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**BEFORE THE UNITED STATES SENATE COMMITTEE ON HEALTH, EDUCATION,
LABOR AND PENSIONS**

Hearing About The Fair Pay Restoration Act

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430 Dirksen Senate Office Building

Good morning Chairman Kennedy, Ranking Member Enzi, and Members of the Committee. I thank you and the entire Committee for affording me the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm of Akin Gump Strauss Hauer & Feld LLP here in Washington, D.C.

Prior to joining Akin Gump in September 2005, I served as the General Counsel of the United States Equal Employment Opportunity Commission (“EEOC” or “Commission”). As EEOC General Counsel, I directed the federal government’s litigation of the federal employment discrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases.

Title VII of the Civil Rights Act of 1964 created the EEOC. Title VII also made unlawful discrimination in employment on the basis of race, color, religion, sex, and national origin. EEOC enforcement authority over Title VII is plenary, with the exception of litigation against public employers. The employment protections of the Americans with Disabilities Act incorporate Title VII’s enforcement scheme, and so the EEOC also enforces that Act. The EEOC enforces two other statutes: the Equal Pay Act, which prohibits sex-based wage discrimination, and the Age Discrimination in Employment Act. Collectively, then, Congress has vested the EEOC with enforcement authority over a broad array of employment discrimination laws, including laws that protect American workers against discrimination on the basis of race, color, religion, sex, national origin, disability, and age.

During my tenure at the EEOC, the Commission continued its tradition of aggressive enforcement. We obtained relief for thousands of victims of discrimination, and the EEOC’s litigation program recovered more money for victims of discrimination than at any other time in the Commission’s history. The Commission settled thousands of charges of discrimination, filed hundreds of lawsuits every year, and recovered, literally, hundreds of millions of dollars for victims of discrimination.

I am here today, at your invitation, to speak about the proposed Fair Pay Restoration Act. I do not believe that the bill would advance the public interest. The bill assumes that the decision by the Supreme Court of the United States in *Ledbetter v. Goodyear Tire & Rubber Company* “impairs statutory protections” that “have been bedrock principles of American law for

decades.”¹ This assumption is not correct. The *Ledbetter* decision is entirely consistent with more than three decades of Supreme Court decisions. Furthermore, the bill appears inspired by the mistaken notion that, after *Ledbetter*, the law currently provides no remedy for concealed discrimination – what the bill describes as “the reality of wage discrimination.”² Finally, the bill is not limited to compensation and, if enacted in its present form, will create unanticipated and potentially ruinous liability for state and local governments, unions, employers, and others covered by the federal antidiscrimination laws. The bill may also subject pension funds to unanticipated liability that may jeopardize the integrity of those funds and risk the retirement security of pension fund beneficiaries.

As an alternative to the Fair Pay Restoration Act, Congress could codify the EEOC’s Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC’s enforcement process and establish a clear, Congressionally-mandated rule for when the EEOC’s charge-filing period ought to be extended.

I. History And Purpose Of The Charge-Filing Period

When Congress enacted Title VII in 1964, it determined that cooperation and voluntary compliance were the preferred means for achieving equal employment opportunities and eliminating unlawful discrimination.³ To accomplish this legislative goal, Congress created the EEOC and established an administrative procedure that required the EEOC to settle disputes through conference, conciliation, and persuasion. Congress also required that a charge of discrimination be filed within a precisely-defined charge-filing period as a prerequisite to the EEOC’s administrative process and any subsequent lawsuit.⁴

In 1972, Congress amended Title VII to strengthen the EEOC’s ability to enforce the law. Congress retained the charge-filing requirement and the charge-filing period and added a new requirement: Congress required the EEOC to provide those accused of discrimination with prompt notice of the charges against them.⁵ Congress authorized the EEOC to sue private employers in federal court, but the Commission could do so *only* if it failed to resolve disputes through informal methods of conference, conciliation, and persuasion.⁶

¹ Fair Pay Restoration Act, S. 1843, 110th Cong. § 2 (2007).

² *Id.*

³ *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77-78 (1984); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) (quoting *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 44 (1974)).

