EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 30, 2008
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

H.R. 1338 – To amend the Fair Labor Standards Act of 1938

(Representative DeLauro (D-CT) and 230 cosponsors)

The Administration strongly supports and aggressively enforces our Nation's anti-discrimination laws and is firmly committed to the principle of equal pay for equal work. But rather than contributing to that cause, H.R. 1338 would make enforcement of these laws more difficult and error-prone and invite a surge of litigation. Therefore, the Administration strongly opposes the "Paycheck Fairness Act." The bill would unjustifiably amend the Equal Pay Act (EPA) to allow for, among other things, unlimited compensatory and punitive damages, even when a disparity in pay was unintentional. It also would encourage discrimination claims to be made based on factors unrelated to actual pay discrimination by allowing pay comparisons between potentially different labor markets. In addition, it would require the Department of Labor (DOL) to replace its successful approach to detecting pay discrimination with a failed methodology that was abandoned because it had a 93 percent false positive rate. Thus, if H.R. 1338 were presented to the President, his senior advisors would recommend that he veto the bill.

The bill's provision for unlimited compensatory and punitive damages without even a showing of intent is especially troubling. Other employment statutes, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, provide for limited compensatory and punitive damages of up to $300,000 (but unlimited backpay). These statutes only provide for such damages after a showing that the discrimination was intentional and, for punitive damages, that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." To permit punitive damages in the absence of intent or reckless indifference would be wrong. Moreover, there is no need to add punitive damages to the EPA, since such damages are already available under Title VII for pay discrimination.

Further, the bill appears to significantly change one of the affirmative defenses available under the EPA that is used to explain wage differentials due to such nondiscriminatory factors as market rates and prior salary history. Changing the "factor other than sex" affirmative defense would impose a tremendous burden on employers. They would be required to prove, in order to counter the presumption of wage discrimination, that the reason for the wage differential is not only something other than sex, but that it also passes a "job relatedness" and a "business necessity" test that would be determined by a judge or jury. The judicial system -- judges and juries -- would supplant the free market system to determine how businesses must be run and how much they must pay individual workers. This will substantially harm the American economy and the labor market.

H.R. 1338 also would significantly change the "establishment" requirement under the EPA to allow for pay comparisons within the same county (or political subdivision) rather than within

the same physical place of business. Moreover, the bill would permit and invite the Equal Employment Opportunity Commission to develop rules defining the term "establishment" more broadly, which would potentially allow for the comparison of employee pay in different locations – with different market rates and costs of living. For example, the bill contemplates rules under which an employee working for a company in Omaha, Nebraska, might be able to compare her salary even to that of a coworker in New York, New York, to prove her case of discrimination. Such a comparison of dissimilarly situated employees makes no sense if the goal is to identify differences in pay that are due to discrimination.

Finally, the bill would have DOL abandon the refined tools and methodologies for discerning pay discrimination (such as regression analysis) that have led to an impressive enforcement record on systemic discrimination in recent years. In its place, the bill would have DOL use imprecise and dubious statistical models. Moreover, the bill directs DOL to resume using the Equal Opportunity (EO) Survey to identify contractors for compliance evaluations. However, DOL rescinded the EO Survey collection requirement after an independent study determined that the EO Survey had a 93 percent false positive rate and wrongly classified one-third of true discriminators as non-discriminators. There is no valid reason for requiring the reinstitution of a survey shown to suffer from substantial inaccuracies. The effectiveness of DOL's enforcement – without use of the EO Survey – is clearly demonstrated by its unprecedented successes in enforcement over the past three years. In Fiscal Year 2007, DOL recorded a 78 percent increase over FY 2001 in monetary remedies obtained for workers who had been subjected to unlawful employment discrimination. This marked the third consecutive year that DOL has posted record enforcement numbers in its pursuit of systemic discrimination.

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