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The Employment Effects of the Paycheck Fairness Act

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Introduction

In November, just as the holidays approach, the Senate will consider the Paycheck Fairness Act, a bill designed to raise women's wages introduced by Hillary Clinton when she was still a Democratic senator from New York. The bill would vastly expand the role of the government in employers' compensation decisions.

The Paycheck Fairness Act was one of the first bills that the House of Representatives passed in January 2009. It would require the government to collect information on workers' pay, by race and sex, with the goal of equalizing wages of men and women, by raising women's wages.

President Obama has frequently called for passage of the Paycheck Fairness Act. For example, on July 20, 2010, he declared, "Yet, even in 2010, women make only 77 cents for every dollar that men earn…So today, I thank the House for its work on this issue and encourage the Senate to pass the Paycheck Fairness Act, a common-sense bill that will help ensure that men and women who do equal work receive the equal pay that they and their families deserve."

But the Paycheck Fairness Act is not a common-sense bill. Rather, it would lower hiring in America and increase hiring abroad. Further, it would hurt women, the very group it is designed to help, by depriving them of jobs. Within groups of women, the lowest-skilled might be hit the hardest, because it might be harder for employers to justify their salaries in lawsuits.

Lower levels of employment are never justified. But at a time when the unemployment rate is 9.6 percent, when 14.8 million Americans are out of work, when 42 percent of the unemployed have been out of work for six months or longer, it makes no sense to discourage employers from hiring workers.

Furthermore, the bill is misnamed because it responds to a false problem. As will be discussed below, there is far less pay discrimination against women than is alleged by professional feminists. With numerous anti-discrimination laws, such as Title VII of the Civil Rights Act, the Equal Pay Act, and the Lily Ledbetter Fair Pay Act (signed into law by President Obama in January 2009), women do not need more remedies for discrimination. Courts have sufficient tools, and use them. The pending bill would only burden employers with more regulations and paperwork, further discouraging hiring.

Men and women generally have equal pay for equal work now—if they have the same jobs, responsibilities, and skills. Two entry-level tellers at a bank, one male and one female, are usually paid the same, as are male and female first-year associates at law firms. Otherwise, they sue for discrimination under current law—as did Walmart and Novartis employees.

This paper explains why the Paycheck Fairness Act will only burden employers with more litigation and paperwork, encouraging them to move offshore or reduce hiring in the United States. The first section is devoted to the myth of the 77 cent pay gap, which is the rationale for the bill. The second section describes the bill and shows how it will cause job loss.

The Pay Gap

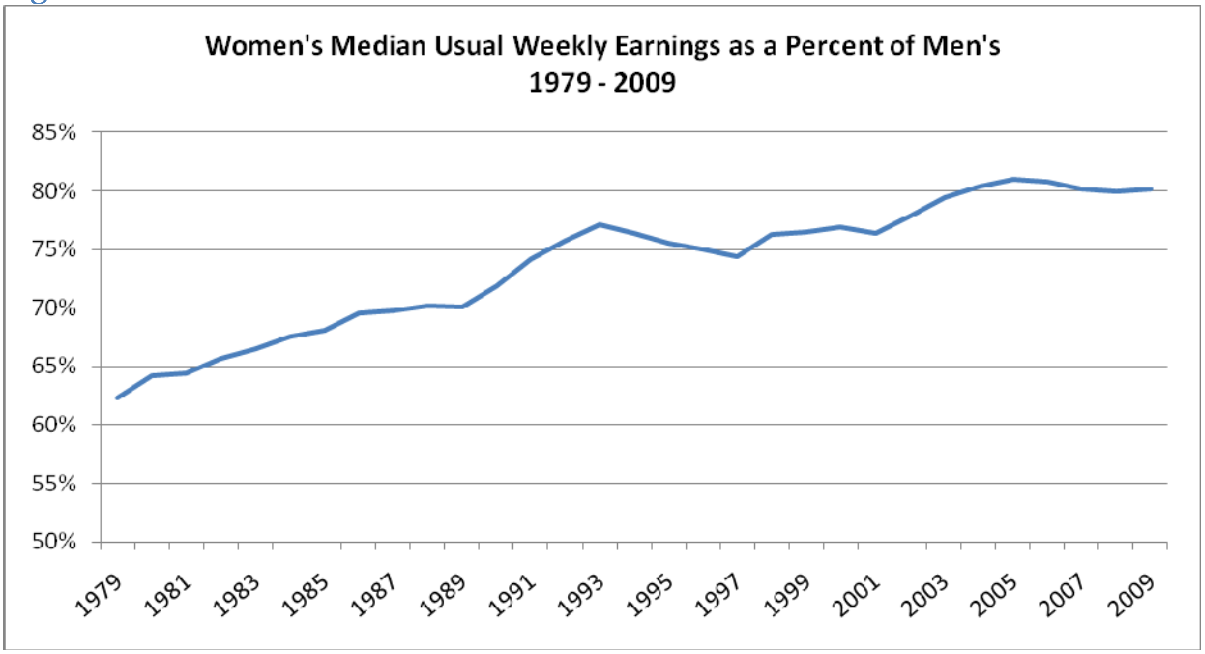
No discussion of the Paycheck Fairness Act can begin without presenting data on the pay gap, which is the stated rationale for the bill, even thought the most current figures indicate that women have nearly closed the formerly wide divisions that separated men and women in terms of economic and social status.