⁴ The legislative history of Title VII explains: “The purpose of [this legislation] is to achieve a peaceful and voluntary settlement of the persistent problems of racial and religious discrimination or segregation[.] . . . In brief, the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play.” S.REP. NO. 88-872, as reprinted in 1964 U.S.C.C.A.N. 2355, 2355-56.

⁵ 42 U.S.C. § 2000e-5(b).

⁶ *Id.*; *EEOC v. Shell Oil Co.*, 466 U.S. at 78 (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982)).

Title VII thus established the multi-step, integrated enforcement procedure that survives to present day. In 1967, Congress enacted the Age Discrimination in Employment Act, and that law contains the same charge-filing period and substantially the same investigation and conciliation process as Title VII. In 1990, Congress incorporated Title VII's enforcement scheme into the employment protections of the Americans with Disabilities Act.⁷ Accordingly, then, the EEOC administers the following four-step process.

1. *The Charge.* The EEOC receives charges of discrimination from aggrieved individuals, from persons who file charges on behalf of aggrieved individuals, and from EEOC Commissioners.⁸ In a State that has an agency with the authority to grant or seek relief for an alleged unlawful practice, an individual who initially files a charge with that agency must file the charge with the EEOC within 300 days of the employment practice. In all other States, the charge must be filed within 180 days.⁹ A charge places the EEOC on notice that a named respondent may have violated the federal antidiscrimination laws.¹⁰

2. *Notice Requirement.* The Commission must “serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the accused] . . . within ten days” of the filing of the charge.¹¹ “[T]he principal objective of [this] provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC.”¹² The ten-day notice provision, like the charge-filing period, fosters “the importance that the concept of due process plays in the American ideal of justice” and “insure[s] that fairness and due process are part of the enforcement scheme.”¹³

3. *EEOC Investigation.* After the EEOC receives a charge, and provides notice to the accused, the EEOC undertakes an investigation into the allegations contained in the charge. The

⁷ Title VII's “powers, remedies, and procedures” apply to the employment protections of the Americans with Disabilities Act. 42 U.S.C. § 12117(a). The Age Discrimination in Employment Act similarly adopts the charge-filing requirement, contains the same 180- and 300-day charge-filing periods as Title VII, obligates the EEOC to “make investigations and require the keeping of records,” to eliminate discriminatory practices through “informal methods of conciliation, conference, and persuasion,” requires prompt notice to persons named in charges, and authorizes the Commission to conduct litigation. 29 U.S.C. § 626(a)-(d).

⁸ 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(d).

⁹ 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002).

¹⁰ *EEOC v. Shell Oil Co.*, 466 U.S. at 68 (1984).

¹¹ 42 U.S.C. § 2000e-5(b).

¹² *EEOC v. Shell Oil Co.*, 466 U.S. at 74.

¹³ S. Rep. No. 92-415, at 25 (1971), quoted in *EEOC v. Shell Oil Co.*, 466 U.S. at 75 n.31. *See also id.* at 75 n.30 (“Thus, the section-by-section analysis of S. 2515, from which the notice of requirement was derived, explained the provision as follows: ‘In order to accord respondents fair notice that charges are pending against them, this subsection provides that the Commission must serve a notice of the charge on the respondent within ten days. . . .’” (quoting 118 Cong. Rec. 4941 (1972))).

Commission may inspect and copy “any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation.”¹⁴ The Commission may also issue administrative subpoenas and seek judicial enforcement of those subpoenas.¹⁵

4. Disposition of a Charge. If the Commission determines that there is “reasonable cause” to believe that a respondent violated an EEOC-enforced law, the EEOC may issue a “probable cause” finding. The Commission then must “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”¹⁶ The EEOC may file suit only if these efforts fail.¹⁷

If the EEOC finds that no “reasonable cause” exists, it must promptly inform the accused and the person, if any, who claims to be aggrieved. The aggrieved person may then file a private action in federal court against the accused.¹⁸

The EEOC’s enforcement scheme has served the nation well. Since 1964, millions of American workers have participated in the EEOC’s process and obtained redress for their grievances. The charge-filing requirement, charge-filing periods, and notification requirements have made it possible for the EEOC to conduct timely investigations, and for state and local governments, unions, employers, and others to take prompt action to investigate and respond to charges.

