

PAYCHECK FAIRNESS ACT

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MARCH 18, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. SCOTT of Virginia, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 7]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 7) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:  
Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Paycheck Fairness 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.
- (3) In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination. After controlling for educational attainment, occupation, industry, union status, race, ethnicity, and labor force experience roughly 40 percent of the pay gap remains unexplained.
- (4) 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 women from realizing their full economic potential, particularly in terms of labor force participation and attachment;
  - (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) tends to cause labor disputes, as evidenced by the tens of thousands of charges filed with the Equal Employment Opportunity Commission against employers between 2010 and 2016;
  - (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 to the Constitution.
- (5)(A) Artificial barriers to the elimination of discrimination in the payment of wages on the basis of sex continue to exist decades after the enactment of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) and the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.).
  - (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 law are necessary to ensure that the Act provides 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’ power to enforce the 5th and 14th Amendments to the Constitution.
- (6) The Department of Labor and the Equal Employment Opportunity Commission carry out functions to help ensure that women receive equal pay for equal work.
- (7) 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-discrimination 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) investigating and prosecuting systemic gender based pay discrimination involving government contractors.

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

(9) Vigorous implementation by the Department of Labor and the Equal Employment Opportunity Commission, increased information as a result of the amendments made by this Act, wage data, and more effective remedies, will ensure that women are better able to recognize and enforce their rights.

(10) 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 subparagraph (A)(iv) shall apply only if the employer demonstrates 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; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative 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 Employment Opportunity 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)—

(A) in paragraph (3), by striking “employee has filed” and all that follows 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.”;

(B) in paragraph (5), by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(6) to require an employee to sign a contract or waiver that would prohibit the employee from disclosing information about the employee’s wages.”; 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 individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge 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, except that the United States shall not be liable for punitive damages.”;

(2) in the sentence beginning “An action to”, by striking “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(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(c)) is amended—

(1) in the first sentence—

(A) by inserting “or, in the case of a violation 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 following: “, 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 violation of section 6(d), additional compensatory or punitive damages, as described in subsection (b)”;

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

(4) in the sixth 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 11, 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.

(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 the purposes of addressing pay disparities, including through outreach to women and girls.

(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 information 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 for the purposes described in paragraph (2).

(b) INCORPORATING TRAINING INTO EXISTING PROGRAMS.—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 Innovation and Opportunity Act (29 U.S.C. 3101 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 18 months after the date of enactment of this Act, and annually thereafter, the Secretary of Labor, in consultation with 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 section.

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

Not later than 18 months after the date of enactment of this Act, and periodically thereafter, the Secretary of Labor shall conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including—

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, 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, local, and community 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; and

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

**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, on an annual basis, to an employer to encourage proactive efforts to comply with section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), as amended by this Act.

(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 and presentation of the award.

(c) BUSINESS.—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 apprenticeship 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 following:

“(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall issue regulations to provide for the collection from employers of compensation data and other employment-related data (including hiring, termination, and promotion data) disaggregated by the sex, race, and national origin of employees.

“(2) In carrying out 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 reports (including the size of employers required to prepare reports), appro-

appropriate protections for maintaining data confidentiality, and the most effective format to report such data.”.

**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 implement a survey to collect compensation data and other employment-related data (including hiring, termination, and promotion data) and designate not less than half of all nonconstruction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify contractor 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 Department of Labor website, and through any other forum that the Department may use to distribute compensation discrimination information), accurate information on compensation discrimination, including statistics, explanations of employee rights, historical analyses of such discrimination, instructions for employers on compliance, and any other information that will assist the public in understanding and addressing such discrimination.

**SEC. 10. PROHIBITIONS RELATING TO PROSPECTIVE EMPLOYEES’ SALARY AND BENEFIT HISTORY.**

(a) **IN GENERAL.**—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended by inserting after section 7 the following new section:

**“SEC. 8. REQUIREMENTS AND PROHIBITIONS RELATING TO WAGE, SALARY, AND BENEFIT HISTORY.**

“(a) **IN GENERAL.**—It shall be an unlawful practice for an employer to—

“(1) rely on the wage history of a prospective employee in considering the prospective employee for employment, including requiring that a prospective employee’s prior wages satisfy minimum or maximum criteria as a condition of being considered for employment;

“(2) rely on the wage history of a prospective employee in determining the wages for such prospective employee, except that an employer may rely on wage history if it is voluntarily provided by a prospective employee, after the employer makes an offer of employment with an offer of compensation to the prospective employee, to support a wage higher than the wage offered by the employer;

“(3) seek from a prospective employee or any current or former employer the wage history of the prospective employee, except that an employer may seek to confirm prior wage information only after an offer of employment with compensation has been made to the prospective employee and the prospective employee responds to the offer by providing prior wage information to support a wage higher than that offered by the employer; or

“(4) discharge or in any other manner retaliate against any employee or prospective employee because the employee or prospective employee—

“(A) opposed any act or practice made unlawful by this section; or

“(B) took an action for which discrimination is forbidden under section 15(a)(3).

“(b) DEFINITION.—In this section, the term ‘wage history’ means the wages paid to the prospective employee by the prospective employee’s current employer or previous employer.”.

(b) PENALTIES.—Section 16 of such Act (29 U.S.C. 216) is amended by adding at the end the following new subsection:

“(f)(1) Any person who violates the provisions of section 8 shall—

“(A) be subject to a civil penalty of \$5,000 for a first offense, increased by an additional \$1,000 for each subsequent offense, not to exceed \$10,000; and

“(B) be liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed \$10,000 plus attorneys’ fees, and shall be subject to such injunctive relief as may be appropriate.

“(2) An action to recover the liability described in paragraph (1)(B) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees or prospective employees for and on behalf of—

“(A) the employees or prospective employees; and

“(B) other employees or prospective employees similarly situated.”.

#### SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary 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. 12. 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 enterprises in complying with the requirements of this Act and the amendments made by this Act.

(c) SMALL BUSINESSES.—A small enterprise shall be exempt from the provisions of this Act, and the amendments made by this Act, to the same extent that such enterprise is exempt from the requirements of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) pursuant to clauses (i) and (ii) of section 3(s)(1)(A) of such Act (29 U.S.C. 203(s)(1)(A)).

#### SEC. 13. RULE OF CONSTRUCTION.

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

#### SEC. 14. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of that provision or amendment to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this Act, the amendments made by this Act, or the application of that provision to other persons or circumstances shall not be affected.

