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Although in effect for more than 40 years, the Equal Pay Act ("EPA") has fallen into disuse. The liability requirements of the EPA are extraordinarily difficult for plaintiffs to satisfy, the remedies available fail to address the full range of harm suffered by aggrieved women and the enforcement scheme provided by the statute ignores the realities of the modern workplace. As a result, women who believe they have been subject to pay discrimination in compensation more often invoke Title VII of the Civil Rights Act of 1964, enacted one year after the EPA was passed. Properly recast, however, the EPA can offer a powerful tool in the ongoing efforts to reduce the gap in earnings between men and women. The Paycheck Fairness Act of 2007 ("PFA" or "Act") would eliminate most shortcomings of the EPA that have limited its utility.

In this statement, I will identify and discuss the most serious flaws of the EPA. In offering these views, I draw upon nearly 30 years of legal practice representing victims of civil rights violations, especially in equal employment opportunity matters.

- First, the initial proof required of a plaintiff to establish a *prima facie* case is prohibitively high, as a result of which most women who pursue claims individually under the EPA do not prevail.

- Second, the EPA permits employers to defend claims by asserting that the pay difference is attributable to one or more "factors other than sex." This defense shields from challenge grounds for pay disparities that, while not overtly attributable to sex, may nonetheless be closely associated with gender. As such, the scope of the defense must be confined to grounds that plainly could have no relationship to gender.

- Third, where evidence exists of a pattern or practice of pay discrimination, the EPA requires each aggrieved worker to opt into the case in order to receive any relief. This opt in requirement has had the effect of excluding many women from participation in EPA cases. Instead of employing this outdated and burdensome procedure where multiple claims are advanced, the EPA should employ Rule 23 of the Federal Rules of Civil Procedure which includes within a certified class all women who may be aggrieved by the same or similar pay practice without the obligation to opt into the case.

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- Fourth, the remedies available under the Equal Pay Act fail to address fully the harm that pay discrimination causes and provide little deterrence to employers from engaging in such discrimination, as the maximum relief available is often little more than payment of the wages the aggrieved women would have been paid in the absence of the pay discrimination to which they were subject.

- Fifth, as most employees are unaware of the compensation paid to their co-workers, they lack the information needed to initiate actions under the EPA. Private enforcement of this statute, therefore, will often fail to reveal, much less challenge and end, systemic gender-based pay disparities. Without regular disclosure of worker compensation by gender to an appropriate enforcement agency, the protections afforded by the EPA will never be realized.

I. DIFFICULTIES IN ESTABLISHING PLAINTIFF'S PRIMA FACIE CASE

A plaintiff seeking to recover under the Equal Pay Act bears a heavy burden of proof to demonstrate a sex-based pay disparity is discriminatory. A plaintiff must show she performed work that is "equal" or "substantially equal" to that of a male comparator in the same establishment and under similar working conditions.[1] In determining whether work is equal or substantially equal, courts consider factors such as skill, effort, responsibility, and working conditions.[2] While a plaintiff must show more than that the work of the comparator is comparable, she is not required to prove the work was identical.[3] The meaning of equal work in the EPA, therefore, lies somewhere between comparable and identical work. This range of possible meanings that can be ascribed to "equal work," the central requirement that the plaintiff must satisfy, has created considerable uncertainty about how to satisfy this standard.

1/ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

2/ Working conditions need not be equal, but must be similar as evidenced by the physical surroundings and job hazards. *Id*. at 200.