II. *Ledbetter v. Goodyear Tire & Rubber Company* Is Consistent With Three Decades Of Supreme Court Decisions.

The Supreme Court first articulated the doctrine that led to *Ledbetter* in 1977, when it decided *United Air Lines, Inc. v. Evans*.¹⁹ In that case, flight attendant Carolyn Evans married in 1968 and lost her job because her employer, United Air Lines, did not permit married women to work as flight attendants. United later abandoned its no-marriage rule and, in February 1972, rehired Ms. Evans. Ms. Evans filed a charge of discrimination and alleged that United violated Title VII because it refused to credit her with seniority for any period prior to February 1972. The Court acknowledged that the seniority system gave “present effect to a past act of discrimination[,]” but determined that there was no discriminatory intent within the charging period.²⁰ The Court explained:

¹⁴ 42 U.S.C. § 2000e-8(a).

¹⁵ *Id.* § 2000e-9.

¹⁶ *Id.* § 2000e-5(b).

¹⁷ *Id.* § 2000e-5(f)(1).

¹⁸ *Id.*

¹⁹ 431 U.S. 553 (1977).

²⁰ *Id.* at 558.

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.²¹

The Court re-affirmed *Evans* three years later, in 1980, when it decided *Delaware State College v. Ricks*.²² In that case, Professor Columbus Ricks alleged that his employer, Delaware State College, discriminated against him because of his national origin when it denied him tenure, offered him a one year “terminal” contract, and terminated his employment at the end of that contract. The Court observed that “termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure,” and held that the alleged discrimination occurred when the college denied Mr. Ricks tenure.²³ Because Mr. Ricks waited to file his charge until after the charge-filing period expired – as measured by the time that lapsed between the decision to deny Mr. Ricks tenure and the date of his charge – Mr. Ricks’s claim was time-barred. The Court rejected his argument that the loss of his job should transform his last day of work into a discriminatory act.²⁴ The Court reasoned:

[T]he only alleged discrimination occurred – and the filing limitations periods therefore commenced – at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later[,] “The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.”²⁵

The Court in *Ricks* noted that “limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.”²⁶

The Court re-affirmed the *Evans* line of cases in 1986 when it decided *Bazemore v. Friday*.²⁷ In that case, an employer maintained a segregated work force and a discriminatory pay structure that pre-dated Title VII. The defendant did not eliminate the discriminatory pay structure after it became covered by Title VII. Instead, the defendant merged the two race-based “branches” of workers, then continued to utilize its racist pay structure – that is, it continued

²¹ *Id.*

²² 449 U.S. 250 (1980).

²³ *Id.* at 257-58.

²⁴ *Id.* at 258.

²⁵ *Id.* (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (1979)).

²⁶ *Id.* at 256-57.

²⁷ 478 U.S. 385 (1986).

intentionally to pay black employees less than white employees.²⁸ The Court concluded that the defendant violated Title VII:

A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.²⁹

The Court explained that its decision was entirely consistent with *Evans* and its progeny. The Court reasoned that *Evans* “support[ed] the result” in *Bazemore* because Ms. Evans, unlike the *Bazemore* plaintiffs, “made no allegation that [United’s] seniority system itself was intentionally designed to discriminate.”³⁰

More recently, in 2002, the Court decided *National Railroad Passenger Corporation v. Morgan*.³¹ In that case, Abner Morgan, Jr., a black male, alleged that his employer subjected him to discrete discriminatory and retaliatory acts and a racially hostile work environment throughout his employment.

The Court in *Morgan* determined that discrete acts that fell outside the charging period were time-barred. So-called “discrete acts,” the Court said, include “termination, failure to promote, denial of transfer, [and] refusal to hire.”³² The Court explained that a discrete discriminatory act within the charge-filing period does not make timely “related” discriminatory acts that fall outside the time period.³³

The Court distinguished Mr. Morgan’s hostile environment claims from his “discrete act” claims. The Court concluded that if “an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”³⁴

Evans, *Ricks*, *Bazemore*, and *Morgan* are entirely consistent with the Court’s decision in *Ledbetter*.

In *Ledbetter*, the plaintiff, Lilly Ledbetter, worked for Goodyear from 1979 until she retired in 1998. Ms. Ledbetter claimed that throughout this period, her supervisors gave her poor

²⁸ *Id.* at 397.

