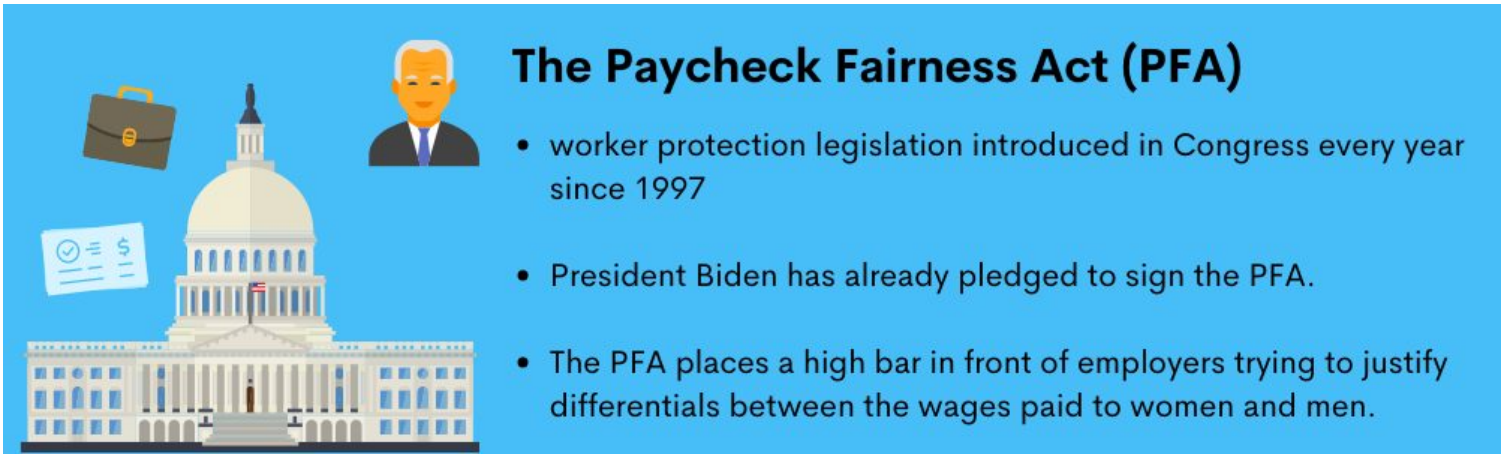
Historic worker-focused legislation could pass this year

New worker-oriented legislation is likely to have a significant impact on employers if it passes. Both the Paycheck Fairness Act (PFA) and the Protect the Right to Organize Act (Pro Act) are likely to be introduced to Congress this year. The margins of Democratic control in both the House and Senate are narrow. However, the chances of these historic pieces of worker protection legislation passing are higher than ever.

The Biden Administration has made it clear that pay equity and pro-labor legislation are key priorities. We're already seeing the evidence of that as the administration touts its support for the legislation mentioned above.

However, it's not a guarantee that these Acts will pass. Additionally, unless Democrats eliminate the Fillibuster, they'll need Republican support in the Senate to pass. That means the final legislation may not look exactly like what has currently been proposed. Still, employers would be smart to keep an eye on these two pieces of legislation and their contents. Both acts reflect a growing trend in pro-worker pro-labor perspectives. It may be best to start acting now to make organizational changes where needed instead of having to play catch up later.



The Paycheck Fairness Act

Nearly 60 years after the enactment of the Equal Pay Act (EPA) in 1963, the promise of equal pay for equal work has not been fulfilled. According to the Census Bureau, a woman working full time earns 82 cents for every dollar a man earns.

Enter the Paycheck Fairness Act, worker protection legislation introduced in Congress every year since 1997. This year, there is a good chance it will actually become law. With Democrats controlling both houses of Congress, its passage is likely in 2021, and President Biden has already pledged to sign the PFA. Equal pay is one of Biden’s top domestic priorities.

The PFA places a high bar in front of employers trying to justify differentials between the wages paid to women and men.

The Equal Pay Act and employers

Its proponents describe the Paycheck Fairness Act as adding procedural protections to the Equal Pay Act. The EPA considers jobs equal if they require equal skill, effort, and responsibility and are performed under similar working conditions. The law requires equal pay for equal work.

But the EPA grants employers a powerful tool to justify wage differences. It lets them point to any factor other than sex to justify a pay discrepancy. Common examples are paying members of one sex more because of training, length and quality of experience, education, employment gaps, or past salary history. As long as employers can justify the difference with a rational reason not based on sex, employees will lose an EPA lawsuit.

PFA would upend EPA defense

Advocates of the PFA say that standard makes it too easy for employers to get away with underpaying women. For example, basing a woman's initial pay on past wages can perpetuate past discrimination that originated with her former employers.

