



H.R. 7 — Paycheck Fairness Act (Rep. DeLauro, D-CT)

FLOOR SCHEDULE:

Expected to be considered March 27, 2019, under a structured [rule](#) that makes nine amendments in order.

The rule would self-execute an [amendment](#) offered by Rep. Bobby Scott that would elaborate on the requirements for collection by employers of such data including by collecting specific data (such as numbers of employees and numbers of hours worked) for a dozen different income levels.

TOPLINE SUMMARY:

[H.R. 7](#) would heighten federal restrictions on employment pay decisions, place the burden of proof on the employer when defending against pay disparity lawsuits, prohibit employers from requesting wage histories from prospective employees, and prohibit employers from penalizing employees who discuss wages.

COST:

The Congressional Budget Office [estimates](#) that implementing H.R. 7 would increase spending by 68 million in the 2019-2024 period, subject to appropriation. Paygo would apply.

CONSERVATIVE CONCERNS:

Conservatives believe in equal pay for equal work such that no woman or man should be deprived of an opportunity to succeed and receive just compensation because of their gender. It is for these reasons that Congress passed the [Equal Pay Act](#) to explicitly outlaw gender-based pay discrimination. Many conservatives believe that through H.R. 7, however, Democrats are attempting to go beyond the balance struck in the *Equal Pay Act* to “close the gender pay gap” and suffers from several systemic flaws that can actually hurt employees generally, and women specifically. The bill seeks to adopt approaches taken by a few liberal states such as California, New York and Massachusetts, and force them upon all 50 states.

Workplace Flexibility

In attempting to further legislate pay equity, Democrats may actually reduce the amount of compensation and employment options available for women, and men, in the workplace. Currently, employers have the ability to negotiate with men and women who prefer a more flexible work schedule

instead of a higher paycheck. The Paycheck Fairness Act threatens this flexibility and may remove mothers, and fathers, from the workforce that may depend on flexible arrangements. Employers would be pressured to ensure compensation and benefits packages are standardized and identical between employees or risk litigation. To mitigate risk, employers could be forced to reduce the flexible options working mothers, and fathers, rely on to provide for their families.

Wage Suppression

Attempting to legislatively mandate elimination of wage disparities has been shown to actually suppress wages. For instance, a [study](#) of the compensation effects of a Danish law that requires employers to merely report salary information found that a 2 percent reduction in the gender pay gap was primarily accomplished through lowering men's wages, and not by increasing women's wages. Overall, employee wages dropped by an average of almost 3 percent.

Governmental and Judicial Meddling

Under the *Paycheck Fairness Act*, should an employer be required to defend a gender pay disparity in court, the employer would only be allowed to use the "bona fide factor" defense if the employer did not reject an alternative practice that serves the same business purpose without requiring a difference in pay. This could effectively require employers to adopt alternative [practices](#) that are less efficient or costlier. In addition, the bill does not define the "same business purpose." This could lead to disputes between employers and employees in defining what serves the same "business purpose," leaving it to the court to settle the dispute. These provisions would result in government and courts dictating which business practices an employer should be following and preventing employers from making the best decisions for their businesses, even when the employer has not discriminated based on sex.

Performance-Based Pay

The bill would make it risky for employers to provide performance-based pay, and in some cases, could result in employers eliminating it all together. With the passage of the Paycheck Fairness Act, businesses would become vulnerable to lawsuits should they continue to provide performance-based pay. A female employee could sue her employer for not providing the same bonus to male and female employees by claiming the bonuses were not a "business necessity," or that her performance was a result of actions, or non-actions, taken by her employer. The threat of lawsuits would serve as a disincentive for businesses to continue providing performance-based pay and encourage them to adopt a uniform pay scale. This would negatively affect both female and male employees, since performance-based pay has been found to increase [wages](#) between 6 and 10 percent.

