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March 10, 2010

The Honorable Tom Harkin, Chairman  
Committee on Health, Education, Labor and Pensions  
United States Senate  
Washington, DC 20510

**RE: ABA SUPPORT FOR S. 182, THE PAYCHECK FAIRNESS ACT**

Dear Chairman Harkin:

On behalf of the American Bar Association, I commend you for scheduling tomorrow's hearing on pay equity in the American workplace. We hope that the hearing will provide the necessary impetus for long-stalled Senate action on the Paycheck Fairness Act, passed by the House last year as H.R. 12 and pending in the Senate as S. 182.

I am pleased to report that the ABA adopted policy last month that specifically supports enactment of the Paycheck Fairness Act. This much-needed legislation would update and strengthen the Equal Pay Act of 1963 (EPA) so that it can finally achieve its goal of eliminating gender-based wage discrimination, which remains a present-day, widespread, and pernicious problem in the workplace. Our new pay equity policy is the latest in a long line of ABA policy statements aimed at supporting congressional efforts to eradicate workplace discrimination.

While every modification proposed by the legislation is important, I would like to highlight a few provisions of the Paycheck Fairness Act that would correct defects in the EPA of particular concern to the ABA.

**1. Section 3(a) clarifies the substantive standards of the EPA regarding wage comparisons and the scope of the "factor other than sex" affirmative defense so that the EPA can function as intended.**

Wage Comparisons. Under the EPA, in order to determine that there is wage discrimination, a wage comparison must be made between employees working at the same "establishment." 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.

Section 3(a) of the Paycheck Fairness Act clarifies that the “establishment” provision of the EPA allows for reasonable comparisons between female and male employees within clearly defined geographical areas to determine fair wages.

Scope of Affirmative Defense. The EPA permits employers to raise several affirmative defenses. One defense -- that a pay differential is based on a “factor other than sex”-- has been interpreted by some courts in a manner that has undermined the EPA’s fundamental purpose.

Section 3(a) of the Paycheck Fairness Act also would clarify that an employer relying on the “factor other than sex” defense must show that: (1) the defense is based on a bona fide factor, such as education, training or experience, that is not based upon or derived from a sex-based differential; (2) the factor is job-related for the position in question; and (3) the factor is consistent with business necessity. These reasonable changes mirror the requirements under Title VII of the Civil Rights Act of 1964.

**2. Section 3(b) adds a new provision to the EPA to prohibit employer retaliation for sharing information about wages.**

Section 3(b) of the Paycheck Fairness Act prohibits retaliation against employees who inquire about employers’ wage practices or disclose their own wages. It also clarifies that employers may not retaliate against employees who seek legal redress for, or participate in investigations of, alleged wage discrimination.

**3. Section 3(c) expands the remedies available to prevailing plaintiffs and updates the procedures governing class actions under the EPA.**

Remedies. The EPA currently only provides for back pay plus an equal amount in liquidated damages where a willful violation is proven. In contrast, successful claimants who sue for wage discrimination under Title VII and other anti-discrimination laws are entitled to recover compensatory and punitive damages. Section 3(c) will allow prevailing plaintiffs to recover compensatory and punitive damages, thereby putting victims of sex-based wage discrimination on an equal footing with those who experience wage discrimination based on race or national origin.

As with Title VII cases, the Paycheck Fairness Act would permit an award of punitive damages only upon a showing of malice or reckless indifference by the employer. Numerous existing limitations in current law that guard against improperly high verdicts assure that providing compensatory and punitive damages to victims of sex-based wage discrimination will not unduly burden employers.

Class Actions. Section 3(c) also would provide more effective remedies to combat systemic sex-based wage discrimination. Women who seek to bring class actions under the EPA will be afforded the choice of proceeding with an opt-out class action, like those who have experienced wage discrimination on the basis of race or national origin.

Under the EPA, which was enacted prior to the adoption of Rule 23 of the Federal Rules of Civil Procedure, plaintiffs are required to take affirmative steps to opt in to a class action lawsuit. This is unlike other civil rights claims, governed by Rule 23(b) (3), where class members seeking damages are automatically considered part of the class unless they choose to opt out.

In conclusion, the Paycheck Fairness Act proposes much-needed modifications and improvements to the Equal Pay Act of 1963, a statute of fundamental importance to our nation's effort to eradicate wage discrimination. We thank you for your commitment to pay equity and urge prompt passage by the Senate of the Paycheck Fairness Act so that women will finally have the legal tools to effectively assert their right to receive equal pay for equal work.

Please contact Denise A. Cardman, Deputy Director of the Governmental Affairs Office, at [cardmand@staff.abanet.org](mailto:cardmand@staff.abanet.org) if you have any questions regarding our position.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members of the Committee  
The Honorable Barbara Mikulski  
The Honorable Rosa L. DeLauro