



May 25, 2012

Paycheck Fairness Act: Another Election Year Distraction

For almost 50 years, workers have been protected against sex-based pay discrimination through the Equal Pay Act of 1963 (EPA) and Title VII of Civil Rights Act of 1964, which was recently amended through the Lilly Ledbetter Fair Pay Act of 2009 (Pub.L. 111-2). Despite these laws, Democrats are pushing a new political vote -- the Paycheck Fairness Act (S. 3220). They expect to schedule a floor vote next month.

The bill was last brought before the Senate for a vote in November 2010, when the Senate failed to invoke cloture on the motion to proceed by a vote of [58-41](#). Senator Nelson (NE) joined Republican Senators in opposing cloture.

The Paycheck Fairness Act is another election year distraction that will harm job creators and will not put Americans back to work.

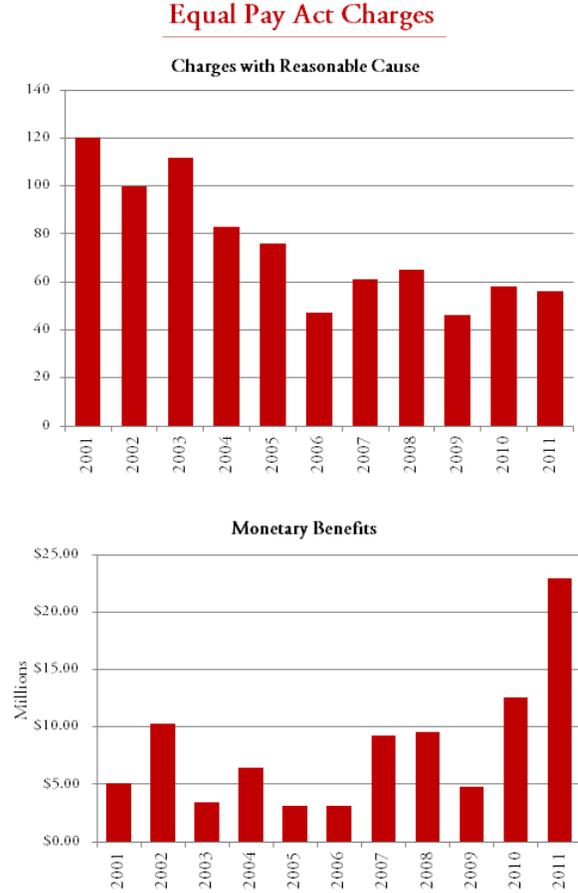
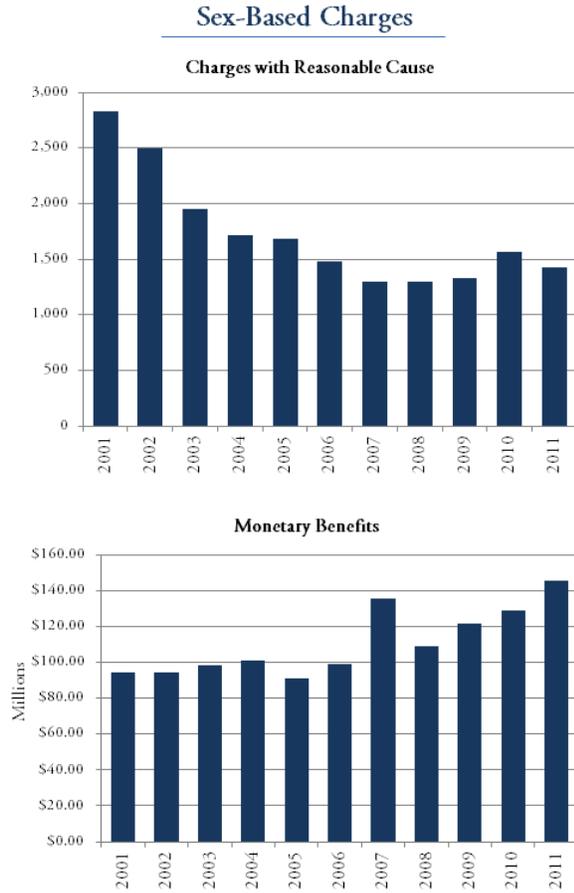
Sex-Based Pay Discrimination is Illegal

Enforcement and litigation statistics from the U.S. Equal Employment Opportunity Commission (EEOC) show that while sex-based discrimination unfortunately still occasionally occurs in the workplace, both the EPA and Title VII already provide ways for those who are discriminated against to file successful complaints and access financial remedies.

