

HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT

Forty-five years ago, President Kennedy signed the Equal Pay Act (EPA) 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. 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 77 cents for every dollar earned by men.

The Paycheck Fairness Act, introduced in both the House (H.R. 12) and the Senate (S. 182) and passed by the House on January 9, 2009, would update and strengthen the EPA in important ways, including:

- **Improving Equal Pay Act Remedies**

The Act toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated damages and back pay awards, which tend to be insubstantial. The change will put gender-based wage discrimination on an equal footing with discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available.

- **Facilitating Class Action Equal Pay Act Claims**

The Act allows an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently, it is very difficult to bring EPA suits as class actions because the EPA, adopted prior to the current federal class action rule, requires plaintiffs to opt *in* to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt *out* of the class.

- **Prohibiting Employer Retaliation**

The Act generally prohibits employers from punishing employees for sharing salary information with their coworkers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

- **Closing a Loophole in the Employer Defense**

Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an affirmative defense that the pay differential is based on a "factor other than sex." Some employers have argued for interpretations of this affirmative defense that are so broad (e.g., to include factors such as a male worker's stronger salary negotiation skills or higher previous salary) that they may themselves be "based on sex" and would seriously undermine the EPA. The Act tightens this affirmative defense so that it can excuse a pay differential for men and

women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance and consistent with business necessity.

- **Modifying the “Establishment” Requirement**

Under the EPA, in order to determine that there is wage discrimination, a wage comparison must be made between employees working at the same “establishment.” Some courts have interpreted this to mean that wages paid in different facilities or offices of the same employer cannot be compared even if the employer is paying workers different salaries for the same work. The Act clarifies that comparisons may be made between employees in offices in the same county or similar political subdivision as well as between broader groups of offices in some commonsense circumstances.

- **Improving Collection of Pay Information by the EEOC**

The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC’s ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **Reinstating Pay Equity Programs and Enforcement at the Department of Labor**

The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors. The Act also directs implementation of the Equal Opportunity Survey, a vital tool for detecting wage and other types of discrimination.

The Senate should expeditiously pass, and the President should sign, the Paycheck Fairness Act.