In . . . Morgan, the Supreme Court ruled that the timeliness of a charge depends upon whether it involves a discrete act or a hostile work environment claim . . . A discrete act, such as the failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge. Such acts must be chal-

1005 (10th Cir. 2002); Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005); Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999).

[44] Forsyth v. Federation Employment and Guidance Service, 409 F.3d 565, 573 (2d Cir. 2005) (citing Bazemore and Morgan).

[45] Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007, 1009 (7th Cir. 2003).

[46] See, e.g., Tademe v. Saint Cloud State Univ., 328 F.3d 982, 989 (8th Cir. 2003); Williams v. Giant Food, Inc., 370 F.3d 423, 429 (4th Cir. 2004); Davidson v. America Online, Inc., 337 F.3d 1179, 1186 (10th Cir. 2003); Shea v. Rice, 409 F.3d 448, 453–54 (D.C. Cir. 2005).

> lenged within 180/300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date . . . Repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period.[47]

The EEOC's view is consistent with case law, Title VII, and the intent of Congress. Accordingly, the EEOC filed an amicus brief arguing for the timeliness of the plaintiff's charge in Ledbetter when the case went before the Eleventh Circuit.

Congressional Intent—Generalizing the rule in Bazemore

As the dissent in Ledbetter pointed out, congressional intent with respect to cases such as Ledbetter was clarified in the 1991 Civil Rights Act. There, Congress explicitly reversed the Supreme Court decision in Lorance v. AT&T Technologies,[48] which involved the application of a discriminatory seniority system. While the legislative answer to Lorance, Section 112 of the Act, dealt only with seniority systems, "Congress made clear (1) its view that this Court had unduly contracted the scope of protection afforded by Title VII and other civil rights statutes, and (2) its aim to generalize the ruling in Bazemore."[49] For example, the Sponsors' Interpretative Memorandum in 1991 explained: "This legislation should be interpreted as disapproving the extension of [Lorance] to contexts outside of seniority systems."[50] In Lorance, the Court found that the statute of limitations started running at the time the employer adopted the seniority system and did not restart when the effects of that system were felt. In Section 112 of the 1991 Civil Rights Act, in response to Lorance, Congress clarified that an unlawful employment practice occurs with respect to discriminatory seniority systems when such a system is adopted, when a person becomes subject to it, and when a person is injured by its application.

THE LEDBETTER DECISION

On May 29, 2007, the Court decided the case of Ledbetter v. Goodyear Tire & Rubber Co., Inc.[51] In a 5–4 decision authored by Justice Alito,[52] the Court rejected Lily Ledbetter's argument that each paycheck she received reflected a lower salary due to past sex discrimination and therefore constituted a new violation of Title VII.[53] Instead, the Court held that the 180–day statute of limitations ran from the day the discriminatory decision was made and that "a new violation does not occur and a new charging period does not commence upon the occurrence of subsequent nondiscriminatory acts that entail effects from the past discrimination."[54]

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[47] EEOC Compliance Manual, "Threshold Issues: Timeliness" Section 2–IV.C (July 21, 2005).
[48] 490 U.S. 900 (1989). This decision was a 5–3 decision with Justice O'Connor taking no part. Justice Scalia wrote for the majority, which included Justices Rehnquist, White, Stevens and Kennedy. Justices Marshall and Blackmun dissented.
[49] Ledbetter, supra note 2, at 11.
[50] Id., at 11–12 (quoting 137 Cong. Rec. 29046, 29407 (1991)).
[51] Ledbetter, supra note 2.
[52] Justices Roberts, Scalia, Thomas and Kennedy concurred, while Justices Ginsburg, Breyer, Souter and Stevens dissented.
[53] 42 U.S.C. section 2000e–2(a).
[54] Ledbetter, supra note 2, at 2162.

Facts of the case

Lily Ledbetter was a female production supervisor at the Goodyear plant in Gadsden, Alabama.[55] She worked there from 1979 to 1998—a period of 19 years—when she retired.[56] Six months prior to her retirement, Ledbetter filed a charge with the EEOC, alleging various acts of sex discrimination.[57] At trial a jury found that Goodyear illegally discriminated against her on the basis of her sex.[58] Some of the evidence showed:

- Her supervisor admitted that Ledbetter's pay, during one year, fell below the minimum threshold for her position.[59]
- While Goodyear claimed the pay disparity was due to poor performance, her supervisor admitted that Ledbetter received the "Top Performance Award" in 1996.[60]
- Testimony was presented showing a supervisor—who evaluated Ledbetter in 1997 and whose evaluation led to her most recent raise denial—was openly biased against women.[61]
- Two women who had worked as managers at the plant told the jury that they had been subjected to pervasive discrimination and were paid less than the men they supervised.[62]
- Discriminatory animus was present throughout Ledbetter's career. Near the end, a plant manager told Ledbetter that "the plant did not need women, that [women] didn't help it, [and] caused problems."[63]
- Initially in line with the salaries of men performing the same work, Ledbetter's salary fell 15 to 40 percent behind her male counterparts after excessive evaluations and percentage-based pay adjustments.[64]

The Alabama jury awarded Ledbetter $223,776 in backpay, $4,662 in compensatory damages and $3,285,979 in punitive damages. The trial court reduced the backpay award to $60,000, and reduced the punitive and compensatory damages in accordance with the statutory cap adopted in the 1991 Civil Rights Act, to $295,338.[65]

Goodyear appealed the case to the Eleventh Circuit Court of Appeals, which overturned the verdict.[66] Unlike the rule utilized by other circuits hitherto, the Eleventh Circuit found that the operative act of discrimination was the decision what to pay Ledbetter not the act of issuing paychecks. Looking only at the pay decisions made within the 180 days prior to filing the EEOC charge, the Appeals Court concluded that there was insufficient evidence to prove that Goodyear acted with discriminatory intent.[67] As a consequence, Lily Ledbetter appealed to the Supreme Court and asked the Court to resolve the following question:

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[55] Id. at 2178.
[56] Id.
[57] Id.
[58] Id.
[59] Id. at 2187.
[60] Id.
[61] Id.
[62] Id.
[63] Id. at 2187.
[64] Id. at 2181.
[65] Ledbetter v. Goodyear, Brief of Appellant, Lilly Ledbetter, 2005 U.S. Briefs 1074 at 1078 (Sept. 7, 2006).
[66] Ledbetter, supra 2 at 2166.
[67] Id.

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging equal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.[68]

Ms. Ledbetter argued that her Title VII pay discrimination claim was timely filed with the EEOC because: the paychecks issued to her during the 180 day period each constituted a separate act of discrimination, and the 1998 decision denying her a raise was unlawful because it perpetuated the discriminatory pay decision from previous years.[69]

The majority decision

The Supreme Court held that Ledbetter's case was time-barred because no discriminatory acts had taken place within the 180–day statute of limitations period. It found that Title VII claims alleging disparate treatment require evidence of discriminatory intent and that there was none within the charging period. The fact that Ledbetter may have been currently suffering from discriminatory paychecks based on past discrimination was not enough to save her claim.

The Court relied heavily on the Lorance Court's finding that the plaintiffs had not alleged that the new seniority rule at issue treated men and women differently or that the rule had been applied in a discriminatory manner. The Court explained that the complaint of the Lorance plaintiffs was that the rule was adopted with discriminatory intent, while the Lorance decision held that the "EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt."[70]

This reliance on Lorance came despite Congress's explicit reversal of that decision in 1991 and the legislative history of that reversal, directing the courts to interpret it as not just a reversal of that decision but a disapproval of that approach in cases beyond seniority systems.[71]

The Court was particularly focused on the issue of discriminatory intent noting that Ledbetter made no claim that the "intentionally discriminatory conduct occurred during the charging period or that the discriminatory decision that occurred prior to that period were not communicated to her."[72] And it rejected Ledbetter's argument that Goodyear's conduct during the charging period gave "present effect" to its discriminatory conduct before the charging period, holding that "Ledbetter should have filed an EEOC charge within

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[68] Id.

[69] Jody Feder, Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court's Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., Congressional Research Service (June 28, 2007).

[70] Id. at 2168.

[71] The majority opinion also relied heavily upon the decisions in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) and Delaware State College v. Ricks, 449 U.S. 250 (1980), neither of which were pay discrimination cases but involved "single, immediately identifiable" acts of discrimination—a constructive discharge and a denial of tenure—qualitatively different from the "repetitive, cumulative discriminatory employment practice" that is involved in pay discrimination cases.

[72] Ledbetter, supra note 2 at 2169.

180 days after each allegedly discriminatory pay decision was made and communicated to her." [73]

The dissent

Justice Ginsburg was joined by Justices Stevens, Breyer and Souter in a strongly-worded dissent. Unlike the majority, she found that the Court's decision in Bazemore applied to Ledbetter's situation:

> Paychecks perpetuating past discrimination . . . are actionable not simply because they are 'related' to a decision made outside the charge-filing period . . . but because they discriminate anew each time they issue.[74]

She also found the Morgan decision to be equally applicable. The Morgan decision, she argued distinguished (for purposes of Title VII's timely filing requirement) between unlawful actions of two kinds: 'discrete acts' that are 'easy to identify' as discriminatory and acts that are cumulative in impact such as hostile environment claims. According to Morgan, "if an act contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court for purposes of determining liability." [75]

Justice Ginsburg then explained that pay disparities:

> have a closer kinship to hostile environment claims than to charges of a single episode of discrimination. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm.[76]

She also pointed out that pay discrimination is not easy to identify and distinguished it from other types of employment discrimination. Unlike the worker who immediately knows that she is denied a promotion or transfer which someone else gains, compensation disparities are often hidden from sight. Management does not publish employee pay levels. One-third of companies even prohibit employees from discussing their pay with each other. Goodyear, for example, kept salaries confidential. Moreover, pay disparities are even more difficult to discern where a female employee is not denied a raise but her male counterparts are given larger ones.

