April 7, 2014

Re: ABA Support for the Paycheck Fairness Act

Dear Senator:

On behalf of the American Bar Association, I am writing to urge you to allow a Senate vote on S. 2199 (formerly S. 84), the Paycheck Fairness Act. This legislation, which may come to the floor this week, has the overwhelming support of working women across the country and deserves a full and informative debate on its merits.

The sole purpose of the Paycheck Fairness Act is to update the Equal Pay Act of 1963. That fifty-year old statute was 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 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 prevalent misperceptions regarding this important legislation:

**Enactment of this bill will not discriminate against male employees. 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 are the primary victims of sex-based wage discrimination.

**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 only applies in situations where women or men are receiving unequal pay for equal work. It does not create a new mandate. Employers already have a legal obligation to pay men and women equal wages for equal work unless there is a legitimate reason for the differential.

**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.”
Amendment of 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 “factor other than sex” must be job-related and consistent with business necessity, and an alternative practice that would serve the same purpose without producing the wage differential must not be available. This standard, adapted from Title VII discrimination cases and expressly codified in the Civil Rights Act of 1991, is one with which courts already are familiar.

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 only requires that pay decisions are job- and business-related.

Enactment of this bill will not spawn enormous verdicts against employers that will bankrupt businesses and further jeopardize a frail economy. The bill is designed to provide a greater incentive for all employers to abide by law, not to encourage more lawsuits. Most women do not want to sue their employers; they want to be paid fairly without having to undergo the time-consuming and emotionally taxing ordeal of bringing a lawsuit.

- S. 2199 would strengthen remedies available under the Equal Pay Act, which only allows recovery of back pay and liquidated damages, by allowing prevailing plaintiffs to recover compensatory and punitive damages. Punitive damages would be available only upon a showing of malice or reckless indifference by the employer, which requires a very stringent standard of proof. Because of the availability of these enhanced damages, critics allege that it will encourage litigation and result in “outrageous” verdicts. This allegation misses the mark.

- These enhanced remedies are intended to make businesses more cognizant of their legal obligations and careful about how they set wages. Only those employers who continue to violate the equal pay laws need to fear the enhanced remedies.

- 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 support floor consideration of the Paycheck Fairness Act so that you will have the opportunity to hear the debate on, and make an informed decision about, the merits of the legislation. Once you know the facts, we are confident you will support strengthening our nation’s commitment to equal pay for equal work by voting for the Paycheck Fairness Act.

Thank you for your consideration of our views.

Sincerely,

James R. Silkenat
President
American Bar Association