# Testimony on the Paycheck Fairness Act

## Before the Senate Committee on Health, Education, Labor & Pensions

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Mr. Chairman and members of the Committee, thank you for this opportunity to testify on S. 182, the Paycheck Fairness Act. My name is Jane McFetridge. I am a Partner at Jackson Lewis LLP, where I manage the firm's Chicago office.[1] Jackson Lewis is a national law firm of over 600 lawyers in 45 offices, all of whom are dedicated exclusively to the practice of labor and employment law. For over 20 years, I have represented employers in all types of employment discrimination litigation, including class actions, collective actions, and multi-plaintiff lawsuits brought both by private parties and by the Equal Employment Opportunity Commission. I also routinely counsel businesses, from very small to extremely large, on a wide variety of human resources and employment law related issues and concerns, and have spoken and written frequently on employment law topics in this subject area. I have extensive experience dealing with the Equal Employment Opportunity Commission and the U.S. Department of Labor, as well as state and local labor and employment agencies throughout the United States.

You have asked me to speak about the Paycheck Fairness Act. As you might expect, given my background and my area of practice, I have some strong opinions on this topic. Those opinions are informed not just by experience as an employment litigator, but as a working mother who has been an active participant in the U.S. workforce for the last 30 years. I am the mother of two daughters. One is in college now and will hopefully join the workforce soon, and the other is a few years behind. If I believed the Paycheck Fairness Act would advance the goal of eradicating gender discrimination in the workplace, I would ardently support the measure – not just for myself and others like me, but for my two daughters and women of their generation. However, based upon my own personal experience, as well as my legal work representing employers, it is my unequivocal belief that passage of the Paycheck Fairness Act is not the solution.

The Paycheck Fairness Act would preclude employers from making market-based pay determinations, encourage frivolous litigation, and expose companies to financial ruin by way of uncapped punitive damages and massive class action litigation. Rather than eliminating discrimination, the legislation, if passed, would provide a windfall to attorneys who litigate employment discrimination cases, but result in no meaningful change in the extant wage differential. Furthermore, the Paycheck Fairness Act would levy enormous cost on companies and employers already reeling from the worst economic crisis we have seen in most of our lives.

Numerous studies demonstrate that women have made vast strides in the workforce since enactment of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.

[1] The views expressed herein are my own.

Though we are not quite at the finish line, the existing legal framework has proven successful in narrowing the wage gap and compensating victims of unlawful discrimination. It would be ill advised to disrupt that framework with onerous legislation that will do nothing but impede the ability of American companies to compete in the global marketplace, and serve no real ameliorative or beneficial purpose, other than to increase financial opportunities for both the plaintiffs' and defense bar.

## Current Protections Against Gender-Based Pay Discrimination

While women have not always enjoyed the same wages for the same work as men, great inroads have been made over the past 45 years to bring about pay equality between the sexes. Most notably, Congress has passed two comprehensive pieces of legislation – the Equal Pay Act of 1963 ("EPA") and Title VII of the Civil Rights Act of 1964 ("Title VII") – which strike at the heart of gender-based pay discrimination. In addition to the EPA and Title VII, which will be discussed in more detail below, many states also have their own laws that prohibit employers from discriminating against women. For instance, my home state of Illinois has passed both the Illinois Equal Pay Act and the Illinois Human Rights Act, both of which prohibit Illinois employers – many of whom are not covered by the federal EPA or Title VII – from discriminating on the basis of sex with respect to compensation. Additionally, Executive Order 11246, enforced by the Office of Federal Contract Compliance Programs ("OFCCP"), prohibits federal contractors and subcontractors from discriminating in employment decisions on the basis of sex. This legislative and executive framework, when taken in conjunction with voluntarily-implemented diversity initiatives and training programs, provides sufficient assurances that we as a country are well on our way to addressing any remaining pay disparity that may exist between the sexes as a result of unlawful discrimination.

### Mechanics Of The EPA

Enacted by Congress in 1963, the EPA provides that no employer may pay a female employee less than a male employee for "substantially equal" work. To present a *prima facie* case of discrimination under the EPA, a plaintiff must show that an employer pays workers of one sex more than workers of the opposite sex for jobs substantially equal in skill, effort, and responsibility, assuming those jobs are performed under similar working conditions within the same establishment. Where this is the case, an employer will be held liable unless it can demonstrate that the differential results from: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) any factor other than sex.[2] Critically, there is no requirement that a plaintiff prove any discriminatory intent or animus on the part of her employer in order to recover.[3]

Successful plaintiffs may recover back pay, front pay (if unlawful retaliation is proven), prejudgment interest, attorneys' fees and costs.[4] Moreover, where willfulness is shown, an

[2] 29 U.S.C. § 206(d)(1).
[3] *See* 29 U.S.C. § 206(d)(1) (making clear that the only relevant inquiry is whether the alleged pay disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).
[4] 29 U.S.C. § 216(b).