Justice Ginsburg accused the majority of either not comprehending or being indifferent to the insidious nature of pay discrimination and found that its opinion was inconsistent with the overall anti-discrimination purpose of Title VII. She explicitly called on Congress to reverse the Court's decision: "the ball is in Congress' court." [77]

CONGRESS'S ACTION TODAY

Just as Congress was forced to act to reverse Lorance in 1991, Congress is forced to act today to reverse Ledbetter in order to ensure the robust application of Title VII (and other laws) to fully protect workers from discrimination. Congressional action to re-

[73] Id. at 2170.
[74] Ledbetter, supra note 2 at 2179.
[75] Id. at 2180.
[76] 2181.
[77] Id. at 2188.

assert the viability of discrimination claims with respect to pay is particularly timely now, with recent reports that the gender gap in pay is not improving. An April 2007 study, for example, conducted by the American Association of University Women ("AAUW"), confirmed found that women who are only one year out of college make 80 percent of what men earn, and 10 years later, make only 69 percent. [78]

H.R. 2831 is designed to be a narrow reversal of the Ledbetter decision, without upsetting any other current law. It is also yet another disapproval of the approach used by the Court in both Lorance, which has already been reversed by Congress, and Ledbetter, which is reversed with this bill. The Committee cannot envision every fact pattern in which charges might be brought within 180/300 days of an act that effectuates a past decision to discriminate. Application of the seniority system in Lorance was one; paycheck issuance in Ledbetter was another. By rejecting the Court's holdings in these cases, the Congress rejects the Court's underlying idea that the statute of limitations starts to run upon the mere decision to discriminate and not also upon the employer's effectuation of that discriminatory decision. An employer who decides to discriminate based on pay should be subject to challenge with every repeated instance of the employer effectuating that decision. Present and future instances of discrimination must not be immunized by a cramped reading of when an unlawful employment practice occurs for purposes of the statute of limitations. Pay discrimination occurs both when an employer decides to discriminate and then when the employer actually discriminates. Victims of pay discrimination are entitled to justice with each paycheck.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Amendment in the Nature of a Substitute offered by Chairman Miller and accepted by the Committee. The changes made by that Amendment to H.R. 2831 are specified earlier in this report.

Section 1. Provides that the short title is the "Lilly Ledbetter Fair Pay Act of 2007."

Section 2. Provides several congressional findings.

The first finding expresses Congress's disapproval of the ruling in Ledbetter.

The second finding explains that the Ledbetter decision is inconsistent with both the realities of wage discrimination and the robust application of nondiscrimination law that Congress intended.

The third finding clarifies the intent that this bill does not preclude or limit the introduction of evidence of unlawful employment practices occurring outside the statutory time period. Negative in-

[78] Strengthening the Middle Class: Ensuring Equal Pay for Equal Work, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Catherine Hill, Research Director at the American Association of University Women, at 1) [hereinafter Hill Testimony]. The AAUW's analysis further demonstrated that women full-time workers earn less than men full-time workers in nearly every field they work, although the size of the gap varies. After controlling for factors like major, occupation, industry, sector, hours worked, workplace flexibility, experience, educational attainment, enrollment status, grade point average, institution selectivity, age, race/ethnicity, region, marital status and children, a five percent difference in the earnings of male and female college graduates is unexplained. AAUW's analysis showed that (controlling for this similar set of factors), ten years after graduation there is a twelve percent difference in the earnings of recent male and female college graduates that is unexplained and attributable only to gender.

ferences about what evidence of unlawful employment practices may be considered should not be drawn from any of the bill's provisions.

The fourth finding clarifies the intent that this bill does not change current law treatment of when pension distributions are considered paid. While the bill includes benefits as a form of compensation which could trigger the statute of limitations when paid, the bill does not intend to alter how current law treats the question of when such benefits are considered paid. For example, case law treats the receipt of repeated pension checks under a defined benefit plan to be qualitatively different from the receipt of paychecks.[79] One court has explained: "Paychecks are payments for a prior term of work. For example, an employee works for a week, then the salary structure is applied and the paycheck is issued. Pension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application."[80] Accordingly under this rule, pension distributions would be considered paid upon entering retirement and not upon the issuance of each annuity check.

Section 3. Amends the Civil Rights Act of 1964 in order to reverse Ledbetter. Specifically, this section adds a new Section 706(e)(3)(A) to clarify that an unlawful employment practice occurs, with respect to compensation discrimination, when a discriminatory compensation decision or other practice is adopted, when a person 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. This section is the core reversal of the Ledbetter decision. Under this provision, Lilly Ledbetter would have had a timely-filed charge against her employer. She filed her charge within 180 days of receiving a paycheck resulting in whole or in part from an earlier discriminatory compensation practice, namely, sex-based performance evaluations in conjunction with a performance-based pay system resulting in discriminatorily lower pay throughout her career.

Differences between this provision and the Lorance legislative fix for seniority systems, Section 706(e)(2), provide greater clarity and ensure that Ledbetter is fully and clearly reversed. First, this provision is not limited to intentional discrimination but deals with all compensation discrimination in violation of Title VII, to ensure that Ledbetter is not later utilized to limit employees' rights with respect to any kinds of compensation discrimination in violation of Title VII. Second, while the Lorance legislative fix switches between using "individual" and "aggrieved person," this provision uses the word "individual" consistently throughout the language for consistency's sake. There is no substantive difference here between "individual" and "aggrieved person." Third, while the Lorance legislative fix uses the phrase "when an aggrieved person is injured," this provision uses the phrase "when an individual is affected." There is no substantive difference between "injured" and "affected,"

[79] See, e.g., Florida v. Long, 487 U.S. 223, 239 (1988).
[80] Maki v. Allete, Inc., 383 F.3d 740, 744 (8th Cir. 2004).

except that "affected" is simpler and clearer than "injured" when the Court has placed such emphasis, for purposes of what is actionable, on a mistaken disjuncture between the discriminatory decision (the pay decision) and subsequent acts effectuating that discriminatory decision (the paycheck).

This section also adds a new Section 706(e)(3)(B) to the Act. This new section clarifies that victims of pay discrimination are entitled to the full back pay amount available—up to two years of back pay as already provided under Section 706(g)(1). This section is added to ensure that back pay in cases such as Ledbetter are not limited to 180 days. The statute of limitations period and the back pay recovery period are two separate periods in the Act.

Section 4. Amends the Age Discrimination in Employment Act (ADEA) to provide for the same statute of limitations triggers as provided in the Civil Rights Act of 1964 amendments in Section 3. There is no reason why a fair paycheck rule should be limited to discrimination cases under Title VII. It should be noted that Section 4 does not include a provision clarifying recovery as in Section 3. Such provision is not necessary here, since the ADEA operates under a different recovery scheme from Title VII which was not called into question by Ledbetter.

Section 5. Provides that the changes made to the Civil Rights Act of 1964 in Section 3 are applicable to the Americans with Disabilities Act and the Rehabilitation Act, ensuring that victims of pay discrimination because of their disability are covered by this bill. This section also provides conforming amendments which ensure that federal employees are covered by the bill's provisions.

Section 6. Provides an effective date for the bill. Specifically, the bill takes effect as if enacted on May 28, 2007, the day before the Ledbetter decision, and applies to all claims of discrimination pending on or after that date. This effective date ensures that no pending or future claims, not yet finally adjudicated, are affected by the Ledbetter ruling.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. H.R. 2831's changes to the Civil Rights Act of 1964, the Americans with Disabilities Act, the Rehabilitation Act, and the Age Discrimination in Employment Act apply to employees of the legislative branch in the same way they apply to employees of the private sector and federal government employees, to the extent that current law applies these acts to various legislative branch employees. A variety of statutes and provisions in current law, by way of reference, operate to apply nondiscrimination laws to legislative branch employees, such as the Equal Employment Opportunity Act of 1972, Title III of the 1991 Civil Rights Act, and Section 117(a) of the 1991 Civil Rights Act.

REGULATORY IMPACT STATEMENT

As H.R. 2831 merely reverses a Supreme Court decision to return to prior law which had already been accepted by lower courts and the EEOC, the Committee has determined that H.R. 2831 will have minimal impact on the regulatory burden.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates.

