

114TH CONGRESS
1ST SESSION

S. 862

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

MARCH 25, 2015

Ms. MIKULSKI (for herself, Ms. BALDWIN, Mr. BLUMENTHAL, Mrs. GILLIBRAND, Mr. REED, Mrs. SHAHEEN, Ms. STABENOW, Mr. UDALL, Mr. REID, Mrs. MURRAY, Ms. HIRONO, Mr. CASEY, Mr. NELSON, Ms. WARREN, and Mr. BROWN) 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”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

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

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

12 (3) The existence of such pay disparities—

13 (A) depresses the wages of working fami-
14 lies who rely on the wages of all members of the
15 family to make ends meet;

16 (B) undermines women's retirement secu-
17 rity, which is often based on earnings while in
18 the workforce;

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

21 (D) has been spread and perpetuated,
22 through commerce and the channels and instru-
23 mentalities of commerce, among the workers of
24 the several States;

25 (E) burdens commerce and the free flow of
26 goods in commerce;

1 (F) constitutes an unfair method of com-
2 petition in commerce;

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

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

8 (I) in many instances, may deprive workers
9 of equal protection on the basis of sex in viola-
10 tion of the 5th and 14th Amendments.

11 (4)(A) Artificial barriers to the elimination of
12 discrimination in the payment of wages on the basis
13 of sex continue to exist decades after the enactment
14 of the Fair Labor Standards Act of 1938 (29 U.S.C.
15 201 et seq.) and the Civil Rights Act of 1964 (42
16 U.S.C. 2000a et seq.).

17 (B) These barriers have resulted, in significant
18 part, because the Equal Pay Act has not worked as
19 Congress originally intended. Improvements and
20 modifications to the law are necessary to ensure that
21 the Act provides effective protection to those subject
22 to pay discrimination on the basis of sex.

23 (C) Elimination of such barriers would have
24 positive effects, including—

1 (i) providing a solution to problems in the
2 economy created by unfair pay disparities;

3 (ii) substantially reducing the number of
4 working women earning unfairly low wages,
5 thereby reducing the dependence on public as-
6 sistance;

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

9 (iv) remedying the effects of past discrimi-
10 nation on the basis of sex and ensuring that in
11 the future workers are afforded equal protection
12 on the basis of sex; and

13 (v) ensuring equal protection pursuant to
14 Congress' power to enforce the 5th and 14th
15 Amendments.

16 (5) The Department of Labor and the Equal
17 Employment Opportunity Commission have impor-
18 tant and unique responsibilities to help ensure that
19 women receive equal pay for equal work.

20 (6) The Department of Labor is responsible
21 for—

22 (A) collecting and making publicly avail-
23 able information about women's pay;

24 (B) ensuring that companies receiving
25 Federal contracts comply with anti-discrimina-

1 tion affirmative action requirements of Execu-
2 tive Order 11246 (relating to equal employment
3 opportunity);

4 (C) disseminating information about wom-
5 en's rights in the workplace;

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

8 (E) being proactive in investigating and
9 prosecuting equal pay violations, especially sys-
10 temic violations, and in enforcing all of its man-
11 dates.

12 (7) The Equal Employment Opportunity Com-
13 mission is the primary enforcement agency for
14 claims made under the Equal Pay Act, and issues
15 regulations and guidance on appropriate interpreta-
16 tions of the law.

17 (8) With a stronger commitment by the Depart-
18 ment of Labor and the Equal Employment Oppor-
19 tunity Commission to their responsibilities, increased
20 information as a result of the amendments made by
21 this Act to the Equal Pay Act of 1963, wage data,
22 and more effective remedies, women will be better
23 able to recognize and enforce their rights.

24 (9) Certain employers have already made great
25 strides in eradicating unfair pay disparities in the

1 workplace and their achievements should be recog-
2 nized.

