PAY CONFIDENTIALITY: A REMAINING OBSTACLE TO EQUAL PAY AFTER *LEDBETTER*

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I. INTRODUCTION

In April 2007, Justice Alito delivered the majority opinion in *Ledbetter v. Goodyear Tire and Rubber Company*[1]—the most controversial labor-and-employment case of the 2006–2007 term for the Supreme Court of the United States.[2] *Ledbetter* called on the Court to decide whether a plaintiff may proceed with a pay-discrimination claim under Title VII of the Civil Rights Act of 1964 (Title VII) when an employer's decision to discriminate occurred outside of the Equal Employment Opportunity Commission (EEOC) charging period, but the employer issued paychecks reflecting the unlawful discrimination within the EEOC charging period.[3] The Court, in a five-to-four opinion, held that individual paychecks do not qualify as discrete acts of discrimination and that an employee, for his or her filing to be timely, must file a complaint within 180 or 300 days, depending on whether the employee filed with a state or local agency,[4] of the employer's discriminatory pay decisions.[5] *Ledbetter* garnered widespread criticism from academics,[6] politicians,[7] and civic organizations.[8]

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[1] 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[2] Michael Selmi, *The Supreme Court's 2006–2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 EMP. RTS. & EMP. POL'Y J. 219, 219–20 (2007).

[3] *Ledbetter*, 550 U.S. at 623.

[4] An aggrieved person must file a claim within 180 days of the alleged unlawful action. 42 U.S.C. § 2000e-5 (2006). But if she has filed a claim with a state or local agency, the aggrieved person must file the claim within the earlier of either 300 days of the unlawful conduct or 30 days after the state or local agency terminated proceedings. *Id.*

[5] *See Ledbetter*, 550 U.S. at 628.

[6] *See, e.g.*, Martha C. Nussbaum, *The Supreme Court: 2006 Term: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 81 (2007) ("What

These critics argued that the decision would foreclose many victims of pay discrimination from the opportunity to file a timely claim.[9]

Members of the 110th Congress promptly countered the Court's decision with legislation designed to overturn *Ledbetter*, but opponents of the bill successfully forestalled the measure in the Senate.[10] After the 2008 election, however, Congress and President Barack Obama answered *Ledbetter*'s critics' ongoing concerns with the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA).[11] The LLFPA amended the operation of several central pieces of employment legislation,[12] including Title VII.[13] Section 3 amended Title VII so that an employer commits an unlawful employment practice each time it issues a paycheck reflecting a discriminatory compensation decision.[14] Employees such as Lilly Ledbetter may now proceed with Title VII claims if they receive disparate pay within the EEOC charging period even though the employer made the discriminatory pay decision outside of the statute of limitations.[15] In a nod to employer interests, Congress put a two-year limit on back pay for successful plaintiffs.[16]

The LLFPA is clearly a major victory for employees; nonetheless, it is incapable of according sufficient relief to a particular class of plaintiffs. This does not mean, however, that Congress failed to draft legislation that adequately responds to *Ledbetter*. The deficiencies stem from two necessary elements of Title VII—its 180/300-day statute of limitations and its two-year limit on back pay. The LLFPA does not change the statute-of-limitations period, and thus, Title VII

the majority's reasoning really entailed was that women will often be unable to sue for pay discrimination.").

[7] *See, e.g.*, 154 CONG. REC. H7638 (daily ed. July 31, 2008) (statement of Rep. Slaughter) (characterizing the decision as a "grave mistake").

[8] *See, e.g.*, Liz Gilchrist, *Supreme Court Moves Backward on Equal Pay*, NAT'L ORG. FOR WOMEN, May 30, 2007, http://www.now.org/issues/economic/070530equalpay.html.

[9] *See supra* notes 6–8.

[10] Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

[11] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[12] *Id.* pmbl., 123 Stat. at 5 (amending "[T]itle VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1964, and . . . modify[ing] the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973").

[13] 42 U.S.C. §§ 2000e–2000e-17 (2006).

[14] § 3, 123 Stat. at 5–6.

[15] *See infra* Part II.B.

[16] *See id.*

continues to offer relief only to employees that discover a compensation disparity within 180 days after their final paycheck.[17] Additionally, employees are eligible to recover only two years of back pay even if a discriminatory pay decision has affected an employee's compensation for the past twenty years.[18] These Title VII provisions are crucial for the prompt processing of claims; however, without additional legislation, these limitations may unjustly bar a particular class of plaintiffs—employees working for employers with pay secrecy-and-confidentiality (PSC) rules—from receiving due compensation.

PSC rules are workplace rules that forbid employees from discussing wages with each other.[19] They represent a subset of a larger set of rules designed to set limitations on employee speech.[20] While many employers formalize these rules in employment policies, other employers communicate their expectations of pay secrecy informally.[21] A typical PSC rule implicitly or explicitly threatens violators with disciplinary action, or even conditions employment on compliance.[22]

Justice Ginsburg, in her powerful *Ledbetter* dissent, expressed concern for employees in workplaces governed by PSC rules.[23] The dissenting Justice correctly noted that PSC rules make it difficult for employees to determine whether their employers are discriminating against them.[24] Without the right to discuss wages, workers cannot be certain that their employer is paying them equitably. Workers' lack of wage information is a key obstacle to their discovering and correcting pay disparities. PSC rules enable unscrupulous employers to discriminate against classes of employees while simultaneously preventing those employees from uncovering the discrimination.

Although some experts have concluded that PSC rules are prevalent in American workplaces, section 8 of the National Labor Relations Act (NLRA or Act) prohibits such rules.[25] Courts consistently have held that PSC rules constitute unfair labor practices, which vi-

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[17] *See* § 2000e-5(e)(1).

[18] *See* § 3, 123 Stat. at 6.

[19] *See infra* notes 103–112 and accompanying text.

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649–50 & n.3 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[24] *Id.*

[25] *See infra* Part IV.A.

olate employees' rights under section 7 of the NLRA to engage in concerted activity.[26] Additionally, several states have enacted legislation prohibiting PSC rules and encouraging wage transparency.[27]

Unfortunately, existing federal and state laws concerning PSC rules are unable to prevent the promulgation of potentially harmful policies because the laws are fundamentally flawed in their design and operation.[28] Congress can remedy these laws' shortcomings by passing statutory reform that removes jurisdiction over PSC rules from the province of the National Labor Relations Board (NLRB or Board) and effectively preventing the promulgation of PSC rules in American workplaces.

Part II of this Comment discusses the recent enactment of the LLFPA. That section summarizes the Court's decision in *Ledbetter*, reviews Congress's response, and analyzes the LLFPA's inherent inability to fully protect employees in workplaces that maintain PSC rules. Part III of this Comment provides an overview of PSC rules. That section discusses the prevalence of PSC rules in American workplaces, explains why and how employers promulgate and enforce PSC rules, and summarizes the purported benefits to employers that utilize PSC rules. Part IV details the statutory landscape currently governing PSC rules—the NLRA and four state statutes. Part V explains why the current statutory regime governing PSC rules is inadequate. Part VI outlines potential legislative solutions to the continuing promulgation of PSC rules. That section presents recommendations on how federal legislators can effectively address the largest problems undermining legislation currently regulating PSC rules—its failure to protect supervisors or provide adequate incentive for compliance. Congress should pass legislation that exempts PSC rules from NLRA regulation, levies civil fines on violators, allows plaintiffs to sue for punitive damages, and extends the right to wage discussion to supervisory employees. A model for future congressional legislation that is capable of effectively eliminating PSC rules from American workplaces closes that section. Finally, Part VII concludes this Comment by emphasizing the need for legislation that eliminates PSC rules to accomplish the LLFPA's goal of ending compensation discrimination.

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[26] *See id.*

[27] *See infra* Part IV.B.

[28] *See infra* Part V.

II. THE LILLY LEDBETTER FAIR PAY ACT

Pay discrimination going unnoticed by victimized employees is a serious danger inherent in PSC rules because employers conceal the discrimination by silencing wage discussion. A lack of wage transparency among coworkers creates difficulty for employees to determine the existence of wage discrepancies or discrimination. In May 2007, the Supreme Court compounded the danger of PSC rules in *Ledbetter v. Goodyear Tire & Rubber Co.*[29] The majority held that a paycheck reflecting prior discriminatory decisions does not restart the EEOC charging period, which forecloses the opportunity to bring a Title VII claim for many victims of pay discrimination.[30] This decision was particularly ominous for employees whose employers promulgated PSC rules. Even if such employees were fortunate enough to realize that their employer was paying them unfairly, they likely could not make this discovery within the stringent 180-day filing period.

Less than two years later, the 111th Congress, with the support of President Obama, made an important first step toward reversing the potential inequities resulting from *Ledbetter* and PSC rules by passing the LLFPA into law. The LLFPA essentially reversed *Ledbetter*'s holding that a paycheck reflective of prior compensation discrimination cannot serve as a "discrete act" for the purpose of restarting the EEOC charging period.[31] The LLFPA was a crucial step in achieving equal pay for equal work. Nonetheless, it does not fully alleviate problems flowing from the existence of PSC rules. Employees who are unable to discern whether they are receiving disparate pay because of PSC rules will still encounter two specific problems. First, the LLFPA does not offer back pay for discrimination occurring more than two years prior to the charge. Second, the current law leaves without recourse plaintiffs who do not discover discrimination until 180/300 days after their final paycheck.

A. Ledbetter v. Goodyear Tire & Rubber Company

In 1979, Goodyear hired Lilly Ledbetter as a production supervisor in its Gadsden, Alabama plant.[32] Six years later, management

[29] 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[30] *See id.* at 625.

[31] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §§ 2–3, 123 Stat. 5, 5–6.

[32] Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

promoted her to the newly created position of Area Manager after she scored the second highest among more than forty-five applicants for the position.[33] In January 1998, management transferred Ledbetter to the position of Technology Engineer, and in November of that year, she took an early retirement.[34]

Pay records and testimony demonstrated that in 1997, Goodyear paid Ledbetter much less than male employees in the same position.[35] The pay discrepancies between Ledbetter and men in the same position ranged from 15–40 percent.[36] Her pay was so low that it fell below the minimum salary set by Goodyear's policy for her position.[37] Long after the first pay decision that she challenged, Ledbetter filed a charge of discrimination with the EEOC.[38] After receiving her right-to-sue letter from the EEOC, Ledbetter filed suit in the Northern District of Alabama and alleged pay discrimination under Title VII.[39]

Ledbetter claimed that her disparate pay was the consequence of discrimination.[40] Three pieces of evidence supported this allegation. First, she demonstrated that her performance rankings were not accurate reflections of her performance.[41] Early in her career at Goodyear, Ledbetter's direct supervisor threatened to give her additional evaluations if she did not succumb to his sexual advances.[42] Although management moved Ledbetter to a different supervisor, Goodyear later reassigned her former harasser to the role of her Performance Auditor.[43] Once again, he made advances that she rejected, which resulted in more poor evaluations.[44] Ledbetter also revealed that in 1996, another of her supervisors gave her a poor performance evalua-

[33] Brief for Petitioner-Appellant at 3, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[34] *Ledbetter*, 421 F.3d at 1174–75.

