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Testimony of Barbara Berish Brown

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Before the Senate Committee on Health, Education, Labor & Pensions

I am here today to testify about S. 766, the Paycheck Fairness Act. I am a practitioner in the area of employment law, handling issues and matters across the broad span of employment discrimination and personnel practices. I have counseled and defended employers with respect to such issues for the past 27+ years. Among the issues that I have handled and considered is compensation discrimination and class actions. I am Vice-Chair of the 21,000 member Labor & Employment Law Section of the American Bar Association and a Fellow of the American College of Labor and Employment Lawyers. I am co-author of **Equal Employment Law Update** (BNA 7th ed. Fall 1999) and **The Legal Guide to Human Resources** (Thomson/West Supp. 2006). I speak and write frequently on employment law topics. I am chair of the Washington, D.C. office of Paul, Hastings, Janofsky &Walker LLP.[1] Paul Hastings has over 1,100 attorneys internationally and over 130 attorneys in our Washington office.

I am firmly and unequivocally committed to the eradication of compensation discrimination against women. S. 766 is not the way to do it. I believe that effective legal tools are in place to accomplish that goal and that S. 766 will impose substantial, costly burdens on employers that are unnecessary, unrealistic and indefensible. The provisions of Title VII of the Civil Rights Act of 1964, as amended, and of the Equal Pay Act of

[1]The views expressed in this paper are my own.

1963 cover the area of compensation discrimination. I see no reason to change the underlying substantive law concerning compensation, as S. 766 would do in various mischievous ways. Nor do I see a need to loosen the procedural rules that govern class action lawsuits concerning alleged gender bias in compensation. That also would lead to undesirable results.

All that the proposed changes will do is encourage more employment-related litigation, which is already drowning the federal court docket, and make it much more difficult, if not impossible, for employers, particularly small businesses, to prove the legitimate non-discriminatory reasons that explain differences between the salaries of male and female employees.

If the goal of this Committee is to increase the compensation of women, then the Committee's focus is better spent on creating opportunities for women to choose whatever jobs they want, including those that the market rewards with high levels of pay. The amount an employee earns depends a lot on the choices that employee makes (or is able to make) about her career paths: the amount and type of education received, training undertaken, hours worked, family obligations, prior experience, personal goals, ability to relocate, frequency and duration of time out of the labor force, willingness to commute, and similar factors. All of these choices greatly influence employee compensation. Many of these factors are outside the control of employers. But many are not outside the scope of meaningful government programs that serve to promote access to jobs that pay more. That expertise is within the ambit of Congress and the Executive Branch, not the judiciary.

Education and training are of primary importance. Women need to be provided with opportunities and incentives for education and training that will lead to jobs that pay more. The market is the best way to set pay that we have. We should not manipulate the market by setting salaries for IT or mining jobs, as S. 766 seeks to do, but we should

examine the market for trends on the best paying jobs and focus government education and training programs on those areas.

Several broad observations underlie my views:

1. **Current Law Is Reliable And Effectively Remedies Discriminatory Practices.** The law on compensation discrimination under the Equal Pay Act and Title VII is fairly well settled. That reliability plays a positive role in attaining compliance with those established principles by the employer community. Employers take compensation discrimination very seriously. They are keenly aware that the failure to take steps to eliminate unexplained compensation differences may lead to litigation that will result in tarnished public image, loss of valuable employees, costly legal fees, and judicial intervention in their business practices, all of which subtract from the bottom line. Even without the threat of litigation, employers are witnessing major changes and shifts in our tight (and increasingly mobile) labor market. In order for businesses to survive, employers across all industries are committing vast resources to recruitment and diversity initiatives to attract, retain and train minority and female talent. Without a doubt, competitive compensation is central to achieving these labor goals. But, as explained below, the setting of compensation is complex and requires consideration of numerous factors.

2. **S. 766 Ignores The Complex Realities Of Compensation Determinations**. My experience has taught me that compensation is a very complex area as compared to most other types of personnel decisions. Many different factors play a part in determining salary level. Investigating to find out what skills and experiences are most highly valued by a particular employer and then looking at how those factors can he isolated and quantified is not easy. For example, in a newspaper setting, the number of bylines or front page articles may well be a proxy for the most highly performing employee, and correlating such information to the pay of a group of reporters may well explain the higher salaries of some of them. Or, in a company where certain kinds of professional skills are most highly valued, managers who came from the ranks of those

professionals will typically be paid more highly than other managers, who may have come to that position from administrative jobs.

Regression analysis is the tool that allows an employer to find out what explains differences in pay. This is the method of analyzing pay of a group of employees that has been approved by the courts as the best method of ascertaining whether differences are explained by job-related factors or remain unexplained, perhaps attributable to a protected characteristic. When we do such an analysis, we typically find that most, if not all, of the difference is explained by a myriad of non-discriminatory factors including:

- length of experience in the workforce altogether;
- length of service with the current employer;
- length of time in job;
- length of time in the job type (e.g. certain kinds of professional experience);
- whether there were significant breaks in service;
- prior job-related experience;
- skills; and
- education.

