

111TH CONGRESS  
1ST SESSION

# S. 904

To amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 28, 2009

Mr. HARKIN (for himself, Mr. KENNEDY, Mr. KERRY, Mr. FEINGOLD, Mr. SANDERS, Mrs. BOXER, Mrs. MURRAY, Mr. MERKLEY, Mr. LEAHY, Mr. SCHUMER, Mr. DURBIN, and Mr. AKAKA) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

To amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       (a) **SHORT TITLE.**—This Act may be cited as the  
5       “Fair Pay Act of 2009”.

6       (b) **REFERENCE.**—Except as provided in section 8,  
7       whenever in this Act an amendment or repeal is expressed  
8       in terms of an amendment to, or repeal of, a section or

1 other provision, the reference shall be considered to be  
2 made to a section or other provision of the Fair Labor  
3 Standards Act of 1938 (29 U.S.C. 201 et seq.).

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) Wage rate differentials exist between equiv-  
7 alent jobs segregated by sex, race, and national ori-  
8 gin in Government employment and in industries en-  
9 gaged in commerce or in the production of goods for  
10 commerce.

11 (2) The existence of such wage rate differen-  
12 tials—

13 (A) depresses wages and living standards  
14 for employees necessary for their health and ef-  
15 ficiency;

16 (B) prevents the maximum utilization of  
17 the available labor resources;

18 (C) tends to cause labor disputes, thereby  
19 burdening, affecting, and obstructing com-  
20 merce;

21 (D) burdens commerce and the free flow of  
22 goods in commerce; and

23 (E) constitutes an unfair method of com-  
24 petition.

1           (3) Discrimination in hiring and promotion has  
2 played a role in maintaining a segregated work  
3 force.

4           (4) Many women and people of color work in  
5 occupations dominated by individuals of their same  
6 sex, race, and national origin.

7           (5)(A) United States Census Bureau data  
8 shows that in 2007, women in the United States  
9 working full-time, year-round earned roughly 78  
10 cents for every dollar earned by a man working full-  
11 time, year-round.

12           (B) A 2003 study by the General Accountability  
13 Office found that even when accounting for key fac-  
14 tors generally known to influence earnings such as  
15 race, marital status, age and number of children as  
16 well as hours worked and time out of the workforce,  
17 a 20 percent gap in pay remains which cannot be ac-  
18 counted for but may be partially explained by women  
19 make less who work in traditionally female domi-  
20 nated careers as well as other discrimination in the  
21 workplace.

22           (6) Section 6(d) of the Fair Labor Standards  
23 Act of 1938 prohibits discrimination in compensa-  
24 tion for “equal work” on the basis of sex.

1           (7) Artificial barriers to the elimination of dis-  
 2           crimination in compensation based upon sex, race,  
 3           and national origin continue to exist more than 4  
 4           decades after the passage of section 6(d) of the Fair  
 5           Labor Standards Act of 1938, the Equal Pay Act of  
 6           1963, and the Civil Rights Act of 1964 (42 U.S.C.  
 7           2000a et seq.). Elimination of such barriers would  
 8           have positive effects, including—

9                   (A) providing a solution to problems in the  
 10                   economy created by discrimination through  
 11                   wage rate differentials;

12                   (B) substantially reducing the number of  
 13                   working women and people of color earning low  
 14                   wages, thereby reducing the dependence on pub-  
 15                   lic assistance; and

16                   (C) promoting stable families by enabling  
 17                   working family members to earn a fair rate of  
 18                   pay.

19 **SEC. 3. EQUAL PAY FOR EQUIVALENT JOBS.**

20           (a) AMENDMENT.—Section 6 (29 U.S.C. 206) is  
 21           amended by adding at the end the following:

22           “(h)(1)(A) Except as provided in subparagraph (B),  
 23           no employer having employees subject to any provision of  
 24           this section shall discriminate, within any establishment  
 25           in which such employees are employed, between employees

1 on the basis of sex, race, or national origin by paying  
2 wages to employees in such establishment in a job that  
3 is dominated by employees of a particular sex, race, or  
4 national origin at a rate less than the rate at which the  
5 employer pays wages to employees in such establishment  
6 in another job that is dominated by employees of the oppo-  
7 site sex or of a different race or national origin, respec-  
8 tively, for work on equivalent jobs.