[35] *Id.* at 1174.

[36] *Id.*

[37] Brief for Petitioner-Appellant, *supra* note 33, at 3.

[38] *See Ledbetter*, 421 F.3d at 1175.

[39] *Id.* Title VII of the Civil Rights Act of 1964 provides that it is an "unlawful employment practice" to discriminate "against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2006).

[40] *Ledbetter*, 421 F.3d at 1175, 1180.

[41] Brief for Petitioner-Appellant, *supra* note 33, at 5.

[42] *Id.*

[43] *Id.* at 5–6.

[44] *Id.* at 6.

tion while also recommending her for the company's "Top Performance Award."[45] Second, Ledbetter presented testimony of other female Goodyear employees who stated that Goodyear discriminated against them.[46] Third, Ledbetter testified that other plant officials made biased remarks during her time at Goodyear.[47]

Goodyear argued that the pay discrepancy arose naturally from its "neutral merit system."[48] Under this system, the Business Center Manager (Manager) would make recommendations about who should receive raises and how much their raises should be.[49] The Manager based the recommendations on performance, subjective impressions, and Performance Auditors' reports.[50] Goodyear consistently gave Ledbetter smaller raises than those that were to her male counterparts or no raises at all.[51] The company contended that the discrepancies were simply a result of her poor performance.[52]

The jury found in favor of Ledbetter and awarded her back pay and damages.[53] On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed and found that Ledbetter failed to file a timely charge within the statutory charging period for a Title VII claim.[54] The statute requires plaintiffs to file a charge with the EEOC within 180/300 days of the unlawful employment practice.[55] The Court of Appeals concluded that Ledbetter's claims based on the 1980s and mid-1990s pay decisions were untimely and that no reasonable juror

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[45] *Id.* at 5.

[46] *Id.* at 7.

[47] Brief for Petitioner-Appellant, *supra* note 33, at 8.

[48] *Id.* at 5. *See also* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1172–73 (11th Cir. 2005) (describing the "merit compensation system"), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[49] *Ledbetter*, 421 F.3d at 1172.

[50] *Id.* (stating that the recommendations were based "primarily" on performance but that the details of the system were not worth extended discussion); Brief for Petitioner-Appellant, *supra* note 33, at 5.

[51] *Ledbetter*, 421 F.3d at 1174–75.

[52] Brief for Petitioner-Appellant, *supra* note 33, at 5. *See also Ledbetter*, 421 F.3d at 1173–75 (discussing Goodyear management's appraisals of Ledbetter's performance).

[53] Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 U.S. Dist. LEXIS 27406, at *1–5 (N.D. Ala. Sept. 24, 2003), *rev'd*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[54] *Ledbetter*, 421 F.3d at 1171.

[55] 42 U.S.C. § 2000e-5(e)(1) (2006); *see supra* note 4 and accompanying text.

could find that Goodyear acted with discriminatory intent while making the only two pay decisions occurring within the 180-day period prior to Ledbetter's charge—decisions made in 1997 and 1998—to deny her a raise.[56] Ledbetter's petition for a writ of certiorari did not contest the Eleventh Circuit's findings regarding these final two pay decisions. Instead, she framed the issue as

> [w]hether 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.[57]

Justice Alito, writing for a five-to-four majority, denied Ledbetter's Title VII claim and held that the applicable limitations period of 180 days had run before she filed her EEOC questionnaire.[58] The Court found that the charging period for the decisions made with discriminatory intent—the early 1980s and mid-1990s retaliatory evaluations—had long since expired.[59] The majority explained that paychecks reflecting earlier pay decisions based on these negative evaluations were merely effects of past discrimination and did not constitute discrete instances of discrimination because, viewed alone, they lacked the requisite discriminatory intent.[60] In sum, the Court held that the EEOC charging period begins running with an act of

[56] *Ledbetter*, 421 F.3d at 1178.

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

[58] *See id.* at 621–43. An EEOC intake questionnaire solicits preliminary information from the aggrieved party. Laurie M. Stegman, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 125 (1992). Ledbetter did not include a discriminatory-pay claim until she filed a formal charge in July 1998. *Ledbetter*, 550 U.S. at 622 n.1. The parties, however, assumed that the EEOC charging period began running on September 26, 1997—the date that she filed her intake questionnaire. *Id.* at 622 & n.1. The court likewise assumed that the filing of the questionnaire initiated the EEOC charging period. *Id.* at 622 n.1. In February 2008, the Supreme Court held that "a filing is deemed a charge if the document reasonably can be construed to request agency action and appropriate relief on the employee's behalf." Fed. Express Corp. v. Holowecki, 533 U.S. 389, 404 (2008). The Court concluded that EEOC intake questionnaires satisfy this test and thus constitute formal charges for the purpose of determining whether a plaintiff has satisfied the statutory filing requirements. *Id.*

[59] *Ledbetter*, 550 U.S. at 628.

[60] *Id.* at 629.

discrimination and is not renewed each time that a victim suffers an effect of the prior discrimination.[61]

The majority based its stringent adherence to the filing deadline on a policy argument that "[s]tatutes of limitations serve a policy of repose."[62] The 180-day policy, Justice Alito contended, works to balance aggrieved employees' interests with employers' interest in swift processing of employment-discrimination charges.[63] The Court explained that the short filing deadline reflects Congress's intent to encourage prompt processing of Title VII allegations.[64] Without relatively short deadlines, employers would need to defend charges arising from employment decisions that occurred long ago.[65] This consideration was particularly relevant to Lilly Ledbetter. Her discrimination claim rested on the misconduct of a Goodyear employee who retaliated against her for rejecting his sexual advances in the early 1980s and mid-1990s.[66] Ledbetter argued that this employee's misconduct was the foundation for negative performance evaluations that caused her to receive disparate pay.[67] At the time of trial, this supervisor had died and thus could not testify.[68] A timely charge would have avoided this evidentiary problem.

The majority cited the Court's precedent supporting its argument that continuing adverse consequences of past discrimination do not restart the EEOC charging period.[69] The Court also addressed

[61] *Id.* at 628 ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.").

[62] *Id.* at 630.

[63] *Id.* at 642.

[64] *Id.* at 630.

[65] *Ledbetter*, 550 U.S. at 630.

[66] *Id.* at 632 n.4.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 625–30. The Court relied primarily on two Supreme Court cases. *Id.* at 625–26. In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), the defendant's policy that refused to employ married flight attendants forced the plaintiff to resign. *Id.* at 554. Years later, the employer rehired the plaintiff but regarded her as a new employee. *Id.* at 555. Her status as a new employee had a negative impact on her seniority status. *Id.* The plaintiff sued on the grounds that the present effect of the company's illegal act, that is, forcing her to resign based on marital status, renewed the statutory filing period. *Id.* at 557. The Court denied her claim and concluded that the continuing effects of the past discrimination did not constitute a new claim. *Id.* at 558. In *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980), the employer denied the plaintiff tenure but granted him a final, nonrenewable one-year contract. *Id.* at 252–53. The employee sued, alleged that the school discharged him based on na-

Bazemore v. Friday,[70] which appeared on the surface to support the notion that pay discrimination was a continuing violation: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[71] This language, Ledbetter and the dissent argued, meant that the 180-day period ran anew from each paycheck that reflected the prior discriminatory decision.[72] Justice Alito, however, distinguished *Bazemore* by explaining that the decision stands for the proposition that paychecks trigger new EEOC charging periods only when the pay structure is discriminatory on its face.[73] A new charging period is not triggered when employees receive paychecks pursuant to a facially nondiscriminatory pay system.[74] The Court thus held that *Bazemore* did not require a different result.[75]

In dissent, Justice Ginsburg argued that with each new paycheck, Goodyear contributed to the accumulating harm caused by its managers' sexual discrimination.[76] The Justice posited that each payment infected by the previous act of discrimination should constitute an unlawful employment practice.[77] Ginsburg cited to *Bazemore* to support this position, but at its core, the dissenting opinion presents a policy argument that pay-discrimination claims are unique because the discrete act is less conspicuous than other types of discriminatory acts:

> The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts "easy to identify." A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, trans-

tional origin, and argued that the EEOC charging period ran from the point of his termination. *Id.* at 254–55. The court denied his claim and held that his termination was merely an effect of the denial of tenure. *Id.* at 257–58. The statute of limitations began running after the illegal employment decision—the denial of tenure. *Id.*

[70] 478 U.S. 385 (1986).

[71] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 635 (2007) (quoting *Bazemore*, 478 U.S. at 395–96), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[72] *Id.* at 633; *id.* at 645 (Ginsburg, J., dissenting).

[73] *Id.* at 637 (majority opinion).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 648–49 (Ginsburg, J., dissenting).

[77] *Ledbetter*, 550 U.S. at 646, 655 (Ginsburg, J., dissenting).

> fers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries.[78]

The dissent then noted that Goodyear kept its employees' salaries confidential and suggested that Ledbetter did not know that Goodyear was discriminating against her.[79] Essentially, Justice Ginsburg's opinion highlights the concealed nature of pay discrimination and argues that the EEOC charging period should restart each time that an employee is harmed by its effects.[80] The dissent contended that this would avoid time barring potential plaintiffs who may not have known about the discrimination until after the filing period has expired.[81]

B. Congress's Response to Ledbetter

At the conclusion of her dissent, Justice Ginsburg called on Congress to "correct th[e] Court's parsimonious reading of Title

[78] *Id.* at 649–50. The majority did not find merit in Justice Ginsburg's policy argument:

> Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents. We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by the statute.

Id. at 642–43 (majority opinion).