Increased Lawsuits

The *Paycheck Fairness Act* would make workers automatic members of class-actions unless they opt-out. This invites trial attorneys to file [frivolous class-action suits](#) in hopes of winning large windfall judgments, at the cost of both employees and employers. This is further encouraged by effectively removing the \$300,000 cap on punitive damages under current law. Encouraging frivolous litigation hurts industries by driving up the cost of doing business. This ultimately suppresses workers' wages and opportunities, since employers will attempt to limit their exposure by implementing uniform pay scales and [purchasing liability insurance](#).

Appropriations

The bill would authorize to be appropriated such sums as may be necessary to carry out the bill.

- **Expand the Size and Scope of the Federal Government?** Yes, the bill significantly swell federal control of private business operations in a way that may actually harm those individuals it is intended to help.
- **Encroach into State or Local Authority?** Yes. The bill seeks to adopt approaches taken by a few liberal states such as California, New York and Massachusetts, and force them upon all 50 states.
- **Delegate Any Legislative Authority to the Executive Branch?** Yes. The bill directs the Secretary of Labor and the Secretary of Education to issue regulations or policy guidance that provide for integrating the negotiation skills training into existing related programs.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

Currently, under the [Equal Pay Act](#), it is illegal for an employer to pay two people of the opposite sex a different rate of pay for the same job based off of their sex. Employers are allowed to differ pay based on a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or any other factor other than sex.

The *Paycheck Fairness Act*, however, would go further and place the burden of proof solely on the employer and force them to prove that differences in pay are related to “bona fide factors,” such as education, training or experience when defending against pay disparity lawsuits. Furthermore, the employer must prove that these factors must be related to job performance, necessary for the business and are not based on sex. The “bona fide factor” defense would be unavailable if the court finds that an alternative business practice could serve the same business purpose without the pay disparity and the employer refused to adopt the practice. Pay comparisons may be made for those who work for the same employer at different locations within the same area.

The *Paycheck Fairness Act* would prohibit employers from penalizing employees who discuss wages even if it violates company policy. Employers also would be prohibited from requiring employees to sign commonplace nondisclosure agreements prohibiting them from disclosing wage information.

Employers violating these provisions would be subject to compensatory damages and could even be held liable for punitive damages. The federal government, however, could not be held liable for punitive damages.

The bill would facilitate expansive litigation by allowing an employee to start a class-action lawsuit against an employer without getting prior written consent from other employees that would be added to the class. Employees added to the class would be forced to opt-out of a class-action lawsuit.

Wage History

The *Paycheck Fairness Act* would prohibit employers from relying on a prospective employee’s wage history when making employment or compensation decisions. Furthermore, employers would be prohibited from requesting the disclosure of a prospective employee’s pay history. Violations would be subject to a \$5,000 civil penalty for the first offense and \$1,000 for subsequent offenses, up to \$10,000.

Other Provisions

- Establishes a new grant program to provide negotiation skills training specifically for girls and women.

- Creates an annual National Award for Pay Equity in the Workplace to encourage compliance with these provisions.
- Requires the Equal Employment Opportunity Commission (EEOC) to collect compensation data disaggregated by the sex, race, and ethnic identity of employees.
 - The self-executed an [amendment](#) offered by Rep. Bobby Scott elaborates on the requirements for collection by employers of such data including by collecting specific data (such as numbers of employees and numbers of hours worked) for a dozen different income levels. *Conservatives may be concerned that information collected could be used to investigate charges under the Fair Labor Standards Act and any other purpose that the Commission deems appropriate.*
- Requires the Department of Labor to make information on wage discrimination readily available.

The bill would authorize to be appropriated such sums as may be necessary to carry out the bill.

If a provision of the bill is found unconstitutional, the remainder of the bill would not be affected.

The committee report accompanying H.R. 7 (H. Rept. 116-18) can be found [here](#).

