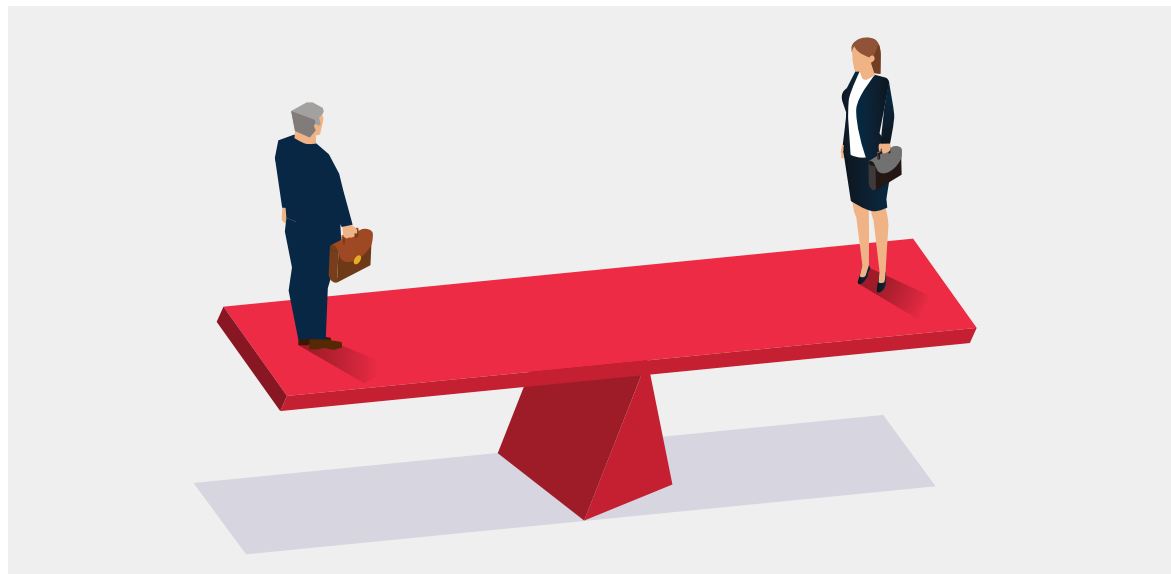


# The Paycheck Fairness Act Comes Back Around



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**Rep. Rosa DeLauro (D-Conn.) has introduced the Paycheck Fairness Act (the Act)** in every session of Congress beginning with the 105th Congress in 1997. Over the years, various forms of the proposed bill have passed the House in 2007, 2009, 2019, and most recently, on April 15, 2021 ([H.R. 7](#)).

The Act, which amends the [Equal Pay Act of 1963](#), has never passed in the Senate. Historically, members of the House and Senate vote largely along party lines, with Independents voting with Democrats. This most recent go-round was no different. On June 8, 2021, the Senate voted along party lines, 49 to 50, against passage of the Act. Sen. Kirsten Gillibrand (D-N.Y.) did not vote.

Regardless of the outcome of the vote, employers need to be aware of the Act's proposed terms and what it means for their compensation program and equal employment opportunity compliance strategy more broadly, as the Act's provision may be a template for future regulation.

## The Equal Pay Act

The Equal Pay Act of 1963 (EPA) requires that men and women in the same workplace be paid equally for equal work. It is a provision within the Fair Labor Standards Act of 1938 (FLSA), which is more commonly known for establishing minimum wage and overtime requirements. The EPA provides that

the jobs being compared need not be identical, but they must be substantially similar. Pay differentials are permitted if based on seniority, merit, quantity or quality of production, or "any other factor other than sex."

An employee can prove a claim under the EPA by simply showing that she is paid less than a man performing the same or substantially similar job. Unlike a Title VII claim, the employee is not required to show that her employer acted with the intent to discriminate. Employers will avoid liability if they can prove that the pay difference at issue is justified by:

- a *seniority system* that rewards employees based on length of employment;
- a *merit system* that rewards employees for exceptional job performance;
- an *incentive system* that pays employees based on the quality or quantity of their work; or

- *any other factor other than sex*, such as a difference in time in grade, minor educational differences, experience, nature of the duties, etc.

Many advocates for the Act claim that courts have been far too easily convinced that a pay differential is defensible.

An employee who successfully proves a violation of the EPA is entitled to back pay, a pay increase, attorney fees and liquidated damages equal to the back pay award, if she proves that the employer intended to discriminate. The EPA does not allow for punitive or compensatory damages available under Title VII.

## Paycheck Fairness Act Expands the Scope of the EPA

The legislation has many implications for employers, such as:

- **Narrows Catchall Defense:** As noted above, employers generally defend against an EPA claim by showing that the pay differential at issue is because of a "factor other than sex." The Act seeks to significantly narrow this catchall defense to include only "bona fide factors, such as education, training or experience." The "bona fide factor" defense would apply only when the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Moreover, an employee can overcome this defense by demonstrating that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential and (2) the employer refused to adopt such alternative practice.
- **Prohibits Pay Secrecy:** The Act prohibits employers from retaliating against employees for inquiring about, discussing or disclosing their wages or the wages of other employees in response to a complaint or charge, or in furtherance of a sex discrimination investigation, proceeding, hearing, or action, or an investigation conducted by the employer.
- **Implements Federal Pay History Ban:** The current version of the Act makes it unlawful for employers to ask applicants to disclose their salary history.
- **Expands Available Monetary Remedies:** In addition to back pay, employers found in violation may be required to pay compensatory or punitive damages.
- **Eliminates Barriers to Participation in Class Actions:** In the event of a class action claim, all potential claimants are automatically included in the class. They are not required to affirmatively "opt-in" to receive a share of any monetary award.
- **Requires Compensation Data Collection:** Employers will be required to report pay data for all employees by sex, race and national origin and such data may be used by federal agencies (i.e., Equal Employment Opportunity Commission

[EEOC] and Office of Federal Contract Compliance Programs [OFCCP]) to initiate litigation.

## Other provisions of the PFA include:

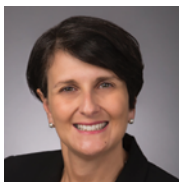
- EEOC and OFCCP will train their investigators and other affected entities on pay discrimination and develop guidance materials for small businesses.
- The OFCCP will use all tools at its disposal to identify and remedy pay discrimination.
- The Department of Labor will:
  - provide grants to eligible organizations for negotiation skills training programs for women and girls;
  - conduct studies and provide information to employers, labor organizations and the general public regarding the means available to eliminate pay disparities; and
  - establish the Secretary of Labor's National Award for Pay Equity in the Workplace.

Regardless of whether the Act, as currently proposed, passes in the Senate, certain aspects of this bill may be implemented by the EEOC and OFCCP without the approval of Congress. There is no doubt that the EEOC and OFCCP will reinstitute some form of pay reporting.

Indeed, the pay report described in the Act is strikingly similar to the [pay report](#) OFCCP proposed in 2014. Employers can also count on both agencies to aggressively investigate and litigate systemic or class-based compensation claims. (Federal contractors are already required to comply with [pay transparency](#) requirements. Compensatory and punitive damages are provided for under Title VII. Finally, 19 states and 21 localities have passed [salary history bans](#).)

It is also possible that some of the other provisions of the Act will be imposed on federal contractors by an expanded Executive Order. ###

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