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Chairman Patrick Leahy
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Ranking Member Arlen Specter
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

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Dear Chairman Leahy and Ranking Member Specter:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-four affiliates nationwide, we thank the Senate Judiciary Committee for holding a hearing examining the impact of the Supreme Court's decision in *Ledbetter v. Goodyear* on women's equality in the workplace. We thank the Committee for holding the hearing record open, and we respectfully submit this statement for the record.

The Impact of the *Ledbetter* Decision

On May 29, 2007, the Supreme Court, in *Ledbetter v. Goodyear*, severely limited the ability of victims of pay discrimination to vindicate their rights.[1] According to the 5-4 decision, the majority held that the plaintiff, Lilly Ledbetter, did not have a valid claim of wage discrimination because she had not filed her complaint within 180 days of Goodyear's initial discriminatory pay decision. The Court so held despite the fact that Ms. Ledbetter did not become aware of the unlawfully lower wages until years after the discrimination began.

Under Title VII of the Civil Rights Act of 1964, an employee has 180 days after a discriminatory act to file a claim. Prior to the Supreme Court's decision, a majority of the federal circuits recognized the "paycheck accrual rule" in employment discrimination cases.[2] Under this principle, courts recognized that each new discriminatory paycheck started a new clock because each paycheck was a separate discriminatory act. This meant that employees were able to bring a timely claim as long as they could show that they had received a paycheck lessened by discrimination in the required time period. This common-sense rule prevailed in the majority of federal circuits and was the policy of the Equal Employment Opportunity Commission (EEOC) under both Democratic and Republican administrations before the Supreme Court's ruling. In fact, the EEOC intervened on behalf of Ms. Ledbetter before the Eleventh Circuit.[3]

Unfortunately, the Eleventh Circuit reversed Ms. Ledbetter's hard fought victory before a jury of her peers at trial, based solely on the radical, new argument that she had not timely filed her original claim. Worse still, when the case reached the

Supreme Court, the U.S. Solicitor General and the Department of Justice filed a brief in opposition to this well-established principle, standing in stark contrast to the EEOC's earlier brief supporting the paycheck accrual rule.[4] The Supreme Court affirmed the Eleventh Circuit and overturned the broadly recognized legal precedent that each paycheck diminished by discrimination carries forward an employer's unlawful wage decisions. For Ms. Ledbetter, not only was she unaware of the date the pay discrimination began, but her employer also kept it secret, thereby preventing her from gathering the information that would have been necessary to file a complaint within 180 days of the original discriminatory decision.

The Supreme Court's decision to limit sharply workers' opportunities to challenge wage discrimination jeopardizes the robust application of our civil rights laws, which are intended to ensure that salary decisions are not infected by discrimination. The decision is also at odds with the realities of the workplace. As Supreme Court Justice Ruth Bader Ginsburg discussed in her dissent, the realities of the workplace may prevent employees from detecting pay discrimination when it first occurs. It might take years for an employee to uncover the problem, or as in the case of Ms. Ledbetter, it could happen through anonymous information provided by a concerned co-worker years after the initial problem. Indeed, the majority of workers may never know the salaries of their coworkers. According to a recent study, only one in ten private sector employers has adopted a pay openness policy. And many employers instruct employees not to share financial information at all. Furthermore, pay disparities often occur in small increments building up slowly but steadily in an insidious way. As Justice Ginsburg noted, "cause to suspect that discrimination is at work develops only over time."[5]

H.R. 2831: Addressing the *Ledbetter* Decision

In response to the Supreme Court's decision, Congress introduced H.R. 2831, the Lilly Ledbetter Fair Pay Act. The bill addresses the Court's decision to undermine protections against discrimination in compensation that have been bedrock principles of civil rights law for decades, by ensuring that victims of workplace discrimination have effective remedies. Moreover, because the Court's decision in *Ledbetter* has implications beyond Title VII, affecting pay discrimination claims brought under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, H.R. 2831 addresses pay discrimination based on race, color, religion, sex, national origin age, and disability. The bill clarifies that such discrimination is not a one-time occurrence starting and ending with a pay decision, but that each paycheck lessened due to discrimination represents a continuing violation by the employer.

Critically, this legislation will ensure employers do not profit from years of discrimination simply because their employees were unaware of it for a few months. This bill restores Congress' original intent and reaffirms the fundamental principle that our civil rights protections are intended to make people whole for injuries suffered because of unlawful employment discrimination. Employers should be assured, however, that the bill does not change the two-year limit of back pay damages that is currently part of Title VII of the Civil Rights Act of 1964.

S. 3209 Does Not Correct the Problems Raised by the Supreme Court in *Ledbetter*

The clear, measured approach taken in H.R. 2831 is the only way Congress can reverse the effects of the *Ledbetter* decision. A newly introduced bill from Senator Hutchison (R-TX), S. 3209, purports to offer a solution for victims of pay discrimination. But, in reality, S. 3209 would fail to correct the injustice created by the *Ledbetter* decision. The legislation would create new, confusing,

and unnecessary hurdles for those facing discrimination and would flood the courts with premature claims and unnecessary litigation.