additional amount equal to the back pay found to be due and owing may be awarded as liquidated damages, and the defendant may also be fined up to $10,000 and imprisoned for up to six months.[5]

Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission (the "EEOC"), which may bring its own suits to enforce the law.[6]

**Mechanics Of Title VII**

Similarly, Title VII also prohibits compensation discrimination on the basis of enumerated protected characteristics – including sex.[7] An employee may assert a claim for gender-based pay discrimination by filing a charge of discrimination with the EEOC and later bringing a lawsuit in federal court upon receipt of her notice of right to sue (regardless of whether the EEOC finds "cause" for concluding that discrimination occurred). Employees need not be represented by counsel to participate in the EEOC processes, including the investigation of their charge. Indeed, as the U.S. Supreme Court has reiterated, Title VII "sets up a 'remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process.'"[8] An attorney may also not be necessary at the litigation stage should the EEOC determine to file suit on the employee's behalf.

Plaintiffs alleging gender-based pay discrimination in violation of Title VII may do so by either showing disparate treatment or disparate impact. Generally, in a disparate treatment case, the McDonnell Douglas burden-shifting analysis applies. A plaintiff must first establish a *prima facie* case of pay discrimination. The burden then shifts to the employer to offer evidence of a legitimate, non-discriminatory reason for the pay differential. If the defendant meets this burden of production, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's explanation is a pretext for unlawful sex discrimination.

In contrast, in a typical Title VII disparate impact case, a plaintiff must first identify a specific policy or practice with a statistically significant adverse impact on women; the plaintiff need not allege any discriminatory intent. Once the plaintiff has made this showing, the burden then shifts to the employer to produce evidence that the policy or action was "job related for the position in question and consistent with business necessity."[9] Ultimately, the plaintiff may still prevail if she can prove that the employer refused to adopt "an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[10]

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[5] *Id.;* 29 U.S.C. § 216(a).

[6] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, as amended. In 2006, additional regulations were issued, 29 CFR § 1621, as amended.

[7] 42 U. S. C. §2000e-2(a).

[8] *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (Feb. 27, 2008).

[9] 42 U. S. C. §2000e–2(k)(1)(A)(i).

[10] *Ricci v. DeStefano,* 129 S. Ct. 2658, 2673 (June 29, 2009) (referencing 42 U. S. C. §§2000e–2(k)(1)(A)(ii) and (C)).

Historically, an employer found guilty of pay discrimination under Title VII was subject to injunctive relief, as well as back and front pay. When Congress passed the Civil Rights Act of 1991, however, it made compensatory and punitive relief available in cases involving unlawful *intentional* discrimination.[11] To receive punitive damages, which are subject to a statutory cap, the complaining party must show that "the respondent engaged in a discriminatory practice … with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[12]

## The Existing Legal Framework Is Working And There Is No Evidence The Wage Gap Today, Such As It Is, Stems From Employer Discrimination.

Proponents of S.182 oft-cite that, despite the existing legal framework, women continue to make only 77 percent of men's wages. Not only is this figure overly simplistic in that it is based on the median earnings of men and women as compiled by the U.S. Census Bureau, but the statistic is bandied about as if it were an automatic indication of employers' discrimination against women. This is simply not the case.

During the past three decades, women have made notable gains in the workforce and in pay equity, including significant gains in real earnings, increased labor force participation, advances in educational attainment, and employment growth in higher paying occupations. Indeed, the U.S. Department of Labor ("DOL") has recognized that while the median usual weekly earnings for women working full-time in 1970 was only 62.1 percent of those for men, the raw wage gap had shrunk from 37.9 percent to just 21.5 percent by 2007. [13]

Moreover, there are observable differences in the workforce attributes of men and women that account for much of the remaining wage gap. According to a January 2009 report prepared for the DOL by CONSAD Research Corp., these variables include:

- A greater percentage of women than men work part-time, which tends to pay less than full-time work.

- A greater percentage of women than men tend to leave the labor force for child birth, or to care for their children or elderly relatives. Part of the wage gap is explained by the percentage of women who were not in the labor force during previous years, the number of children in the home, and the age of women.

- Women, especially working mothers, tend to value "family friendly" employment policies more than men, and are often willing to accept a lower paying job in return for such policies. Part of the wage gap is therefore explained by industry and

[11] 42 U.S.C. §1981a(a)(1).
[12] 42 U.S.C. §1981a(b)(1).
[13] U.S. Department of Labor, *Foreword* to CONSAD RESEARCH CORPORATION, AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN, at 1 (Jan. 12, 2009).

occupation, particularly, the percentage of women who work in a particular industry and occupation.[14]

After adjusting for these non-discriminatory variables, the adjusted gender wage gap is between 4.8 and 7.1 percent, and some, or all, of the remaining differential may be explained by factors not included in the CONSAD study due to data limitations.[15] For instance, the CONSAD study focused on wages rather than total compensation.[16] Research indicates that women may value non-wage benefits more than men do, and consequently choose to take a greater part of their compensation in fringe benefits, such as health insurance.[17] Furthermore, the fact that there is an unexplained gender wage gap does not mean that the differential is attributable to discrimination, as proponents of the Paycheck Fairness Act suggest. Rather it means only what it states – that there is an unexplained differential.