## PURPOSE

When President John F. Kennedy signed the *Equal Pay Act of 1963* (EPA) into law, he observed that the statute “adds to our laws another structure basic to democracy” and “affirms our determination that when women enter the labor force, they will find equality in their pay envelope.”<sup>1</sup> Fifty-six years later, women have made tremendous progress in the workplace. Women comprise almost half of this country’s workforce and own more than 11 million businesses.<sup>2</sup> Despite these gains, women continue to be held back by

<sup>1</sup>Remarks Upon Signing the *Equal Pay Act*, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-equal-pay-act> (last visited Mar. 10, 2019).

<sup>2</sup>*Employment Status of the Civilian Population by Sex and Age*, Bureau of Labor Statistics, <https://www.bls.gov/news.release/empsit.t01.htm> (last visited Mar. 10, 2019); see also Am. Express, *The 2018 State of Women-Owned Businesses Report 3* (2018), <https://>

wage discrimination. Because of loopholes in the law and weak sanctions for violations, the EPA is ineffective in combating unequal pay. Women working full time, year-round earn, on average, 80 cents for every dollar earned by a White man.<sup>3</sup> H.R. 7, the *Pay-check Fairness Act* (the Act), modernizes the EPA and brings the country one step closer to ensuring that women receive equal pay for equal work.

The long-term impact of pay disparity on women’s lifetime earnings is substantial, costing a woman anywhere from \$400,000<sup>4</sup> to \$2 million<sup>5</sup> over the course of her career. H.R. 7 will strengthen the EPA to make it a more effective means to combat wage discrimination on the basis of gender. Specifically, the Act builds upon the EPA and closes loopholes that have enabled unscrupulous employers to evade liability under the law. The Act prohibits retaliation against workers who discuss or disclose salary information;<sup>6</sup> prohibits seeking or relying on pay history in considering an individual for prospective employment; expands the definition of “establishment” so that an employee can find a comparator at any workplace in the same county or political subdivision; clarifies that an employer’s affirmative defense of any “factor other than sex” must be related to the job in question and consistent with business necessity; reforms the EPA’s collective action standard so that women with claims of unequal pay will automatically be part of a class action lawsuit unless they choose to “opt-out” of the case; equalizes damages for discrimination based on sex with damages for discrimination based on race and national origin; and authorizes the U.S. Department of Labor (Department of Labor) to award competitive grants to be used for salary negotiation education and training programs. The Act amends Title VII of the *Civil Rights Act of 1964* (Title VII) to expand the Equal Employment Opportunity Commission’s (EEOC) authority to collect pay data from certain employers in addition to data already collected from employers on employment by race, gender, and national origin.<sup>7</sup> This will help employers and the relevant enforcement agencies identify unknown gender-based pay discrimination. The Act also strengthens the role government will play in combating wage discrimination. The Act authorizes additional training for EEOC staff on recognizing and remedying wage discrimination; codifies the Bureau of Labor Statistics’ collection of data on female workers that compares them to their male counterparts as part of the Current Employment Statis-

about.americanexpress.com/files/doc\_library/file/2018-state-of-women-owned-businesses-report.pdf.

<sup>3</sup>Am. Ass’n of Univ. Women, *The Simple Truth about the Gender Pay Gap 1* (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=simple-truth-one-pager](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=simple-truth-one-pager).

<sup>4</sup>Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2017), <https://nwlc.org/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017.pdf>.

<sup>5</sup>*The Wage Gap Over Time: In Real Dollars, Women See a Counting Gap*, National Committee on Pay Equity, <https://www.pay-equity.org/info-time.html> (last visited Mar. 10, 2019).

<sup>6</sup>Section 3(b)(2) of the amendment in the nature of a substitute provides that employees who have access to wage information of other employees as part of an essential job function are not protected if they disclose the wages to workers who do not otherwise have access to such information. Their wage disclosures are protected if: they reveal that information to an employee who also has access to that data, divulge their own wages, or disclose wages in response to or in furtherance of a government or internal employer investigation.

<sup>7</sup>Based on the number of employees and federal contract activities, certain employers are required to file an EEO-1 report on an annual basis under the EEOC and the OFCCP regulations.

tics survey; and requires the Department of Labor to collect employment and pay data from non-construction federal contractors.

#### COMMITTEE ACTION

##### 105TH CONGRESS

Senator Thomas Daschle (D–SD) first introduced S. 71, the *Paycheck Fairness Act*, on January 21, 1997. The bill had 23 cosponsors and was referred to the Senate Committee on Labor and Human Resources. Congresswoman Rosa DeLauro (D–CT–3) introduced H.R. 2023, the *Paycheck Fairness Act*, on June 24, 1997. The bill had 95 cosponsors and was referred to the House Committee on Education and the Workforce. H.R. 2023 was then referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

##### 106TH CONGRESS

Senator Daschle introduced S. 74, the Paycheck Fairness Act, on January 19, 1999. The bill had 31 cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. The Senate Committee on Health, Education, Labor, and Pensions held a hearing on gender-based wage discrimination on June 8, 2000. The hearing, entitled “*Examining the Bureau of Labor Statistics Report Which Provides a Full Picture of the Gender-Based Wage Gap, the Reasons for These Gaps and the Impact This Discrimination Has on Women and Families, and the Effectiveness of Current Laws and Proposed Legislative Solutions, and S. 74, 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,*” featured testimony from Dr. Katherine Abraham, Commissioner, Bureau of Labor Statistics; Dr. June O’Neill, Professor of Economics and Finance, Baruch College, Zicklin School of Business; Dr. Heidi Hartmann, Director, Institute for Women’s Policy Research; Anita Hattiangadi, Economist, Employment Policy Foundation; Barbara Berish Brown, Partner, Paul, Hastings, Janofsky & Walker, LLP; Judith Applebaum, Vice President and Director of Employment Opportunities, National Women’s Law Center; and Gail Shaffer, Chief Executive Officer, Business and Professional Women/USA. Testimony was submitted for the record by Irasema Garza, Director, Women’s Bureau, U.S. Department of Labor.

Congresswoman DeLauro introduced H.R. 541, the *Paycheck Fairness Act*, on February 3, 1999. The bill had 122 cosponsors and was referred to the House Committee on Education and the Workforce. Once in committee, the bill was referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. Congresswoman DeLauro introduced an updated version of the bill as H.R. 2397 on June 30, 1999, with 170 cosponsors (166 Democrats, 3 Republicans, and 1 Independent). The bill was referred only to the Subcommittee on Workforce Protections.