[79] *Id.* at 650 (Ginsburg, J., dissenting). The record does not indicate that Goodyear had a PSC rule; it only indicates that Goodyear kept salaries confidential, and management made sure that it always locked up pay-rate tables. Brief for Petitioner-Appellant, *supra* note 33, at 26. The *Los Angeles Times* reported that "Ledbetter had suspected for years that her male co-workers were being paid more, but she did not have proof until shortly before her retirement, when someone anonymously left documents in her work mailbox showing what three male managers earned." Nicole Gaouette, *House Bill to Lift Limits on Pay Suits*, L.A.TIMES, July 31, 2007, at A12. In an op-ed piece, Ledbetter wrote, "How many workers know what their colleagues make? Do you? I certainly didn't until years after the fact." Lilly Ledbetter, *Equal Work, Unequal Pay*, CHRISTIAN SCI. MONITOR, July 31, 2007, at 9, *available at* http://www.csmonitor.com/2007/0731/p09s01-coop.html.

[80] *Ledbetter*, 550 U.S. at 645–46 (Ginsburg, J., dissenting).

[81] *Id.*

VII."[82] California Representative George Miller responded swiftly by introducing the Lilly Ledbetter Fair Pay Act of 2007[83] in the House of Representatives on June 22, 2007, less than one month after Justice Alito handed down the *Ledbetter* decision.[84] The Lilly Ledbetter Fair Pay Act of 2007 would have amended Title VII so that each paycheck affected by a past discriminatory pay decision would constitute an unlawful discriminatory practice for the purposes of the EEOC statute of limitations period.[85]

But before the House of Representatives voted on the bill, President Bush issued a statement pledging to veto any legislation passed in response to *Ledbetter*.[86] The President's Statement of Administrative Policy, communicating the Bush Administration's opposition to the Lilly Ledbetter Fair Pay Act of 2007, argued that the bill "would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved."[87] Against a backdrop of presidential disapproval, the outlook for the Lilly Ledbetter Fair Pay Act of 2007 was grim from the beginning. Nonetheless, the bill passed in the House on July 31, 2007, by a vote of 225 to 199, but the passage would prove to be a temporary victory.[88] Congress effectively killed the bill on April 23, 2008, when a Senate cloture motion terminated Senate debate or the possibility of voting on the bill by roll call.[89]

In 2009, a new president and new Congress reopened the possibility of a legislative solution to *Ledbetter*. On January 8, 2009, Maryland Senator Barbara Mikulski introduced the LLFPA.[90] The LLFPA,

[82] *Id.* at 661.

[83] H.R. 2831, 110th Cong. (2007).

[84] 153 CONG. REC. H7010 (daily ed. June 22, 2007).

[85] *Id.* The Act also would have amended the Age Discrimination in Employment Act of 1967 and modified the operation of both the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. H.R. 2831.

[86] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY, H.R. 2831—LILLY LEDBETTER FAIR PAY ACT OF 2007 (2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf.

[87] *Id.*

[88] 153 CONG. REC. D1097 (daily ed. July 31, 2007).

[89] Megan E. Mowrey, *Discriminatory Pay and Title VII: Filing a Timely Claim*, 41 J. MARSHALL L. REV. 325, 389 (2008) (noting that the Senate cloture motion made "uncomplicated passage of the bill unlikely").

[90] 155 CONG. REC. S228 (daily ed. Jan. 8, 2009) (statement of Sen. Mikulski). The Senate and House passed the LLFPA on January 22, 2009, and January 27, 2009, respectively. 155 CONG. REC. S775 (daily ed. Jan. 22, 2009); 155 CONG. REC. H556 (daily ed. Jan. 27, 2009). President Obama signed the bill into law on January 29, 2009.

using the same language as the 2007 bill, amended Title VII and the Age Discrimination in Employment Act of 1967 and modified the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.[91] Section 3 of the LLFPA, which is the crux of the new law, amended section 706(e) of the Civil Rights Act of 1964 and directly addressed the core criticism against *Ledbetter*:

> [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.[92]

Significantly, the statute limits damages so that aggrieved parties may only recover back pay for up to two years prior to the filing of the charge.[93]

Section 6 of the LLFPA reveals Congress's intent that the statute apply retroactively to claims based on pay decisions made prior to the statute's enactment.[94] The statute reads, "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007," which was the day before the Supreme Court decided *Ledbetter*.[95] Rather than protect only future victims of pay discrimination, the statute "attempts to eradicate *Ledbetter* root and branch—as if it were never the law."[96] In light of the Court's holding in *Plaut v. Spendthrift Farm*,[97] Congress appears to have acted within its authority by permitting courts to retroactively apply the new law.[98] Plaintiffs whose claims

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Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=1&ref=lilly_m_ledbetter

[91] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, pmbl., 123 Stat. 5, 5.

[92] *Id.* § 3, 123 Stat. at 5–6 (emphasis added).

[93] *Id.* § 3, 123 Stat. at 6.

[94] *Id.* § 6, 123 Stat. at 7.

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

[96] Charles Sullivan, *Sullivan on the Retroactivity of the Ledbetter Fair Pay Act*, WORKPLACE PROF BLOG, Feb. 9, 2009, http://lawprofessors.typepad.com/laborprof_blog/2009/02/sullivan-on-t-1.html (follow "Retroactivity.doc" hyperlink).

[97] 514 U.S. 211 (1995).

[98] Sullivan, *supra* note 96 ("[T]he *Plaut* Court was receptive to Congress changing the law for pending cases, stating that any bar on prescribing rules of decision for the

were once dead in the wake of *Ledbetter* may now proceed with discrimination suits premised on pay decisions made years ago.[99]

The LLFPA clearly signifies a victory for employees and *Ledbetter*'s critics and dissenting justices. The statute lengthens the window for pay-discrimination claims so that discrimination remains actionable for as long as it affects an employee's compensation.[100] Two elements of the LLFPA's operation, however, limit its ability to compensate some victims of pay discrimination appropriately. First, aggrieved employees may only recover back pay for up to two years preceding the filing of their claim.[101] A plaintiff like Lilly Ledbetter, for example, could only recover two years of back pay despite having received disparate pay for almost twenty years. Second, Title VII claims based on pay discrimination remain subject to the EEOC's 180-day statute of limitations period.[102] Employees who fail to discover pay discrimination until six months after their last paycheck remain remediless.

These two particular limitations have the potential to bar relief unfairly from employees whose employers promulgate PSC rules. In such workplaces, employees have a difficult time discovering whether their employer is paying them fairly. If the employee is fortunate enough to uncover the discrimination, she is only eligible for two years of back pay even if she received disparate pay for decades. Additionally, a PSC rule may conceal wage discrimination for the entire length of the EEOC charging period—that is, 180 days after an employee's final paycheck—and thus leave employees without recourse if they manage to uncover the disparate pay after their tenure with the employer.

Additional legislation is necessary to prevent PSC rules from interfering with the rights accorded to employees by Title VII. The solution, however, does not involve altering the 180-day charging period or the two-year limit on back pay. These elements of Title VII represent important political compromises and encourage the prompt processing of discrimination claims, and thus should not be

judiciary in pending cases 'does not take hold when Congress amend[s] applicable law.'" (quoting *Plaut,* 514 U.S. at 216)).

[99] The new law cannot revitalize Lilly Ledbetter's claims, however, because the Court, in *Plaut*, held that the separation-of-powers doctrine prohibited Congress from reviving suits in which a final judgment has been entered. *Id.*

[100] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6.

[101] *Id.* § 3, 123 Stat. at 6.

[102] *See* 42 U.S.C. § 2000e-5(e)(1) (2006).

disturbed. Further legislation must seek to eradicate the root of the problem—PSC rules.

III. AN OVERVIEW OF PSC RULES

PSC rules are workplace rules that forbid employees from discussing their compensation with coworkers.[103] Employers may promulgate these rules in an employment manual or orally and informally.[104] Employers may convey PSC rules "at the time of hiring or at some later point during" an employee's tenure.[105] The grant of a raise is an example of a post-hiring situation in which some employers feel that they must communicate expectations of pay secrecy to employees.[106] In addition to different modes of promulgation, PSC rules also differ in scope. While most formal PSC rules forbid wage discussion in all forms at the workplace, some employers promulgate benign PSC rules that prohibit only discussion of "confidential information."[107] For example, employers often forbid members of their payroll departments from disclosing compensation information "obtained in the course of [their] duties."[108] Typical PSC rules, whether informal or formal, stress the importance of maintaining the confidentiality of compensation information and provide for disciplinary action in the event that an employee discloses her wage.[109]

PSC rules are a subset of broader employer rules that limit what employees may say while at work.[110] Rules restricting employees' right to speak freely in the workplace take many different forms. Sexual-

[103] Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 124 (2003).

[104] Leonard Bierman & Rafael Gely, *Love, Sex and Politics. Sure. Salary? No Way*, 25 BERKELEY J. EMP. & LAB. L. 167, 171 (2004).

[105] *Id.*

[106] *See, e.g.*, NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 535 (6th Cir. 2000) ("[The employer] informed [employees] that they would be receiving a fifty-cent raise. [The employer] 'told [the employees], together, not to say anything to the other girls in the kitchen because they were not getting a raise.'").

[107] Gely & Bierman, *supra* note 103, at 124.

[108] *See id.*

[109] For a good example of the language used in a typical formal PSC rule, see *Fredericksburg Glass and Mirror, Inc.*, 323 N.L.R.B. 165, 168 (1997). Upon hiring, the employer distributed a handbook to many or all employees that included the following PSC rule: "An employee's earnings are a confidential matter between the employee and his earnings supervisor. Earnings may not be discussed among fellow employees and any such discussion will result in dismissal and/or disciplinary action at the supervisor's discretion." *Id.*

[110] Gely & Bierman, *supra* note 103, at 124–25.

harassment policies are an example of workplace rules that restrict employees' speech.[111] Policies that attempt to eliminate workplace communication in any language other than English are another example.[112]

Academic researchers have not yet studied the prevalence of PSC rules;[113] however, some data suggests that the policies are quite common in American workplaces. An informal, online poll provides an approximation of how widespread PSC rules are in the workplace.[114] The survey, taken by HRnext.com, polled 329 unidentified individuals and found that "over one-third" had a formal PSC rule in effect.[115] Only one in fourteen respondents said that they had "adopted a 'pay openness' policy."[116] And 51 percent reported that no policy regarding pay confidentiality existed in their workplaces.[117] This figure, however, may not reflect the number of workplaces that "communicate expectations of employee pay confidentiality informally" without a written policy.[118]

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[111] *See generally* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996) (discussing First Amendment defenses to Title VII sexual-harassment claims that are based on speech alone); John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905 (2007) (discussing the tension between sexual-harassment law and the First Amendment).