The approach taken in S. 3209 fails to recognize the basic principle that as long as discrimination in the workplace continues, so too should employees' ability to challenge it. Every time an employer issues a discriminatory paycheck, that employer violates the law, and victims of that discrimination should be afforded a remedy. Instead, S. 3209 would create new legal hurdles by requiring employees to show they filed their claims within 180 days of when they had – or *should have* had – enough information to suspect they had been subjected to discrimination. This *should have known* standard would encourage employees to file discrimination claims based on mere speculation or office rumors of wrongdoing in order to preserve their rights within the 180-day time frame.

Further, S. 3209 would create "mini-trials" focused on when the employee should have discovered the employer's wrongdoing, rather than on hard evidence correctly focusing on whether an employee suffered unlawful discrimination. The new and confusing standard and inducement to file premature claims will penalize both employers and employees by forcing them to expend time, resources, and money on unnecessary legal proceedings. In contrast, H.R. 2831 would not create a new standard, but would merely restore the law to the fair rule both employers and employees had come to rely upon prior to the *Ledbetter* decision.

The ACLU commends the Committee on holding a hearing to examine the Supreme Court's impact on women's equality in the workplace. We urge the Committee to help make equal pay for equal work a reality by supporting the approach in H.R. 2831 as the only real solution for the problems created by the Supreme Court's decision in *Ledbetter*. If you have any questions please contact Deborah J. Vagins at (202) 715-0816 or dvagins@dcaclu.org.

Sincerely,

Caroline Fredrickson
Director

Deborah J. Vagins
Legislative Counsel

cc: Members of the Senate Judiciary Committee

[1] *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162, 167 L. Ed. 2d 982 (U.S. 2007).

[2] Prior to the Supreme Court's decision in *Ledbetter*, nine of the ten federal courts of appeals to consider the issue recognized the paycheck accrual rule. *See* **D.C. Circuit:** *Shea v. Rice*, 409 F.3d 448, 452-453 (D.C. Cir. 2005) (indicating that "[an] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason"); **Second Circuit:** *Forsyth v. Fed'n Employment & Guidance Servs.*, 409 F.3d 565, 573 (2d Cir. 2005) (stating that "[a]ny paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); **Third Circuit:** *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (finding that each paycheck was a separate discriminatory act); **Fourth Circuit:** *Brinkley-Obu v. Hughes Training, Inc*., 36 F.3d 336, 345-49 (4th Cir.1994) (stating that "in a compensation discrimination case, the issuance of each diminished paycheck constitutes a discriminatory act."); *Williams v. Giant Food Inc.*, 370 F.3d 423, 430 (4th Cir. 2004) (reiterating the longstanding rule that "each discriminatory salary payment was a discrete discriminatory act even though such payment was made pursuant to a broader policy"); **Sixth Circuit:** *Leffman v. Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) (referencing "continuing violations that arise with each new use of the discriminatory act (*e.g.,* the *Bazemore* paychecks)"); **Seventh Circuit:** *Hildebrandt v. Illinois Dep't of Human Res*, 347 F.3d 1014, 1027-28 (7th Cir. 2003) (concluding that "each of [the plaintiff's] paychecks that included discriminatory pay was a discrete discriminatory act"); **Eighth Circuit:** *Ashley v. Boyle's Famous Corned Beef Co*., 66 F.3d 164, 167-68 (8th Cir.1995) (reiterating that "'[e]ach week's paycheck that delivers less to a [woman] than to a similarly situated [man] is a wrong actionable under Title VII'") (quoting *Bazemore v. Friday*, 478 U.S. 385 (1987)); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 989 (8th Cir. 2003) (noting that each discriminatory paycheck is a discrete act); **Ninth Circuit:** *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir.1986) (stating that the policy of paying lower wages to female employees on each payday constitutes a continuing violation of the law); *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003) (noting that the "wrong in *Bazemore* accrued each time the salary policy was implemented"); **Tenth Circuit:** *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009-1010 (10th Cir. 2002) (commenting that each race-based discriminatory salary payment constitutes a fresh violation of Title VII).

[3]Brief of the Equal Employment Opportunity Commission in Support of Petition for Rehearing and Suggestion for Rehearing En Banc Filed by Appellee Ledbetter, *Ledbetter v. Goodyear Tire and Rubber Co. Inc.,* 421 F.3d 1169 (11th Cir. 2005) (No. 03-15264-GG), *available at* http://www.eeoc.gov/briefs/Ledbetter.txt.

[4] Brief for the United States as Amicus Curiae Supporting Respondent, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162, 167 L. Ed. 2d 982 (U.S. 2007) (No. 05-1074).

[5] *Ledbetter*, 127 S. Ct. at 2178-2179.