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Surviving Draconian Law Unscathed:An Alternative to the Ledbetter Fair Pay Act, orAn Employer's Guide to Compliance

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MEGAN R. ROBY*

I. INTRODUCTION

Women, according to many employers' pay scales, are just not as good as men. In 2009, almost fifty years after the enactment of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, women still earn only seventy-eight cents for every dollar earned by men for performing equal work.[1] Thus, "[a]fter . . . years of litigation . . . the equal pay gap is not fully resolved."[2] Nine days after his inauguration on January 29, 2009, President Obama made clear his seriousness in combating gender pay disparities by signing into law the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act" or "Act").[3]

A procedural law, the Ledbetter Act codifies the paycheck accrual rule, stating that an unlawful employment action occurs when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual is subjected to a discriminatory compensation decision or other practice; or (3) an individual is affected by a discriminatory compensation decision or other practice.[4] The Ledbetter Act reversed the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co*.[5] In *Ledbetter*, the Supreme Court held that only discriminatory pay decisions qualify as "discrete discriminatory acts" that trigger the statute of limitations to file an Equal Employment Opportunity Commission ("EEOC") charge.[6] The Court asserted that a new violation does not occur, and the time period in

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1. Ruben J. Garcia, *Toward Fundamental Change for the Protection of Low-Wage Workers: The "Workers' Rights are Human Rights" Debate in the Obama Era*, 2009 U. CHI. LEGAL F. 421, 422.

2. *Id*. at 422.

3. *See id*. at 438-439; *see generally* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 29 U.S.C. §§ 626, 794a; 42 U.S.C. §§ 2000e-5, 2000e-16).

4. *Id*. § 3(A).

5. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

6. *Id*. at 621, 638-39 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113- 114 (2002)).

which plaintiffs must file their charge to be timely does not restart, when each discriminatory paycheck is issued pursuant to a "facially nondiscriminatory and neutrally applied" compensation system.[7]

Since its enactment, the Ledbetter Act has been significantly controversial legislation. The Act primarily benefits employees by extending the statute of limitations to file discriminatory compensation claims, preventing legitimate claims from being time-barred.[8] For instance, an employee who was refused a promotion twenty years ago may still have a cause of action today, "as long as the nonpromotion has an effect on current compensation."[9] However, the Act has also been severely criticized; the Act has been referred to as a "draconian response"[10] and a "dues ex machina intervention of Congress."[11] Employers fear increased employment litigation and vulnerability to discriminatory compensation claims, arguing that the Act effectively eliminates the statute of limitations and unfairly favors employees.[12]

This comment will analyze the Supreme Court's interpretation of *Ledbetter v. Goodyear Tire & Rubber Co.* as well as Congress's legislative response, the Lilly Ledbetter Fair Pay Act of 2009. It will conclude that the Ledbetter Act, though somewhat beneficial, was not the appropriate solution to the equal pay problem, highlighting the ways in which the Act's risks outweigh its benefits and suggesting how employers, particularly, must react to avoid increased litigation and liability. Part II provides an overview of the law's recent changes, examining the Supreme Court's 2007 *Ledbetter* decision and Congress's 2009 Ledbetter Act. Part III discusses both the advantages and disadvantages of the Act, but argues that the problems and burdens imposed by it are unnecessary and destructive. Finally, Part IV suggests an alternative doctrine capable of reversing or ameliorating the effects of the *Ledbetter* decision and provides, in the meantime, a post-Ledbetter Act compliance guide for employers.

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7. *Id*. at 637 (quoting Lorance v. AT&T Techs., 490 U.S. 900, 911 (1989)).

8. Autumn George, Comment, *"Adverse Employment Action" – How Much Harm Must be Shown to Sustain a Claim of Discrimination under Title VII?*, 60 MERCER L. REV. 1075, 1106-1107 (2009).

9. Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 499 (2010).

10. Thomas H. Wilson, *Congress and the Supreme Court Tackle Key Employment Issues*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF SUPREME COURT EMPLOYMENT CASES: LEADING LAWYERS ANALYZE RECENT DECISIONS AND THEIR IMPACT ON EMPLOYMENT LAW 53, 53 (Jo Alice Darden ed., 2010), *available at* 2010 WL 282923.

11. Sullivan, *supra* note 9, at 500.

12. *See* W. Christopher Arbery, *In Times of Change, Keep It Simple: A Fresh Look at Employment Law* Practice, *in* ASPATORE SPECIAL REPORT: COMPLYING WITH EMPLOYMENT REGULATIONS: LEADING LAWYERS ON KEY REGULATIONS, RECENT TRENDS, AND EFFECTIVE COMPLIANCE PRACTICES 33, 42-44 (Eddie Fournier ed., 2009), *available at* 2009 WL 2510860.

II. LILLY LEDBETTER: CHANGING THE FACE OF FAIR PAY LAW . . . TWICE

A. Ledbetter v. Goodyear Tire & Rubber Co.

1. Facts and Procedural History

From 1979 until 1998, Lilly Ledbetter was employed by Goodyear Tire & Rubber Company ("Goodyear") in Gadsden, Alabama.[13] During her employment, Goodyear granted or denied raises to its salaried employees based on "their supervisors' evaluation[s] of their performance."[14] Allegedly, Ledbetter's supervisors gave her poor evaluations because of her sex, causing her to receive smaller pay raises than if she had been evaluated fairly.[15] Ledbetter further claimed that the "past pay decisions continued to affect the amount of her pay throughout her employment" and that "[t]oward the end of her time with Goodyear, she was being paid significantly less than . . . her male colleagues."[16] In March 1998, Ledbetter submitted a questionnaire to the EEOC detailing the alleged sex discrimination; in July 1998, she filed a formal EEOC charge.[17] Finally, in November 1998, after taking early retirement, Ledbetter sued Goodyear, asserting both Title VII and Equal Pay Act discriminatory compensation claims.[18]

The district court granted summary judgment for Goodyear on Ledbetter's Equal Pay Act claim; however, it permitted Ledbetter's Title VII claim to proceed to trial.[19] At trial, Goodyear argued that its evaluations and compensation decisions were not discriminatory, but the jury found for Ledbetter and awarded back pay and damages.[20] Goodyear appealed to the United States Court of Appeals for the Eleventh Circuit, arguing this time that Ledbetter's discriminatory compensation claims arising prior to September 26, 1997 – 180 days[21] prior to her filing the EEOC questionnaire – were time-barred.[22] Likewise, Goodyear argued that only two compensation decisions were made within the 180-day charging period and

13. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

14. *Id*.

15. *Id*. at 622.

16. *Id*.

17. *Id*. at 621.

18. *Ledbetter*, 550 U.S. at 621-22.

19. *Id*. at 622.

20. *Id*. at 622.

21. To be timely, a formal charge of discrimination must be filed with the EEOC during the charging period, i.e., within 180 days of the discriminatory act in Ledbetter's case. *See id*. at 623-24 (citing 42 U.S.C. § 2000e-5(e)(1), (f)(1) (1994)).

22. *Id*. at 622.

neither decision was discriminatory.[23] The Eleventh Circuit agreed, holding that (1) "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 EEOC charging period" and (2) Goodyear lacked any discriminatory intent when it made the two pay decisions within the 180-day charging period.[24] The Supreme Court of the United States granted certiorari to determine, specifically:

> 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 outside the limitations period.[25]

2. Majority Opinion

In a 5-4 decision authored by Justice Alito, the Court affirmed the Eleventh Circuit's holding, asserting that only discriminatory pay *decisions* constitute discrete discriminatory acts that trigger the EEOC charging period.[26] Under Title VII, an employer acts unlawfully if it discriminates against any individual based on that individual's sex.[27] Furthermore, to timely challenge such an unlawful employment practice, an employee must file an EEOC charge within either 180 or 300 days, depending on the state, after the alleged discriminatory act occurred.[28] The Court recognized the difficulty in identifying the specific employment practice at issue and, subsequently, determining whether that employment practice occurred within the applicable charging period.[29] In *Ledbetter*, for instance, Lilly Ledbetter argued that each paycheck she received during the 180-day charging period was a "separate act of discrimination," because each paycheck constituted a continuing effect of the original discriminatory pay decision and each paycheck "would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period."[30]

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23. *Ledbetter*, 550 U.S. at 622-23.
24. *Id*.
25. *Id*. at 623.
26. *Id*. at 621(emphasis added).
27. *Id*. at 623 (citing 42 U.S.C. § 2000e-2(a)(1).
28. *Ledbetter*, 550 U.S. at 623-24 (citing 42 U.S.C. § 2000e-5(e)(1)).
29. *Id*. at 624.
30. *Id*. at 624-25.

The Court rejected Ledbetter's contentions, relying primarily on four precedential cases. In *United Air Lines, Inc. v. Evans*,[31] the Court held that "continuing effects of the precharging period discrimination did not make out a present violation."[32] Similarly, in *Delaware State College v. Ricks*,[33] the Court asserted that the EEOC charging period started when the discriminatory decision was made and communicated to the plaintiff, not when the plaintiff felt the effects of the discriminatory decision.[34] Following these cases, in *Lorance v. AT&T Technologies, Inc.*,[35] the Court also asserted 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."[36] Finally, in *National Railroad Passenger Corp. v. Morgan*,[37] the Court defined "'employment practice'" as a "'discrete act or single occurrence,'" declaring that only discrete acts or single occurrences taking place within the 180- or 300-day period may support timely EEOC charges.[38] Cumulatively, the *Ledbetter* Court held:

> A new violation does not occur, and new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. . . . [I]f an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.[39]

This law foreclosed Ledbetter's arguments.[40] Intent is required for a successful Title VII claim; however, Ledbetter did not assert that any intentionally discriminatory act occurred within the charging period.[41] Rather, she alleged that Goodyear intended discrimination only when it made its compensation decision and, through a "continuing effects theory," attempted to shift the intent associated with that decision to the issuance of paychecks within the charging period.[42] The Court rejected this argument

31. 431 U.S. 553 (1977).
32. *Ledbetter*, 550 U.S. at 625 (citing *Evans*, 431 U.S. at 558).
33. 449 U.S. 250 (1980).
34. *Ledbetter*, 550 U.S. at 626 (citing *Ricks*, 449 U.S. at 257-59).
35. 490 U.S. 900 (1989).
36. *Ledbetter*, 550 U.S. at 626-27 (citing *Lorance*, 490 U.S. at 907-11).
37. 536 U.S. 101 (2002).
38. *Ledbetter*, 550 U.S. at 628 (citing *Morgan*, 536 U.S. at 110-11).
39. *Id*. (citing *Morgan*, 536 U.S. at 113).
40. *Id*.
41. *Id*. at 624, 628-29.
42. *Id*. at 629.