Over the past three decades, the average wage gap decreased steadily, as shown in figure 1-1. However, average wage gaps do not represent the compensation of women compared to men in specific jobs, because they average all full-time men and women in the population, rather than comparing men and women in the same jobs with the same experience. Data from the U.S. Department of Labor's Bureau of Labor Statistics that women earned 80 cents for every dollar that men earned in 2008 and in 2009, using full-time median weekly earnings, ignore fundamental differences between jobs, experience, and hours worked.[i]

If we compare wages of men and women who work 40 hours a week, without accounting for any differences in jobs, training, or time in the labor force, Labor Department data show the gender wage ratio increases to 86 percent, as can be seen in figure 1-2.[ii]

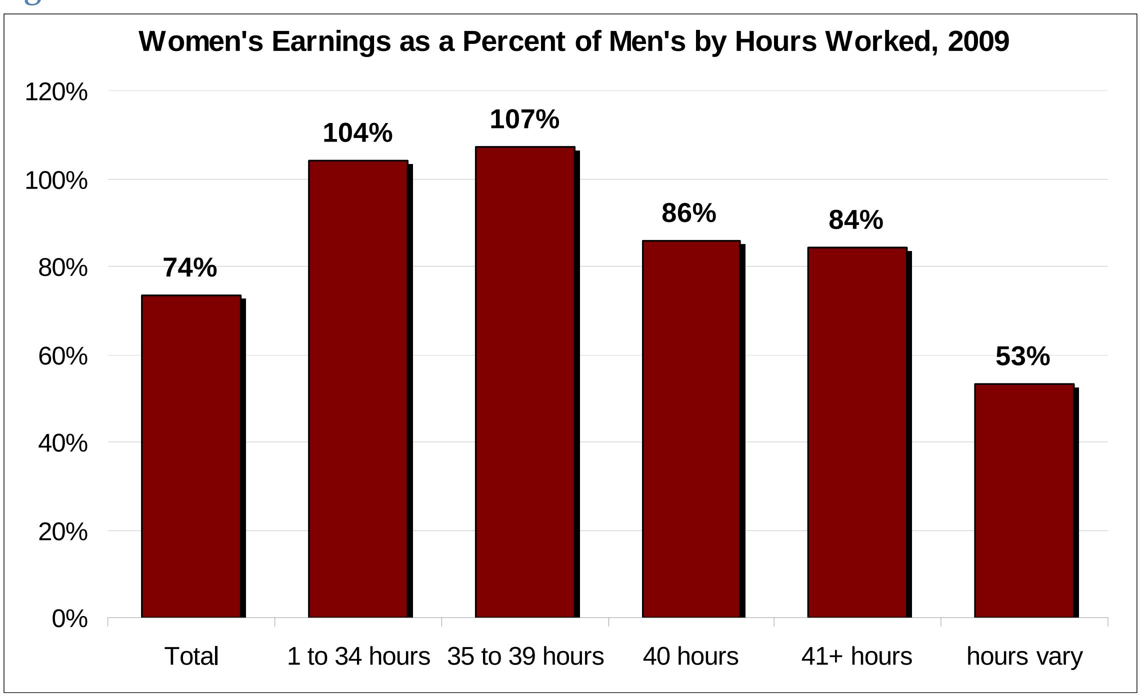
When the wage gap is analyzed by individual occupations, jobs and employee characteristics, regional labor markets, job titles, job responsibility, and experience, then the wage gap shrinks even more. When these differences are considered, many studies show that men and women make about the same. For instance, a 2009 study by the economics consulting firm CONSAD Research Corporation, prepared for the Labor Department, shows that women make around 94% of what men make. The remaining six cents are due to unexplained variables, one of which might be discrimination.

