

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

July 24, 2008

The Honorable George Miller
Chairman
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter expresses the views of the Department of Labor on the substitute amendment to H.R. 1338, the "Paycheck Fairness Act," introduced in the U.S. House of Representatives on March 6, 2007. The Department strongly supports and aggressively enforces our nation's anti-discrimination laws and is firmly committed to the principle of equal pay for equal work.

Under this Administration, the Department has produced record results in protecting workers from discrimination. In FY 2007, over 22,000 workers who had been subjected to unlawful employment discrimination by government contractors received more than \$51 million in back pay, annualized salary and benefits. Ninety-eight percent of this amount was collected in cases of systemic discrimination – those involving a significant number of workers or applicants subjected to discrimination because of an unlawful employment practice or policy. This reflects a 78 percent increase over monetary remedies obtained in FY 2001 and marks the third consecutive year that the Department has posted record enforcement numbers in this area.

H.R. 1338 would unjustifiably amend the Equal Pay Act (EPA) to allow for, among other things, unlimited compensatory and punitive damages, even when a disparity in pay was unintentional. It would also require the Department to replace its successful approach to detecting pay discrimination with a failed methodology that was abandoned because it had a 93 percent false positive rate. For these reasons and those outlined below, if H.R. 1338 were presented to the President, I would recommend that he veto the bill.

Amendments to the Equal Pay Act

Section 3 contains a multi-part amendment to the Equal Pay Act, 29 U.S.C. 206(d).¹ The provision for *unlimited* compensatory and punitive damages, without even a showing of intent, is especially troubling. Other employment statutes, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, provide for limited compensatory and punitive damages of

¹ The pertinent part of the Equal Pay Act reads as follows:

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. (Emphasis added to highlight areas changed by the bill.)

up to \$300,000 (but unlimited backpay), and only after a showing that the discrimination was *intentional* and, for punitive damages, that the employer “engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C §1981a. To permit punitive damages in the absence of intent or reckless indifference would be wrong. Moreover, there is no need to add punitive damages to the EPA, since such damages are already available under Title VII for pay discrimination.

The bill also makes a significant alteration to the EPA by changing the “establishment” requirement – that employees whose pay is being compared must work in the same establishment, i.e., the same physical place of business. 29 CFR §1620.9. The bill redefines establishment to mean workplaces in the same county (or similar political subdivision). But, significantly, it also permits and invites the Equal Employment Opportunity Commission (EEOC) to develop “rules or guidance” which defines the term more broadly. Such guidance could potentially take the form of the introduced bill’s language that allowed for the comparison of employee pay in different locations throughout the country – with different market rates and costs of living. For example, the bill contemplates rules under which an employee working for a company in Omaha, Nebraska, might be able to compare her salary even to that of a coworker in New York, New York, to prove her case of discrimination.

Further, the bill appears to significantly change one of the affirmative defenses available under the EPA. It changes the fourth affirmative defense, “any other factor other than sex,” a defense used to explain wage differentials due to such nondiscriminatory factors as market rates and prior salary history. Changing the “factor other than sex” affirmative defense would impose a tremendous burden on employers. They would be required to prove, in order to counter the presumption of wage discrimination, that the reason for the wage differential is not only something other than sex, but that it also passes a “job relatedness” and a “business necessity” test that would be determined by a judge or jury. The judicial system - judges and juries - would supplant the free market system to determine how businesses must be run and how much they must pay individual workers. This will substantially harm the American economy and the labor market.

The class action rules under the EPA are also changed by this legislation. At present, employees follow the procedures of the Fair Labor Standards Act (of which the EPA is a part), by which potential members of the class must affirmatively opt in to a lawsuit. The bill changes this to a procedure in which all potential class members are deemed a party to the lawsuit unless they *opt out*.

Reinstatement of the Flawed Equal Opportunity Survey and Rescission of OFCCP’s Compensation Standards

The bill would have the Department abandon the refined tools and methodologies for discerning pay discrimination (such as regression analysis) that have led to an impressive enforcement record on systemic discrimination in recent years. In its place, the bill would have the Department use imprecise and dubious statistical models.

Section 9 of the bill directs the Department’s Office of Federal Contract Compliance Programs (OFCCP) to resume using the Equal Opportunity (EO) Survey to identify contractors for compliance evaluations. However, OFCCP rescinded the EO Survey collection requirement

after an independent study determined that the EO Survey had a 93 percent false positive rate and wrongly classified one-third of true discriminators as non-discriminators. There is no valid reason for requiring the reinstatement of a survey established to be ineffective 93 percent of the time. The effectiveness of OFCCP's enforcement – without use of the EO Survey – is clearly demonstrated by its unprecedented successes in enforcement over the past three years.

Section 9 also appears to invalidate the OFCCP's Interpretative Standards for Systemic Compensation Discrimination (“the standards”), which were published in the *Federal Register* in 2006. The standards, which have provided federal contractors the first definitive guidance for evaluating compensation practices, require that contractors' compensation practices be evaluated by comparing the pay of similarly situated employee groups. The standards provide the agency a stronger basis for pursuing investigations of possible systemic compensation discrimination because of their transparency and because of their consistency with court rulings on pay discrimination law. Under the standards, employees are similarly situated – and their compensation can be compared – if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions. The standards adopt a statistical technique called regression analysis for assessing the combined effects of the multiple, legitimate factors that influence employers' compensation decisions (such as education, experience, performance, and productivity). The Supreme Court has endorsed this analytical approach. See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Pay Survey and Collection of Information by EEOC

Section 8 would require EEOC to “complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws.” While lack of pay data may impede enforcement, it is not clear that efforts to collect such data would be worthwhile. Because such data may not exist, significant time would be wasted in hunting for nonexistent information. Moreover, employers will oppose requirements to make pay data available and may be able to block requirements to collect pay data. Thus, time spent by the EEOC and other agencies in identifying additional data collections would be wasted. In addition, with an opt out class action proposal, someone could simply take EEOC data, file a class action against large employers, and with the threat of unlimited damages, force settlement.

Training Mandate

Section 4 of the bill would require that OFCCP and the EEOC provide training on compensation discrimination to EEOC employees (but not OFCCP employees), affected individuals, and regulated entities. Such a statutorily mandated training program is unnecessary and superfluous. OFCCP already regularly provides compliance assistance to federal contractors and subcontractors regarding their obligations under the laws enforced by OFCCP, including the obligation not to discriminate in compensation. Furthermore, since 1981, OFCCP and EEOC have coordinated complaint processing procedures and, in 1999, they entered into a Memorandum of Understanding that specifically provides for joint training programs and sharing of information and data concerning potential issues of compensation discrimination.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Elaine L. Chao

cc: The Honorable Howard P. "Buck" McKeon
Ranking Minority Member