

**Statement of Samuel R. Bagenstos**  
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**Before the United States Senate Committee on Health, Education,**  
**Labor, and Pensions**

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Mr. Chairman and Members of the Committee, I am pleased to testify before you today. My name is Samuel Bagenstos. I currently serve as Professor of Law and Associate Dean for Research and Faculty Development at the Washington University in St. Louis School of Law. For the past fifteen years, I have been working on and writing about civil rights litigation. I served as an attorney in the Civil Rights Division of the United States Department of Justice in the mid-1990s. Since entering academia in 1999, I have focused my research and teaching on civil rights litigation and antidiscrimination law, and I have continued to serve as counsel for individuals and organizations in civil rights cases in the federal courts of appeals and the Supreme Court.

I have been invited to discuss the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>1</sup> and the bill currently pending before this Committee to overturn that decision, the Fair Pay Restoration Act. The Fair Pay Restoration Act would adopt a simple and commonsense rule to govern the timeliness of pay discrimination claims: Each paycheck that is infected with an employer's discrimination is a separate violation of

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<sup>1</sup> 127 S. Ct. 2162 (2007).

the employment discrimination laws—lawyers call this the paycheck accrual rule—and the victim of pay discrimination may recover back pay for up to two years prior to the last discriminatory paycheck he or she has received.

In these remarks, I will make three essential points. First, the *Ledbetter* decision makes it exceptionally difficult to enforce the legal prohibitions on discrimination in pay—not just discrimination on the basis of sex, but also discrimination on the basis of race, religion, age, or disability. Second, the paycheck accrual rule that the Fair Pay Restoration Act adopts is not at all new; to the contrary, it was the law in most of the Nation before the Court’s decision last summer in *Ledbetter*, and there is simply no evidence that it led to an avalanche of stale claims. Third, the paycheck accrual rule is far preferable to the alternatives that have been most prominently suggested: equitable tolling or a discovery rule.

### **The *Ledbetter* Decision Undermines Enforcement of Pay Discrimination Laws**

*Ledbetter* requires an employee who is the victim of pay discrimination to file a charge with the Equal Employment Opportunity Commission within 180 or 300 days of his or her employer’s discriminatory pay-setting decision.<sup>2</sup> For a number of reasons, that rule substantially undermines the enforcement of the prohibitions on pay discrimination in Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

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<sup>2</sup> See *id.* at 2166-2177.

First, pay discrimination sneaks up on its victims. When an employer discriminates against an individual in hiring, promotion, or discharge, that individual will know at least that he has been disadvantaged—that he did not get the job or promotion he desired, or that he was discharged from his job. The individual may not know that the employer’s action resulted from discrimination, but the employer’s readily identifiable act of rejecting his application for a job or a promotion, or of firing him, puts him on notice of the adverse treatment that might form the basis for an antidiscrimination claim.

Pay discrimination is very different. Although the practice is itself of dubious legality, many employers prohibit their employees from discussing how much they are paid with their coworkers.<sup>3</sup> And even in the absence of an employer policy, many employees are unwilling to discuss their wages with their coworkers.<sup>4</sup> As a result, a victim of pay discrimination is unlikely to know right away that other employees were paid more than she was. She might know, for example, that she received a raise, but she is unlikely to know that other employees received *higher* raises. As Justice Ginsburg explained in her dissent in *Ledbetter*, the victim of pay discrimination in such circumstances is especially unlikely to know that she has been treated less well than her colleagues: “Having received a pay increase, the female

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<sup>3</sup> See Adrienne Collella *et al.*, *Exposing Pay Secrecy*, 32 ACAD. OF MGT. REV. 55, 57 (2007) (36% of surveyed employers “prohibited discussion of pay”).

