Statement of the U.S. Chamber Of Commerce

ON: **THE PAYCHECK FAIRNESS ACT (S. 84)**

TO: **THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS**

BY: **CAMILLE A. OLSON**
SEYFARTH SHAW LLP

DATE: **APRIL 1, 2014**

The Chamber's mission is to advance human progress through an economic,

Political and social system based on individual freedom,

Incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

THE PAYCHECK FAIRNESS ACT

APRIL 1, 2014

Good afternoon Mr. Chairman and members of the Committee. On behalf of the U.S. Chamber of Commerce, I am pleased to testify on S. 84, the Paycheck Fairness Act (the "Act").[1] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region.

I am also a partner with the law firm of Seyfarth Shaw LLP,[2] where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their pay practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Dukes v. Wal-Mart*, and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

In today's testimony[3] I discuss the meaning and impact of the Act on the Equal Pay Act of 1963[4] ("EPA"). If enacted, the Act would amend the EPA significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise – namely, that throughout

[1] In July 2007, I testified before the House Subcommittee on Workforce Protections on H.R. 1338 (also entitled The Paycheck Fairness Act), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36467/html/CHRG-110hhrg36467.htm.

[2] Seyfarth Shaw LLP is a global law firm of over 800 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 350 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

[3] I would like to acknowledge Seyfarth Shaw LLP attorneys Richard B. Lapp, Paul H. Kehoe, Kevin A. Fritz, and Lawrence Z. Lorber, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[4] 29 U.S.C. § 206(d)(1).

the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.[5]

On the unsupported assertion that women today earn 77 cents for every dollar a man earns as a result of intentional employer discrimination, the Act would impose harsher, "lottery-type" penalties upon all employers, in effect eliminate the factor other than sex defense,[6] and make available a more attorney-friendly class action device. The Act's proponents contend that these changes are necessary to ensure equal pay for women. Nothing could be further from the truth because existing laws already provide robust protections and significant remedies to protect employees against gender-based pay discrimination (protections exist under both the EPA, Title

---

[5] The proponents of the Act have not cited any evidence establishing that a wage gap is actually caused by employer discrimination. They essentially propose acceptance of the existence of the wage gap as presumptive proof. However, this unsubstantiated syllogism does not withstand scrutiny. As labor economists and feminist scholars have observed, any wage gap between men and women is attributable to a number of factors bearing no relationship whatsoever to alleged employer discrimination. *See, e.g.*, BUREAU OF LABOR STATISTICS REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS (2013); JOINT ECON. COMM., INVEST IN WOMEN, INVEST IN AMERICA (2010); and AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN Commissioned by the U.S. Dep't of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp. (2009) (when accounting for factors such as: occupation, human capital development, work experience, career interruptions, industry, health insurance, fringe benefits, and overtime work, the 2009 Report found that the unexplained hourly wage differences were between 4.8 and 7.1 percent).

The so-called gender wage gap ignores the complexity and documented factors that have been identified in social science research to explain the differences in wage rates between men and women, including the following differences: the availability of other non-economic benefits provided by the employer; an employees' willingness and ability to negotiate pay; pay history; the number of hours worked; an employee's willingness to work during certain shifts and in certain locations; certifications and training obtained by the employee; the amount and type of education achieved; prior experience; length of time in the workforce; length of service with the employer; time in a particular job; the frequency and duration of time spent outside the workforce; job performance; personal choices regarding other family or social obligations; occupational choice, self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors. Many of these factors are a function of personal choices employees make. Reliance on this figure as sufficient evidence of widespread employer discrimination in today's workforce runs counter to every facet of the long-held standard of equal pay for equal work.

[6] Revisions to the "factor other than sex" defense would render it a nullity, allowing judges and juries to second guess employers and the marketplace as to the relative worth of job qualifications in individual pay decisions. The Act, in effect, requires employers to implement a civil service philosophy with respect to all pay decisions, eliminating individual pay advancements unless an employer can prove its pay raise was a business necessity and it cannot be shown that a different economic decision could have been implemented that would not have caused a wage differential for female employees without the pertinent job qualifications.

VII of the Civil Rights Act of 1964 ("Title VII")[7] as well as Executive Order 11,246). Plaintiffs are taking advantage of the multiple forms of redress available to remedy pay discrimination through both the filing of discrimination charges as well as federal and state court individual lawsuits and class actions.

Instead, in practice, the Act would: (1) impose enormous burdens and risks on employers who base compensation decisions on factors other than sex such as training, experience and education, or reliance on the current market value placed on skills and experience and economic need, (2) devalue in the marketplace enhanced skills, training and experience (as well as other non-discriminatory factors for pay differences between employees), and (3) expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women.

The proposed changes to the EPA are also contrary to its most fundamental underpinnings; the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of a worker's qualifications, the work performed, and more specifically, the setting of compensation.[8] The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other anti-discrimination legislation. Perhaps the most notable difference is the lack of any requirement that a prevailing EPA plaintiff prove intentional employer discrimination. This feature separates the EPA from Title VII, the Age Discrimination in Employment Act,[9] the Americans with Disabilities Act,[10] as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[11] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. In contrast, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for substantially equal

---

[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) ("Title VII").