[112] Gely & Bierman, *supra* note 103, at 124–25. The EEOC has issued guidelines classifying workplace English-only rules as a form of national-origin discrimination unless the rules are limited in scope and the employer can prove a legitimate business justification for the rule. Lisa L. Behm, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 570–71 (1998). These guidelines, however, are not binding on courts, and a number of different federal appellate courts have upheld English-only rules. *Id.* at 570–72. *See generally* Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (rejecting plaintiffs' claim that an English-only policy violated Title VII because it had a disparate impact on Hispanic employees); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (holding that an employer's rule that required employees to speak English in public areas was not discriminatory as applied to a discharged worker who was capable of speaking English).

[113] *See* Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 48 n.42 (2005).

[114] *See id.* ("Given the lack of academic research on point, it is reasonable to use any relevant available sources.").

[115] *See* Gely & Bierman, *supra* note 103, at 125.

[116] *Id.*

[117] *Id.*

[118] Bierman & Gely, *supra* note 104, at 171.

Employers and academic researchers have cited four primary benefits of PSC rules that help employers accomplish managerial objectives: (1) maintenance of a peaceful workplace; (2) increased workplace privacy for employees; (3) labor-market immobility; and (4) greater freedom for employers regarding compensation decisions. These purported benefits overlap so that some of the benefits share common elements. For example, the avoidance of jealousy among employees resulting from wage secrecy supposedly produces the first and fourth purported benefits—decreased workplace conflict and more accurate compensation systems.[119] Some of these justifications may arguably provide employees with incidental benefits; however, the purported benefits generally undermine employees' interests.

The first alleged benefit is that PSC rules help employers maintain a peaceful workplace.[120] Employers argue that PSC rules help avoid conflicts and foster peace in two ways.[121] First, PSC rules can help reduce jealousy among employees and prevent loss of employee morale by concealing pay differentials.[122] Systems for rewarding individuals are imperfect and difficult to communicate to employees.[123] Without PSC rules, employees may hear about coworkers' wages but not about the reasons for any wage discrepancies.[124] Alternatively, they may fail to understand those reasons even if known.[125] A satisfied employee may quickly become a malcontent if she learns that the employer is paying more to a similarly situated coworker.[126] The second way that PSC rules help to prevent workplace conflict is by limiting "influence behavior" that may result from pay-openness policies.[127] Influence behavior occurs when employees attempt to persuade their supervisors "to give them a raise."[128] This type of behavior can result in conflict between a calculating employee and her super-

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[119] *See infra* text accompanying notes 122–126, 149–151.

[120] Adrienne Colella, *Exposing Pay Secrecy*, 32 ACAD. MGMT. REV. 55, 61 (2007).

[121] *See id.*

[122] *Id.*

[123] *See* Bierman & Gely, *supra* note 104, at 178.

[124] *See id.*; Gely & Bierman, *supra* note 103, at 129.

[125] *See* Bierman & Gely, *supra* note 104, at 178; Gely & Bierman, *supra* note 103, at 129.

[126] Bierman & Gely, *supra* note 104, at 178.

[127] *See id.* (internal quotations omitted).

[128] *Id.*

visor or other coworkers.[129] Some economists argue that the cost of the influencing behavior and its resulting conflict make PSC rules more efficient than pay-openness policies.[130]

The second claimed benefit of PSC rules is enhanced workplace privacy for employees.[131] Employee surveys have found that most employees favor PSC rules.[132] The strong norm in American culture that disapproves of discussing compensation strengthens the reliability of these findings.[133] Enhanced privacy may offer incidental benefits to employees, but employers enjoy the greatest "perks" resulting from enhanced privacy in the workplace, such as retention, satisfaction, commitment, and performance.[134]

The third asserted benefit to employers from PSC rules is labor-market immobility.[135] Many productive employees, who might otherwise leave their employers if they knew what their coworkers were paid, stay because they are ignorant of their relatively low pay.[136] Additionally, many workers, staying with their employers only during economic downturns, may wait for the economy to improve before moving on to better employment opportunities.[137] Pay openness and employees' ability to discuss job offers that coworkers receive facilitates this type of labor mobility.[138] PSC rules enable employers to limit labor-market mobility by preventing employee opportunism.[139] Aside from promoting workplace stability, labor-market immobility has the additional benefit for employers of avoiding the costs incidental to labor transitions, such as recruiting and training replacement employees.[140] This particular benefit helps illustrate the point

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[129] *Id.*

[130] *See id.*; Colella, *supra* note 120, at 61.

[131] Colella, *supra* note 120, at 62.

[132] *Id.*

[133] *See* Bierman & Gely, *supra* note 104, at 168 (citing Abby Ellin, *Want to Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, § 3, at 9) (observing that discussion of compensation is generally considered "crass" in America); Colella, *supra* note 120, at 62.

[134] Colella, *supra* note 120, at 62.

[135] *Id.*

[136] *See id.*

[137] Bierman & Gely, *supra* note 104, at 179.

[138] *Id.*

[139] *Id.*

[140] *See* Colella, *supra* note 120, at 62.

that the perks enjoyed by employers from promulgating PSC rules often undermine employees' interests.[141]

The fourth purported benefit of PSC rules is that they give employers more freedom to set individual employees' compensation and to establish the relevant factors for determining compensation. PSC rules provide the enhanced freedom to make compensation decisions in two ways: (1) by permitting employers to reward employees for firm-specific investments and (2) by increasing the breadth of the pay-distribution scale through reduced potential for coworker conflict. As an initial matter, PSC rules allow employers to reward employees who make firm-specific investments.[142] Employees frequently confront alternatives concerning how their time is best spent.[143] On the one hand, they have opportunities at their workplace that will help their careers at that particular firm but will not increase their marketability in the larger labor market.[144] On the other hand, they can spend that same time working on projects that make them more marketable in the broader workforce.[145] Employers often help employees deal with this dilemma by giving them large salary increases to reward firm-specific commitments.[146] These types of raises are highly subjective, difficult for coworkers to understand, and potentially controversial.[147] PSC rules help managers reward employees' firm-specific investment without causing workplace strife.[148]

Additionally, PSC rules provide managers with latitude in compensation decisions by increasing the possible pay-distribution scale. This rationale involves the potential conflict resulting from coworker jealousy under a pay-openness policy.[149] If employees can discuss their compensation, managers may feel the need to narrow the pay-distribution range to avoid conflicts.[150] PSC rules enable managers "to provide maximal separation in reward for performance" without fearing conflict from those who are at the lower end of the pay

[141] *See supra* text accompanying note 134.
[142] Bierman & Gely, *supra* note 104, at 179–81.
[143] *See id.* at 180.
[144] *See id.*
[145] *See id.*
[146] *Id.*
[147] *See id.* at 180–81.
[148] *See* Bierman & Gely, *supra* note 104, at 181.
[149] *See supra* text accompanying notes 122–126.
[150] Colella, *supra* note 120, at 61.

scale.[151] In the absence of PSC rules, employers may establish low pay scales rather than reward valuable employees.

This tendency towards a narrower and lower pay scale is another example of how a particular consequence stemming from PSC rules represents a benefit to the employer and a detriment to some employees. Employers may assign valuable employees to the low end of wide-ranging compensation scales for illegal reasons, such as using race or gender as a motive, or simply by mistake the worth of such employees. These employees have valid grounds for challenging employers' pay decisions and should have the means to discover the differential between their compensation and that of their peers. Sometimes conflict is necessary to correct illegitimate equalities because employees cannot always trust their employers to establish accurate pay scales. If an employer makes a mistake in evaluating an employee or discriminatory animus factors into an employer's pay decision, avoidance of conflict benefits only the employer.

The consequences of PSC rules have their own benefits and detriments from the employees' perspective. Possibly the greatest benefit to employees is the enhanced sense of privacy that results from pay secrecy. While pay openness may offer employees the opportunity to evaluate their own salaries more accurately, survey data suggests that employees favor PSC rules because of the heightened sense of privacy.[152] The more valuable employees also benefit when employers are free to expand pay scales so that pay accurately reflects performance.[153]

On the other hand, employers, to the detriment of their employees, enjoy two of the benefits stemming from PSC rules. First, decreasing labor mobility means that PSC rules discourage employees from moving to jobs that fit better or pay more.[154] Second, employers claim that PSC rules help organizations correct pay inequities without facing employees' negative reactions and avoid claims of discrimination or other wrongdoing.[155] In this case, the damage suffered by employees is clear. Employees have an interest in exposing pay in-

[151] *Id.*

[152] *See id.* at 62. This heightened sense of privacy likely benefits employers more than employees. *See supra* text accompanying notes 131–134.

[153] Colella, *supra* note 120, at 61. Some valuable employees may not benefit because of discrimination or employer error.

[154] *Id.* at 60, 62.

[155] *Id.* at 61.

equalities, whether they are motivated by discrimination or not, so that the employer can correct them.

IV. CURRENT STATUTORY, ADMINISTRATIVE, AND JUDICIAL LANDSCAPE GOVERNING PSC RULES

Despite the prevalence of PSC rules, federal and state legislators have recognized the potential downside of such policies and have enacted legislation that treats the policies unfavorably. The NLRA is federal legislation governing union workers and certain nonunion employee conduct.[156] The responsibility for interpreting and applying the NLRA lies with the NLRB.[157] The NLRB and reviewing courts consistently hold that PSC rules violate employees' right to engage in concerted activity under the NLRA and constitute unfair labor practices.[158] Additionally, several state legislatures have recognized the potential dangers engendered by PSC rules and have passed laws that explicitly prohibit them.

A. *The NLRA and PSC Rules*

Congress enacted the NLRA in 1935 in response to strikes and industrial strife resulting from some employers' efforts to deny their workers the right to organize and bargain collectively.[159] By providing workers with full freedom to self-organize and choose bargaining representatives, Congress tried to level bargaining inequalities between employees and employers to avoid future obstructions to the flow of commerce.[160]

The extension of rights designed to protect workers is found in section 7 of the NLRA, entitled "Rights of employees, as to organization, collective bargaining, etc.," which grants workers the unequivocal right to join labor unions and engage in "other concerted activities" for collective bargaining or other "mutual aid or protection."[161] Under section 8(a)(1), employers that "interfere with, restrain, or

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[156] Gely & Bierman, *supra* note 103, at 131. *See generally* 29 U.S.C. §§ 151–160 (2006).