3/ 29 C.F.R. 1620.14(a) (2003); *Lambert v.Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993)

Rather than conducting a comparison of the essential features of jobs held by a plaintiff and her comparator, courts too often compare superficial features of the jobs and overlook fundamental similarities that are masked by trivial differences. Without the assistance of an expert to conduct analyses of each job at issue, which requires an expense few plaintiffs can afford individually, courts are left at sea in interpreting the requirements that plaintiffs must satisfy. Rather than assessing whether the jobs involve equal or similar skill, effort, and responsibility, courts have been tempted simply to compare a detailed job task list.[4] Similarly, courts are not required to consider (1) experience, training, education, and ability required of jobs when assessing whether they involve equal skill; (2) the degree of mental or physical exertion required by the two jobs, as effort may be equal even if exerted in a different manner; and (3) the degree of accountability required for each job responsibility, despite the relevance of such factors in determining job comparability. Without the assistance of experts to guide the interpretation of broad statutory language and its application to job features that may not be easily compared, courts often find plaintiffs failed to satisfy their initial burden of proof and, as a result, the burden of proof never shifts to the employer to justify its challenged pay practices.

The Equal Pay Act also requires that a plaintiff and her male comparator work in the same establishment.[5] As more employers have multiple facilities at which the same jobs are performed, this requirement imposes increasingly unjustified constraints on the job comparisons that must be made. Where women work in jobs whose only

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4/ *Cavuoto v. Oxford Health Plans, Inc.*, 2001 WL 789316, *7 (D.Conn. June 13, 2001) (conducting a superficial task-by-task comparison of job duties as opposed to inquiring into the effort, skill, and responsibility involved in the jobs being compared); 29 C.F.R. § 1620.15(a) (2003).

5/ 29 U.S.C. § 216(d) (2007).

comparators are located in other facilities, this provision creates a requirement that is impossible to satisfy.

These difficulties in establishing appropriate comparators pose the greatest obstacles to success under the EPA for women holding higher level jobs where an employer's contention that each job is unique may seem most plausible. Current litigation trends show that blue-collar workers who hold jobs with simple, well-defined duties and whose work is almost identical have had greater success in satisfying their burden of proof under the EPA.[6] In contrast, women in administrative, managerial and executive positions have experienced a high rate of dismissal of their EPA claims because their jobs are more easily viewed as unique and therefore lack an appropriate comparator.[7] As women have come to occupy higher level positions in the workplace with increasing frequency, they have found less available to them the protection against pay discrimination that Congress intended to provide by enacting the EPA.

The Paycheck Fairness Act in part addresses these obstacles to satisfying the plaintiffs' burden of proof under the EPA. The Act would appropriately eliminate the requirement that equal work must be performed at jobs located at the same facility, thereby shifting the focus of any comparison to the characteristics of the work performed.[8] Other artificial barriers to satisfaction of the plaintiffs' burden of proof cannot be so easily eliminated. Clearer and more precise definitions of the initial

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6/ *See, e.g., Georgen-Saad v. Texas Mutual Insurance Co.*, 195 F.Supp.2d 853, 857 (W.D. Tex. 2002) (noting that the Equal Pay Act is more easily applied to lower-level workers performing commodity-like work and is not suitable for assessing high-level workers)

7/ *See* Juliene James, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873 (2004) (explaining the historical and normative factors that result in a de facto white collar exemption to the Equal Pay Act).

8/ PFA, § 3(c).

requirements that plaintiffs must satisfy might provide courts with greater guidance and reduce the all-too-common resort to mechanical comparisons that ignore important features of the jobs. Ultimately, the elaborate comparisons of multiple job dimensions that the EPA requires are most likely accomplished with assistance from experts. But, their cost is prohibitive for most employees who pursue their claims individually, making the ability to pursue such claims collectively especially important to effective enforcement of the EPA.

II. THE DEFENSE AVAILABLE TO EMPLOYERS, THAT A PAY DISPARITY WAS ATTRIBUTABLE TO A "FACTOR OTHER THAN SEX," MUST BE MORE NARROWLY DEFINED, AS IT PRESENTLY PROTECTS CONDUCT THAT CAUSES GENDER PAY DISPARITIES.