as "distort[ing] Title VII[]"[43] and interfering with an employer's "'right to be free from stale claims.'"[44] Congress intentionally required a short EEOC charging period and preferred the prompt resolution of employment discrimination claims; recognizing a discriminatory effect of past intentional discrimination, if within the charging period, as a sufficient discriminatory act to support a timely discrimination claim defeats this purpose.[45] Thus, according to the Court, Ledbetter should have filed her EEOC charge within 180 days of Goodyear's discriminatory compensation *decision* to be timely.[46] Despite its "continuing discriminatory effect," each paycheck did not constitute a discriminatory act or trigger the EEOC charging period.[47]

Alternatively, Ledbetter argued that, under *Brazemore v. Friday*,[48] the paycheck accrual rule made her discriminatory compensation claims timely.[49] When applied, the paycheck accrual rule states that each discriminatory paycheck constitutes an independent Title VII violation.[50] Under this rule, Ledbetter asserted, "each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck."[51] However, the Court concluded that Ledbetter's reliance on this case was unsound: in *Brazemore*, the Court held that each paycheck issued pursuant to a *discriminatory pay structure* constituted an intentionally discriminatory act and triggered the EEOC charging period.[52] Thus, *Brazemore* addressed and applied the paycheck accrual rule to instances of "fresh" and "current" discrimination.[53] According to the Court, Ledbetter's case was distinguishable: it involved a facially nondiscriminatory pay structure and, at most, the attempted "carrying forward" of past intentional

43. *Ledbetter*, 550 U.S. at 629 (citing Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 359 (1977)).
44. *Id*. at 630 (citing United States v. Kubrick, 444 U.S. 111, 117 (1979)).
45. *See id*. at 630-31 (citing Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980); *Occidental Life*, 432 U.S. at 367-68).
46. *Id*. at 628-29.
47. *Id*. at 628.
48. 478 U.S. 385 (1986).
49. *Ledbetter*, 550 U.S. at 633.
50. *Id*.
51. *Id*.
52. *Id*. at 634.
53. *Id*. at 635 n.5.

discrimination.[54] In Ledbetter's case, the paycheck accrual rule did not save her untimely claims of past discrimination.[55]

3. Dissenting Opinion

Justice Ginsburg vehemently dissented from the Court's opinion, arguing to reverse the Eleventh Circuit and hold Ledbetter's claims timely.[56] Primarily, Justice Ginsburg asserted that unlawful employment practices include "*current payment* of salaries infected by gender-based . . . discrimination," not just discriminatory compensation *decisions*.[57] This position, according to Justice Ginsburg, is more "faithful to precedent, . . . in tune with the realities of the workplace, . . . and respectful of Title VII's remedial purpose."[58]

Justice Ginsburg reasoned that Congress has already adopted this position because it superseded *Lorance* by passing the 1991 Civil Rights Act.[59] *Lorance* held that "a facially neutral seniority system adopted with discriminatory intent must be challenged immediately"; however, the 1991 Civil Rights Act provided that an unlawful employment practice occurs when an individual originally becomes subject to *or is later injured by the application of* the seniority system, extending the statute of limitations beyond the discriminatory decision to encompass discriminatory effects.[60] Likewise, Justice Ginsburg argued that *Brazemore* supports this position because, in that case, the Court held that each week's paycheck that reflected a discriminatory compensation decision constituted a discriminatory act.[61] Similarly, it follows *Morgan* because *Morgan* distinguished "claims . . . based on the cumulative effect of individual

54. *Ledbetter*, 550 U.S. at 635 n.5.

55. *Id*. at 636-37. Ledbetter made additional arguments to support her position; however, those arguments are not directly relevant to this comment. For instance, Ledbetter further argued that pay raises are unique and, thus, require unique applications of employment discrimination law and the pay-check accrual rule. *Id*. at 636. However, the Court rejected this contention based on precedent. *Id*. at 636-37. Similarly, Ledbetter analogized her case to other statutes, such as the Equal Pay Act, the Fair Labor Standards Act, and the National Labor Relations Act, and asserted policy arguments, such as pay discrimination is difficult to detect, still attempting to persuade the Court to apply the paycheck accrual rule. *Id*. at 640-42. The Court again refused, holding that each Act is distinguishable from a Title VII claim and that "it is not [the Court's] prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination.'" *Ledbetter*, 550 U.S. at 642 (citing Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980)).

56. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

57. *Id*. at 645.

58. *Id*. at 646.

59. *Id*. at 652-53.

60. *Id*. at 652.

61. *Ledbetter*, 550 U.S. at 647 (Ginsburg, J., dissenting) (citing Brazemore v. Friday, 478 U.S. 385, 395 (1986)).

acts"[62] from claims based on identifiable, discrete acts that occur on a single day: a discriminatory charge based on a discrete act must be filed within 180 days of its occurrence,[63] whereas a discriminatory charge based on the cumulative effect of individual acts "may be filed at a later date and still encompass the whole."[64]

Likening pay disparities to hostile work environments, Justice Ginsburg argued that pay disparity claims are based on the cumulative effect of individual acts – such as individual discriminatory paychecks – and, thus, may be brought after the expiration of the 180-day charging period following the original compensation decision.[65] To support her conclusion, Justice Ginsburg reasoned that pay disparities are "significantly different from [other] adverse actions."[66] Unlike discrete and easily identifiable employment actions such as termination, failure to promote, or refusal to hire, pay disparities often occur in small increments, causing suspicion of discriminatory pay only over time.[67] Additionally, "comparative pay information . . . is often hidden from the employee's view,"[68] making pay discrimination particularly difficult to discern when female employees are awarded smaller raises than male employees.[69] Thus, for the entire charging period, female employees may not – and may have no reason to – suspect any adverse employment decision, unknowingly allowing their claims to become untimely.[70] To avoid this problem, Justice Ginsburg characterized pay disparity claims as "cumulative effect" claims, not discrete act claims.[71]

Justice Ginsburg applied this theory in *Ledbetter*. Lilly Ledbetter should have been permitted to timely assert her discrimination claims, despite the delay between the original discriminatory compensation decision and its post-EEOC charging period discovery, because each paycheck accrued "cumulative effects."[72] Ledbetter was not discriminated against in a single paycheck on a single day; rather, her salary fell fifteen to forty percent below similarly situated males' salaries only after *successive* discriminatory evaluations and pay adjustments that accumulated over

62. *Id*. at 648 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002)).
63. *Id*. at 647 (citing *Morgan*, 536 U.S. at 110).
64. *Id*. at 648 (quoting *Morgan*, 536 U.S. at 117).
65. *Id*.
66. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).
67. *Id*.
68. *Id*. at 645.
69. *Id*.
70. *See id*.
71. *Ledbetter*, 550 U.S. at 648-49 (Ginsburg, J., dissenting).
72. *See id*.

time.[73] Thus, although some individual paychecks occurred after the expiration of the EEOC charging period, "the repetition of pay decisions undervaluing her work gave rise to the current discrimination."[74] By holding her claims untimely, Justice Ginsburg argued, the Court misapplied its precedent.[75]

B. Lilly Ledbetter Fair Pay Act of 2009

1. Legislative History

The Court decided *Ledbetter* on May 29, 2007.[76] Just twenty-four days after that decision, Congressman George Miller, a Democrat from California, introduced the first version of the Ledbetter Act to the House of Representatives.[77] The House of Representatives passed the bill on July 31, 2007 by a vote of 225 to 199.[78] However, the bill failed a cloture motion in the Senate on April 23, 2008 by a vote of 56 to 42.[79] Nearly nine months later, Democrats again attempted to pass the Ledbetter Act on January 8, 2009, when Democratic Senator Barbara Mikulski reintroduced the bill in the Senate.[80] This time, the Senate passed the bill on January 22, 2009 by a vote of 61 to 36; the House of Representatives passed it on January 27, 2009 by a vote of 250 to 177.[81] The first bill he signed into law during his presidency, President Obama approved the Ledbetter Act on January 29,

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73. *Id*. at 648-49 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002); Brazemore v. Friday, 478 U.S. 385, 395-96 (1986)).

74. *Id*. at 649.

75. *See id*. at 651. Though not directly relevant to this comment, Justice Ginsburg concluded with additional support for her contentions: (1) "[t]he EEOC's Compliance Manual provides that '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,'" *Ledbetter*, 550 U.S. at 655 (Ginsburg, J., dissenting) (quoting EEOC Compliance Manual § 2-IV-C(1)(a), at 605:0042 n.183 (2006)); (2) several courts of appeals have judged each discriminatory paycheck, even if issued pursuant to a nondiscriminatory compensation structure, to be an independent Title VII violation, *id*. at 654-55; and (3) employers will not be disadvantaged by the "cumulative effects" doctrine; employers may raise defenses such as waiver, estoppel, and equitable tolling, *id*. at 657.

76. *Id*. at 618.

77. Bill Summary & Status, H.R. 2831, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02831:.

78. Bill Summary & Status, All Congressional Actions, H.R. 2831, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02831:@@@L&summ2=m&.

79. *Id*.

80. Bill Summary & Status, S. 181, 111th Cong. (2009), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00181:@@@L&summ2=m&.

81. *Id*.

2009.[82] The Ledbetter Act, as enacted, is "nearly identical" to the bill introduced by Congressman George Miller.[83]

2. Provisions

The express purpose of the Ledbetter Act, according to a House Report, was "'to reverse the Supreme Court's May 29, 2007 . . . ruling in *Ledbetter v. Goodyear*.'"[84] The Act states that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation . . . that have been bedrock principles of American law for decades" and "unduly restrict[s] the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices."[85] Essentially, the Act asserts that the Court ignored workplace and wage discrimination realities and ruled contrary to Congress's intent.[86]

Reversing *Ledbetter*, the Ledbetter Act states:

> [A]n 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.[87]

Thus, unlike *Ledbetter* in which the Supreme Court held that only discriminatory compensation *decisions* constitute unlawful employment actions,[88] the Ledbetter Act is broader, providing that discriminatory compensation *decisions or practices*, *applications*, and *effects* constitute unlawful employment practices.[89] Further clarifying its objective, Congress

82. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Katie Putnam, Note, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 685 (2009).

83. Jonathon Wright, Note, *The Problematic Application of Title VII's Limitations Period in the Pay Discrimination Context: Ledbetter v. Goodyear, the Ledbetter Fair Pay Act, and An Argument for a Modified Balancing Test*, 42 IND. L. REV. 503, 522 (2009).

