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The Paycheck Fairness Act:

S. 182: Section by Section

Section 1 is the short title.

Section 2 contains the findings.

Section 3(a) requires that non-gender reasons for the difference in wages have a business justification. Current law allows an employer to defend a gender difference in pay if the difference is based on: (i) seniority systems; (2) merit systems; (3) systems that measure earnings by quality or quantity of production; or (4) "any factor other than sex." Courts have interpreted the "any factor other than sex" factor so broadly that it embraces an almost limitless number of factors, including those without a business justification or that are themselves derived from factors that are sex-based, so long as they do not explicitly mention sex. As a result, employers have been able to successfully raise factors such as market forces and prior salaries to justify a gender wage disparity, even though the Supreme Court rejected the market forces defense as early as 1974, and even though the disparity is in fact linked to sex discrimination.

This legislation restores the original intent of the Equal Pay Act by clarifying the "any factor other than sex" defense. Under this section, to successfully raise this affirmative defense, an employer must demonstrate that the disparity is based on a bona fide factor other than sex, such as education, training, or experience, that is: (1) not based upon or derived from a sex-based differential; (2) job-related to the position in question; and (3) consistent with business necessity. The defense will not apply if the employee can then demonstrate that an alternative employment practice exists that would serve the same business purpose without producing the differential and that the employer has refused to adopt the alternative. This language mirrors comparable language in Title VII.

Section 3(a) also broadens the number of offices or locations from which the employer conducts business to which courts can look in identifying employees who are similarly situated to the plaintiff in order to determine if there is a wage disparity. Current law forbids unequal pay within the same "establishment," which many courts have restricted in such a way that employers are barred only from paying unequal wages to employees within the same physical location. This interpretation unfairly limits employees' ability to bring cases under the Equal Pay Act; in many cases, particularly in the case of managers or supervisors, there are no similarly situated employees of the opposite sex at the plaintiff's work location, although there may be appropriate comparators at the employer's other worksites. Indeed, today's employers are much different than they were 45-years ago when the Equal Pay Act was first enacted. Many have multiple facilities at which the same jobs are performed, and some worksites may have only one person in certain high level positions such as manager or supervisor.

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The Paycheck Fairness Act preserves the "establishment" requirement, but clarifies that employees shall be considered to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a state. In addition, the bill makes clear that broader interpretations are permissible if consistent with EEOC regulations which state that employees can compare themselves with employees outside their physical location if the company's salary and staff decisions are made by a central administrative unit or if the employees frequently interchange locations.

Section 3(b) provides that employers are prohibited from retaliating against employees who share salary information with their co-workers. Many employers discourage and may even have workplace policies against the sharing of salary information. This makes it extremely difficult to detect pay discrimination. For example, Lilly Ledbetter was paid less than her male co-workers for years but did not realize it. A company policy prohibited her from discussing her pay with her coworkers. She discovered the pay discrimination only when someone sent her an anonymous note.

Under the Paycheck Fairness Act, employees will generally be protected when they have disclosed, discussed, or inquired about their wages or the wages of another employee. In addition, the Act clarifies that employees are protected from retaliation if they (a) make a charge, file a complaint or participate in any way in a government initiated or employer initiated investigation, including but not limited to testifying, assisting or participating in any way in an investigation, proceeding, hearing or (b) have served or plan to serve on an industry committee.

Section 3(b) also states that the new anti-retaliation protections do not apply to employees with access to wage information as an essential function of their job. That is, an employer may, if it chooses, bar these employees, such as payroll personnel and HR personnel, from disclosing the wages of employees to other employees who do not otherwise have access to this information. Those employees with access to wage information will, however, be protected under the Act from retaliation for sharing that information if: (1) they were discussing or disclosing wages with another employee who also had access to the wage information; (2) they were discussing or disclosing their own wages; or (3) such disclosure was in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing or action under the EPA.