In order to avoid liability, employers must rebut evidence of a gender-based pay disparity by proving that the wage gap is a result of one of the following – a bona fide seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a factor other than sex. The first three defenses available to employers are specifically defined by statute and are normally associated with sound business practices likely to minimize the influence of gender in compensation decisions. The last defense that the EPA affords employers, however, that the pay disparity was caused by a "factor other than sex," insulates from judicial scrutiny a wide array of business practices which, while neutral on their face, nonetheless may rely on factors that disadvantage women. Accordingly, the "factor other than sex" defense must be confined to business practices shown to serve compelling and legitimate interests of the employer and for which no alternative exists that would cause a smaller or no disparity in pay.

For example, a policy that paid war veterans more than non-war veterans in jobs involving the same work was found to be a gender-neutral "factor other than sex" notwithstanding that the lower paid non-war veteran employees were all women and the higher paid war veterans were all men.[9] Reliance on pre-hire pay levels and strength and agility requirements offer other examples of factors that correlate highly with gender but which nonetheless can satisfy the "factor other than sex" defense.

While not expressly relying upon gender, these factors and others like them are so closely associated with gender that they serve as a proxy for gender. As such, they should not qualify as grounds on which an employer may successfully defend a gender-based pay disparity.

Nor is the EPA clear in prescribing the burden of proof that employers must satisfy in order to assert the "factor other than sex" defense successfully. The vague language of this defense, in contrast to the specificity of the other three defenses, has led courts to allow employers to satisfy the "factor other than sex" defense more easily than the other defenses. In *Strecker v. Grand Forks County Social Service Board*, for example, the court accepted the employer's simple assertion that use of the state personnel classification system was a gender-neutral "factor other than sex" that contributed to the observed gender-based pay disparity.[10] In contrast, in *Brewster v. Barnes*, the court required the employer to satisfy a burden of persuasion; that is, to persuade it that the proffered reason actually contributed to the pay disparity and was

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9/ *Fallon v. State of Illinois*, 882 F.2d 1206, 1212 (7th Cir. 1989).

10/ 640 F.2d 96 (8th Cir. 1980), *rev'd on other grounds* by *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *see also Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985) (holding that the defendant satisfied the factor-other-than-sex defense based on the existence of a reorganization plan).

gender neutral.[11] As a result, the court concluded that the employer had failed to raise a "factor other than sex" because it failed to investigate or determine whether the employee in fact spent more than fifty percent of her time performing certain tasks. Defining the "factor other than sex" defense with greater particularity and specifying the burden of proof that the employer must satisfy would likely ensure that courts hold employers to the same evidentiary standard as they do with the other affirmative defenses available under the EPA.

The Paycheck Fairness Act would address the shortcomings in the "factor other than sex" defense available in the EPA. First, the Act requires that the "factor other than sex" be *bona fide*.[12] The addition of the *bona fide* requirement ensures the factor proffered by the employer actually is neutral and unrelated to sex. Second, the Act requires that, in order to qualify as a defense, the proffered factor must be related to the position in which the pay disparity was observed, ensuring that it actually accounts for the challenged pay disparity.[13] Third, the Act requires as an alternative ground that the proffered factor serve a "legitimate business purpose" and that no alternatives be available that would achieve the same business purpose but cause less pay disparity.[14] This provision will be invaluable in ensuring that neutral practices, such as pre-hire pay levels or criteria relying upon stamina or strength, be scrutinized closely for the purpose

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[11]/ 788 F.2d 985 (4th Cir. 1986). A burden of persuasion requires the party to which it is assigned to prove or persuade a fact finder that the fact proffered is more likely true than not. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). In contrast, a burden of production only requires the party to which it is assigned to articulate or produce evidence in support of the fact proffered, not persuade the fact finder that such evidence should be credited. *Id. See also Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000) (concluding that, unlike Title VII claims, Equal Pay Act claims follows a two-step burden-shifting paradigm).

[12]/ PFA § 3(a).

[13]/ PFA § 3(a)(I)(aa)(AA).

[14]/ PFA § 3(a)(I)(aa)(BB).

they serve and compared with alternative criteria that may not cause gender-based pay disparities.