<sup>4</sup> See Leonard Bierman & Rafael Gely, “*Love, Sex and Politics? Sure. Salary? No Way*”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 176-181 (2004) (discussing strong social norms that keep employees from discussing pay with coworkers).

employee is unlikely to discern at once that she has experienced an adverse employment decision.”<sup>5</sup>

Even if an employee knows he has experienced an adverse employment decision, there is another hurdle: He has to understand that the adverse decision is based on *discrimination*. An extensive body of work by social psychologists shows that victims of discrimination “often fail to notice discrimination, underestimate it, or deny being the target of discrimination, even when they objectively are.”<sup>6</sup> Individuals find discrimination “difficult to detect on a case-by-case basis where each individual’s outcomes can be attributed to multiple causes”—which will be true in nearly every pay discrimination case.<sup>7</sup>

And even if an employee knows that she was paid less than her coworkers and believes that the difference was the result of discrimination, she is still unlikely to file an EEOC charge immediately. Although it is not true of every victim of discrimination, psychological and sociological studies show that many “‘underreport’ perceived discrimination due to a sense of shame or their rejection of victimhood, because friends, family, and coworkers discourage them from thinking they were victims of discrimination, or due to

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<sup>5</sup> *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting).

<sup>6</sup> Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 *LAW & SOCIAL INQ.* 801, 804 (2006); *see also id.* at 805 (“Results of several studies are consistent with the idea th[at] people often err on the side of minimizing, or not seeing, discrimination when it is directed at the self.”); Faye J. Crosby & Stacy A. Ropp, *Awakening to Discrimination*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 382 (Michael Ross & Dale T. Miller, eds., 2002).

<sup>7</sup> Kaiser & Major, *supra* note 6, at 805.

the interpersonal costs associated with making a discrimination claim.”<sup>8</sup> Those interpersonal costs can be severe. Workers who make discrimination claims “report that they often are targeted by retaliation,” and a body of psychological experiments demonstrates that people who claim discrimination are often viewed as troublemakers or complainers.<sup>9</sup>

These problems are exacerbated by the small stakes in any challenge to a single, incremental act of pay discrimination—a point Justice Ginsburg pointed out in her *Ledbetter* dissent<sup>10</sup>. As Lily Ledbetter’s case demonstrates, discriminatory pay decisions can accumulate into big money over a series of years—in her case, over the course of 20 years her pay fell 15 to 40 percent behind that of her similarly situated coworkers.<sup>11</sup> But in any given year, the difference will be quite small in absolute terms. Imagine two coworkers who start out receiving the same salary of \$50,000.00 per year. In the first year, one gets a raise of five percent, and, for discriminatory reasons, the other gets a raise of three percent. If that pattern continues for 20 years, the victim of discrimination will be earning less than 70 percent of what her

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<sup>8</sup> Laura Beth Nielsen & Robert L. Nelson, Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System, 2005 WIS. L. REV. 663, 683 (footnotes omitted); see also Charles Stangor et al., Reporting Discrimination in Public and Private Contexts, 82 J. PERSONAL & SOCIAL PSYCHOL. 69, 73 (2002) (concluding that “because they are (or at least they are concerned about being) discriminated against, stigmatized individuals are particularly aware of the costs of claiming discrimination” and that “the costs of reporting discrimination are particularly salient when the social context includes members of another social category”).

<sup>9</sup> Kaiser & Major, *supra* note 6, at 818-819.

<sup>10</sup> See *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting) (“[T]he amount involved may seem too small, or the employer’s intent too ambiguous, to make the issue immediately actionable or winnable.”).

<sup>11</sup> See *id.* at 2178.

coworker earns—a difference of over \$40,000.00 in annual salary. But after the first set of discriminatory raises, the gap will be much smaller: The victim of discrimination will still earn more than 98 percent of what her coworker earns, and the difference in annual salary will be only \$1,000.00.

Few attorneys will be willing to take an employment discrimination suit where only \$1,000.00 is at stake. The costs of bringing a suit are too high, and the potential recovery too low.<sup>12</sup> A wise attorney might well counsel her client *not* to bring such a suit, because the risks for an employee are much higher than for a lawyer. An employee who files a claim of pay discrimination, as I have shown, subjects himself to retaliation. Although the federal employment discrimination laws prohibit retaliation, that prohibition is often illusory in practice.<sup>13</sup> With the prospect of only a very small recovery even if a claim of pay discrimination succeeds, even a small risk that the employer will retaliate will be enough to deter many employees from filing a claim in the first place.

