



AMERICAN BENEFITS
COUNCIL

February 1, 2008

The Honorable Edward Kennedy
Chairman
Committee on Health, Education,
Labor and Pensions
644 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Michael Enzi
Ranking Member
Committee on Health, Education,
Labor and Pensions
835 Dirksen Senate Office Building
Washington, DC 20510

Re: The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases

STATEMENT FOR THE RECORD

Dear Chairman Kennedy and Ranking Member Enzi:

The American Benefits Council submits this statement in connection with the hearing of the Senate Committee on Health, Education, Labor and Pensions on "The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases." We respectfully request that this statement be included in the record of the hearing.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We wish to express our continued concern regarding proposed legislation (S. 1843, The Fair Pay Restoration Act) to overrule the Supreme Court's *Ledbetter v. Goodyear Tire and Rubber Co.* decision. The Council's area of expertise is in the employee benefit area, and accordingly we limit our letter to the possible effect of the proposed legislation on benefit programs.

We are writing with regard to S. 1843, as we previously wrote to the House Education and Labor Committee with regard to H.R. 2831, because the proposed legislation could possibly raise serious retirement plan issues. Under both bills, each payment of compensation or benefits that is lower because of past discrimination is arguably a new act of discrimination and thus an employee could file a charge or sue many years after the discrimination actually occurred. We appreciate that the findings sections of the House and Senate legislation -- which does not affect the actual statutory provisions -- each include a finding that the bill is not intended to change the current law treatment of when pension distributions are considered paid. As we understand it, this finding was intended to clarify that, for purposes of the legislation, pension payments are treated as paid at an employee's retirement, not as each actual

payment is made. Such a clarification would help address an important concern, i.e., that an individual who has been retired for many years could file a charge or sue based on acts that occurred during his or her active service.

However, in order to be effective, we believe that the finding must be reflected in the actual bill language; as currently drafted, the finding and bill language appear to conflict.

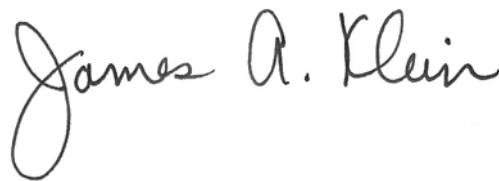
Moreover, the underlying significant concern as to how a judgment in favor of a plaintiff would affect an employer-sponsored retirement plan still remains unaddressed. For example, if a company maintains a defined benefit plan that calculates benefits based on an employee's final average pay, would the plan need to recalculate the plaintiff's benefit based on the revised pay? What if the lawsuit is a class action, so that large numbers of plan participants could be making the same claim for much higher benefits? What if this caused the plan to be woefully underfunded or resulted in the employer being forced to terminate the plan? The retirement security of other participants could be severely undermined as a result of a claim now being made for discrimination that occurred many years before.

We continue to be concerned about the possible effect of the proposed legislation on 401(k) plans, 403(b) plans (those maintained by schools and charities generally), and 457 plans maintained by state and local governments. To what extent would such plans have to recalculate benefits payable to the plaintiffs? If the employer needs to fund enormous additional benefits for the plaintiffs, would the employer effectively have to reduce or eliminate contributions for others?

We urge that this legislation not be considered by the full Senate until the possible ramifications of the bill are fully understood. We are very mindful of the concerns that led to the drafting of this proposed legislation but we continue to have concerns about its application to employer sponsored retirement plans in its current form. It would be very unfortunate to risk the retirement security of large numbers of plan participants as a result of failing to address the question of how a judgment in favor of a plaintiff affects the employer's retirement plans.

Thank you for the opportunity to share our views.

Respectfully submitted,

A handwritten signature in black ink that reads "James A. Klein". The signature is written in a cursive, flowing style with a large initial "J".

James A. Klein
President
American Benefits Council