[8] Indeed, the Government's experience with wage setting finds its genesis with the War Labor Board in World War II when the Board looked to determine market rates to apply to women then entering previously male-dominated jobs.

[9] 29 U.S.C. § 621 *et seq*.

[10] Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Like Title VII, under the ADA, punitive and compensatory damages are only available where intentional disability discrimination is shown. *See* 42 U.S.C. §§ 12117(a), 1981a(2). Similarly, disparate impact claims under Title VII do not subject an employer to punitive or compensatory damage claims.

[11] 42 U.S.C. §§ 1981 and 1983, respectively.

work unless the employer can show that the pay differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Act are debated. By eliminating the factor other than sex defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference was: (1) job-related and required by "business necessity" and (2) not "derived from a sex-based differential in compensation" the Act imports a business necessity "plus" standard for an employer to defend every individual pay decision even where no evidence of discrimination is required to be shown.[12]

And, if the Act becomes law, a plaintiff could erase an employer's defense and leave it open to a jury award of unlimited punitive and compensatory damages in large mass actions on the basis of one employee's complaint (without regard to the size of the employer). Under the Act, employer liability attaches every time a plaintiff's lawyer shows an employer could have implemented an alternative employment practice that would serve the same business purpose without producing a differential in pay between a male and female employee. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience. The Act does not describe any examples of alternative employment practices that would suffice to defeat the employer's burden. If a plaintiff countered an employer's justification of education, training, or experience by suggesting that the employer had the financial ability to raise everyone's pay in the same job – is that alternative an alternative employment practice that would defeat the employer's defense (in every case, so that the Act's "factor other than sex" defense is in fact a complete illusion)? In effect, the Act suggests that the universal alternative will be to "round up" any wage distinction. No answer is found in the Act; yet, there is no question that this one issue will lead to considerable uncertainty and litigation.

The Act's elimination of the EPA's defense of a factor other than sex with the imposition of a statutory framework previously reserved for application to an employer's neutral policy decisions that have a disparate impact on minority employees (where employers are not liable for compensatory or punitive damages) is unworkable, ill-advised, and inappropriate as an analytical tool to judge an employer's individualized wage decisions.

For these reasons, and all of the reasons set forth below, the Chamber strongly opposes the Paycheck Fairness Act. We urge the Committee to carefully consider the issues raised by the Chamber and proceed cautiously in considering the Act.

---

[12] Under the Act, market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative -- that the market rate used was not derived or influenced by a sex-based differential in pay. Under the Act, an employee's request for higher pay to match a competitor's offer could not be "matched" unless, first, the employer proved the competitor's offer was not influenced by a sex-based differential (practically, a very difficult burden) and second, the employee's increase was a business necessity (how does an employer prove that one employee's retention is a business necessity?).

Current Protections Against Sex-Based Wage Discrimination

Overview

Since 1963, it has been unlawful under the EPA for an employer to pay a female employee less than a male employee for equal work. Today, employees enjoy a substantial assortment of protections against wage discrimination. Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission.[13] In addition to the protections against wage discrimination based on sex afforded by the EPA, sex discrimination in wages is also prohibited by Title VII, many state antidiscrimination statutes, and, for employees of federal contractors and subcontractors.[14]

Today, the EPA and Title VII provide a woman who prevails on her wage discrimination claim a collection of favorable and effective remedies. Those combined remedies include: back pay; front pay; liquidated damages; attorneys' fees; costs; affirmative injunctive relief in the nature of an increase in wages on a going forward basis; prejudgment interest; $300,000 in punitive and compensatory damages. If an employer is a government contractor, as many are, it may also face sanctions (including, for example, debarment, the cancellation, termination or suspension of any existing contract) and remedies (such as elimination of practices, seniority relief, monetary and equitable relief to identified class members, and accelerated training). These contractor remedies exceed those available to victims of intentional discrimination under Title VII generally, the ADA, and the ADEA.

Mechanics of the EPA and Title VII

The EPA

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work.[15] An employee may assert an EPA claim either by filing a charge of discrimination with EEOC or by proceeding directly to federal court and filing a lawsuit there.

---

[13] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, *as amended*. In 2006, the EEOC issued regulations under the EPA, 29 CFR § 1621, *as amended*. Since Fiscal Year 2008, the EEOC has received between 919 and 1,082 charges asserting violations of the Equal Pay Act annually, representing roughly 1% of total charge filings. *See* EEOC CHARGE STATISTICS FY 1997 THROUGH FY 2013, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[14] Exec. Order No. 11,246, Section 202(1), 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended* by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

[15] 29 U.S.C. § 206(d).

