

How the Paycheck Fairness Act Would Increase Employment Litigation

Unprecedented Unlimited Damages, Elimination of Reasonable Non-Discriminatory Factors in Defending Pay Determinations, and EEOC Collection of Sensitive Wage and Salary Data Create Fuse for Employment Litigation Explosion

The Senate is considering whether to take up a measure passed by the House of Representative in 2009 that was described at the time by the *Washington Post* as a bill that would “remove, rather than restore, a sense of balance to the law [against pay discrimination].”¹ At a critical time in our nation’s economic recovery, the Paycheck Fairness Act (PFA; H.R. 12/S. 182) would subject companies to an explosion in costly employment litigation under the Equal Pay Act that would make it far too easy to both bring and prevail in lawsuits, even where the employer has no intent to discriminate but has based pay on legitimate factors such as education, training and productivity.

Employment Litigation Already Out of Control Even without the PFA, the United States’ system of enforcing its employment laws benefits attorneys more than employees, contributing to the fact that, among all the industrialized nations, the U.S. has the highest number of lawyers per capita. Other countries typically limit remedies to make an aggrieved employee whole through back pay or reinstatement or both. In contrast, the U.S. allows compensatory and punitive damages for most employment discrimination laws, making those cases much more attractive to plaintiffs’ lawyers. Also, the U.S. is one of the few nations that brings employment cases before juries, frequently resulting in significant monetary damages. Consequently, employers spend considerable time and resources dealing with nuisance lawsuits driven by the plaintiffs’ bar. These are filed with the objective of shaking the employer down for a settlement in return for withdrawing the case. For many employers, even where they are in compliance, it is far more cost effective and predictable to simply settle, rather than spend years in litigation where even a victory will not secure reimbursement for huge legal expenses. In the case of class actions, which are now available for most employment laws, the problem is compounded as lawyers often walk away with huge fees while individual plaintiffs may only receive a modest share of the recovery.

Existing Protections Against Pay Discrimination Already Strong and Pervasive

Currently, where gender pay discrimination is suspected, plaintiffs and their attorneys have two options. If they can prove that the employer has intentionally discriminated, they can bring an action under Title VII of the Civil Rights Act for compensatory and punitive damages—up to \$300,000—in addition to make whole remedies. If intent cannot be proven, the Equal Pay Act allows claims under a type of strict liability that only requires a showing of pay disparity between two or more employees. The employee prevails unless the employer can show a nondiscriminatory reason for the disparity. Moreover, the employee who prevails can receive double back pay, unless the employer can show that it had “objective, reasonable grounds” for believing it was not violating federal law. Of course, plaintiffs may elect to bring a claim under both laws simultaneously and attorney’s fees are available under both.

Paycheck Fairness Act Provides New Tools for Plaintiffs’ Lawyers, Encouraging Litigation The PFA contains a number of provisions designed to stimulate litigation. Most notably, the bill would direct the EEOC to collect sensitive pay and

compensation data from all covered employers, which it can then disclose publicly, either on its website or through a Freedom of Information Act request. The EEOC would be given virtually unlimited discretion in determining what wage data employers must report, including the pay of named individuals at any level of the company. Thus, plaintiffs' attorneys looking to bring pay discrimination suits could search the pay data of one or more companies, looking for a target. Meanwhile, the bill would make it easier for those attorneys to bring lucrative class actions suits by changing the current rule—which requires individuals to “opt in” to a class action suit—to one that includes them in the suit automatically unless they take affirmative action to opt out.

Paycheck Fairness Act Enables Success Against Pay Decisions That Have a Legitimate, Non-Discriminatory Basis Because a plaintiff may bring an action under the Equal Pay Act merely by showing a disparity in pay, an employer may defend itself under current law by establishing any nondiscriminatory basis for the differences. Thus, employers who successfully defend discrimination claims typically point to reasonable factors, such as:

- experience in the position or occupation;
- extent of training or education;
- productivity; and
- revenue production.

However, the PFA calls into question the viability of these factors. In addition to showing that the factors are “bona fide,” the employer would also have to satisfy a judge that the factor is both “job-related” and “consistent with business necessity.” Even then, the employee could refute this defense by simply showing that an “alternative employment practice” exists that would serve the same business purpose without producing the wage differential. This attack on legitimate pay practices led the *Washington Post* to characterize this provision as “invi[si]ble” too much intrusion and interference with core business decisions,” further asserting:

[The] bill allows employers to defend against lawsuits by proving that pay disparities between men and women were based on “bona fide” factors, such as experience or education, and that these factors are tied to business necessities. Fair enough. But the bill also says that this defense “shall not apply” when the employee “demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.” But what if the employer has refused because it has concluded that the alternative is, indeed, more costly or less efficient? What if the employee and employer disagree on what the “business purpose” is or should be?

Unlimited Damages Available For Successful Suits In addition to making it easier to both bring and prevail in a pay discrimination suit, the PFA departs from all other equal employment opportunity laws and creates the additional litigation incentive of providing unlimited compensatory and punitive damages. As a result of the Civil Rights Act of 1991, compensatory and punitive damages were made available under Title VII and the ADA. However, to avoid the “casino” effect that has occurred under other laws, Congress established caps for those damages up to \$300,000, based on employer size. The only discrimination law which allows such unlimited damages is the Civil Rights Act of 1866, which is also known as Section 1981. This law was originally enacted to enforce the 13th, 14th, and 15th amendments to the U.S. Constitution following the Civil War. The Act prohibits race discrimination in making and enforcing contracts, which has been broadly construed to include employment.

¹ Two Sides of Fair Pay, *The Washington Post*, Jan. 15, 2009, A-18.