



UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425

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September 30, 2010

The Honorable Joseph Biden, President of the Senate  
The Honorable Harry Reid, Majority Leader, U.S. Senate  
The Honorable Mitch McConnell, Minority Leader  
The Honorable Richard Durbin, Majority Whip, United States Senate  
The Honorable Jon Kyl, Minority Whip  
The Honorable Tom Harkin, Chair, Senate Health, Education, Labor and Pensions  
Committee  
The Honorable Michael Enzi, Ranking Member, Senate Health, Education, Labor, and  
Pensions Committee

Re: The proposed Paycheck Fairness Act (S. 182)

Dear President Biden and Distinguished Senators:

We<sup>1</sup> write today to express our opposition to the proposed Paycheck Fairness Act (S. 182).

Too often, legislation fails to live up to its name. So it is with the Paycheck Fairness Act. Rather than making wage rates fair for men and women, S. 182 will succeed only in placing heavy and unnecessary burdens on employers. Those burdens will be felt by all Americans, both men and women, particularly in today's unhealthy economy.

S. 182 will amend the provisions of the Fair Labor Standards Act (as amended by Equal Pay Act of 1963). But while employers look for certainty in their legal obligations, S. 182 will create only uncertainty. The proposal's primary effects will be to make it difficult for employers to know whether they are in compliance with the law and, if they

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<sup>1</sup> The U.S. Commission on Civil Rights was established to, among other things, "make appraisals of the laws and policies of the Federal Government with respect to... discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. 1975(a).

Because we understood that action regarding this bill was imminent, a version of this letter was first sent to the Senate on September 23, 2010 by four commissioners (Reynolds, Kirsanow, Heriot, and Gaziano) in their individual capacities. The Commission later voted to adopt the letter as an official Commission letter if a majority of the Commission agreed to sign. Two out of the four remaining commissioners (Thernstrom and Taylor) later agreed to sign, rendering this letter an official Commission letter. Aside from the change to this footnote, the text of this letter is otherwise identical to the letter sent by the four commissioners on September 23.

are found not to be, to increase the likelihood of large compensatory and punitive damages. Employers with as few as two employees are subject to the bill's provisions.<sup>2</sup>

In addition, under S. 182, the EEOC will impose new record-keeping regulations.<sup>3</sup> Each employer will be required to provide information to the federal government on how employees, classified by sex, race, and national origin, are paid.<sup>4</sup> Such data collection is likely to be onerous on both small and large employers. But that is only the beginning of the problem. Over time, the national statistics collected pursuant to the new regulations are likely to be used as a cudgel by the EEOC and by employees who wish to sue their employers. Employers whose pay scales deviate from the national averages will be subject to added risk of litigation—regardless of the reason for their deviations.<sup>5</sup>

“One size” does not fit all employers. For example, a particular freight company may be in need of especially reliable truck drivers because its customers are especially demanding. The company may not even recognize that its customers differ from the run-of-mill freight customers, since it has no basis for comparison. All it may know is that top-quality truck drivers are crucial to its bottom line. But if it pays its truck drivers (who are mostly male) more generously than the average employer does, and it pays its (mostly female) office crew the prevailing wage, it will be exposing itself to litigation. Not all employers will be willing to take that risk. Some will be pressured into marching in lockstep with the national statistics and will thereby lose their competitive edge.

The foundation upon which the argument for S. 182 is built—that women are paid only 77¢ for every dollar men are paid—is shaky indeed.<sup>6</sup> This comparison fails to take into consideration a multitude of factors other than sex discrimination that contribute to the gap. For example:

- (1) Men are more likely than women to have college degrees in high-paying fields like science and engineering or professional degrees in fields like law and medicine, although the gap is closing for younger women.<sup>7</sup>
- (2) Women are more likely than men to leave the labor force temporarily for child birth, child rearing and elder care. Career interruptions of this kind tend to have a negative effect on wages.<sup>8</sup>

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<sup>2</sup> 29 U.S.C. 203(s). The requirement of two or more employees may be deduced from the use of the plural in the requirement that the enterprise have “employees” engaged in commerce. *See, e.g.*, Arthur Lawson, EMPLOYMENT DISCRIMINATION, §6.20 (1987).

<sup>3</sup> *See* Sec. 8 of the Paycheck Fairness Act, which would amend Sec. 709 of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)-8).

<sup>4</sup> Sec. 8(f)(1)(B).

<sup>5</sup> *See, e.g.*, 8(f)(2) – In designing the data collection regulations, the Equal Employment Opportunity Commission “shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination.”

<sup>6</sup> *See, e.g.*, Valerie Jarrett, “Closing the wage gap: A matter of survival for working families,” *The Washington Post*, September 17, 2010.

<sup>7</sup> Consad Research Corporation, “An Analysis of the Reasons for the Disparity in Wages Between Men and Women,” Final Report Prepared for the Department of Labor (January 12, 2009), 6.

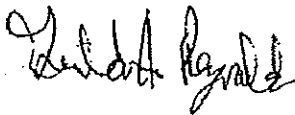
<sup>8</sup> *Id.* at 1.

- (3) Men are more likely than women to take jobs that involve physical risks and hence command higher wages.<sup>9</sup>
- (4) Women are more likely than men to take jobs with child-friendly policies so they can consistently leave work on time or take the day off when a child is sick. These policies cost employers and hence tend to reduce wages.<sup>10</sup>

When all these factors and others are taken into account, the wage gap shrinks considerably. Indeed, if more data were available (on issues like the number of hours white-collar workers actually work), it might disappear altogether.

Thank you for your attention. If you have any questions or comments, please feel free to contact any of us through Commissioner Heriot's special assistant Alison Schmauch. She can be reached at [aschmauch@usccr.gov](mailto:aschmauch@usccr.gov) and (202) 376-7671.

Respectfully,



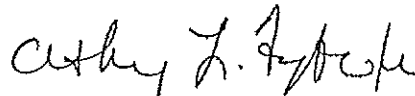
Gerald A. Reynolds  
Chairman



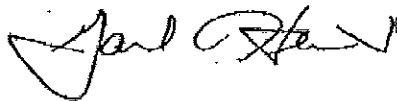
Abigail Thernstrom  
Vice Chair



Peter Kirsanow  
Commissioner



Ashley Taylor, Jr.  
Commissioner



Gail Heriot  
Commissioner



Todd Gaziano  
Commissioner

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<sup>9</sup> See, e.g., Diana Furchtgott-Roth and Christine Stolba, *WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA* (AEI Press, 1999), 33-4.

<sup>10</sup> Consad Research Corporation at 1.