84. Putnam, *supra* note 82, at 696 (quoting H.R. Rep. No. 110-237, at 3 (2007)).

85. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1).

86. *Id*. § 2(1)-(2).

87. *Id*. § 3(A).

88. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628, 639 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

89. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).

expressly provided that a discriminatory wage, benefit, or other compensation qualifies as an unlawful employment practice *every time* it occurs.[90] This provision makes clear that Congress would have counted each of Lilly Ledbetter's paychecks as discrete discriminatory acts, restarting the EEOC charging period; held her discrimination claims timely; and permitted recovery.[91] Effectively, the Ledbetter Act adopted the paycheck accrual rule that Justice Alito rejected in *Ledbetter*.[92]

The Ledbetter Act also dictates a successful employee's recovery. After an employee proves his or her discriminatory compensation claim, the employee may recover back pay for the two years "preceding the filing of the charge, where the unlawful employment practices that . . . occurred during the charge[-]filing period are similar or related to [the] unlawful employment practices . . . that occurred outside the charge-filing period."[93] Thus, not only does the Ledbetter Act expand the acts that constitute "unlawful employment practices" to trigger the EEOC charging period and permit recovery, the Ledbetter Act also expands the recovery itself.[94] Recovery is not limited to only those discriminatory compensation acts that occur within the EEOC charging period; rather, the Act permits employees to recover for acts occurring two years prior to that period.[95]

Similarly, the Ledbetter Act has broad application. The Act applies to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973.[96] The Act also has an effective date of May 28, 2007 – the day before the Supreme Court decided *Ledbetter*.[97] Therefore, the Act applies to "all claims of discrimination in compensation . . . that are pending on or after that date."[98]

III. "INJUSTICE 5, JUSTICE 4"[99] . . . OR IS IT?

Following the *Ledbetter* decision, the New York Times ran an editorial entitled "Injustice 5, Justice 4,"[100] arguing that the *Ledbetter* Court "forced

90. *Id*. § 3(A).
91. *See id*.
92. *See id*.; Putnam, *supra* note 82, at 692-93.
93. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(B).
94. *See id*.
95. *See id*.
96. *Id*.
97. *Id*.
98. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 6.
99. Sri Srinivasan & Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: Why the Supreme Court's Recent Business Decisions may not Reveal very Much*, 49 SANTA CLARA L. REV. 1103, 1107 (2009) (citing Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18).
100. *Id*.

an unreasonable reading on the law, . . . tossed aside longstanding precedents, . . . [and indicated] that a [C]ourt that once proudly stood up for the disadvantaged is increasingly protective of the powerful."[101] In response, some scholars have favored the Ledbetter Act as Congress's "push back against the Supreme Court."[102] However, the Ledbetter Act has been criticized more than praised, earning the nickname "'economic stimulus' for trial lawyers"[103] and the Act that "rais[es] the dead."[104] Opponents of the Act argue that it is "plaintiff-favoring" and will "radically change the landscape" of antidiscrimination laws.[105] This Part will examine these arguments, recognizing that the Court's *Ledbetter* decision may not have been the best, but concluding that Congress's Ledbetter Act was, perhaps, one of the worst.

A. Benefits of the Ledbetter Act

Despite its disadvantages, the Ledbetter Act advances fair pay law in three primary ways: (1) the Act extends the statute of limitations for discriminatory compensation claims, avoiding the unfair barring of claims often unknown to the plaintiff;[106] (2) the Act appropriately holds both employers and employees accountable for eliminating discriminatory compensation in the workplace and asserting only legitimate claims, respectively;[107] and (3) the Act accurately evidences Congress's intent to protect employees, not powerful businesses, through Title VII.[108]

1. Statute of Limitations Extension

To its supporters, the Ledbetter Act is a "victory for . . . all workers across the country who are shortchanged by receiving unequal pay for performing equal work."[109] Specifically, the Ledbetter Act is most beneficial because it protects discriminated-against employees.[110] Unlike *Ledbetter*, the Act does not punish employees for their failure to recognize

101. Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18.

102. Lani Guinier, Symposium, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 544 (2009).

103. Sameena Mohammed, *President Obama Keeps Campaign Promise in Signing Fair Pay Act, Drawing Praise and Criticism*, 14 PUB. INT. L. REP. 147, 149 (2009) (quoting Derrick Cain, Ledbetter, Paycheck Fairness Measures Win House Approval, 60 Human Resources Rep (BDA), at 2 (Jan. 13, 2009)).

104. Sullivan, *supra* note 9, at 499.

105. *Id*. at 563.

106. George, *supra* note 8, at 1105-07.

107. *See* Srinivasan & Joondeph, *supra* note 99, at 1107.

108. Wright, *supra* note 83, at 525.

109. Mohammed, *supra* note 103, at 148 (quoting EEOC Acting Chairman Stuart Ishimaru).

110. Garcia, *supra* note 1, at 421.

concealed discrimination by strictly adhering to a statute of limitations and time-barring their claims; rather, the Act allows those employees to assert timely discriminatory compensation claims and recover for their injuries.[111] Before the Act was passed, the *Ledbetter* decision was criticized for forcing employees to "put up (fil[e] a lawsuit) or shut up (lose [the] right to equal pay) on a tightened timeline."[112] Under *Ledbetter*, employees often would lose their right to equal pay because the statute of limitations extended only 180 days following the original discriminatory compensation decision and employees did not – and could not – know that their pay was discriminatory until after that period expired.[113] Regarding the *Ledbetter* holding, Lilly Ledbetter said before Congress:

> You can't expect people to go around asking their coworkers how much they are making. Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Especially when you work at place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.[114]

Many critics of the *Ledbetter* decision favor the Ledbetter Act because the Act addresses and directly avoids Lilly Ledbetter's problem.[115] Like Justice Ginsburg in her *Ledbetter* dissent, Congress seemed to recognize that compensation secrecy is an employee's primary obstacle to filing a timely discriminatory compensation claim.[116] Congress drafted the Act to account for discriminatory compensation decisions that, unlike termination, failure to promote, or refusal to hire decisions, cannot be recognized immediately upon occurrence.[117] Expanding the statute of limitations, Congress defined "unlawful employment practices" to include discriminatory compensation decisions or practices, applications, and effects and asserted that every discriminatory paycheck triggers a new

111. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

112. Alison I. Stein, *Women Lawyer's Blog for Workplace Equality: Blogging as a Feminist Legal Method*, 20 YALE J.L & FEMINISM 357, 376 (2009) (quoting Comment by Legal Eagle on Chicana, Supreme Court Build Barrier to Equal Pay for Women, Ms. JD, May 29, 2007, http://ms-jd.org/supreme-court-builds-barrier-equal-pay-women).

113. *See id*.; *see* George, *supra* note 8, at 1105-07; *see also supra* Part II(a)(iii) (discussing Justice Ginsburg's dissent, particularly her theory that compensation decisions often are unidentifiable or hidden from employees and, consequently, discriminatory compensation may be recognized only as an accumulated effect over time).

114. Guinier, *supra* note 102, at 543.

115. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).

116. *See* George, *supra* note 8, at 1105-07.

117. *See id*.

EEOC charging period.[118] Congress alleviated the plight of many women who were precluded from recovering for discriminatory compensation under *Ledbetter*.[119] The Act does not force employees to "shut up",[120] rather, employees are its "obvious beneficiaries . . . because legitimate actions . . . [can] be adjudicated and not time-barred."[121]

2. Employee and Employer Accountability

The Ledbetter Act also positively advances fair pay law because it promotes employee accountability by encouraging the assertion of only legitimate claims. During Senate debates, Senator Mikulski stated that "[e]mployees may want to give their employers the benefit of the doubt[,] hoping [that] the employers will voluntarily remedy [the pay] gap[,] or may want to work actively with the employer to resolve the dispute."[122] The Ledbetter Act presents this opportunity because it expands the definition of "unlawful employment practice," extending the statute of limitations for employees to assert timely discriminatory compensation claims and affording employees more time to investigate, evaluate, and craft their charges.[123] Employees may then carefully determine, without undue time constraints, whether to informally confront their employers or formally assert their claims, preventing employees from "jumping the gun" against employers[124] and causing fewer "half-baked" claims to be filed in court.[125] Thus, according to some senators, the Act will produce less employment discrimination litigation than *Ledbetter*.[126] The Act facilitates prudent investigation and legitimate filing by effectively reassuring employees that their discriminatory compensation claims will be timely, without forcing them to run to the courthouse prematurely and without proper cause.[127]

Likewise, the Ledbetter Act promotes employer accountability.[128] Under *Ledbetter*, employers were "off the hook" for discriminatory

118. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).

119. George, *supra* note 8, at 1107.

120. *See* Stein, *supra* note 112, at 376.

121. *Id*.

122. *See* Sullivan, supra note 9, at n.151 (citing 155 CONG. REC. S12,708 (daily ed. Jan. 21, 2009) (statement of Sen. Mikulski)).

123. *See id*. at 534-35.

124. *See* George, *supra* note 8, at 1107.

125. *See* Sullivan, *supra* note 9, at 534-35 (citing 155 CONG. REC. H4,123 (daily ed. Jan. 9, 2009) (statement of Rep. Grijalva)).

126. 155 CONG. REC. S557 (daily ed. Jan. 15, 2009) (statement of Sen. Leahy).

127. *See id*.; *see* Sullivan, *supra* note 9, at 534-35.

128. Cyrus Mehri, *Letter from Cyrus Mehri, Partner, Mehri & Skalet, PLLC, to Hon. Patrick Leahy, Chair, United States Senate Committee on the Judiciary*, 799 PRACTICING L. INST.: LITIG. 721, 727 (June 15, 2009).

compensation decisions after the expiration of 180 or 300 days, depending on the state.[129] However, unlike *Ledbetter*, the Ledbetter Act charges employers with eliminating discrimination in the workplace and prevents them from "shirking" this responsibility.[130] By asserting that employees suffer an unlawful employment practice when the employer adopts, subjects the employee to, or affects the employee by a discriminatory compensation practice, the employer cannot simply wait six months and be free from a discrimination claim, litigation, and, ultimately, liability.[131] Rather, employers must actively guard against this liability because employees may timely bring discrimination claims for an extended period, as each discriminatory paycheck, for example, restarts the statute of limitations.[132] This increased risk of liability will force employers to reevaluate their practices and continue only those practices that discourage and eliminate discrimination.[133] For instance, "employers should be more aware of past issues . . . and they should change records retention policies to maintain any and all records relating to pay[.]"[134] Increased employer awareness and accountability will create a less discriminatory – and more productive – environment that will benefit both employers and employees.

