

President Obama Urges Congress to Pass the Paycheck Fairness Act

07.26.2010

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In the wake of recent battles with Congress over healthcare reform, financial reform, and extension of unemployment benefits, President Obama is urging the Senate to move forward on the Paycheck Fairness Act after its approval last year by the House of Representatives.

The Paycheck Fairness Act was initially introduced as a companion to the [Lilly Ledbetter Fair Pay Act](#) that was passed by Congress and signed into law by President Obama at the beginning of last year soon after he became president. Though it was approved by the House of Representatives at the same time as the Fair Pay Act, the Paycheck Fairness Act has been on hold in the Senate since then.

The Paycheck Fairness Act would amend the Equal Pay Act of 1963, which prohibits pay discrimination on the basis of sex, by increasing and enhancing the remedies available to employees for Equal Pay Act violations. For example, if the Act becomes law:

- In addition to currently available remedies for Equal Pay Act violations (back pay for up to two years and attorney's fees, plus liquidated damages in some cases), employees would be able to recover other types of compensatory damages, as well as punitive damages, and there would be no "caps" on the amounts of such damages employees could recover;
- The current procedure for a class action Equal Pay Act lawsuit, which requires employees to "opt in" to the lawsuit in order to benefit from it, would be changed so that all employees meeting the class criteria would be included as plaintiffs and only those who affirmatively "opt out" would not be covered; and
- The prohibition against retaliation for complaining about pay discrimination would be expanded. Employers also would be prohibited from retaliating against employees for inquiring about, discussing or disclosing wage information in response to a pay discrimination complaint or charge or in furtherance of a pay discrimination investigation or proceeding.

The Paycheck Fairness Act also would narrow employers' defenses to Equal Pay Act claims if it becomes law. More specifically, the Act would change an affirmative defense currently available to employers that allows them to defend an Equal Pay Act claim by showing that a pay disparity resulted from "any factor other than sex." Instead, under the Paycheck Fairness Act:

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- Employers would be required to prove that a pay disparity is based on a “bona fide factor other than sex,” such as education, training, or experience;
- This “bona fide factor” defense would apply only if an employer demonstrates that such factor: (i) is not based on or derived from a sex-based differential in compensation, (ii) is job-related with respect to the position in question, and (iii) is consistent with business necessity; and
- The “bona fide factor” defense would not apply if the employee demonstrates that: (i) an alternative employment practice exists that would serve the same business purpose without producing the pay disparity in question, and (ii) the employer has refused to adopt such alternative practice.

Opponents of the Paycheck Fairness Act argue that its provisions allowing prevailing plaintiffs to recover compensatory and punitive damages, with no “caps” on such damages, could put some small employers out of business and all of their employees out of work.

Opponents also contend the Paycheck Fairness Act’s changes to the affirmative defenses available to employers will make it harder for companies to grow and compete by hiring new employees and advancing existing employees. Employers need flexibility to address different salary histories for new hires and respond to different pay demands from existing employees. Critics of the Paycheck Fairness Act argue that these changes will limit that flexibility and make it more difficult for employers to justify legitimate differences in pay offers and increases.

Healthcare reform, financial reform, and extension of unemployment benefits are just some of the hotly contested legislative battles the Obama administration has had with Congress. With midterm elections on the horizon, the Paycheck Fairness Act is likely to be another one and it remains to be seen whether the Act will become law. Stay tuned.

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