These factors explain the differences in pay among employees without regard to gender, and they often explain the differences in pay between men and women, on average, as well.

One thing that is very clear is that simplistic comparisons between pay for incumbents of different jobs, with different levels of seniority and different skills, without taking those factors into account, is comparing apples and oranges. To say by fiat that men and women have equal amounts of all those qualities, and therefore that their pay should be equal, is to ignore reality. Indeed, through our own personal experiences as employees in the labor market, common sense tells us that these factors cannot be separated from the way we are compensated. S. 766 brushes aside their importance even though they form the fundamental core to compensation determinations. **3. S. 766 Leaves Employers Legally Defenseless, Imposes Uncertain Punitive Damages, and**

Creates Unmanageable Class Actions. An agenda of equalizing the pay of men and women, without regard for their job content, the market for their type of work and, the choices they made in the past concerning the salary they would work for, their education, and the fields they chose to work in, is something far different from working to eliminate discrimination.

With these thoughts in mind, I have grave concerns about the provisions of S. 766, the Paycheck Fairness Act. My concerns must be viewed in light of the fact that there is no requirement to find intentional discrimination before liability is imposed under the Equal Pay Act. Therefore, if the defenses to a prima facie case are eliminated or weakened, the Act would hold the current employer liable for differences that grew up in the far distant past, perhaps because of the acts of prior employers or because of the choices made by the employee with respect to her preferred job, salary, training and education. These are circumstances outside the current employer's control, and it is illogical and unfair to impose liability on it. Some of these factors may be legitimate bases for pay differences, as different fields, with their different amounts of supply and demand, opportunities for public versus private employment, and terms and condition of work, are properly compensated differently.

Overall, the bill is aimed at destroying the requirement, which is the cornerstone of current compensation discrimination law, that two employees must be *similarly situated* but paid differently before there is liability. Under the Equal Pay Act, the men and women being compared have to be performing jobs with equal or substantially equal content in the same establishment. S. 766 removes these requirements. First, it eliminates the "establishment" requirement -- that the employees being compared work in the same establishment or geographic market. Therefore, employees in different locations, with different markets and different cost of living, will be able to cite a comparator in another location to prove their case. An employee working for Company X in Topeka, Kansas, will be able to cite a comparator in Company X's New York City location to prove her case of compensation discrimination. On these basic facts, it is

indisputable that economic and labor circumstances are vastly different in Topeka than they are in New York City and the alarm bell should signal loudly that such a comparator provides dubious probative value as to whether the employee suffers from compensation discrimination. S. 766 will drive employers to pay the same amounts across geographic markets even if the salary scale for different jobs is quite different, because a woman in the lower-paid market will otherwise have a viable case. Of course, it may be possible for the employer to make out a defense to such a charge at great expense and burden, but we have to consider the incentives that legislation of this sort creates to change compensation systems in order to avoid a deluge of litigation.

The scope of the fourth defense to a prima facie case, "any other factor other than sex," is dramatically reduced in S. 766. Because pay is so complex and depends so much on what an employer needs to pay at a particular point in time in order to meet business exigencies, the fourth affirmative defense has been (properly) broad and open-ended. Consider a reduction in force, where some managers are demoted to a professional job but are held at their managerial salaries for some period of time. Justifying this kind of factor would be very difficult if not impossible under S. 766, yet it makes eminent good sense and serves an equitable purpose. This kind of personnel decision would make the employer vulnerable to being ordered to raise the salaries of all the women in the professional job to the level of the former managers.

The hoops that are created for the fourth defense by S. 766 make it virtually impossible for an employer to prove the legitimacy of its compensation decisions. By requiring that the employer prove that any such factor is objective, job-related, and was "actually applied and used reasonably" in light of the justification for its use, the bill essentially eliminates the defense. The bar has been raised so high that employers will be doing nothing but keeping records and doing studies to justify each compensation decision, or they will give in and abandon perfectly legitimate pay practices. The changes in this defense will essentially eliminate the market as a defense to pay differentials unless detailed contemporaneous data is collected to show how the external market influences

require a particular job or group of jobs to be paid more than other jobs, if those latter jobs are held predominantly by women.

No one who has tried to recruit information technology employees can reasonably quarrel with the fact that the market for people with their skills and experience is far different than that for financial analysts, who may have had as much education and experience as the IT folks. Yet, merely if the IT employees are more heavily male than the analysts, a presumptive violation of the law will occur. S. 766 will therefore tend to result in the same pay for employees in widely varying jobs. Many compensation systems are driven by a relationship to the market price for benchmark jobs, and depriving employers of the ability to defend the salaries of individual employees by referring to the market for that position will require wholesale revamping of those compensation systems. The market has worked very well to motivate people to acquire the skills and take the jobs for which there is a need; this bill will interfere with those incentives and produce inefficiency and waste. The net bottom line effect of the elimination of the establishment basis for comparison and the narrowing of the fourth defense is to require that the pay for more and more jobs and employees be equalized, no matter how even-handedly the employer has been treating the employees.