No further action was taken on either bill.

##### 107TH CONGRESS

Senator Daschle introduced S. 77, the *Paycheck Fairness Act*, on January 22, 2001. The bill had 32 cosponsors and was referred to

the Senate Committee on Health, Education, Labor, and Pensions. Congresswoman DeLauro introduced H.R. 781, the *Paycheck Fairness Act*, on February 22, 2001. The bill had 196 cosponsors and was referred to the House Committee on Education and the Workforce. Once in committee, it was referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

## 108TH CONGRESS

Senator Daschle introduced S. 76, the *Paycheck Fairness Act*, on January 7, 2003. The bill had 20 cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. Congresswoman DeLauro introduced H.R. 1688, the *Paycheck Fairness Act*, on April 9, 2003. The bill had 116 cosponsors and was referred to the House Committee on Education and the Workforce. The committee referred it to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

## 109TH CONGRESS

On April 19, 2005, Senator Hillary Rodham Clinton (D-NY) and Congresswoman DeLauro introduced the *Paycheck Fairness Act*, S. 841 and H.R. 1687, respectively. S. 841 had 18 cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. H.R. 1687 had 111 cosponsors and was referred to the House Committee on Education and the Workforce, where it was referred to the Subcommittees on Workforce Protections and Employer-Employee Relations. No further action was taken on either bill.

## 110TH CONGRESS

On March 6, 2007, Senator Clinton and Congresswoman DeLauro introduced the *Paycheck Fairness Act*, S. 766 and H.R. 1338, respectively. S. 766 had 24 cosponsors and was referred to the Senate Committee on Health, Education, Labor, and Pensions. H.R. 1338 had 230 cosponsors and was referred to the House Committee on Education and Labor, where it was referred to the Subcommittee on Workforce Protections.

On Thursday, April 12, 2007, the Senate Committee on Health, Education, Labor, and Pensions held a hearing entitled "*Closing the Gap: Equal Pay for Women Workers.*" The hearing examined enforcement of the EPA, the *Fair Pay Act* and the *Paycheck Protection Act*. At the hearing, the following people presented testimony: Evelyn Murphy, President, WAGE Project, Inc. and Resident Scholar of the Women's Research Center at Brandeis University; Jocelyn Samuels, Vice-President for Education and Employment at the National Women's Law Center; Dr. Philip Cohen, Associate Professor and Director of Graduate Studies for the Department of Sociology at the University of North Carolina; and Barbara Brown, Attorney at Paul Hastings.

On Tuesday, April 24, 2007, the House Committee on Education and Labor held a hearing entitled "*Strengthening the Middle Class: Ensuring Equal Pay for Women.*" The hearing examined the scope and causes of gender-based wage disparity. Witnesses included

Congresswoman DeLauro; Congresswoman Eleanor Holmes Norton (D–D.C.); Catherine Hill, Research Director for the American Association of University Women; Heather Boushey, Senior Economist at the Center for Economic and Policy Research; Dedra Farmer, Plaintiff in the Wal-Mart sex-discrimination class-action lawsuit;<sup>8</sup> and Diana Furchtgott-Roth, Director of the Center for Employment Policy at the Hudson Institute.

On Wednesday, July 11, 2007, the House Education and Labor Subcommittee on Workforce Protections held a legislative hearing titled “*H.R. 1338, The Paycheck Fairness Act.*” The hearing focused on the wage disparity that exists from the moment men and women enter the workforce—a gap that only grows over time.<sup>9</sup> Witnesses included Evelyn Murphy, President, WAGE Project, Inc. and Resident Scholar of the Women’s Research Center at Brandeis University; Joseph Sellers, Partner with the law firm of Cohen, Milstein, Hausfeld & Toll, PLLC; Marcia Greenberger, Co-President of the National Women’s Law Center; and Camille A. Olson, Partner at Seyfarth Shaw, LLP.

On Thursday, July 24, 2008, the Committee on Education and Labor met for a full committee markup of H.R. 1338. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Congressman George Miller (D–CA–7), Chairman, and ordered the bill, as amended, be favorably reported to the House of Representatives by a vote of 26–17.

On July 31, 2008, the House debated and passed H.R. 1338 with a recorded vote of 247–178.

#### 111TH CONGRESS

On January 8, 2009, Senator Clinton introduced S. 182, the *Paycheck Fairness Act*. The bill had 42 cosponsors (41 Democrats and 1 Independent). On March 11, 2010, the Committee on Health, Education, Labor, and Pensions held a hearing entitled “*A Fair Share for All: Pay Equity in the New American Workplace.*” Witnesses included Congresswoman DeLauro; Commissioner Stuart Ishimaru, Acting Chairman, Equal Opportunity Commission; Heather Boushey, Senior Economist, Center for American Progress; Deborah L. Brake, Professor of Law, University of Pittsburgh; Deborah L. Frett, Chief Executive Officer, Business and Professional Women’s Foundation; and Jane McFetridge, Partner, Jackson Lewis, LLP.

On September 13, 2010, Senator Harry Reid (D–NV) re-introduced the *Paycheck Fairness Act* as S. 3772. On September 14, 2010, the bill was placed on the Senate Legislative Calendar. On September 29, 2010, Senator Reid filed a motion to proceed to consideration; he withdrew the motion on the same day. On November 17, 2010, Senator Reid filed a motion to proceed; cloture on the motion to proceed on the bill was not invoked by a Yea-Nay vote of 58–41. No further action was taken on either Senate version of the *Paycheck Fairness Act*.

On January 6, 2009, Congresswoman DeLauro introduced H.R. 12, the *Paycheck Fairness Act* with 200 cosponsors. The bill was re-

<sup>8</sup>*Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141–42 (N.D. Cal. 2004).

<sup>9</sup>*The Paycheck Fairness Act: Hearing on H.R. 1338 Before H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 110th Cong. (2007) (statement of Rep. Lynn Woolsey, Chairwoman, Subcomm. on Workforce Protections).

ferred to the House Committee on Education and Labor, where it was referred to the Subcommittee on Workforce Protections. On January 9, 2009, the House of Representatives passed the *Paycheck Fairness Act* as a part of H.R. 11, *the Lilly Ledbetter Fair Pay Act of 2009*, with a recorded vote of 256–163. However, the *Paycheck Fairness Act* was not included in the final version of the *Lilly Ledbetter Fair Pay Act of 2009*, which was signed into law (Pub. L. No. 111–2) on January 29, 2009.

