CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE IN THE EQUAL PAY ACT

Under the Equal Pay Act, the law that makes it illegal for employers to pay unequal wages to men and women who perform substantially equal work, an individual subject to wage discrimination must establish that "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions."[1] Even if the individual makes each of these showings, the defendant employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses—that is, that the employer has set the challenged wages pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."[2]

Congress intended the Equal Pay Act to serve a sweeping remedial purpose. As the Supreme Court has recognized, the Act was designed:

> to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[3]

Despite the Equal Pay Act's broad language and purpose, courts have narrowed and constrained the law in ways that undermine its fundamental goals. In particular, some courts have interpreted the "factor other than sex" defense to permit employers to pay discriminatory wages for a limitless number of reasons. The Paycheck Fairness Act would close this loophole by ensuring that employers relying on the "factor other than sex" defense may not pay men and women doing substantially equal work different wages unless the wage differential is justified by a job-related reason, such as education, training or experience, and consistent with business needs. The Act, which is pending in the 112th Congress, has twice passed the U.S. House of Representatives and fell just two votes short of a Senate vote on its merits in the last Congress.

Courts Have Created a Loophole in the "Factor Other Than Sex" Defense

Before an employer need even offer an affirmative defense in an Equal Pay Act case, a plaintiff must make a prima facie showing of wage discrimination. The plaintiff's burden is substantial, as she must identify a comparable male employee who makes more money for performing equal work, requiring equal skill, effort, and responsibility under similar working conditions.[4] If a plaintiff fails to make this showing, the case ends, and the employer need not offer any defense at all.[5]

If a plaintiff presents a prima facie case of wage discrimination, the Equal Pay Act provides four affirmative defenses under which an employer may justify a wage disparity between substantially equal jobs. As one commentator has noted, the first three of these defenses—that a

pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production—are relatively straightforward ones applied with reasonable consistency by the courts.[6] The Paycheck Fairness Act would not change these defenses.

The fourth defense—the "factor other than sex" defense—has been more problematic and courts have, despite Supreme Court interpretations to the contrary, applied it in ways that undermine protections against pay discrimination. The Paycheck Fairness Act is designed to address these misinterpretations.

In *Corning Glass Works v. Brennan*, the Supreme Court rejected the argument that "market forces"—that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded—can constitute a "factor other than sex," since sex is precisely the factor upon which those forces have been based.[7] In that case, Corning Glass Works created a nightshift inspector position at a time when New York and Pennsylvania prohibited female employees from working at night. Many men viewed the inspector position, which had historically been a day position composed of only women, as inferior "women's work." So, to recruit male employees to these inspector positions, Corning Glass Works paid male employees more than the dayshift female employees. Corning Glass Works argued that male employees would not perform inspection work unless they received more money than the daytime female inspectors, in other words, that the pay differential was not based on sex but on the company's need to accommodate the male nightshift workers. The Court rejected this reasoning, recognizing that the company's decision to pay women less for the same work men performed "took advantage" of the market and was illegal under the Equal Pay Act.

Despite this unequivocal holding, employers have continued to argue, and courts have continued to accept, a "market forces" theory to justify pay differentials.[8] Moreover, some courts have accepted rationales as a "factor other than sex" that seriously undermine the principles of the Equal Pay Act.

First, some courts have, for example, authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers without analyzing whether the prior salary itself was inflated because of sex discrimination. Others have abandoned any effort to determine whether the purported "factor other than sex" on which an employer relies is in any way related to the qualifications, skills, or experience needed to perform the job. For example:

- In a 2008 case, a New York federal district court dismissed the plaintiff's Equal Pay Act claim, holding that "salary matching is permitted under the Equal Pay Act" because "it allows an employer to reward prior experience and to lure talented people from other settings."[9] The district court came to this conclusion despite the fact that the men and women had similar experience and qualifications for the position.
- Similarly, another district court stated that "[o]ffering a higher starting salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity."[10] Indeed, that court stated that "[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the [Equal Pay Act], *even though the current work may not justify the higher wage*."[11]

- In a 2007 case, a federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer."[12] The court emphasized that "[s]alary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as 'a factor other than sex.'"[13]

A more demanding showing is appropriate for the "factor other than sex" defense, since the defense is less defined than those based on seniority, merit, or quality or quantity of an employee's production. Moreover, the "factor other than sex" defense must be interpreted consistent with the Equal Pay Act's goal of rooting out pay discrimination. Yet this is precisely what the cases discussed above fail to do. For example, the cases do not recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men. This is particularly true, as in one of the cases described above, when the employer matches the salary of a highly paid man without regard for whether his experience, skills, and talents are any different from those of a lower paid woman or whether more experience or better credentials are necessary for the position.

Second, although some courts have correctly required an employer to identify a legitimate business reason when asserting the "factor other than sex" defense,[14] other courts have applied a blinkered approach to evaluating the legitimacy of an employer's claim that a man's greater experience or education justifies a higher salary. These latter courts have read the "factor other than sex" defense to mean literally any factor—legitimate or not—other than sex.[15] For example, the Seventh Circuit has presumed that a "factor other than sex" need not "be related to the requirements of a particular position in question, [n]or . . . be a 'business-related reason[ ].'"[16]

- One court, for example, accepted the male comparators' purportedly superior qualifications as a "factor other than sex" justifying higher salaries without any examination of whether those qualifications were in fact necessary for the job.[17]
- At least two circuits have accepted the argument that *any* "factor other than sex" should be interpreted literally and that employers need not show that such a factor is in any way related to a legitimate business purpose.[18]

The Paycheck Fairness Act Addresses the Judicially Created Loophole

The Paycheck Fairness Act would address this judicially created loophole in the "factor other than sex" defense. Like Title VII, the Paycheck Fairness Act will direct courts to scrutinize seemingly neutral pay practices to determine whether they actually serve a legitimate business purpose and whether there are comparable alternatives that will not result in gender-based pay disparities.[19]

- First, the Act requires that the "factor other than sex" defense be based on a bona fide factor, such as education, training or experience, that is not based upon or derived from a sex-based differential.
- Second, the "factor other than sex" must be job-related to the position in question.
- Third, the "factor other than sex" must be consistent with business necessity.