Figure 1-1



U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook*: 2009, table 16; *Employment and Earnings*: January 2010, annual averages, table 37.

Figure 1-2



Source: U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2009*, 2010.

In a similar vein, a report by Jody Feder and Linda Levine of the Congressional Research Service entitled "Pay Equity Legislation in the 110th Congress," states that "although these disparities between seemingly comparable men and women sometimes are taken as proof of sex-based wage inequities, the data has not been adjusted to reflect gender difference in all characteristics that can legitimately affect relative wages (for instance, college major or uninterrupted years of employment.)"[iii] Once researchers account for those factors, the gap shrinks considerably.

Dozens of studies on the gender wage gap that attempt to measure "discrimination" have been published in academic journals in the past two decades. Unlike the Bureau of Labor Statistics, which uses simple mathematical tools to calculate the wage ratio, these studies use an econometric technique called regression analysis to measure contributing effects of all factors that could plausibly explain the wage gap. The residual that cannot be explained by any of the included variables is frequently termed as "discrimination." However, it has been found that an increase in the number of explanatory variables significantly reduces the residual portion attributable to "discrimination." Many of these studies suffer from a problem called omitted variable bias, which means that they fail to include enough explanatory variables to truly account for all, or even most, of the factors that plausibly affect wages.

Many studies have conducted regression based decomposition analysis in order to infer the relative importance of various factors in forming the wage gap. One such study, by Professor June O'Neill of the City University of New York, shows that the adjusted wage ratio between men and women in 2000 increased from 78.2 percent to 97.5 percent when appropriate explanatory variables were included in calculations.[iv] When data were included on demographics, education, scores on the Armed Forces Qualification Test, and work experience, the wage ratio increased to 91.4 percent. When workplace and occupation characteristics, as well as child-related factors, were added, the wage ratio rose to 95.1 percent. Finally, the addition of the percentage of women in the occupation increased the ratio to 97.5 percent.

Similarly, Professor Marianne Bertrand of the University of Chicago and Professor Kevin Hallock of Cornell University found an insignificant difference in the pay of male and female top corporate executives when factoring in the size of the firm, company position, age, seniority, and tenure.[v] As table 1-1 shows, when accounting for detailed manager occupation, the female-male wage ratio rises from 56 percent to 87 percent and, when accounting for age and tenure, the wage ratio jumps from 56 percent to 95 percent.