To prevail under the EPA, an employee must make a *prima facie* showing of discrimination by presenting evidence that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[16] If the employee makes that showing, she has established a presumption of discrimination. The burden of persuasion then shifts to the employer, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[17] Note, even if an employer meets this burden, a plaintiff prevails if able to show that the employer's proffered reason is not bona fide, but is a pretext or excuse for paying higher wages to men for equal work. Critically, there is no requirement under the EPA for a plaintiff to prove any discriminatory intent or animus on the part of the employer. That element is not present in the liability scheme under the EPA.[18]

The EPA is contained within the Fair Labor Standards Act ("FLSA").[19] Under the FLSA, a successful EPA plaintiff may recover back pay, front pay, prejudgment interest, and attorneys' fees and costs. Where willfulness is shown, a plaintiff may also recover an additional amount of back pay as liquidated ("double") damages, and the defendant may also be fined up to $10,000 and imprisoned for up to six months.[20]

Title VII

Similarly, under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex . . . ."[21] An employee may assert a claim for sex-based pay discrimination by filing a charge of discrimination with EEOC and then, upon receipt of her notice of right to sue (and regardless of whether EEOC finds "cause" for concluding that discrimination occurred), may file a lawsuit in federal court. Further, an employee need not engage an attorney to participate in the EEOC processes, including investigation of their allegations of discrimination under the EPA and Title VII, as well as conciliation and litigation of their claim in federal court (if the EEOC determines to file suit on the employee's behalf).

---

[16] 29 U.S.C. § 206(d)(1); *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

[17] 29 U.S.C. § 206(d)(1).

[18] *See* 29 U.S.C. § 206(d)(1) (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).

[19] 29 U.S.C. 201 *et seq*.

[20] 29 U.S.C. § 216(b).

[21] 42 U.S.C. § 2000e-2(a). *See also* 42 U.S.C. § 2000e-2(h).

To establish that similarly-situated males were more favorably compensated, as is necessary to prevail in a disparate treatment pay claim under Title VII, a plaintiff must either provide direct evidence of discrimination, or prove discrimination through the indirect method by providing evidence of a *prima facie* case of discrimination. Once she has done so, the employer must articulate a legitimate, non-discriminatory reason for the wage differential. At that juncture, the plaintiff has an opportunity to prove that the proffered reason is a pretext for unlawful employment discrimination. The plaintiff's burden is higher under Title VII in connection with discrimination-based pay claims than under the EPA, where establishment of a disparity in pay for equal work obligates the employer to prove that the disparity is for a reason other than sex to avoid strict liability.

Comparison of EPA and Title VII

Both the EPA and Title VII provide remedies for women who believe they have been subjected to sex discrimination in pay, and we have included examples below demonstrating that both serve as effective mechanisms for women to redress alleged claims of sex-based pay discrimination. From an employee's perspective, the EPA is the more favorable and lenient of the two statutes with respect to both the ease of pursuing a claim against an employer and the relatively low standard for establishing liability. For example:

- Under the EPA, an "employer" includes entities and individuals. An employer employing as few as two employees is included within its coverage (whereas Title VII covers employers of 15 or more employees);

- Establishment of the *prima facie* case of pay discrimination under the EPA entitles an employee to a legal presumption of discrimination, with the burden of production and persuasion moving to the employer. In contrast, under Title VII, even where a plaintiff establishes a *prima facie* case of pay discrimination, she at all times retains the burden of persuasion as to discrimination. To avoid the imposition of liability, an employer must prove that the disparity was caused by one of four permissible reasons. As a result, under the EPA, plaintiffs are much more successful in defeating employer's motions for summary judgment and having their claims heard by a jury;[22]

[22] *King v. Acosta Sales & Mktg., Inc*., 678 F.3d 470, 474 (7th Cir. 2012) (reversing summary judgment for employer where it only articulated, rather than proved, that education and experience accounted for a pay differential between male and female managers); *Vehar v. Cole Nat. Group Inc.*, No. 06-4542, 2007 WL 3127913, at *7-8 (5th Cir. 2007) (reversing summary judgment for employer where the differences in experience between male and female computer programmers were not enough to support summary judgment); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 794 (7th Cir. 2007) (reversing summary judgment for employer where a genuine issue of material fact existed regarding the justification – perceived performance and one additional year of seniority – for a $2 per hour pay differential between male and female press feeders); *EEOC v. Health Management Group*, No. 09-1762, 2011 WL 4376155, at *5-6 (N.D. Ohio Sept. 20, 2011) (denying employer's motion for summary judgment where it argued that a pay differential between male and female franchise distributors was based on the male's prior negotiating skills with physicians, where a question of fact existed regarding whether the

- The EPA provides for strict liability, meaning that a plaintiff need not show discriminatory intent on the part of the employer to prevail, whereas a disparate treatment plaintiff under Title VII must show the existence of discriminatory intent on the part of the employer to prevail;

- There is a much longer, more generous limitations period (2 years for a general violation, 3 years for a violation found to be willful) under the EPA as opposed to at most 300 days for the filing of an administrative charge of discrimination with the EEOC under Title VII (which is a prerequisite to suit in federal court); and

- Under the EPA there is no charge filing requirement with an administrative agency.

The EPA also shares many of the advantages accorded to claimants under Title VII, including:

- Plaintiffs may recover attorneys' fees and costs;

- The EEOC may bring public suits to enforce the EPA, including seeking injunctive and other remedies; and

- Plaintiffs may file a charge alleging a violation of the EPA and request the EEOC investigate the violation.

