

# ISSUE BRIEF

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## Paycheck Fairness Act Unfairly Burdens Employees and Employers

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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. 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.

S. 3220, the Paycheck Fairness Act (PFA), undermines this policy. In the name of protecting women from discrimination, the PFA allows employees to sue businesses that pay different workers different wages—even if those differences have nothing to do with the employees' sex. These lawsuits can be brought for unlimited damages, giving a windfall to trial lawyers. Any financial benefits they reap, however, would

come at the expense of workers. The PFA would 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 \$824 a week, compared to \$669 a week for the median woman.<sup>1</sup>

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

In recent decades, women have attained more education, gained more experience, and shifted toward higher-paying occupations. Women now constitute almost three out of every five college students, and more women than men earn PhDs each year.<sup>3</sup> As they have done so, the gender gap has narrowed.<sup>4</sup>

Both Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963 prohibit sexual discrimination in the workplace. However, 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 and vice versa. 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 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 use this “bona fide factor” defense only if they demonstrate that “business necessity” demands it. The PFA further provides:

Such [bona fide factor] defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing

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such differential and that the employer has refused to adopt such alternative practice.<sup>5</sup>

Consequently, the PFA would make virtually any pay difference between a male and female worker grounds for a lawsuit. An employee could sue if she could find an alternative pay practice that arguably serves the same business purpose. This would lead to the government and the courts dictating business practices to employers.

Consider a company with two employees in a division: a man with 10 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 pay her identical wages. And if the company refused? The woman in question could sue.

Or consider a man who consistently performs better than his peers—both male and female—and so earns higher pay than other employees with the same job title. This would also be potential grounds for a lawsuit. A female colleague could argue that performance pay was

not a business necessity—unionized employers typically do not pay more productive employees higher wages.<sup>6</sup> If the business refused to pay everyone with the same job title the same amount, she could file a lawsuit.

Paying uniform wages for everyone with the same job title, or ignoring experience in setting pay, might make sense for some companies. For other companies, it would not. The government does not know which business practices are best for individual enterprises. 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.

The PFA removes these limits on punitive and compensatory damages and specifies that workers are automatically members of a class-action suit unless they opt out. This makes filing class action lawsuits more profitable.

The PFA would 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.<sup>7</sup>

**Eliminating Performance Pay.** In any job, there are some men who are more productive than some women, and vice versa. The PFA would allow a woman getting paid less than a man to sue, even if the pay difference had nothing to do with her sex. This gives businesses very strong incentives to pay workers with the same duties exactly the same wages regardless of performance.

Employers increasingly use performance pay to motivate productivity. Over 40 percent of Americans

1. U.S. Department of Labor, Bureau of Labor Statistics, “Women in the Labor Force: A Databook 2011,” December 2011, table 16, <http://www.bls.gov/cps/wlf-databook-2011.pdf> (accessed June 5, 2012).
2. June O’Neill, “The Gender Gap in Wages, circa 2000,” *American Economic Review*, Vol. 93, No. 2 (May 2003), p. 313.
3. Daniel de Vise, “More Women Than Men Got PhDs Last Year,” *The Washington Post*, September 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/13/AR2010091306555.html> (accessed June 5, 2012).
4. Kevin Lang, *Poverty and Discrimination in America* (Princeton, NJ: Princeton University Press, 2007), p. 370.
5. The Paycheck Fairness Act, S. 3220, 112th Cong., 2nd Session, § 3(A).
6. David Metcalf, Kirstine Hansen, and Andy Charlwood, “Unions and the Sword of Justice: Unions and Pay Systems, Pay Inequality, Pay Discrimination and Low Pay,” *National Institute Economic Review*, Vol. 176, No. 1 (2001), pp. 61–75; and Richard B. Freeman, “Union Wage Practices and Wage Dispersion Within Establishments,” *Industrial and Labor Relations Review*, Vol. 36, No. 1 (October 1982), pp. 3–21.
7. See, for example Jonathan Gruber, “The Incidence of Mandated Maternity Benefits,” *American Economic Review*, Vol. 84, No. 3 (June 1994), pp. 622–641; and 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.

now work in jobs with performance pay.<sup>8</sup> This motivates employees to work harder—they know hard work will be rewarded—which in turn raises their pay. Average wages rise 6–10 percent after companies implement performance pay systems.<sup>9</sup> Companies can afford these raises because their workers become more productive.

Forcing uniform pay scales on employers would mean lower wages for both men and women. Companies should be allowed to reward good performance without risking a

lawsuit. Punishing companies that do not adopt uniform pay scales would cut the wages of both men and women.

**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. The PFA does little to combat discrimination. It would heavily burden both employers and employees with frivolous litigation by trial lawyers hoping to hit a multi-million-dollar jackpot.

Employers would defend themselves from litigation by using uniform pay systems that ignore individual performance. This would cut the pay of both men and women.

Congress should not expose employers to frivolous lawsuits or micromanage business practices in an already weak economy.

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8. Thomas Lemieux, W. Bentley MacLeod, and Daniel Parent, "Performance Pay and Wage Inequality," *Quarterly Journal of Economics*, Vol. 124, No. 1 (2009), pp. 1–49.
9. Alison L. Booth and Jeff Frank, "Earnings, Productivity, and Performance-Related Pay," *Journal of Labor Economics*, Vol. 17, No. 3 (July 1999), pp. 447–463; Edward Lazear, "Performance Pay and Productivity," *American Economic Review*, Vol. 90, No. 5 (December 2000), pp. 1346–1361; Tuomas Pekkarinen and Chris Riddell, "Performance Pay and Earnings: Evidence from Personnel Records," *Industrial and Labor Relations Review*, Vol. 61, No. 3 (April 2008), pp. 297–319; Adam Copeland and Cyril Monnet, "The Welfare Effects of Incentive Schemes," *Review of Economic Studies*, Vol. 76, No. 1 (2009), pp. 93–113; and Daniel Parent, "Methods of Pay and Earnings: A Longitudinal Analysis," *Industrial and Labor Relations Review*, Vol. 53, No. 1 (October 1999), pp. 71–86.