I should emphasize that these problems are not limited to sex discrimination cases. The statute of limitations provision that the Court interpreted in *Ledbetter* applies not just to sex discrimination, but also to

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<sup>12</sup> See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1452-1454 (1998) (explaining that statutory attorneys' fee recovery provides an "insufficient" incentive for private attorneys to bring civil rights suits, and that the prospect of a significant damages recovery is therefore frequently necessary to encourage an attorney to bring such a suit); cf. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031-1032 (1991) (explaining that few incumbent employees sue their employers for on-the-job discrimination, because the "meager benefits" are not worth the costs of bringing suit).

<sup>13</sup> See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

discrimination on the basis of race, color, national origin, and religion.<sup>14</sup> Title VII's statute of limitations provision is incorporated by reference in the Americans with Disabilities Act and the Rehabilitation Act, and the Age Discrimination in Employment Act contains a substantively identical provision.<sup>15</sup> Indeed, there is good reason to believe that the *Ledbetter* decision will have more far-reaching consequences in the race, color, national origin, religion, age, and disability contexts than in the sex context. Even after *Ledbetter*, many employees who challenge sex discrimination in pay can continue to sue under the Equal Pay Act, which incorporates a paycheck accrual rule in its statute of limitations.<sup>16</sup> But the Equal Pay Act does not apply to race, color, national origin, religion, age, or disability discrimination.

The paycheck accrual rule incorporated in the Fair Pay Restoration Act avoids these problems. By permitting an employee to challenge any paycheck that continues to be infected by prior discriminatory decisions, that rule recognizes the workplace realities that the *Ledbetter* Court ignored. Absent such a rule, it will be extremely difficult to enforce the legal prohibitions on pay discrimination.

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<sup>14</sup> See 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination in terms and conditions of employment based on “race, color, religion, sex, or national origin”).

<sup>15</sup> See 29 U.S.C. § 626(d) (Age Discrimination in Employment Act); *id.* § 794(d) (Rehabilitation Act); 42 U.S.C. § 12117(a) (Americans with Disabilities Act).

<sup>16</sup> See *Ledbetter*, 127 S. Ct. at 2176 (“If *Ledbetter* had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts.”).

## The Paycheck Accrual Rule Has Been Applied Across the Nation for Years, With No Dire Consequences

Some opponents of legislation adopting the paycheck accrual rule contend that such legislation would make it well nigh impossible for employers to defend themselves against charges of pay discrimination:

An employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire, or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no opportunity to gather and preserve the evidence with which to sustain itself. . . . [W]hen an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.<sup>17</sup>

What is notable about this contention is its entirely theoretical nature. Although ten federal circuit courts of appeals had adopted the paycheck accrual rule before the *Ledbetter* case,<sup>18</sup> the opponents of that rule have not pointed to *any* systematic evidence (or even any significant anecdotal evidence) that the rule caused employers to be unable to defend themselves against pay discrimination claims.

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<sup>17</sup> Statement of the U.S. Chamber of Commerce Before the House Committee on Education and Labor 5-6 (June 12, 2007) (internal quotation marks and alterations omitted).

<sup>18</sup> See, e.g., *Forsyth v. Federation Employment & Guidance Service*, 409 F.3d 565, 572-573 (2d Cir. 2005); *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013-1014 (7th Cir. 2003); *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1009-1011 (10th Cir. 2002); *Cardenas v. Massey*, 269 F.3d 251, 257-258 (3d Cir. 2001); *Anderson v. Zubieta*, 180 F.3d 329, 335-336 (D.C. Cir. 1999); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (*en banc*); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 346-347 (4th Cir. 1994); *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 448-449 (11th Cir. 1993); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399-1400 (9th Cir. 1986); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982); see also *Lamphere v. Brown University*, 685 F.2d 743, 747 (1st Cir. 1982) ("a decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights").

