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PAYCHECK FAIRNESS ACT

You may recall that a month or so ago, a talking head "pundit," described as a Democratic political "strategist," made a comment about presumptive (*how many times have you read that word already*) Republican presidential nominee Mitt Romney's wife, "having not worked a day in her life." In the quirky ways of Washington, the comment and the ensuring reaction by both candidates may provide the momentum for an equal pay for women bill. The Senate may consider S.797, the Paycheck Fairness Act, introduced by Senator Barbara Mikulski (D-MD). The companion bill in the House, H.R.1519, was introduced by Representative Rosa DeLauro (D-CT.) This initiative was passed by the House in 2009, but the Senate did not follow suit.

This legislation is not to be confused with the Ledbetter Fair Pay Act of 2009 which was signed into law by President Obama as Public Law 111-2 on January 29, 2009. The law amends various federal equal employment opportunity laws to clarify discrimination occurs every time a paycheck is issued following a discriminatory compensation decision. In effect, a new 180-day period to file a discrimination claim would commence.

Background

The topic of equal pay discrimination is a complicated one. There are actually four federal laws in play, the Equal Pay Act (EPA,) Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).

The Equal Pay Act of 1963 is part of the Fair Labor Standards Act (FLSA) but is administered and enforced by the Equal Employment Opportunity Commission (EEOC). It prohibits sex-based wage discrimination between men and women in the same establishment who are performing under similar working conditions.

The EPA requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides employers may not pay unequal wages to men and women who perform jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. The EEOC describes these factors this way:

Skill – is measured by factors such as the experience, ability, education, and training required to perform the job. The key issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort – is the amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility – is the degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

Working Conditions - encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation and (2) hazards.

Establishment - The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. However, in some circumstances, physically separate places of business should be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply. In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

Damages are the amount of difference between that which was paid to the claimant and what would have been paid if the claimant's pay had been equal to others. The period of pay is up to two years in back pay, three years if willful. Whatever the amount is, it is doubled as liquidated damages.

Since the EPA is a provision of the FLSA, the basic employee threshold is that of the FLSA which means it is generally applicable regardless of the number of employees (The exceptions are limited, for example, a retail establishment with an annual dollar volume of sales of at less than $500,000 and no employees engaged in interstate commerce.) The exemptions of the FLSA (e.g. white collar) do not apply.

Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement under Title VII, the ADEA, or the ADA that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class, nor do these statutes require the claimant to work in the same establishment as a comparator.

The coverage threshold for a business for Title VII and the ADA is fifteen or more employees and the ADEA threshold is twenty or more employees.

This bill is only applicable to the EPA.

Legislation

The bill revises the "any factor other than sex" defense by requiring employers to provide non-gender reasons for the difference in wages based on a business justification. An employer must demonstrate that the disparity is based on a bona fide factor other than sex, such as education, training, or experience, that is: (1) not based upon or derived from a sex-based differential; and (2) related to the position in question; and (3) consistent with business necessity. Such a defense shall not apply if the employee can then demonstrate that an alternative employment practice exists that would serve the same business purpose without producing the differential, and the employer refused to adopt the alternative.

The bill broadens the range of where a female employee can look to find a male comparator within a company. Employees shall be considered to work in the same establishment if the employees work at workplaces located in the same county or similar political subdivision of a state. In addition, the bill recognizes that establishment, consistent with rules or guidance offered by the EEOC, can be applied more broadly when, for example, there is a central decision-making structure that makes the salary and hiring decisions for employees in multiple locations.

The bill would prohibit employers are from retaliating against employees who share salary information with their co-workers. Employees are protected when they have disclosed, discussed, or inquired about the wages of

another employee. In addition, employees are protected if they make a charge, file a complaint, or participate in any way in a government-initiated or employer-initiated investigation, including but not limited to testifying, assisting or participating in any way an investigation, proceeding, hearing, or has served or plans to serve on an industry committee.

Employees with access to wage information of other employees as an essential function of their job, such as payroll and human resource personnel, would not be protected if they disclose that wage information to individuals who do not otherwise have access to this information. However, they would be protected if: (1) they were disclosing that wage information to someone who also has access to such information; (2) they were disclosing their own wages; or (3) the disclosure was in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under the EPA, including an internal employer investigation.

The bill would permit compensatory and punitive damages in private EPA suits. In addition, class action lawsuits brought under the EPA shall proceed as opt-out class actions in conformity with the Federal Rules of Civil Procedure.

Opposition

In the 110th Congress, the Bush Administration issued a Statement of Administration Policy (SAP) in opposition to the bill. The SAP sums up the basic arguments as follows:

"Other employment statutes, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, provide for limited compensatory and punitive damages of up to $300,000 (but unlimited back pay). These statutes only provide for such damages after a showing that the discrimination was intentional and, for punitive damages that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." To permit punitive damages in the absence of intent or reckless indifference would be wrong. Moreover, there is no need to add punitive damages to the EPA, since such damages are already available under Title VII for pay discrimination.

"Further, the bill appears to significantly change one of the affirmative defenses available under the EPA that is used to explain wage differentials due to such nondiscriminatory factors as market rates and prior salary history. Changing the "factor other than sex" affirmative defense would impose a tremendous burden on employers. They would be required to prove, in order to counter the presumption of wage discrimination, that the reason for the wage differential is something other than not only sex, but that it also passes "job relatedness" and a "business necessity" test that would be determined by a judge or jury. The judicial system -- judges and juries -- would supplant the free market system to determine how businesses must be run and how much they must pay individual workers.

"The bill also would significantly change the "establishment" requirement under the EPA to allow for pay comparisons within the same county (or political subdivision) rather than within the same physical place of business. Moreover, the bill would permit and invite the Equal Employment Opportunity Commission to develop rules defining the term "establishment" more broadly, which would potentially allow for the comparison of employee pay in different locations - with different market rates and costs of living. For example, the bill contemplates rules under which an employee working for a company in Omaha, Nebraska, might be able to compare her salary even to that of a coworker in New York, New York, to prove her case of discrimination. Such a comparison of dissimilarly situated employees makes no sense if the goal is to identify differences in pay that are due to discrimination."