Moreover, studies on the pay gap largely ignore the fringe benefits given to workers that account for approximately one-third of total compensation. Professor Helen Levy of the University of Michigan found in her study that data show smaller gender wage gaps when using both health insurance and wages than wages alone.[vi]

Table 1-1

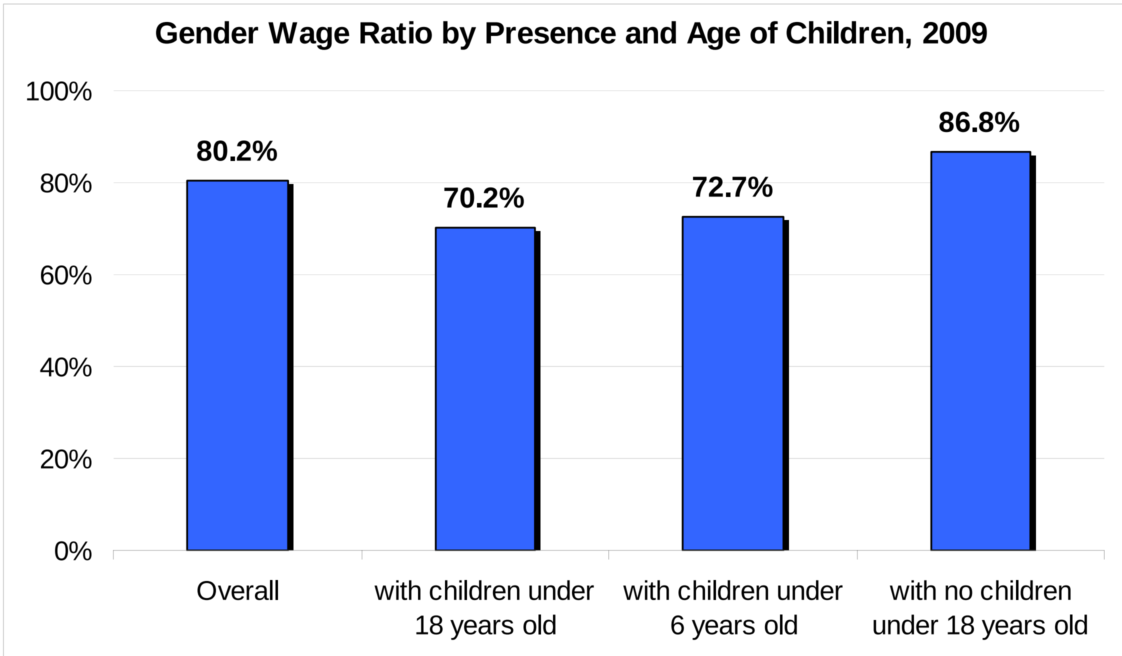
Comparisons of Literature on Gender Wage Gap					
Researcher	**Year**	**Sample From**	**Factors included in adjusted ratio**	**F/M Wage Ratio**	
				Unadjusted	**Adjusted**
Census Bureau	2008	Population	Full-time Annual Wages	0.78	-
BLS	2008	Population	Full-time Weekly Wages of Workers who work 40 hours per week	0.8	**0.87**
Bertrand and Hallock	2001	Top Executives, Managers	Industrial Specialization, Firm Size, Average Weekly earnings of workers working over 35 hours, Compensation, Detail Manager Occupation	0.56	**0.87**
GAO	2009	Federal Workers	Breaks in federal service, Unpaid Leave, Education, Occupational differences, Federal experience, Worker characteristics	0.89	**0.93**
Jane Waldfogel	1989	Population	Age, Gender, Race, Education, Hourly wage, Work Experience, Marital Status, Number of Children	0.84	**0.95**
Bertrand and Hallock	2001	Top Executives, Managers	Industrial Specialization, Firm Size, Average Weekly earnings of workers working over 35 hours, Compensation, Age and Tenure of Manager	0.56	**0.95**
June O'Neill	2003	Population	Age, Gender, Race, Education, SMSA, Region, AFQT, work experience, Time lost due to family responsibilities, Class of worker, Occupational Characteristics, Percent female in occupation	0.78	**0.97**

Note: The unadjusted wage ratio includes compensation only.

For the wage ratios provided in Jane Waldfogel's study, 0.84 is the overall female to male wage ratio and 0.95 is the wage ratio of non-mothers to male.

Official labor statistics, graphed in figure 1-3, indicate a higher gender wage ratio for women without any children than for women with children. Thus, mothers tend to have lower wages than women without children. This is widely known as the "mother's penalty," and some argue that it exists because of discrimination. However, various empirical findings prove that it is rather a matter of productivity and preference, than discrimination.