- In addition, the defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing a pay differential and the employer has refused to adopt the alternative.

Requiring employers to justify any decision not to pay workers equal wages for doing substantially equal work is reasonable in light of the Equal Pay Act's goal to uncover discrimination and the unspecific nature of the "factor other than sex" defense. Moreover, the Paycheck Fairness Act does not alter the safeguards embedded in the Equal Pay Act that ensure that employers have appropriate discretion in setting compensation in nondiscriminatory ways. For example:

- The Paycheck Fairness Act, like the Equal Pay Act, still requires employees to meet an exceptionally high burden before an employer need even offer an affirmative defense. An Equal Pay Act plaintiff must identify a comparable male employee who makes more money for performing equal work, requiring equal skill, effort, and responsibility under similar working conditions.
- The Paycheck Fairness Act does not alter the other three of the four affirmative defenses available to employers. Thus, employers may still pay different wages to male and female employees performing equal work if the pay decision is based on merit, seniority, or quantity or quality of production.
- The Paycheck Fairness Act allows employers to raise the business necessity defense, which is a concept imported from Title VII and familiar to employers and courts.

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Some courts have interpreted the "factor other than sex" defense under the Equal Pay Act to require only that an employer articulate some ostensibly nondiscriminatory basis for its decision-making, even if the employer's rationale is ultimately a proxy for sex-based pay disparities. As one court has noted, requiring that the "factor other than sex" defense rely upon a legitimate business reason prevents employers "from relying on a compensation differential that is merely a pretext for sex discrimination—*e.g.*, determining salaries on the basis of an employee's height or weight, when those factors have no relevance to the job at issue."[20] Although height or weight restrictions are particularly extreme examples, it is critical that courts sufficiently scrutinize the "factor other than sex" defense based on the full range of employer-proffered rationales to prevent unchecked pay discrimination. The Paycheck Fairness Act will provide a means to assess whether employers are setting wages based on an employee's sex or, in contrast, legitimate rationales tethered to business needs and the particular job in question.

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[1] *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).
[2] 29 U.S.C. § 206(d)(1) (2006).
[3] *Corning Glass Works*, 417 U.S. at 195.
[4] 29 U.S.C. § 206(d)(1).
[5] *See, e.g.*, *Miranda v. B. & B. Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992).
[6] Peter Avery, *Note, The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 868 (2004).
[7] 417 U.S. at 205; *see also Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001) (noting that "[t]his court has previously stated that the University's market forces argument is not tenable and

simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the [Equal Pay Act]" (citations omitted)).

[8] *See, e.g., Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, 697 n.6 (7th Cir. 2006) (noting that the Seventh Circuit had "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination).

[9] *Sparrock v. NYP Holdings, Inc*., No. 06 Civ. 1776, 2008 WL 744733, at *16 (S.D.N.Y. Mar. 4, 2008).

[10] *Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing *Mazzella v. RCA Global Commc'ns, Inc.*, 814 F.2d 653 (2d Cir. 1987) and *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981)).

[11] *Glunt*, 123 F. Supp. 2d at 859 (emphasis added). *But see Lenihan v. Boeing Co.*, 994 F. Supp. 776, 798 (S.D. Tex. 1998) ("[P]rior salary, standing alone, cannot justify a disparity in pay[.]"); U.S. Equal Employment Opportunity Commission, Compliance Manual, Section 10: Compensation Discrimination (2000), at 10-IV(F)(2)(g), *available at* http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION.

[12] *Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 U.S. Dist. LEXIS 18435, at *13 (S.D.N.Y. Mar. 8, 2007).

[13] *Id.*

[14] *See, e.g., Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999) (noting that an employer seeking to rely on the "factor other than sex defense [ ] . . . must . . . demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) ("[T]he Equal Pay Act's exception that a factor other than sex can be an affirmative defense 'does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.'" (quoting *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988))).

[15] *See, e.g., Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (describing how the "factor other than sex" defense "embraces an almost limitless number of factors, so long as they do not involve sex").

[16] *Id.* (quoting *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321-22 (7th Cir. 1987)); *see also Markel v. Bd. of Regents*, 276 F.3d 906, 913 (7th Cir. 2002).

[17] *Boriss v. Addison Farmers Ins. Co.*, No. 91 C 3144, 1993 WL 284331 (N.D. Ill. July 26, 1993).

[18] *See Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that required an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").

[19] Under the comparable Title VII "business necessity" standard, an employer must demonstrate that a practice is job related for the position in question and consistent with business necessity. The final question in the business necessity analysis is whether the employer rejected an alternative employment practice that would satisfy its legitimate business interest without resulting in a disparate impact. This standard is familiar to employers and courts, as it has been judicially applied since the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and was expressly codified by the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2 (2006).

[20] *Engelmann v. Nat'l Broad. Co., Inc.*, No. 94 Civ. 5616, 1996 U.S. Dist. LEXIS 1865, at *20 (S.D.N.Y. Feb. 22, 1996).