

# PUBLICATION

## The Paycheck Fairness Act & Fair Pay Act Of 2007: More than Meets the Eye

May 8, 2007

For nearly a decade, Representative Rosa DeLauro (D-CT) has attempted to convince Congress to pass a version of what she has named the Paycheck Fairness Act. The Act would amend the equal pay provisions (the Equal Pay Act) of the Fair Labor Standards Act to provide stronger remedies to employees, make the employer's affirmative defense of any other factor other than sex more difficult to show, and provide onerous reporting requirements of compensation data to the Equal Employment Opportunity Commission (EEOC). Although the bill was first introduced ten years ago, on April 24, 2007 the bill received its first hearing from the House Committee on Education and Labor on the issue of equal pay. The bill numbers for the Paycheck Fairness Act are S. 766 (Senator Clinton) and H. 1338 (Rep. DeLauro). In addition, Senator Tom Harkin (D-IA) introduced a similar bill, the Fair Pay Act of 2007 (S. 1087), specifically aimed at prohibiting wage discrimination on account of sex, race or national origin. The Senate Health, Education, Labor and Pensions Committee held an April 12, 2007 hearing on this bill as well as S. 766.

Employers alarmed by the possible passage of the Free Choice Act in the House, which would virtually allow unions free rein to strong-arm their way into a company's workforce, should also be watching the above legislation as it will impose burdens on employers if passed. The table below compares the two pieces of legislation with the current Equal Pay Act (EPA) and illustrates the substantial changes being proposed:

Equal Pay Act (current form)	Fair Pay Act of 2007	Paycheck Fairness Act
Gender only	Adds race and national origin to the EPA	Gender only
Circuits are split on whether the "any other factor other than sex" defense must be job-related or further a legitimate business purpose. However, the Supreme Court in a footnote in <i>Smith v. City of Jackson</i> , 544 U.S. 228 (2005) appears to cast in doubt those courts which hold that the "any other factor" must be job-related or further a legitimate business purpose.(1)	The "any other factor other than sex" defense must be job-related or further a legitimate business purpose and such factor was actually applied.	The "any other factor other than sex" defense must be job-related or further a legitimate business purpose and such factor was actually applied.

Same "establishment" required	Same "establishment" required	Eliminates the requirement that the jobs at issue being compared are located within the same "establishment"
No provision	Provides for the EEOC to issue guidelines specifying criteria for whether a job is dominated by employees of a particular sex, race or national origin	Does not address
No provision	A finding of liability under this section deems the amounts owing to any employee to be unpaid minimum wages or unpaid overtime	Does not address
Retaliation provision similar to Title VII	Adds a specific retaliation provision for the categories of race and national origin	Retaliation provision specifically allows employees to inquire about, discuss or otherwise disclose the wages of the employee or another employee
Opt-in class actions	Specifically allows for opt-out class actions	Specifically allows for opt-out class actions
Penalties: Normally, back wages and liquidated damages	Enhanced penalties (in addition to the current EPA penalties): 1) Compensatory and/or punitive damages; 2) Allows expert witness fees as part of costs	Enhanced penalties (in addition to the current EPA penalties): 1) Compensatory and/or punitive damages; 2) Allows expert witness fees as part of costs
Recordkeeping: Employers have no obligation to report	Recordkeeping: 1) Employers must keep records that document and support the method, system, calculations	Recordkeeping:EEOC to issue guidelines to collect pay information

<p>compensation data to the EEOC</p>	<p>and other bases used in establishing, adjusting and determining the wage rates paid to employees;  2) The EEOC is authorized to obtain data with respect to an employer's employees' wage rates, including information with respect to the sex, race and national origin of its employees at each wage rate and may publish any data it obtains with respect to those wage rates.  3) EEOC will publish regulations allowing any person to inspect or examine the above data.  4) EEOC will publish regulations providing for the furnishing of copies of the above data to any person.</p>	<p>data from employers as described by the sex, race and national origin of employees.</p>
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As can easily be gathered from the above table, passage of either or both of these bills would result in a huge recordkeeping burden for employers – not to mention no protection from disclosure of the employer's compensation data – as well as much stiffer penalties for any alleged violation of the proposed Acts. Employers would lose much of the flexibility that they currently enjoy in setting wage rates if either of the above Acts come to fruition.

(1) "We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based 'on any other factor' – reasonable or unreasonable – 'other than sex.' The fact that Congress provided that employees [sic] could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive." *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (emphasis in original).