(The CBO letter will address this issue)

EARMARK STATEMENT

H.R. 2831 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLL CALL

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 BILL: H.R. 2831 DATE: 6/27/2007
AMENDMENT NUMBER: 2 DEFEATED: 18 AYES / 24 NOES
SPONSOR/AMENDMENT: BOUSTANY / INTENTIONAL DISCRIMINATION

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK				X
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE				X
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT				X
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS				X
Mr. MARCHANT				X
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER	X			
TOTALS	**18**	**24**		**7**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 2 BILL: H.R. 2831 DATE: 6/27/2007
AMENDMENT NUMBER: 3 DEFEATED: 20 AYES / 25 NOES
SPONSOR/AMENDMENT: KELLER / "OTHER PRACTICES"

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK				X
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE				X
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS	X			
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mrs. McMORRIS RODGERS				X
Mr. MARCHANT				X
Mr. PRICE	X			
Mr. FORTUÑO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
Mr. HELLER	X			
TOTALS	**20**	**25**		**4**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 3 **BILL: H.R. 2831** **DATE: 6/27/2007**
AMENDMENT NUMBER **PASSED: 25 AYES/20 NOES**
SPONSOR/AMENDMENT: FAVORABLY REPORTING THE BILL

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ	X			
Mr. SARBANES	X			
Mr. SESTAK				X
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE				X
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON		X		
Mr. PETRI		X		
Mr. HOEKSTRA		X		
Mr. CASTLE		X		
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER		X		
Mr. WILSON		X		
Mr. KLINE		X		
Mrs. McMORRIS RODGERS				X
Mr. MARCHANT				X
Mr. PRICE		X		
Mr. FORTUÑO		X		
Mr. BOUSTANY		X		
Mrs. FOXX		X		
Mr. KUHL		X		
Mr. ROB BISHOP		X		
Mr. DAVID DAVIS		X		
Mr. WALBERG		X		
Mr. HELLER		X		
TOTALS	**25**	**20**		**4**

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 980 from the Director of the Congressional Budget Office:

JULY 12, 2007.

Hon. GEORGE MILLER,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2831, the Lilly Ledbetter Fair Pay Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 2831—Lilly Ledbetter Fair Pay Act of 2007

H.R. 2831 would effectively reverse a recent Supreme Court decision (Ledbetter v. Goodyear Tire and Rubber Co., No. 05–1074, May 29, 2007) that addressed the time period during which employees may file claims for pay discrimination. The Court ruled that the statute of limitations for such claims begins when the original discriminatory act occurs and is communicated to the employee. Under H.R. 2831, the statute of limitations would begin whenever an employee receives any wages, benefits, or other compensation affected by the alleged discriminatory act.

H.R. 2831 would not establish a new cause of action for claims of pay discrimination. Because many variables influence the filing of a claim for pay discrimination, CBO expects that the bill would not significantly affect the number of filings with the Equal Employment Opportunity Commission (EEOC). Based on information from that agency, CBO estimates the H.R. 2831 would not significantly increase costs to the EEOC or to the federal courts over the 2008–2012 period. Enacting the bill would not affect revenues or direct spending.

Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from the application of that act legislative provisions that enforce statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability. CBO has determined that H.R. 2831 falls within that exclusion and

has not reviewed the bill for intergovernmental or private-sector mandates.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with Clause 3(c) of House rule XIII, the goal of H.R. 2831 is to protect individuals from discrimination in pay on the basis of sex, race, color, national origin, religion, age, or disability, by reversing the Supreme Court's Ledbetter decision.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 2831. The Committee believes that the amendments made by this bill which would clarify that the protections under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Rehabilitation Act, extend not only to discriminatory pay decisions and practices but to every paycheck that results from discriminatory pay decisions and practices are within Congress' authority under the Equal Protection Clause, Commerce Clause, and Due Process Clause.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 2831. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CIVIL RIGHTS ACT OF 1964

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

* * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) * * *

* * * * * * *

(e)(1) * * *

* * * * * * *

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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.

(B) In addition to any relief authorized by section 1977a of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

* * * * * * *

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) * * *

* * * * * * *

(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.

* * * * * * *

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

* * * * * * *

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) * * *

* * * * * * *

(d)*(1)* No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

[(1)**]** *(A)* within 180 days after the alleged unlawful practice occurred; or

[(2)**]** *(B)* in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

[Upon]
(2) Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person 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.

* * * * * * *

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 15. (a) * * *

* * * * * * *

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions [of section] *of sections 7(d)(3) and* 12(b) of this Act and the provisions of this section.

* * * * * * *

REHABILITATION ACT OF 1973

* * * * * * *

TITLE V—RIGHTS AND ADVOCACY

* * * * * * *

REMEDIES AND ATTORNEYS' FEES

Sec. 505. (a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e–5 (f) through (k)) *(and the application of section 706(e)(3) (42 U.S.C. 2000e–5(e)(3)) to claims of discrimination in compensation),* shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 *(42 U.S.C. 2000d et seq.) (and in subsections (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation)* shall be avail-

able to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

* * * * * * *

COMMITTEE CORRESPONDENCE

None.

MINORITY VIEWS

INTRODUCTION

On May 29, 2007, the Supreme Court issued its decision in Ledbetter v. Goodyear Tire & Rubber Company, Inc.[1] At issue before the Court was whether a former employee may sue her former employer under Title VII of the Civil Rights Act of 1964 for pay discrimination if she claims that a discriminatory pay decision occurred outside of the relevant statute of limitations, but is still given effect by virtue of the fact that she continues to receive lower pay. Relying on well-established precedent under Title VII, the Court held that an employee in this position cannot sue her employer for an otherwise time-barred discriminatory pay action, even if the effects of such discrimination are still reflected in her pay today. In so doing, the Court gave meaning to the legislative text of the Civil Rights Act of 1964; Congress's intent in choosing and enacting the language it did; and the strong policy interests of fairness and finality reflected in those Congressional choices.

The proposition of whether Ledbetter was properly decided is a question on which Members on both sides of the aisle, in good conscience and in good faith, can disagree. Similarly, the question of whether the Court's decision in the case should be reversed, limited, or modified, is subject to legitimate debate. What is beyond legitimate debate or question is the fact that despite its supporters' claims to the contrary, H.R. 2831, the so-called "Ledbetter Fair Pay Act," goes far beyond the mere reversal of the Court's decision in that case. As detailed herein, H.R. 2831 is not a narrowly-drawn bill that merely reverses the result of one court case, or even a class of similar cases. Simply put, H.R. 2831 virtually eliminates the statute of limitations with respect to almost every claim of discrimination available under federal law, and potentially broadens the scope and application of civil rights laws to entirely new fact patterns, practices, and claims. It is no exaggeration to say that H.R. 2831 represents the most comprehensive revision to our nation's civil rights laws to be given serious consideration by the Committee in almost two decades.

The vast scope of the changes embodied in H.R. 2831 makes its premature and ill-advised consideration all the more irresponsible and objectionable. Indeed, in many instances, even the bill's supporters appear unclear as to the intent and certainly the effect of the bill's provisions, a concern highlighted by the fact that the bill was introduced and rushed to full Committee markup in five days, without the benefit of legislative consideration via the hearing process, stakeholder comment and review, or subcommittee consid-

[1] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S.____, 127 S. Ct. 2162 (2007) (hereinafter "Ledbetter" or "the Ledbetter decision").

eration. H.R. 2831 is bad policy, compounded by bad process, and for the reasons set forth below we oppose its passage.

BACKGROUND: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice, inter alia, for an employer to discriminate "against any individual with respect to his [or her] compensation . . . because of such individual's . . . sex."[2] Generally, an individual wishing to challenge an employment practice under Title VII (whether it be a termination, the denial of a promotion, a pay decision, or other adverse employment action) must first file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful employment practice occurred.[3] If an employee does not submit a timely EEOC charge, the employee may not later challenge the subject employment practice in court. The period of time running from the date of an act of discrimination to the date on which a charge must be filed is commonly referred to as the "charging period."

LEDBETTER V. GOODYEAR TIRE & RUBBER COMPANY

Lilly Ledbetter worked for Goodyear Tire and Rubber Company at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ms. Ledbetter filed suit against Goodyear in court, including, among other things, a Title VII pay discrimination claim and a claim under the Equal Pay Act.[4] The lower court ruled in favor of Goodyear on several of Ms. Ledbetter's claims, including her Equal Pay Act claim, but allowed others, including her Title VII pay discrimination claim, to proceed to trial.

At trial, Ms. Ledbetter introduced evidence that during the course of her nineteen years of employment at Goodyear, several supervisors had given her poor evaluations because of her sex (although it appears that many of these claims turned principally on the misconduct of a single supervisor whom Ms. Ledbetter claims retaliated against her in the early 1980s and mid–1990s for rejecting his sexual advances; by the time the case went to trial, this supervisor had died). Ms. Ledbetter argued that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Notably (and as discussed in further detail below), she did not appear to claim that the alleged discrimination on which she based her suit in 1998 was unknown to her at the time it occurred in the 1980s and 1990s.

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[2] 42 U. S. C. §2000e–2(a)(1).

[3] In states where a state agency has a work-sharing agreement with the EEOC and where potential discrimination may be covered by state law as well, the time for filing a charge of discrimination is extended to 300 days. See 42 U.S.C. § 2000e–5(e)(1).

[4] See generally 29 U.S.C §206(d).

At trial, Goodyear maintained that Ms. Ledbetter's evaluations had been nondiscriminatory. The jury found in her favor and awarded her back pay and damages.[5] Goodyear, on appeal, contended that Ms. Ledbetter's pay discrimination claim was time-barred with respect to all pay decisions made prior to September 26, 1997 (180 days before she filed her charge at the EEOC), and that it committed no discriminatory act relating to her pay after that date.

The Court of Appeals for the Eleventh Circuit held that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the charging period. Put more simply, the court found that any pay decision made more than 180 days prior to Ms. Ledbetter filing her charge with the EEOC could not provide the basis for a claim of discrimination. The court then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span, namely, a decision made in 1997 to deny Ms. Ledbetter a raise and a similar decision made in 1998. Thus, the Appeals Court found in the company's favor and vacated the jury's verdict.

Ms. Ledbetter appealed her case to the Supreme Court, but did not seek review of the Court of Appeals' holdings regarding the sufficiency of the evidence in relation to the 1997 and 1998 pay decisions. Rather, she sought review of the following question:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred out-side the limitations period?