[157] *See* § 153 (announcing that the NLRB will continue in existence and describing certain features of the NLRB); § 160; NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 348 (1953) ("It is the business of the Board to give coordinated effect to the policies of the Act.").

[158] *See, e.g.*, cases cited *infra* note 176.

[159] § 151.

[160] *Id.*

[161] *Id.* § 157.

coerce employees in the exercise of the rights guaranteed in [section 7]" thereby commit unfair labor practices and violate the NLRA.[162] To determine whether an employer has committed a section 8 violation, a three-part test generally applies.[163] First, the NLRB or reviewing court asks whether the employer's practice adversely affects its employees' section 7 rights.[164] Next, if the practice does infringe on section 7 rights, the employer must demonstrate a "substantial and legitimate business reason" for the conduct or employment practice.[165] Finally, the NLRB or court applies a balancing test to determine whether the section 7 rights outweigh the employer's proffered business justification.[166]

The NLRB does not actively seek out unfair labor practices. Rather, the Board reviews employment practices after an employee, union, or employer submits a formal allegation of an NLRA violation.[167] Under this scheme, the NLRB will not address a violation that employees accept or support.[168] This reactive enforcement scheme stands in contrast to other administrative agencies, such as the Securities and Exchange Commission, which have the power to investigate and enforce without waiting for complaints.[169]

Section 10 provides the NLRB's remedies for unfair labor practices.[170] If the Board finds that an employer has committed an unfair labor practice, it shall issue a cease-and-desist order and "take such affirmative action . . . as will effectuate the policies of th[e] [Act]."[171] The NLRB's affirmative action is limited to reparative remedies, such as reinstatement and back pay.[172] The available remedies illustrate the Act's general purpose, which is remedial rather than punitive.[173] The remedies aim to end the unfair labor practice and remove the

[162] *Id.* § 158 (referring to § 157, which is section 7 of the NLRA).
[163] *See* Medeco Sec. Locks, Inc. v. NLRB., 142 F.3d 733, 745 (4th Cir. 1998).
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] Bierman & Gely, *supra* note 104, at 188.
[168] *Id.*
[169] *See* 15 U.S.C. § 78(u) (2006).
[170] *See* 29 U.S.C. § 160(c) (2006).
[171] *Id.*
[172] *See id.*; Consol. Edison Co. v. NLRB, 305 U.S. 197, 236 (1938).
[173] Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 758 (E.D. Mich. 1997).

consequences of the violation from the workplace.[174] The NLRB may not punish guilty employers beyond what is necessary to rid the workplace of the violation's effects.[175]

The NLRB has heard complaints from workers regarding PSC rules on many occasions.[176] In the first step of the Board's three-part test for determining an unfair labor practice, the NLRB has consistently held that PSC rules encroach on workers' section 7 right to engage in "concerted activity for . . . mutual aid or protection."[177] Wage levels are a chief concern of organizational activity,[178] and dissatisfaction stemming from low wages is a key motivator of concerted activity.[179] In light of this, wage discussion is considered a protected activity.[180] Unqualified PSC rules, by nature, obstruct this recognized form of concerted activity, and therefore, courts routinely find that PSC rules obstruct employees' section 7 rights.[181]

After finding that an employer's prohibition of wage discussion impedes protected activity, the NLRB or a reviewing court moves to the second and third steps: determining whether a legitimate business justification exists for the PSC rule and, if so, whether that justification outweighs the employees' section 7 right to discuss wages. The most common justification offered by employers in defense of PSC rules is that the policies reduce jealousy among employees.[182] The NLRB and courts consistently reject this argument and hold that the potential for limiting jealousy among employees is not a justifiable business reason to inhibit employees from engaging in protected concerted activity.[183] Where employers have no legitimate business justification to weigh against their infringement on section 7 rights,

[174] *Consol. Edison*, 305 U.S. at 236.

[175] *Id.*

[176] *See generally* NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531 (6th Cir. 2000) (holding that oral promulgation of a PSC rule constituted an unfair labor practice); Wilson Trophy Co. v. NLRB, 989 F.2d 1502 (8th Cir. 1993) (holding that an employer violated its employees' section 7 rights by unconditionally forbidding wage discussion in the warehouse); Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976) (holding that an employer committed an unfair labor practice by maintaining an unqualified, unwritten PSC rule).

[177] 29 U.S.C. § 157 (2006); *see, e.g.*, cases cited *supra* note 176.

[178] *Main St.*, 218 F.3d at 537.

[179] *See Jeannette*, 532 F.2d at 919.

[180] *See* Gely & Bierman, *supra* note 103, at 131.

[181] *See, e.g.*, cases cited *supra* note 176.

[182] *See Jeannette*, 532 F.2d at 919; Gely & Bierman, *supra* note 103, at 129.

[183] Gely & Bierman, *supra* note 103, at 129; s*ee, e.g.*, *Jeannette*, 532 F.2d at 919.

the NLRB and reviewing courts reach the unavoidable conclusion that PSC rules are unfair labor practices that constitute section 8(a)(1) violations.[184]

But an important exception applies to the NLRB's consistent, unfavorable treatment of PSC rules. Modified PSC rules that prohibit employee wage discussion only during working hours are generally acceptable because they support an employer's legitimate business interest of maintaining workplace efficiency.[185] To avoid unfair labor practices, employers must not prohibit wage discussion during "breaks, . . . lunch time, in the restroom, and before and after work while employees [are in the workplace]."[186]

The manner in which an employer communicates its prohibition of wage discussion is immaterial to a court's unfair-labor-practice determination: a rule may constitute a violation regardless of the mode of communication. The NLRB and reviewing courts thus analyze orally promulgated PSC rules no differently than formal, written PSC rules.[187] The potential for orally communicated PSC rules to violate the NLRA is important for several reasons. First, experts speculate that informal, unwritten PSC rules are very common and that pay secrecy is "the unwritten law" across American workplaces.[188] Second, verbal communication of workplace policies may be particularly coercive because employees perceive that the employer is more likely to enforce such policies than a policy hidden in an employment manual that employees may view as mere boilerplate.[189] Finally, if the Board and reviewing courts did not consider orally promulgated PSC rules to be unfair labor practices, employers could easily evade the NLRA by issuing PSC rules orally.[190]

The Board and reviewing courts have strongly protected the right of employees to discuss their wages. Two examples of employer action that violate the NLRA are illustrative of employers' very limited ability to institute PSC rules. First, an employer need not actually en-

[184] 29 U.S.C. § 158(a)(1) (2006) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .").

[185] *See Jeannette*, 532 F.2d at 919 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945)).

[186] Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1511 (8th Cir. 1993).

[187] *See* NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 538 (6th Cir. 2000).

[188] Bierman & Gely, *supra* note 104, at 171.

[189] *See Main St.*, 218 F.3d at 538.

[190] *Id.*

force a PSC rule to violate section 8(a)(1).[191] The mere existence of a PSC rule constitutes an unfair labor practice, regardless of whether an employer ignores or enforces the policy.[192] The rationale behind prohibiting even unenforced rules is that "mere maintenance" of a pay-secrecy policy may "chill" employee wage discussion, a protected section 7 employee activity.[193] Even intentional failure to enforce a facially unlawful PSC rule will not vindicate the rule.[194]

The NLRA's proscription of PSC rules is also interpreted to outlaw provisions in employment manuals that do not explicitly forbid pay discussions so long as employees could reasonably construe a provision's language to prohibit section 7 activity.[195] In *Cintas Corp. v. NLRB*, an employee handbook simply prohibited the disclosure of "any information concerning . . . partners."[196] Clear evidence existed to demonstrate that employees did not interpret the provision as restricting their right to disclose wage information: the employees posted pictures of themselves with their wages around the workplace.[197] Despite the ambiguous language of the policy and the fact that the employees did not interpret the policy as a PSC rule, the court agreed with the Board's determination that the policy was capable of impeding employees' section 7 rights.[198] In sum, an employment policy may violate section 8(a)(1) even though it does not explicitly forbid wage discussion, employees do not interpret it as forbidding wage discussion, and the employer does not enforce it.[199]

The remedies imposed by the NLRB after it has determined that a PSC rule violates employees' section 7 rights are similar to the remedies for any unfair labor practice. In accordance with the remedial purpose of the NLRA,[200] remedies for employees in workplaces with PSC rules are reparative rather than punitive. The NLRB and reviewing courts provide a number of different remedies to eliminate the

[191] Cintas Corp. v. NLRB, 482 F.3d 463, 466 (D.C. Cir. 2007).
[192] *See id.*
[193] *See* Guardsmark, LLC v. NLRB, 475 F.3d 369, 374 (D.C. Cir. 2007).
[194] *Cintas*, 482 F.3d at 466.
[195] *Id.* at 467.
[196] 482 F.3d 463, 465 (D.C. Cir. 2007). The company referred to all employees as "partners." *Id.*
[197] *Id.* at 467.
[198] *Id.*
[199] *See supra* notes 191–198 and accompanying text.
[200] *E.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 n.6 (2002); Clover Fork Coal Co. v. NLRB, 97 F.2d 331, 335 (6th Cir. 1938).

PSC rule and its effects.[201] These remedies fall into two categories: remedies designed to repair the entire workplace and remedies designed to make whole individual employees whom their employer unlawfully discharged pursuant to an illegal PSC rule.[202]

The Board uses two primary remedies to repair a workplace previously governed by an unlawful PSC rule. First, the NLRB will mandate that the employer rescind the unlawful policy.[203] If the employer formalized the policy in an employment manual, the NLRB may order the employer to print new manuals and to redistribute the revised version to all employees.[204] Second, the Board will order the employer to post notices in the workplace informing its employees of the affirmative remedies provided to the unlawfully terminated employees and notifying them that the policy is no longer in effect.[205]

The Board generally provides unlawfully discharged employees with three principal remedies. First, the NLRB will order the employer to reinstate all employees terminated for violating a PSC rule.[206] If those employees' jobs no longer exist, the employer must

[201] The NLRB promulgated the remedies in this section in *Fredericksburg Glass and Mirror, Inc.*, 323 N.L.R.B. 165 (1997). The facts of the case provided the NLRB an opportunity to grant every remedy typical of cases involving unlawful PSC rules. The *Fredericksburg* order is a representative example of how the Board approaches cases involving unlawful PSC rules, and it will guide this discussion of PSC-rule remedies. In other pertinent case law, the Board or reviewing court provided for one or two of the following sets of remedies cited to in *Fredericksburg*.

