The Heritage Foundation

ISSUE BRIEF

No. 4200 | APRIL 17, 2014

Paycheck Fairness Act Would Reduce Pay and Flexibility in the Workplace

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In the name of protecting women from discrimination, the Paycheck Fairness Act (PFA) would allow 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' freedom, opportunity, and pay. Employers would respond to these increased risks by implementing more uniform pay structures that would limit employees' flexibility and opportunity for advancement. 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 frequently cited figure that women make only 77 cents for every dollar earned by men does not take into account any possible explanations for different wages.

When other factors that affect wages—such as work experience, education, occupation, hours of work, and other observable characteristics—are taken into account, the average woman makes between 95 and 98 cents for every dollar earned by a man.[1] Other factors not measured in government surveys may account for the remaining difference.

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.[2] As they have done so, the gender gap has narrowed.[3]

Micromanaging Employers. Both Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963 prohibit sexual discrimination in the workplace. However, the law does not dictate how employers must pay employees. The law protects workers from discrimination but does not micromanage businesses. 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 would eliminate the "any factor other than sex" defense and replace it with a "bona fide factor other than sex" defense. This means employers must prove that any difference in pay constitutes a "business necessity" for which no other remedy is available. 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 such differential and that the employer has refused to adopt such alternative practice.[4]

Consequently, the PFA would make virtually any pay difference between a male and female worker

This paper, in its entirety, can be found at **http://report.heritage.org/ib4200**

Produced by the Center for Data Analysis

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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.

Even if observable factors besides sex explain differences in pay, those factors may not suffice for a defense against lawsuits under PFA standards. Consider a company with two employees in the same 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.

Jackpot Justice. The PFA would compound this problem by giving a windfall to trial lawyers at the expense of employees—encouraging more lawsuits.

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 would remove 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. Even employers who won their cases would still have to pay for their legal defense.

Such "jackpot justice" ultimately hurts workers, because these legal costs will come out of their wages and work opportunities. 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]

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.

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 constitute 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.[6] If the business refused to pay everyone with the same job title the same amount, she could file a lawsuit.

This gives businesses very strong incentives to pay workers with the same duties exactly the same wages regardless of performance—reducing average pay for both men and women.

Employers increasingly use performance pay to motivate productivity. Over 40 percent of Americans now work in jobs with performance pay.[7] This motivates employees to work harder—they know

1. June O'Neill, "The Gender Gap in Wages, circa 2000," *American Economic Review*, Vol. 93, No. 2 (May 2003), p. 31, and CONSAD Research Corporation, "An Analysis of the Reasons for the Disparity in Wages Between Men and Women," final report prepared for the U.S. Department of Labor, January 2009, Tables 6 and 7.
2. Mark J. Perry, "Women Earned Majority of Doctoral Degrees in 2012 for 4th Straight Year, and Outnumber Men in Grad School 141 to 100," American Enterprise Institute, September 30, 2013, http://www.aei-ideas.org/2013/09/women-earned-majority-of-doctoral-degrees-in-2012-for-4th-straight-year-and-outnumber-men-in-grad-school-141-to-100/ (accessed April 15, 2014).
3. CONSAD, "An Analysis of the Reasons for the Disparity in Wages Between Men and Women."
4. The Paycheck Fairness Act, S. 84, § 3(A).
5. 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.
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. 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.

hard work will be rewarded—which in turn raises their pay. Average wages rise 6 percent to 10 percent after companies implement performance pay systems.[8] Companies can afford these raises because their workers become more productive.

Forcing uniform pay scales on employers would reduce productivity—and consequently 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.

Less Workplace Flexibility. As women's labor force participation has risen over the past decades, so, too, has workplace flexibility. Employees have benefitted from the availability of flexible and more accommodative work arrangements such as teleworking, customized schedules, and unscheduled leave. Employers have also benefited from such flexibilities that can increase employees' productivity and morale.

Oftentimes, employees are willing to accept lower pay in exchange for some of these flexible arrangements. The PFA could prevent such mutually beneficial arrangements because of the risk of lawsuits. The PFA would move employers toward uniform pay scales and uniform work schedules. Rather than choosing a suitable work-life balance, some women could be driven out of the labor force, while others could be forced to accept undesirable jobs.

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 would do little to combat discrimination. It would heavily burden both employers and employees with frivolous litigation. Employers would defend themselves by using uniform pay systems and uniform work schedules that ignore individual performance and individual preference. This uniformity would cut the pay and limit the flexibility of both men and women.

Congress should not expose employers to frivolous lawsuits, micromanage business practices, or restrict the personal choices of employees. The PFA's unnecessary intrusions would weaken the economy and hurt the women it aims to help.

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8. 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.