3. Employee, not Business, Protection

As evidenced by the foregoing discussion, employees are the "obvious beneficiaries" of the Ledbetter Act[135] – they have a longer time to discover, investigate, and file their discriminatory compensation claims.[136] These employee protections, however, may be necessary. The Roberts Court, specifically, has been referred to as "a friend of American business"[137] and "increasingly protective of the powerful."[138] Likewise, American judges tend to be "out of sync" with ordinary Americans: United States appellate courts reverse 41.1% of judgments in favor of employees, but reverse only

129. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 623-24 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

130. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).; *see* Mehri, *supra* note 128, at 733.

131. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).

132. *See id*.

133. *See* C.R. Wright, *Ledbetter Act Makes Old Claims New Again – What's an Employer to Do?*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER 39, 45-47 (2009).

134. *Id*. at 46.

135. George, *supra* note 8, at 1107.

136. *See* Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e)(3); 42 U.S.C. § 2000e-5(2)(1) (2010).

137. Srinivasan & Joondeph, *supra* note 99, at 1103.

138. *Id*. (citing Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18).

8.72% of judgments in favor of employers.[139] As one scholar noted, "There is no defensible reason why U.S. Appellate Courts' decisions would have a five to one disparity against American workers[.]"[140] Furthermore, Title VII, specifically, includes several pro-employer provisions, including: the employee bears the burden of proof; the employer's burden is easily met; employer intent is difficult to prove; employers can defend claims by equitable doctrines; and an employee's damages are limited.[141] Thus, the Ledbetter Act may provide essential employee protections that employees cannot independently obtain and courts refuse to provide.[142]

B. Risks of the Ledbetter Act

Though the Ledbetter Act has certain advantages, the Act is more significantly shadowed by problems and risks. Most notably, the Act is misplaced, incorporating flawed logic[143] and heavily favoring, but ineffectively addressing, employees' interests.[144] The Act is also overly expansive: lower courts have stretched the definition of "compensation" and "other practice," applying the Act not to just discrete compensation claims but to tenure or promotion claims.[145] Finally, the Act leaves employers in a precarious position, faced with increased litigation but unable to formulate effective defenses, since evidence regarding an allegedly discriminatory decision made years ago often has been lost or destroyed.[146]

1. The Act's Misplaced Meaning

The Ledbetter Act is most problematic because it effectively eliminates the statute of limitations.[147] Under the Act, employees may bring timely discriminatory compensation claims within 180 or 300 days of the time the

139. Mehri, *supra* note 128, at 729.

140. *Id*.

141. Wright, *supra* note 83, at 526.

142. *See* Mehri, *supra* note 128, at 729-32.

143. Robert J. Gonnello, Comment, *Closing One Door and Opening Another: The End of the Paycheck Accrual Rule and the Need for a Legislative Discovery Rule*, 39 SETON HALL L. REV. 1021, 1040 (2009).

144. Jeremy A. Weinberg, *Blameless Ignorance? The Ledbetter Act and Limitations Periods for Title VII Pay Discrimination Claims*, 84 N.Y.U. L. REV. 1756, 1763-69 (2009).

145. Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 60 MERCER L. REV. 1173, 1190-91 (2009); Brad Cave, *Employment Law: From Bush to Obama*, 32 WYO. LAW. 32, 34 (2009).

146. Corbin & Duvall, *supra* note 145, at 1191; Nelson D. Cary, *Employer Compliance and Strategies*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW: LEADING LAWYERS ON ADAPTING TO CHANGING REGULATIONS, PROTECTING CLIENTS FROM LIABILITY, AND IMPLEMENTING SUCCESSFUL COMPLIANCE STRATEGIES; RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS, 2009 WL 4025303, at *13 (Nov. 2009).

147. *See* Arbery, *supra* note 12, at 42-43.

employer adopts, the employee becomes subject to, or the employee is affected by a discriminatory compensation decision or other practice.[148] Though admittedly beneficial for employees who do not – and cannot – discover discriminatory compensation until after the expiration of the charging period following the original discriminatory decision, the Ledbetter Act goes too far, causing more problems than it solves.[149] For instance, under the Ledbetter Act, an employee who was refused a promotion in 1995 can timely file a discrimination claim in 2010, "[a]s long as she alleges that there is a continuing effect of the discriminatory decision evidenced in her [current] paycheck."[150] An employee, therefore, must only suffer some discriminatory effect within the past 180 or 300 days to timely file a discriminatory compensation claim.[151] Thus, the statute of limitations can extend for years – or even decades – for certain discriminatory conduct, subjecting employers to seemingly endless liability.[152]

The Ledbetter Act's first difficulty is that its drastic provisions are unsupported: the Ledbetter Act abrogates Title VII's disparate treatment intent requirement[153] and improperly distorts the continuing violation theory.[154] Recognizing that discriminatory intent is a "central element" of disparate treatment,[155] the continuing violation theory "allows plaintiffs to amass discriminatory acts that are significantly related because they accumulate to form a single [Title VII] claim."[156] Thus, it finds a Title VII violation based on a single, present violation or the continual presence of discriminatory intent.[157] Because "wage discrimination, within the context of a facially neutral compensation system, lacks the requisite intent to form a present violation,"[158] the Ledbetter Act attempts to implement the continuing violation theory, by characterizing every paycheck issued

148. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009); Mary E. Pivec, *Representing Employers Challenged by Harsh and Conflicting Regulatory Imperatives*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW: LEADING LAWYERS ON ADAPTING TO CHANGING REGULATIONS, PROTECTING CLIENTS FROM LIABILITY, AND IMPLEMENTING SUCCESSFUL COMPLIANCE STRATEGIES; RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS, 2009 WL 4025310, at *9 (Nov. 2009).

149. *See* Pivec, *supra* note 148, at *8-9 (Nov. 2009).

150. *Id*. at *9.

151. *See id*.; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

152. *See* Pivec, *supra* note 148, at *9.

153. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 624-25 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5.; Gonnello, *supra* note 143, at 1040.

154. Gonnello, *supra* note 143, at 1040.

155. *Ledbetter*, 550 U.S. at 624.

156. Gonnello, *supra* note 143, at 1040.

157. *Id*.

158. *Id*.

pursuant to a past discriminatory compensation decision as a continuing violation that triggers the EEOC charging period.[159] However, as the *Ledbetter* Court noted, employers lack discriminatory intent when they issue each paycheck *after* the initial discriminatory compensation decision.[160] Thus, to apply the continuing violation theory, the original discriminatory intent – attached to the original discriminatory compensation decision – must be transferred to each paycheck.[161] This application is misplaced; it ignores Title VII's disparate treatment intent requirement and circumvents the continuing violation theory's "continual presence of discriminatory intent" provision.[162] The Ledbetter Act's statute of limitations extension, therefore, subjects employers to increased employment discrimination claims, yet it is supported by flawed logic.[163]

The Ledbetter Act's second difficulty is that, even if it is soundly supported, it is practically ineffective. Specifically, the Ledbetter Act: (1) protects only a limited number of discrimination victims, and (2) gives a strategic advantage to undeserving individuals.[164] As discussed in Part III(a)(i), *supra*, the Ledbetter Act's primary benefit is extending the statute of limitations for employees who suffer undiscoverable discrimination due to concealed compensation information.[165] However, "wage discrimination . . . is not the only form of discrimination that is difficult to detect," and many employees unknowingly suffer alternative forms of discriminatory compensation and should be protected by the Ledbetter Act.[166] For example, the Act does not address discriminatory bonuses.[167] In bonus cases, the statute of limitations does not extend beyond the traditional 180 or 300 days because, after a bonus decision is made, an employee can no longer be subject to or feel the effects of that decision.[168] Likewise, an employee who voluntarily leaves the company or is fired following a discriminatory compensation decision must file his or her claim within 180 or 300 days of the last paycheck received.[169] Though this employee is unlikely to timely discover his or her victimization, the statute of limitations is not extended or restarted because he or she is no longer affected by the

159. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).
160. Gonnello, *supra* note 143, at 1040-41 (citing *Ledbetter*, 550 U.S. at 629).
161. *See id*.
162. *See id*.
163. *See id*.
164. Weinberg, *supra* note 144, at 1766-69.
165. *See supra* Part III(a)(i).
166. Weinberg, *supra* note 144, at 1766 (citing *Ledbetter*, 550 U.S. at 649-650 (Ginsburg, J., dissenting)).
167. *Id*.
168. *Id*.
169. *Id*. at 1766-67.

discrimination; "only the fortuitous plaintiff still on the payroll benefits from the Ledbetter Act."[170] Thus, the Ledbetter Act ignores many employees it should protect.[171]

Furthermore, the Ledbetter Act provides undeserving employees with a strategic advantage in filing discriminatory compensation claims.[172] Specifically, the Ledbetter Act "does not make the more generous limitations period subject to a plaintiff's ignorance of the discrimination against her."[173] Thus, employees who were aware of the discriminatory compensation also benefit from the extended statute of limitations and may strategically delay filing their claim, hoping that "evidence has been lost, memories have faded, and witnesses have disappeared[.]"[174] Though there are defenses available for an employer subjected to an intentionally delayed claim,[175] the employee still may achieve his or her purpose by simply making the employer's defense "harder to mount."[176] Furthermore, while a cited benefit of the Ledbetter Act is its facilitation of prudent investigation and legitimate filing by providing the employee with ample time to investigate and evaluate his or her claim,[177] the Ledbetter Act also increases an employee's apathy in making these efforts.[178] Because it significantly extends the statute of limitations, scholars assert that the Act actually "reduces employees' incentives to seek out and discover pay discrimination."[179] This apathy increases both the occurrence of discrimination and the costs of litigation, suggesting that the Ledbetter Act – though facially beneficial – has had the opposite effect of that intended by Congress.[180]

2. The Act's Overbroad Application

The Ledbetter Act is also significantly problematic because it is written to encourage overbroad application and, thus, overbroad employer liability. In *Ledbetter*, a concealed discriminatory pay raise was at issue: Lilly Ledbetter received poor evaluations and, accordingly, significantly smaller

170. *Id*.
171. Weinberg, *supra* note 144, at 1766-67.
172. *Id*. at 1768.
173. *Id*.
174. *Id*. (quoting Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944)).
175. These defenses include Title VII's two year backpay limitation as well as the equitable doctrine of laches. *Id*.
176. Weinberg, *supra* note 144, at 1768-69.
177. *See supra* Part III(a)(ii).
178. Weinberg, *supra* note 144, at 1769.
179. *Id*.
180. *See id*.

pay increases than her male colleagues because of her sex.[181] Admittedly problematic, Ledbetter did not – and could not – discover this discrimination until after the EEOC charging period expired, making her claim untimely.[182] However, the Ledbetter Act does not address only Lilly Ledbetter's problem. The Ledbetter Act (1) applies to unlawful employment practices "with respect to discrimination in compensation," and (2) states that an unlawful employment practice occurs when a "discriminatory compensation decision *or other practice*" is adopted, is applied, or causes effects.[183] This language suggests that, on its face, the Ledbetter Act applies not just to concealed discriminatory compensation decisions, but also to *any* employer practice – readily identifiable or unidentifiable – that results in discrimination in compensation.[184] Effectively, the Act extends the statute of limitations in most employment discrimination cases because most employment decisions somehow affect compensation.[185]

The Act's legislative history supports this broad reading.[186] The House Committee on Education and Labor "refused to strike the 'other practices' language from the bill," and the Senate rejected a similar amendment.[187] Likewise, during floor debates, one representative said:

> [W]hile Ledbetter addresses discrimination in employment, our passage of this bill expresses broad disapproval of the Court's reasoning in any context where it might be applied. Within the specific context of pay discrimination, our use of the phrase "discriminatory compensation decision or other practice" should be read broadly, and to include any practice – including, for example, seniority or pension practice – that impact[s] overall compensation.[188]

Thus, Congress's intent is clear: Congress wanted to reverse the Supreme Court's *Ledbetter* decision "in any context where it might be

181. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 622 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

182. *See id*. at 632.

183. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009) (emphasis added).

184. Sullivan, *supra* note 9, at 527.

185. *See id*. at 527, 537.

186. *See id*. at 530-34.

187. *Id*. at 530-31.

188. *Id*. (quoting 155 CONG. REC. H16,554 (daily ed. Jan. 27, 2009) (statement of Rep. Nadler)).

applied"[189] and benefit employees to the utmost extent.[190] By describing an "unlawful employment practice" as a "discriminatory compensation decision *or other practice*,"[191] the Ledbetter Act was purposely drafted to encompass a variety of discriminatory practices and to subject employers to extended liability for them.[192]

This congressional response is broader than Justice Ginsburg's *Ledbetter* dissent.[193] Justice Ginsburg argued that every paycheck issued pursuant to a discriminatory compensation decision should restart the charging period because that original decision is often undiscoverable, distinguishing promotions, for example, as discrete and easily identifiable adverse actions.[194] However, using the "other practice" language, Congress's Ledbetter Act extends the statute of limitations for undiscoverable discriminatory compensation decisions as well as other discoverable discriminatory employment practices as long as compensation is affected.[195] According to one scholar, the Act cannot be interpreted another way: "[I]t seems impossible to derive from the legislative history a strong basis for restricting [the phrase] 'other practices,' and . . . there seems to be no basis for a narrowing construction that is consistent with the statute's language."[196]

Since its enactment, lower courts have seized the Ledbetter Act and its broad "other practice" and "discrimination in compensation" provisions. Only eight days after the Act's passage, the United States District Court for the Southern District of New York decided *Vuong v. New York Life Insurance Co*.[197] In *Vuong*, the court held that the plaintiff's Title VII claim for the defendant's 1998 adoption of a discriminatory pay allocation between co-managers – four years before the plaintiff filed an EEOC charge – was timely because the plaintiff received paychecks pursuant to the discriminatory allocation within the charging period.[198] Lower courts quickly expanded this straightforward application of the Ledbetter Act. For

189. Sullivan, *supra* note 9, at 530 (quoting 155 CONG. REC. H16,554 (daily ed. Jan. 27, 2009) (statement of Rep. Nadler)).

190. *See id*. at 530-32.

191. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009) (emphasis added).

192. *See* Sullivan, *supra* note 9, at 530-31, 537.

193. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

194. *Id*.

195. Sullivan, *supra* note 9, at 530-31 (quoting 155 CONG. REC. H16,554 (daily ed. Jan. 27, 2009) (statement of Rep. Nadler)).

196. *Id*. at 536.

197. No. 03 Civ. 1075(TPG), 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009).

198. *Id*. at *9.

example, in *Gentry v. Jackson State University*,[199] the court held that the plaintiff's Title VII discrimination claim, predicated on a 2004 denial of tenure because of sex, was timely filed in 2006 under the Ledbetter Act.[200] The court asserted that "the denial of tenure, which plaintiff . . . contended negatively affected her compensation, qualifies as a 'compensation decision' or 'other practice' affecting compensation."[201] Similarly, the court in *Bush v. Orange County Corrections Department*[202] declared that the plaintiffs' sixteen-year-old Title VII claims, alleging racially discriminatory demotions, were timely under the Ledbetter Act.[203] Though the discriminatory decision was a demotion, which only indirectly affected compensation, the court still applied the Ledbetter Act to save the plaintiffs' otherwise stale claims.[204]

Lower courts also have applied the Ledbetter Act to extend the statute of limitations for temporary job assignment,[205] pension benefit,[206] and failure to promote[207] claims. In *Gilmore v. Macy's Retail Holdings*, the court held that the Ledbetter Act made timely plaintiff's claims that she was "denied the opportunity to fill in for absent . . . associates on account of her race" because, during the charging period, she was "deprived the opportunity to earn bonuses on sales of more expensive products."[208] Thus, the Ledbetter Act was applied to a temporary job assignment claim as an "other practice," though the temporary job assignment only speculatively affected compensation by providing the plaintiff with "the opportunity" to earn bonuses.[209] Similarly, the court in *Tomlinson v. El Paso Corp*. asserted that "[t]he Act covers 'wages, benefits, or other compensation,' which appears to include employer contributions to a pension plan" and that the Act "provides that a discriminatory act occurs when an individual is 'affected' by the application of a discriminatory compensation decision or other 'practice,' which could plausibly include the accrual of pension

199. 610 F. Supp. 2d 564 (S.D. Miss. 2009).
200. *Id*. at 566.
201. *Id*.
202. 597 F. Supp. 2d 1293 (M.D. Fla. 2009).
203. *Id*. at 1296.
204. *See id*.
205. *See* Gilmore v. Macy's Retail Holdings, No. 06-3020(JBS), 2009 WL 305045 (D.N.J. Feb. 4, 2009).
206. *See* Tomlinson v. El Paso Corp., No. 04-cv-02686-WDM-MEH, 2009 WL 2766718 (D. Colo. Aug. 28, 2009).
207. *See* Gertskis v. New York City Dep't of Health & Mental Hygiene, No. 07 Civ. 2235(TPG), 2009 WL 812263 (S.D.N.Y. Mar. 26, 2009). *But see* Rowland v. Certainteed Corp., No. 08-3671, 2009 WL 1444413, at *1 (E.D. Pa. May 21, 2009) (refusing to apply the Ledbetter Act to make timely plaintiff's failure to promote claim when it was "divorced from a discriminatory compensation claim").
208. *Gilmore*, 2009 WL 305045, at *1-3.
209. *See id*.

benefits."[210] Therefore, the Ledbetter Act also has been applied to pension benefit claims, and a new EEOC charging period is triggered when an employee retires and pension benefits accrue.[211] Finally, in *Gertskis v. New York City Department of Public Health & Mental Hygiene*, the court held the plaintiff's failure to promote claim timely – when filed four years after the plaintiff was denied the promotion and knew it – because the decision "continued to affect plaintiff" throughout the charging period.[212]

As evidenced by its overbroad application, the Ledbetter Act does not simply reverse the *Ledbetter* decision and extend the statute of limitations in concealed discriminatory compensation cases,[213] which would have been, concededly, a necessary and appropriate change in the law.[214] The Act, again, goes too far, extending the statute of limitations for most employment discrimination claims.[215] Fearing the Act's broad effects before its passage, Senator Michael Enzi stated:

> Virtually all personnel decisions – promotions, transfers, work assignments, training, sales territory assignments – affect an individual's compensation, benefits, or their pay. It appears that the other undefined "other practices" language would extend liability far beyond simple pay decisions to include anything that might conceivably 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 they occurred and years after the employee left

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210. *Tomlinson*, 2009 WL 2766718, at *4.

211. *See id*.

212. *Gertskis*, 2009 WL 812263, at *1, 3-4.

Though less significantly, the Ledbetter Act's use of the term "individual," rather than employee, further facilitates its broad application. *See* Philip S. Mortensen, *Lilly Ledbetter: A Push for More Transparency in Employment Practices*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER 25, 31 (2009). The Act states that an unlawful employment practice occurs when "an *individual* becomes subject to" or when "an *individual* is affected by" a discriminatory compensation decision or other practice. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009). This language may open the door for other individuals, not just employees, to bring discriminatory compensation claims against employers outside the original EEOC charging period. Mortensen, *supra* note 212, at 31.

213. *See supra* notes 197-212 and accompanying text.

214. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643-61 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5.

215. *See* Robin E. Shea, *Integrating the Ledbetter Fair Pay Act into Practice*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER 5, 13 (2009).

> employment. . . . The phrase could also potentially embrace employment decisions with no discriminatory intent or effect.[216]

By utilizing the phrase "discriminatory compensation decision *or other practice*," loosely interpreting "discrimination in compensation," and readily applying the Ledbetter Act to *almost any* employer practice – including those practices that are not concealed, but readily identifiable – lower courts have already proven Senator Enzi's fears true.[217] Furthermore, if lower courts continue their current treatment of the Act, its application to denial of tenure, demotion, failure to promote, temporary job assignment, and pension benefit claims may be only the beginning.[218] The full extent of the Act's application has yet to be seen, but scholars expect the Act to be applied to a significant number of employer practices.[219] Thus, the Ledbetter Act unnecessarily addresses issues not considered by the *Ledbetter* Court,[220] unreasonably subjects employers to additional liability for extended periods of time,[221] and inappropriately encourages employees to reassert otherwise stale claims in a variety of employment contexts.[222]

3. Increased Litigation and Impossibility of Defense

The aforementioned concerns culminate to form yet another problem with the Ledbetter Act, particularly for employers: increased litigation and impossibility of defense. Unsurprisingly, the Ledbetter Act is expected to cause an "immediate uptick in pay cases,"[223] resulting primarily from the Act's statute of limitations extension[224] and overbroad application.[225] Under

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216. Sullivan, *supra* note 9, 531 n.144 (quoting 155 CONG. REC. S13,749-50 (daily ed. Jan. 22, 2009) (statement of Sen. Enzi)).

217. *See supra* notes 197-212 and accompanying text.