Figure 1-3



Source: U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2009*, 2010.

In a study that addresses the notion of how the majority of parenting responsibilities fall on the mother rather than the father, the AAUW writes that "women's personal choices are similarly fraught with inequities."[vii] This statement suggests that what people choose for themselves is not right for them. They are referring to the problem of the "social construct" of gender roles, but it can be argued that this is not entirely about "nurture" but also about "nature." After birth, it is the mothers who need time off to rest and recover. Even if the social construct of gender roles were eliminated, it still would not stop the need for women to take work leave, while men continue working in their respective professions. Consequently, it is unclear how laws would help us change such gender roles.

Mothers often choose to work fewer hours and do flexible jobs in order to spend more time with their children. Professor Elizabeth Fox-Genovese writes that "even highly successful women frequently want to spend much more time with their young children than the sixty-hour weeks required by the corporate fast tracks will permit."[viii] Having done a thorough study on the extent to which non-discriminatory factors explain the wage gaps, Professors June and Dave O'Neill suggest that the gender pay gap arises from women's choices on "the amount of time and energy devoted to her career, as reflected in years of work, experience, utilization of part-time work, and other workplace and job characteristics".[ix]

Professor Paula England of Stanford University also comes to similar conclusions. She explains that mothers tend to choose “mother-friendly” jobs in which flexibility is traded off for higher earnings, promotion prospects and on-the-job training.[x] Another study by Professor Lalith Munasinghe, Professor Alice Henriques, and Tania Reif of Barnard College, Columbia University and Citigroup respectively finds that women, compared to men, are less likely to invest in learning job-specific skills, and are much less likely to select jobs with “back-loaded” compensation, because they know that they are likely to face more job separations.[xi]

In her book, *What Children Need,* Professor Jane Waldfogel of Columbia University writes that there is a positive correlation between the number of children and the pay gap.[xii] Her analysis of the importance of family status in determining the pay gap using cohorts from national longitudinal surveys found that mothers earned much less than non-mothers and men.[xiii] She found that the 20 percentage point increase in the wage ratio from 64 percent to 84 percent during the 1980s was averaged from a higher increase in wages of non-mothers and a lower increase in wages of mothers. Mothers’ wages had only grown from 60 percent to 75 percent, while the wages of childless women had risen sharply from 72 percent of men’s pay to 95 percent.

Consistent with her findings are those of Professors Claudia Goldin and Lawrence Katz of Harvard University and Professor Marianne Bertrand of the University of Chicago, which report that the presence of children was the major reason behind career interruptions and fewer working hours of the female MBA graduates they studied. Their study found that although all MBA graduates entered the job market with the same amount of compensation, their pay gap started rising steadily over the years because of the difference in MBA training, working hours and career interruptions.[xiv]