AMENDMENTS:

1. [Foxx \(R-NC\)](#) – This amendment would strike provisions related the collection of pay information by the Equal Employment Opportunity Commission (EEOC).
2. [Torres \(D-CA\)](#) – This amendment would add that “Pay disparities are especially severe for women and girls of color” to the bill’s findings section.
3. [Torres \(D-CA\)](#) – This amendment would require that the Secretary of Labor pay specific attention to women and girls from historically underrepresented and minority groups when conducting and promoting research to develop the means to correct conditions leading to pay disparities.
4. [Byrne \(R-AL\)](#) – The amendment would ensure that for a pay-discrepancy that exists between a male and female employee that is not based on sex to be allowable it *must also* be based on a bona fide business related reason.

The amendment would eliminate from the underlying bill several complicated requirements that employers must prove to be found faultless in instances where a pay discrepancy exists between a male and female employee and is not based on sex. The underlying bill would require that a such a pay-discrepancy not based on sex be connected to a bona fide factor such as education, training, and experience. Further, the underlying bill provides that the bona fide factor defense shall apply only if the employer demonstrates that the bona fide factor meets several requirements, including: (i) it is not sex-based; (ii) is job-related with respect to the position in question; (iii) it is consistent with business necessity; (iv) it accounts for the entire differential in pay, and (v) an alternative employment practice – that the employer refused -- does not exist that would serve the same business purpose without the pay differential.

5. [Waters \(D-CA\)](#) – This amendment would require the Secretary of Labor, when conducting studies and proving information concerning the means availability to eliminate pay disparities, to include “women who are Asian American, Black or African-American, Hispanic American or Latino, Native American or Alaska Native, Native Hawaiian or Pacific Islander, and White American”.

6. [Vargas \(D-CA\)](#) – This amendment would prohibit the “bona fide factor” defense from applying if the defense is related to the use of leave to care for children, or related to whether or not an employee has children.
7. [Beyer \(D-VA\)](#) – This amendment would require that compensation data be collected from employers that have at least 100 employees, and employers that the EEOC deems appropriate.
8. [Lawrence \(D-MI\)](#) – This amendment would require the Secretary of Labor to submit a report to Congress on the gender pay gap among the teenage labor force and provide recommendations for addressing pay inequality.
9. [Brown \(D-MD\)](#) – This amendment would prohibit retaliation against an employee that asks why their wages are set at a certain rate.

OUTSIDE GROUPS:

Opposed

Americans for Tax Reform - [Key Vote No](#)

FreedomWorks - [Key Vote No](#)

National Federation of Independent Business - [Key Vote No](#)

National Taxpayers Union – [Key Vote No](#)

[Associated Builders and Contractors, Inc.](#)

[Center for Worker Freedom](#) (A project of Americans for Tax Reform)

[College and University Professional Association for Human Resources](#)

[Eagle Forum](#)

[Goldwater Institute](#)

Heritage Action

[HR Policy Association](#)

[International Franchise Association](#)

[National Association of Manufacturers](#)

[National Federation of Independent Business](#)

National Federation of Republican Women

[National Restaurant Association](#)

[National Retail Federation](#)

[Retail Industry Leaders Association](#)

[Society for Human Resource Management](#)

[U.S. Chamber of Commerce](#)

Additional Resources:

Heritage Foundation [Factsheet: The Truth About H.R. 7 - the Paycheck Fairness Act](#)

Independent Women's Forum: [Two Truths and a Lie: Paycheck Fairness Act](#)

Independent Women's Voice: [The Equal Pay Debate in 60 Seconds](#)

COMMITTEE ACTION:

H.R. 7 was introduced on January 30, 2019 and referred to the House Committee on Education and Labor. The bill was marked up and reported on February 26, 2019, by a vote of [27-20](#).

ADMINISTRATION POSITION:

No Statement of Administration Policy is available at this time.

CONSTITUTIONAL AUTHORITY:

According to the bill's sponsor: "Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clause 3 of the United States Constitution and Article I, Section 8, Clause 1 of the United States Constitution."

NOTE: *RSC Legislative Bulletins are for informational purposes only and should not be taken as statements of support or opposition from the Republican Study Committee.*