It is also important to note, however, that at least some lower courts have refused to apply the Ledbetter Act to harassment claims and claims of disparate job responsibilities. *See* Johnson v. Watkins, No. 3:07CV621 DPJ-JCS, 2009 WL 1507572, at *4 n.3 (S.D. Miss. May 29, 2009) (stating that the Ledbetter Act applies only to claims of discrimination in compensation, not quid pro quo harassment claims); Leach v. Baylor Coll. of Med., No. H-07-0921, 2009 WL 385450, at *17-18 (S.D. Tex. Mar. 10, 2009) (holding that the Ledbetter Act affects only discriminatory compensation claims and stating that *Ledbetter* applies to determine the timeliness of Leach's disparate job responsibilities claim).

218. *See supra* notes 197-212 and accompanying text; Shea, *supra* note 215, at 13.

219. *See* Shea, *supra* note 215, at 13.

220. *See Ledbetter*, 550 U.S. at 623-43.

221. *See* Geoffrey S. Sheldon, *The Lilly Ledbetter Fair Pay Act of 2009: The Death of the Statute of Limitations Defense*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER,49, 55 (2009).

222. *See id*.

223. Corbin & Duvall, *supra* note 145, at 1191.

224. *See supra* Part III(a)(i).

225. *See supra* Part III(b)(ii).

the Act, an unlawful employment practice occurs and the EEOC charging period restarts every time a discriminatory compensation decision or other practice is adopted, is applied, or causes effects.[226] Furthermore, the Act is applied to any employment practice that affects compensation,[227] effectively eliminating the statute of limitations for many employment decisions.[228] Thus, plaintiffs have more time – and a wider variety of cases – in which to bring their discriminatory compensation claims.[229] The Ledbetter Act's retroactivity provision also facilitates increased litigation.[230] Under that provision, the Act applies as if enacted on May 28, 2007, making timely any qualifying claim that is pending on or after that date.[231] Therefore, cases that were foreclosed as untimely in pending litigation or never filed at all before the Ledbetter Act's passage may be resurrected and reasserted.[232]

This increased litigation is significantly problematic – and largely unfair – to employers because employers cannot defend against it.[233] An employer's typical defense strategy against pay discrimination cases is the statute of limitations and the merits of the case; however, the Ledbetter Act forecloses effective defenses on both bases.[234] The Act eliminates the statute of limitations because each discriminatory decision or practice's adoption, application, or effect restarts the charging period;[235] thus, plaintiffs must file a charge within 180 or 300 days of their last paycheck, not the underlying compensation decision.[236] Since most employees are paid biweekly, the Act provides plaintiffs with a continuously restarted charging period during which timely claims may be filed.[237] Under this

226. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).
227. *See id*.; *see supra* notes 197-212 and accompanying text.
228. Arbery, *supra* note 12, at 42-43.
229. *See supra* Parts III(a)(i), (b)(ii).
230. *See* Sheldon, *supra* note 221, at 55.
231. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 6.
232. Sheldon, *supra* note 221, at 55; Wright, *supra* note 133, at 41.

It is also important to note, however, that the Supreme Court has limited the Ledbetter Act's retroactivity provision; the Ledbetter Act will retroactively apply to only discriminatory acts that were unlawful at the time they were made. *See* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009). In that case, in the 1960s and 1970s, AT&T Corp. provided fewer seniority credits to women on maternity leave than it provided to full-time employees. *Id*. at 1967. After Congress enacted the Pregnancy Discrimination Act ("PDA"), AT&T Corp. changed its policy. *Id*. However, because it did not recalculate the credits for women who had already taken maternity leave, plaintiffs received less in retirement benefits when they retired in the 1990s than similarly-situated individuals who had not taken maternity leave. *Id*. Plaintiffs filed a discrimination suit. *Id*. However, because AT&T Corp.'s policy was legal at the time the plaintiffs were subjected to it – since Congress had not yet enacted the PDA – the Court held that the Ledbetter Act could not retroactively apply to make their claims timely. *Hulteen*, 129 S. Ct. at 1970-71, 73.

233. Cary, *supra* note 146, at *12-13.
234. *Id*. at *12.
235. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).
236. Cary, *supra* note 146, at *12.
237. *See id*.

scheme, an employer's statute of limitations defense will not – and most often cannot – succeed.[238] Accordingly, the Act elevates an employee's right to prosecute stale claims over an employer's right to be free from them, offending the fundamental notion of the statute of limitations defense.[239]

Consequently, employers will be forced to defend the merits of the case; however, the Ledbetter Act precludes this defense's success as well.[240] The Act "punishes employers for the acts of their predecessors."[241] Because the Act effectively eliminates the statute of limitations, plaintiffs may assert timely discriminatory compensation claims decades after the compensation decision was made, as long as the plaintiff's paychecks are still affected by that decision.[242] Thus, the Act "shifts the focus of the limitations period from the acts of the employer to the effect on the employee" and holds "today's management liable for the discriminatory intent of those who left the company long ago[.]"[243] The Act requires current, innocent managers to defend allegedly discriminatory decisions or practices that were adopted by previous managers, possibly even before the current managers' employment with the company and even if the current managers' intent and actions are nondiscriminatory.[244]

These circumstances make crafting a defense particularly difficult, if not impossible. Current managers often do not know about past discriminatory decisions or practices when beginning employment, let alone how to defend against them.[245] Even if current managers are aware of the discrimination, most attempts to investigate pay disparities prove to be futile: current managers are unlikely to recognize discrimination or relevant documentation – even by reviewing corporate records – because they are "far removed in time from the relevant events."[246] Moreover, as time passes, documents are lost, witness memories fade, and supervisors, managers, and human resources staff often turnover or pass away.[247] If nobody with personal knowledge is still employed by the company when the discrimination charge is filed or if the employer has no documentation

238. *See id*.
239. *See* Weinberg, *supra* note 144, at 1765 (citing Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944)).
240. *See* Cary, *supra* note 146, at *13.
241. Weinberg, *supra* note 144, at 1763.
242. *Id*. at 1763-64.
243. *Id*.
244. *See id*. at 1764.
245. *See id*.
246. *See* Weinberg, *supra* note 144, at 1764-65.
247. Cary, *supra* note 146, at *13.

to prove the allegedly discriminatory decision was legitimate, an employer has no evidence to support its position and is unlikely to successfully defend its case.[248] Thus, the Ledbetter Act extends an employee's opportunity to bring a timely claim while simultaneously narrowing an employer's opportunity for a successful defense.[249] Though the Act provides beneficial protection for employees, particularly in concealed discriminatory compensation cases, it is unjust to so significantly disadvantage employers in the process.[250]

IV. WHAT IS AN EMPLOYER TO DO?

As evidenced by its benefits and risks, the Ledbetter Act treats employers and employees – both deserving of protection under the law – very differently. The Act, undeniably, is advantageous for employees: it extends the statute of limitations in concealed discriminatory compensation cases, preventing the time-bar of plaintiffs' legitimate, undiscoverable claims, and it enables employees to investigate and evaluate claims before asserting them without proper cause.[251] However, the Act is shadowed by considerable difficulties for employers: it is overbroad, encompassing many employment practices when *Ledbetter* only contemplated discriminatory pay decisions, and it increases litigation, subjects employers to increased and extended liability, and forecloses employers' defenses.[252] This strong divergence demonstrates that employee advantages come at the expense of employer troubles.

Because the Ledbetter Act's risks are significant and employers are most negatively impacted by them, Part IV addresses ways in which the law may more fairly treat employers, while maintaining the Act's legitimate employee protections. This Part proposes the discovery rule as an alternative to the Ledbetter Act, arguing that it may better address the problems raised by *Ledbetter* while eliminating – or at least minimizing – the Act's burdens on employers. This Part will also suggest methods by

248. *See* Pivec, *supra* note 148, at *9.
249. *See id*.
250. *See id*.; *see* Carey, *supra* note 146, at *13.
The only "saving grace" of the Ledbetter Act is that it "limits" an employer's liability to two years of back pay. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(B), 123 Stat. 5, 6 (2009). However, even if an employer's liability is limited, the employer is still subjected to that liability under the expanded provisions of the Ledbetter Act. *See* Arbery, *supra* note 12, at 42-43. If the Ledbetter Act did not effectively eliminate the statute of limitations, an employer may not be subject to any liability at all. *See id*.
251. *See supra* Part III(a)(i)-(iii).
252. *See supra* Part III(b)(i)-(iii).

which employers may comply with and decrease their liability under the Ledbetter Act until a new standard is adopted.

A. Alternative Standard: Discovery Rule

The discovery rule provides an attractive alternative to the Ledbetter Act. Generally, the discovery rule states that "the statute of limitations does not start to run until the plaintiff discovers the injury giving rise to the claim, usually because it is the type of injury that is inherently difficult to detect."[253] Scholars recognize two forms of the discovery rule: (1) the statute of limitations begins to run only when plaintiff has, or should have, *knowledge of an actionable claim* against defendant; or (2) the statute of limitations begins to run when plaintiff *discovers, or reasonably should have discovered, the injury*, regardless of whether plaintiff knows who caused the injury or that a cause of action exists.[254]

The discovery rule's second form – that the statute of limitations is triggered when the plaintiff discovers, or should have discovered, the injury – best addresses and remedies the Ledbetter Act's shortcomings.[255] Before Congress passed the Act, Senator Kay Bailey Hutchinson proposed, as an alternative, a discovery rule for pay discrimination cases, suggesting that the statute of limitations is triggered only "'when the person aggrieved has, or should be expected to have, enough information to support a reasonable suspicion of . . . discrimination.'"[256] Similarly, this discovery rule would trigger the EEOC charging period "when an employee discovers that she has received a lower pay raise than other similarly situated employees, not when she learns that the differential treatment was the product of sex discrimination."[257] Contrary to the Ledbetter Act, which automatically restarts the statute of limitations every time a discriminatory compensation decision or other practice is adopted, is applied, or causes effects,[258] this discovery rule focuses on only the plaintiff's knowledge of the discrimination.[259] Thus, the discovery rule maintains – and betters – the Ledbetter Act's benefits, while eliminating the Act's risks.

253. Putnam, *supra* note 82, at 700.
254. Weinberg, *supra* note 144, at 1771.
255. *See id*. at 1771-73.
256. *Id*. at 1770 (quoting 155 CONG. REC. S401, S588 (daily ed. Jan. 15, 2009) (statement of Sen. Hutchinson)).
257. *Id*. at 1771.
258. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).
259. *See* Weinberg, *supra* note 144, at 1771.