9 “(B) Nothing in subparagraph (A) shall prohibit the  
10 payment of different wage rates to employees where such  
11 payment is made pursuant to—

12 “(i) a seniority system;

13 “(ii) a merit system;

14 “(iii) a system that measures earnings by quan-  
15 tity or quality of production; or

16 “(iv) a differential based on a bona fide factor  
17 other than sex, race, or national origin, such as edu-  
18 cation, training, or experience, except that this  
19 clause shall apply only if—

20 “(I) the employer demonstrates that—

21 “(aa) such factor—

22 “(AA) is job-related with respect  
23 to the position in question; or

24 “(BB) furthers a legitimate busi-  
25 ness purpose, except that this item

1 shall not apply if the employee dem-  
2 onstrates that an alternative employ-  
3 ment practice exists that would serve  
4 the same business purpose without  
5 producing such differential and that  
6 the employer has refused to adopt  
7 such alternative practice; and

8 “(bb) such factor was actually applied  
9 and used reasonably in light of the as-  
10 serted justification; and

11 “(II) upon the employer succeeding under  
12 subelause (I), the employee fails to demonstrate  
13 that the differential produced by the reliance of  
14 the employer on such factor is itself the result  
15 of discrimination on the basis of sex, race, or  
16 national origin by the employer.

17 “(C) The Equal Employment Opportunity Commis-  
18 sion shall issue guidelines specifying criteria for deter-  
19 mining whether a job is dominated by employees of a par-  
20 ticular sex, race, or national origin for purposes of sub-  
21 paragraph (B)(iv). Such guidelines shall not include a list  
22 of such jobs.

23 “(D) An employer who is paying a wage rate differen-  
24 tial in violation of subparagraph (A) shall not, in order

1 to comply with the provisions of such subparagraph, re-  
2 duce the wage rate of any employee.

3 “(2) No labor organization or its agents representing  
4 employees of an employer having employees subject to any  
5 provision of this section shall cause or attempt to cause  
6 such an employer to discriminate against an employee in  
7 violation of paragraph (1)(A).

8 “(3) For purposes of administration and enforcement  
9 of this subsection, any amounts owing to any employee  
10 that have been withheld in violation of paragraph (1)(A)  
11 shall be deemed to be unpaid minimum wages or unpaid  
12 overtime compensation under this section or section 7.

13 “(4) In this subsection:

14 “(A) The term ‘labor organization’ means any  
15 organization of any kind, or any agency or employee  
16 representation committee or plan, in which employ-  
17 ees participate and that exists for the purpose, in  
18 whole or in part, of dealing with employers con-  
19 cerning grievances, labor disputes, wages, rates of  
20 pay, hours of employment, or conditions of work.

21 “(B) The term ‘equivalent jobs’ means jobs that  
22 may be dissimilar, but whose requirements are  
23 equivalent, when viewed as a composite of skills, ef-  
24 fort, responsibility, and working conditions.”

1 (b) CONFORMING AMENDMENT.—Section 13(a) (29  
2 U.S.C. 213(a)) is amended in the matter before paragraph  
3 (1) by striking “section 6(d)” and inserting “sections 6  
4 (d) and (h)”.

5 **SEC. 4. PROHIBITED ACTS.**

6 Section 15(a) (29 U.S.C. 215(a)) is amended—

7 (1) by striking the period at the end of para-  
8 graph (5) and inserting a semicolon; and

9 (2) by adding after paragraph (5) the following:

10 “(6) to discriminate against any individual be-  
11 cause such individual has opposed any act or prac-  
12 tice made unlawful by section 6(h) or because such  
13 individual made a charge, testified, assisted, or par-  
14 ticipated in any manner in an investigation, pro-  
15 ceeding, or hearing to enforce section 6(h); or

16 “(7) to discharge or in any other manner dis-  
17 criminate against, coerce, intimidate, threaten, or  
18 interfere with any employee or any other person be-  
19 cause the employee inquired about, disclosed, com-  
20 pared, or otherwise discussed the employee’s wages  
21 or the wages of any other employee, or because the  
22 employee exercised, enjoyed, aided, or encouraged  
23 any other person to exercise or enjoy any right  
24 granted or protected by section 6(h).”.



1 **SEC. 5. REMEDIES.**

2 (a) ENHANCED PENALTIES.—Section 16(b) (29  
3 U.S.C. 216(b)) is amended—

4 (1) by inserting after the first sentence the fol-  
5 lowing: “Any employer who violates subsection (d) or  
6 (h) of section 6 shall additionally be liable for such  
7 compensatory or punitive damages as may be appro-  
8 priate, except that the United States shall not be lia-  
9 ble for punitive damages.”;

10 (2) in the sentence beginning “An action to”,  
11 by striking “either of the preceding sentences” and  
12 inserting “any of the preceding sentences of this  
13 subsection”;

14 (3) in the sentence beginning “No employees”,  
15 by striking “No employees” and inserting “Except  
16 with respect to class actions brought under sub-  
17 section (f), no employee”;

18 (4) in the sentence beginning “The court in”,  
19 by striking “in such action” and inserting “in any  
20 action brought to recover the liability prescribed in  
21 any of the preceding sentences of this subsection”;  
22 and

23 (5) by striking “section 15(a)(3)” each place it  
24 occurs and inserting “paragraphs (3), (6), and (7)  
25 of section 15(a)”.

