



ATTORNEYS AT LAW

ADVISORY BULLETIN  
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## **Current Issues in Employment Law: The Proposed Paycheck Fairness Act**

The Paycheck Fairness Act (H.R. 12 and S. 182) amends the portion of the Fair Labor Standards Act of 1938 known as the Equal Pay Act (the "EPA"). The primary purpose of the bill is to end wage discrimination by requiring equal pay for equivalent work. The bill recognizes that, despite the enactment of the EPA in 1963, many women continue to earn significantly lower pay than their male counterparts for equivalent work. The text of the proposed act states that these pay disparities depress the wages of working families, and in many cases, deprive workers of equal protection on the basis of sex under the Fifth and Fourteenth Amendments of the U.S. Constitution.

The bill was introduced by then-Senator Hillary Clinton and Representative Rose DeLauro in January 2009. The House of Representatives voted in favor of the bill in a 256-163 vote in May 2009. The bill has been reported out of committee in the Senate, and placed on the Senate Legislative Calendar for a floor vote.

### **Important Provisions in the Paycheck Fairness Act**

**The Paycheck Fairness Act offers many key changes to the EPA that all employers need to know.**

The Paycheck Fairness Act enhances the penalties that employers who violate the EPA may face. The bill provides that employers who violate sex discrimination in pay prohibitions may be liable in a civil action for compensatory or punitive damages (except for the federal government). By comparison, the EPA currently provides only for back pay awards and liquidated damages.

The EPA currently allows an employer to justify the pay differential between female and male employees by showing that the disparity is attributed to any factor other than sex. The Paycheck Fairness Act limits this affirmative defense for the employer. The bill requires that the “other factor” be a “bona fide factor,” such as education, training, or experience. The employer must demonstrate that such factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. The bill further provides that the “bona fide factor” affirmative defense does not apply where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential and (2) that the employer has refused to adopt such alternative practice.

The bill also expands the prohibition on retaliation to protect an employee who inquires about, discusses, or discloses his or her own wages or the wages of another employee. However, this protection does not include employees who have access to wage information as part of their essential job functions unless the wage disclosure was in response to a wage complaint.

The Paycheck Fairness Act will also ease plaintiffs’ ability to organize a class action suit. The bill allows individuals to be joined as party plaintiffs without their written consent in a class action suit for an EPA violation. The EPA currently requires potential class plaintiffs to take affirmative action to “opt in” to the litigation class. The bill changes the EPA requirement by automatically including members as part of the class until they “opt out.”

In addition to these substantive changes to the EPA, the bill requires the Equal Employment Opportunity Commission to complete a survey of the available data and to issue regulations within eighteen months of the passage of the bill that provide for the collection of pay information from employers relating to the sex, race, and national origin of employees. The bill also establishes grants for negotiation training for women, funds for education and research, and the National Award for Pay Equity in the Workplace.

Notably, small businesses are exempt from the Paycheck Fairness Act to the same extent that they are exempt from the Fair Labor Standards Act of 1938.

### **The Impact of the Paycheck Fairness Act on Employers**

With the changes to the “bona fide factor” affirmative defense, it is expected that employers will have less success in relying on subjective factors as support for a pay differential between men and women. Employers should be aware of the limitation on this affirmative defense when negotiating salaries, because “bona fide factors” may not include salary disparity as a result of the employee’s negotiation skill and protracted salary negotiations with the employer.

President Bush, while in office, threatened to veto the bill, saying that it would “invite a surge of litigation” and “impose a tremendous burden on employers.” The United States Chamber of Commerce and the National Association of Manufacturers also oppose the bill. Jeri G. Kubicki, a vice president of the National Association of Manufacturers, predicts that the bill would “open the floodgates to unwarranted litigation against employers at a time when businesses are struggling to retain and create jobs.”

Representative Rose DeLauro, on the other hand, advocates that, “[t]he Paycheck Fairness Act closes numerous loopholes that have enabled employers to evade liability.”

To date, the Paycheck Fairness Act is currently under consideration in the Senate, and is not law. Please contact Denis Jacobson or Martha Sacrinty if you have any questions concerning the status of this bill.