1. Better Employee Protection

Most importantly, the discovery rule maintains the Ledbetter Act's protection for employees subjected to concealed discriminatory compensation decisions.[260] As discussed in Part III(a)(i)-(ii), *supra*, the Ledbetter Act asserts that each paycheck issued pursuant to a discriminatory pay decision restarts the EEOC charging period, extending the statute of limitations and providing employees – who often do not and cannot immediately recognize discrimination – more time to discover, investigate, evaluate, and file their claims.[261] The discovery rule maintains this benefit. Though the discovery rule does not permit the EEOC charging period to restart over and over, it does toll the original statute of limitations until the plaintiff discovers or should have discovered her injury.[262] Thus, if the plaintiff is unaware – and could not have been aware – of the discriminatory compensation decision, the statute of limitations will not begin to run, let alone expire, before she discovers it.[263] Rather, the plaintiff will have 180 or 300 days *after* she actually or constructively discovers her injury to properly investigate and assert her claim.[264] Functionally, then, the rules are the same: the Ledbetter Act and the discovery rule prevent the time-bar of unknowing plaintiffs with legitimate claims.[265]

Furthermore, the discovery rule would protect discriminated-against employees better than the Ledbetter Act.[266] While the Ledbetter Act does not extend the statute of limitations for discriminatory compensation decisions or other practices that have no subsequent effects, failing to protect all employees that may be unknowingly victimized, the discovery rule tolls the statute of limitations for *all employees* who suffer undiscoverable discrimination.[267] For example, as discussed in Part III(b)(i), *supra*, the Ledbetter Act does not extend the statute of limitations for discriminatory bonus claims, despite an employee's inability to discover the discrimination, because it does not affect subsequent compensation.[268] The discovery rule, however, would protect these employees because the statute of limitations would not begin to run until the employee discovered

260. *See id*. at 1770-73.
261. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A); *see supra* Part III(a)(i)-(ii).
262. *See* Weinberg, *supra* note 144, at 1771.
263. *See id*.
264. *See id*.
265. *See id*.; George, *supra* note 8, at 1107.
266. Weinberg, *supra* note 144, at 1771-73.
267. *Id*. at 1771-72.
268. *Id*. at 1772.

or reasonably should have discovered that the bonus was discriminatory.[269] Unlike the Ledbetter Act, the discovery rule's protection does not hinge on the discriminatory act's subsequent effects.[270]

Likewise, the discovery rule would appropriately limit protection to deserving employees.[271] The Ledbetter Act fails to consider an employee's knowledge of the discriminatory decision or other practice; the statute of limitations is simply restarted every time the discriminatory compensation decision or other practice is adopted, is applied, or causes effects.[272] Thus, as discussed in Part III(b)(i), *supra*, the Ledbetter Act encourages employees to "sleep on their rights," because they know that their EEOC charging period will continuously restart.[273] The discovery rule, however, would time-bar these suits.[274] By asserting that the statute of limitations begins when the plaintiff actually or constructively discovers the injury, the discovery rule encourages employees to reasonably investigate any potentially discriminatory decision without delay.[275] Employees cannot wait for employers to lose evidence or witnesses' memories to fade before filing suit; the statute of limitations is triggered when – and will expire 180 or 300 days after – the employee *should have discovered* the injury.[276] Thus, to avoid the time-bar, employees must timely investigate, evaluate, and file their claims; otherwise, "[v]ictims of discrimination who act with insufficient diligence to discover the discrimination will be prevented from vindicating their rights."[277] Contrary to the Ledbetter Act, the discovery rule would not protect intentionally ignorant plaintiffs.[278]

2. Better Employer Protection

The discovery rule also includes important limits to facilitate fairness to employers that the Ledbetter Act excludes. As discussed in Part III(b)(i)-(iii), *supra*, the Ledbetter Act seems to endlessly extend the statute of limitations in most employment discrimination cases: claims may be timely asserted decades after the original discriminatory act,[279] and the Act applies

269. *Id*.
270. *See id*.
271. Weinberg, *supra* note 144, at 1772-73.
272. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).
273. *See id*.; *see* Weinberg, *supra* note 144, at 1772.
274. *See* Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle*, 16 WM. & MARY J. WOMEN & L. 1, 23 (2009).
275. *See id*. at 23-24.
276. *See id*. at 6, 23-24.
277. *Id*. at 23-24.
278. *See id*.
279. *See* Pivec, *supra* note 148, at *9.

to any employment decision or other practice that affects compensation.[280] This unfounded and overbroad application both increases litigation[281] and destroys employers' defenses.[282] The discovery rule, however, avoids these pitfalls.[283]

The discovery rule incorporates considerable substantive improvements.[284] It does not distort the intent requirement of Title VII or the continuing violation theory.[285] Whereas the Ledbetter Act improperly shifts the original discriminatory decision's intent to that decision's application or effect to extend the statute of limitations, as discussed in Part III(b)(i), *supra*, the discovery rule focuses on only the original discriminatory act, tolling the statute of limitations until it is or should have been discovered.[286] The discovery rule does not shift any intent or restart any charging period; therefore, it remains truer to Title VII and its remedial purposes.[287]

Moreover, unlike the Ledbetter Act, the discovery rule does not loosely define "other practices" and "affecting compensation" to provide plaintiffs with endless time to assert a multitude of claims against employers.[288] Rather, by tolling the statute of limitations until the plaintiff discovers or reasonably should have discovered her injury, it applies to all discriminatory decisions or other practices similarly and, more importantly, predictably.[289] Employers know, understand, and can apply this standard, and employees have less opportunity – due to less time and fewer claims – to assert delayed and unsupported claims.[290] Contrary to the Ledbetter Act, the discovery rule would limit litigation to meritorious and timely claims.[291]

These substantive improvements treat employers significantly more fairly. Primarily, "[a]llowing the discovery of discrimination to trigger the start of the limitations period protects victims of discrimination, but it does not mean that statutes of limitations will become meaningless or that claims will be viable forever."[292] Whereas the Ledbetter Act may extend the statute of limitations endlessly, provided that the employee still receives

280. Sullivan, *supra* note 9, at 527.
281. Corbin & Duvall, *supra* note 145, at 1191; *see supra* Part III(b)(iii).
282. Cary, *supra* note 146, at *12-13; *see supra* Part III(b)(iii).
283. *See* Gonnello, *supra* note 143, at 1053.
284. *See id*.
285. *See* Gonnello, *supra* note 143, at 1053-54.
286. *Compare supra* Part III(b)(i), *with* Zisk, *supra* note 274, at 23-24.
287. *See* Gonnello, *supra* note 143, at 1053-54.
288. *Compare* Zisk, *supra* note 274, at 23-24, *with supra* Part III(b)(ii).
289. *See* Gonnello, *supra* note 143, at 1056.
290. *See id*.
291. *See id*.
292. Zisk, *supra* note 274, at 23.

"affected paychecks,"[293] the discovery rule prohibits employees from "preserv[ing] their claims by simply receiving any form of compensation."[294] The discovery rule delays the initial charging period only until the plaintiff actually or constructively discovers the injury; the statute of limitations begins to run when – and will expire 180 or 300 days after – either criteria is met.[295] Under the discovery rule, therefore, employers still may successfully assert a statute of limitations defense and avoid liability for stale claims.[296]

Likewise, the discovery rule better enables employers to defend discrimination claims on the merits.[297] Because the statute of limitations will expire 180 or 300 days after the employee actually or constructively discovers her injury, less time passes between the discriminatory act and the plaintiff's charge under the discovery rule.[298] Thus, employers must defend more recent acts, increasing the likelihood that they have – and can locate – the requisite documentation and witnesses to be successful.[299] An employee who unduly delays bringing suit despite knowledge of his injury, hoping that an employer will lose evidence and witnesses, will be time-barred.[300] The discovery rule, therefore, limits employers' exposure to indefensible claims.

The discovery rule "offers a 'sensible compromise' that respects the purposes of a limitations period and balances it against the rights of victims of discrimination to vindicate their rights."[301] It protects employees who suffer undiscoverable discrimination by tolling the statute of limitations until they actually or constructively discover their injury; however, it also protects employers by imposing a duty on employees to reasonably investigate and timely assert their claims and by preserving the statute of limitations.[302] Furthermore, the discovery rule encourages employee-employer collaboration to solve wage discrimination's root problem.[303] If the discovery rule is implemented, employers may disclose compensation information to employees upfront, which will simultaneously (1) benefit employers by triggering the statute of limitations and capping their liability

293. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5-6 (2009).
294. Gonnello, *supra* note 143, at 1056.
295. Zisk, *supra* note 274, at 6, 24.
296. *See id*. at 23-24; Gonnello, *supra* note 143, at 1056.
297. *See* Zisk, *supra* note 274, at 23-24.
298. *See id*. at 6, 23-24.
299. *See id*.; *compare* Cary, *supra* note 146, at *13 (highlighting the difficulty of a merits defense under the Ledbetter Act).
300. *See* Zisk, *supra* note 274, at 23-24.
301. *Id*. at 24.
302. *See id*. at 23-24.
303. *See* Gonnello, *supra* note 143, at 1056.

based on the employee's knowledge, and (2) benefit employees by providing the information necessary for them to recognize, investigate, and assert their claims.[304] Unlike the Ledbetter Act, the discovery rule may be a win-win standard.[305]

B. Post-Ledbetter Act Compliance Guide

Though the discovery rule provides an attractive alternative to the Ledbetter Act, it is not yet the law.[306] Employers are still bound by the Act, and scholars anticipate that, since its passage, the EEOC will be particularly aggressive in investigating and asserting discriminatory compensation charges against employers.[307] Thus, the EEOC will compel strict compliance to the Ledbetter Act's exceptionally burdensome and often inequitable provisions, forcing employers to take extraordinary precautions to minimize their liability.[308] These proactive precautions, however, are employers' best defenses against the Ledbetter Act.[309]

To comply with the Ledbetter Act, "employers should implement a non-discriminatory, business-related methodology to adopt a compensation program."[310] Since the Ledbetter Act restarts the EEOC charging period every time a discriminatory compensation decision or other practice is adopted, is applied, or causes effects,[311] employers must immediately eliminate all discrimination – or practices that may be viewed as discriminatory – to cutoff the statute of limitations and minimize liability.[312] Compensation programs must be transparent, permitting employees to

304. *See id*.

305. *See id*.

Some scholars have reservations about the Court's likelihood of adopting and applying the discovery rule in addition to, or in place of, the Ledbetter Act. *See* Weinberg, *supra* note 144, at 1775-83. However, other scholars argue that the discovery rule is "a model for what Congress could have done with the Ledbetter Act." Zisk, *supra* note 274, at 27. This "likelihood of implementation" debate is beyond the scope of this comment; this comment's purpose is only to argue that, theoretically, the discovery rule effectively addresses and remedies the Ledbetter Act's deficiencies, providing a strong alternative standard to reverse or ameliorate the effects of the Supreme Court's *Ledbetter* decision.

306. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

307. Arbery, *supra* note 12, at 43-44.

308. *See id*.; *see* Cary, *supra* note 146, at *13.

309. Charles M. Louderback, *What Employers Should Know About the Ledbetter Fair Pay Act*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER 15, 22 (2009).

310. Richard H. Block & Gregory R. Bennett, *An Overview of Recent and Possible Changes in Employment Law*, *in* COMPLYING WITH EMPLOYMENT REGULATIONS, LEADING LAWYERS ON KEY REGULATIONS: RECENT TRENDS, AND EFFECTIVE COMPLIANCE PRACTICES, 2009 WL 2510863, at *6 (2009).

311. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A).

312. *See* Block & Bennett, *supra* note 310, at *6.

understand the evaluative criteria and ultimate compensation decision.[313] The compensation system must also minimize potential errors, utilize objective rather than subjective criteria to evaluate employees, require documentation of all decisions, and consider the impact of compensation decisions and pay structure changes on protected classes, such as gender, race, ethnicity, and disability.[314] Employers should also ensure that all supervisors and managers – who will be evaluating employees and assigning wage increases – are trained on these fundamental principles to avoid potential discrimination charges.[315]

Moreover, compensation programs should eliminate, to the extent possible, any managerial discretion, minimizing the opportunity for employees to capitalize on subjective compensation decision-making and assert discrimination decades after the original decision or practice occurred.[316] If discretion cannot be completely eliminated, however, employers should clearly document guidelines for "both upward and downward exercise[s] of discretion."[317] Scholars also suggest that employers "decrease the frequency of pay decisions."[318] If an employer makes one compensation decision annually over ten years, that employer must defend only ten compensation decisions.[319] This practice will ultimately lead to less liability than, for example, awarding three or four salary increases per year, each of which is "a potential source of unlawfully based difference in pay"[320] and can, under the Ledbetter Act, restart the statute of limitations with each paycheck issued pursuant to it.[321] To further minimize liability, employers also should sever salaries from performance evaluations; if employees receive bonuses, rather than pay raises, each subsequent paycheck does not restart the statute of limitations – or subject employers to extended liability – because bonuses are not reflected in later compensation.[322] Finally, employers should conduct periodic self-audits to ensure ongoing compliance: "[T]he sooner a potentially discriminatory

313. *Id*.

314. *See id*. at *7; Cary, *supra* note 146, at *13; Pivec, *supra* note 148, at *11.

315. *See* Cary, *supra* note 146, at *13; Louderback, *supra* note 309, at 23; Mortensen, *supra* note 212, at 32.

316. *See* Block & Bennett, *supra* note 310, at *6.

317. Margaret Keane, *Trends in Discrimination Claims*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW: LEADING LAWYERS ON ADAPTING TO CHANGING REGULATIONS, PROTECTING CLIENTS FROM LIABILITY, AND IMPLEMENTING SUCCESSFUL COMPLIANCE STRATEGIES, 2009 WL 4025307, at *5 (Nov. 2009).

318. Cary, *supra* note 146, at *13.

319. *Id*.

320. *Id*.

321. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

322. Louderback, *supra* note 309, at 22.

compensation structure is detected, the sooner an employer can rectify the alleged disparity and stop the statute of limitations from accruing further."[323]

In addition to maintaining a new companywide transparent compensation system, employers should periodically review, individually, each employee's current pay rates to uncover "potentially discriminatory compensation structure[s]."[324] Employers should ensure that all job classifications and pay disparities between men and women in the same or similar positions are explained by objective criteria, such as skill and work performance.[325] These differences must be documented by anything other than the employee's protected category, including resumes, performance evaluations, responsibility, training certifications, or prior experience.[326] By regularly reviewing compensation decisions on both a companywide and individual level, employers will discover and remedy the most potential discrimination and be best protected from the Ledbetter Act's broad liability provisions.[327] If the discrimination is remedied, subsequent paychecks can neither restart the charging period nor extend an employer's liability.[328]

Finally, employers should conduct thorough investigations of any discrimination charges and maintain all documentation to aid in defending such claims.[329] Employers should conduct "[v]igorous investigation and resolution of pay discrimination-related complaints submitted through an employer's hotline, nondiscrimination policy, or open door process."[330] For example, employers should implement an internal complaint procedure to: (1) "ensure that the employee is heard," (2) encourage the employee to confront the employer rather than file an EEOC charge or lawsuit, (3) facilitate good relations with the court by showing that the employer is attempting to address and eliminate discrimination in the workplace, and (4) perhaps most importantly, guarantee that the employer, for its defense, gathers and maintains all possible documentation regarding the

323. Block & Bennett, *supra* note 310, at *7.

324. *Id*.

325. Brooke Duncan, III, *Best Practices for Dealing with Recent Employment Law Developments and Trends*, *in* ASPATORE SPECIAL REPORT: THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW: LEADING LAWYERS ON ADAPTING TO CHANGING REGULATIONS, PROTECTING CLIENTS FROM LIABILITY, AND IMPLEMENTING SUCCESSFUL COMPLIANCE STRATEGIES, 2009 WL 4025301, at *2 (Nov. 2009); Keane, *supra* note 317, at *4.

326. Keane, *supra* note 317, at *4; Duncan, *supra* note 325, at *2.

327. *See* Cary, *supra* note 146, at *13; Block & Bennett, *supra* note 310, at *7.

328. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

329. *Id*.; Pivec, *supra* note 148, at *9-10; Jeffrey S. Klein et al., *Employment Selection*, 802 PRACTICING L. INST.: LITIG. 997, 1007-08 (Oct. 1, 2009).

330. Cary, *supra* note 146, at *13.

complaint.[331] According to one scholar, "[t]he best defense to claims based on membership in a protected class is clear documentation that decisions are based on non-discriminatory factors such as relevant education and skills, performance ratings and achievement of objective goals, along with experience and market rates."[332]

As discussed in Part III(b)(iii), *supra*, however, the Ledbetter Act is significantly problematic for employers because it permits employees to assert claims decades after the original discriminatory decision or practice occurred, often precluding the employer from locating the necessary documentation and witnesses to compile a successful defense.[333] Thus, to combat this problem, employers must create and maintain meticulous recordkeeping and documentation retention practices.[334] Specifically, employers must document legitimate, nondiscriminatory reasons for all employment decisions "that may arguably provide a basis for future decisions with respect to employees' pay" as well as reduce to writing all decisions involving hiring, compensation, promotion, and complaint resolution.[335] Employers should also retain any documents regarding the company's compensation structure, including communications between responsible committees, market salary surveys, research, and other related documents.[336] Because of the Ledbetter Act's extensive statute of limitations, employers must ensure that these records will be, and will remain, available "after key decision-makers are no longer available."[337] In fact, to comply with the Ledbetter Act and minimize liability to the utmost extent, attorneys recommend that clients electronically maintain records forever.[338] These painstakingly meticulous recordkeeping and document retention systems will provide the best – and potentially the only – grounds for a successful defense against decades-old discrimination claims.

V. CONCLUSION

On January 29, 2009, President Obama signed into the law the Ledbetter Fair Pay Act of 2009.[339] Under the Ledbetter Act, an unlawful employment practice occurs when (1) a discriminatory compensation decision or other practice is adopted, (2) an individual is subjected to a

331. Pivec, *supra* note 148, at *10.
332. Keane, *supra* note 317, at *5.
333. Cary, *supra* note 146, at *13; Keane, *supra* note 317, at *4; *supra* Part III(b)(iii).
334. Klein et al., *supra* note 329, at 1007-08.
335. *Id*.
336. Block & Bennett, *supra* note 310, at *7.
337. Klein et al., *supra* note 329, at 1008.
338. *See* Shea, *supra* note 215, at 11.
339. Putnam, *supra* note 82, at 685.

discriminatory compensation decision or other practice, or (3) an individual is affected by a discriminatory compensation decision or other practice.[340] The Act legislatively overruled *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Supreme Court held that only discriminatory compensation *decisions*, not continuing violations, constituted discrete acts to trigger the EEOC charging period.[341]

The Ledbetter Act has been both praised and criticized. The Act significantly extends the statute of limitations for employees who do not and cannot discover a concealed discriminatory compensation decision, protecting employees with legitimate claims from the time-bar; it provides employees with time to properly investigate, evaluate, and file their claims, while encouraging employers to discontinue discriminatory practices; and it provides employee protections that are otherwise unattainable.[342] However, the Act's risks significantly outweigh its benefits. The Act has been referred to as "draconian" because:[343] it distorts Title VII's intent requirement; it fails to protect deserving employees but adamantly protects undeserving employees; it is overbroad, addressing concerns not contemplated by *Ledbetter* and endlessly extending the statute of limitations for most employment discrimination cases; and it significantly increases litigation while foreclosing most employer defenses.[344]

Employers are most burdened and disadvantaged by the Ledbetter Act; thus, the immediate question becomes: "how do employers survive this draconian law unscathed?" This comment proposed two solutions: (1) implement the discovery rule instead of the Ledbetter Act, and (2) modify employment practices to most fully and clearly comply with the Act until a new standard is adopted.[345] The discovery rule maintains the Ledbetter Act's benefits, but eliminates – or at least minimizes – the Act's risks; for example, it extends the statute of limitations for concealed discriminatory compensation decisions until employees actually or constructively discover them while simultaneously preserving employers' statute of limitations and merits defenses.[346]

Until the discovery rule becomes law, however, current Ledbetter Act compliance will require employers to implement and maintain transparent compensation programs, ensure all employees' pay rates are objectively

340. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5-6 (2009).

341. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 632, 637 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.111-2, 123 Stat. 5 (2009).

342. *See supra* Part III(a)(i)-(iii).

343. *See* Wilson, *supra* note 10, at 53.

344. *See supra* Part III(b)(i)-(iii).

345. *See supra* Part IV(a)-(b).

346. *See supra* Part IV(a)(i)-(ii).

explainable, and maintain meticulous recordkeeping and document retention systems.[347] Under the Act, these "changes made today will . . . creat[e] insulation today" and decrease liability tomorrow.[348] The Ledbetter Act, thus, significantly changed the employment discrimination landscape, particularly for employers. To best avoid its draconian provisions, employers must be proactive, not reactive, and tread lightly in making any and all compensation decisions.

347. *See supra* Part IV(b).
348. Mortensen, *supra* note 212, at 33.