This piece of worker protection legislation would redefine "factors other than sex." Employers would have to show the factor:

Is not based on or derived from a sex-based compensation differential.

The first factor is designed to end the practice of basing starting pay on a new hire's past earnings. Instead, employers will have to place new hires into existing pay bands without knowing what the employee's previous pay. Some states already forbid using past salary to set starting pay — or even asking how much an applicant previously earned.

Is job-related and consistent with business necessity.

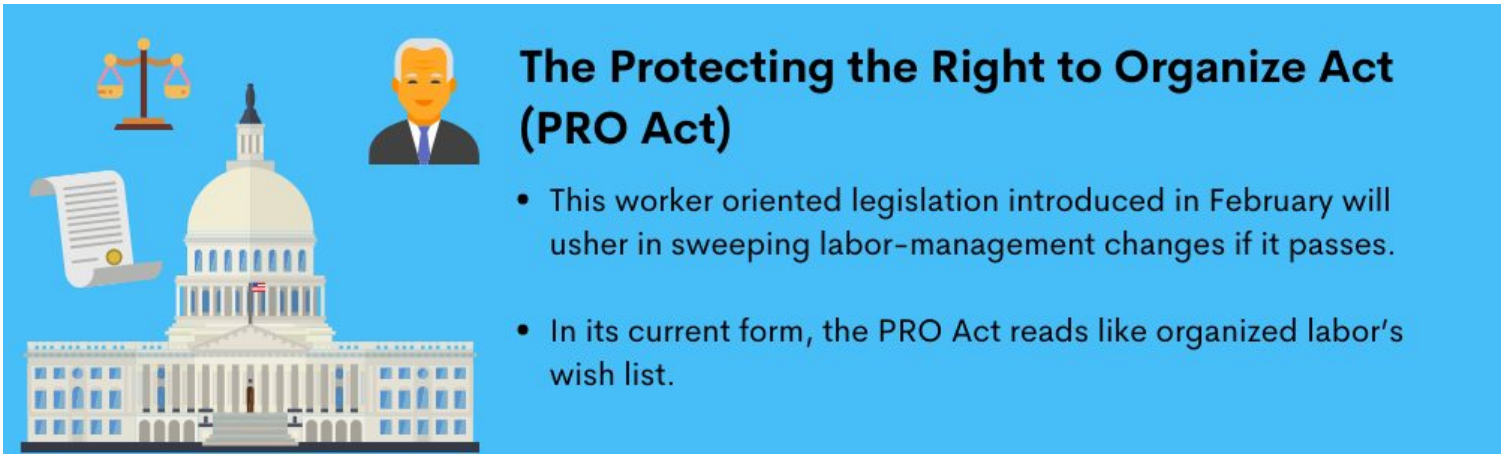
Showing that a factor is job-related isn't hard; justifying it as consistent with business necessity is. For example, paying someone more because he has more experience could probably be justified as job-related.

But is that consistent with business necessity? Probably not. It's not "necessary" to pay more for years of experience. The practice may mean a mother who took time off to have children would end up paid less than a father who did not.

To justify necessity, an employer might have to explain exactly how an extra year of experience translates into greater job success.

Accounts for the entire differential in compensation.

Finally, employers will have to prove the stated reason for pay differences translates into the entirety of the pay differential. That means placing a dollar value on each stated business necessity. How much is that extra year of experience worth? As a practical matter, this is nearly impossible.



The Protecting the Right to Organize Act

This worker-oriented legislation introduced in February will usher in sweeping labor-management changes if it passes. The House of Representatives approved an earlier version of the Protecting the Right to Organize Act last year, but the bill never made it to the Senate. But now that Democrats control both houses and the White House, the PRO Act's changes are looking far better.

In its current form, the PRO Act reads like organized labor's wish list. It would:

Define a joint employer as any entity that has either direct or indirect control over workers. That standard was set in the National Labor Relations Board's 2015 *Browning-Ferris* decision. A more conservative NLRB overturned *Browning-Ferris* last year, but the PRO Act would codify the expansive definition as a matter of federal law.

Result: More companies would potentially be subject to unfair labor practices charges.

Classify more workers as employees rather than independent contractors. The PRO Act would establish as a federal standard the relatively simple "ABC test" as the way to determine that someone is an employee. Most states use a more complex "economic realities test" that more often classifies workers as contractors.

Why that's important: Employees can unionize; contractors can't.

Pre-empt right-to-work laws, which let workers in 27 states opt out of paying union dues even if they enjoy benefits secured by union contracts. That would fill union coffers and expand union membership.

Let unions establish "quickie" representation elections with smaller bargaining units, and permit voting in person or by mail. Faster elections would give employers less time to convince employees that union representation might not be advantageous.

Additional Resource: Performing an internal pay equity audit is a great way to prepare for future pay equity legislation.