In fiscal year 2011, there were [32,789 claims](#) of sex-based discrimination resolved under Title VII.

- The EEOC determined that there was no evidence of discrimination in 63 percent of those cases -- the highest percentage of claims without reasonable cause in 15 years.
- Of the 19.5 percent of meritorious allegations, only 2.8 percent were unsuccessfully resolved.
- Workers received more than \$150 million through successfully resolved [Title VII](#) and [EPA](#) discrimination claims last year, the largest amount awarded in 15 years.

Discrimination Declining, Penalties Rising



Given that the current system is working, it appears Democrats simply want to make it easier for employees to file discrimination charges against employers regardless of whether there is evidence to support those claims.

The Pay Disparity Fallacy

A 2009 [report](#) commissioned by the Department of Labor found the wage gap exists because of individual choices, not because of discrimination in the workplace. In fact, women between 22 and 30 often [earn more](#) than their male peers. However, as men and women balance their work, personal, and family lives differently, the report found that women tend to prefer non-wage compensation -- such as health insurance and working fewer hours -- to greater financial compensation.

The White House's 2011 [report](#) "Women in America: Indicators of Social and Economic Well-Being" supported this idea, as married men spent more time at work (8.8 hours) than married women did (7.6 hours). It is not unreasonable to think that someone who spends more time working earns more money. So, while there may be a "[gender-hours gap](#)," that does not mean there is a gender-wage gap or employer discrimination; in fact, it is likely a conscious decision made by each individual.

The Impact on Job Creators

To address alleged discrimination, the Paycheck Fairness Act amends the Fair Labor Standards Act of 1938 by creating a new EPA standard for acceptable salary differences between male and female employees. Under the new language, the differences must not only be “job-related,” but also “consistent with business necessity,” although what constitutes “necessity” is open for a jury or court to decide. Additionally, if employers decide to say that the difference is consistent with business necessity, they would still have to prove they could not implement an alternative that would produce the same business outcome without creating a difference in salaries.

The practical application means that, under the Paycheck Fairness Act, if a male employee were the lead on a project and his manager wanted to give him a bonus for completing that project, the manager would not be able to do so. Or if a male employee notified his manager that he had a job offer that included a higher salary, the manager would not be able to make a counter-offer that included a salary increase, because the pay discrepancy could expose the employer to discrimination claims.

While creating an environment where employers can no longer reward employees with a salary increase or bonus would hurt both employees and employers, other aspects of the bill would have an even more adverse effect on the economy.

- Under current law, the EPA requires that workers give written consent to join a class action lawsuit. The Paycheck Fairness Act would change that by automatically including all employees in the class, which would likely result in an increase of class action lawsuits being filed, make it easier to obtain class certification, and increase the size of the class, regardless of whether the suit has any merit.
- Under current law, the EPA prevents successful claimants from receiving compensatory or punitive damages while allowing them to earn back-pay damages. Additionally, while limited compensatory or punitive damages can be awarded under Title VII to claims where there was intentional discrimination, there is a cap on those damages at \$300,000. The Paycheck Fairness Act would allow unlimited compensatory and punitive damages under the EPA -- even if the discrimination was found to be unintentional.

According to the [“The Second Annual State of Women-Owned Businesses Report,”](#) there are more than 8.3 million women-owned businesses in America, a number that has increase by 54 percent over the last 15 years and continues to increase at one and half times the national average. These businesses generate nearly \$1.3 trillion in revenues and employ 7.7 million people. Even these small, women-owned businesses would be subject to the Paycheck Fairness Act’s sweeping changes and the increased possibility of expensive, frivolous lawsuits.

The Paycheck Fairness Act would apply to almost every business in America. By making it difficult for employers to defeat frivolous lawsuits, fostering larger class action cases, and creating an unprecedented level of remedies regardless of the intent to discriminate, the real winner with the passage of the Democrats’ bill would be trial lawyers. The increased liability that job creators would face could have a chilling effect on wage growth and hiring at a time when business should be encouraged to increase both.