3 **SEC. 3. ENHANCED ENFORCEMENT OF EQUAL PAY RE-**
4 **QUIREMENTS.**

5 (a) BONA FIDE FACTOR DEFENSE AND MODIFICA-
6 TION OF SAME ESTABLISHMENT REQUIREMENT.—Section
7 6(d)(1) of the Fair Labor Standards Act of 1938 (29
8 U.S.C. 206(d)(1)) is amended—

9 (1) by striking “No employer having” and in-
10 sserting “(A) No employer having”;

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

14 (3) by inserting at the end the following:

15 “(B) The bona fide factor defense described in sub-
16 paragraph (A)(iv) shall apply only if the employer dem-
17 onstrates that such factor (i) is not based upon or derived
18 from a sex-based differential in compensation; (ii) is job-
19 related with respect to the position in question; (iii) is con-
20 sistent with business necessity; and (iv) accounts for the
21 differential in compensation at issue. Such defense shall
22 not apply where the employee demonstrates that an alter-
23 native employment practice exists that would serve the
24 same business purpose without producing such differential

1 and that the employer has refused to adopt such alter-
2 native practice.

3 “(C) For purposes of subparagraph (A), employees
4 shall be deemed to work in the same establishment if the
5 employees work for the same employer at workplaces lo-
6 cated in the same county or a similar political subdivision
7 of a State. The preceding sentence shall not be construed
8 as limiting broader applications of the term ‘establish-
9 ment’ consistent with rules prescribed or guidance issued
10 by the Equal Opportunity Employment Commission.”.

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

14 (1) in subsection (a)—

15 (A) in paragraph (3), by striking “em-
16 ployee has filed” and all that follows and insert-
17 ing “employee—

18 “(A) has made a charge or filed any com-
19 plaint or instituted or caused to be instituted
20 any investigation, proceeding, hearing, or action
21 under or related to this Act, including an inves-
22 tigation conducted by the employer, or has tes-
23 tified or is planning to testify or has assisted or
24 participated in any manner in any such inves-
25 tigation, proceeding, hearing, or action, or has

1 served or is planning to serve on an industry
2 committee; or

3 “(B) has inquired about, discussed, or dis-
4 closed the wages of the employee or another
5 employee;”;

6 (B) in paragraph (5), by striking the pe-
7 riod at the end and inserting “; or”; and

8 (C) by adding at the end the following:

9 “(6) to require an employee to sign a contract
10 or a waiver that would prohibit such employee from
11 disclosing information about the employee’s wages.”;
12 and

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

14 “(c) Subsection (a)(3)(B) shall not apply to instances
15 in which an employee who has access to the wage informa-
16 tion of other employees as a part of such employee’s essen-
17 tial job functions discloses the wages of such other employ-
18 ees to individuals who do not otherwise have access to such
19 information, unless such disclosure is in response to a
20 complaint or charge or in furtherance of an investigation,
21 proceeding, hearing, or action under section 6(d), includ-
22 ing an investigation conducted by the employer. Nothing
23 in this subsection shall be construed to limit the rights
24 of an employee provided under any other provision of
25 law.”.

1 (c) ENHANCED PENALTIES.—Section 16(b) of the
2 Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is
3 amended—

4 (1) by inserting after the first sentence the fol-
5 lowing: “Any employer who violates section 6(d)
6 shall additionally be liable for such compensatory
7 damages, or, where the employee demonstrates that
8 the employer acted with malice or reckless indiffer-
9 ence, punitive damages as may be appropriate, ex-
10 cept that the United States shall not be liable for
11 punitive damages.”;

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

16 (3) in the sentence beginning “No employees
17 shall”, by striking “No employees” and inserting
18 “Except with respect to class actions brought to en-
19 force section 6(d), no employee”;

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

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

2 (A) by striking “in such action” and in-
3 serting “in any action brought to recover the li-
4 ability prescribed in any of the preceding sen-
5 tences of this subsection”; and

6 (B) by inserting before the period the fol-
7 lowing: “, including expert fees”.

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

11 (1) in the first sentence—

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

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

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

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

1 (4) in the last sentence—

2 (A) by striking “commenced in the case”

3 and inserting “commenced—

4 “(1) in the case”;

5 (B) by striking the period and inserting “;

6 or”; and

7 (C) by adding at the end the following:

8 “(2) in the case of a class action brought to en-
9 force section 6(d), on the date on which the indi-
10 vidual becomes a party plaintiff to the class action.”.