In the aggregate, these overlapping non-discrimination statutes provide employees multiple avenues for pursuing claims of unequal pay for equal work. They also provide employees with multiple forms of redress with respect to alleged pay discrimination, including: a direct right to a jury trial on their own behalf in federal court, the filing of a charge of discrimination with the EEOC, the right to have the EEOC pursue a claim on their behalf in federal court, and the right to bring a collective action or class action on behalf of other similarly-situated employees who choose to participate in an action under the EPA or Title VII, respectively (on their own or by their attorney of choice). It is not uncommon for a worker suing to enforce his or her rights to equal pay under the EPA to also file a charge of discrimination with the Equal Employment Opportunity Commission, file a lawsuit in federal or state court, and, if their employer is a federal contractor, raise a claim under Executive Order 11,246 with the Office of Federal Contract Compliance Programs (or do all of the above).

And, of course, notwithstanding the differences between the statutes, claimants may bring parallel claims under the EPA and Title VII to ensure that they receive the fullest protection under the law. Indeed, they may recover under both statutes for the same period of time provided they do not receive a double or duplicative recovery for the same "wrong." As such, a prevailing plaintiff may recover back pay, a front pay adjustment, compensatory damages,

---

hiring official knew of that skill). *See also, Mickelson*, 460 F.3d at 1311 ("This is not to say that an employer may never be entitled to summary judgment on an EPA claim if the plaintiff establishes a prima facie case. But, because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary'") (internal citation omitted).

punitive damages, liquidated damages, and injunctive relief, among other relief. Put simply, women who believe that they suffer wage discrimination as a result of their sex have available to them federal statutes that provide significant remedies.[23]

Concerns Regarding Proposed Changes to the Equal Pay Act

Inappropriate Expansion of EPA Remedies For Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

Critics of the EPA in its current form have observed that it is not a "lottery."[24] Indeed, it is not intended to be. Rather, its remedial provisions are intended to compensate employees for sex-based pay inequities, whether inadvertent (which is sufficient for the imposition of liability) or not. Awarding compensatory and punitive damages where no showing of intent is required would be inappropriate and contrary to the purposes behind the allowance for compensatory and punitive damages in cases of *intentional* discrimination.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages. Prior to passage of that Act, 42 U.S.C. § 1981 "permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination.[25] As then-Congresswoman Pat Schroeder from Colorado explained in her statement during the Congressional floor debate from August 2, 1990 regarding punitive damages for Civil Rights Act:

> Mrs. SCHROEDER. Mr. Chairman, I want to answer some of the things that we have just heard. We are hearing here that there is something wrong with this bill because there are remedies **. . . .** Let me tell Members one more thing about punitive damages. *You do not get punitive damages unless there was intent. It is all equitable, unless there is intent.* It seems to me in this country that if there is intent to discriminate, then we certainly should be out trying to assess some kind of punitive damages. Otherwise, someone just assigns it as a cost of doing business.[26]

As evidenced by the above, compensatory and punitive damages serve distinct and specific purposes. Compensatory damages are "intended to redress the concrete loss that the

---

[23] BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 15 (3d ed. 1996).

[24] Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 REV. PUB. PERS. ADMIN. 199, 204 (2006).

[25] *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001).

[26] 101 CONG. REC. S. 1745 (daily ed. Aug. 2, 1990) (Statement of Cong. Schroeder).

plaintiff has suffered by reason of the defendant's wrongful conduct."[27] Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[28] Under Title VII, "[A] finding of liability does not of itself entitle a plaintiff to an award of punitive damages."[29] "The purpose of awarding punitive damages is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'").[30] "Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff."[31] It strains logic and flouts the entire body of federal anti-discrimination law to suggest – or, as the Act would do, to mandate – that damages conceived and intended to punish and deter wrongful conduct should apply to claims of inadvertent, unintentional conduct that has the effect of violating the EPA. It is inconsistent to introduce a concept of malice or reckless indifference into a strict liability statute.

In sum, it is inappropriate here to amend the EPA, a strict liability remedial statute that requires no showing of discriminatory intent, to facilitate the imposition of unlimited punitive and compensatory damages. It would serve no legitimate purpose, and it would serve the illegitimate purposes of both turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate wage differentials and to unjustly enrich plaintiffs' attorneys.

De Facto Elimination of the "Factor Other Than Sex" Affirmative Defense

Perhaps the most significant substantive revision to the EPA contained in the Act is found in its re-writing of the "factor other than sex" affirmative defense. If enacted, it would be extremely onerous, impracticable, and prohibitively expensive for an employer to defend against a claim that a wage differential existed on the basis of a factor other than sex.

The EPA's existing factor other than sex affirmative defense was explained by the EPA's primary sponsor in the House of Representatives, Representative Charles E. Goodell, back in 1963, as follows:

> We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is

[27] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, (2001).

[28] *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence") and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

[29] *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).

[30] *Id.* (internal citations omitted).