Similarly, according to a study of the federal workforce conducted by the U.S. Government Accountability Office (the "GAO"), "all but about 7 cents of the [wage] gap can be explained by differences in measurable factors such as the occupations of men and women and, to a lesser extent, other factors such as education levels and years of federal experience."[18] "[F]actors for which we lacked data or are difficult to measure, such as experience outside the federal government, may account for some or all of the remaining pay gap."[19] Even looking at the "raw" data, the wage gap in the federal workforce declined from 28 percent in 1988 to 11 percent in 2007.[20]

It is my firm belief that any wage gap between men and women is unacceptable. However, it is important that we talk about real numbers and not the misleading "raw wage gap" proponents of the Paycheck Fairness Act repeatedly point to. Employers cannot control their employees' educational and career choices. Nor can employers interfere with an employee's choice to enter or leave the workforce, or work a part or flex-time schedule, in order to care for her family. All an employer can do is pay two similarly-situated employees the same salary regardless of gender. That is what the law requires. Based on the results of the CONSAD and GAO studies, this is also what most employers appear to be doing. As the DOL stated in its Foreword to the CONSAD report, "[T]he raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of individual choices being made by both male and female workers."[21]

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[14] *Id.* at 1-2.
[15] *Id*. at 1.
[16] *Id.* at 2.
[17] *Id.*
[18] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN'S PAY: CONVERGING CHARACTERISTICS OF MEN AND WOMEN IN THE FEDERAL WORKFORCE HELP EXPLAIN THE NARROWING PAY GAP, at 2 (Apr. 28, 2009) (Statement of Andrew Sherrill, Director, Education, Workforce, and Income Security Issues, Before the Joint Economic Committee, U.S. Congress).
[19] *Id.*
[20] *Id.*
[21] U.S. Department of Labor, *supra* note 13, at 2.

## The Existing Legal Framework Protects Victims Of Unfair Pay Discrimination.

This is not to say that employers do not occasionally, intentionally or otherwise, make discriminatory pay decisions based on gender. When this occurs, both the EPA and Title VII, as well as commensurate state and local laws, provide multiple avenues for women to pursue claims of unequal pay for equal work, including directly bringing a lawsuit on their own behalf, filing a charge with the EEOC, having the EEOC bring a lawsuit on their behalf, or bringing a collective action or class action on behalf of similarly-situated employees.

**Multiple Forms Of Redress Are Available To Plaintiffs.**

From an employee's perspective, the EPA may be the most favorable and lenient of the statutes with respect to both the ease of pursuing a claim against an employer (without the need to first exhaust administrative remedies) and the relatively low standard for establishing liability (what amounts to strict liability). However, an employee may also choose to bring a Title VII claim in order to recover punitive and compensatory damages (as opposed to back pay and liquidated damages) or in order to institute an opt-out class action. Indeed, it is not uncommon for women alleging pay discrimination to bring parallel claims under both the EPA and Title VII, as well as under state and local antidiscrimination laws, to ensure that they receive the fullest protection of the law. When parallel claims are brought, plaintiffs may recover under both statutes for the same period of time provided they do not receive duplicative recovery for the same "injury." As such, they may recover back pay, front pay, compensatory damages, liquidated damage, punitive damages, and injunctive relief. As more fully illustrated in the chart attached as Appendix 1, the passage of the Paycheck Fairness Act will not increase the protections afforded to women allegedly suffering pay discrimination.

**Plaintiffs Are Taking Advantage Of Existing Statutes.**

Proponents of the Paycheck Fairness Act may point to EEOC and employment litigation statistics to demonstrate that women are still victims of unlawful compensation discrimination. What these statistics prove to me, however, is that the average employee is well aware of her right to be free of discrimination in the workforce, and readily seeks redress when she feels her rights have been violated.[22] Indeed, according to the Statistical Abstract of the United States 2010, there were 13,036 employment cases commenced and 15,452 cases pending in U.S. District Courts in 2008.[23] There are thousands more pending in state courts throughout the country.

[22] Kevin M. Clermont & Stuart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, JOURNAL OF EMPIRICAL LEGAL STUDIES 429 (2004); *see* UNITED STATES COURTS JUDICIAL FACTS AND FIGURES, *available at* http://www.uscourts.gov/judicialfactsfigures/2008/all2008judicialfactsfigures.pdf (last visited Mar. 4, 2010).

[23] U.S. District Courts – Civil Cases Commenced and Pending: 2000 to 2008, *available at* http://www.census.gov/compendia/statab/2010/tables/10s0323.pdf (last visited Mar. 3, 2010).