Oddly, the Act as it is presently drafted treats these two new requirements that a "factor other than sex" must satisfy as alternatives rather than as standards both of which must be met.[15] There is no reason the requirement that a "factor other than sex" be related to the job in question serve as an alternative to the requirement that "a factor other than sex" serve a legitimate business purpose and have no alternative factors available that may cause no pay disparity. The first requirement, that the factor at issue is job related, ensures that it is applicable to the job in which the disparity was observed, not simply apply to a broader or different category of jobs. The second requirement, that the factor serve a legitimate business purpose and have no alternatives that would have caused less pay disparity, ensures that the factor at issue be important to the employer's business and that the availability of options that might not cause the observed pay disparity be considered in assessing the lawfulness of the employer's compensation practice. Both requirements are necessary to ensure a "factor other than sex," while neutral on its face, not serve as a proxy for sex. The Act should be revised to treat these requirements in the conjunctive, not the disjunctive as they now appear, to ensure that both requirements be satisfied when an employer asserts the defense that a gender-based pay disparity was due to a "factor other than sex."

15/ PFA § 3(a)(I)(aa)(AA).

III. WHEN MULTIPLE CLAIMS ARE ASSERTED UNDER THE EPA, EACH CLAIMANT SHOULD BE ABLE TO PARTICIPATE IN THE CASE WITHOUT THE NEED TO OPT INTO THE ACTION.

When more than one woman working for the same employer claims she was the subject of a gender-based pay disparity, the EPA may permit them to pursue their claims together. Unlike virtually every other employment discrimination law, however, the EPA requires each woman who may have been adversely affected by the same discriminatory pay practice to file a notice with the court in which the case is pending expressing an intention to participate in the action. This burden erects an obstacle to women who may have been aggrieved by the same pay practice that may deny to some, or even many, the opportunity to participate in the case. Women aggrieved by the same pay practice should be afforded the opportunity to participate in the same lawsuit by order of the court, as occurs under virtually every other civil rights statute, rather than be required to notify their employer and the court of such an interest.

At the time the EPA was enacted in 1963, most of the civil rights laws in effect today had not been passed. As there was no other federal law in effect at that time which protected against sex discrimination in the workplace, the EPA was enacted as an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. ("FLSA") Enacted in 1938, the FLSA provides that where multiple persons wish to challenge the same conduct under that statute, each must file a separate notice with the court in order to opt into the case. One year after the EPA was enacted, Congress passed the Civil Rights Act of 1964, of which Title VII provides comprehensive protections against employment discrimination in all phases of the employment relationship, including compensation practices. Because Title VII was enacted as freestanding legislation, claims brought

under it are governed by the Federal Rules of Civil Procedure which generally apply to all cases brought in the federal courts. Rule 23 of the Federal Rules of Civil Procedure provides that, where multiple claimants seek to challenge the same conduct, an order of the court certifying their group as a class ensures their participation in the action and their eligibility to share in any remedies awarded to members of the class. As a consequence of its early enactment and the absence of other laws that addressed sex discrimination in the workplace at that time, the EPA borrowed a procedure to govern multi-party claims from the FLSA, a statute that was enacted about 30 years earlier, before the Federal Rules of Civil Procedure and Rule 23 existed.

The ability of all women aggrieved by a discriminatory pay practice to participate in the same case is critical to vindicating their rights under the EPA and ensuring that the rights of all women with the same claim are adjudicated in the same case at the same time and before the same court. The current process governing the pursuit of multiple pay discrimination claims against the same employer inevitably leads to the exclusion of many women with similar claims from the case in which the alleged pay practices are challenged. Although the EPA permits the court to issue notice to all women who may have been aggrieved by the challenged pay practice, some women have refrained from opting into EPA cases as they may lack knowledge personally that they were paid less than similarly situated men. Other women have declined to opt into the EPA cases from fear that the notice they must provide to their employer of an interest in participating in the case will subject them to retaliation. The cumulative effect of these additional hurdles that must be surmounted for women to participate in EPA multi-party

cases, in my experience, leads to the exclusion of as many as half of the women eligible to participate.

