Re: Support S. 797, 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 S. 797, the Paycheck Fairness Act. This legislation has the widespread support of women across the country and deserves a full and informed floor debate on its merits. The ABA unequivocally supports S. 797 in its current form and urges its prompt passage.

Congress declared that equal pay for equal work was the law of the land when it passed the Equal Pay Act of 1963. But, in the 50 years since its passage, this historic legislation has become outdated and ineffective, and wage discrimination remains a persistent, widespread, and pernicious problem. Women today, regardless of their educational level, their occupation, or their state of residence, still receive unequal pay for equal work, even in jobs such as secretary or nurse that are predominantly held by women.

The Paycheck Fairness Act would update key provisions of the Equal Pay Act of 1963 without altering the basic scheme of this historic statute or imposing excessive, 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 consideration, we offer the following comments to address what we believe are mischaracterizations and areas of confusion:

- **The provisions of this bill apply equally to men and women who experience sex-based wage discrimination.** S. 797 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, the bill clearly covers both sexes.

- **Enactment of this bill will not make employers liable for any and every wage differential.** As with the current Equal Pay Act, the Paycheck Fairness Act provides that an employer is not guilty of wage discrimination if a pay differential
is based on seniority, merit, quantity or quality of production, or “any other factor other than sex.” The legislation closes an existing loophole by clarifying 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 excessive verdicts against employers that will bankrupt businesses and jeopardize the recovery of our 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 will help their bottom line by reducing future lawsuits and creating a positive work environment.

Furthermore, 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 breadwinners in more than 12 million families, the Paycheck Fairness Act will foster financial security and a strong economy.

- **Enactment of this bill will not impose unduly burdensome and unnecessary reporting requirements on businesses.** Data collection is critical because it provides necessary documentation of existing wage discrimination and enables us to analyze the degree of success that various programs have on eradicating it.

The bill contains provisions to safeguard against burdensome regulations by requiring the Equal Employment Opportunity Commission to “consider factors including the imposition of burdens on the employers, the frequency of required data collection reports… and the most effective format for data collection.” It also directs the Secretary of Labor to engage in research, education, and outreach and to develop technical assistance material to assist small businesses in complying with the requirements of the Act.

It is clear that lip service alone to the American ideal of a workplace free from 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 denise.cardman@americanbar.org if we can provide additional information or assistance.

Sincerely,

Wm. T. (Bill) Robinson III