²⁹ *Id.* at 395.

³⁰ *Id.* at 396 n.6.

³¹ 536 U.S. 101 (2002).

³² *Id.* at 114.

³³ *Id.* at 113.

³⁴ *Id.* at 117.

evaluations because of her sex, and that, as a result, her pay did not increase as much as it would have if she had been evaluated fairly.³⁵

Ms. Ledbetter sued Goodyear after she retired, and the United States Court of Appeals for the Eleventh Circuit reversed a jury verdict in her favor.³⁶ Ms. Ledbetter appealed and raised the following issue:

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.³⁷

Ms. Ledbetter did not claim that the relevant Goodyear decision makers acted with discriminatory intent during the charge-filing period. Instead, she asserted “that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period.”³⁸

The Court applied *Evans* and its progeny and concluded that Ms. Ledbetter’s challenge to pay decisions that pre-dated the charge-filing period was time-barred. The Court explained that in discrimination cases, “the employer’s intent is almost always disputed, and evidence relating to intent may fade quickly with time.”³⁹ The Court observed that “*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.”⁴⁰ Because Goodyear’s pay system was facially nondiscriminatory and neutrally applied, a new Title VII violation did not occur every time a paycheck issued.⁴¹

III. Discrimination Victims May Assert Claims That Pre-Date The Charge-Filing Period.

The proposed Fair Pay Restoration Act appears premised on the notion that *Ledbetter* was wrongly decided and that existing law sanctions hidden discrimination. This notion apparently finds its inspiration in Justice Ruth Bader Ginsburg’s dissent in *Ledbetter*. According to the

³⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2165-66 (2007).

³⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169 (11th Cir. 2005).

³⁷ *Ledbetter*, 127 S. Ct. at 2166.

³⁸ *Id.* at 2167 (citing Brief for Petitioner at 22).

³⁹ *Id.* at 2171.

⁴⁰ *Id.* at 2174.

⁴¹ *Id.*

dissent, wage discrimination is often “concealed,” and so EEOC charge-filing periods should not apply.⁴²

But, existing law provides a remedy for any such hidden or concealed discrimination. In fact, for decades, both the Supreme Court of the United States and the EEOC have recognized that EEOC charge-filing periods can be extended or “tolled” in such circumstances.

Twenty-five years before *Ledbetter*, in 1982, the Court decided *Zipes v. Trans World Airlines, Inc.*⁴³ In that case, the Court explained that “filing a timely charge of discrimination is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”⁴⁴ The Court also explained that “equitable modification for failing to file within the time period will be available to plaintiffs under [Title VII].”⁴⁵ Twenty years later, in *Morgan*, the Court reaffirmed *Zipes* and held that “[t]he application of equitable doctrines . . . may either limit or toll the time period within which an employee must file a charge.”⁴⁶ *Ledbetter* did not change any of this.

Like *Zipes* and *Morgan*, the EEOC maintains that the charge-filing period “is subject to equitable tolling, equitable estoppel, and waiver. Thus, there are circumstances under which the charge should be accepted as timely even though the alleged violation transpired outside the limitations period.”⁴⁷

According to the EEOC’s Compliance Manual, and consistent with *Zipes* and *Morgan*, the statutory time limits may be extended, or “tolled,” for equitable reasons when a person who alleges unlawful discrimination “was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination.”⁴⁸

Grounds for equitable tolling include: (1) no reason to suspect discrimination at the time of the disputed event; (2) mental incapacity; (3) misleading information or mishandling of a charge by the EEOC or state fair employment practices agency; and (4) timely filing in the wrong forum. The EEOC explains:

Sometimes, a charging party will be unaware of a possible EEO claim at the time of the alleged violation. Under such circumstances, the filing period should be

⁴² *Id.* at 2179, 2182.

⁴³ 455 U.S. 385 (1982).

⁴⁴ *Id.* at 393.

⁴⁵ *Id.* at 395 n.11 (citing legislative history to the 1978 amendments to the Age Discrimination in Employment Act, H.R. REP. NO. 95-950, at 12 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 504, 534).

⁴⁶ *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002).

⁴⁷ EEOC Compliance Manual § 2, Threshold Issues, Number 915.003 (May 12, 2000) available at <http://www.eeoc.gov/policy/docs/threshold.html>.