The better approach to the adjudication of multi-party claims arising under the EPA is to permit pursuit of such claims in a class action certified by a court pursuant to Rule 23 of the Federal Rules of Civil Procedure, where the circumstances warrant it. By employing the class certification process, the claims of women aggrieved by the same or similar pay practice are encompassed within the same case by court order and without the need for each woman to file notice opting into the action. This process comports with the procedure used for adjudicating multi-party sex discrimination claims arising under Title VII and ensures that all women who may have been aggrieved by the same or similar pay practice will pursue their claims together.

The Paycheck Fairness Act would amply address this shortcoming in the EPA by expressly providing that women seeking to challenge the same or similar pay practices may proceed by class action governed by Rule 23 of the Federal Rules of Civil Procedure.[16] This provision will rectify a significant procedural flaw in the EPA and bring it into conformity with other civil rights laws enacted during the same period.

IV. REMEDIES AVAILABLE UNDER THE EQUAL PAY ACT SHOULD INCLUDE THE AWARD OF COMPENSATORY AND PUNITIVE DAMAGES

The remedies available under the Equal Pay Act are too limited to address the harm that is suffered by pay discrimination and to provide an adequate deterrence to discrimination by employers.

16/ PFA § 3(e)(4).

Successful litigants under the Equal Pay Act ordinarily recover the difference between the wages they were paid and the average wages paid to employees of the opposite sex who performed equal work for the two years before their complaint was filed. If the plaintiffs show the violation was willful, then they receive three years of back pay. Should the employer fail to show that the challenged pay disparities were the product of good faith, then the plaintiffs may also recover liquidated damages in the amount of the pay disparity.

Unlike Title VII of the Civil Rights Act of 1964, which was amended in 1991 to permit the award of compensatory and punitive damages to victims of intentional discrimination, the Equal Pay Act does not authorize the award of such remedies. The award of compensatory damages may be warranted where a victim's knowledge of the pay disparity causes emotional harm or the payment of wages to women below those paid to similarly-situated men leads to consequential damage to a victim. Punitive damages might be warranted where an employer knew of the gender-based pay disparity and failed to take prompt and appropriate corrective action or the employer recklessly disregarded the rights of women to be free from pay discrimination. Absent the availability of these remedies, the EPA fails to provide the full panoply of remedies that are now routinely available under federal law to victims of intentional employment discrimination.

Moreover, the monetary remedies currently available under the EPA for the most part simply require payment of wages that were unlawfully withheld in pursuit of gender-based pay discrimination. That remedy fails to provide an adequate incentive for employers to engage regularly in the examination of their own compensation practices and to investigate and address any pay disparities that may be detected. Even the

payment of lost wages doubled where an employer has failed to demonstrate it acted in good faith permits employers to tolerate the risk that employment practices resulting in gender-based pay disparities will be detected and challenged, as they can compute precisely the economic exposure and determine whether it is a tolerable cost of doing business. The potential for the award of damages, on the other hand, may create risk that is not easily quantified and financial exposure that will cause employers to be more diligent in examining their pay practices and promptly address gender-based disparities where warranted.

The Paycheck Fairness Act redresses the deficiency in the remedies available under the EPA by permitting the award of compensatory and punitive damages.[17] In doing so, the Act eliminates a shortcoming of the EPA that has long diminished its value as a vehicle for addressing unlawful pay disparities.

V. AS MOST EMPLOYEES ARE UNAWARE OF THE AMOUNT OF PAY THEIR CO-WORKERS RECEIVE, COMPENSATION DATA MUST BE REPORTED TO FEDERAL ENFORCEMENT AGENCIES TO ENSURE UNLAWFUL PAY DISPARITIES CAN BE SYSTEMATICALLY DETECTED AND REDRESSED.