[202] Generally, the NLRB will order both sets of remedies unless the employer did not discharge an employee pursuant to the PSC rule, in which case the Board may order only the first set of remedies. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), offers an example of a case where the employer terminated the employee pursuant to a PSC rule, but the employee was not reinstated. The employee encountered performance evaluations while in his supervisor's office. *Id.* at 361. Later that morning, he shared the information with his fellow employees. *Id.* His supervisor told him that the employer was not firing him for stealing information but for revealing the wages to his coworkers. *Id.* Upon receiving an unfair labor charge from the discharged employee, the Administrative Law Judge (ALJ) ordered that the employer rescind the rule and post notice around the workplace, but the ALJ refused to reinstate the employee. *Id.* at 362. The Board reversed the ALJ's order, but on appeal, the Fifth Circuit held that "an employee's right to discuss wage levels freely within the workplace does not, and should not, extend to that employee the prerogative of taking company papers. . . . Where 'the purposes and polices of the Act would not be effectuated by reinstatement' or other remedial measures, then denial of the traditional remedies accorded under the Act is proper." *Id.* at 364 (quoting NLRB v. Big Three Welding Equip. Co., 359 F.2d 77, 84 (5th Cir. 1966)).

[203] *See, e.g.*, Fredericksburg Glass and Mirror, Inc., 323 N.L.R.B. 165, 181 (1997).

[204] *See, e.g.*, *id.*

[205] *See, e.g.*, *id.*

[206] *See, e.g.*, *id.*

find substantially equivalent positions or dismiss replacement hires to make room for the reinstated employees.[207] The employer must also ensure that the dismissed employees do not suffer any prejudice to seniority or other rights and privileges previously enjoyed.[208] Second, employers are required to make whole the unlawfully discharged plaintiffs for their loss of earnings or other benefits by supplying back pay with interest.[209] Finally, the NLRB will also order an employer to expunge from its records all references to the unlawful termination of the employees.[210]

B. State Statutes Prohibiting PSC Rules

In the past twenty-seven years, four state legislatures enacted statutes outlawing PSC rules: Michigan,[211] California,[212] Vermont,[213] and Colorado.[214] With the exception of the Colorado statute,[215] which appears slightly broader in its protection of employees' rights, the statutes utilize almost identical language to prohibit PSC rules. The Vermont statute, typical of the state PSC prohibitions, reads as follows:

> (B) No employer may do any of the following:
>
> (i) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages
>
> (ii) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages
>
> (iii) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wag es.[216]

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[207] *See, e.g.*, *id.*

[208] *See, e.g.*, *id.*

[209] *See, e.g.*, *Fredericksburg Glass and Mirror*, 323 N.L.R.B. at 181.

[210] *See, e.g.*, *id.*

[211] *See* MICH. COMP. LAWS SERV. § 408.483a (LexisNexis, LEXIS through 2008 legislation).

[212] *See* CAL. LAB. CODE § 232 (West 2003).

[213] *See* VT. STAT. ANN. tit. 21, § 495(a)(8)(B) (LEXIS through 2009 Sess.).

[214] *See* COLO. REV. STAT. § 24-34-402(1)(h)(II)(C)(i) (LEXIS through 2009 legislation).

[215] Rather than only protecting an employee's right to disclose their wage, the Colorado statute prohibits an employer from disciplining an employee "because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages." *Id.*

[216] § 495(a)(8)(B).

The relief available to aggrieved employees under the statutes varies by state. On one end of the spectrum, Colorado's statute offers only minimal relief that is similar in substance to that available under the NLRA.[217] The courts' remedial options are limited to equitable remedies such as reinstatement or back pay.[218] The California and Michigan statutes fall in the middle of the spectrum, imposing civil penalties on offending employers.[219] The Vermont statute offers the strongest remedies. In addition to back pay, reinstatement, and attorney's fees, Vermont courts may impose a $10,000 civil penalty on offending employers and grant punitive or treble damages to plaintiffs.[220] Thus, the Vermont statute is unique in two ways. First, it is the only state statute to offer punitive damages to plaintiffs. Second, the statute imposes on the defendant a civil fine that is presumably designed to deter employers from instituting PSC rules. The Vermont statute represents the most aggressive effort by a state legislature to punish employers and deter them from promulgating PSC rules.

Case law involving any of the four state statutes is very sparse. Only two suits have been filed accusing employers of promulgating illegal PSC rules.[221] The most recent case took place in 2002 after a California employer allegedly terminated an employee for mentioning to coworkers that she did not receive a bonus.[222] The employee, using section 232 of the California Labor Code, which prohibits PSC rules, filed a tort claim for wrongful termination in violation of public policy.[223] Section 232 provided the statutory hook, or tether, for the

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[217] *See* COLO. REV. STAT. § 24-34-405 (LEXIS through 2009 legislation).

[218] *See id.;* Continental Title Co. v. Dist. Court of Denver, 645 P.2d 1310, 1317 (1982) ("[T]his statute was intended to invoke only the equitable powers of the court and not to create a legal claim for damages.").

[219] CAL. LAB. CODE § 2699 (West Supp. 2010); Reo v. Lane Bryant, Inc., 536 N.W.2d 556, 557–58 (Mich. Ct. App. 1995) ("We recognize that our construction of the act may result in a civil fine being the only remedy available under the act if the petitioner's claim is proven . . . . While we are cognizant of this result, we are without authority to change it, given our interpretation of the statutes and the Legislature's failure to provide explicit remedies for violations of 13a.").

[220] VT. STAT. ANN. tit. 9, §§ 2458, 2461 (LEXIS through 2009 Sess.); VT. STAT. ANN. tit. 21, § 495b (LEXIS through 2009 Sess.).

[221] Grant-Burton v. Covenant Care, Inc., 122 Cal. Rptr. 2d 204, 210–11 (Cal. Ct. App. 2002). *See generally Reo,* 211 Mich. App. 364 (accusing employer of allegedly terminating plaintiff for disclosing her wage).

[222] *Grant-Burton*, 122 Cal Rptr. 2d at 210–11.

[223] *Id.* at 213.

employee's public-policy claim.[224] The statute demonstrated that public policy disfavored PSC rules and thus supported the employee's wrongful-termination claim.[225]

V. WHY THE CURRENT STATUTORY REGIME IS INADEQUATE

The existing statutory regime governing PSC rules is inadequate for three reasons. First, most employers lack incentives to remove existing PSC rules. Second, the existing scheme leaves a large class of employees unprotected. Finally, the possibility exists that courts may eventually hold that the NLRA preempts state statutes that make PSC rules illegal.

A. *The Futility of the NLRA*

The chief deficiency of the NLRA's ability to protect employees against PSC rules is that the Act provides only limited incentive for employers to remove PSC rules from their policies. The overarching purpose of the NLRA is to offer victims of unfair labor practices remedial relief without resorting to punitive damages or civil penalties.[226] The NLRA limits the Board by providing remedial relief even in situations where it believes that punitive damages or fines would best "effectuate the policies of the Act."[227] The limited remedies provided to employees and workplaces restrained by PSC rules illustrate the NLRA's underlying policy of repairing rather than punishing.[228]

Having only remedial powers, the NLRB cannot effectively deter workplace PSC rules. Workplace prohibitions against certain activities, even if unenforced, have the effect of preventing or chilling

[224] Public-policy claims must be "tethered" to statutory or constitutional provisions. *Id.* at 213–14.

[225] *Id.* at 214.

[226] Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 758 (E.D. Mich. 1997).

[227] Consol. Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938) ("[T]his authority to order affirmative action does not go so far as to convey a punitive jurisdiction . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."). The NLRB is also not permitted to take punitive action with the hope of deterring a particular unfair labor practice. Florida Steel Corp. v. NLRB, 620 F.2d 79, 83 (5th Cir. 1980) ("While . . . a penalty might have the effect of deterring persons from violating the Act . . . , it is not warranted.").

[228] Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940); *see, e.g.*, Wilson Trophy Co. v. NLRB, 989 F.2d 1502 (8th Cir. 1993) (providing for reinstatement and back pay for employees who were fired for violating PSC rules); NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990) (requiring employer to eliminate its PSC rule even though plaintiff was not entitled to relief).

those activities. Under the NLRA, employers may maintain unenforced PSC rules with the objective of chilling wage discussion. In the employer's worst-case scenario, an employee would bring the PSC rule to the Board's attention, and the Board would issue a cease-and-desist order. The harshest penalty that an unenforced PSC rule will precipitate is an order to comply with the law despite the significant chilling effect that the rule itself can have on section 7 rights. Even if an employer enforces the PSC rule and fires violators, the employer will only be slightly worse off than if the employer had always complied with the law because the remedy is merely reinstatement and back pay.[229] As the NLRA is reactive in nature—that is, a petitioner does not enforce it without a claim—most PSC rules will not be brought to the NLRB's attention.[230] Ignoring the law is easier and more efficient for employers because the NLRA does not adequately incentivize compliance.[231]

The decline of unionization in American workplaces[232] as well as the fact that nonunion employees know little about their rights under

[229] If the employer does not hire a replacement, it will pay for unrealized labor costs—back pay—between termination and reinstatement. Alternatively, if the employer hires a replacement, it will pay double the normal wage of one employee.

[230] *See* Bierman & Gely, *supra* note 104, at 188–89.

[231] Gely & Bierman, *supra* note 103, at 149 ("In this context . . . it is much easier and efficient to simply ignore the law.").

[232] Although the rate of unionization among American workers has steadily declined over recent decades, legislation pending in Congress, if passed, may bring about increased levels of unionization in the future. The Employee Free Choice Act of 2009 (EFCA) amends section 9 of the NLRA to make it easier for unions to gain certification as employees' bargaining agent. *See* H.R. 1409, S. 560, 111th Cong. (2009). Under the current system, the process leading to union certification begins when "any person or labor organization acting on behalf of a substantial number of employees" files a petition. 29 C.F.R. § 101.17 (2009). The petitioner must also produce evidence that a "substantial number"—that is, at least thirty percent—of employees want the union to represent them. *Id.* §§ 101.17, 101.18(a). This evidence generally takes the form of signed authorization cards. § 101.17. Once a union claims to represent the majority of employees in a workplace, the employer has the right to demand a secret ballot election. *Id.* § 101.19. In 2009, elections were conducted in a median of thirty-seven days after the filing of a petition. NLRB, PERFORMANCE AND ACCOUNTABILITY REPORT 24 (2009), *available at* http://www.nlrb.gov/nlrb/shared_files/reports/PAR/2009/PAR2009.pdf. During this time, employers frequently engage in aggressive anti-union campaigning and often utilize coercive and illegal measures to diminish the chances of a union victory on election day. *See* KATE BRONFENBRENER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 2–3 (2009), *available at* http://www.americanrightsatwork.org/dmdocuments/ARAWReports/noholdsbarred.pdf. The EFCA prevents employers from utilizing pre-election coercive tactics by eliminating an employer's right to demand an election once a majority of employees

the Act is increasing the likelihood of employers' intentional noncompliance with the NLRA.[233] In 1983, 20.1 percent of America's workforce belonged to a labor union.[234] This figure, steadily declining, fell to 13.4 percent in 2000 and to 12.4 percent in 2008.[235] Although section 7 provides nonunion employees with the same rights as unionized workers, most nonunion workers are either ignorant of the NLRA's existence or believe that the Act does not apply to them.[236] Labor unions are more aware of their workers' rights under the law and consequently more likely to contest unlawful PSC rules. The continuing decline of unionization in America will likely strengthen employers' incentive to ignore the NLRA's prohibition on PSC rules because nonunion opposition to such policies is doubtful.