That should not be surprising, for the law provides employers a number of protections against stale claims, even when those claims are not barred by a statute of limitations. The most fundamental of those protections is the burden of proof. It is the plaintiff who must show that her wages were discriminatory.<sup>19</sup> If, because of the passage of time, relevant evidence becomes unavailable, it is the plaintiff who will suffer the consequences. And in the rare case in which an employee sleeps on her rights, and the burden of proof is not sufficient to protect the employer from prejudice, the employer has another protection. If the employer can show that the plaintiff's lack of diligence in bringing her employment discrimination claim has caused "unreasonable and prejudicial delay," the action may be barred by the defense of laches.<sup>20</sup>

The Fair Pay Restoration Act, in any event, protects employers against open-ended liability. The bill would reaffirm the law's current two-year cap on back pay awards.<sup>21</sup> Under the bill, victims of pay discrimination would have no incentive to sleep on their rights. Because a plaintiff can recover back pay for only the two years preceding his filing of the charge with the EEOC, an employee who waits to file for more than two years after the initial discrimination will lose the chance to obtain full compensation. Given the complete lack of evidence that the paycheck accrual rule led to harmful

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<sup>19</sup> See, e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

<sup>20</sup> *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-122 (2002).

<sup>21</sup> See 42 U.S.C. § 2000e-5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."); see also S. 1843, 110th Cong., 1st Sess. § 3 (2007) (reaffirming that principle).

results in the ten circuits that adopted it before the *Ledbetter* case, and given the substantial protections against stale claims that employers would retain under the Fair Pay Restoration Act, there is no basis for concluding that the bill will unfairly burden employers.

### **Neither Equitable Tolling nor a Discovery Rule Solves the Problems Created by the Court’s Decision in *Ledbetter***

Opponents of the Fair Pay Restoration Act contend that the bill is unnecessary. In their view, existing principles of equitable tolling and estoppel are sufficient to mitigate any unfairness that might result from the *Ledbetter* decision.<sup>22</sup> At most, they argue, Congress should pass legislation that makes clear that a discovery rule applies to pay discrimination cases—a rule that starts the statute of limitations at the time “a ‘reasonable person’ could or should have been aware of the discrimination.”<sup>23</sup> These contentions are profoundly misguided.

Opponents of the bill before this Committee place great emphasis on the employer’s interest in certainty and repose.<sup>24</sup> But the Fair Pay Restoration Act serves that interest far better than do the proffered

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<sup>22</sup> See Statement of U.S. Chamber of Commerce, *supra* note 17, at 9.

<sup>23</sup> *Fair Pay, The Right Way: The House Overcorrects a Supreme Court Decision*, WASH. POSTS, Aug. 14, 2007, at A12. The Supreme Court has never resolved whether a discovery rule applies to employment discrimination cases, see *Ledbetter*, 127 S. Ct. at 2177 n.10, but four justices in *Morgan*, *supra*, endorsed such a rule. See *Morgan*, 536 U.S. at 124 (O’Connor, J., concurring in part and dissenting in part) (“In my view, therefore, the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act.”).

<sup>24</sup> See Statement of U.S. Chamber of Commerce, *supra* note 17, at 5 (“The interest in repose is particularly compelling in the employment setting.”).

alternatives of equitable tolling or the discovery rule. Under the Fair Pay Restoration Act's paycheck accrual rule, an employer knows that it has an obligation to avoid discrimination with every paycheck, and it knows that its back pay liability will not extend back more than two years. Reliance on the principle of equitable tolling or the discovery rule, by contrast, will mean that an employer can never be certain that the limitations period has run until *after* a court makes a factual determination about when the employee knew or should have known of the discrimination, and whether the employer took any action to mislead the employee about the discrimination. Although equitable tolling and the discovery rule would likely ensure that employers would *win* statute of limitations arguments more often than they would under the Fair Pay Restoration Act, those principles would give employers *less* certainty and repose, because an employer could never be sure *which* claims would be time-barred. They would also promote wasteful satellite litigation over both the employer's and the victim's conduct *after* the alleged discrimination.