⁴⁸ *Id.*

tolled until the individual has, or should have, enough information to support a reasonable suspicion of discrimination.⁴⁹

The EEOC Compliance Manual provides the following examples:

Example 1 - On March 15, 1997, CP, an African-American man, was notified by Respondent that he was not hired for an entry-level accountant position. In February 1998, more than 300 days later, CP learned that the selectee, a white woman, was substantially less qualified for the position than CP. CP filed a charge of race and sex discrimination on March 15, 1998. The charge would be treated as timely because he filed promptly after acquiring information that led him to suspect discrimination.

Example 2 - On March 1, 1997, CP, a 55-year-old woman, learned that she was denied a promotion in the Office of Research and Development, and that the position was awarded to a 50-year-old man with similar qualifications. She subsequently applied for another promotion opportunity in the same office, and was notified in January 1998 that the position was awarded to a 35-year-old woman with similar qualifications. The second rejection prompted CP to suspect that she was being discriminated against because she was an older woman, and she filed a charge five weeks later, in February 1998. Tolling should apply, and she can challenge both promotion denials.⁵⁰

Like the doctrine of equitable tolling, the doctrine of equitable estoppel also permits the charge-filing period to be extended. This doctrine applies when any delay associated with the filing of a charge is attributable to active misconduct by an employer, union, or other respondent that is intended to prevent timely filing. For example, the charge-filing period can be extended when an employer or union conceals or misrepresents facts that would support a charge of discrimination. The charge-filing period may also be tolled or extended when an employer or union lulls the alleged victim “into not filing a charge by giving assurances that relief would be provided through internal procedures.”⁵¹

Additionally, the federal antidiscrimination laws and EEOC regulations require employers to post notices about federal antidiscrimination protections, including the time frames for filing a charge.⁵² According to the EEOC, when an employer fails to post notices that explain these protections and processes, and an individual who alleges unlawful discrimination was not otherwise aware of his or her rights, the charge-filing period can be extended or tolled. The EEOC provides the following example:

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 42 U.S.C. § 2000e-10; 29 U.S.C. § 627; 29 C.F.R. § 1601.30; 29 C.F.R. § 1627.10.

Example - CP was sexually harassed by her supervisor, leading to her resignation on March 1, 1997. CP contacted Respondent's human resources department regarding the alleged violations, and was told that Respondent would conduct an internal review. Respondent said that appropriate relief would be provided after the completion of the investigation and told CP that she did not have to file an EEOC charge until the internal investigation was complete. On February 1, 1998, Respondent notified CP that the investigation was complete and that it had concluded that CP was not sexually harassed. CP was dissatisfied with the results of the investigation and filed a charge on March 1, 1998. Under these circumstances, the time frame should be extended, and CP's charge accepted as timely.⁵³

The federal courts routinely follow the EEOC's approach.⁵⁴

IV. Tolling Did Not Apply In *Ledbetter*

The Court in *Ledbetter* did not consider whether Ms. Ledbetter's charge-filing period should be extended, nor did Ms. Ledbetter argue that the Court should extend the charge-filing period. The record in the case establishes why.

⁵³ EEOC Compliance Manual, § 2.

