

## CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN

Forty-five years ago, President Kennedy signed the Equal Pay Act (EPA)<sup>1</sup> into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar earned by men.<sup>2</sup> Although enforcement of the EPA as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. Today, women make, on average, only 77 cents for every dollar earned by men.

To further strengthen current laws against wage discrimination and require the federal government to be more proactive in preventing and battling wage discrimination, Representative Rosa DeLauro (D-CT) has introduced H.R. 1338, the Paycheck Fairness Act.<sup>3</sup> Enactment of the Paycheck Fairness Act would update and strengthen the EPA in important ways,<sup>4</sup> including:

- **Improving Equal Pay Act Remedies**

The Act toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated (fixed and limited) damages and back pay awards, which tend to be insubstantial. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available.

- **Facilitating Class Action Equal Pay Act Claims**

The Act allows an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently, it is very difficult to bring EPA suits as class actions because the EPA, adopted prior to the current federal class action rule (FRCP Rule 23), requires plaintiffs to opt *in* to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt *out* of the class.

- **Improving Collection of Pay Information by the EEOC**

The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **Prohibiting Employer Retaliation**

The Act prohibits employers from punishing employees for sharing salary information with their coworkers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

- **Closing a Loophole in the Employer Defense**

Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an "affirmative defense"<sup>41</sup> that the pay differential is based on a "factor other than sex."<sup>42</sup> Some employers have argued for

interpretations of this affirmative defense that are so broad (e.g., to include factors such as a male worker's stronger salary negotiation skills or higher previous salary) that they may themselves be "based on sex" and would seriously undermine the EPA.<sup>43</sup> The Act tightens this affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance.

- **Eliminating the "Establishment" Requirement**

Under the EPA, in order to determine that there is wage discrimination, the wage comparison must be made between employees working at the same "establishment."<sup>44</sup> Some courts have interpreted this to mean that wages paid in different facilities or offices of the same employer cannot be compared even if the employer is paying workers different salaries for the same work.<sup>45</sup> The Act clarifies that a comparison need not be between employees in the same physical place of business.

- **Developing Voluntary Guidelines for and Recognizing Model Employers**

The Act directs the Department of Labor to develop guidelines to enable employers voluntarily to compare wages paid for different jobs to determine whether their pay scales accurately reflect the requirements of the jobs. This will help employers to eliminate unfair disparities between occupations traditionally dominated by men and by women. The Act also establishes an award, to be administered by the Labor Department, to recognize and promote the achievements of employers who have made strides to eliminate pay disparities.

- **Increasing Training, Research, and Education**

The Act provides for increased training for EEOC employees to help them identify and respond to wage discrimination claims. It also calls for enhancing various research and education programs at the Department of Labor, including programs to research ways to eliminate gender-based pay disparities and provide information to employers to assist them in eradicating such disparities.

- **Reinstating Pay Equity Programs and Enforcement at the Department of Labor**

The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors.<sup>46</sup> The Act also directs means to implement of the Equal Opportunity Survey, a vital tool for detecting wage and other types of discrimination.<sup>47</sup>

- **Sparkling the Development of Salary Negotiation Skills Training**

The Act establishes a competitive grant program to develop training programs for women and girls on how to negotiate better compensation packages, and directs the Secretaries of Labor and Education to integrate the programs developed into education and job training programs under their respective jurisdictions.

**For all of these reasons, Congress must approve the Paycheck Fairness Act without setting artificial limits.**

## **NOTES**

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<sup>1</sup> 29 U.S.C. § 206(d).

<sup>2</sup> U.S. Census Bureau, Historical Income Tables – People, Table P-40: Woman's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin: 1960 to 2005, *available at* <http://www.census.gov/hhes/www/income/histinc/p40.html> (last visited Feb. 22, 2007).

<sup>3</sup> As of April 4, 2007, 17 Senators and 71 Representatives had joined the bill as cosponsors.

<sup>4</sup> Although neither the House nor the Senate have held votes on the Paycheck Fairness Act, both the House and the Senate held hearings on both bills in 2007 in conjunction with Equal Pay Day.