

Closing the Loophole: The Paycheck Fairness Act and Eliminating Caps on Damages

Forty-five years ago, President Kennedy signed the Equal Pay Act (EPA)ⁱ into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar earned by men.ⁱⁱ Although enforcement of the EPA as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. Today, women make, on average, only 78 cents for every dollar earned by men.

The Paycheck Fairness Act, H.R. 1338, would strengthen current laws against wage discrimination and require the federal government to be more proactive in preventing and battling wage discrimination. Among other things, the Paycheck Fairness Act will close a significant loophole in the EPA to allow for full compensation for sex-based wage discrimination. Unlike most anti-discrimination statutes, the EPA does not currently allow the award of compensatory or punitive damages. Instead, women who have been paid less than their male counterparts are entitled to recover only their "unpaid minimum wages" and "an additional equal amount as liquidated damages."ⁱⁱⁱ

To ensure the fair and full enforcement of the EPA, it is critical that Congress move swiftly to pass the Paycheck Fairness Act without any arbitrary caps or limits on recovery. Indeed, setting arbitrary caps or limits on the remedies available under the Paycheck Fairness Act would significantly undermine the purpose of the law to provide effective protection to victims of pay discrimination, and would severely limit its deterrent effect. Among other things, a cap on damages would have the following adverse consequences:

- **A cap on damages would treat victims of sex-based wage discrimination differently from victims of discrimination based on race or national origin.** Under current law, those subject to race and national origin discrimination are not subject to damages caps. The remedies available to those subject to unlawful conduct should not depend on the basis for the discrimination; women and men who endure sex-based wage discrimination should be entitled to the same remedies as those available in race and national origin cases. A cap on damages would destroy this equity.
- **A cap on damages would deny victims of sex-based wage discrimination full compensation.** Because a cap on damages sets an artificial limit on the amount that an individual can recover, the ultimate award may be insufficient to compensate the plaintiff for the injuries s/he has suffered. In fact, a cap on damages would penalize those who are the most seriously injured -- plaintiffs who suffer the greatest injury as a result of discrimination are the ones most likely to end up not being fully compensated for their losses.

- **A cap on damages would limit the deterrent effect of monetary remedies.** Capped damages create perverse incentives, allowing employers to gamble that it costs less to pay damages than to create workplaces free of discrimination. This is contrary to the intent of the Equal Pay Act. Congress intended to create incentives for employers to voluntarily comply with the Equal Pay Act, not to bury discrimination in the cost of doing business.
- **A cap on damages would pose a unique burden for women of color.** Where women of color brought combined race and sex discrimination claims, they would run the risk of having their race-based claims dismissed and their race-based remedies limited, since it would be in the employer's interest to characterize any discrimination as sex-based and therefore subject to the caps.
- **Uncapped damages do not unduly burden employers.** In employment discrimination cases based on race or national origin – where there are no damages caps – there have not been egregious damages verdicts. This is, in part, due to the numerous existing limitations in current law that guard against improperly high verdicts. Punitive damages are only awarded if the employer intentionally discriminated and acted with “malice or reckless indifference to the plaintiff’s federally protected rights”—a standard the Supreme Court has construed very explicitly and narrowly in *Kolstad v. American Dental Assoc.*^{iv} Additionally, if a judge feels a jury award is excessive, the judge can reduce or vacate the amount. Finally, there are constitutional limitations on the amount of punitive damages that a plaintiff can receive.

For all of these reasons, Congress must approve the Paycheck Fairness Act without setting artificial limits on the remedies that individuals subject to discrimination can receive.

ⁱ29 U.S.C. § 206(d).

ⁱⁱU.S. Census Bureau, Historical Income Tables – People, Table P-40: Woman's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin: 1960 to 2005, *available at* <http://www.census.gov/hhes/www/income/histinc/p40.html> (last visited Feb. 22, 2007).

ⁱⁱⁱ29 U.S.C. § 2 16(b).

^{iv}527 U.S. 526 (1999).