⁵⁴ See, e.g., *Frazier v. Delco Electronics Corp.*, 263 F.3d 663, 666 (7th Cir. 2001) (“[w]hen . . . the victim of harassment is reasonably induced by the defendant or others to believe that the situation has been or is in reasonable course of being resolved, the statute of limitations is tolled”); *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) (“an employer’s affirmatively misleading statements that a grievance will be resolved *in the employee’s favor* can establish an equitable estoppel” (emphasis in original)); *EEOC v. Ky. State Police Dep’t*, 80 F.3d 1086, 1096 (6th Cir. 1996) (equitable tolling proper where employer failed to post required ADEA notices and employee was unaware of his rights); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (equitable estoppel appropriate where employer lulls or tricks plaintiff into letting the EEOC discrimination filing deadline pass); *Anderson v. Unisys Corp.*, 47 F.3d 302, 307 (8th Cir. 1995) (misleading letter from Minnesota Department of Human Resources justified equitable tolling); *Oshiver v. Levin, Fishbein, Sedran, & Berman*, 38 F.3d 1380, 1387, 1392 (3d Cir. 1994) (automatic extension of length of tolling period justified where employer’s deceptive conduct caused untimeliness); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 880-81 (5th Cir. 1991) (time frame should be extended under equitable estoppel theory because employer misrepresented facts about discharge by indicating that employee was being terminated due to reduction in force and would potentially be rehired, and failed to disclose that it was replacing him with younger individual at lower salary); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (terminated older worker who had no reason to suspect discrimination until younger worker replaced him given a reasonable period of time to file charge); *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 520 (4th Cir. 1986) (limitations period may be extended because employer’s misconduct caused employee to delay filing a discrimination complaint); *Leake v. Univ. of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979) (filing period should be extended because plaintiff and defendant agreed not to use time spent to investigate complaint to prejudice complainant with respect to time limitations); *Jones v. Bernanke*, 493 F. Supp. 2d 18, 25-26 (D.D.C. 2007) (employee’s claims not time-barred where employer allegedly misled and dissuaded him from contacting the EEOC by falsely promising future promotions); *Duhart v. Fry*, 957 F.Supp. 1478, 1486 (N.D. Ill. 1997) (African American employee did not “discover his injury” for filing period purposes until he learned of promotions of allegedly less qualified white employees); *Bracey v. Helene Curtis, Inc.*, 780 F. Supp. 568, 570 (N.D. Ill. 1992) (equitable tolling appropriate where EEOC letter misstated filing deadline); *Sarsha v. Sears, Roebuck & Co.*, 747 F. Supp. 454, 456 (N.D. Ill. 1990) (tolling appropriate where state agency improperly rejected charge on jurisdictional grounds).

In 1982, Ms. Ledbetter filed a charge of discrimination in which she alleged that her supervisor had sexually harassed her.⁵⁵ Goodyear and Ms. Ledbetter settled the dispute without litigation shortly after Ms. Ledbetter filed her charge.⁵⁶

Years later, during litigation, Ms. Ledbetter testified that “[d]ifferent people that I worked for along the way had always told me that my pay was extremely low.”⁵⁷ She explained that she knew by 1992 that her pay was lower than her peers and that she learned about the amount of the difference “probably about 1994 and ‘95.”⁵⁸ In 1995, she spoke with her supervisor about her pay: “I told him at that time that I knew definitely that they were all making a thousand at least more per month than I was and that I would like to get in line.”⁵⁹

Ms. Ledbetter did not file a charge in 1992, 1993, 1994, 1995, 1996, or 1997. Instead, she waited until July 21, 1998 to file the charge that gave rise to the Supreme Court’s decision. Her 1998 charge sought to challenge each pay decision that occurred during her 19 years of employment at Goodyear.

Because Ms. Ledbetter “knew definitely” that her pay was lower than her peers several years before she filed a charge, she could not and did not assert that the charge-filing period should be extended. The Court therefore declined to consider whether to extend the charge-filing period.⁶⁰

A timely charge would have enabled the EEOC and Goodyear to investigate the allegations and, as occurred when Ms. Ledbetter filed her 1982 charge, to resolve the matter promptly. The delay had real consequences: Ms. Ledbetter’s case dragged on for nearly ten years, and the supervisor accused of sexual harassment in 1982, and who later evaluated Ms. Ledbetter’s work and affected her pay, was dead by the time the case went to trial.⁶¹

V. The Proposed Fair Pay Restoration Act Would Not Be In The Best Interest of The American People.

⁵⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), Joint Appendix at 103-09 [hereinafter “J.A. at ___”].

⁵⁶ J.A. at 42-43.

⁵⁷ J.A. at 233.

⁵⁸ J.A. at 233.

⁵⁹ J.A. at 231-32.

⁶⁰ *Ledbetter*, 127 S. Ct. at 2177 n.10.

⁶¹ See *Ledbetter*, 127 S. Ct. at 2171 n.4 (“Ledbetter’s claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980’s, and did so again in the mid-1990’s when he falsified deficiency reports about her work. His misconduct, Ledbetter argues, was ‘a principal basis for [her] performance evaluation in 1997.’ Brief for Petitioner 6; see also *id.*, at 5-6, 8, 11 (stressing the same supervisor’s misconduct). Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously.”). *Accord* J.A. at 39-46, 77-82.