1 (b) ACTION BY SECRETARY.—Section 16(c) (29  
2 U.S.C. 216(c)) is amended—

3 (1) in the first sentence—

4 (A) by inserting “or, in the case of a viola-  
5 tion of subsection (d) or (h) of section 6, addi-  
6 tional compensatory or punitive damages,” be-  
7 fore “and the agreement”; and

8 (B) by inserting before the period the fol-  
9 lowing: “, or such compensatory or punitive  
10 damages, as appropriate”;

11 (2) in the second sentence, by inserting before  
12 the period the following: “and, in the case of a viola-  
13 tion of subsection (d) or (h) of section 6, additional  
14 compensatory or punitive damages”; and

15 (3) in the third sentence, by striking “the first  
16 sentence” and inserting “the first or second sen-  
17 tence”.

18 (c) FEES.—Section 16 (29 U.S.C. 216) is amended  
19 by adding at the end the following:

20 “(f) In any action brought under this section for a  
21 violation of section 6(h), the court shall, in addition to  
22 any other remedies awarded to the prevailing plaintiff or  
23 plaintiffs, allow expert fees as part of the costs. Any such  
24 action may be maintained as a class action as provided  
25 by the Federal Rules of Civil Procedure.”.

1 **SEC. 6. RECORDS.**

2 (a) RECORDS.—Section 11(c) (29 U.S.C. 211(c)) is  
3 amended—

4 (1) by inserting “(1)” after “(c)”; and

5 (2) by adding at the end the following:

6 “(2) Every employer subject to section 6(h) shall pre-  
7 serve records that document and support the method, sys-  
8 tem, calculations, and other bases used by the employer  
9 in establishing, adjusting, and determining the wage rates  
10 paid to the employees of the employer. Every employer  
11 subject to section 6(h) shall preserve such records for such  
12 periods of time, and shall make such reports from the  
13 records to the Equal Employment Opportunity Commis-  
14 sion, as shall be prescribed by the Equal Employment Op-  
15 portunity Commission by regulation or order as necessary  
16 or appropriate for the enforcement of the provisions of sec-  
17 tion 6(h) or any regulation promulgated pursuant to sec-  
18 tion 6(h).”.

19 (b) SMALL BUSINESS EXEMPTIONS.—Section 11(c)  
20 (as amended by subsection (a)) is further amended by  
21 adding at the end the following:

22 “(3) Every employer subject to section 6(h) that has  
23 25 or more employees on any date during the first or sec-  
24 ond year after the effective date of this paragraph, or 15  
25 or more employees on any date during any subsequent  
26 year after such second year, shall, in accordance with reg-

1 ulations promulgated by the Equal Employment Oppor-  
2 tunity Commission under paragraph (8), prepare and sub-  
3 mit to the Equal Employment Opportunity Commission  
4 for the year involved a report signed by the president,  
5 treasurer, or corresponding principal officer, of the em-  
6 ployer that includes information that discloses the wage  
7 rates paid to employees of the employer in each classifica-  
8 tion, position, or job title, or to employees in other wage  
9 groups employed by the employer, including information  
10 with respect to the sex, race, and national origin of em-  
11 ployees at each wage rate in each classification, position,  
12 job title, or other wage group.”.

13 (c) PROTECTION OF CONFIDENTIALITY.—Section  
14 11(c) (as amended by subsections (a) and (b)) is further  
15 amended by adding at the end the following:

16 “(4) The rules and regulations promulgated by the  
17 Equal Employment Opportunity Commission under para-  
18 graph (8), relating to the form of such a report, shall in-  
19 clude requirements to protect the confidentiality of em-  
20 ployees, including a requirement that the report shall not  
21 contain the name of any individual employee.”.

22 (d) USE; INSPECTIONS; EXAMINATION; REGULA-  
23 TIONS.—Section 11(c) (as amended by subsections (a)  
24 through (c)) is further amended by adding at the end the  
25 following:

1       “(5) The Equal Employment Opportunity Commis-  
2 sion may publish any information and data that the Equal  
3 Employment Opportunity Commission obtains pursuant to  
4 the provisions of paragraph (3). The Equal Employment  
5 Opportunity Commission may use the information and  
6 data for statistical and research purposes, and compile  
7 and publish such studies, analyses, reports, and surveys  
8 based on the information and data as the Equal Employ-  
9 ment Opportunity Commission may consider appropriate.

