

## PENDING FEDERAL PAY EQUITY LEGISLATION COULD ELIMINATE A REAL REASON FOR PAY DIFFERENCES

The Paycheck Fairness Act (pending federal bill H.R. 7) was reintroduced on January 28, 2021 and as currently proposed, would drastically alter the federal law effectively eliminating a defense of the Equal Pay Act of 1963, the landmark legislation designed to reduce gender discrimination in the workplace. Specifically, under current law, an employer can provide a defense for a wage differential to exist, due to any factor other than sex. The pending bill would require employers to demonstrate that the wage differential is a matter of business necessity.



### H.R. 7's Limitation of the Catchall Factor Other Than Sex Defense

The Equal Pay Act (EPA) prohibits employers from discriminating *between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] 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.*

The current law recognizes four defenses, one of which is a catchall provision that states a *differential based on any other factor other than sex*—an employer is not liable under the EPA if it can establish that a sex-based wage differential is due to a factor other than sex. However, the proposed law *eliminates the factor other than sex defense by requiring the employer to also show the difference and...*

- Is not based upon a sex-based differential in compensation
- Is job-related and *consistent with business necessity*
- Accounts for the entire differential in compensation at issue

These elements represent a critical change to the existing law and introduce *job-related and consistent with business necessity criterion*. Although certain of these features exist under some states' laws, those rules provide some versions of affirmative defense without reference to business necessity.

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From a practical perspective then, there is speculation on how the following will be addressed that are often cited for pay differentials:

- **Education** – Often cited as a reason for pay difference by employers; it is unsure how this will come to be viewed as an overriding legitimate business purpose.
- **Experience** – This is also cited as a valid reason.
- **Other Intangibles** – This includes differences in skill sets, soft-skills, etc. that may not be viewed as an overriding legitimate business purpose.

Employers who compete in a very competitive marketplace must be free to pay compensation differences with as much of their own business judgement as possible, provided they are not basing those decisions on discriminatory reasons. The challenge is determining what warrants a business necessity when each business operates from its own specific competitive position.

There is clearly broad interpretation of what fair compensation is and which business goals are deemed legitimate. This could potentially result in every compensation decision being challenged and possibly eliminate an employer's judgement and/or being called into question.

For example, a business determines that it needs to hire an experienced and well-educated engineer at a higher compensation level than others for a particular operation. The proposed legislation sets the groundwork for challenging this as an unreasonable business purpose, which would then need to be decided in a court of law.

### Action Plan for Employers

It is too early to tell where this law may end up, but it could lead to a new burden on employers in defending pay actions. For now, employers must continue to create and maintain clear and specific rationales for pay differences. This can be assessed through the completion of a protected pay-equity study to determine any potential exposures and corrective actions in policies.

We will continue to monitor the situation. If you have any immediate questions or wish to discuss, please contact Elliot.



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