## 112TH CONGRESS

On April 12, 2011, Senator Barbara Mikulski (D–MD) introduced S. 797, the *Paycheck Fairness Act*. The bill had 36 cosponsors (35 Democrats and 1 Independent) and was referred to the Senate Committee on Health, Education, Labor, and Pensions. On May 22, 2012, Senator Mikulski re-introduced the *Paycheck Fairness Act* as S. 3220 with 37 cosponsors (36 Democrats and 1 Independent). On June 5, 2012, Senator Reid filed a motion to proceed to consideration on S. 3220. Cloture was not invoked by Yea-Nay vote of 52–47. Senator Reid filed a motion to reconsider the vote, but the motion was withdrawn later that day. No further action was taken on any of the three bills.

On April 13, 2011, Congresswoman DeLauro introduced H.R. 1519, the *Paycheck Fairness Act*. It had 197 Democratic cosponsors and was referred to the House Committee on Education and the Workforce, where it was referred to the Subcommittee on Workforce Protections.

## 113TH CONGRESS

On January 23, 2013, Senator Mikulski introduced S. 84, the *Paycheck Fairness Act* with 56 cosponsors (55 Democrats and 1 Independent). The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. On April 1, 2014, the Senate Committee on Health, Education, Labor, and Pensions held a hearing entitled “*Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act.*” The hearing featured testimony from Professor Deborah Thompson Eisenberg, Associate Professor of Law, University of Maryland Francis King Carey School of Law; ReShonda Young, Operations Manager, Alpha Express, Inc.; Kerri Sleeman, Mechanical Engineer, Houton; and Camille A. Olson, Partner, Seyfarth Shaw, LLP.

On April 1, 2014, Senator Mikulski re-introduced the *Paycheck Fairness Act* as S. 2199 with 42 cosponsors (41 Democrats and 1 Independent). On April 7, Senator Reid filed a motion to proceed to consideration of the measure, but cloture was not invoked by a Yea-Nay vote of 53–44. On September 9, 2014, Senator Reid motioned to reconsider the vote, which was agreed to by voice vote on September 10, 2014. The same day, cloture on the motion to proceed to the measure was invoked in the Senate by a Yea-Nay vote of 73–25, and the measure was laid before the Senate. On September 15, 2014 the cloture motion failed by a Yea-Nay vote of 52–40. No further action was taken on any of the bills.

On January 23, 2013, Congresswoman DeLauro introduced H.R. 377, the *Paycheck Fairness Act*. It had 208 cosponsors (207 Democrats and 1 Republican). The bill was referred to the House Committee on Education and the Workforce. On April 11, 2013, Con-

gresswoman DeLauro filed a motion to discharge the Committee from consideration of H.R. 377. The discharge petition received 197 signatures, fewer than the 218 signatures needed for further action. On April 23, 2013, the bill was referred to the Subcommittee on Workforce Protections. No further action was taken.

## 114TH CONGRESS

On March 25, 2015, Senator Mikulski and Congresswoman DeLauro introduced the *Paycheck Fairness Act*, S. 862 and H.R. 1619, respectively. S.862 had 44 cosponsors (43 Democrats and 1 Independent) and was referred to the Senate Committee on Health, Education, Labor, and Pensions. H.R. 1619 had 193 cosponsors (192 Democrats and 1 Republican). The bill was referred to the House Committee on Education and the Workforce, where it was referred to the Subcommittee on Workforce Protections. No further action was taken on either bill.

## 115TH CONGRESS

On April 4, 2017, Senator Murray and Congresswoman DeLauro introduced the *Paycheck Fairness Act*, S. 819 and H.R. 1869, respectively. S. 819 had 48 cosponsors (47 Democrats and 1 Independent) and was referred to the Senate Committee on Health, Education, Labor, and Pensions. H.R. 1869 had 201 cosponsors (200 Democrats and 1 Republican) and was referred to the House Committee on Education and the Workforce. No further action was taken on either bill.

## 116TH CONGRESS

On January 30, 2019, Senator Murray introduced, S. 270, the *Paycheck Fairness Act*, with 45 cosponsors. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions.

On January 30, 2019, Congresswoman DeLauro introduced H.R. 7, the *Paycheck Fairness Act* with 239 original co-sponsors (including 1 Republican). The bill was referred to the House Committee on Education and Labor. On Wednesday, February 13, 2019, the House Committee on Education and Labor held a joint legislative hearing in the Subcommittee on Workforce Protections and the Subcommittee on Civil Rights and Human Services (Joint Subcommittee Hearing) entitled “*Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work.*” The Committee heard testimony on how the weaknesses in the EPA have left the law ineffective in preventing gender-based wage discrimination. Witnesses included Congresswoman DeLauro; Congresswoman Holmes Norton; Congressman Beyer; Fatima Goss Graves, CEO and President of the National Women’s Law Center; Camille A. Olson, Partner at Seyfarth Shaw, LLP; Kristin Rowe-Finkbeiner, CEO of Moms Rising; and Jenny Yang, Partner at Working Ideal.

On Tuesday, February 26, 2019, the House Committee on Education and Labor met for a full committee markup of H.R. 7, the *Paycheck Fairness Act*. The Committee adopted an amendment in the nature of a substitute (ANS) offered by Congressman Robert C. “Bobby” Scott (D–VA–3), Chairman, and reported the bill favorably, as amended, to the House of Representatives by a vote of 27–19.

The ANS incorporates the provisions of H.R. 7 with the following modifications:

- It makes a number of technical corrections throughout the bill to ensure that congressional intent is clear.
- It updates Section 2, the findings section, to add evidence supporting the existence of the gender pay gap and evidence of the impact of the gender pay gap.
- It amends Section 5 to authorize grants for a negotiation and skills training program that aims to address all pay disparities, including through outreach to women and girls, and to provide the U.S. Secretary of Labor (Secretary of Labor) 18 months, instead of one year, to report to Congress on the effectiveness of the training program.
- It amends Section 6 to provide the Secretary of Labor 18 months, instead of one year, to implement the bills' research and education provisions, and it eliminates a requirement for the Secretary of Labor to conduct a national convening.
- It amends Section 7 to clarify that the National Pay Equity award is issued on an annual basis to one employer.
- It amends Section 11 to change the authorization of appropriations from \$15 million to "such sums as are necessary" to carry out the Act.
- It adds Section 14, a standard severability clause.

