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DISCRIMINATION

Nearly five decades after passage of the Equal Pay Act, supporters are seeking passage of the Paycheck Fairness Act, a sweeping measure that would substantially increase the ability of workers and the government alike to assume roles in determining and policing employee compensation, Dinsmore & Shohl attorney William Robinson writes in this BNA Insights article.

Supporters claim the measure is a much-needed update to the EPA, Robinson says, but opponents contend the bill goes too far and could raise unemployment, snare employers in frequent wage litigation, and result in foreign outsourcing. Robinson analyzes the legislation itself, the need for such legislation, and whether the Paycheck Fairness Act is the answer to the persisting gender wage gap.

The Paycheck Fairness Act

By William Robinson

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Throughout his 2008 election campaign, President Obama placed equal pay for women among those causes at the forefront of his party's platform. Before his inaugural ceremony even took place, the House of Representatives passed its version of the Paycheck Fairness Act by a vote of 256–163. A Senate companion bill was introduced shortly thereafter by then-Sen. Hillary Clinton (D-N.Y.).

Though that bill eventually stalled, Majority Leader Harry Reid (D-Nev.) reintroduced a new Senate version of the Paycheck Fairness Act (S. 3772), virtually identical to the legislation passed by the House, on Sept. 14, 2010. Against the hopes and wishes of many of its supporters, the bill failed to receive consideration before the Senate adjourned its fall session in advance of 2010 congressional elections. It is now on the Senate calendar to be considered in the lame-duck session of Congress on Nov. 17, 2010. If it receives the required 60 votes, it will proceed to the Senate floor for a final vote.

What Is the Paycheck Fairness Act?

In 1963, Congress passed the Equal Pay Act, which mandates equal pay for the performance of jobs that require (1) equal skill, (2) equal effort, (3) equal responsibility, and which are performed under (4) equal working conditions. 29 U.S.C. § 206(d)(1). In enacting the statute, Congress chose the term "equal" over the word "comparable" in order "to show that the jobs involved should be virtually identical, that is …very much alike or closely related to each other." *Brennan v. City Stores Inc.*, 479 F.2d 235, 238, 9 FEP Cases 846 (5th Cir. 1973) (internal quotation omitted). *See also, Waters v. Turner*, *Wood & Smith Ins. Agency Inc.*, 874 F.2d 797, 799, 50 FEP Cases 327 (11th Cir. 1989); *EEOC*

v. Madison Community Unit School Dist., 818 F.2d 577, 582, 43 FEP Cases 1419 (7th Cir. 1987).

Otherwise stated, the term "equal" has been interpreted to mean "substantially equal." *See, e.g., Wheatley v. Wicomico County,* 390 F.3d 328, 332, 94 FEP Cases 1409 (4th Cir. 2004). Jobs do not automatically involve equal effort or responsibility even if they "entail most of the same routine duties." *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493, 9 FEP Cases 706 (4th Cir. 1972). Jobs are considered unequal—despite having the same general core responsibilities—"if the more highly paid job involves additional tasks which (1) require extra effort … (2) consume a significant amount of the time …and (3) are of an economic value commensurate with the pay differential." *Id*. (internal quotation omitted).

Nearly five decades after passage of the Equal Pay Act, supporters are seeking passage of the Paycheck Fairness Act in an effort to close perceived loopholes in the existing statute and to enact provisions they believe will finally achieve its original goals. The bill, as passed in the House and reintroduced in the Senate, is fairly sweeping in its scope and would substantially increase the ability of workers and the government alike to assume roles in determining and policing employee compensation. It would:

- alter the parties' respective burdens of proof in the litigation of federal wage discrimination actions. Under the Equal Pay Act, employees are required to prove a prima facie case of wage discrimination by demonstrating that the skill, effort, and responsibility required in her job performance are equal to those of a higher-paid male employee. *Wheatley,* 390 F.3d at 332 (4th Cir. 2004). If the employer succeeds in proving a prima facie case, the burden of proof shifts to the employer to demonstrate that the wage disparity results from "any factor other than sex."

The Paycheck Fairness Act eliminates the "any factor other than sex" standard and replaces it with a "bona fide factor" defense, which would require an employer to affirmatively show that any wage discrepancy is caused by a bona fide factor other than sex, such as education, training or experience, and that this factor is job-related and consistent with "business necessity." If, however, the employee presents evidence demonstrating 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 that alternative practice, the employer's business necessity defense collapses.

- expand remedies available to prevailing plaintiffs in wage discrimination actions. Currently, the Equal Pay Act provides for up to three years of back pay, and twice that amount in liquidated damages in the case of proven willful violations. If enacted, the Paycheck Fairness Act would allow plaintiffs to recover unlimited compensatory damages and, if it is found the employer "acted with malice or reckless indifference," punitive damages.

- fundamentally alter the landscape of class action wage suits by eliminating the current requirement that employees affirmatively agree to take part in a class action to be included, and specifying that workers are automatically members of the class unless they opt out.

- mandate that the EEOC promulgate regulations directing employers to collect and report wage data by employee race, sex and national origin.

- alter the "establishment" provision of the Equal Pay Act by eliminating the requirement that employees work in the same establishment for purposes of wage comparison. Rather, the definition of an employer's establishment could be broadened to include multiple workplaces in the same county or similar political subdivision of the state in which it is located.

- include an anti-retaliation provision that would protect employees who have made a complaint, filed a charge, testified or otherwise assisted in an investigation or proceeding related to a wage complaint, or have inquired about their employer's wage practices or disclosed their or their co-workers' wages.