The second deficiency in the NLRA's ability to protect employees against PSC rules involves the limited scope of section 7. The NLRA's extension of section 7 rights does not reach those employees who qualify as supervisors under the Act's definition and thus leaves a large class of employees unprotected from PSC rules. Section 7, the source of wage-discussion protection, only affords "employees" the right to engage in concerted activity.[237] The NLRA states that "the term 'employee' . . . shall not include . . . any individual employed as a supervisor."[238] Case law has consistently affirmed that supervisory employees have no section 7 rights.[239] This gap in the NLRA's protec-

manifest a desire to be represented by a union. *See* H.R. 1409, S. 560, 111th Cong. (2009). Under section 2 of the EFCA, if a majority of employees in an appropriate bargaining unit sign valid authorization cards, the Board shall certify a labor union without a secret ballot election. *Id.*

[233] *See* Gely & Bierman, *supra* note 103, at 148–49.

[234] News Release, Bureau of Labor Statistics, U.S. Dept. of Labor, Union Members in 2008, at 1 (Jan. 28, 2009), *available at* http://www.bls.gov/news.release/pdf/union2.pdf.

[235] *Id.*; Bureau of Labor Statistics, U.S. Dept. of Labor, Labor Force Statistics from the Current Population Survey, http://www.bls.gov/cps/cpslutabs.htm (last visited May 21, 2010).

[236] William Corbett, *Waiting for the Labor Law of the Twenty-First Century*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002) ("The scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.").

[237] 29 U.S.C. § 157 (2006).

[238] *Id.* § 152(3).

[239] *See, e.g.*, Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n, 382 U.S. 181, 188 (1965) ("[Section] 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities."); NLRB v. Silver Bay Local 962, 498 F.2d 26, 28 (9th Cir. 1974) ("It has long been recognized that supervisors are not entitled to the protection afforded 'ordi-

tion of workers is amplified by a very inclusive definition of the term "supervisor."[240] The NLRA defines many types of employees as supervisors that convention would probably regard as regular employees.[241] Additionally, the Board, representing the employee's interest rather than the employer's interest, has the burden of proving the employees are not supervisors.[242] This makes it even more difficult for employees who have even limited amounts of responsibility to gain section 7 protection of wage discussion.

Ledbetter illustrates the potentially negative effects of the NLRA's exclusion of supervisors. Lilly Ledbetter was a supervisor at Goodyear.[243] The dissent suggested that she did not discover that Goodyear was subjecting her to pay discrimination in part because of Goodyear's policy of confidentiality regarding pay.[244] If Ledbetter suspected that she was a victim of pay discrimination within the 180-day filing period, Goodyear could have legally obstructed her from investigating her suspicions by maintaining a PSC rule. The same Goodyear officials who discriminated against Ledbetter could threaten her with termination if she asked coworkers about their pay, and the NLRA would provide her no recourse. The inequitable character of the situation is clear: supervisors, such as Lilly Ledbetter, are also vulnerable to pay discrimination and should be entitled to discuss their wage with coworkers.

nary employees' under the Act, and that 'as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice.'") (quoting NLRB v. Fullerton Publishing Co., 283 F.2d 545, 551 (9th Cir. 1960)); Mon River Towing, Inc. v. NLRB, 421 F.2d 1, 6 (3d Cir. 1969) (stating that section-7 "protection does not extend to supervisors").

[240] § 152(11) ("[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.").

[241] *See, e.g.*, NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971) (classifying a secretary with access to confidential information as a supervisor); Eastern Greyhound Lines v. NLRB, 337 F.2d 84 (6th Cir. 1964) (classifying bus-line dispatchers as supervisors); Cleveland Cliffs Iron Co., 117 N.L.R.B. 668 (1957) (finding that a handyman on a freight vessel qualified as a supervisor).

[242] *E.g.*, Integrated Health Servs. v. NLRB, 191 F.3d 703, 705 (6th Cir. 1999).

[243] Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[244] *See supra* note 79 and accompanying text.

B. The NLRA Should Preempt Existing State Statutes

Under the current interpretation of the NLRA, state statutes prohibiting PSC rules are not a viable alternative to NLRB enforcement. The NLRA probably preempts state legislation prohibiting PSC rules to the extent that the statutes protect non-supervisory employees.

Analysis regarding NLRA preemption of state or federal legislation begins with the Supreme Court's decision in *San Diego Building Trades Council v. Garmon*.[245] In *Garmon*, Justice Frankfurter significantly limited the states' ability to legislate on matters of labor relations and provided the foundation for the NLRA preemption analysis: "When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal court, must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[246] The Supreme Court determined that state jurisdiction yields to the NLRA when the state attempts to regulate activities arguably protected by section 7 or outlawed by section 8.[247]

Although *Garmon* remains the basic standard for NLRA preemption of state legislation, subsequent decisions have adjusted the standard and provided certain exceptions. In 1978, the Supreme Court tweaked the *Garmon* standard and held that when alleged conduct may be "arguably prohibited" by the *Garmon* preemption test, the critical issue is "whether the controversy presented to the state court is identical . . . or different from . . . that which could have been, but was not, presented to the Labor Board."[248]

In addition to this adjustment of the *Garmon* standard, three primary exceptions apply to the preemption doctrine.[249] The first two exceptions are contained in the *Garmon* opinion itself and have been adopted and expanded by subsequent courts. First, the NLRA does not preempt state regulation of activity that is merely a peripheral

[245] 359 U.S. 236 (1959); *see* Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 759 (E.D. Mich. 1997) ("Any analysis regarding NLRA preemption of RICO must necessarily begin with the Supreme Court decision in *San Diego Bldg. Trades Council v. Garmon.*").

[246] *Garmon*, 359 U.S. at 245.

[247] *Id.* at 244.

[248] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978).

[249] *See* Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 296–97 (1977).

concern of the NLRA.[250] Second, the NLRA will not preempt state regulation of an activity that touches interests "deeply rooted in local feeling and responsibility."[251] In addition to the two judicially created exceptions to the *Garmon* doctrine, the Court recognizes congressional exclusions of certain classes of cases from the Board's exclusive jurisdiction.[252]

Nevertheless, to the extent that the existing state statutes prohibiting PSC rules apply to non-supervisory employees, the NLRA should preempt them. Under the standard for preemption articulated in *Garmon*, state legislation may not regulate activity surrounding PSC rules if the NLRB has already recognized a right under section 7 or an unfair labor practice under section 8 involving wage disclosure.[253] The NLRB and reviewing courts have repeatedly recognized a right under section 7 to disclose one's wage and have recognized that prohibiting wage disclosure through maintenance of PSC rules constitutes an unfair labor practice.[254] When judged under the preemption standard articulated in *Sears*, state statutes are even more clearly preempted.[255] Bringing a claim under state statutes for interference with one's right to disclose one's wage is identical to a claim that can be brought to the NLRB.

Finally, the state statutes do not fall within any of the three exceptions to the *Garmon* doctrine because wage discussion is not peripheral to the NLRA,[256] wage discussion does not touch and concern a

[250] *Id.* at 296; *see, e.g.*, Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (holding that the NLRA does not preempt a civil action in state court for libel when a union makes false, defamatory remarks during a union-organizing campaign).

[251] *Garmon*, 359 U.S. at 244.

[252] *Farmer*, 430 U.S. at 297 n.8; s*ee, e.g.*, 29 U.S.C. § 187(b) (2006) (allowing parties to bring suit in federal district court to recover damages from violations of section 8(b)(4) of the NLRA even though the unfair labor practice is remediable by the Board). Section 14(c)(2) of the NLRA also permits the Board to decline jurisdiction over "any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction," and thus, the Board may leave jurisdiction in the hands of state or federal courts. *Id.* § 164(c)(1).

[253] *Garmon*, 359 U.S. at 244.

[254] *See supra* Part IV.A.

[255] *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978).

[256] *See* Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976) ("[D]issatisfaction due to low wages is the grist on which concerted activity feeds.").

particular locality,[257] and Congress has yet to carve out the NLRB's jurisdiction over PSC rules. As applied to PSC rules, the NLRA preemption doctrine leads to the conclusion that the NLRA preempts any state statutes regarding PSC rules to the extent that they protect non-supervisory employees.

In 2002, the California Court of Appeals suggested that the NLRA may preempt section 225 of the California Labor Code but left the issue to the trial court on remand.[258] Six years later, the California Court of Appeals revisited the issue of preemption in the context of section 232.5, a provision of California Labor Code that extends section 225 protections regarding wage disclosure to working-condition disclosure. In *Luke v. Collotype Labels USA, Inc.*,[259] the plaintiff brought a public-policy claim based on section 225.5.[260] The court found that the NLRA preempted the statute and thus rendered useless any future attempt by non-supervisory employees to find protection under the statute.[261] Because section 232.5 is almost identical to section 232, future courts will likely conclude that the NLRA preempts the state's statute prohibiting PSC rules.

Although state statutes will likely prove largely ineffective because of preemption, the statutes will continue to protect the supervisors' right to disclose their wages because the NLRA does not preempt this protection. None of the four state statutes has a definition of "employee" that explicitly excludes supervisors. Rather, the definitions appear to include anybody hired by the employer.[262] The

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[257] The notion that wage discussion does not touch and concern a particular locality is evidenced by the fact that the state statutes exist in four very different states: Michigan, California, Vermont, and Colorado. *See infra* note 262 and accompanying text.