THE SUPREME COURT'S RULING

On May 29, 2007, in a five to four decision,[6] the Supreme Court held that Ms. Ledbetter's claims were not timely. In arriving at its ruling, the Court's majority stressed two points. First, the Court stressed that its holding in Ledbetter was consistent with its prior rulings on the question of when the statute of limitations begins to toll for a discrete act of discrimination. Second, the Court went on at length to note that its decision was compelled by the terms of the statute of limitations included in Title VII by Congress, and that Congress plainly had given special attention to the policy choices underlying a short statute of limitations. As the Court observed:

> Statutes of limitations serve a policy of repose. They "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of

[5] The jury awarded Ms. Ledbetter $223,776 in back pay, $4,662 in compensatory damages, and $3.3 million in punitive damages. The trial court reduced the back pay award to $60,000, and capped compensatory damages at $300,000 pursuant to the Civil Rights Act of 1991 (which generally sets for limits damages other than back pay).

[6] Justice Alito wrote the majority decision, in which he was joined by Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas.

> stale claims in time comes to prevail over the right to prosecute them.'" The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." Certainly, the 180-day EEOC charging deadline is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.[7]

Based on this reasoning, the Court held that Ms. Ledbetter could not base a claim in 1998 on alleged discrimination which occurred outside of the 180-day charging period, even if such discrimination "tainted" her wages today. The Court affirmed the Eleventh Circuit's decision in favor of Goodyear.

In dissent, Justice Ginsberg[8] argued that pay disparities are "significantly different" than other adverse employment actions such as termination and failure to promote, which she believed involve "fully communicated discrete acts." In contrast, Justice Ginsburg wrote, "[p]ay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time," Ginsburg said.[9] She asserted that under Supreme Court precedent "the unlawful practice is the current payment of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man."[10]

Finally, Justice Ginsburg's dissent suggested that an employer might "conceal" pay discrimination, or otherwise make it difficult for an employee to be on notice that he or she was the victim of discrimination. In that light, it is worth noting that the Court's majority opinion expressly left open the question of whether Title VII claims are amenable to a "discovery rule."[11] The Court did note, however, that in Ms. Ledbetter's case, there was no indication that a "discovery rule" would have changed the outcome—Ms. Ledbetter herself did not claim that the discrimination she alleged to have been the victim of in the 1980s and 1990s was unknown to or hidden from her.[12]

Almost immediately upon its announcement, the Ledbetter decision was met with criticism from plaintiffs' advocates, the trial bar, and others in the civil rights community, who claimed that the decision represented a radical departure from established law validating the "paycheck rule." The Supreme Court's decision "severely weakens remedies for employees who have faced wage discrimination and represents a flawed interpretation of our civil rights laws,"

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[7] 127 S. Ct. at 2170–71 (citations omitted).

[8] Justice Ginsburg was joined by Justices Stephens, Souter, and Breyer in her dissent. Significant media attention has been paid to the fact that Justice Ginsburg read her dissent from the bench, an unusual occurrence, if not one of substantive import.

[9] 127 S. Ct. at 2178–79.

[10] Id. at 2179 (citation omitted).

[11] A "discovery rule" generally provides that the statute of limitations on a claim begins to run when a plaintiff is on notice (or reasonably should be on notice) of a potential claim, and is intended to ensure that meritorious claims are not time-barred simply because a defendant conceals facts or otherwise attempts to "run out the clock" on a plaintiff's claim.

[12] See 127 S. Ct. at 2177 n. 10.

said the National Women's Law Center.[13] "Not only does the ruling ignore the reality of pay discrimination, it also cripples the law's intent to address it, and undermines the incentive for employers to prevent and correct it.[14] "The National Partnership for Women & Families described the decision as "a painful and costly step backward for the nation and a deep disappointment to those of us who want to see strong measures in place to give all workers meaningful protections against discrimination." [15]

In contrast, the employer community has generally supported the Supreme Court's ruling in Ledbetter, noting, as did the Court's majority, that the holding is directly in line with judicial precedent as to when a cause of action for discrimination accrues and when it is time-barred. Moreover, employer groups have posited that that the decision may encourage employees to file pay discrimination charges earlier so that pay disputes can be resolved before documents are gone and memories have faded. Moreover, they note, filing a charge gets the attention of the employer and allows the EEOC to investigate and conciliate, which in many instances may result in a pay increase for the employee or otherwise reveal a bona fide reason for the pay disparity.

COMMITTEE ON EDUCATION AND LABOR HEARING ON LEDBETTER V. GOODYEAR DECISION

On June 12, 2007, the Committee on Education and Labor held a hearing entitled "Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision." At that hearing, Ms. Ledbetter herself testified, as did an academic, a representative of civil rights groups, and Neal D. Mollen, the attorney who represented the United States Chamber of Commerce as amicus curiae in the Ledbetter case and testified at the hearing on their behalf. The hearing focused on the policy issues arising from the Ledbetter decision, but did not focus on any particular piece of legislation or proposed legislative solution. Mr. Mollen testified as to the Court's reasoning in Ledbetter, as well as the fundamental policy issues advanced served by the Court's decision. In his own words:

> [The] "paycheck" limitations rule, soundly and expressly rejected in Ledbetter, would have utterly frustrated Congress' design for attempting to resolve such matters, at least in the first instance, without litigation.
>
> Moreover, in order to embrace this "paycheck" rule, the Supreme Court would have been required to renounce a rule announced in a long line of well-understood cases regarding the application of rules of limitation under Title VII. The Court had repeatedly held that the statute's limitations period begins to run when the alleged discriminatory decision is made and communicated, not when the complainant feels the consequences of that decision. *For the Court to overrule this precedent or for the Congress to*

[13] "Supreme Court Rules 5–4 Filing Period Applies to Each Discrete Pay Decision," *Daily Labor Report*, No. 103 (May 30, 2007) (BNA) at AA–1.
[14] Id.
[15] Id.

supersede this settled law with legislation would promote instability and confusion in the law.

Finally and perhaps most importantly, the Ledbetter decision recognized the profound unfairness inherent in a limitations rule that would permit an individual to sleep on his or her rights for years, or even decades, before raising a claim of discrimination. To defend itself against a claim of discrimination, an employer must be in a position to explain—first to the EEOC and the charging party, and perhaps later to a jury—the reasons it had for making the challenged decisions. To do so, it must rely on the existence of documents and the memories of people, neither of which is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination, as Ms. Ledbetter did in this case, he or she can "wait out" the employer, i.e., ensure that the employer is effectively unable to offer any meaningful defense to the claim. That, the Court properly held, is patently unfair. *It does not serve Congress' goal—eliminating discrimination to substitute a game of "gotcha" for the investigation and conciliation Congress envisioned.*

Statutes of limitation are an expression of society's principled, collective judgment that is it unfair to call upon a defendant to answer serious charges when placed at such a disadvantage. A rule that "refreshes" the period of limitations with every paycheck received to permit a challenge to every decision that contributed to current pay cannot be squared with this important societal value.[16]

Mr. Mollen, an employment law practitioner with decades of experience, explained to the Committee why, in particular, the policy underlying decisions as to the appropriate time period in which to bring a claim should be given particular attention in the context of employment-related lawsuits. As Mr. Mollen testified:

The interest in repose is particularly compelling in the employment setting. *To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged decision, and to do so convincingly.* In an employment discrimination case, the employer attempts to show at trial that it had good reason for treating the plaintiff in the way it did, and the plaintiff tries to show that the employer's explanation is unworthy of credence; the jury must decide whom to believe. *In many, if not most, trials, the testimony devolves to a "he said/she said" battle of recollections, and the most vivid rendition of events usually prevails.*

An employer 's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether.

[16] Testimony of Paul D. Mollen, testifying on behalf of the U.S. Chamber of Commerce, Committee on Education and Labor Hearing, "Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision," (June 12, 2007) (hereinafter, "Mollen Testimony") at 3–4 (emphasis added).

Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no "opportunity to gather and preserve the evidence with which to sustain [itself] . . ." *That is precisely why Congress wisely selected relatively brief periods of limitation for filing administrative charges under Title VII.*

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, expansions, acquisitions, reductions-in-force, divestitures and reorganizations. *When a dispute in the workplace is raised promptly as Congress intended, most or all of the decision-makers, witnesses, and human resources representatives an employer will need to consult and to tell its story convincingly are likely to still be working for the defendant employer at the time of a trial, or at least the employer will usually be able to locate them. The employer's ability to muster a defense dwindles, however, as the challenged decision recedes into the past . . .*

The fact that an employer may keep some employment records documenting decisions affecting pay is of little comfort. First, in practice, employers rarely record detailed explanations on paper as to why one employee might have received an incrementally lower or higher pay increase than his or her co-worker. *Unlike terminations, which are relatively rare and therefore are usually documented thoroughly at the time, most employers make compensation decisions about every one of their employees every year.* The employer can hardly be expected to write extended narratives explaining the rationale for every one of those decisions for every employee, or record comparisons between and among all of the other similarly situated employees—i.e., why Employee A got a 3.5% increase and Employee B got 4%.