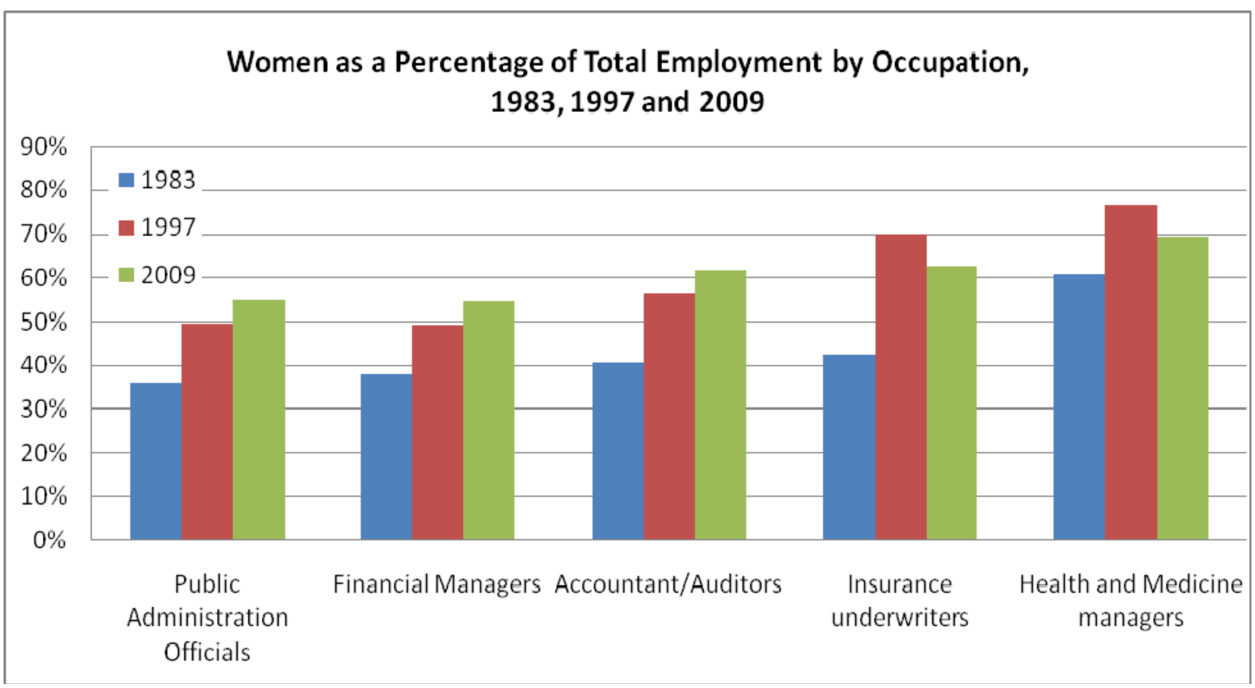
The home page of the Yale Law Women Web site, the site for female law students at Yale Law School, reads “In the aftermath of the recent global financial crisis, YLW believes that the focus on family-friendly firm policies and policies designed for the retention of women remains more important and pressing than ever.” Friendly firm policies are those that allow children to be combined with a professional career.

In addition to a desire for flexibility within full-time work, the Labor Department reports that 31 percent of women chose to work part-time in 2009. (Another 5 percent worked part-time because they could not find full-time work.) Labor Department data show that in 2009 single women working full-time earned about 95 percent of men’s earnings, but married women earned 76 percent of what married men earned. Married women with children between the ages of 6-17 earned 70 percent of men with children of the same age.

Women in management have been attaining increasingly similar levels of education and work characteristics as men, but significant differences still remain. The GAO's report on women in management showed that for most industries in 2000, female managers had less education, were younger, were more likely to work part-time, and were less likely to be married than men in management.[xv]

The GAO also found that in 2000, half of the ten industries studied had no statistically significant difference between the percent of management positions filled by women and the percent of all industry positions filled by women. In the industries where the difference was significant, namely, educational services, retail trade, finance, insurance and real estate, hospitals and medical services, and professional medical services, the majority of management positions were filled by women, except in retail trade. By 2009, as shown in figure 1-4, women made up the majority of higher-level jobs in public administration, financial managing, accounting and auditing, insurance underwriting, and health and medicine managing. This encouraging evidence highlights women's achievements in the workplace, and casts further doubt on discrimination theory.

Figure 1-4



Source: U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Employment and Earnings*: January 2010; unpublished tabulations from Current Employment Statistics.

Although individual cases of discrimination still take place, there is no evidence that discrimination is systematic and persistent. The Korn/Ferry executive search firm reported in July that, by 2007, women were represented on corporate boards in 85 percent of the Fortune 1000 companies, compared with 78 percent in 2001, 53 percent in 1988 and 11 percent in 1973.[xvi] This growth is notable for women, and there is no reason to believe that it has stalled.

With all these elements working against the unexplained pay gap, it is simply irrational to argue that it exists because of "persistent discrimination." Yet many organizations such as the American Association of University Women (AAUW) and the National Organization for Women (NOW) are quick to falsely attribute the unexplained portion of the pay gap to discrimination. Hence, their support of the Paycheck Fairness Act.