[31] *Id.* (internal citations omitted).

not based on sex. That is the sole factor that we are inserting here as a restriction.[32]

So, clearly, just as important to the EPA's sponsors of the legislation as the goal of eliminating sex-based pay differentials was the bedrock of free enterprise. Given how critical that concept is to the EPA – and the fundamental importance of the factor other than sex affirmative defense in achieving it – it is clear that this Act would not actually "amend" the EPA. Instead, what the Paycheck Fairness Act seeks to do is require employers to justify individualized pay decisions on a case-by-case basis based on vague, but clearly onerous, standards.

Today, the "factor other than sex" affirmative defense forms the crux of the EPA. It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a gender-neutral factor other than sex.[33] This affirmative defense enables employers to consider a wide range of permissible, *i.e.*, non-discriminatory, factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as marketplace conditions, in setting salaries. Although some circuit courts have attempted to read a "business justification" or "business necessity" element into this affirmative defense,[34] the U.S. Supreme Court, quite prudently, has never endorsed such a reading and has made clear that the affirmative defense means what it says – any factor other than sex.[35]

---

[32] 109 CONG. REC. 9198 (1963) (statement of Rep. Goodell, principal exponent of the Act).

[33] *See, e.g.*, *Fallon v. State of Ill.*, 882 F.2d 1206, 1211-12 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

[34] *See, e.g.*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC v. J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988); and *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

[35] *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005). *Compare* the Second, Third, Sixth, Ninth, and Eleventh Circuits' application of a "legitimate business reason" standard to the Act's "factor other than sex" *with* the Fourth, Seventh, and Eight Circuits' application of a "gender neutral test" requiring the "factor other than sex" to be both facially gender neutral and uniformly applied. *See*, Kouba v. Allstate Ins. Co., 691 F.2d 783, 876 (9th Cir. 1982) *with Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) and *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003) (court noted its function is not to sit as a "super personnel department" and that inquiring into the reasonableness of an employer's decision would narrow the exception beyond the plain language of the statute). *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000) ("[I]t is inappropriate for the judiciary to substitute its judgment for that of management."). *See also Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006) (holding that courts do not "sit as super-personnel department with authority to review an

The Act would effectively eliminate the EPA's factor other than sex defense. Under the Act, even if an employer proved an applicant's job experience or education was the factor considered when paying a male applicant more than a female applicant, the employer faces liability if it cannot prove paying the male applicant a higher starting wage based on his greater job experience or education was a business necessity.

In addition, an employer who determines to pay an applicant or an employee a higher wage based on market forces -- i.e. matching a higher pay offer from a competitor -- does so at considerable peril. Under the Act, payment of a wage rate as a result of a market condition is unacceptable unless an employer can prove all of the above plus that the market rate of its competitor is "not based upon or derived from a sex-based differential in compensation". How does a small employer demonstrate the absence of sex-based discrimination in its competitor's setting of wages when faced with an imminent decision as to whether to match the pay rate or lose a valuable employee? The Act provides no guidance.

And, finally, having passed each of the above hurdles for every individual wage decision, an employer remains liable for a violation of the Act, if a plaintiff responds to the job-related, business necessitated prior job experience, prior training, or education reason for the higher starting wage rate for the male applicant by "demonstrat[ing] that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."[36] If an employee demonstrates that an employer was not required to employ a worker with the most experience in the business, or has the financial ability to pay all employees in that position a higher starting wage rate, does the employee satisfy this burden and eliminate the employer's defense? The Act provides no guidance.

Having shown an employer could have adopted another employment practice instead of paying a male applicant a higher wage rate because of their greater experience, education or training, the Act seals the liability of the employer for unlimited compensatory and punitive damages for paying a male applicant a higher wage rate that was job-related, consistent with business necessity, and not the result of sex discrimination, because in retrospect, years later, a jury determined it could have chosen an alternative employment practice.

If the Act were law, it would be imprudent and highly risky for an employer to ever reward applicants or employees in a job title for their individual educational, training, or experience,[37] without providing that same reward to all employees in the job, regardless of their

---

employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.").

[36] S. 84, 113th Cong. (2013-2014).

[37] For example, under this replacement for the factor other than sex affirmative defense, an employer who wishes to pay a higher wage to an employee who has five years more experience than another employee may not be able to do so because a court finds that the differential in experience could be overcome by in-house training over an extended period of time. That is a

inferior business-related qualifications. Yet, what is the purpose of compensation? Is it to fairly compensate employees for work performed as well as to enable employers to attract the skills and experience necessary to promote the enterprise? The Act looks to the first concept (though it minimizes the importance of education, experience and training by saddling any wage payment differential based on these examples with other prerequisites before they can be used to justify a wage increase), but ignores the second. By placing an employer's decision to value intangible skills and experience under a business necessity test, the Act motivates employers to lean toward compensation practices of an earlier industrial age where many jobs were fungible and skills and education were not regarded as valuable. These concepts have long since been rejected, but the Act will resurrect them as national policy.

As such, the Act places judges and juries in the human resources offices of American businesses to determine whether sex-neutral factors were appropriate considerations – and appropriately considered in an employer's wage-setting decision-making. As the Seventh Circuit Court of Appeals aptly observed with respect to questions of relative job valuation, "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give.[38]

Application of A Disparate Impact Defense to EPA Disparate Treatment Claim is Inappropriate

Section 3(a) of the Act would alter the "factor other than sex" affirmative defense by requiring employers to *prove*, in order to counter the presumption of wage discrimination, that the factor responsible for a wage differential is a bona fide factor other than sex, job related, consistent with business necessity, and is not based upon or derived from a sex-based differential in compensation.

