

April 13, 2021

Re: ABA Urges Passage of H.R. 7, the Paycheck Fairness Act

Dear Representative:

On behalf of the American Bar Association (ABA), the largest voluntary association of lawyers and legal professionals in the world, I am writing to urge you to vote for passage of H.R. 7, the Paycheck Fairness Act, which would update the Equal Pay Act of 1963 enacted by Congress almost 60 years ago to prohibit gender-based pay inequality. This legislation, which is expected to come to the floor this week, has the support of working men and women across the country who want this nation to live up to its expressed commitment to equal pay for equal work.

The Equal Pay Act of 1963 prohibits an employer from paying unequal wages to male and female workers who perform jobs under similar work conditions that require substantially equal skill, effort, and responsibility unless there is a legitimate reason for a pay differential.

The Paycheck Fairness Act does not alter the basic scheme of this statute or impose unreasonable burdens on employers; indeed, the majority of its proposed changes are borrowed from other civil rights statutes that have proved more effective in eradicating workplace discrimination.

We would like to respond to some persistent misperceptions regarding this important legislation:

Enactment of this bill will not compel businesses to pay their female workforce substantially more money to eliminate the existing wage gap. The purpose of this bill is to update the Equal Pay Act, which applies only in situations where women or men are receiving unequal pay for equal work. It does not create a new mandate.

Enactment of this bill will not interject the government into the pay decisions of businesses. The Paycheck Fairness Act does not tell employers what factors to use to set pay; it requires only that pay decisions are job- and business-related.

Enactment of this bill will not make employers liable for any and every wage differential. An employer will still have four affirmative defenses and will not be guilty of wage discrimination if a pay differential is based on (i) seniority, (ii) merit, (iii) a system that measures quantity or quality of production, or (iv) a “factor other than sex.” 29 U.S.C 206(d)(1). The Paycheck Fairness Act modifies only the definition of the fourth defense by striking the current language and inserting “a bona fide factor other than sex, such as education, training, or experience.” This clarification will resolve current uncertainty in the law by making it clear that a “factor other than sex” under the Equal Pay Act must be business related.

Enactment of a provision to clarify the “factor other than sex” defense will not eviscerate legitimate use of the defense. It is intended to prevent employers from asserting that unequal pay was the result of market force-derived excuses such as prior salaries or negotiation outcomes. A bona fide factor other than sex must be job-related, consistent with business necessity, and account for the entire differential in compensation at issue. The only time this defense would not apply would be in situations where an alternative employment practice is available that would serve the same business purpose without producing the wage differential and the employer has refused to adopt it.

Enactment of this bill will not encourage more lawsuits or jeopardize post-pandemic economic recovery. The bill is designed to resolve uncertainties in the law and increase employer compliance with the Equal Pay Act, not to encourage more lawsuits.

- The bill’s strengthened remedies, which are similar to those available under other employment discrimination statutes, will encourage employers to review their wage-setting practices and rectify those that are based on invalid justifications. Men and women who are paid fairly have no incentive to jeopardize their jobs and subject themselves to a costly, time-consuming, and emotionally taxing wage discrimination lawsuit.
- The bill’s clarification of the “factor other than sex” defense will not spawn new litigation. Instead, it will provide clear guidance to judges and result in more uniform application of the defense. The definition, which is adapted from Title VII discrimination cases and codified in the Civil Rights Act of 1991, is one with which courts already are familiar.
- The bill will help strengthen the economy by improving the present and future economic welfare of working women who comprise about one-half of the workforce and are the primary breadwinner in more than 12 million American families.

We urge you to demonstrate your commitment to equal pay for equal work by voting for the Paycheck Fairness Act.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Patricia Lee Refo". The signature is written in a cursive, flowing style.

Patricia Lee Refo