

Testimony prepared for a hearing

**“The Fair Pay Restoration Act:
Ensuring Reasonable Rules in Pay Discrimination Cases”**

**before the
Senate Committee on Health, Education, Labor, and Pensions**

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Chairman Kennedy, Ranking Member Enzi, and members of the Senate Committee on Health, Education, Labor, and Pensions, my name is Margot Dorfman. I am the CEO of the U.S. Women's Chamber of Commerce. I appreciate the opportunity to testify today, and am here representing American women business owners who seek your urgent action.

The U.S. Women's Chamber of Commerce was founded to support the continued economic advancement of women in America. In essence, we are both a product as well as a part of the great Civil Rights Movement. The Women's Chamber has over 500,000 members – young and old, students and retirees, employees and business owners. We have members in every state, and these members understand that the fight for equal pay is part of the battle that all women face for economic independence.

While the Civil Rights Act of 1964 provided individuals with groundbreaking legal protection against discrimination, it has done much more in the intervening years. By assuring our civil rights, and by putting the force of our legal system behind these rights, it has allowed America to ignite a generation of growth and prosperity. This sense of economic empowerment propelled an incredible surge of women into higher education, management, business ownership, and home ownership.

Consequently, the struggle for equal pay can no longer be blindly painted as a struggle between business owners and the labor force. The struggle for equal pay is important to America – period. In truth, the Civil Rights Act of 1964 gave legal authority to what we already knew in our hearts: we not only deserve the right to question inequality whenever and wherever it occurs – we *must* question it. We must question it if we are to keep the flame of economic opportunity and advancement alive in America.

The Fair Pay Restoration Act (S. 1843) offers an opportunity to right a fundamental wrong that arose from the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* This decision severely limits the ability of victims of pay discrimination to seek a remedy under Title VII of the Civil Rights Act of 1964. The Women's Chamber was deeply disappointed in the Court's willingness to overturn decades of legal precedents and EEOC practice, and believes this misguided decision must be addressed with this timely legislative fix so that the flame of economic opportunity is not extinguished.

The economic successes and struggles of American women echo the story of our nation as a whole. To gain our independence, establish economic fairness, and create new opportunities, women moved from their homes to the factories, into the workforce, and finally into business ownership. Just as America fought for her independence, at each step in the road to equality, women have been forced to fight for our economic independence.

In spite of this long and dedicated struggle, and more than four decades after Congress outlawed wage discrimination based on sex, women continue to earn less than their male counterparts. According to the U.S. Census Bureau, women who work full-time earn, on average, only 77 cents for every dollar men earn. The figures are even worse for women of color. And while women are going to college in record numbers, that hasn't been the panacea we'd hoped it would be. According to the American Association of University Women's recent report, *Behind the Pay Gap*, just one year out of college, women working full time are already earning less than their male colleagues -- even when they work in the same field. Ten years after graduation, the pay gap widens. A gap remains even after controlling for hours, occupation, parenthood, and other factors known to affect earnings -- and this unexplained gap is likely due to sex discrimination. This persistent wage gap can be addressed -- and the promise of our civil rights advanced -- only if women are armed with the tools necessary to challenge sex discrimination against them. As employees and business owners, women understand the profound need to actively advance and protect our civil rights. And, as one of our members said in a recent letter to Congress calling for passage of the Fair Pay Restoration Act, "We deserve to question inequality at any time it is occurring."

The *Ledbetter* decision represents a step backwards on this road to economic equality. Previously, Title VII's requirement that employees file complaints within 180 days of "the alleged unlawful employment practice" was interpreted to include a worker's last paycheck tainted by discrimination. Despite their own precedent and Congressional intent, the Supreme Court has narrowly redefined the timeframe for discrimination claims, leading to the dismissal of Ms. Ledbetter's case on the grounds that she failed to file her complaint in a timely manner. As a result, Ms. Ledbetter was left with no recourse against discrimination that continued unabated for years. Now, potentially millions of other people may be as well.

With this misguided decision, the Court ignores the realities of the 21st century workplace. The confidential nature of employee salary information complicates workers' abilities to recognize

and report discriminatory treatment. Employees generally do not know enough about what their co-workers earn, or how pay decisions are made, to file a complaint as quickly as required by the Court's reasoning. Justice Ruth Bader Ginsburg's dissenting opinion distinguishes pay disparities from other types of adverse employment actions, such as refusal to hire, failure to promote, or termination. Whereas these actions are clear to both the affected employee and others in her workplace, pay discrimination is rarely so obvious. In fact, special efforts are often undertaken to ensure that compensation details are not made public. Such was the case at Goodyear.