- require reinstatement of the Equal Opportunity Survey ["EOS"], administered by the Office of Federal Contract Compliance Programs ["OFCCP"], requiring federal contractors and subcontractors to submit data relating to hiring, promotions, terminations, and wages.

The OFCCP also would be given additional tools intended to investigate wage disparities.

• call for the EEOC and OFCCP to expand training on wage discrimination issues so as to better identify and handle wage disputes. DOL also would be required to develop or expand activities designed to foster equal pay, including educational programs, providing technical assistance to employers, and conducting or promoting research addressing wage disparities among the genders.

• create a grant program to develop salary negotiation training for females.

Does There Remain a Gender Wage Gap Requiring Correction?

As with most issues captured within the maelstrom of American politics, there is substantial disagreement among supporters and detractors of the Paycheck Fairness Act as to the size, or at least the cause, of the gender wage gap still remaining in 2010. Numerous contemporary analyses seem to give proof to the continued existence of a disparity, however.

When the Equal Pay Act was passed in 1963, it was estimated that women earned just 59 cents for every dollar earned by men performing the same work. Nearly 50 years later, it is reported that women still earn only 77 cents for every dollar earned by similarly situated men. The disparity exists nationwide, in all states, and crosses all racial and ethnic lines.

The American Association of University Women recently studied female workers who have achieved the same level of educational attainment, hold the same types of jobs, and have the same marital and family dynamics as their male peers. According to their findings, college-educated women earn 5 percent less their first year out of school than men, and that gap broadens to 12 percent by year 10.

During a Joint Economic Committee hearing in September 2010, Congress released a General Accounting Office Study concluding that female managers, who constitute 40 percent of that segment of the workforce, earned 19 percent less than their male counterparts (187 DLR A-11, 9/28/10). The significance of those findings was somewhat undermined, however, by an accompanying letter from Andrew Sherrill, the GAO's Director of Education, Workforce, and Income Security Issues, cautioning that the study did not incorporate factors such as “managerial responsibility, field of study, years of experience, or discriminatory practices, all of which can be found in the research literature as affecting earnings.” Thus, said Sherrill, “[o]ur analysis neither confirms nor refutes the presence of discriminatory practices.”

Not surprisingly, the evidence is sufficient in the eyes of women's rights groups and professional organizations to strongly advocate the Paycheck Fairness Act's passage. Supporters claim it is a much-needed update of the Equal Pay Act that will create incentives for employers to follow the law and allow women to finally achieve equal pay for equal work. President Obama agrees, calling it “a common-sense bill that will help ensure that men and women who do equal work receive the equal pay that they and their families deserve.”

Not so, claim the bill's opponents. In a recent, highly publicized op-ed piece in the *New York Times*, contributing author Christina Hoff Sommers of the American Enterprise Institute claims that the legislation “overlooks mountains of research showing that discrimination plays little role in pay disparities between men and women, and it threatens to impose onerous requirements on employers to correct gaps over which they have little control.” Sommers argues there are many reasons men might earn more than women, including differences in education, experience, and job tenure, and concludes the PFA “would set women against men, empower trial lawyers and activists, perpetuate falsehoods about the status of women in the workplace and create havoc in a precarious job market. It is 1970s-style gender-war feminism for a society that should be celebrating its success in substantially, if not yet completely, overcoming sex-based workplace discrimination.”

Is Legislation Through the Paycheck Fairness Act the Answer?

Those urging passage of the bill assert that, after almost 50 years of case law development under the Equal Pay Act, it is clear the current statute cannot and will not achieve its intended goal of ending gender-based wage discrimination. Many believe that, in the absence of the proposed increased damages provisions, the Equal Pay Act will continue as an insufficient deterrent to wage discrimination, and that employers will continue to see the risk of potential litigation under the present statute as nothing more than a cost of doing business.

Among other organizations supporting the bill is the American Bar Association, whose House of

Delegates endorsed its passage in early 2010. Roberta D. Leisenberg, chair of the ABA Commission on Women in the Profession, says the PFA “would strengthen the Equal Pay Act by eliminating certain loopholes and amending outdated provisions that have prevented that act from fulfilling Congress' intent to eliminate pay discrimination on the basis of sex.” She believes “the continued pay disparity between men and women clearly demonstrates that the status quo is not acceptable and that the Equal Pay Act needs to be strengthened. The Paycheck Fairness Act would do so and place women on the same level playing field as those who have experienced pay discrimination based on race or national origin.”

Others fear the current bill goes too far. Some contend, for example, the requirement that employers submit data detailing the sex, race, and national origin of employees will increase hiring costs, raise unemployment, snare employers in frequent wage litigation, and result in even more foreign outsourcing. Companies, they say, will lose the ability to address different salary histories for new hires, or take advantage of different salary demands for existing workers. Employees and their attorneys will be able to conjure alternative business practices that do not result in pay disparities, or the employer and employee might simply disagree as to whether there is a better alternative or what the business purpose is or should be, thus allowing employees, the government and courts to effectively dictate business practices and intrude too far into employer business practices and decisions.

Another highly questioned provision in the proposed Paycheck Fairness Act is that requiring that the EOS be reinstituted. The EOS was discontinued in 2006 by the Department of Labor after it concluded the survey failed miserably to accurately identify sex discrimination. As noted by James Sherk of the Heritage Foundation, “[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.” Many potentially affected employers are less than optimistic that the EOS will be any more accurate in its potential resurrection.

The Senate's consideration of the Paycheck Fairness Act is slated to begin Nov. 17, and many see the upcoming session as the bill's best chance for passage in the foreseeable future. Whether the bill survives in its original form, passes following amendment, or once more stalls remains to be seen.

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