Second, even if this kind of documentation existed, the "story line" of an employment decision cannot be told at trial solely with a few pieces of paper. *Few defendants are likely to prevail at a trial—even when the challenged decision was entirely bias-free—by meeting the live, detailed, and often emotional testimony of the plaintiff with a few words recorded on a document . . .*

Thus, the limitations periods selected by Congress in enacting Title VII are rooted in notions of fundamental fairness that are the hallmarks of our American system of justice. The American people are fair. They want individuals to have an opportunity to raise their concerns and, where their legal rights have been invaded, a process through which they can seek redress. But they also believe—correctly—that an injured party has to act with reasonable dispatch in pressing his or her claims. *It violates the most basic notions of justice to allow an individual—even one who may have been subjected to discrimination—to wait*

until the employer is essentially defenseless to raise the allegation. [17]

Insofar as no legislative proposal was pending before the witnesses, the Committee was not able to ascertain the views of any witness, stakeholder, or interested party as to what specific language to reverse the Ledbetter decision or adopt a "paycheck rule" more broadly might look like. These witnesses were not able to offer their views as to whether H.R. 2831 accomplishes these goals, does less than that, or does more than that, insofar as that bill was not introduced until ten days after the hearing.

H.R. 2831, THE LEDBETTER FAIR PAY ACT

On the afternoon of Friday, June 22, 2007, Chairman Miller introduced H.R. 2831, the "Ledbetter Fair Pay Act of 2007," legislation which its supporters purport is a "narrowly drawn" bill simply intended to overturn the Supreme Court's Ledbetter decision. The afternoon of the June 22 was the first time that Minority Members and staff were afforded the opportunity to review legislative text ostensibly relating to the Supreme Court's Ledbetter decision.

In general, H.R. 2831 amends four different statutes (Title VII of the Civil Rights Act of 1964, which applies to discrimination on the basis of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act, which prohibits discrimination on the basis of age; and the Americans with Disabilities Act and its precursor, the National Rehabilitation Act, which both prohibit discrimination on the basis of disability). With respect to each of these statutes, H.R. 2831 would:

• Eliminate the statute of limitations and EEOC charging requirements for any claim of discrimination, no matter how long ago, that could be characterized as an (undefined) "discriminatory compensation decision or other practice." H.R. 2831 allow an individual to bring a claim of discrimination where he or she alleges to have been the victim of a "discriminatory compensation decision or other practice" at any of the following times: (a) the time the decision or practice is adopted; (b) the time an individual became "subject to" the decision or practice; or (c) the time an individual is "affected by" application of the decision or practice, "including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." [18] There is no limit on how many years into the future a plaintiff may bring a claim, or as to how many years a future plaintiff can look backward (e.g., with respect to, for example, pension benefits, a plaintiff retiring in 2057 could bring a claim of discrimination based on pay decisions made on her first day of employment fifty years ago in 2007).

• Allow an "aggrieved person" who files a charge of discrimination to challenge "similar or related instances" of discrimination that occur after the filing of the initial charge, without having to file a subsequent charge with the EEOC;" [19] and

[17] Id. at 5–7 (emphasis added; citation omitted).
[18] See H.R. 2831 (as introduced) § 3, proposed subparagraph 3(a).
[19] See id. § 3, proposed subparagraph 3(b).

• Provide that an aggrieved person could obtain damages and relief, including recovery of back pay for up to two years preceding the filing of a charge with the EEOC, where discrimination that occurred during the charging period was "similar or related to" (an undefined term) claims of discrimination that would be otherwise barred by the statute of limitations.[20]

H.R. 2831 appears to have been written to expressly revive plaintiff Ledbetter's claim in the lower court: the bill applies retroactively to all cases that were pending on May 28, 2007—the day before the Supreme Court disposed of Ms. Ledbetter's claim.

LEGISLATIVE ACTIVITY

No hearing on H.R. 2831 was held in the Committee on Education and Labor subcommittee of jurisdiction, the Subcommittee on Health, Employment, Labor and Pensions.

No hearing on H.R. 2831 was held in the Committee on Education and Labor.[21]

The Subcommittee on Health, Employment, Labor, and Pensions did not meet to consider or mark up H.R. 2831.

On Wednesday, June 27, 2007, five days after its introduction, the Committee on Education and Labor met to consider and mark up H.R. 2831. An Amendment in the Nature of a Substitute offered by Mr. Miller was adopted without objection. Amendments to the Miller Substitute offered by Representatives Boustany and Keller were rejected on roll call votes of 18 to 24 and 20 to 25, respectively. The Committee favorably reported H.R. 2831, as amended by the Miller Amendment in the Nature of a Substitute, on a roll call vote of 25 to 20. Republican Members were unanimous in their opposition to reporting the bill favorably to the House of Representatives.

REPUBLICAN VIEWS

Committee Republicans are united in their opposition to intentional discrimination and their support of Title VII's protection from and prohibition of discrimination in the workplace. Committee Republicans are equally united, however, in their opposition to the fundamentally flawed legislation that is H.R. 2831.

Stripped of its rhetoric and the characterization of the bill by its supporters notwithstanding, H.R. 2831 positively eliminates the statute of limitations and EEOC charging requirements contained in current law with respect to almost every conceivable claim of discrimination one can imagine. It allows an employee—or any individual who can arguably claim to be "affected" by an allegedly discriminatory decision relating to compensation, wages, benefits—

[20] See id. § 3, proposed subparagraph 3(c).

[21] The Majority would appear to imply in their Views, see supra, that the Committee on Education and Labor's hearing on June 12, 2007, concerning the policy implications of the Ledbetter decision is an adequate substitute for a legislative hearing on the specific language and proposed statutory amendment set forth in H.R. 2831. As demonstrated by the range of unanswered questions raised by and the unknown consequences resulting from the precise language used in the bill (discussed more fully below), plainly, it is not. Moreover, insofar as H.R. 2831 purports to be a reversal of the Supreme Court's Ledbetter decision, the Majority's attempt to portray as part of the legislative history of this bill a Committee hearing held five weeks prior to the issuance of the Court's decision (an April 24 hearing entitled "Strengthening the Middle Class: Ensuring Equal Pay for Women"), which in no way even purported to be a discussion of the statute-of-limitations issues raised by the pending Ledbetter case, strains credulity at best.

or any other practice—to sue for discrimination that may have occurred years or even decades in the past.

As set forth below, H.R. 2831 is fundamentally flawed on almost every level. It proceeds from faulty assumptions; it adopts flawed new constructions of law; and it expands the scope of liability under our nation's civil rights laws exponentially. The bill's failings as a matter of substantive policy are magnified by the failure of process which has led to its hasty consideration, and which does a grave disservice to the thoughtful and deliberate legislative process for which this Committee in particular has come to be known. H.R. 2831 should be rejected by the House.

Courts have long been divided as to the propriety of the so-called "paycheck rule"

As a preliminary matter, H.R. 2831's supporters proceed from the flawed premise that the Supreme Court's decision in Ledbetter reversed well-settled law, or in some fashion rejected a "paycheck rule" that had been applied universally, uniformly, and without question or confusion by courts administering and interpreting federal civil rights laws. H.R. 2831's supporters may wish that this was the case; they may even believe that this was the case—but they are alone in doing so.

No plainer evidence of this can be found than in the court filings made on behalf of the plaintiff in the case, Ms. Ledbetter herself, which recognized that federal courts had come to vastly differing conclusions about whether and how the paycheck rule was the proper application of law under Title VII. As Ms. Ledbetter's attorneys argued to the Supreme Court:

> *The courts of appeals are divided over the proper analysis and resolution of disparate pay claims like Ledbetter's in light of National Railroad Passenger Corp* v. *Morgan, 536 U.S. 101 (2002)* and *Bazemore* v. *Friday, 478 U.S. 385 (1986).* Some courts hold that an employee may challenge disparate paychecks received during the limitations period if the paycheck implements and carries forward into the limitation period discriminatory decisions made by her employer at any point in the past. *Other decisions permit employees to challenge such disparities in pay only if they can demonstrate that the disparity arises from independently illegal decisions made during the limitations period itself or, at most, from the employer's most recent pay decision. . . .*
>
> *Although the conflict in circuits is most clear in the decisions of the Second, Eleventh, and D.C. Circuits, the proper treatment of disparate pay claims under Morgan and Bazemore has generated considerable conflict and confusion in other circuits as well.*[22]

H.R. 2831's proponents find no support for the proposition that a "paycheck rule" was, pre-Ledbetter, the well-settled law of the land in the holding of various federal circuit and district courts. Indeed, as recognized by the parties to Ledbetter, practitioners, and the Supreme Court itself, courts have come to widely differing con-

[22] Brief of Petitioner Lilly Ledbetter, Petition for a Writ of Certiorari, Ledbetter v. Goodyear Tire and Rubber Company, Inc., No. 05. ____ (February 17, 2006) at 9, 13 (emphasis added).

clusions as to the proper application and/or limitation of a "paycheck rule" as applied to claims of discrimination under federal law.[23] The elision of this point by the bill's supporters is not one alone on which to base opposition, but it underscores that with respect to H.R. 2831, the claims of the bill's proponents are too often at odds with—if not plainly contradicted by—the facts and law at hand.

H.R. 2831 eliminates the statute of limitation for virtually all discrimination claims

Foremost, H.R. 2831 would eliminate the statute of limitations and charging requirements with respect to any "discriminatory compensation decision or practice . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision."[24] Nowhere in the text of the Civil Rights Act (nor in any of the other statutes amended by this bill) is the phrase "discriminatory compensation decision" defined or limited. Thus, at the outset, the bill's provisions extend to any claim of discrimination that concerns not only allegations of "pay discrimination" resulting in a lower paycheck, but also to any claim alleging that some decision by an employer at some point in time resulted in some diminution in whole or in part of some pension or other benefit. Under the express language of the bill, a claim of discrimination can be brought years after an employment decision is made, or even years after employment ends, if the employee claims that his or her compensation is less than it would have been but for alleged discrimination long in the past.