10       “(6) In order to carry out the purposes of this Act,  
11 the Equal Employment Opportunity Commission shall by  
12 regulation make reasonable provision for the inspection  
13 and examination by any person of the information and  
14 data contained in any report submitted to the Equal Em-  
15 ployment Opportunity Commission pursuant to paragraph  
16 (3).

17       “(7) The Equal Employment Opportunity Commis-  
18 sion shall by regulation provide for the furnishing of copies  
19 of reports submitted to the Equal Employment Oppor-  
20 tunity Commission pursuant to paragraph (3) to any per-  
21 son upon payment of a charge based upon the cost of the  
22 service.

23       “(8) The Equal Employment Opportunity Commis-  
24 sion shall issue rules and regulations prescribing the form  
25 and content of reports required to be submitted under

1 paragraph (3) and such other reasonable rules and regula-  
2 tions as the Equal Employment Opportunity Commission  
3 may find necessary to prevent the circumvention or eva-  
4 sion of such reporting requirements. In exercising the au-  
5 thority of the Equal Employment Opportunity Commis-  
6 sion under paragraph (3), the Equal Employment Oppor-  
7 tunity Commission may prescribe by general rule sim-  
8 plified reports for employers for whom the Equal Employ-  
9 ment Opportunity Commission finds that because of the  
10 size of the employers a detailed report would be unduly  
11 burdensome.”.

12 **SEC. 7. RESEARCH, EDUCATION, AND TECHNICAL ASSIST-**  
13 **ANCE PROGRAM; REPORT TO CONGRESS.**

14 Section 4(d) (29 U.S.C. 204(d)) is amended by add-  
15 ing at the end the following:

16 “(4) The Equal Employment Opportunity Commis-  
17 sion shall conduct studies and provide information and  
18 technical assistance to employers, labor organizations, and  
19 the general public concerning effective means available to  
20 implement the provisions of section 6(h) prohibiting wage  
21 rate discrimination between employees performing work in  
22 equivalent jobs on the basis of sex, race, or national origin.  
23 Such studies, information, and technical assistance shall  
24 be based on and include reference to the objectives of such  
25 section to eliminate such discrimination. In order to

1 achieve the objectives of such section, the Equal Employ-  
2 ment Opportunity Commission shall carry on a continuing  
3 program of research, education, and technical assistance  
4 including—

5           “(A) conducting and promoting research with  
6           the intent of developing means to expeditiously cor-  
7           rect the wage rate differentials described in section  
8           6(h);

9           “(B) publishing and otherwise making available  
10          to employers, labor organizations, professional asso-  
11          ciations, educational institutions, the various media  
12          of communication, and the general public the find-  
13          ings of studies and other materials for promoting  
14          compliance with section 6(h);

15          “(C) sponsoring and assisting State and com-  
16          munity informational and educational programs; and

17          “(D) providing technical assistance to employ-  
18          ers, labor organizations, professional associations  
19          and other interested persons on means of achieving  
20          and maintaining compliance with the provisions of  
21          section 6(h).

22          “(5) The report submitted biennially by the Secretary  
23          to Congress under paragraph (1) shall include a separate  
24          evaluation and appraisal regarding the implementation of  
25          section 6(h).”.

1 **SEC. 8. CONFORMING AMENDMENTS.**

2 (a) CONGRESSIONAL EMPLOYEES.—

3 (1) APPLICATION.—Section 203(a)(1) of the  
4 Congressional Accountability Act of 1995 (2 U.S.C.  
5 1313(a)(1)) is amended—

6 (A) by striking “subsections (a)(1) and (d)  
7 of section 6” and inserting “subsections (a)(1),  
8 (d), and (h) of section 6”; and

9 (B) by striking “206 (a)(1) and (d)” and  
10 inserting “206 (a)(1), (d), and (h)”.

11 (2) REMEDIES.—Section 203(b) of such Act (2  
12 U.S.C. 1313(b)) is amended by inserting before the  
13 period the following: “or, in an appropriate case,  
14 under section 16(f) of such Act (29 U.S.C. 216(f))”.

15 (b) EXECUTIVE BRANCH EMPLOYEES.—

16 (1) APPLICATION.—Section 413(a)(1) of title 3,  
17 United States Code, as added by section 2(a) of the  
18 Presidential and Executive Office Accountability Act  
19 (Public Law 104–331; 110 Stat. 4053), is amended  
20 by striking “subsections (a)(1) and (d) of section 6”  
21 and inserting “subsections (a)(1), (d), and (h) of  
22 section 6”.

23 (2) REMEDIES.—Section 413(b) of such title is  
24 amended by inserting before the period the fol-  
25 lowing: “or, in an appropriate case, under section  
26 16(f) of such Act”.



1 **SEC. 9. EFFECTIVE DATE.**

2       The amendments made by this Act shall take effect

3 1 year after the date of enactment of this Act.

○