

WebMemo



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The Paycheck Fairness Act: The Heritage Foundation 2009 Labor Boot Camp

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What Is the Paycheck Fairness Act (PFA)?

- Under the current Equal Pay Act, once employees have provided prima facie evidence of sex discrimination, the burden 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.
 - 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.
- The PFA makes employers liable for unlimited punitive damages in addition to compensatory damages in cases of sex discrimination.
- The PFA makes it easier to bring class action lawsuits in such cases.

Policy Objections

- Now employers must justify their pay practices with a “bona fide” factor other than sex that they must potentially defend in the courts. If employees can find an alternative business practice that does not result in a pay disparity, employers must adopt it. Under the PFA, government and the courts dictate business practices to employers.

- The PFA removes the Equal Pay Act’s limits on punitive and compensatory damages.
- It specifies that workers are automatically members of a class action suit unless they opt out.
- Section 9 of the PFA 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.
 - The Department of Labor discontinued this survey after concluding that it was essentially worthless in identifying sexual discrimination. A detailed study found the EOS had a 93 percent false-positive rate and a 33 percent false-negative rate. Most companies identified as discriminating did not, while a third of companies discriminating were missed by the survey. The EOS did little better than random chance at identifying discrimination..
- 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.

This paper, in its entirety, can be found at:
www.heritage.org/Research/Labor/wm2212.cfm

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Economic Effects

- Under the PSA, the government will inject itself into areas of business over which it has no experience. For instance:
 - Does experience constitute a “bona fide factor other than sex”?
 - A woman earning less than a man with more experience could argue that her employer should be required to send her to training and then pay them identical wages. She would have a strong case to argue that experience was not a “bona fide” factor because an alternative employment practice would eliminate the disparity.
 - o Potential investors would likely be deterred by such increased costs and government interference.
- The PSA gives a windfall to trial lawyers, exposing employers to unlimited punitive damages.
- The PFA will encourage trial lawyers to initiate many frivolous class-action suits in hopes of winning a few large judgments.
- Any financial benefits reaped by trial lawyers, however, will come at the expense of workers. Employers would protect themselves by purchasing legal liability insurance, which would be partly paid for by reducing workers wages. The PFA will hurt the very workers it is meant to help.
- The PFA means millions of dollars for trial lawyers but lower wages and fewer jobs for most Americans.

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