The following amendments to the ANS were offered, but not adopted:

- Congressman Bradley Byrne (R-AL-1) offered an amendment to amend the *Fair Labor Standards Act of 1938* (FLSA) to limit "reasonable" attorney's fees in the event of a contingency fee case to no more than 15 percent of any judgment award to a plaintiff. The amendment failed by a vote of 21-25.

- Congressman Rick Allen (R-GA-12) offered an amendment to direct the Secretary of Labor to study and report back to Congress no later than 90 days after enactment a study to determine the effect of amendments made under section 3 (bona fide factor defense, non-retaliation, enhanced penalties) on employers' ability to recruit, hire, promote, and increase the pay of employees irrespective of gender. If the Secretary finds the amendments are likely to significantly hinder employers' ability to recruit, hire, promote, and increase the pay of employees irrespective of gender, the amendments made by the section would not go into effect. The amendment failed by a vote of 20-25.

- Congressman Byrne offered an amendment to strike language in the ANS that allows a defense to gender-based pay differences based on a "bona fide factor other than sex, such as education, training or experience" and replace it with ambiguous language allowing a defense to gender-based discrimination based on "a bona fide business-related reason other than sex." Accompanying that change, the Byrne amendment would have stripped out conditions establishing when such bona fide factor defense would apply. The amendment failed by a vote of 19-26.

- Congresswoman Virginia Foxx (R-NC-5), Ranking Member, offered an amendment to strike Section 8 relating to pay data collection by the EEOC. The amendment failed by a vote of 18-27.

## SUMMARY

Neither the EPA nor Title VII is sufficient in their current forms to achieve wage equality. The EPA prohibits gender-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. Under the EPA, an aggrieved person has two years (or three years in a case of a willful violation) from the date of any instance of unequal pay to file a claim in court.<sup>10</sup> Under the EPA, there is no requirement to seek any remedies through the EEOC first. A plaintiff does not bear the burden of proving that the employer intentionally committed wage-based gender discrimination, but employers have a very broad business necessity defense for “factors other than sex.” A plaintiff who successfully proves wage discrimination under the EPA can recover back pay, and the EPA also provides for liquidated damages in an amount equal to back pay, unless the employer can show that it acted in good faith and it had reasonable grounds to believe that its actions did not violate the EPA.<sup>11</sup>

Title VII also has limitations when it comes to closing the gender wage gap. Title VII prohibits discrimination based on race, color, national origin, religion, and sex. To bring a case of wage discrimination under Title VII, a plaintiff must prove intentional discrimination. Before bringing a case to court, a claimant must exhaust administrative remedies through the EEOC. Cases under Title VII must be filed with the EEOC within 180 days of the violation, or longer in states where there is a state fair employment practices law.<sup>12</sup> Although a plaintiff bringing a gender-based wage discrimination claim is entitled to back pay, compensatory damages,<sup>13</sup> and punitive damages,<sup>14</sup> compensatory and punitive damages do have monetary caps. These caps apply only to gender-based discrimination, and they vary depending on the size of the employer,<sup>15</sup> but under no circumstance can these damages exceed \$300,000.<sup>16</sup> However, wage discrimination claims based upon race and national origin are uncapped, creating a two-tiered system where pay discrimination based on race and national origin is considered more egregious than pay discrimination based on sex. This has been the case since enactment of the *Civil Rights Act of 1991*.

Due to weaknesses in the EPA, the landmark legislation has not lived up to its original purpose. Women working full-time earned just 58.9 cents to the dollar that men earned when the EPA was passed in 1963. The wage gap has narrowed somewhat since then, but it persists as a significant problem for American women. Today, women earn, on average, 80 cents for every dollar that a White man earns.<sup>17</sup> The wage gap is even more substantial for

<sup>10</sup> 29 U.S.C. § 255.

<sup>11</sup> 29 U.S.C. § 216; 29 U.S.C. § 260.

<sup>12</sup> 42 U.S.C. § 2000e-5(e).

<sup>13</sup> Jody Feder & Benjamin Collins, Cong. Research Serv., RL31867, Pay Equity: Legislative and Legal Developments 3 (2016) (stating that compensatory damages include such items as pain and suffering, medical expenses and emotional distress).

<sup>14</sup> *Id.* (punitive damages may be recovered when the employer acted with malice or reckless indifference).

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C. § 1981a.

<sup>17</sup> Am. Ass’n of Univ. Women, The Simple Truth about the Gender Pay Gap 1 (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=simple-truth-one-pager](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=simple-truth-one-pager).

some groups of women. For every dollar paid to White, non-Hispanic men, Black women typically make only 61 cents, Latina women only 53 cents, and American Indian or Alaskan Native women only 58 cents.<sup>18</sup> H.R. 7 is a critical step forward in the fight to eliminate pay disparity that “depresses wages and living standards for employees necessary for their health and efficiency; prevents maximum utilization of the available labor resources; tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; and constitutes an unfair method of competition.”<sup>19</sup> Congress has a responsibility to modernize the EPA so that it can better achieve its intended purpose.

Hundreds of organizations have expressed support for H.R. 7, including: 9to5; 9to5 California; 9to5 Colorado; 9to5 Georgia; 9to5 Wisconsin; A Better Balance; ACCESS Women’s Health Justice; Advocacy and Training Center; AFL–CIO; PA AFL–CIO; African American Ministers In Action; American Association of University Women (along with 55 individual chapters); American Civil Liberties Union; American Federation of Government Employees; American Federation of State, County, and Municipal Employees; American Federation of Teachers; American Psychological Association; Americans for Democratic Action; Anti-Defamation League; Atlanta Women for Equality; Bend the Arc: Jewish Action; Bozeman Business & Professional Women; California Employment Lawyers Association; California Federation of Business & Professional Women; Caring Across Generations; Casa de Esperanza: National Latin@ Network for Healthy Families and Communities; Center for Advancement of Public Policy; Center for Law and Social Policy; Citizen Action of New York; Clearinghouse on Women’s Issues; Coalition of Labor Union Women (along with 22 individual chapters); Congregation of Our Lady of the Good Shepherd, US Provinces; Connecticut Women’s Education and Legal Fund; Disciples Women; Ecumenical Poverty Initiative; Equal Pay Today; Equal Rights Advocates; Friends of the Delaware County Women’s Commission; Futures Without Violence Gender Equality Law Center; Girls For Gender Equity; Girls Inc.; Grameen Development Society; Graphic Communications Conference/International Brotherhood of Teamsters Local 24M/9N; Greater New York Labor Religion Coalition; Hadassah, The Women’s Zionist Organization of America, Inc.; Holy Spirit Missionary Sisters—USA—JPIC; Hope’s Door; Indiana Institute for Working Families; Interfaith Worker Justice; International Alliance of Theatrical Stage Employees; International Association of Machinists and Aerospace Workers; International Association of Sheet Metal, Air, Rail and Transportation Workers Local 20; International Brotherhood of Electrical Workers—3rd District; International Brotherhood of Electrical Workers 29; International Federation of Professional and Technical Engineers International Union, United Automobile, Aerospace & Agricultural Implement Workers of America; JALSA: Jewish Alliance for Law and Social Action; Jewish Women International; Justice for Migrant Women; Lambda Legal; The Leadership Conference on Civil and Human Rights; League of Women Voters of St. Lawrence County, NY; Legal Aid At Work; Main Street Alliance; Maine Women’s Lobby;