At the administrative level, charge receipt statistics also remain strong. In 2009, the EEOC received a total of 942 charges under the EPA.[24] The EEOC found "reasonable cause" in only 4.6 percent of the charges, and successful parties received approximately $4.8 million in compensation.[25] In addition to EPA charges, in 2009, the EEOC received 28,028 Title VII sex discrimination charges generally, but found "reasonable cause" in only five percent of the charges, with successful parties receiving $121.5 million in compensation.[26] These statistics demonstrate that the EEOC identifies and obtains compensation for true victims of pay discrimination. The statistics also demonstrate, however, that the vast majority of charges lack merit, as shown in the statistically small number of cause findings made by the EEOC after they have thoroughly investigated and evaluated the charging party's allegations of discrimination. Passage of the Paycheck Fairness Act would only encourage additional frivolous charges.

Moreover, class-actions continue to serve as an aggressive mechanism for both vindicating the rights of victims of pay discrimination and incentivizing employers to root out any vestiges of such discrimination. For example:

- In 2004, Boeing Co. agreed to pay up to $72.5 million to settle a sex-discrimination lawsuit filed on behalf of 29,000 current and former female employees at its Seattle area facilities. Under the settlement, Boeing also agreed to monitor salaries and overtime assignments, and to conduct annual performance reviews, in an effort to hold managers responsible for how they make salary and overtime decisions. The settlement affected non-executive salaried and hourly female workers, from janitors to first-level managers.[27]

- In July 2007, a federal district court in New York certified a class of female sales employees at Novartis Pharmaceuticals in a $200 million lawsuit against the company. Among other evidence presented to the court, statistical evidence revealed that female employees were paid approximately $75 per month less than their male counterparts.[28]

- In July 2009, a federal district court in Texas preliminarily approved a $9.1 million settlement of a sex discrimination class action against Dell Inc. alleging that the company systematically discriminated against female employees in pay, promotions, terminations, and other terms and conditions of employment. In addition to the monetary award, the settlement agreement requires Dell to hire a labor economist to analyze existing compensation practices and recommend pay equity adjustments for current female employees. Dell is also required to hire an industrial psychologist

[24] EEOC Equal Pay Act Charges, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm (last visited Mar. 5, 2010).
[25] *Id*.
[26] EEOC Sex-Based Charges, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm (last visited Mar. 5, 2010).
[27] *Beck v. Boeing*, 2004 U.S. Dist. LEXIS 27622 (W.D. Wash. April 4, 2004).
[28] *Velez v. Novartis Pharms. Corp*., 244 F.R.D. 243 (S.D.N.Y. July 31, 2007).

to assist in policy formation regarding compensation, performance evaluations, hiring, promotions, and assignments.[29]

- In the historic *Wal-Mart v. Dukes* gender discrimination class action, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's decision to certify a class of over 1.5 million past and present employees spread across 3,400 stores and positions throughout the country.[30] In February 2009, the Ninth Circuit agreed to an *en banc* rehearing. Several days before oral argument, on March 19th, 2009, the EEOC submitted an *amicus curiae* brief to the Ninth Circuit, taking the position that class-wide punitive damages can be determined by a jury in Title VII pattern or practice cases and back pay determinations may be made without individualized hearings when appropriate. The EEOC's decision to file an amicus brief in the *Wal-Mart* case is no doubt connected to its aggressive pursuit of potential systemic discrimination cases.

Given the media attention paid to such lawsuits, employers fully understand the seriousness of pay discrimination, and are keenly aware that any failure to take steps to eliminate unjustified pay disparities between men and women may lead to a tarnished reputation, significant financial expense in the form of legal fees and awards, the loss of valued employees, and the potential for judicial intervention in their business practices. The passage of the Paycheck Fairness Act will contribute nothing to employers' existing commitment to gender pay parity. What it will do, however, is place further stress on an already struggling business community, which is suffering through the worst economic crisis since the Great Depression.

## Rather Than Amend The EPA, The Paycheck Fairness Act Would Create A New Law More Burdensome Than All Existing Federal Anti-Discrimination Legislation.

**By eliminating the EPA's "any factor other than sex" defense, the Paycheck Fairness Act would fundamentally change the EPA, contradict existing Title VII precedent, and place an enormous drain on judicial resources.**

The Paycheck Fairness Act seeks to replace the EPA's "any factor other than sex" defense with a much more demanding "business necessity" requirement. Eliminating the EPA's "any factor other than sex" defense could essentially prohibit companies from making the kinds of individual pay decisions that are currently permissible under both the EPA and Title VII, such as determinations based upon prior education and experience. As a result, employers could lose their ability to attract and retain the best talent by way of market-based incentives, and judges and courts across the country could be called upon to serve as "super-human resource departments," scrutinizing the reasoning behind pay decisions that have nothing to do with gender. Courts routinely denounce this role for good reason.

[29] *Hubley et al. v. Dell Inc.*, No. 08-cv-00804 (W.D. Tex.).
[30] *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. Dec. 11, 2007).