The job-related and consistent with business necessity defense, however, is an offshoot of disparate impact law under Title VII, intended to address the effects of an employer's neutral policies that disproportionately impact a protected group.[39] A helpful key to explaining the improper application of the business necessity standard to EPA defendants can be found in the supposition of discrimination uniquely afforded to the EPA plaintiff. To establish a *prima facie*

---

judgment that employers should have an ability to retain in order to have an effective, efficient workforce and in order to achieve their own specific business objectives and priorities.

[38] *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007).

[39] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii) which provides "a complaining party demonstrates that a respondent uses a *particular employment practice* that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity or the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." Notably, the job-related and consistent with business necessity defense was left undefined in the Civil Rights Act of 1991.

case of disparate impact under Title VII, a plaintiff must not only demonstrate that a disparity exists, but also identify a specific policy or practice and establish a causal relationship between the disparity and the policy or practice.[40] It is in direct response to this challenged, specific, particular policy or practice identified by the Title VII plaintiff that Title VII defendants must demonstrate the business necessity of the specific practice. In contrast, EPA plaintiffs are already free from this requirement of specificity, as EPA claims directly challenge an employer's pay practices based on the existence of a pay disparity alone.

Courts have long held that these frameworks are not compatible. In *Wernsing*, the Seventh Circuit found that "[a]n analogy to disparate-impact litigation under Title VII does not justify a "business reason" requirement under the Equal Pay Act, however, because the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate impact component."[41] As the Ninth Circuit explained in *Spaulding v. University of Washington*:

> The [disparate impact] model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related . . . As the court in *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir.1982) (Pouncy), made clear: "[t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." The [Plaintiff-Appellant] unconvincingly cites cases for the proposition that "the disparate impact analysis has been applied to wage discrimination cases." They do not involve wide-ranging allegations challenging general wage policies but rather challenges to specific employer practices. [42]

Attaching a disparate impact framework onto a disparate treatment claim is fundamentally illogical, because it removes the intermediary step of identifying the practice or policy, whose application allegedly serves as the basis for the assertion of employer discrimination. In other words, EPA claims challenge pay practices directly rather than identifying a policy that results in the pay disparity, because under the EPA, discrimination is presumed to exist once a disparity is shown.

It is important to note that the plain text of Act proposes to apply the "bona fide" determination to factors including education, training, or experience. And where such tests have been permitted by courts in pay discrimination cases under Title VII, the question has always pertained to a limited threshold test: whether the non-discriminatory factor is truly necessary and inseparably intertwined with the performance of duties and responsibilities of a job. In other words, Title VII applies the business necessity test to questions that result in a binary answer:

---

[40] *See* 42 U.S.C. § 2000e–2(k)(1)(B)(i), which provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact . . ."

[41] 427 F.3d 466, 469 (7th Cir. 2005). *See also Smith v. City of Jackson*, 544 U. S. at 239 n.11 (2005) (noting in EPA, Congress intended to prohibit all disparate impact claims).

[42] 740 F. 2d 686 (9th Cir. 1984) (overruled on other grounds). *See also Wards Cove Packing Company, Inc. v. Atonio*, 490 U.S. 642, 655-58 (1989).

either a factor is necessary to job performance or it is not. For instance, the *Griggs* court found that a high school diploma was not necessary to job performance; and it is from this business necessity showing that courts infer whether defendants are able to produce explanations that are "bona fide" factors, rather than merely a pretext for discrimination that would exclude certain groups. In that sense, the business necessity test as established by the *Griggs* court and applied to Title VII claims since then upholds the equality of opportunity explicitly protected by the Civil Rights Act and implicitly promised by the principles that have guided this country since its founding.

In contrast, the Act would now apply standards of job-relatedness and business necessity to questions that require economic valuations of an unlimited number of factors. The Act essentially invites employees and employers to dispute in court whether certain qualifications, including education, training, or experience, are justifications for disparities in compensation. In that sense, the Act represents an unprecedented intrusion of government into the independent business decisions of private enterprises by eroding the fundamental purpose of compensation;[43] in reality, compensation functions not only as a means to remunerate employees for work performed, but also to enable employers to attract the skills and experience likely to promote the competitiveness of the enterprise. In contrast to its usage in Title VII and ADA claims, the business necessity test as applied by the amended EPA would sacrifice the autonomy of private enterprise because the statute uniquely presumes discrimination merely on the basis of unequal outcomes.