<sup>18</sup>*Id.*

<sup>19</sup>Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56-57.

McCree Ndjatou, PLLC; Methodist Federation for Social Action; MomsRising; Mississippi Black Women's Roundtable; NAACP; National Advocacy Center of the Sisters of the Good Shepherd; National Asian Pacific American Women's Forum; National Association of Letter Carriers; National Association of Working Women; National Center for Transgender Equality; National Committee on Pay Equity; National Council of Jewish Women; National Domestic Workers Alliance; National Education Association; National Employment Law Project; National Employment Lawyers Association (along with 7 individual chapters); National Federation of Business and Professional Women Clubs; National LGBTQ Task Force Action Fund; National Organization for Women (along with 51 individual Chapters); National Partnership for Women & Families; National Resource Center on Domestic Violence; National Women's Law Center; NC Women United; NETWORK Lobby for Catholic Social Justice; New York Paid Leave Coalition; New York State Coalition Against Domestic Violence; North Carolina Justice Center; Oxfam America; PathWays PA; People For the American Way; Planned Parenthood Pennsylvania Advocates; PowHer NY; Progressive Maryland; Public Citizen; Restaurant Opportunities Centers United; Service Employees International Union; SEIU Local 668; Southwest Women's Law Center; Texas Business Women Inc.; Transport Workers Union; U.S. Women and Cuba Collaboration; U.S. Women's Chamber of Commerce; UltraViolet; Union for Reform Judaism; Unitarian Universalist Women's Federation; UNITE HERE! Local 57; United Church of Christ Justice and Witness Ministries; United Mine Workers of America; United Mine Workers of America District Two; United Nations Association of the United States; United State of Women; United Steelworkers (USW); United Steelworkers, District 10; USW Local 1088; L.U. #1088 USW; UN Women USNC Metro New York Chapter; Voter Participation Center; Westminster Presbyterian Church; Women Employed; WNY Women's Foundation; Women of Reform Judaism; Women's All Points Bulletin, WAPB; Women's Voices; Women Vote Action Fund; WomenNC; Women's Law Project; YWCA USA; Zonta Club of Greater Queens; and Zonta Club of Portland.

#### COMMITTEE VIEWS

The Committee on Education and Labor is committed to protecting the rights of individuals in the workplace. Fifty-six years after the passage of the EPA, women continue to earn less than men for the same work. The long-term impact of pay disparity on women's earnings is substantial. Many women have been unable to utilize the protections afforded under the EPA because loopholes, court interpretations, and ineffective sanctions have made enforcement extremely difficult. H.R. 7 strengthens the EPA to more effectively combat wage discrimination. The Act builds upon Congress' efforts 56 years ago when the EPA was enacted and is a necessary step forward to close the persistent wage gap between men and women.

## HISTORY OF THE EQUAL PAY ACT

In 1963, Congress first addressed the issue of unequal pay<sup>20</sup> when it passed the EPA as an amendment to the FLSA.<sup>21</sup> The purpose of the legislation was broadly remedial to eliminate once and for all gender-based discriminatory pay practices:

The objective of the legislation is to ensure that those who perform tasks which are determined to be equal shall be paid equal wages. The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded with equal wages.<sup>22</sup>

The EPA enshrined “equal work for equal pay regardless of sex” alongside minimum wages, overtime pay, and the protection of child laborers as a fair labor standard in the FLSA.<sup>23</sup> Other versions of equal pay legislation had been introduced prior to and during 1963, but because the Department of Labor had already developed “a now familiar system of regulations and procedures for investigation, administration, and enforcement,” Congress decided that a simple expansion of the FLSA to include pay equity was the “most efficient and least difficult course of action.”<sup>24</sup> Upon introduction of the bill, Senator Patrick McNamara (D–MI) stated:

Such a utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation. And second, compliance should be made easier because of both industry and labor’s long-established familiarity with existing fair labor standards provisions.<sup>25</sup>

Some legislators felt that the legislation did not go far enough but voted for it nonetheless because it was “a good start . . . in eliminating the unfairness of unequal pay.”<sup>26</sup>

In passing the EPA, Congress intended that “men and women doing the same job under the same working conditions . . . receive equal pay.”<sup>27</sup> Congressman Rodney Frelinghuysen (R–NJ–11) elaborated on the standard:

[T]he jobs in dispute must be the same in work content, effort, skill and responsibility requirements, and in working conditions . . . it is not intended to compare unrelated jobs or jobs that have been historically and normally considered by the industry to be different.<sup>28</sup>

<sup>20</sup>Support for “equal pay” dates back to World War I when the War Board enforced regulations requiring pay equity; see Elizabeth Wyman, *The Current Framework of Sex/Gender Discrimination Law: The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 Me. L. Rev. 23 (2004).

<sup>21</sup>29 U.S.C. §206(d).

<sup>22</sup>H.R. Rep. No. 110-783 at 12 (2008) (internal citations and quotations omitted).

<sup>23</sup>*Id.* (internal citations and quotations omitted).

<sup>24</sup>*Id.* (internal citations and quotations omitted).

<sup>25</sup>*Id.* (internal citations and quotations omitted).

<sup>26</sup>*Id.* (internal citations and quotations omitted).

<sup>27</sup>*Id.* at 12-13 (internal citations and quotations omitted).

<sup>28</sup>H.R. Rep. No. 110-783 at 12 (2008) (internal citations and quotations omitted).