Under the EPA, employers are prohibited from paying women less than men for performing the same or "substantially equal" work in the same "establishment" unless the differential results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv)… any… factor other than sex."[31] If passed, the Paycheck Fairness Act would essentially eliminate the EPA's long-standing "any… factor other than sex" defense. Instead, employers would have to demonstrate that any pay differential is based on a "bona fide factor other than sex, such as education, training, or experience" *and*, among other requirements, is "consistent with business necessity." The defense would be inapplicable if the plaintiff demonstrates that "an alternative employment practice exists that would serve the same business purpose." If the employer fails to meet its evidentiary burden, it would be strictly liable for the pay disparity without any showing of intentional discrimination.

To understand the significance of this change, consider a common "factor other than sex": mergers and acquisitions. When one company acquires another, it absorbs differing pay scales, often times resulting in pay disparities that are wholly unconnected to sex. However, under the Paycheck Fairness Act's "business necessity" requirement, employers would arguably have to undertake a prompt review of these differing pay scales upon consolidation and normalize the disparities by elevating the lower salaries to the higher-paid salary (as the EPA does not allow employers to reduce salaries in response to a pay disparity).

Consider another, more routine example: a male store manager at a supermarket is paid more than a female store manager because he holds a college degree. Such a disparity could be illegal under the Paycheck Fairness Act if a court finds that enhanced compensation for supermarket managers with college degrees is not "consistent with business necessity."[32] Further, the female manager could argue that a program instituted by the supermarket where store managers without college degrees are taught the same skills they would have learned in college would serve the same business purpose. Even if the supermarket could ultimately prevail in a lawsuit, it may eliminate the "college degree incentive" and equalize pay just to avoid costly litigation.

*The Paycheck Fairness Act could jettison an existing body of case law in which courts have said that, under Title VII, employers can consider subjective factors in employment decisions so long as they are not discriminatory.* Consider, for example, jobs that require frequent personal interaction. Under Title VII, employers may consider unquantifiable qualities like a friendly disposition or positive attitude. As the U.S. Court of Appeals for the Eleventh Circuit has explained, "It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation."[33] "[S]ubjective

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[31] 29 U.S.C. §206(d)(1).

[32] If the Paycheck Fairness Act is enacted, litigation interpreting the legislation's "business necessity" requirement will likely ensue. Courts will be forced to assess "business necessity" – finally being forced to assume the mantle of a "super human resources department" they have so long and consistently decried.

[33] *Chapman v. A.I. Transport*, 229 F.3d 1012, 1034 (11th Cir. 2000) (en banc). *See also Sengupta v. Morrison-Knudsen Co.,* 804 F.2d 1072, 1075 (9th Cir. 1986).

reasons," the Court said, "are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions."[34] "Traits such as 'common sense, good judgment, originality, ambition, loyalty, and tact,' often must be assessed primarily in a subjective fashion…."[35] Under the Paycheck Fairness Act, however, pay differentials based upon such immeasurable qualities may not be deemed "consistent with business necessity."

In addition to challenging subjective determinations, the Paycheck Fairness Act could even be interpreted as prohibiting employers from considering factors such as educational and professional experience in occupations that may not strictly require a degree or prior experience. Without the ability to make pay decisions based on such factors, U.S. companies would be forced to standardize compensation to the detriment of both male and female employees. The inevitable result may be a gradual decline toward mediocrity as prospective employees have no incentive to make the types of investments that would otherwise allow them to excel at a particular job, and advance within an organization or their chosen field.

*Further, replacing the EPA's "any factor other than sex" defense with a "business necessity" requirement would place an enormous drain on judicial resources, turning courts into "super-human resource departments"— a role they consistently eschew*.[36] Unlike the "any factor other than sex" defense, the "business necessity" test could result in drawn out litigation regarding what is and is not consistent with business necessity and whether there is an alternative employment practice that would serve the same business purpose. It would be much more difficult for employers to prevail on summary judgment as almost every case will involve a factual dispute regarding the business necessity behind any pay differential.

Ultimately, courts will be responsible for making the very type of business judgments that they have denounced time and time again. As one federal court explained, "[t]he Court is not here to second guess [a company's] hiring and firing decisions."[37] Passing legislation that would divert judicial resources for the purpose of scrutinizing market-based pay determinations that have nothing to do with sex discrimination is not only bad law, it is also bad policy.