The Fair Pay Restoration Act would require the EEOC to investigate events that happened years or decades before anyone files a charge, would force respondents to implement incredibly costly record-keeping or lose the ability to mount a defense, and would create unanticipated and potentially limitless monetary penalties for state and local governments, unions, employers, and others covered by the federal antidiscrimination laws. The bill may also create unforeseen and unanticipated liability for pension funds.

1. EEOC Process. For more than four decades, the EEOC has used its authority to receive and investigate charges of discrimination, and to settle disputes through conference, conciliation, and persuasion. The EEOC's ability to do so has come about because the charge-filing period and notice requirements mandate prompt investigations, prompt responses, and prompt resolutions of charges. The Fair Pay Restoration Act would sweep away this time-tested enforcement scheme because it would remove, completely, any requirement that alleged discrimination be dealt with swiftly. By eviscerating the charge-filing period, the Fair Pay Restoration Act would require the EEOC to conduct investigations into events that happened decades before anyone filed a charge, despite the absence of records. Witnesses' memories will be faded. Some witnesses may be missing. Others, as in *Ledbetter*, may be dead.

2. Record-keeping. EEOC regulations require state and local governments, unions, employers, and others to preserve records for up to two years "from the date of the making of the record or the personnel action involved, whichever occurs later."⁶² The Fair Pay Restoration Act would require any entity accused of discrimination to make a dreadful choice: preserve records in perpetuity or lose the ability to defend against a charge that challenges decades-old employment decisions. The cost of perpetual record-keeping would be enormous, and, in the case of public employers, would add to the taxpayers' burden. The alternative is not better: a decision to forego such record-keeping would render respondents incapable of responding. And, even if such records exist, the problem of faded memories and missing witnesses would invariably accompany any challenge to long-ago personnel decisions.

3. Limitless monetary penalties. The Fair Pay Restoration Act is not limited to pay. Rather, it repeatedly invokes the phrase "discriminatory compensation decision or other practice" and would define an "unlawful employment practice" to occur anytime an "individual is affected by application of" such a practice.⁶³ The bill contains no time limit for any award of compensatory and punitive damages. The bill likewise contains no time limit for back pay and liquidated damages that may be recovered under the Age Discrimination in Employment Act.⁶⁴ If enacted, then, the Fair Pay Restoration Act would subject state and local governments, unions,

⁶² 29 C.F.R. § 1602.14. Title VII and Americans with Disabilities Act regulations require personnel records to be maintained for one to two years. See 29 C.F.R. §§ 1602.21 (apprenticeship programs); 1602.28 (labor organizations); 1602.31 (state and local governments); 1602.40 (schools); 1602.49 (institutions of higher learning). Other statutes enforced by EEOC contain similar record-keeping and record-preservation requirements. See, e.g., 29 C.F.R. §§ 1620.32(c) (Equal Pay Act); 29 C.F.R. §§ 1627.3 to 1627.5 (Age Discrimination in Employment Act).

⁶³ Fair Pay Restoration Act, S. 1843, 110th Cong. § 3(a) (2007).

⁶⁴ *Id.* § 3(b); 42 U.S.C. § 1981a (compensatory and punitive damages); 29 U.S.C. § 626(b) (back pay and liquidated damages).

employers, and others to potentially unlimited compensatory and punitive damages, back pay, and liquidated damages.

4. Pension benefits. The Fair Pay Restoration Act contains a provision about pension benefits: “Nothing in this Act is intended to change the law in effect as of May 28, 2007, concerning the treatment of when pension benefits are considered paid.”⁶⁵ May 28, 2007 is the day before the Supreme Court announced its decision in *Ledbetter*. By citing this date, the bill seems to assume that *Ledbetter* changed existing law about pension benefits. But, *Ledbetter* did not even mention pension benefits, and it did not change the law about pension benefits or anything else. Furthermore, the remaining sections of the bill do not exclude or exempt pension benefits, so the bill may be construed to apply to pension benefits. This may have the affect of exposing pension funds to unanticipated and potentially staggering liability.

I look forward to your questions. Thank you.

⁶⁵ Fair Pay Restoration Act, S. 1843, 110th Cong. § 2(4) (2007).