At the same time, “equal pay for equal work” did not mean that the jobs in question had to be identical. They were to be similar in terms of “work content, effort, skill and responsibility requirements and in working conditions.”<sup>29</sup>

In addition, the floor debate made clear that under the EPA, discrimination against one individual would be actionable, and a showing of a pattern and practice of discrimination would not be required. Senator McNamara stated:

It is inconceivable that this Congress should write legislation that would permit selective discrimination which, without doubt, would occur mostly likely against those individuals who are least able to protest. It is certainly the intent of the Senate that an employer will have violated this act if he discriminates against one employee, just as he will violate it if he discriminates against many.<sup>30</sup>

While the EPA was aimed at eradicating wage differentials based on sex, it was not intended to limit other kinds of pay inequity. As such, even though the female employee might show that the employer’s wages were unequal as compared to a man, the EPA does provide employers with affirmative defenses to justify the differences in pay if such differences are based on: (1) seniority systems; (2) merit systems; (3) methods that measure earnings by quality or quantity of production; or (4) “any factor other than sex.”<sup>31</sup>

While the “any factor other than sex” affirmative defense was broadly written, Congress intended that any proffered reason for a pay differential be a bona fide one. Also, the drafters made sure that the employer shouldered the burden of proving the legitimacy of its practice,<sup>32</sup> making clear that these affirmative defenses were never intended to “shield employers who have a plan or system in place that is devised to evade the law.”<sup>33</sup>

#### EPA, TITLE VII, AND SECTION 1981

On July 2, 1964, President Lyndon Johnson signed the Civil Rights Act of 1964<sup>34</sup> into law. It was historic legislation prohibiting discrimination in employment, among other things, on the basis of race, color, religion, national origin, and sex.<sup>35</sup> The EPA and Title VII, passed only one year apart, both prohibited sex discrimination in pay and provided overlapping coverage.

Before the *Civil Rights Act of 1991* amended Title VII, White women could only recover equitable relief for intentional sex discrimination.<sup>36</sup> Although the *Civil Rights Act of 1991* allowed women to recover compensatory and punitive damages for intentional sex discrimination, the damages were capped at a maximum award of \$300,000 and were based upon the size of the employer

<sup>29</sup> *Id.* at 13 (internal citations and quotations omitted).

<sup>30</sup> *Id.* (internal citations and quotations omitted).

<sup>31</sup> 29 U.S.C. § 206(d)(1).

<sup>32</sup> H.R. Rep. No. 110-783 at 13 (2008) (internal citations and quotations omitted).

<sup>33</sup> *Id.* (internal citations and quotations omitted).

<sup>34</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>35</sup> 42 U.S.C. § 2000e et. seq.

<sup>36</sup> Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Cap on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 Yale J.L. & Feminism 250, 249–50 (2013).

rather than the amount of harm to the victim.<sup>37</sup> During the two years of debate, Congress acknowledged that caps on damages for victims of sex discrimination created a two-tiered system where damages for sex discrimination were less than damages available for race and national origin discrimination. Congress considered and ultimately rejected uncapped damages in cases of sex discrimination as part of a compromise to avoid a presidential veto by President George H.W. Bush.<sup>38</sup> The judgment made by Congress established a “disparate treatment of the law which seems to imply that some forms of discrimination are more tolerable than others.”<sup>39</sup>

Eighteen years after Congress acknowledged that it was creating a two-tiered system of damages where discrimination based upon race and national origin is elevated over discrimination based on gender, distinct differences remain between the application of Title VII and the EPA in sex-based wage discrimination cases.<sup>40</sup> Key differences are outlined below.

*Statute of Limitations/Exhaustion of Administrative Remedies.* Under the EPA, an aggrieved person has two years (or three years in a case of a willful violation) from the date of any instance of unequal pay to file a claim in court.<sup>41</sup> The *Lilly Ledbetter Fair Pay Act of 2009* directly addressed the 180-day statute of limitation established in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, where the U.S. Supreme Court found that Lilly Ledbetter’s equal pay claim was time-barred due to it being filed more than 180 days after the initial act of discrimination.<sup>42</sup> The *Lilly Ledbetter Fair Pay Act of 2009* now enables workers to file Title VII pay discrimination claims 180 days from the last discriminatory paycheck as opposed to 180 days from when the discrimination first began.<sup>43</sup>

*Burden of Proof.* When alleging discrimination under the EPA, an employee is required to show that a man and a woman working in the same establishment and doing substantially similar jobs are receiving unequal pay. However, she does not bear the burden of proving that the employer intentionally committed wage-based gender discrimination. Once the employee has made a showing of unequal pay, the burden of proof shifts to the employer to show that the pay inequity is not due to gender discrimination.<sup>44</sup>

In contrast, a plaintiff under Title VII must typically prove that the employer engaged in intentional discrimination against her, and she retains the burden of proving discrimination throughout the case. However, unlike an EPA complainant, a Title VII plaintiff is not required to demonstrate that she performed substantially similar (or equal) work as higher paid males, so long as she has other evidence of discrimination such as proof that a man worked fewer hours or evidence that she would have been paid more had she been a man.<sup>45</sup>

<sup>37</sup> *Id.* at 250.

<sup>38</sup> *Id.* at 301.

<sup>39</sup> *Id.* at 271 n.162.

<sup>40</sup> H.R. Rep. No. 110–783 at 14 n.28 (2008) (internal citations and quotations omitted).

<sup>41</sup> 29 U.S.C. § 255.

<sup>42</sup> *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

<sup>43</sup> 42 U.S.C. § 2000e–5(e).

<sup>44</sup> EEOC Compliance Manual, No. 915.003 § 10–5 (Dec. 5, 2000), <https://www.eeoc.gov/policy/docs/compensation.html>.

<sup>45</sup> *Id.*

*Damages.* A plaintiff who successfully proves gender-based wage discrimination under the EPA can only recover backpay, and, unless the employer can show that it acted in good faith, an equal amount in liquidated damages.<sup>46</sup> Conversely, under Title VII, a prevailing plaintiff for a gender-based wage claim is entitled to back pay, compensatory damages,<sup>47</sup> and punitive damages<sup>48</sup> for intentional wage discrimination.<sup>49</sup> However, as noted above, there are monetary caps on compensatory and punitive damages, which vary depending on the size of the employer rather than the extent of a victim's injuries.<sup>50</sup> However, in no event may these damages exceed \$300,000.<sup>51</sup>

*Section 1981.* While Section 1981 of the *Civil Rights Act of 1866* (Section 1981) does not cover sex-based discrimination, it is worth comparing as well. Section 1981 forbids discrimination on the basis of race or national origin in the making and enforcement of contracts.<sup>52</sup> Such contracts may be between employee and employer or between businesses. Plaintiffs in Section 1981 cases may recover compensatory and punitive damages, and like those claims under Title VII, the damages are not limited. Thus, under current law, an employee receiving unequal pay for equal work on the basis of race or national origin may recover punitive damages without an arbitrary statutory limit, but an employee receiving unequal pay on the basis of sex cannot. In this way, limitations on damage awards based on gender are considered by some to be another form of discrimination based upon sex.

