To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12, 2011

Ms. Mikulski (for herself, Mr. Akaka, Mrs. Boxer, Ms. Cantwell, Mr. Cardin, Mr. Casey, Mr. Coons, Mr. Durbin, Mr. Franken, Mrs. Gillibrand, Mr. Harkin, Mr. Kerry, Ms. Klobuchar, Mr. Lautenberg, Mr. Leahy, Mr. Levin, Mrs. McCaskill, Mrs. Murray, Mr. Reed, Mr. Reid, Mrs. Shaheen, Ms. Stabenow, Mr. Whitehouse, Mr. Wyden, Mr. Merkley, and Mrs. Hagan) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, 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 This Act may be cited as the “Paycheck Fairness
5 Act”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Women have entered the workforce in record numbers over the past 50 years.

(2) Despite the enactment of the Equal Pay Act of 1963, many women continue to earn significantly lower pay than men for equal work. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination.

(3) The existence of such pay disparities—

(A) depresses the wages of working families who rely on the wages of all members of the family to make ends meet;

(B) undermines women’s retirement security, which is often based on earnings while in the workforce;

(C) prevents the optimum utilization of available labor resources;

(D) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of the several States;

(E) burdens commerce and the free flow of goods in commerce;
(F) constitutes an unfair method of competition in commerce;

(G) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

(H) interferes with the orderly and fair marketing of goods in commerce; and

(I) in many instances, may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th Amendments.


(B) These barriers have resulted, in significant part, because the Equal Pay Act of 1963 has not worked as Congress originally intended. Improvements and modifications to the provisions added by the Act are necessary to ensure that the provisions provide effective protection to those subject to pay discrimination on the basis of their sex.

(C) Elimination of such barriers would have positive effects, including—
(i) providing a solution to problems in the economy created by unfair pay disparities;

(ii) substantially reducing the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance;

(iii) promoting stable families by enabling all family members to earn a fair rate of pay;

(iv) remedying the effects of past discrimination on the basis of sex and ensuring that in the future workers are afforded equal protection on the basis of sex; and

(v) ensuring equal protection pursuant to Congress’s power to enforce the 5th and 14th Amendments.

(5) The Department of Labor and the Equal Employment Opportunity Commission have important and unique responsibilities to help ensure that women receive equal pay for equal work.

(6) The Department of Labor is responsible for—

(A) collecting and making publicly available information about women’s pay;

(B) ensuring that companies receiving Federal contracts comply with anti-discrimin-
tion affirmative action requirements of Executive Order 11246 (relating to equal employment opportunity);

(C) disseminating information about women’s rights in the workplace;

(D) helping women who have been victims of pay discrimination obtain a remedy; and

(E) being proactive in investigating and prosecuting equal pay violations, especially systemic violations, and in enforcing all of its mandates.

(7) The Equal Employment Opportunity Commission is the primary enforcement agency for claims made under the provisions added by the Equal Pay Act of 1963, and issues regulations and guidance on appropriate interpretations of the law.

(8) With a stronger commitment by the Department of Labor and the Equal Employment Opportunity Commission to their responsibilities, increased information about the provisions added by the Equal Pay Act of 1963, wage data, and more effective remedies, women will be better able to recognize and enforce their rights.

(9) Certain employers have already made great strides in eradicating unfair pay disparities in the
workplace and their achievements should be recognized.

SEC. 3. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

(a) BONA FIDE FACTOR DEFENSE AND MODIFICATION OF SAME ESTABLISHMENT REQUIREMENT.—Section 6(d)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(1)) is amended—

(1) by striking “No employer having” and inserting “(A) No employer having”;

(2) by striking “any other factor other than sex” and inserting “a bona fide factor other than sex, such as education, training, or experience”; and

(3) by inserting at the end the following:

“(B) The bona fide factor defense described in sub-
paragraph (A)(iv) shall apply only if the employer dem-
onstrates that such factor (i) is not based upon or derived
from a sex-based differential in compensation; (ii) is job-
related with respect to the position in question; and (iii)
is consistent with business necessity. Such defense shall
not apply where the employee demonstrates that an alter-
native employment practice exists that would serve the
same business purpose without producing such differential
and that the employer has refused to adopt such alter-
native practice.
“(C) For purposes of subparagraph (A), 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. The preceding sentence shall not be construed as limiting broader applications of the term ‘establishment’ consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission.”.

(b) NONRETALIATION PROVISION.—Section 15 of the Fair Labor Standards Act of 1938 (29 U.S.C. 215) is amended—

(1) in subsection (a)(3), by striking “employee has filed” and all that follows through “committee;” and inserting “employee—

“(A) has made a charge or filed any complaint or instituted or caused to be instituted any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer, or has testified or is planning to testify or has assisted or participated in any manner in any such investigation, proceeding, hearing, or action, or has served or is planning to serve on an industry committee; or
“(B) has inquired about, discussed, or disclosed the wages of the employee or another employee;”; and

(2) by adding at the end the following:

“(c) Subsection (a)(3)(B) shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee’s essential job functions discloses the wages of such other employees to an individual who does not otherwise have access to such information, unless such disclosure is in response to a charge or complaint or in furtherance of an investigation, proceeding, hearing, or action under section 6(d), including an investigation conducted by the employer. Nothing in this subsection shall be construed to limit the rights of an employee provided under any other provision of law.”.