The EPA's Collective Action Mechanism in Section 216(b) Should Not be Amended to Incorporate Fed. R. Civ. P. 23

Section 3(c)(4) of the Act allows an action brought to enforce section 6(d) to be maintained as a class action under the Federal Rules of Civil Procedure. Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by women on behalf of themselves

[43] The Act's business necessity test takes standards of rigor designed to measure and justify the impact of a specific policy to bar certain groups from access to employment and impose the same standards on individualized compensation decisions. As such, the Act improperly thrusts onto the judiciary an untold number of fact-finding exercises with respect to whether certain qualifications result in incremental performance gains that justify the challenged pay differential. For example, if a law degree is not necessary to the performance of duties and responsibilities of a policy analyst, Title VII will provide appropriate protection if it is used as an inappropriate barrier to employment. However, application of the Act would place members of this legislative body at risk for unlimited damages for paying a higher salary to a male analyst with a law degree as well as a Master of Public Policy degree in comparison with a female analyst without a law degree. In response, the hypothetical defendant would bear the burden of showing that the second degree is indeed a bona fide factor that justifies added compensation, and would face the risk of a judicial body determining otherwise, or determining that, even if so, there was another employment decision that could have been made that would lead to a lesser pay differential between the two policy analysts (*i.e.* paying both the same pay regardless of the fact one had different qualifications). However, the Act invites such disputes into courtrooms, forcing the judiciary to weigh the merits of the economic judgments of employers.

and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action, including before becoming affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. FLSA, ADEA, and EPA collective actions, as they are known under Section 216(b), provide employees with a generally more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees than that required under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and proposed by the proponents of the Paycheck Fairness Act as the applicable new class action mechanism to apply to EPA claims. The Chamber submits that the Act's proponents have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a) a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit, that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole, or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of Rule 23's requirements.[44]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees. [45] The similarly situated requirement is met through allegations and evidence of class wide discrimination. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively

---

[44] *See e.g.*, *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[45] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.*, No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001) (citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982)).

"opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[46]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex, as well as Rule 216(b) collective actions under the EPA.[47] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.[48] The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly-situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For all of these reasons, the Chamber submits that this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by the Paycheck Fairness Act.

Other Concerns

In addition to the concerns discussed above, the Act raises other serious concerns. Some of those concerns are noted below:

Reinstatement of The EO Survey

Section 9(b)(3) of the Act reinstates the EO Survey, originally adopted in late 2000 for the primary purpose of effectively targeting OFCCP compliance review resources pursuant to Executive Order 11246,[49] However, the EO Survey was a flawed tool as it failed to accurately

[46] Portal-to-Portal Pay Act, 29 U.S.C. § 256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[47] *See, e.g., Jarvaise v. Rand Corp.*, No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

[48] *See, e.g., Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

[49] The stated objectives of the EO Survey were "(1) To improve the deployment of scarce federal government resources towards contractors most likely to be out of compliance; (2) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts thereby allowing better resource allocation; and (3) To increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations." Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 65 Fed. Reg. 68,039 (Nov. 13, 2000).

target contractors whose pay practices were either compliant or noncompliant. Indeed, in April 2000, Bendick and Eagan Economic Consultants Inc. reported serious concerns to the OFCCP regarding the results of the pilot program and recommended that the survey be validated before implementation before implementation.[50] The OFCCP failed to conduct the recommended study.[51] In 2002, OFCCP contracted with Abt Associates to evaluate the reliability and usefulness of the EO Survey.[52] Abt determined that the EO Survey's predictive power was only slightly better than chance, with a false positive rate (identifying compliant contractors as non-compliant) of 93% and a high rate of classifying true discriminators as non-discriminators.[53] Based on the EO Survey's limited reliability, the Department of Labor rescinded the EO Survey in 2006.[54]

Data Collection Requirements and Regulations

In 2010, the EEOC requested that the National Academy of Sciences convene a panel to review methods for measuring and collecting pay information by gender, race and national origin.[55] The panel concluded that collecting earnings data would be a significant undertaking for the EEOC and a potential increased burden for employers.[56] The panel also found that the EEOC had "no clearly articulated plan of how the data on wages could be used in the conduct of enforcement responsibilities of the relevant agencies."[57] In addition, the panel determined that existing studies of the cost effectiveness of an instrument for collecting wage data and the resulting burden [were] inadequate to assess any new program."[58] Given the real budgetary and personnel constraints facing the EEOC and the current backlog of pending investigations, simply adding a requirement to adopt regulations and collect data is unwise. The EEOC simply does not have the personnel or the expertise in analyzing this data.

---

[50] Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 71 Fed. Reg. 53,033 (Sept. 8, 2006).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See* PANEL ON MEASURING AND COLLECTING PAY INFORMATION FROM U.S. EMPLOYERS BY GENDER, RACE, AND NATIONAL ORIGIN ET AL., COLLECTING COMPENSATION DATA FROM EMPLOYERS, (National Academies Press 2013).

[56] *Id.* at 2.

[57] *Id.*

[58] *Id.*

OFCCP Program Initiatives

Under the innocuous title "Reinstatement of Pay Equity Programs and Pay Equity Data Collection," Section 9 of the Act instructs the Director of the OFCCP to ensure that OFCCP employees, among other things, use a full range of investigatory tools and not to require a multiple regression analysis or anecdotal evidence in a compensation discrimination case. In 2006, the OFCCP adopted two enforcement guidance documents, commonly known as the "Compensation Standards" and "Voluntary Guidelines." Among other items, the Compensation Standards only compared "similarly situated individuals," required OFCCP to use multiple regression analysis, and required that statistical showings be supported with anecdotal evidence of discrimination. Effective February 29, 2013, the OFCCP rescinded these common sense guidelines.