An example of the broad scope of H.R. 2831, and the consequences (intended or not) that is poses for employers, is helpful. Assume that under the law as it stands today, post-Ledbetter, an employee is hired on January 1, 2008. One year later, on January 1, 2009, the employee has an annual review, and is given a raise that she later feels is discriminatory. Under current law, the employee would have 180 days (or perhaps 300, depending on the state in which she works) to file a charge of discrimination—roughly July 1 or November 1 of 2009—with the EEOC or state agency. This time could be conceivably extended by a court if it was equitable to do so (for example, if there was evidence that the employer concealed information from the employee, or unlawfully prohibited the employee from asking questions about her raise). In this case, the employer is put on notice that the pay decision is being challenged, and the EEOC is able to immediately investigate while witnesses are available, recollections are fresh, and supporting documents and paperwork are available. If the employee is able to prove discrimination, he or she is entitled to recover damages, including back pay and other benefits.

Applying the same set of facts under H.R. 2831, an employee is hired on January 1, 2008, and receives a pay adjustment that he

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[23] Compare, e.g., Elmenayer v. ABF Freight Syst., Inc., 318 F.3d 130 (2d Cir. 2003), Forsyth v. Federation Employment Guidance Service, 409 F.3d 565 (2d Cir. 2005), Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999), & Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005) with Dasgupta v. University of Wisconsin Board of Regents, 121 F.3d 1138 (7th Cir. 1997), Hildebrandt v. Illinois Department of Natural Resources, 347 F.3d 1014 (7th Cir. 2003) & Ledbetter v. Goodyear Tire & Rubber Co, Inc., 421 F.3d 1169 (11th Cir. 2005).

[24] H.R. 2831 § 3, proposed subparagraph 3(a).

feels is discriminatory on January 1, 2009. The employee remains employed at that company for the next forty years, and every year has an annual review where his salary is adjusted upward on a percentage basis—at no time does the employee claim (or does evidence suggest) that any of these subsequent reviews are discriminatory. The employee retires in 2049 and receives a final paycheck. Under H.R. 2831, the employee now has 180/300 days to file a claim of discrimination relating back to the only discriminatory act ever claimed—his first pay adjustment in 2009, forty years ago—on the theory that even if he got a fair review every year thereafter, he still makes less than he would have had he gotten a fair review in 2009. Indeed, if post-retirement the employee receives a monthly pension that was in some way based on his salary, the employee can bring a claim even further in the future, based on a pension allegedly "tainted" by a discriminatory decision forty years ago.

In light of the potentially radical change to civil rights law embodied in H.R. 2831, it is hardly surprising that representatives of employers providing jobs to millions of Americans are united in their opposition to this bill, and, equally important, deeply concerned with the unanswered questions and unintended consequences the bill portends:

> While we strongly oppose unlawful discrimination in any form, the Ledbetter Fair Pay Act *virtually eliminates any time limitations for claims of employment discrimination. In doing so, the legislation invites stale claims and frivolous litigation when unwarranted litigation is already an issue under current discrimination laws.* In fact, the Equal Employment Opportunity Commission reported that it found reasonable cause in only 5.3% of the over 75,000 charges of discrimination that it received in FY2006 and found *absolutely no cause* for discrimination in over 60% of the charges (amounting to 45,500 "no cause" charges). A study of previous years' statistics yields similar results.
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> When Congress passed Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act, it created limits on the period of time under which an individual may file an employment charge. These limits promote rapid resolution of employment claims and quick remedial actions by employers where appropriate. *The limitations also balance competing interests by providing plaintiffs a reasonable time to file charges while preventing courts and employers from facing stale claims in which the truth is difficult to ascertain because evidence is lost, memories have faded and witnesses have disappeared. We urge that you preserve this balance that has existed in civil rights law for over 40 years.*
>
> *In addition, we are dismayed that this bill appears to go well beyond the issues raised in the Supreme Court's recent decision in Ledbetter v. Goodyear Tire & Rubber Co. It is critical that legislation of this complexity and with the po-*

tential for such significant impact be carefully considered and not rushed through only days after its introduction.[25]

Committee Republicans share the concerns, both substantive and procedural, raised by these parties, and object to the hasty consideration of legislation which, whether intended or not, will result in an exponential increase in potentially frivolous litigation, and in any case directly upsets a balance that has been maintained under civil rights law for more than four decades.

H.R. 2831 eliminates the statute of limitations in virtually all claims of discrimination

H.R. 2831 does not merely eliminate statutes of limitation with respect to allegations of discrimination relating to pay decisions—the issue before the Court in Ledbetter—or even to allegations relating to the setting of wages or other benefits. Rather, it expressly eliminates the statute of limitations with respect to any allegedly discrimination resulting from a "discriminatory compensation decision or other practice."[26]

As explained at the Committee's June 12 hearing, even in the absence of broad and undefined "other practice" language, almost any alleged act of discrimination can be characterized to have consequences for an employee's pay and thus result in an "individual [being] affected by application of a discriminatory compensation decision" under the bill: "Nearly every form of adverse employment action has an impact on compensation—denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline—they all have the potential to affect pay."[27]

The "other practice" clause contained in the text of the bill serves only to make explicit that which most would have understand was implied from a plain reading of the bill—that H.R. 2831 has the effect of eliminating the statute of limitations and charging requirements for almost every conceivable claim of workplace discrimination.

H.R. 2831 modifies established law standards without explanation or definition

As detailed more fully in the discussion of the Boustany Amendment set forth below, in 1991, Congress enacted amendments to the Civil Rights Act of 1964 that were intended, among other things, to reverse certain decisions of the Supreme Court, specifically (among others), Lorance v. AT&T Technologies, Inc.[28] In

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[25] Letter to Chairman George Miller and Ranking Republican Member Howard P. "Buck McKeon," dated June 27, 2007 urging opposition to H.R. 2831 from the American Bakers Association, American Hotel and Lodging Association, College and University Professional Association for Human Resources, HR Policy Association, International Foodservice Distributors Association, International Franchise Association, International Public Management Association for Human Resources, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Public Employer Labor Relations Association, National Restaurant Association, National Retail Federation, Retail Industry Leaders Association, Society for Human Resource Management, and U.S. Chamber of Commerce (emphasis added). In addition to these groups, the National Federation of Independent Business has advised the Committee of its opposition to H.R. 2831.

[26] H.R. 2831, § 3 proposed subparagraph 3(a).

[27] Mollen Testimony at 8.

[28] 490 U.S. 900 (1989).

1991, Congress amended the Civil Rights Act to overturn Lorance, by adopting a new section 706(e)(2), which provides that:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or *when a person aggrieved* is *injured* by the application of the seniority system or provision of the system.[29]

In crafting the language of H.R. 2831, it is clear that the bill's supporters have attempted to model the language they propose to use to overturn Ledbetter on the section 706(e)(2) language that was used to overturn Lorance. The operative section of H.R. 2831 provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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.[30]

While modeled on the language of section 706(e)(2), on its face, the language of H.R. 2831 differs in two substantive respects.[31] First, the bill—as contrasted with the law—applies not to "person[s] aggrieved" by alleged violation of the statute, but rather to a broader universe of "individuals"—there is no requirement that such individual be "aggrieved." Second, and plainly more questionable, section 706(e)(2) of existing law provides relief to a party that is "injured" by discrimination in the workplace. H.R. 2831, in contrast, extends relief to those merely "affected by" such alleged discrimination. It is clear that the universe of persons "affected by" a decision is far broader than the universe of persons "injured by" a decision—what delimits that expansion?[32]

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[29] 42 U.S.C. § 2000e–5(e)(2) (emphasis added).

[30] H.R. 2831 § 3(a) (emphasis added). See also id. § 4(a) (making corresponding changes in Age Discrimination in Employment Act).

[31] The Majority's Views, see Section by Section, supra, appears to attempt to argue that there is no "substantive difference" between a "person aggrieved" by a practice or "an individual," or between a person "injured by" or "affected by" same. That argument fails, on its face, on several fronts. First, the drafters' intent as expressed in legislative history notwithstanding, in both instances the latter term is far broader than the former. More to the point, barely a few words later, the Majority argues that "affected" is "simpler and clearer" than "injured"—at some point, the drafters need make up their collective minds—the term has either the same meaning, or it doesn't. Finally, as noted in the text above, a reviewing court is now left with the riddle of what Congress meant when it enacted different language in different places in the same statute, while its supporters apparently debate internally whether and what the purpose of that different language is.

[32] At markup, bill supporters attempted to argue that such individuals would be limited in bringing claims of discrimination by courts through application of the doctrine of "standing." Such an argument misses the mark. The standing doctrine provides that a party may bring a claim in federal court under a particular statute if that party can show that he or she has suffered some injury, and is generally within the confines of that class of individuals whom the

Again, a hypothetical serves to illustrate some of the unanswered questions raised by H.R. 2831. Assume that an individual starts working at an employer, Employer A, on January 1, 2008, and one year later, January 1, 2009, receives a pay raise that the employee some years later comes to believe is discriminatory. In the interim, the individual receives annual percentage increases over the next five years—there is no claim that these raises were discriminatory, but at the end of his employment with Employer A, the employee believes that his compensation is lower in total amount than it would have been absent alleged discrimination. The employee leaves Employer A on December 31, 2014.

Employer B hires the worker on January 1, 2015, and sets his starting salary based, at least in part, on the worker's prior final salary at Employer A. The individual works for Employer B for ten years and retires from Employer B in 2025, with no allegation discriminatory acts and regular annual raises at any time. In 2035, the employee reaches age 65 and begins receiving retirement benefits from both Employers A and B.

