February 12, 2019

The Honorable Suzanne Bonamici, Chair
Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
House of Representatives
Washington, DC 20515

The Honorable Alma Adams, Chair
Subcommittee on Workforce Protections
Committee on Education and Labor
House of Representatives
Washington, DC 20515

**RE: ABA SUPPORT FOR H.R. 7, THE PAYCHECK FAIRNESS ACT**

Dear Chair Bonamici and Chair Adams:

On behalf of the American Bar Association and its over 400,000 members, I commend you for scheduling tomorrow’s joint hearing on H.R. 7, the Paycheck Fairness Act, and refocusing the nation’s attention on the persistent and pernicious problem of gender-based wage discrimination. We offer the following comments in support of the legislation and request that this letter be made part of the hearing record.

H.R. 7, introduced by Representative DeLauro (D-CT), would update and strengthen the Equal Pay Act of 1963 (EPA), which was passed by Congress expressly to prohibit “discrimination on account of sex in the payment of wages by employers.” Enacted over a half a century ago, the EPA needs a tune-up – it is sorely out of date and out of touch with today’s business world. It no longer is an effective legal vehicle for uncovering and correcting workplace pay inequities. While the pay gap differential has been reduced since the EPA was enacted, it still exists and is still significant.

The Paycheck Fairness Act (PFA) will make critical, common-sense improvements to this important and historic law so that we can continue to make progress in eradicating gender-based wage discrimination and advancing this nation’s longstanding goal of equal pay for equal work. In accordance with policy adopted in 2010 in furtherance of our commitment to work to eliminate discrimination in the workplace, the American Bar Association supports the following essential components of the PFA.
1. **The Paycheck Fairness Act will update the definition of a work “establishment.”**

Under the EPA, a determination of wage discrimination is made by comparing the wages of a male and female employee who perform substantially equal jobs (i.e., jobs requiring similar skills, effort, and responsibility that are performed under similar conditions) and work at the same “establishment.”

The PFA will broaden the law’s definition of “establishment” by stating that wage comparisons may be made between employees who perform substantially equal jobs at any of the employer’s places of business that are in the same county or political subdivision. This change is needed because many businesses today operate out of multiple offices in the same area.

2. **The Paycheck Fairness Act will clarify the “factor other than sex” defense.**

Some pay differentials are legal under the EPA. An employer will not be liable if the employer can prove that the pay differential is based on: 1) seniority; 2) merit; 3) the quality or quantity of production; or 4) a “factor other than sex.”

Courts have interpreted the “factor other than sex” defense inconsistently and, at times, without regard to its relevance to job performance. The PFA provides much needed guidance to help courts determine when a “factor other than sex” qualifies as a legitimate defense.

The PFA provides that a “factor other than sex” defense must be based on a bona fide, job-related factor such as education, training or experience that is consistent with business necessity. In addition, it specifies that a factor will not qualify as an affirmative defense if the employee can demonstrate that the employer refuses to adopt an existing alternative business practice that would serve the same business purpose without producing a pay differential. This definition is modeled on the business necessity standard used by courts in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964.

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

At present, the EPA provides for back pay and, in some cases, liquidated damages. These limited monetary remedies often provide inadequate compensation to make the victim whole and are insufficient to deter future violations of the law by employers who view them as a cost of doing business.

The PFA allows prevailing plaintiffs to recover compensatory and punitive damages. Compensatory damages include out-of-pocket expenses resulting from the discrimination and compensation for non-economic damages such as loss of reputation and mental anguish. Punitive damages would be allowed only in cases of intentional discrimination involving malice and reckless disregard and would not apply in cases against the United States.

These proposed changes would bring the remedy provisions of the EPA more in line with those of Title VII, and would put gender-based wage discrimination on an equal footing with discrimination based on race or ethnicity.

In addition, the PFA would allow Equal Pay Act class actions to proceed under the "opt-out" provisions of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The EPA was adopted prior to Rule 23 and requires putative class members to "opt in" if they want to participate in a
proposed class action. This amendment is needed to place Equal Pay Act plaintiffs in the same position as other victims of pay discrimination, to whom the "opt-out" provisions of Rule 23(b)(3) have long applied.

4. **The Paycheck Fairness Act will strengthen oversight and enforcement mechanisms.**

The PFA will revitalize the role of the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) in combating gender-based discrimination by requiring research, education, outreach, and ready public access to compensation discrimination information.

It also requires the DOL and the EEOC to collect compensation and other employment-related data by race, nationality, and sex for the purpose of enhancing the EEOC’s ability to detect violations and improve enforcement of the EPA.

5. **The Paycheck Fairness Act will prohibit retaliation for disclosure of salary information.**

At present, the EPA prohibits an employer from retaliating against an employee who asserts his or her rights under the EPA, but it is silent regarding situations involving salary discussions.

The PFA will protect employees from retaliation not only for seeking redress, but also for inquiring about the employer’s wage practices or disclosing their own wages to coworkers. Without the PFA’s broad prohibition against retaliation by an employer, fear of being fired will continue to inhibit workers from discovering and seeking redress for discriminatory gender-based pay disparities.

Thank you for this opportunity to express these views on this important legislation. If you have any questions regarding these comments, please contact Denise Cardman at 202-662-1761 or denise.cardman@americanbar.org.

Sincerely,

Robert M. Carlson

cc. Honorable James Comer, Ranking Member
    Subcommittee on Civil Rights and Human Services

    Honorable Bradley Byrne, Ranking Member
    Subcommittee on Workforce Protections