Two provisions are worth particular note: the provisions relating to the agency's analysis of systematic compensation discrimination and the provisions targeted toward surveying the federal contractor community.[59]

Section 9 of the Act appears to be designed to statutorily mandate that the OFCCP refrain from requiring the adoption of multiple regression analysis or anecdotal evidence for a compensation discrimination case, among other things. Notwithstanding that the OFCCP recently rescinded the above-noted 2006 Compensation Standards and Voluntary Guidelines, the Chamber opposes the utilization of pay grade analysis as a method for proving that systemic compensation discrimination exists for one very simple reason: it doesn't work. Assuming individuals in the same pay "band" are similarly situated is simply too crude a statistical tool. Multiple regression analysis, on the other hand, is the widely accepted method by which plaintiffs and defendants make their case. Robust statistical tools like this are necessary to analyze the many factors that determine compensation and determine whether pay differentials are due to discrimination or some other factor. Statistical techniques will result in the OFCCP alleging discrimination more frequently, without adequate proof, forcing employers to unnecessarily incur legal costs and wasting OFCCP's resources. One perverse result of making such a change will be that employers will choose to settle with OFCCP based on such an inadequate statistical analysis would open themselves up to charges of reverse discrimination under Title VII or state law.[60]

---

[59] A full discussion of these issues is beyond the scope of this testimony. Extensive comment by the Chamber on related issues is available on the Chamber's web site at: www.uschamber.com.

[60] *See Maitland v. Univ. of Minn.* 155 F.3d. 1013, 1016-18 (8th Cir. 1998) (reversing district court's grant of summary judgment to employer on reverse discrimination claim and ruling that "the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court's conclusion at the summary judgment stage of this case and that there was a manifest imbalance in faculty salaries."); *see also Rudebusch v. Hughes*, 313 F.3d 506, 515-516 (9th Cir. 2002) (reverse discrimination case based on allegedly insufficient multiple regression analysis, ultimately resulted in a ruing requiring the employer to pay male faculty members $1.4 million); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

Section 9(b)(3) appears to statutorily mandate the OFCCP equal opportunity survey. It should be noted that the OFCCP's survey, which was intended to help identify federal contractors that should be audited by the OFCCP, was substantively flawed, failed to serve as a useful enforcement tool of the agency, and placed a significant, unnecessary burden on contractors. Years ago, a neutral study of the survey was conducted by Abt Associates as part of the OFCCP's review of the survey. That study conclusively demonstrated that the survey provided no useful data and was extremely burdensome (with a conservative estimate that the study cost contractors approximately $6 million per year). Imposing this burden, which has been proven to do nothing to help identify or eradicate discrimination, on the federal contractor community cannot be justified.

Permitted Inquiries About Wages

Section 3(c) of the Act appears to provide an unprecedented broad right to employees under the EPA. Employees would have the right to "inquire about wages of the employee or another employee . . ." without fear of any adverse action by an employer. The new right does not appear to be narrowed in any way by relevancy to the employee's pay or by confidentiality concerns of an employer. This language goes far beyond any rights enjoyed by non-unionized and unionized employees under the National Labor Relations Act ("NLRA").

For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but do not otherwise have the right to obtain written documentation about the wages of any other employees. Although unionized employees, as part of an employer's duty to bargain in good faith, have the right to inquire about wage information for bargaining purposes, this right is not without boundaries and not without safeguards. In *International Business Machines Corp. and Hudson*, the National Labor Relations Board ("NLRB") held that employees could discuss their own wages with each other, but could not access or distribute company-compiled information as the company had a valid business justification for its rule against distribution of wage data compiled and classified as confidential.[61] Instead, the NLRB explained that the employer had a valid business justification for discharging an employee who disclosed wage information in violation of the company's rule. In contrast, here, the Paycheck Fairness Act provides an open door for an employee's inquiries in the wages of all employees, without any balancing of an employer's need for confidentiality and other legitimate concerns.

New Definition of "Establishment"

Section 3(a) of the Act appears to redefine and expand the definition of equal work, by amending the EPA to allow an employee to raise a claim of denial of equal pay for equal work if the inequality between men and women pay exists between men and women who work at different physical places of business within the company. Currently, in keeping with the EPA's prohibition against denying employees equal pay for equal work because of their sex, the EPA requires an employee to compare their wages earned against other employees within the physical place of business in which they work. According to the Regulations issued by EEOC to construe

[61] 265 NLRB 638 (1982).

the EPA, "establishment" "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment."[62] We urge the Committee to consider the difficulty and impropriety of comparing jobs across locations and geographical regions in determining whether equal pay is being paid for equal work, and reject the unworkable proposal contained within the Act.

Conclusion

In conclusion, the Chamber has serious concerns with the Paycheck Fairness Act. Mr. Chairman and members of the Committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

[62] 29 C.F.R. §1620.9(a).