The Costs of the Paycheck Fairness Act

The danger is not that progress for women is slowing, but that Congress will overreact to false discrimination claims and pass legislation such as the Paycheck Fairness Act that will slow the growth of jobs in America for both men and women. This would especially hurt small businesses, who would not be able to afford to comply with the reporting requirements, let alone any compliance requirement. Even more at risk under the proposed law are low-skill women, whose lower wages might make them inviting excuses for trial lawyers wishing to sue. In contrast, larger corporations would expand outside America rather than creating jobs here.

The Paycheck Fairness bill, if enacted, would spawn a tidal wave of lawsuits and enmesh employers in endless litigation. The bill is a full-employment act for lawyers that would further burden already over-burdened courts.

The bill would only allow employers to defend differences in pay between men and women on the grounds of education, training, and experience if these factors are also justified on the grounds of "business necessity." Jane McFetridge, a witness at the March 2010 Senate Committee on Health, Education, Labor, and Pensions hearing and a partner with Jackson Lewis LLP, a Chicago law firm, testified that this change could prohibit male supermarket managers with college degrees from being paid more than female cashiers without—because the college degree for the male manager might not be consistent with "business necessity."

If the Paycheck Fairness Act were to be signed into law, then the rational path for the supermarket owner might be to replace the cashier jobs by investing in self-checkout machines. Then the owner would not have to be worried about getting sued for paying a male manager more. These machines, once the stuff of science fiction, are now common in supermarkets. This would reduce jobs for both men and women.

Higher-skill women would be less affected, because their earnings could be more similar to those of some male employees. A female accountant, for instance, might have a salary closer to the male supermarket manager than the cashiers. Low-skill men often work in more unpleasant or dangerous professions, such as garbage collector, miner, oil driller, and logger. You have to pay more to get someone to be a garbage collector than an administrative assistant.

Another provision of the Paycheck Fairness Act would expand the number of establishments subject to the law from one to all establishments of the same employer in a county. Section 3 of the bill states: "employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State."

Now, employees who do substantially the same work in one location have to be paid equally. Including all locations would mean that employees in high cost, or unpleasant areas, where the employer has to pay more to attract workers, have to be paid the same as those in low-cost, more pleasant areas. Identifying the same work is hard to do for disparate jobs in different locations. The intent may be to raise wages of employees at the lower end, but the practical effect is to drive up employment costs and encourage layoffs.

The Paycheck Fairness Act would facilitate class-action suits by its bill's opt-out clause. Now, if a worker wants to participate in a class-action suit under the Equal Pay Act against her employer, she has to affirmatively agree to take part, or opt in. Under the bill, she would automatically be included unless she opted out. This provision would increase the numbers in class-action suits and would be a boon to plaintiffs' lawyers.

Penalties that the courts could levy on employers would be heavier, too. Under the law now, employers found guilty of discrimination owe workers back pay. Under the pending bill, they would have to pay punitive damages, of which a quarter or a third typically goes to plaintiffs' lawyers. Unlike current suits under the Equal Pay Act, employers would be liable for unrestricted and uncapped damages. That means that they would be under pressure to settle rather than fight, even if they are innocent, raising the costs of doing business.

And many employers are innocent of charges. Only 4.6 percent of the 942 Equal Pay Act claims filed with the Equal Employment Opportunity Commission in 2009 were found to have "reasonable cause." For sex discrimination charges filed before the EEOC under Title VII of the Civil Rights Act, only 5 percent had "reasonable cause."

The bill would require the EEOC to analyze pay data and promulgate regulations to collect more data, including information about the earnings, sex, race, and national origin of employees. The paperwork required would be a ruinous burden to employers, and employers would go out of their way to avoid hiring low-skill women, whose earnings would be a red flag to trial lawyers.

In addition, the reporting requirements would discourage employers from offering women the option of flexible schedules and part-time work. If women wanted to work two-thirds of a day, for example, their total earnings would look lower than men's. That would skew the data reported to the government.