Section 3(c) provides that compensatory and punitive damages are available in private Equal Pay Act suits. Current law only provides for back pay plus an equal amount in liquidated damages. These limited remedies are often inadequate to compensate plaintiffs subject to sex discrimination, do nothing to deter future discrimination in the workplace and are often viewed by employers simply as the cost of doing business. By contrast, Title VII and other anti-discrimination laws permit successful complainants to recover compensatory and punitive damages. As is also true under Title VII, the Paycheck Fairness Act would permit an award of punitive damages only upon a showing of malice or reckless indifference by the employer. The Paycheck Fairness Act would ensure that those subject to sex discrimination can receive remedies that are comparable to those available to employees subjected to discrimination based on race or national origin.

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Section 3(c) also allows Equal Pay Act lawsuits to proceed as opt-out class actions under the Federal Rules of Civil Procedure. The Equal Pay Act, adopted prior to the current federal class action rule, requires plaintiffs to *opt in* to a suit. This rule works to exclude women who may not be aware they have a claim and also to exclude women who may be aware they have a claim but are afraid that they will be subject to retaliation in the workplace if they affirmatively opt in. The Paycheck Fairness Act puts claimants under the Equal Pay Act in the same position as other victims of discrimination who automatically become part of a class-action unless they affirmatively opt out of the class.

Section 3(d) provides for compensatory and punitive damages and class actions in cases brought by the Secretary of Labor on behalf of an employee.

Section 4 requires the EEOC and the Office of Federal Contract Compliance Programs (subject to the availability of funds) to provide training to EEOC employees and other affected individuals and entities on pay discrimination.

Section 5(a) authorizes the Secretary of Labor (after consultation with the Secretary of Education) to establish and carry out a grant program to provide negotiation skills training programs for girls and women. Research shows that one factor contributing to the wage gap is the failure of high numbers of women to negotiate for higher salaries and promotions. The training would help girls and women strengthen their negotiation skills to obtain higher salaries and equal pay.

Section 5(b) requires the Secretary of Labor and the Secretary of Education to issue regulations or guidelines integrating negotiation skills training into existing education and work training programs.

Section 5(c) mandates that the Secretaries of Labor and Education submit an annual report to Congress on the grant program.

Section 6 requires the Secretary of Labor to conduct studies and provide information to employers, labor organizations and the public on ways to eliminate pay disparities. This includes conducting and promoting research, publishing and otherwise making available findings from studies and other materials; sponsoring and assisting State and community informational and educational programs; providing information on the means of eliminating pay disparities; and recognizing and promoting achievements and convening a national summit.

Section 7 establishes an annual award entitled the "Secretary of Labor's National Award for Pay Equity in the Workplace" for businesses that demonstrate substantial effort in eliminating pay disparities.

Section 8 requires the EEOC, within 18 months of enactment, to survey pay data already available to the federal government, and based on the results of the survey, issue regulations to provide for the collection of pay information from employers, the data to be identified by sex, race and national origin of employees.

Data collection can offer critical information to employers about the existence and sources of pay disparities in the workplace. In addition, pay data is an invaluable tool for those agencies—such as the EEOC and the OFCCP—charged with enforcing employment discrimination laws such as the Equal Pay Act. However, these agencies now have minimal information about gender-based disparities in pay; in the last several years, moreover, the government rescinded the data collection initiative that was in place for collecting this information.

Section 9(a) requires the continued collection by the Commissioner of Labor Statistics of gender-based data in the Current Employment Statistics survey. In 2005, the Bureau of Labor Statistics stopped collecting this data, but Congress has since required the Commissioner to continue to collect these data in a series of appropriations bills and continuing resolutions.

Section 9(b) sets standards for the Office for Federal Contract Compliance Programs in conducting systematic wage discrimination analyses, and reinstates the Equal Opportunity Survey, a critical enforcement tool that collects gender wage data from contractors to better target enforcement resources. This survey was developed over two decades of study over three administrations, but was rescinded by the Department of Labor in 2006.

Section 9(c) requires the Secretary of Labor to distribute (or make available) accurate information on wage discrimination.

Section 10 authorizes the appropriation of $15 million to carry out the Act, and prohibits the use of earmarks in the grant program authorized under this Act.

Section 11 delays the Act from going into effect for six months after its enactment, and requires the Secretary of Labor and the Commissioners of the EEOC to develop technical assistance materials to assist small businesses in complying with the requirements of the Act.

Section 12 provides that nothing in the Act shall affect the obligation of employers and employees to comply with immigration laws.

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