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[34] *Id.*

[35] *Id.*

[36] *See, e.g., Byrnie v. Town of Cromwell Bd. of Educ*., 243 F.3d 93, 106 (2d Cir. Mar. 15, 2001) ("we are not a super-personnel department"); *Pinkerton v. Colo. DOT*, 563 F.3d 1052, 1066 (10th Cir. Apr. 16, 2009) ("court should not 'act as a super personnel department that second guesses employers' business judgments'" (internal citations omitted)); *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. Mar. 22, 2002) (refusing to determine "whether a business decision is wise or nice or accurate"); *Lewis v. Two's Comp*., 2008 U.S. Dist. LEXIS 109030, at *14 (S.D.N.Y. Mar. 16, 2008)("[I]t is not the province of the Court to sit as a super-human resources department; a company is legally entitled to make bad [nondiscriminatory] employment decisions"); *Framularo v. Bd. of Educ.*, 549 F. Supp. 2d 181, 187 (D. Conn. Apr. 30, 2008) (same); *Smith v. Home Depot U.S.A., Inc*., 1999 U.S. Dist. LEXIS 22207, at *17 (N.D. Ga. Mar. 3, 1999) ("it is not the court's province 'to second guess an employer's business judgment'")(internal citations omitted); *Tutman v. WBBM-TV/CBS Inc*., 1999 U.S. Dist. LEXIS 5103, at *31 (N.D. Ill. Mar. 30, 1999) ("[t]he Court is not here to second guess [the company's] hiring and firing decisions").

[37] *Tutman*, 1999 U.S. Dist. LEXIS 5103, at *31.

**The Paycheck Fairness Act would expand the EPA's definition of "same establishment," imposing an unfair burden on employers with operations in certain counties.**

The proposed legislation would amend the EPA to define "establishment" as "workplaces located in the same county or similar political subdivision of a State." Because the EPA requires equal pay for men and women who perform "substantially equal" work in the same "establishment," the Paycheck Fairness Act would require some employers to look beyond individual worksites and ensure that employees who perform similar work in *different* locations are paid the same. Though this change may have little effect on employers with operations in counties—such as New York County—comprised entirely of an urban population (or a suburban population), it would have an enormous effect on employers with operations in counties encompassing both urban and suburban communities.

My hometown of Chicago, for example, is located in Cook County. The population of Cook County is larger than 29 individual states[38] and encompasses both the City of Chicago and collar communities up to an hour and a half outside city limits, and even further from Chicago's central business area (the "Loop"). The cost of living is significantly higher in Chicago than in the surrounding suburbs; so, too, is the average salary. If the Paycheck Fairness Act were to become law, employers with operations in Cook County would be required to pay similar employees the same salary regardless of whether they worked in the Loop or in a remote collar community.

Expanding the EPA's definition of "establishment" could also lead to unnecessary litigation involving employers with their main corporate headquarters located within the same county as non-corporate facilities. For instance, a company with its main corporate headquarters in midtown Manhattan and a remote distribution site elsewhere may pay employees who work at the corporate headquarters higher salaries because those positions are more demanding and integral to the company. Although a court may ultimately determine that the corporate positions are not "substantially equal" to the non-corporate positions, this is one more issue employers will have to address in litigation. Consider also a company that wants to incentivize or reward employees who agree to work in less desirable neighborhoods or work less desirable shifts – for instance, a bank teller working in an area with a greater history of hold ups, or a data entry clerk working the "graveyard" shift. The EPA could eliminate a company's ability to make such decisions. For all these reasons, EPA claims should be limited to the "same establishment."

**The Paycheck Fairness Act would add unlimited compensatory and punitive damages to an employer's exposure, despite Congressional efforts to limit such damages in Title VII cases.**

Whereas the EPA currently provides for equitable relief, such as back pay awards, the Paycheck Fairness Act seeks to add compensatory and punitive damages to the types of recovery available to EPA litigants. Though S. 182 (unlike former versions of the Paycheck

[38] Wikipedia, *Cook County, Illinois*, http://en.wikipedia.org/wiki/Cook_County,_Illinois (last visited Feb. 26, 2010).

Fairness Act) would require a showing of "malice or reckless indifference" before subjecting employers to punitive damages, the proposed legislation — which places no limit on compensatory and punitive damages — would still expose employers to frivolous lawsuits and enormous verdicts. And, unlike Title VII, it makes no attempt to ameliorate the size of available damages for smaller employers, who are arguably less capable of surviving such an award, or the cost of the litigation itself. In addition, employers could still be liable for compensatory damages without any showing of intentional discrimination.

When Congress added compensatory and punitive damages to the relief available in Title VII disparate treatment cases through passage of the Civil Rights Act of 1991, it was careful to include a statutory cap on such damages.[39] That cap is set at $50,000 to $300,000 total for compensatory and punitive damages, depending on the employer's size. As the U.S. Court of Appeals for the Second Circuit has pointed out, a review of the Act's legislative history reveals that "the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards."[40] Without such a cap, the Paycheck Fairness Act will be a bonanza for plaintiffs' attorneys, and will subject small businesses to much greater comparative risk. This result is untenable in light of President Obama's recent statements that small businesses are "one of the biggest drivers of employment that we have," as well as recent efforts by Congress to spur job creation via a $15 billion jobs bill.[41] In the midst of this financial crisis, we should be encouraging small businesses to expand, not making it more difficult for them to operate and survive.