11 **SEC. 4. TRAINING.**

12 The Equal Employment Opportunity Commission
13 and the Office of Federal Contract Compliance Programs,
14 subject to the availability of funds appropriated under sec-
15 tion 10, shall provide training to Commission employees
16 and affected individuals and entities on matters involving
17 discrimination in the payment of wages.

18 **SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND**

19 **WOMEN.**

20 (a) PROGRAM AUTHORIZED.—

21 (1) IN GENERAL.—The Secretary of Labor,
22 after consultation with the Secretary of Education,
23 is authorized to establish and carry out a grant pro-
24 gram.

1 (2) GRANTS.—In carrying out the program, the
2 Secretary of Labor may make grants on a competi-
3 tive basis to eligible entities, to carry out negotiation
4 skills training programs for girls and women.

5 (3) ELIGIBLE ENTITIES.—To be eligible to re-
6 ceive a grant under this subsection, an entity shall
7 be a public agency, such as a State, a local govern-
8 ment in a metropolitan statistical area (as defined
9 by the Office of Management and Budget), a State
10 educational agency, or a local educational agency, a
11 private nonprofit organization, or a community-
12 based organization.

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

18 (5) USE OF FUNDS.—An entity that receives a
19 grant under this subsection shall use the funds made
20 available through the grant to carry out an effective
21 negotiation skills training program that empowers
22 girls and women. The training provided through the
23 program shall help girls and women strengthen their
24 negotiation skills to allow the girls and women to ob-
25 tain higher salaries and rates of compensation that

1 are equal to those paid to similarly situated male
2 employees.

3 (b) INCORPORATING TRAINING INTO EXISTING PRO-
4 GRAMS.—The Secretary of Labor and the Secretary of
5 Education shall issue regulations or policy guidance that
6 provides for integrating the negotiation skills training, to
7 the extent practicable, into programs authorized under—

8 (1) in the case of the Secretary of Education,
9 the Elementary and Secondary Education Act of
10 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins
11 Career and Technical Education Act of 2006 (20
12 U.S.C. 2301 et seq.), the Higher Education Act of
13 1965 (20 U.S.C. 1001 et seq.), and other programs
14 carried out by the Department of Education that the
15 Secretary of Education determines to be appro-
16 priate; and

17 (2) in the case of the Secretary of Labor, the
18 Workforce Innovation and Opportunity Act (29
19 U.S.C. 3101 et seq.), and other programs carried
20 out by the Department of Labor that the Secretary
21 of Labor determines to be appropriate.

22 (c) REPORT.—Not later than 1 year after the date
23 of enactment of this Act, and annually thereafter, the Sec-
24 retary of Labor and the Secretary of Education shall pre-
25 pare and submit to Congress a report describing the ac-

1 tivities conducted under this section and evaluating the ef-
2 fectiveness of such activities in achieving the purposes of
3 this Act.

4 **SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.**

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

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

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

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

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

24 (5) recognizing and promoting the achievements
25 of employers, labor organizations, and professional

1 associations that have worked to eliminate the pay
2 disparities; and

3 (6) convening a national summit to discuss, and
4 consider approaches for rectifying, the pay dispari-
5 ties.

6 **SEC. 7. ESTABLISHMENT OF THE NATIONAL AWARD FOR**
7 **PAY EQUITY IN THE WORKPLACE.**

8 (a) IN GENERAL.—There is established the Secretary
9 of Labor’s National Award for Pay Equity in the Work-
10 place, which shall be awarded, as appropriate, to encour-
11 age proactive efforts to comply with section 6(d) of the
12 Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

13 (b) CRITERIA FOR QUALIFICATION.—The Secretary
14 of Labor shall set criteria for receipt of the award, includ-
15 ing a requirement that an employer has made a substan-
16 tial effort to eliminate pay disparities between men and
17 women, and deserves special recognition as a consequence
18 of such effort. The Secretary shall establish procedures for
19 the application and presentation of the award.