Under the bill, in 2015, can the employee bring a challenge against Employer A for his initial act of discrimination in 2009? Going further, can he bring a claim against Employer A in 2020, on the basis that he is "affected by application of a discriminatory compensation decision or other practice" because he is receiving a lower salary from Employer B than he otherwise would have because of Employer A's decision ten years earlier? Is Employer A responsible for Employer B's independent determination of the individual's worth? In the absence of an express "intent" requirement in the bill, can Employer B be subject to a charge in 2015 or beyond, because it arguably perpetuated, albeit unintentionally, a discriminatory act committed by a prior employers? Are decisions made by Employer A twenty-five years ago, or Employer B fifteen years ago, now "revived" and subject to challenge when the employee begins receiving his pension benefits? Were such claims viable or dormant all those years in between? The answer to almost every one of these questions is pointedly unknown.

Committee Republicans are similarly concerned with provisions in the bill that eliminate the statute of limitations and charging requirements and expressly extend liability, not only for acts of discrimination for which the employer is charged, but also "similar or related to" acts which are, by definition, time-barred under the statute.[33] "Similar or related to" is nowhere defined in the text of H.R. 2831, nor elsewhere in applicable civil rights statutes. By definition, this phrase expands the universe of actionable discrimination from a discrete act (even if only broadly defined as a "discriminatory compensation decision or other practice") to include a range of other unspecified acts that range far beyond those of which the employer has been put on notice by virtue of an EEOC charge.

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statute protects. Where, as here, a statute expressly affords relief to an "individual . . . affected by" an allegedly discriminatory compensation decision, to say that courts would use the standing doctrine to disallow plaintiffs to bring claims where they allege that they are "individuals affected by" alleged discriminatory compensation decision and have thereby suffered some injury is circular logic, at best. See Black's Law Dictionary (8th Ed. 2004) (defining standing as "a party's right to make a legal claim or seek judicial enforcement of a duty or right").

[33] See H.R. 2831, as introduced, § 3 proposed subparagraph (c) (redesignated as proposed subparagraph (b) in the Miller Amendment in the Nature of a Substitute discussed infra).

On their face, these textual choices raise serious questions—are they intended to expand liability or application of the statute's protections? If so, to whom, and in what fashion? If not, what policy argument justifies choosing different language in one section of the bill than another—particularly where a reviewing court, applying canons of statutory construction, is bound to view Congress's decision to use different language as implying some substantive import? Again, these questions—which may be susceptible to reasonable answers—are left unanswered, and the consequences of the bill remain unknown. At markup, H.R. 2831's proponents were unwilling or unable to address these fundamental concerns with the text of the bill; this alone suggests that further consideration of this bill in the absence of legislative examination is premature and irresponsible.

H.R. 2831 is not limited to claims of intentional discrimination such as Ledbetter

H.R. 2831 does not limit itself to cases of "intentional" discrimination—the set of facts at issue in Ledbetter, Indeed, as detailed below in discussion of the rejected Boustany Amendment, by utilizing cognate language in Section 706(e)(2), but expressly removing the requirement of an "intentionally discriminatory purpose," H.R. 2831 can be fairly read and construed to eliminate the statute of limitations and charging requirements with respect not only to cases of intentional discrimination, but with respect to cases alleging liability on the theory of non-intentional "disparate impact" discrimination.[34]

Indeed, as set forth in the Majority's Views, supra, the fundamental contradiction of the bill's supporters is made clear with reference to this issue alone—compare the language in the Majority View's discussion at *Congress's Action Today* ("H.R. 2831 is designed to be a narrow reversal of the Ledbetter decision . . .") with that in *Section by Section* ("[T]his provision is not limited to intentional discrimination but deals with *all* compensation discrimination in violation of Title VII . . ." (emphasis added)).

Application of this bill to an entire class of cases which in no way were addressed in the Court's Ledbetter decision potentially allows for claimants to allege, years after the fact, that facially neutral, nondiscriminatory pay systems "unfairly" pay some workers more than others, and thus violate Title VII or other civil rights laws. Such a claim radically expands the scope of liability under Title VII. More to the point, it goes far beyond the facts presented and decision rendered in the Ledbetter case, and should be rejected.

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[34] In general, there are two theories of liability under Title VII and related civil rights laws. First, liability under Title VII may lie where an employer intentionally discriminates against an employee or class of employees, or otherwise treats an employee differently because he or she is in a protected class. In those cases, the plaintiff has the burden to prove that the employer acted with the intent to discriminate. Alternately, liability may be found where an employer adopts a facially neutral practice, but one which has disproportionate adverse consequences for employees in a protected class (for example, an employer requires applicants to take a test that while neutral on its face, disqualifies a disproportionate number of female applicants). In those instances, an employee need not show that the employer intended to discriminate against employees in a protected class, only that its policy or practice has the unintended effect of doing so. An employer may defend against such a claim be showing that it has a valid business necessity that justifies the use of its policy. Thus, in disparate impact cases, an employee need not prove "intent."

H.R. 2831 could result in drastic consequences for pension and other benefit plans

Committee Republicans are deeply troubled by the significant concerns H.R. 2831 raises with respect to the sponsorship and administration of pension benefit and welfare plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). These concerns were highlighted to the Committee as it prepared for markup by way of comment from the American Benefits Council (the "Council"), who implored the Committee to not approve H.R. 2831 until its consequences were more fully understood. The text of the Council's appeal is set forth in its entirety below (emphasis added):

AMERICAN BENEFITS COUNCIL,
JUNE 26, 2007.

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: I am writing today on behalf of the American Benefits Council to express concern regarding proposed legislation (H.R. 2831) to overrule the Supreme Court's Ledbetter v. Goodyear Tire & Rubber Co. decision.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. *Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. The Council's area of expertise is in the employee benefits area, and accordingly we limit our letter to the possible effect of the proposed legislation on benefit programs.*

Under the proposed legislation, each payment of compensation or benefits that is lower because of past discrimination is arguably a separate act of discrimination. Under this interpretation of the proposed legislation, an employee could file a charge or sue within the required period (180 days in the Ledbetter case) after each payment, without regard to when the actual act of discrimination that caused the compensation or benefits to be lower occurred. *That actual act could have occurred 30 or 40 or more years earlier.*

This proposed legislation could possibly raise very serious retirement plan issues. For example, assume that the actual act of discrimination occurred 30 years ago. Assume further that the individuals who allegedly discriminated are all deceased, and the claim of discrimination is based purely on oral statements. In that case, the company may have no effective way to defend the case, which hardly seems fair. Our question is: how would a judgment in favor of the plaintiff affect the company's retirement plan? *If the company maintains a defined benefit plan that calculates benefits based on an employee 's final average pay, would the plan need to recalculate the plaintiffs benefit based on the revised pay, which could be substantially higher? What if the lawsuit is a class action, so that large numbers of plan participants could be making the same claim for much higher benefits? In that case, the plan could become woefully underfunded, undermining the retirement security of thousands of other plan participants.*

We also note that, under the proposed legislation, a claim could arguably be made by an individual who retired many years ago and is now claiming an increased pension based on a plan benefit for-

mula that has not been in effect for a long time. *The burdens of recreating both old data and old benefit formulas in order to recalculate that individual's benefits would be immense, yet would arguably be required by the legislation.*

We have other questions regarding the possible effect of the legislation on 401(k) plans, 403(b) plans (generally maintained by schools and charities), and 457 plans maintained by state and local governments. To what extent would such plans have to recalculate benefits payable to the plaintiffs? *If the employer needs to fund enormous additional benefits for the plaintiffs, would the employer be effectively forced to reduce or eliminate contributions for others?*

We are writing to ask you not to act until the possible ramifications of the bill are fully understood. We understand the concerns that led to the drafting of this proposed legislation. On the other hand, we are also very mindful of the severe practical problems created by the legislation in its current form. *We strongly urge you to fully explore the practical, technical and policy issues before moving forward on legislation that could have far-reaching and unintended consequences.*

Sincerely,

JAMES A. KLEIN,
President.

Committee Republicans are gravely concerned with the potential effects of H.R. 2831 on defined benefit, defined contribution, and other pension and welfare benefit plans both in the near term and far into the future. The concerns raised by the American Benefits Council and others suggest that H.R. 2831, as written, could potentially undermine the solvency of pension plans far into the future, and thereby risk the financial and retirement of security of millions of American workers and retirees. As discussed in further detail below, the response of the bill's supporters—including in the Findings section of the bill one non-binding sentence that does not purport to address substantively these issues—is wholly insufficient to allay these concerns.

H.R. 2831 does grave harm to the committee legislative process, and is flawed as a result

Finally, we express again our grave concern with the failure of process that has led to consideration of H.R. 2831 in a hasty and uninformed fashion. The rush of this legislation from introduction to consideration and markup barely twenty-four business hours later need not be recounted. What bears note, and lays bare the failure of the process, is the comparison of this exercise to Congress's last substantive debate over Civil Rights Act amendments in 1990 and 1991. At that time, in response to decisions by the Supreme Court construing Title VII in 1989, Congress undertook thorough examination of legislative proposals to address those decisions and other issues that had arisen under the Civil Rights Act.

The debate over amendment of the Civil Rights Act spanned two Congresses, and more than two years.[35] Legislative proposals were

[35] See, e.g., legislative histories of H.R. 4000 & S. 2104 (101st Congress); H.R. 1 & S. 1745 (102nd Congress).

the subject of days of hearings in multiple committees and subcommittees of jurisdiction. They were marked up in subcommittees and full committees through days of thoughtful consideration. At the conclusion of nearly two years of thoughtful deliberation, Congress sent to the President the most comprehensive overhaul of our nation's civil rights laws in decades, which were signed into law. These revisions continue to protect millions of Americans from discrimination in the workplace today. The contrast of that legislative process with the process that has sent H.R. 2831 to the House for consideration less than a week after it was introduced is profound and ominous.

