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# Paycheck Fairness Act Unfairly Burdens Employees and Employers

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The Federal Government prohibits sexual discrimination in the workplace. Employers who pay similarly qualified male and female workers different wages for the same job face stiff legal sanctions. The law does not set wages, however. Employers may pay different wages to workers with different qualifications or who work different jobs. This is sound policy. The government has a legitimate role in protecting women from discrimination, but should allow employers to decide how they value the work performed for them.

The Paycheck Fairness Act (PFA, H.R. 1338) undermines this policy. In the name of protecting women from discrimination, the Act permits the government and the courts to micromanage employers, tying them up in a sea of red tape. The Act gives a windfall to trial lawyers, exposing employers to unlimited punitive damages for unintentional mistakes. Any financial benefits reaped by trial lawyers, however, will come at the expense of workers, whose wages will fall in order to cover the increased cost of legal liability insurance. The Act also obliges the government to adopt junk science by requiring the use of a highly flawed survey while declaring the best scientific practices for assessing discrimination superfluous. The PFA will hurt the very workers it is meant to help.

**Different Pay for Different Work Permissible.** In the United States, men earn more, on average, than women. The median man working full time in the United States earns $741 a week, compared to $600 a week for the median woman.[1]

This gender gap is not the result of rampant discrimination. Rather, it exists because men and women often work in different jobs and have different qualifications. When work experience, education, and occupation are taken into account, the average woman makes 98 cents for every dollar earned by a man.[2]

The gender gap has also closed substantially in recent years. In recent decades women have attained more education, gained more experience, and shifted towards higher paying occupations. As they have done so, the gender gap has narrowed.[3] Such data indicates that employers indeed provide equal pay for equal work.

While the law prohibits sexual discrimination, it does not dictate how employers must otherwise pay employees. Different pay for different work is legal and expected. A company may pay a more experienced man a greater amount than a less experienced woman. The law protects workers from discrimination but does not micromanage businesses.

**Micromanaging Employers.** Section 3(A) of the PFA turns this principle on its head. Under the current Equal Pay Act, once employees have provided *prima facie* evidence of sex discrimination, the bur-

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den of proof shifts to the employer to show that the difference in wages results from "any factor other than sex."

The PFA eliminates the "any factor other than sex" defense and replaces it with a "bona fide factor other than sex" defense. Employers can only use this "bona fide factor" defense if they demonstrate that business necessity demands it. Additionally:

> Such defense shall not apply where 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.[4]

Consequently, under the PFA, government and the courts dictate business practices to employers. Consider a company with two employees in a division: a man with ten years experience and a newly hired woman. If the company paid the man greater wages for his greater experience, the woman could insist that the employer provide her with intensive training to make up the experience gap, and then her pay identical wages. And if the company refused? The woman in question could sue.

For some companies this would make sense, while in others it would not. The government does not know which business practices are best for individual enterprises. Drowning businesses in acceptable business practices litigation imposes a heavy burden on companies and reduces their competitiveness. The mandates imposed by the PFA would cost additional jobs at a time when the economy is already weak.

**Jackpot Justice.** The PFA compounds this problem by giving a windfall to trial lawyers at the expense of employees. Under the Equal Pay Act, employers are liable for both intentional and unintentional discrimination. In the case of intentional discrimination, employees can receive up to $300,000 in compensatory and punitive damages. However, the law is not a lottery. The Equal Pay Act compensates workers for discrimination and provides appropriate damages while preventing multimillion dollar jackpot judgments that encourage frivolous lawsuits.

The PFA removes the Equal Pay Act's limits on punitive and compensatory damages and applies punitive damages to cases of unintentional discrimination. It also specifies that workers are automatically members of a class action suit unless they opt out.

Punitive damages exist to deter and punish intentional wrong doing. Therefore, it makes no sense to allow punitive damages in cases of inadvertent discrimination. The PFA will encourage trial lawyers to initiate many frivolous class-action suits in hopes of winning a few large judgments. Many employers who did nothing wrong would still be dragged into court in the hopes that they might be forced to pay out millions. Employers who won their cases would still have to cover the costs of their legal defense.

Such "jackpot justice" ultimately hurts workers because these legal costs will come out of their wages. Employers would protect themselves by purchasing legal liability insurance, thus increasing the cost of doing business. Studies show that employers respond to higher insurance costs by reducing employee's wages and hiring fewer workers.[5] The PFA means millions of dollars for trial lawyers but lower wages and fewer jobs for most Americans.

1. U.S. Department of Labor, Bureau of Labor Statistics, *Women in the Labor Force: A Databook 2007*, Report 1102 (September 2007), Table 16, at *http://www.bls.gov/cps/wlf-databook-2007.pdf* (July 30, 2008).
2. June O'Neill, "The Gender Gap in Wages, Circa 2000," *The American Economic Review*, Vol. 93, No. 2, Papers and Proceedings of the One Hundred Fifteenth Annual Meeting of the American Economic Association, Washington, D.C., January 3–5, 2003 (May 2003), p. 313.
3. Kevin Lang, *Poverty and Discrimination in America* (Princeton, N.J.: Princeton University Press, 2007), p. 370.
4. The Paycheck Fairness Act, H.R. 1338, 110th Cong., 2nd Session, § 3(A).
5. See for example Jonathan Gruber, "The Incidence of Mandated Maternity Benefits," *The American Economic Review*, Vol. 84, No. 3 (June 1994), pp. 622–641; Katherine Baicker and Amitabh Chandra, "The Labor Market Effects of Rising Health Insurance Premiums," *Journal of Labor Economics*, Vol. 24, No. 3 (July 2006), pp. 609–634.



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**Junk Science.** Section 9 of the PFA also requires the government to use junk science. It instructs the Office of Federal Contract Compliance Programs (OFCCP) to reinstitute the Equal Opportunity Survey and use the survey to identify federal contractors for further investigation. However, the Department of Labor discontinued this survey after concluding that it was essentially worthless in identifying sexual discrimination. A detailed study falsely identified 93 percent of the companies survived as guilty of discriminatory practice, thus performing little better than random chance at identifying discrimination.[6]

In addition to requiring the OFCCP to use a flawed survey, the PFA prevents the OFCCP from using the best science available in discrimination cases. Section 9 specifies that the OFCCP "shall not require a multiple regression analysis or anecdotal evidence for a compensation discrimination case." Multiple regressions are the basic scientific tool used to examine how the relation between variables—such whether pay varies by gender—while controlling for the effects of other variables, such as education, experience, and occupation. Virtually every scientific discipline relies on multiple regression analysis. In effect, preventing the OFCCP from requiring regression analysis guarantees the best, most scientifically valid data available will not be used.

**Burden on Employers and Employees.** Presently, the law protects women from gender discrimination, and studies show that the vast majority of employers provide equal pay for equal work. Employers must have the freedom to adopt the best business practices available, and the law defends that right. The Paycheck Fairness Act will do little to combat discrimination, but will heavily burden both employers and employees. Congress should not expose employers to frivolous lawsuits or micromanage business practices in an already weak economy.

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6. *Federal Register*, Vol. 71, No. 13 (January 20, 2006), pp. 3374–3379, at *http://edocket.access.gpo.gov/2006/pdf/E6-646.pdf* (July 30, 2008).