20 (c) BUSINESS.—In this section, the term “employer”
21 includes—

22 (1)(A) a corporation, including a nonprofit cor-
23 poration;

24 (B) a partnership;

25 (C) a professional association;

1 (D) a labor organization; and

2 (E) a business entity similar to an entity de-
3 scribed in any of subparagraphs (A) through (D);

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

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

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

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

16 “(f)(1) Not later than 18 months after the date of
17 enactment of this subsection, the Commission shall issue
18 regulations to provide for the collection from employers
19 of compensation data and other employment-related data,
20 as analyzed by the sex, race, and national origin of em-
21 ployees.

22 “(2) In carrying out paragraph (1), the Commission
23 shall have as its primary consideration the most effective
24 and efficient means for enhancing the enforcement of Fed-
25 eral laws prohibiting pay discrimination. For this purpose,

1 the Commission shall consider factors including the im-
 2 position of burdens on employers, the frequency of required
 3 reports (including which employers should be required to
 4 prepare reports), appropriate protections for maintaining
 5 data confidentiality, and the most effective format, for the
 6 reports resulting from data collection described in para-
 7 graph (1).”.

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

10 (a) BUREAU OF LABOR STATISTICS DATA COLLEC-
 11 TION.—The Commissioner of Labor Statistics shall con-
 12 tinue to collect data on women workers in the Current
 13 Employment Statistics survey.

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

18 (1)(A) shall use the full range of investigatory
 19 tools at its disposal, including pay grade method-
 20 ology;

21 (B) in considering evidence of possible com-
 22 pensation discrimination—

23 (i) shall not limit its consideration to a
 24 small number of types of evidence; and

1 (ii) shall not limit its evaluation of the evi-
2 dence to a small number of methods of evalu-
3 ating the evidence; and

4 (C) shall not require a multiple regression anal-
5 ysis or anecdotal evidence for a compensation dis-
6 crimination case;

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

16 (3) shall implement a survey to collect informa-
17 tion on compensation and other employment-related
18 data and designate not less than half of all non-
19 construction contractor establishments each year to
20 prepare and file such survey, and shall review and
21 utilize the responses to such survey to identify con-
22 tractor establishments for further evaluation and for
23 other enforcement purposes as appropriate.

24 (c) DEPARTMENT OF LABOR DISTRIBUTION OF
25 WAGE DISCRIMINATION INFORMATION.—The Secretary of

1 Labor shall make readily available (in print, on the De-
2 partment of Labor website, and through any other forum
3 that the Department may use to distribute compensation
4 discrimination information), accurate information on com-
5 pensation discrimination, including statistics, explanations
6 of employee rights, historical analyses of such discrimina-
7 tion, instructions for employers on compliance, and any
8 other information that will assist the public in under-
9 standing and addressing such discrimination.

10 **SEC. 10. AUTHORIZATION OF APPROPRIATIONS.**

11 (a) AUTHORIZATION OF APPROPRIATIONS.—There
12 are authorized to be appropriated \$15,000,000 to carry
13 out this Act.

14 (b) PROHIBITION ON EARMARKS.—None of the funds
15 appropriated pursuant to subsection (a) for purposes of
16 the grant program in section 5 of this Act may be used
17 for a congressional earmark as defined in clause 9 of rule
18 XXI of the Rules of the House of Representatives.

19 **SEC. 11. SMALL BUSINESS ASSISTANCE.**

20 (a) EFFECTIVE DATE.—This Act and the amend-
21 ments made by this Act shall take effect on the date that
22 is 6 months after the date of enactment of this Act.

23 (b) TECHNICAL ASSISTANCE MATERIALS.—The Sec-
24 retary of Labor and the Commissioner of the Equal Em-
25 ployment Opportunity Commission shall jointly develop

1 technical assistance material to assist small businesses in
2 complying with the requirements of this Act and the
3 amendments made by this Act.

4 (c) **SMALL BUSINESSES.**—A small business shall be
5 exempt from the provisions of this Act to the same extent
6 that such business is exempt from the requirements of the
7 Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.)
8 pursuant to clauses (i) and (ii) of section 3(s)(1)(A) of
9 such Act (29 U.S.C. 203(s)(1)(A)).

10 **SEC. 12. RULE OF CONSTRUCTION.**

11 Nothing in this Act, or in any amendments made by
12 this Act, shall affect the obligation of employers and em-
13 ployees to fully comply with all applicable immigration
14 laws, including any penalties, fines, or other sanctions.

○