In most workplaces, the amount of compensation paid to each employee is not known by his or her co-workers. As a result, employees ordinarily lack the factual basis with which to compare the compensation they receive with pay levels of co-workers performing the same work. The lack of such information from which informed pay comparisons can be made greatly limits the ability of most workers to formulate and advance a claim of pay discrimination under the EPA. The enforcement of the EPA, therefore, cannot depend for the most part on private legal action. Instead, the

17/ PFA § 3(e)(1).

protections of the EPA can only be secured by investigation and enforcement of pay disparities by the EEOC and the Office of Federal Contract Compliance Programs, the federal agencies charged with enforcing the EPA in the private sector. In order to ensure that these agencies possess reliable information about employer compensation levels, employers must be required to report such information regularly to them.

Unlike most personnel actions, the results of which are readily evident to many employees, the levels of compensation paid to an employee are rarely known to co-workers. In contrast, the identity of persons selected for promotion is often observed by employees who work near or with the selectee. Perhaps more than any other personnel action, the results of compensation decisions are typically confidential and the ensuing amounts of compensation paid are known only to the pay recipient and a handful of managers and personnel staff. Indeed, the limits on knowledge about pay levels and the corresponding difficulty most employees have in comparing their compensation with amounts paid to co-workers prompted Justice Ginsburg to observe recently that: "Comparative pay information … is often hidden from the employee's view."[18]

The lack of knowledge about the amounts paid to co-workers is undoubtedly attributable to several causes. First, concealing compensation levels from workers protects the privacy of employees, for most of whom the amount of their pay is regarded as a matter of considerable sensitivity. Second, many employers discourage, and some actually ban, discussion between employees about the amounts of their compensation. Third, even employees informed about the pay levels of their co-workers likely lack

[18/] *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, No. 05-1074, slip op. at 3 (2007)(Ginsberg, J. dissenting).

knowledge about the factors that influenced those pay levels, such as evaluation of their co-workers performance and perhaps even the level of education and training each has received.

Absent ready access to the pay levels of their co-workers and the factors that led to those pay levels, most employees lack the knowledge needed to make a viable claim of pay discrimination under the EPA. While discovery is ordinarily available to workers who initiate litigation under the EPA, workers must have sufficient information with which to determine they wish to file such a claim before bringing an action to enforce the EPA. It is not surprising, therefore, that of the claims filed alleging discrimination in the workplace, only a small percentage make specific allegations of pay discrimination.[19]

Lacking regular access to information about the amounts of compensation paid to their co-workers, the few employee-initiated complaints of pay discrimination cannot serve as an adequate source of information to federal enforcement agencies about the incidence of gender-based pay disparities in the workplace. Instead, those agencies must be granted access on a regular and organized fashion to information about the amounts of compensation paid to workers, identified by their demographic features and by the characteristics of the jobs they hold. Only with access to such information can federal enforcement of the EPA and its sister protections under Title VII of the Civil Rights Act of 1964 be pursued systematically and thoroughly.

[19/] See Equal Employment Opportunity Commission, EEOC Litigation Statistics FY 1997 to FY 2006, *available at* http://www.eeoc.gov/stats/litigation.html (showing that only 10 of the 403 suits filed in 2006 included Equal Pay Act claims).

The Paycheck Fairness Act directs the EEOC to survey the data on employee compensation currently available to the federal government and, soon thereafter, to issue regulations that will provide for the collection of pay information from employers.[20] This provision offers the best hope for the systematic investigation of employer compensation practices and, to the extent warranted, the pursuit of an organized and strategically developed enforcement program. A similar provision should be added to the Act directing the Office of Federal Contract Compliance Programs of the Department of Labor to undertake similar measures.

CONCLUSION

More than 40 years ago, the Equal Pay Act was enacted with great hope that its protections would eliminate gender-based pay disparities from workplaces throughout the nation. But, the difficult scheme employed for enforcement of the EPA and the inaccessibility of information about pay to most employees has caused enforcement of this statute to fall far short of its promise. The Paycheck Fairness Act would considerably enhance the ability of employees to secure the protections against pay discrimination afforded by the EPA and create the first comprehensive program to investigate and eradicate gender-based pay disparities in this country. I urge its speedy enactment.

[20/] PFA § 9.