[258] Grant-Burton v. Covenant Care, Inc., 122 Cal. Rptr. 2d 204, 218 n.2 (Cal. Ct. App. 2002).

[259] 72 Cal. Rptr. 3d 440 (Cal. Ct. App. 2008).

[260] *Id.* at 442.

[261] *Id.* at 445, 448.

[262] *See* COLO. REV. STAT. § 24-34-401(2) (LEXIS through 2009 legislation) ("'Employee' means any person employed by an employer, except a person in the domestic service of any person."); MICH. COMP. LAWS SERV. § 408.471(1)(c) (LexisNexis, LEXIS through 2008 legislation) ("'Employee' means any individual employed by an employer."); VT. STAT. ANN. tit. 21, § 495d(2) (LEXIS through 2009 Sess.) ("'Employee' means every person who may be permitted, required or directed by any employer, in consideration of direct or indirect gain or profit, to perform services."). The California Labor Code does not define "employee" within the article that protects wage disclosure. *But see* CAL. LAB. CODE § 350(b) (West 2003) ("'Employee' means every person, including aliens and minors, rendering actual service in any business for an employer, whether gratuitously or for wages or pay, whether the wages or pay are

state statutes' protection of supervisors does not overlap with any protection offered by section 7 of the NLRA. The NLRA explicitly excludes supervisors from the rights afforded to employees by section 7. In fact, section 7 arguably does not protect the activity in question—supervisor wage disclosure. Therefore, the NLRA does not preempt state legislation that regulates the matter.

VI. POTENTIAL SOLUTIONS

Any meaningful reform of legislation concerning PSC rules must accomplish three goals to be effective. First, reform must provide incentives for employers to abandon PSC rules and deterrents for employers who are considering adopting PSC rules. Second, legislative reform must extend the right to engage in wage discussion to supervisory employees. Finally, new laws should mandate that employers provide employees notice of their right to engage in wage discussion. Three proposed solutions could be used to attempt to satisfy these three goals.

In the first proposed solution, congressional or judicial reform gives the NLRA bite and creates a notice requirement, and state statutes operate only to the extent that they do not preempt the NLRA—providing rights to supervisory employees. Enabling the NLRB to impose civil penalties or punitive damages against employers who maintain PSC rules will help prevent employers from adopting the rules at all. Unlike the existing situation under the NLRA, employers will have incentives to abandon PSC rules.[263] In addition, the NLRA will only preempt state legislation providing coverage to all employees in cases involving non-supervisory employees. Supervisors will have an avenue of relief outside of the NLRB.

Several problems make this first option impractical. First, reform of the NLRA is unlikely. Prior to the Employee Free Choice Act (EFCA),[264] the 95th Congress made the last attempt to strengthen

measured by the standard of time, piece, task, commission, or other method of calculation, and whether the service is rendered on a commission, concessionaire, or other basis."); Grant-Burton v. Covenant Care, Inc., 122 Cal. Rptr. 2d 204, 216 n.1 (Cal. Ct. App. 2002) ("Labor Code Section 923 *does* protect the concerted activities of supervisors.").

[263] The incentive is that the cost of civil penalties and punitive damages outweighs the utility of maintaining PSC rules. Accordingly, legislation should provide a generous punitive-damages cap and civil penalties that exact meaningful financial harm on violators.

[264] *See supra* note 232 and accompanying text. Although Democrats control Congress and the White House, the card-check system proposed under the EFCA would

the NLRA, and it was successfully filibustered despite Democratic majorities in both houses and a pro-union president, Jimmy Carter.[265] Second, in light of the historically remedial nature of the NLRA,[266] Congress or the NLRB will very likely be unwilling to depart from such long precedent. Third, much like the current situation, this option results in a fragmented regulatory framework. While the NLRA would always cover non-supervisory employees, supervisors would only find protection in states that outlaw PSC rules. State reform has generated only four statutes banning PSC rules in twenty-seven years. Progress is slow and certainly not guaranteed, especially in conservative states. Finally, employers that operate in multiple states are likely to include choice-of-law clauses in their supervisors' contracts to attempt to avoid state laws that extend wage disclosure rights to supervisors by litigating under state laws that are silent on PSC rules.

The second option for reform modifies only the NLRA. In this scenario, Congress gives the NLRA bite and extends the specific section 7 right to discuss wages to supervisors. Giving the NLRA power to levy punitive damages will discourage employers from adopting PSC rules. Extending the right of wage disclosure to supervisors through the NLRA accomplishes the goal of blanket coverage of all employees expeditiously. This presents a clear advantage over the first option, which would wait for state action. The legal justification for imparting the section 7 right of wage disclosure onto supervisors stems from the original purpose of excluding supervisors in the first place. The exclusion was motivated by Congress's desire to free employers to fire foremen as a means of ensuring their loyalty and to prevent supervisor influence within a union.[267] The reasons for excluding supervisors from the NLRA lack applicability in the context of PSC rules. Nonetheless, this second option for reform fails because of the same deficiencies inherent in the first proposal. Namely,

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"be a very tough sell with any Congress." William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 310 (2008). Concerns of fraud, misrepresentation, and coercion frequently lead to disputes regarding the legitimacy of authorization cards. *Id.* at 309–10. Additionally, the proposed system will allow for unions to more easily organize workplaces, which is sure to inspire automatic opposition from anti-union members of Congress. *Id.* at 310–11. Hostility toward unions among segments of Congress coupled with concerns surrounding potential for peer pressure signal that the EFCA's passage is far from certain. *Id.*

[265] Gely & Bierman, *supra* note 103, at 149.

[266] *See supra* note 227 and accompanying text.

[267] NLRB v. Yeshiva Univ., 444 U.S. 672, 694–95 (1980).

similar NLRA reform has failed in the past, and Congress is unlikely to alter the NLRA's fundamental remedial nature.

The final and most promising option for reform calls for congressional legislation to accomplish the following: make PSC rules illegal per se, provide civil penalties for violations, allow plaintiffs to recover punitive damages, establish notice requirements in all workplaces, and extend protection to supervisors and non-supervisory employees alike. Congress can utilize the third exception to the *Garmon* preemption doctrine to carve out jurisdiction of wage disclosure activity to state and federal courts.[268] Unlike the NLRB, the NLRA's reparative philosophy will not restrict state and federal courts' power to craft effective remedies. Additionally, vesting the right to sue in attorneys general and employees will avoid problems that result from the NLRB's reactive character.[269] If Congress implements this option, all goals of reform are achieved. The legislation will motivate employers to abandon PSC rules, extend the right to engage in wage discussion to supervisory employees, and provide notice to employees. This option is particularly appealing because reform is accomplished uniformly on a national basis rather than piecemeal by states. Federal legislation should also include provisions reassuring employers that the new law will not affect confidentiality policies governing employees who handle salary information.

In July 2006, Vermont Senator James Jeffords introduced the Wage Awareness Protection Act.[270] This bill attempted to make PSC rules illegal *per se*.[271] It failed to pass the Senate, which suggests that a similar bill may suffer the same fate; however, *Ledbetter* and the resulting attention directed toward wage discrimination should raise awareness of PSC rules' potential danger and inspire legislators to reconsider the importance of protecting the right to discuss pay. The following model represents a summary of legislation that could effectively curtail the ongoing promulgation of PSC rules:

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[268] *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197 (1978). Although the NLRB may unilaterally relinquish its jurisdiction over certain subjects to state and federal courts pursuant to 29 U.S.C. § 164(c), this is not a suitable opportunity for such action because § 164(c)(1) requires that the effect of the labor activity be insubstantial. *See* 29 U.S.C. § 164(c) (2006). This is not the case with wage discussion because "dissatisfaction due to low wages is the grist on which concerted activity feeds." Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976).

[269] *See supra* notes 167–169 and accompanying text.

[270] S. 2966, 106th Cong. (2000).

[271] *Id.* § 2(a)(4)(B).

(A) Prohibited Acts. No employer may do any of the following:

(i) Promulgate or enforce a written or oral employment policy that forbids its employees from inquiring about, discussing, or disclosing their own wages or the wages of other employees; or

(ii) Formally discipline, discharge, or discriminate against em ployees for inquiring about, discussing, or disclosing their own wages or the wages of other employees.

(B) Penalties and Enforcement.

(i) Whenever the attorney general has cause to believe that an employer is engaged in a practice declared by this statute to be unlawful, the attorney general may bring a civil action in the ap propriate district court of the United States. District courts are authorized to do any of the following:

(1) issue injunctions to restrain and prevent violations of this statute; or

(2) impose civil penalties of not more than $10,000 for each violation.

(ii) Any employee aggrieved by a violation of this statute may bring an action in a district court of the United States seeking compensatory and punitive damages or equitable relief, include ing restitution of wages or benefits, restraint of prohibited acts, reinstatement, reasonable attorney's fees, costs, and other ap propriate relief.

(C) Posting of Notices; Penalties.

(i) Every employer shall keep posted in conspicuous locations on its premises a notice setting forth a summary of this statute and information pertinent to filing a complaint.

(ii) A violation of this subsection is punishable by a fine of no more than $1,000 for each separate offense.[272]

VII. CONCLUSION

Ledbetter used an overly rigid interpretation of Title VII to establish a dangerous precedent that would have prohibited many employees from advancing legitimate claims of pay discrimination. The LLFPA marked an important step in the fight against pay discrimination by overturning the central holding of *Ledbetter*, but it failed to ac-

[272] State statutes, federal statutes, and unenacted federal legislation informed the drafting of the model statute. *See* 42 U.S.C. § 2000e-10 (2006); VT. STAT. ANN. tit. 9, § 2458 (LEXIS through 2009 Sess.); VT. STAT. ANN. tit. 21, § 495 (LEXIS through 2009 Sess.); S. 2966.

cord adequate protection to employees in workplaces that promulgate PSC rules. Such employees remain vulnerable to Title VII's relatively short statutory charging period and its two-year limit on back pay. Rather than passing an amendment to Title VII, which could frustrate public policy favoring prompt processing of discrimination claims, future legislation should aim to solve the problem at its source—unlawful PSC rules.

Lawmakers and judges on both the federal and state levels have recognized the importance of pay openness, but current legislation designed to prevent PSC rules is inherently flawed and ineffective. Congress must pass reform that carves out from the NLRB jurisdiction over wage discussion and prevents the promulgation of PSC rules by instituting meaningful incentives for employers to comply with the law. Until this happens, the LLFPA cannot operate to its full potential, and Title VII will continue to provide many American workers with inadequate protection against pay discrimination.