(c) **Enhanced Penalties.**—Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is amended—

(1) by inserting after the first sentence the following: “Any employer who violates section 6(d) shall additionally be liable for such compensatory damages, or, where the employee demonstrates that the employer acted with malice or reckless indifference, punitive damages as may be appropriate, ex-
cept that the United States shall not be liable for punitive damages.”;

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

(3) in the sentence beginning “No employees shall”, by striking “No employees” and inserting “Except with respect to class actions brought to enforce section 6(d), no employee”; 

(4) by inserting after the sentence referred to in paragraph (3), the following: “Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained as a class action as provided by the Federal Rules of Civil Procedure.”; and

(5) in the sentence beginning “The court in”—

(A) by striking “in such action” and inserting “in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection”; and

(B) by inserting before the period the following: “, including expert fees”.

(d) ACTION BY SECRETARY.—Section 16(e) of the
Fair Labor Standards Act of 1938 (29 U.S.C. 216(e)) is
amended—

(1) in the first sentence—

(A) by inserting “or, in the case of a viola-
tion of section 6(d), additional compensatory or
punitive damages, as described in subsection
(b),” before “and the agreement”; and

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

(2) in the second sentence, by inserting before
the period the following: “and, in the case of a viola-
tion of section 6(d), additional compensatory or pu-
nitive damages, as described in subsection (b)”;

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

(4) in the last sentence—

(A) by striking “commenced in the case”
and inserting “commenced—
“(1) in the case”;

(B) by striking the period and inserting “; or”; and

(C) by adding at the end the following:
“(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.”.

SEC. 4. TRAINING.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, subject to the availability of funds appropriated under section 10, shall provide training to Commission employees and affected individuals and entities on matters involving discrimination in the payment of wages.

SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND WOMEN.

(a) Program Authorized.—

(1) In general.—The Secretary of Labor, after consultation with the Secretary of Education, is authorized to establish and carry out a grant program.

(2) Grants.—In carrying out the program, the Secretary of Labor may make grants on a competitive basis to eligible entities, to carry out negotiation skills training programs for girls and women.

(3) Eligible entities.—To be eligible to receive a grant under this subsection, an entity shall be a public agency, such as a State, a local government in a metropolitan statistical area (as defined
by the Office of Management and Budget), a State
educational agency, or a local educational agency, a
private nonprofit organization, or a community-
based organization.

(4) APPLICATION.—To be eligible to receive a
grant under this subsection, an entity shall submit
an application to the Secretary of Labor at such
time, in such manner, and containing such informa-
tion as the Secretary of Labor may require.

(5) USE OF FUNDS.—An entity that receives a
grant under this subsection shall use the funds made
available through the grant to carry out an effective
negotiation skills training program that empowers
girls and women. The training provided through the
program shall help girls and women strengthen their
negotiation skills to allow the girls and women to ob-
tain higher salaries and rates of compensation that
are equal to those paid to similarly situated male
employees.

(b) INCORPORATING TRAINING INTO EXISTING PRO-
GRAMS.—The Secretary of Labor and the Secretary of
Education shall issue regulations or policy guidance that
provides for integrating the negotiation skills training, to
the extent practicable, into programs authorized under—
(1) in the case of the Secretary of Education, the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), and other programs carried out by the Department of Education that the Secretary of Education determines to be appropriate; and

(2) in the case of the Secretary of Labor, the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.), and other programs carried out by the Department of Labor that the Secretary of Labor determines to be appropriate.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Secretary of Labor and the Secretary of Education shall prepare and submit to Congress a report describing the activities conducted under this section and evaluating the effectiveness of such activities in achieving the purposes of this Act.

SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.

The Secretary of Labor shall conduct studies and provide information to employers, labor organizations, and
the general public concerning the means available to elimi-
nate pay disparities between men and women, including—

(1) conducting and promoting research to de-
velop the means to correct expeditiously the condi-
tions leading to the pay disparities;

(2) publishing and otherwise making available
to employers, labor organizations, professional asso-
ciations, educational institutions, the media, and the
general public the findings resulting from studies
and other materials, relating to eliminating the pay
disparities;

(3) sponsoring and assisting State and commu-
nity informational and educational programs;

(4) providing information to employers, labor
organizations, professional associations, and other
interested persons on the means of eliminating the
pay disparities;

(5) recognizing and promoting the achievements
of employers, labor organizations, and professional
associations that have worked to eliminate the pay
disparities; and

(6) convening a national summit to discuss, and
consider approaches for rectifying, the pay dispari-
ties.
SEC. 7. ESTABLISHMENT OF THE NATIONAL AWARD FOR PAY EQUITY IN THE WORKPLACE.