More important, neither equitable tolling nor the discovery rule would solve the basic problem: Because of all of the barriers that keep an employee from discovering pay disparities, attributing those disparities to discrimination, and pursuing an antidiscrimination claim, it will be the rare case in which the victim of pay discrimination can file a claim within 180 or 300 days of the first discriminatory pay decision.

Just last Term, the Supreme Court emphasized that “[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.”<sup>25</sup> In the employment discrimination context specifically, the Court has declared that the principle of equitable tolling is “to be applied sparingly.”<sup>26</sup> A litigant seeking equitable tolling must show both “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.”<sup>27</sup> As I have explained, though, the barriers to pursuing pay discrimination claims are the *ordinary* circumstance, not an extraordinary one. The Fair Pay Restoration Act takes account of that fact by restoring the paycheck accrual rule for pay discrimination cases.

The discovery rule is insufficient for similar reasons. Under a discovery rule, the statute of limitations typically begins to run on the date the plaintiff knows of her *injury*, even if that is before the plaintiff knows the other elements of a legal claim exist.<sup>28</sup> As I have explained, however, the victim of pay discrimination may know that she is paid less than coworkers long before she knows or can prove that the disparity is the result of *discrimination*. The typical discovery rule will accordingly bar a large percentage of meritorious pay discrimination claims. Moreover, by asking

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<sup>25</sup> *Wallace v. Kato*, 127 S. Ct. 1091, 1100 (2007).

<sup>26</sup> *Morgan*, 536 U.S. at 113.

<sup>27</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

<sup>28</sup> *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) (“[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.”).

when the plaintiff reasonably should have known of her injury, the discovery rule essentially places the victim’s conduct on trial and detracts attention from the central issue in the case—whether the employer discriminated. Experience with workplace harassment doctrine suggests that courts are quite unreliable in determining whether an employee acted “reasonably” in responding to discrimination.<sup>29</sup>

The Fair Pay Restoration Act avoids these problems. In place of the uncertainties and limitations of the equitable tolling doctrine and the discovery rule, the bill adopts a very simple principle: Each and every paycheck that is infected by an employer’s discriminatory pay decision is a new violation of Title VII. That is the rule that the overwhelming majority of circuits applied before the Supreme Court’s decision in *Ledbetter*, and it is a rule that takes account of the dynamics of pay discrimination. The alternatives proposed by opponents of the bill would bar many meritorious pay discrimination claims, and they would do so without meaningfully advancing the employer’s interest in repose.

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<sup>29</sup> See David Sherwyn *et al.*, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1266-1267 (2001) (finding that “courts often find that the complaining employee acted ‘unreasonably’ as a matter of law, even when such a determination may merit a more thorough review of the facts of the case”); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 14 n.67 (2006) (collecting studies reaching the same conclusion).

It bears emphasis that there is nothing in the Supreme Court’s *Ledbetter* decision that even purports to address the policy questions that are before the Committee. In his majority opinion, Justice Alito expressly refused to consider whether it makes sense, as a matter of policy, to apply a paycheck accrual rule to claims of pay discrimination. He explained that the Court was “not in a position to evaluate Ledbetter’s policy arguments” but instead must “apply the statute as written.”<sup>30</sup> As Justice Ginsburg’s dissent demonstrated, there is ample reason to believe that the Court was wrong in its interpretation of what “the statute as written” said.<sup>31</sup> But that is not the question before this Committee. The question before this Committee is whether the *Ledbetter* decision is consistent with the policy that underlies the legal prohibitions on pay discrimination. For the reasons I have explained, it is not. The *Ledbetter* decision makes the prohibitions on pay discrimination exceedingly hard to enforce—not just in the sex discrimination context, but also in the contexts of race, religion, age, and disability discrimination—and its holding is unnecessary to protect employers against stale claims. By adopting the paycheck accrual rule, which was the law in most of the country for many years before *Ledbetter*, the Fair Pay Restoration Act properly balances the interest in employer repose against the imperative to enforce the laws that prohibit pay discrimination.

Thank you.

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<sup>30</sup> *Ledbetter*, 127 S. Ct. at 2177.

<sup>31</sup> *See id.* at 2178-2188 (Ginsburg, J., dissenting).