AMENDMENTS OFFERED IN COMMITTEE

Miller Amendment in the nature of a substitute

The Miller Substitute, which was adopted without objection, made three changes to the text of H.R. 2831 as introduced. First, it changed the short title of the bill. Second, it deleted in two instances language in the introduced bill which would have allowed an aggrieved person who filed a charge of discrimination to challenge "similar or related instances" of discrimination that occur after the filing of an initial charge with the EEOC without having to file a subsequent charge with the agency. Finally, the Miller Substitute included a single sentence in the findings section presumably intended to address the bill's potentially devastating consequences on defined benefit and defined contribution pension plans and other employee benefit schemes discussed above.

The finding contained in the Miller Substitute provides that the bill "is not intended to change current law treatment of when pension distributions are considered paid." [36]

It does not require extended debate to dispose of the notion that this single sentence—a non-binding, non-substantive finding relating to the bill's intent—does nothing to address the substantive concerns with the bill's effect on pension and other benefit plans set forth above. Indeed, it is of little interest what the bill's "intent" is, where its express and operative language provides that the statute of limitations for bringing a claim of discrimination is eliminated for claims "each time that wages, benefits, or other compensation is paid" which result "in whole or in part" from an alleged discriminatory practice.[37]

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[36] Amendment in the Nature of a Substitute, offered by Representative George Miller, Committee on Education and Labor Consideration of H.R. 2831, the "Ledbetter Fair Pay Act of 2007," June 27, 2007, § 2, finding (4).

[37] Moreover, the Majority's "finding" language in this instance appears to suggest that the current state of the law as to when a pension distribution is considered paid is at all clear, simple, universally applied to all pension plans, or, ultimately, relevant to the issue at hand. For instance, in the very case cited by the Majority for the proposition that pension checks are "qualitatively different" than paychecks, see supra, the Supreme Court expressly limited its holding to the facts at hand, and noted that different sets of facts with respect to a particular pension plan would likely result in differing outcomes. See Florida v. Long, 487 U.S. 223, 240 (1988) (applying principles of Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) and concluding that "[a] different case, and a different assessment of retroactivity, might result under pension plan structures which do not provide retirees with a contractual right to a fixed level of benefits or rate of return on contributions."). See also, e.g., Spirt v. Teachers Ins. and Annuity Ass'n, 735 F.2d 23, 27 (2d Cir. 1984) (distinguishing Court's application of Norris principles) & Florida v. Long, 487 U.S. at 240 (recognizing different outcomes and continuing validity of Spirt).

More to the point, even accepting arguendo that the finding—were it to be given substantive meaning by a reviewing court—addressed issues raised with the question of when a cause of action relating to pension benefits accrues under the bill, the language does nothing, implicitly or explicitly, to address fundamental concerns relating to the potential liability of pension and welfare benefit plans decades into the future when a plaintiff or class of plaintiffs brings a claim for benefits under the plan.

In short, this provision of the Miller Substitute is, charitably, an insufficient resolution to some of the most troubling issues relating to pensions and benefits raised by the substantive provisions of H.R. 2831.

Boustany Amendment to preserve intent requirement

There is no debate that the facts of the Ledbetter case presented to the Supreme Court a question of intentional discrimination. Ms. Ledbetter alleged that her employer had, purposefully, discriminated against her because she was a woman, in violation of Title VII. That was the Title VII claim litigated in the lower court, and the case presented to and decided by the Supreme Court.

Historically, in amending Title VII, Congress has drawn distinction between intentional discrimination and so-called "disparate impact" discrimination. Most notably, in 1991 Congress amended the Civil Rights Act to overturn the ruling of the Supreme Court in Lorance v. AT&T Technologies, Inc.[38] By way of brief background, in Lorance, the Court had held that female employees could not sue in 1982 for damages they suffered as the result of the company adopting an intentionally discriminatory seniority system in 1979—those claims were barred by the statute of limitations. Unsatisfied with this result, two years later Congress included in the Civil Rights Act of 1991 a provision expressly overturning Lorance. Specifically (and as noted supra) Congress added to the Civil Rights Act of 1964 a new section 706(e)(2) which provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.[39]

Thus, under this section, a plaintiff challenging the legality of an allegedly discriminatory seniority system must prove that the system was adopted with the intent of discrimination.

In crafting the language of H.R. 2831, it is clear that the bill's supporters have attempted to model the language they propose to use to overturn Ledbetter on the section 706(e)(2) language that was used to overturn Lorance. The operative section of H.R. 2831 provides:

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[38] 490 U.S. 900 (1989).
[39] 42 U.S.C. § 2000e–5(e)(2).

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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.[40]

Note, however, one key exception: nowhere in the Ledbetter bill's language is this provision limited to intentional discrimination, as it was in Lorance and the resulting Civil Rights Act legislative changes. Indeed, nowhere in the text of H.R. 2831 bill does the word "intentional" appear at all. Thus, on its face, the Majority's language would appear to eliminate the statute of limitations not only in cases of intentional discrimination, but also with respect to cases of unintentional discrimination, such as claims of "disparate impact"—an expansion far broader than the contours of the Ledbetter case.

For these reasons, during markup, Representative Charles Boustany offered an amendment that would simply have clarified that—as was the case of the Court's holding in Ledbetter—the provisions of the bill would apply only to cases of intentional discrimination. The Boustany Amendment was narrow and straightforward, and simply provided that in each instance where the phrase "discriminatory compensation practice" appeared it would be amended to read "intentionally discriminatory compensation practice." The Boustany Amendment comports with precedent under section 706(e)(2) and the legislative language Congress used to overturn the Lorance case, and would have narrowed the bill (at least with respect to this issue) to limit the impact of the bill to the sort of case addressed in the Court's Ledbetter decision.

Notwithstanding the logic and simplicity of this language—and bill supporters' claims that H.R. 2831 is a "narrowly drawn" bill intended only to overturn the Ledbetter decision—the Boustany Amendment was rejected on a vote of 18 to 24, with all Democrats voting against limiting the scope of the bill to the class of cases entertained in Ledbetter.

Keller Amendment to eliminate unintended consequences of "other practices"

As noted above, H.R. 2831 would eliminate the statute of limitations with respect not only to an undefined "discriminatory compensation decision" but also with respect to any "other practice" which the individual believes resulted in pay discrimination. The term "other practice" is nowhere defined within the legislation.

As set forth in detail above, Committee Republicans are gravely concerned that despite the assertions of its sponsors, H.R. 2831 represents a vague and overbroad expansion of the Civil Rights Act. As was noted during the hearing on policy issues relating to

[40] H.R. 2831 § 3(a). See also id. § 4(a) (making corresponding changes in Age Discrimination in Employment Act).

Ledbetter, almost every employment decision can in some way be linked to an employee's compensation, benefits, or pay. The "other practice" provision of H.R. 2831 serves only to make the bill's expansion of the scope of liability under the Civil Right Act explicit. On its face the phrase extends liability far beyond simple pay decisions to include any "other practice" that may affect compensation—this would include claims of denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline, all of which could be brought years after the employee left employment.

Advocates of H.R. 2831 have repeatedly insisted that the bill is a narrowly-drawn measure intended solely to overturn the Ledbetter decision. Whether rightly or wrongly decided, all parties agree that the Ledbetter case addressed the issue of a discriminatory pay decision—not some allegedly discriminatory "other practice." The lower court found that Ms. Ledbetter was the victim of a discriminatory compensation decision—not an "other practice." The Supreme Court rejected Ms. Ledbetter's claim that the statute of limitations should be extended in cases where an employee is the victim of a discriminatory compensation decisions—not some "other practice."

For these reasons, during Committee markup, Representative Ric Keller offered an amendment that simply would have struck the phrase "or other practice" in each instance it appeared, thus at least attempting to limit the application of H.R. 2831 to decisions relating to compensation—the practice at issue in Ledbetter. The Keller Amendment was rejected on a roll call vote of 20 to 25, with every Democrat present voting against it. As was the case with the Boustany Amendment, that argument that H.R. 2831 is a narrowly-drawn bill, tailored only to reverse the Supreme Court' ruling in Ledbetter, is undone by Democrat opposition to the Keller Amendment.

CONCLUSION

H.R. 2831 is fundamentally flawed as a matter of policy. As noted at the outset, one can legitimately debate whether legislation to modify, limit, or reverse the Supreme Court's decision in Ledbetter is necessary or prudent. What is beyond serious debate is the proposition that H.R. 2831 simply modifies, limits, or reverses Ledbetter. As reported to the House, this legislation, without question, vitiates the statute of limitations requirements in a host of federal civil rights laws. It goes far beyond the facts presented in the Ledbetter case, and whether by accident or design, makes far more sweeping changes to our nation's civil rights laws than its supporters either at best intend or at worst acknowledge.

The unintended consequences of this bill are not yet fully known, nor are, would we submit based upon the responses of bill supporters to inquiries at markup, its intended consequences. The known policy and drafting flaws of this bill are numerous; the unknown exponentially so. These failings throw into high relief the complete abandonment and failure of regular order and the Committee's legislative process, and the grave disservice done to both by the manner in which the Committee has considered this bill.

For all of these reasons, we oppose in strongest terms the passage of H.R. 2831.

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