One way for employers to avoid the penalties in the Paycheck Fairness Act would be to move offshore. If the bill were to be signed into law, America would be the only industrialized country with this type of legislation. It would be far easier to expand an existing overseas plant, or set up a new one, than expand hiring in America.

The Paycheck Fairness Act would have Washington interfere with employers' ability to set wages. Rather than helping women, the Paycheck Fairness Act would hurt them by increasing the costs of hiring. Employers would be likely to choose the male to avoid litigation.

America leads the world in opportunities for women, and 60 percent of adult women are in the labor force. The latest unemployment rate for adult women, at 8.1 percent, is lower than that for men, at 9.7 percent. Women are closing the pay gap because their education is increasing and they earn well over half of all B.A.s and M.A.s awarded, half of Ph.D.s, and half of professional degrees in law and medicine.

The Paycheck Fairness Act would have the government play a substantial role in determining how much workers earn. This shows a lack of understanding of the reasons behind the high levels of unemployment in America today. As we approach the holidays, at a time when jobs and the economy top Americans' concerns, Congress needs to think about how to make America a more welcoming place to create jobs, rather than how best to drive jobs away.

NOTES:

[i] U.S. Department of Labor, U.S. Bureau of Labor Statistics, (Washington, D.C.: June 2010).

[ii] U.S. Department of Labor, U.S. Bureau of Labor Statistics, "Median usual weekly earnings of wage and salary workers by hours usually worked and sex, 2007 annual averages – continued," *Highlights of Women's Earnings in 2009*, (Washington, D.C.: June 2010: 1025. (Statistic refers to workers who usually work exactly 40 hours a week).

[iii] Jody Feder and Linda Levine, "Pay Equity Legislation," *CRS Report for Congress RL31867,* Washington, DC: Congressional Research Service, Updated 13 January 2009.

[iv] June O'Neill, "The Gender Gap in Wages, Circa 2000," *American Economic Review* 93.2 (May 2003): 309-314.

[v] Marianne Bertrand and Kevin Hallock, "The Gender Gap in Top Corporate Jobs," *Industrial and Labor Relations Review* 55.1 (October 2001): 3-21.

[vi] Helen Levy, "Health Insurance and the Wage Gap," *National Bureau of Economic Research*, Working Paper 11975 (January 2006).

[vii] Judy Goldberg Dey and Catherine Hill, "Behind the Pay Gap," *American Association of University Women Educational Foundation* (Washington, D.C.: American Association of University Women Educational Foundation: 2007).

[viii] Elizabeth Fox-Genovese, *Feminism is Not the Story of My Life* (New York: Doubleday, 1996).

[ix] June O'Neill and Dave M. O'Neill. "What do Wage Differentials tell us about Labor Market Discrimination?" *National Bureau for Economic Research*, Working Paper No. 11240 (March 2005).

[x] Paula England, "Gender Inequality in Labor Markets: The Role of Motherhood and Segregation," *Social Politics: International Studies in Gender, State and Society* 12.2 (2005): 264-288.

[xi] Lalith Munasinghe, Alice Henriques, and Tania Reif, "The Gender Gap in Wage Returns on Job Tenure and Experience," *Labour Economics* 15.6 *(*2008): 1296-1316

[xii] Jane Waldfogel, *What Children Need* (Cambridge: Harvard University Press, 2006).

[xiii] Jane Waldfogel, "Working Mothers Then and Now: A Cross-Cohort Analysis of the Effects of Maternity Leave on Women's Pay," *Gender and Family Issues in the Workplace,* ed. Francine D. Blau and Ronald G. Ehrenberg (New York: Russell Sage Foundation, 1997).

[xiv] Marianne Bertrand et al, "Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors," *National Bureau for Economic Research*, Working Paper No. 14681 (January 2009).

[xv]U.S. Government Accountability Office, "Women in Management: Analysis of Selected Data from the Current Population Survey", Congressional Briefing Slides, 2001.

[xvi] Korn/Ferry Institute, "34th Annual Board of Directors Study," 2008, 27 July 2010 <http://www.kornferry.com/Publication/9955>