(a) In general.—There is established the Secretary of Labor’s National Award for Pay Equity in the Workplace, which shall be awarded, as appropriate, to encourage proactive efforts to comply with section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

(b) Criteria for qualification.—The Secretary of Labor shall set criteria for receipt of the award, including a requirement that an employer has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence of such effort. The Secretary shall establish procedures for the application for and presentation of the award.

(c) Employer.—In this section, the term “employer” includes—

(1)(A) a corporation, including a nonprofit corporation;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in any of subparagraphs (A) through (D);

(2) an entity carrying out an education referral program, a training program, such as an apprentice-
ship or management training program, or a similar
program; and

(3) an entity carrying out a joint program,
formed by a combination of any entities described in
paragraph (1) or (2).

SEC. 8. COLLECTION OF PAY INFORMATION BY THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION.

Section 709 of the Civil Rights Act of 1964 (42
U.S.C. 2000e–8) is amended by adding at the end the fol-
lowing:

“(f)(1) Not later than 18 months after the date of
enactment of this subsection, the Commission shall—

“(A) complete a survey of the data that is cur-
rently available to the Federal Government relating
to employee pay information for use in the enforce-
ment of Federal laws prohibiting pay discrimination
and, in consultation with other relevant Federal
agencies, identify additional data collections that will
enhance the enforcement of such laws; and

“(B) based on the results of the survey and
consultations under subparagraph (A), issue regu-
lations to provide for the collection of pay information
data from employers as described by the sex, race,
and national origin of employees.
“(2) In implementing paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required data collection reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports.”.

SEC. 9. REINSTATEMENT OF PAY EQUITY PROGRAMS AND PAY EQUITY DATA COLLECTION.

(a) BUREAU OF LABOR STATISTICS DATA COLLECTION.—The Commissioner of Labor Statistics shall continue to collect data on women workers in the Current Employment Statistics survey.

(b) OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS INITIATIVES.—The Director of the Office of Federal Contract Compliance Programs shall ensure that employees of the Office—

(1)(A) shall use the full range of investigatory tools at the Office’s disposal, including pay grade methodology;

(B) in considering evidence of possible compensation discrimination—
(i) shall not limit its consideration to a small number of types of evidence; and

(ii) shall not limit its evaluation of the evidence to a small number of methods of evaluating the evidence; and

(C) shall not require a multiple regression analysis or anecdotal evidence for a compensation discrimination case;

(2) for purposes of its investigative, compliance, and enforcement activities, shall define “similarly situated employees” in a way that is consistent with and not more stringent than the definition provided in item 1 of subsection A of section 10–III of the Equal Employment Opportunity Commission Compliance Manual (2000), and shall consider only factors that the Office’s investigation reveals were used in making compensation decisions; and

(3) shall reinstate the Equal Opportunity Survey, as required by section 60–2.18 of title 41, Code of Federal Regulations (as in effect on September 7, 2006), designating not less than half of all non-construction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify con-
tractor establishments for further evaluation and for
other enforcement purposes as appropriate.

(c) DEPARTMENT OF LABOR DISTRIBUTION OF
WAGE DISCRIMINATION INFORMATION.—The Secretary of
Labor shall make readily available (in print, on the De-
partment of Labor website, and through any other forum
that the Department may use to distribute compensation
discrimination information), accurate information on com-
pensation discrimination, including statistics, explanations
of employee rights, historical analyses of such discrimina-
tion, instructions for employers on compliance, and any
other information that will assist the public in under-
standing and addressing such discrimination.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

(a) Authorization of Appropriations.—There is
authorized to be appropriated $15,000,000 to carry out
this Act.

(b) Prohibition on Earmarks.—None of the funds
appropriated pursuant to subsection (a) for purposes of
the grant program in section 5 of this Act may be used
for a congressional earmark as defined in clause 9(e) of
rule XXI of the Rules of the House of Representatives.
SEC. 11. SMALL BUSINESS ASSISTANCE.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect on the date that is 6 months after the date of enactment of this Act.

(b) TECHNICAL ASSISTANCE MATERIALS.—The Secretary of Labor and the Commissioner of the Equal Employment Opportunity Commission shall jointly develop technical assistance material to assist small businesses in complying with the requirements of this Act and the amendments made by this Act.

(c) SMALL BUSINESSES.—A small business shall be exempt from the provisions of this Act to the same extent that such business is exempt from the requirements of the Fair Labor Standards Act of 1938 pursuant to clauses (i) and (ii) of section 3(s)(1)(A) of such Act (29 U.S.C. 203(s)(1)(A)).

SEC. 12. RULE OF CONSTRUCTION.

Nothing in this Act, or in any amendment made by this Act, shall affect the obligation of employers and employees to fully comply with all applicable immigration laws, including any penalties, fines, or other sanctions.