**The Paycheck Fairness Act would impose Title VII's class action mechanism on the EPA, which has always been governed by the FLSA's procedural rules.**

The Paycheck Fairness Act would specifically allow for "opt-out" class actions under Rule 23 of the Federal Rules of Civil Procedure — a right already provided to women who sue their employers for pay discrimination under Title VII. Unlike Title VII, the EPA is governed by the FLSA's procedural rules, which require plaintiffs to "opt-in" to a class action by giving consent in writing. The distinction between the two provisions is important, as class size is likely to be much larger with an opt-out certification where employees need not affirmatively decide to join the case.

Title VII cases — which provide for "opt-out" class actions — are procedurally different from EPA cases precisely because they have different pleading requirements. The EPA is and

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[39] Congress did not make compensatory and punitive damages available in Title VII disparate impact cases, in which employers are held to a "business necessity" defense similar to that proposed by the Paycheck Fairness Act.

[40] *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. Mar. 21, 1997) (referencing 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); 137 Cong. Rec. S15478-79 (1991) (statement of Sen. Bumpers)).

[41] *Obama Vows to Help Small Businesses*, CNN POLITICS.COM, Mar. 16, 2009, *available at* http://www.cnn.com/2009/POLITICS/03/16/obama.small.business/index.html (last visited Mar. 7, 2010); Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Cong. (2010); Carl Hulse, *Senate Approves $15 Billion Job Bills*, N.Y. TIMES, Feb. 24, 2010, *available at* http://www.nytimes.com/2010/02/25/us/politics/25jobs.html (last visited Mar. 7, 2010).

always has been part of the FLSA, which, unlike Title VII, specifically provides for "opt-in" class actions. Allowing "opt-out" class actions under a law that makes it very difficult for employers to defend legitimate decisions while exposing them to unlimited punitive damages serves only one purpose: it encourages plaintiffs' attorneys to bring class action lawsuits against employers who may be forced to settle even when they did nothing wrong, or face financial ruin from the extraordinary costs associated with litigation of this nature.

**The Paycheck Fairness Act would not require the OFCCP to use multiple regression analysis when investigating potential discrimination.**

The proposed legislation would direct the EEOC to collect pay information from employers and impose obligations on the OFCCP for performing compensation discrimination analyses. Among other things, the OFCCP would be directed to use the "full range of investigatory tools" to determine the presence of potential discrimination in federal contractors' compensation systems. This would include the "pay grade methodology," which the OFCCP rejected in 2006, likening that approach to the discredited legal theory of comparable worth. Among other problems, the pay grade methodology assumes all individuals in the same pay "band" are similarly situated. Instead, the OFCCP has been using multiple regression analyses — which generally allows the OFCCP to consider the impact of variables, such as years of work experience, education, and past performance — to determine the presence of potential discrimination.

Under the Paycheck Fairness Act, the OFCCP would no longer need to perform multiple regression analysis to identify potential compensation discrimination and could instead rely on the flawed pay grade methodology. As a result, the OFCCP would likely bring more actions against employers based on inadequate and faulty data. Despite the fact that the data is inaccurate, employers would be forced to spend money defending themselves while the OFCCP wastes its own resources pursuing employers that have done nothing wrong. Given the OFCCP's own recognition that multiple regression analysis is a superior method for identifying discrimination, Congress should not force the agency to use an inferior — and discredited — method.

The Paycheck Fairness Act would also reintroduce another discredited tool: the OFCCP equal opportunity survey. Again, requiring the OFCCP to use a method it has rejected will impose an unnecessary burden on both the OFCCP and federal contractors, many of whom are small businesses who lack formal human resource departments, while doing nothing to reduce discrimination.

**The Paycheck Fairness Act would require the EEOC to collect employer wage data information, raising confidentiality issues that will need to be resolved.**

As drafted, the Paycheck Fairness Act would require the EEOC to issue regulations providing for collection of pay information data from employers "as described by the sex, race, and national origin of employees." Though S. 182 directs the EEOC to "consider factors including the imposition of burdens on employers, the frequency of required data collection reports (including which employers should be required to prepare reports), [and] appropriate

protections for maintaining data confidentiality…" nothing in the proposed legislation prohibits the EEOC from disclosing such data, including to competitors and trial lawyers. If the Paycheck Fairness Act becomes law, private employers may be required to provide extensive information to the EEOC with little assurance that the information will be protected from disclosure to the public, or to competitors.

**The Paycheck Fairness Act would encourage frivolous litigation by prohibiting employers from retaliating against employees who share salary information.**

Although the National Labor Relations Act already protects employees who share salary information with co-workers, the Paycheck Fairness Act would provide broader protection. Employers and courts are already besieged by retaliation claims that often lack merit; adding another cause of action to rectify a problem that does not exist will only lead to unnecessary litigation and additional wasted resources.