According to Justice Ginsburg, "The Court's insistence on immediate contest overlooks common characteristics of pay discrimination." She points out, and rightly so, that pay disparities tend to be incremental, making it difficult to detect discrimination until a significant amount of time has passed -- easily more than the 180 days that the Court's new standard now requires for most workers. The Women's Chamber wholeheartedly agrees with Justice Ginsburg's assertion that, "This initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex." With time, these small differences can expand exponentially over the course of a worker's career, affecting future raises, pension contributions, and other earnings-related benefits in dramatic ways. Thus, the *Ledbetter* decision turns a blind eye to the long-term effects of pay discrimination on individuals, their families and our communities. Research shows that nearly 14 million American households are headed by women,¹ who enter their retirement years with fewer financial assets than men. Millions of women run out of retirement savings, leaving a woman forty-one percent more likely to end up in poverty than a man.² Being paid less than men and taking time off work to raise our families already reduces the amount of retirement income we receive and limits the savings available to us. Who pays for that sad state of affairs – the company that paid these women unfairly or America as a whole?

Not only does the 180 day time limit have the potential to prevent legitimate discrimination claims from being addressed, but the Women's Chamber is also concerned it creates incentives for practices that will be detrimental to both business owners and workers. Rather than take the time necessary to evaluate their situation and confirm that they have been subject to discrimination before filing a claim, the new deadline puts pressure on employees to file complaints as quickly as possible, which will prompt workers to act more hastily than they would have in the past. This change creates a potentially greater burden than the previous

¹ U.S. Census Bureau. "Selected Social Characteristics in the United States: 2006."

http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_DP2&-ds_name=ACS_2006_EST_G00_&-_lang=en&-redoLog=false&-_sse=on

² Legal Momentum. "Reading Between the Lines: Women's Poverty in the United States: 2006."

http://www.legalmomentum.org/site/DocServer/lm_povertyreport2006.pdf?docID=721

system, which provided our members with a well-established, reasonable method for resolving discrimination complaints that protected the worker, recognized the demands on business owners, and balanced these factors in the context of the modern workplace.

Good business practices are also at risk as a result of the *Ledbetter* decision. Whereas the previous system promoted voluntary employer compliance, this new interpretation provides an entirely different incentive. When each new paycheck triggered a new claim filing period, employers had a strong motivation to eliminate discriminatory compensation practices. Under this decision, employers instead have reason to be less vigilant about pay discrimination, knowing that after 180 days they will be insulated from future challenges. This is of special concern to the Women's Chamber and its members. Why? As women have moved from employees to business owners, we have brought a new perspective to America's business leadership. Women now own over thirty percent of all firms in the United States³ and are exercising the decision-making authority that comes with that role to effect positive changes in the workplace. Studies have shown that women business owners frequently provide stronger employee benefits than their male counterparts. And our members tell us that – even as business owners – they understand and respect the ongoing struggle against wage discrimination that women continue to face, and they recognize the need to support workers as they seek fair treatment in the workplace. The Fair Pay Restoration Act rewards those who play fair -- including women business owners -- unlike the Supreme Court's decision, which seems to give an unfair advantage to those who skirt the rules.

To effectively address the Court's detrimental decision in *Ledbetter*, the Women's Chamber urges Congress to move quickly to enact a legislative fix for *Ledbetter*. Rights must have enforceable remedies, and remedies must be adequate to deter discriminatory conduct. To ensure that effective remedies are available to women like Lilly Ledbetter who are victims of pay discrimination, Congress must pass the Fair Pay Restoration Act, which would amend Title VII of the Civil Rights Act of 1964 to make it clear that a pay discrimination claim accrues when a pay decision is made, when an employee is subject to that decision, or at any time they are injured by it.

A woman business owner's will to succeed, her will to offer meaningful opportunity to her employees, demands that you act now to guard this flame of economic opportunity that ensures that every citizen has the right and the ability to question inequality that stands in the way of that progress. As Americans, we are privileged to live in a country that has taken the extraordinary step of clearly committing to the protection of our individual civil rights. We do not value a person's civil rights for one day, one year, or one decade. In America, we value the civil rights

³ Center for Women's Business Women Research, "Women's Owned Businesses in the United States 2006."
<http://www.cfwbr.org/national/index.php>

of the individual every single day, whether you are female or male, black or white, from cradle to grave.

In conclusion, the Women's Chamber would ask the Committee to consider this simple question: does the impact of our failure to protect the worker's civil rights end 180 days after the individual was first discriminated against? We believe the answer is clear -- absolutely not.

We hope you agree, and urge you to move quickly to pass the Ledbetter Fair Pay Restoration Act. Thank you for the opportunity to testify today, and I look forward to taking any questions you might have.