

WebMemo



Published by The Heritage Foundation

No. 3159
February 22, 2011

Paycheck Fairness Act

James Sherk

What Is the Paycheck Fairness Act (PFA)?

- Currently, under the Equal Pay Act, once employees have provided *prima facie* evidence of sex discrimination in compensation, the burden of proof shifts to the employer to show that the difference in wages results from “any factor other than sex.”
 - The PFA would eliminate the “any factor other than sex” defense and replaces it with a “bona fide factor other than sex” defense. Employers can use this “bona fide factor” defense only if they demonstrate that business necessity demands it.
 - However, if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing a gender differential and that the employer has refused to adopt this alternative practice, then employers may not use this defense.
- The PFA would make employers liable for unlimited punitive damages in addition to compensatory damages in cases of sex discrimination in compensation.
- The PFA would make it easier to bring class-action lawsuits in such cases.

Policy Objections:

- The PFA would force employers to justify their pay practices with a “bona fide” factor other than sex and defend it 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 would remove 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 (EOS) and use the survey to identify federal contractors for further investigation.
 - The Department of Labor discontinued this survey after concluding that it failed to identify sexual discrimination. A detailed study found that 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:
<http://report.heritage.org/wm3159>

Produced by the Center for Data Analysis

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Economic Effects:

- The PFA would facilitate lawsuits and cost jobs.
 - The PFA would give a windfall to trial lawyers, exposing employers to unlimited punitive damages.
 - The PFA would encourage trial lawyers to initiate many frivolous class-action suits in hopes of winning a few large judgments.
 - The successful lawsuits could transfer billions of dollars from employers to trial lawyers, bankrupting businesses and costing jobs.
 - The increased legal risks would also reduce the incentive for business owners to start new businesses or invest in and expand their firms, costing even more jobs.
 - The PFA would mean millions of dollars for trial lawyers but fewer jobs for most Americans.
- Under the PFA the courts would micromanage businesses.
 - For instance, the courts would have to decide: Does experience constitute a “bona fide factor other than sex”?
 - A woman earning less than a more experienced man 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.
 - Government micromanaging over areas in which the courts have no business expertise would reduce business competitiveness and cost jobs.
- James Sherk* is Senior Policy Analyst in Labor Economics in the Center for Data Analysis at The Heritage Foundation.