In all of my 20 plus years of employment law experience, I have never encountered a situation where an employer terminated — or even disciplined — an employee for communicating with co-workers regarding his or her salary. That is not to say that it does not happen but, in my experience, it would be extremely rare. And there is nothing in the extant laws that would keep someone penalized in this fashion from raising that theory under the current statutory structure. If the Paycheck Fairness Act becomes law, however, every employee who has previously communicated with co-workers regarding his or her pay and is later disciplined or terminated for a completely unrelated reason will consider pursuing a retaliation claim. Though most employers would ultimately prevail by demonstrating that the employment decision was unrelated to the employee's sharing salary information, companies will be forced to spend money and devote resources to defending these frivolous lawsuits.

Our nation's courts are already inundated with retaliation claims, which often go hand in hand with employment discrimination claims. In 2009, the EEOC received 28,948 retaliation charges filed under Title VII alone, encompassing over 31 percent of all charges filed with the EEOC.[42] Just ten years earlier, Title VII retaliation charges accounted for only 23.1 percent of all charges filed with the EEOC.[43] Creating a new retaliation cause of action for something that hardly ever happens will only further burden courts with needless litigation.

## The Fair Pay Act of 2009

The Fair Pay Act would amend the EPA by extending its coverage to claims of race and national origin discrimination and broaden the statute's requirement that the plaintiff show different pay for equal work and instead require only "equivalent" work. Similar to the Paycheck Fairness Act, the Fair Pay Act would expose employers to punitive and compensatory damages. It would also require all employers to keep records of the methods they use to set employee wages and provide yearly reports to the EEOC describing their workforce by position

[42] EEOC Charge Statistics FY 1997 Through FY 2009, *available at* http://www.eeoc.gov/eeoc/ statistics/ enforcement/charges.cfm (last visited Mar. 8, 2010).
[43] *Id.*

and salary, as well as gender, race, and ethnicity. The Fair Pay Act is unnecessary and harmful for many of the same reasons that the Paycheck Fairness Act is unnecessary and harmful. In addition, the Fair Pay Act — which is premised on the rejected theory of "comparable worth" — would require employers to provide the same pay for very different jobs. Comparable worth legislation will impose massive record-keeping and reporting costs on employers, while doing nothing to deter discrimination.

## Conclusion

Discrimination on the basis of sex is abhorrent. Pay differentials stemming from discriminatory practices clearly must be remedied, but our existing legal framework adequately provides protection.

My firm represents thousands of employers. Our 600 plus attorneys counsel our clients about how to ensure a workplace free of discrimination. Our clients affirmatively want that advice and embrace it for many positive reasons, among them the fact that effective human resources policies are a key competitive factor in the success of any organization.

The legislation before you will cause confusion in the workplace, and in the courts. It will take years and years of expensive litigation to understand and define its terms. The plaintiffs' bar will benefit. My firm may benefit as well.

But the U.S. workforce will not benefit. Passing a law which upends the current employment discrimination paradigm, and creates costly uncertainty in the marketplace, will do nothing to help this country emerge from its current economic crisis. The proposed legislation will certainly not bring down our unemployment rate, nor will it remedy gender based discrimination, especially since the vast majority of employers today embrace equal employment as an essential component of their core values. The small rate of EEOC for cause findings certainly supports this conclusion.

Women have come a long way in the workplace. I am but one of millions of examples of that fact. And I am confident my daughters will prosper and make even more progress during their lives. They do not need this legislation to help them achieve their goals and dreams. Let them be evaluated based on what they do and not who they are. We ask for no more and should demand no less. Our laws today provide us with that dignity.

# APPENDIX 1

| | Employees Covered | Statute of Limitations | Exhaustion of Administrative Remedies | Compensatory Damages | Punitive Damages | Class Actions Allowed | Affirmative Defenses |
|---|---|---|---|---|---|---|---|
| **Title VII** | 15 or more | 300 days to file admin-istrative charge with the EEOC | Required | Capped* | Capped* | Opt-out | *Disparate Treatment*: Legitimate, non-discriminatory reason for pay differential; *Disparate Impact*: Job-related and consistent with business necessity and no alternative employment practice exists |
| **EPA** | 2 or more | 2 years; 3 years if willful/ intentional | Not required | Back Pay | Liquidated Damages (equal to back pay) if willful violation | Opt-in | Seniority system; merit system; measure earnings by quantity or quality of production; a differential based on any factor other than sex |
| **PFA** | 2 or more | 2 years; 3 years if willful/ intentional | Not required | Uncapped | Uncapped | Opt-out | Seniority system; merit system; measure earnings by quantity or quality of production; bona fide factor other than sex if business necessity demands it and no alternative employment practice exists |

*****Title VII limits damage awards based on the number of employees the employer had during the current or preceding calendar year. The sum amount of compensatory and punitive damages that may be awarded is dependent on the number of employees as shown below:

| **Number of Employees** | **Damage Cap** |
|---|---|
| 15-100 employees | $50,000 |
| 101-200 employees | $100,000 |
| 201-500 employees | $200,000 |
| 500 plus employees | $300,000 |