S. 766 permits the award of unlimited compensatory and punitive damages. Moreover, it does so without articulating any heightened standard of liability for the award of punitive damages. This destroys the compromises that resulted in the Civil Rights Act of 1991 and makes no sense in light of the standards typically required to be met before punitive damages can be justified. Under Title VII, there has to be a finding of malice or reckless disregard for the federally protected rights of the aggrieved individual before punitive damages can be imposed. That makes sense because these damages are intended to punish a state of mind that resulted in the discriminatory act.[2] To permit punitive

[2] In failing to provide any heightened standard of liability for the award of punitive damages, S. 766 sets itself on a collision course with Supreme Court precedent and predictably invites years of wasteful constitutional challenge. In one of the leading cases

damages in the absence of any finding of intentional discrimination at all, never mind the absence of malice, would be to misuse that type of damages just to provide unlimited awards against employers. Under current law, good faith provides a defense to the imposition of liquidated damages, and that is appropriate. Moreover, unlimited compensatory damages for pay violations seems very out of place.

The class action rules under the Equal Pay Act are also changed by this legislation. At present, employees can file an "opt-out" class action under Title VII. However, they will have to be able to show some intentional discrimination in order to proceed with a jury trial and seek compensatory and punitive damages. This generally requires showing some central policy or practice that affects the whole class and that is imbued with intentional bias against women. (A disparate impact challenge to a specific identified compensation policy may be permissible, but such a case would be tried to the court without the availability of compensatory or punitive damages.) The area of pay is rife with individualized decision-making, and it is typically not amenable to class treatment. This is particularly true when a plaintiff in an EPA case has to show that a man is doing equal work in order to recover. That is a highly individualized and fact-specific finding. It only makes sense in such a situation for individuals who truly believe that they are being illegally underpaid as compared to a male co-worker to join the suit. Making such suits opt-out cases with unlimited punitive and compensatory damages for all class members will force employers to settle rather than litigate, even when the company has meritorious defenses, because every female employee would purportedly be a member of such a class. In light of recent decisions questioning the viability of class actions seeking individualized

on punitive damages, Justice Stevens stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. . . punitive damages my not be 'grossly out of proportion to the severity of the offense.'" *BMW v. Gore*, 517 U.S. 559, 575-76 (1996). Writing for the majority, he made clear that in the award of punitive damages "aggravating factors associated with particularly reprehensible conduct" must be present. *Id.* S. 766 is devoid of any guidance on the standard of liability for punitive damages, leaving it vulnerable to being overturned after years of litigation and uncertainty for employers.

punitive and compensatory damages in situations where there is a need to litigate each individual's situation separately, it make no sense to write another law providing for just such unwieldy and unmanageable cases. That is not good law nor good policy.

S. 766 directs the Department of Labor to issue guidelines to enable employers to ascertain which jobs are "equivalent" for purposes of the equal pay law. This means that the Department is being asked to group jobs which are not of similar content, but which require similar education or skill, in order to require that they be paid the same. The explicit goal of this section is to require the payment of equal amounts to jobs held "predominantly by men and those held predominantly by women" despite the different job content, market, and other dimensions of those jobs. This is nothing more than the discredited "comparable worth" theory in new clothing. It authorizes grouping jobs based not on their constituting equal work or not on differences in pay being driven by a protected characteristic like gender, but based on a study of equivalency which is driven by the goal of making all "male-dominated" and all "female dominated" jobs pay the same. This is misguided and should not be countenanced.

The bill also instructs the Department of Labor to reject the use of multiple regression analysis and instead to utilize more simplistic comparisons to draw a conclusion that discrimination is at work. This is utterly backwards and rejects well-established precedent and basic statistical principles. The Office of Federal Contract Compliance Programs issued compensation guidelines in early 2006, and federal contractors have been following those guidelines as they monitor their compensation. This guidance was issued only after years of consideration of the most effective and accurate way of assessing pay differences in order to determine whether women are underpaid as compared to similarly situated men. I do not agree with all of the elements of the compensation guidance, but in its adherence to multiple regression analysis as the proper way to study pay differences, as compared to merely comparing the median pay of men and women in a salary level or grade. The bill would represent a major step backwards in terms of securing widespread consensus on the best way to analyze pay and take remedial steps if warranted.

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For all these reasons, I am opposed to this legislation. I believe in the eradication of discrimination. I believe that our current laws work to meet that end. Furthermore, the better course would be to encourage employers to audit their pay systems, through the use of regression analysis, to make training available so the women can enter any job and field of endeavor they wish to pursue, to root out true discrimination, and to provide them with some incentive for doing so. Enforcement dollars and effort should go into attacking discrimination and not into DOL's creation of a template for what employers should pay to their employees based on a formula intended to guarantee equal pay for male and female employees despite valid and objective differences in the markets, skills, and other factors that explain pay levels.