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November 15, 2010

United States Senate
Washington, DC 20510

Re: ABA Support for the Paycheck Fairness Act

Dear Senator:

On behalf of the American Bar Association, I am writing to urge you to vote for floor consideration of the Paycheck Fairness Act. This legislation, which will strengthen an existing wage discrimination protection law, has been stalled in the Senate for more than 20 months despite swift passage by the House of Representatives and overwhelming support from working women across the country. Now designated as S. 3772, the Paycheck Fairness Act is scheduled for a cloture vote on November 17. I believe that a full and informative debate on the merits of this legislation will convince you to vote for passage. Its enactment is long overdue.

The sole purpose of the Paycheck Fairness Act is to assure that men and women have the tools to assert their legal right to equal pay for equal work. It would accomplish this by updating the Equal Pay Act of 1963, a fifty-year old statute passed by Congress to prohibit 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 outrageous, novel 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.

In anticipation of floor deliberations, we would like offer the following observations that may help clear up some common points of confusion:

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• **The provisions of this bill apply equally to men and women who experience sex-based wage discrimination.** It is most often described as a bill that will help working women because women still are the primary victims of sex-based wage discrimination. However, it covers both sexes.

• **Enactment of this bill will not compel businesses to pay their female work force substantially more money to eliminate the so-called “77 cents wage gap.”** The purpose of this bill is to update the Equal Pay Act, which only applies in situations where women or men are receiving unequal pay for equal work. It will force employers to pay men and women equal wages for equal work unless there is a legitimate reason for the differential and, by doing so, may help reduce the wage gap.

• **Enactment of this bill will not make employers liable for any and every wage differential.** An employer is not guilty of wage discrimination if a pay differential is based on seniority, merit, quantity or quality of production, or a factor other than sex. It does, however, close an existing loophole by assuring that the “factor other than sex” defense is valid only when it is based on a *bona fide* factor (like education or training) that is job-related, consistent with business necessity, and where there is no other alternate practice that would serve the same business purpose without producing the wage differential. This standard, adapted from Title VII discrimination cases, is one with which courts already are familiar.

• **Enactment of this bill will not encourage outrageous verdicts against employers that will bankrupt businesses and further jeopardize a frail economy.** In fact, the ABA expects the opposite result. It is true that the bill would strengthen and update the remedies available under the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages but, 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. That is a very high standard to meet and, on top of that, numerous existing limitations in current law that guard against improperly high verdicts assure that compensatory and punitive damages will not unduly burden employers.

Enhanced remedies should make businesses more cognizant of their legal obligations and more careful about how they set wages. A renewed commitment by businesses to non-discrimination should help reduce future lawsuits. Likewise, by helping improve the present and future economic welfare of working women, who make up about one-half of the work force and who are the primary breadwinner in more than 12 million families,

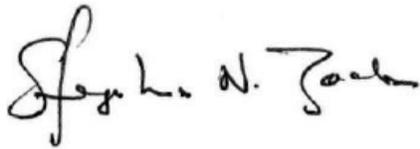
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the Paycheck Fairness Act will strengthen our economy by helping countless families achieve financial security.

It is clear that lip service alone to the American ideal of a workplace free of discrimination will not help eradicate gender-based wage discrimination. We urge you to transform rhetoric into action by supporting floor consideration and voting in favor of this much-needed remedial legislation.

Please contact Denise A. Cardman, Deputy Director of the Governmental Affairs Office, at cardmand@staff.abanet.org if we can provide additional information or assistance.

Sincerely,

A handwritten signature in black ink that reads "Stephen N. Zack". The signature is written in a cursive style with a large initial 'S' and a long, sweeping underline.

Stephen N. Zack, President

Attachment



The Paycheck Fairness Act

ABA Supports Prompt Senate Consideration and Passage

Major Provisions of S. 3772, the Paycheck Fairness Act

The Paycheck Fairness Act, introduced as H.R. 12 and S. 182 during the opening days of the 111th Congress, would update and strengthen the Equal Pay Act of 1963 (EPA) to ensure that the statute provides effective protection against sex-based wage discrimination and deters employers from paying men and women unequal wages for performing substantially the same work unless there is a legitimate business reason for doing so. The House swiftly passed the legislation on a bipartisan basis, but the Senate has yet to act. The bill now designated as S. 3772, is scheduled for a cloture vote on November 17. This procedural vote will determine whether members of the Senate will have an opportunity to debate the Paycheck Fairness Act on its merits and to vote for or against its passage.

The Paycheck Fairness Act will make critical improvements to the Equal Pay Act.

1. The Paycheck Fairness Act will modify the requirement for proving wage disparity between men and women working at the same “establishment.”

Under the EPA, in order to determine wage discrimination, a wage comparison must be made between male and female employees who perform essentially the same job and work at the same “establishment.” The Act will clarify that courts must consider wage comparisons between employees who work in the same physical location as well as those who work for the same employer at workplaces in the same county or political subdivision.

2. The Paycheck Fairness Act will tighten the “Factor Other Than Sex” defense.

An employer may assert as an “affirmative defense” that a pay differential is based on seniority, merit, the quality or quantity of production or a “factor other than sex.” The Act will specify that the “factor other than sex” defense must be based on bona fide job-related factors that are consistent with business necessity.

3. The Paycheck Fairness Act will prohibit employer retaliation.

The Act will protect employees from retaliation for seeking redress, inquiring about employers' wage practices, or disclosing their own wages.

4. The Paycheck Fairness Act will strengthen the remedies available under the EPA.

The Act will allow prevailing plaintiffs to recover compensatory and punitive damages. The latter will be available only in cases of malice and reckless disregard. This change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity.

5. The Paycheck Fairness Act will update the class action provisions of the EPA.

The Act will conform the EPA to the current class action rule (FRCP Rule 23) by specifying that class members are automatically considered part of the class unless they specifically choose to opt out.

6. The Paycheck Fairness Act will improve the government's enforcement mechanisms.

The Paycheck Fairness Act will revitalize the role of the Department of Labor in combating gender-based discrimination and will require better collection of pay information by Equal Employment Opportunity Commission.

Denise A. Cardman, Deputy Director
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