



## Legal News

### Fairness For Whom?

by *Cassandra F. Fortin*



On September 13, 2010, Senator Harry Reid [D-NV] introduced S. 3772: Paycheck Fairness Act, which proposed more effective remedies to victims of wage-discrimination on the basis of sex. This bill is an amendment to the Fair Labor Standards Act of 1938. On September 14, 2010, it was Reported by Committee and placed on the Senate Legislative Calendar under General Orders. Calendar No. 561. The legislation was passed in the House on January 9, 2009 with 256 Ayes to 163 Nays.

In 2007, President Bush warned that he would veto the Paycheck Fairness Act. Indeed, it has been stalled by opposition from some Republicans and business groups, including the U.S. Chamber of Commerce. The Obama Administration, however, supports the Act. On September 20, 2010, the White House said it plans to press Congress to pass pay-equity legislation that would make it easier for women to sue employers that pay them less than their male counterparts.

White House senior advisor, Valerie Jarrett, called the legislation a needed "companion" to the Lilly Ledbetter Act, which President Obama signed days after he took office. The Ledbetter Act extended a 180-day statute of limitations on workers' ability to sue for pay discrimination.

The Paycheck Fairness Act makes five changes to federal wage and hour laws that should be on the radar of employers and employment lawyers alike.

First, the current Equal Pay Act's remedies include back pay and liquidated damages, which are capped at the amount of back pay received. The proposed legislation increases the available remedies for sex discrimination in wage payments because it allows for uncapped punitive and compensatory damages.

Second, the Paycheck Fairness Act prohibits an employer from retaliating against an employee who inquired about, discussed or disclosed the wages of the employee or another employee, unless discussing wages is part of an employee's essential job

function.

Third, the current Equal Pay Act requires that sex discrimination wage payment class actions members "opt in" to the class membership. The Paycheck Fairness Act would change this from "opt in" classes to "opt out" classes. The effect of this will increase class size and make it easier for employees to join class actions.

Fourth, the Paycheck Fairness Act requires the EEOC to issue regulations on the collection of pay information from employers. Additionally, it would require the Office of Federal Contract Compliance Programs to use its "full range of investigatory tools" for investigation, compliance and enforcement.

Lastly, under the current Equal Pay Act, an employer can defend against a claim by showing that the pay difference between men and woman was caused by "any factor other than sex." The Paycheck Fairness Act impedes the ability of employers to defend against sex discrimination wage payment claims in that it requires employers to show "a bona fide factor other than sex, such as education, training, or experience," that is not sex-based, but is job-related to the position and consistent with business necessity. Furthermore, even if an employer establishes the latter, an employee can still prevail by showing that the employer refused to adopt an alternative employment practice that would serve the same business purpose without producing the same wage difference.

In a nutshell, the Paycheck Fairness Act increases employers' potential exposure while simultaneously limiting their ability to defend against sex discrimination wage claims. Moreover, in an effort to strengthen this legislation, the Obama Administration plans to improve the government's data collection from businesses to get a better handle on the scope of wage discrimination, to close the wage gap among federal employees, and to promote greater workplace flexibility. Given its implications for employers, the legislation should be on every employment lawyer's mind.

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