#### WOMEN CONTINUE TO EARN LESS THAN MEN

While progress has been made, equal pay for women is not yet a reality. Kristin Rowe-Finkbeiner testified at the Joint Subcommittee Hearing about a woman named Valerie who discovered this firsthand:

[She] discovered that the male co-worker who had been hired on the same day she was hired was being paid substantially more, even though they had the same job title and she had more duties and responsibilities. Valerie went directly to the owner to request an increase to match her co-worker's wage. She was told because her co-worker was married and male, he "needed" a higher income than she did. Valerie pointed out that since he was married and his wife also worked outside the house, he actually had two incomes to cover his bills; while she was single and struggling to keep her head above water. Her boss was cordial but adamant that that was his policy, and she had no choice but to live with it.<sup>53</sup>

<sup>46</sup> 29 U.S.C. § 216; 29 U.S.C. § 260.

<sup>47</sup> H.R. Rep. No. 110-783 at 14 (2008) (internal citations and quotations omitted).

<sup>48</sup> *Id.* (internal citations and quotations omitted) (punitive damages may be recovered when the employer acted with malice or reckless indifference).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 42 U.S.C. § 1981(a).

<sup>53</sup> *The Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Kristin Rowe-Finkbeiner, CEO/Executive Director of Moms Rising, at 3) [Hereinafter Rowe-Finkbeiner Testimony].

As previously noted, a woman working full-time, year-round earns 80 cents for every dollar a White male makes.<sup>54</sup> This gap can cause significant economic loss for a working woman over the course of her career. For example, a woman working full-time and year-round earning the median income for women would lose \$403,440 in earnings over a 40-year career.<sup>55</sup> To make up for this gap in lifetime earnings, this working woman would have to work ten years longer than her White male counterpart.<sup>56</sup> The gender wage gap's ultimate result is lower lifetime earnings for women, and as a result of these lower lifetime earnings, women's retirement savings and social security benefits are greatly affected.<sup>57</sup> In 2011, women aged 65 and older received a total income of \$22,069 on average as compared to \$41,134 for men.<sup>58</sup> The average Social Security benefit is \$14,044 for women as compared to \$18,173 for men of the same age.<sup>59</sup> Because of the gender wage gap, the economy as a whole suffers. For example, researchers estimate that in 2016, the U.S. economy would have produced additional income of \$512.6 billion if women received equal pay—an amount equivalent to 2.8 percent of the 2016 gross domestic product (GDP).<sup>60</sup> In addition to boosting the economy, pay equity would cut the poverty rate for all working women by more than half, from 8 percent to 3.8 percent.<sup>61</sup>

Research indicates that women experience a pay gap in nearly every line of work, regardless of education, experience, occupation, industry, and job title.<sup>62</sup> In fact, 38 percent of the pay gap remains unexplained even when accounting for these variables.<sup>63</sup> “Most researchers attribute this portion [of the wage gap] to factors such as discrimination and socially constructed gender norms . . .”<sup>64</sup> The wage gap remains even when controlling for educational attainment.<sup>65</sup> Women with a bachelor's degree earn roughly equivalent to men with an associate's degree and earn 26 percent less than their male peers with a college degree.<sup>66</sup> Even in fields where women make up a substantial share of the workforce and control-

<sup>54</sup> Am. Ass'n of Univ. Women, *The Simple Truth about the Gender Pay Gap 1* (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=simple-truth-one-pager](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=simple-truth-one-pager).

<sup>55</sup> Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2017), <https://nwlc.org/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017.pdf>.

<sup>56</sup> *Id.*

<sup>57</sup> Jocelyn Fischer & Jeff Hayes, *The Importance of Social Security in the Incomes of Older Americans: Differences by Gender, Age, Race/Ethnicity, and Marital Status 1–4* (2013), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/D503-ImportanceofSS.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2017), <https://nwlc.org/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017.pdf>; see also Jocelyn Fischer & Jeff Hayes, *The Importance of Social Security in the Incomes of Older Americans: Differences by Gender, Age, Race/Ethnicity, and Marital Status 1–4* (2013), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/D503-ImportanceofSS.pdf> (see figure 4).

<sup>60</sup> Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy 2* (2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> Council of Economic Advisers, *The Gender Pay Gap on the Anniversary of the Lilly Ledbetter Fair Pay Act 3* (2016), <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160128-cea-gender-pay-gap-issue-brief.pdf>.

<sup>63</sup> Washington Center for Equitable Growth, *Gender Wage Inequality: What We Know and How We Can Fix It 18* (2018), <https://equitablegrowth.org/research-paper/gender-wage-inequality/>.

<sup>64</sup> *Id.*

<sup>65</sup> Anthony P. Carnevale et al., *Women Can't Win 4* (2018), [https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Women % 4](https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Women%20Can't%20Win%204.pdf).

<sup>66</sup> *Id.*; see also Am. Ass'n of Univ. Women, *The Simple Truth about the Gender Pay Gap 1* (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The\\_Simple\\_Truth](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth).

ling for experience, skills, education, race, and region, a wage gap remains.<sup>67</sup> Additionally, research demonstrates that when women move into a field of work in large numbers, wages decline.<sup>68</sup>

Wage inequality experienced by mothers threatens the stability of families across the United States. Mothers now represent a larger share of the breadwinners for their families than in previous years, and this “is the continuation of a long-running trend, as women’s earnings and economic contributions to their families continue to grow in importance.”<sup>69</sup> In 2015, 64.4 percent of mothers in the United States were either the sole family breadwinner (42 percent) or the co-breadwinner (22.4 percent).<sup>70</sup> Meanwhile, mothers do not see the wage bump seen by fathers and in fact, statistics show that mothers receive a 7 percent penalty per child.<sup>71</sup> Mothers on average are paid less than fathers, with mothers receiving 71 cents for every dollar a father earns, and low-wage working mothers see the biggest penalty of all groups in the workforce.<sup>72</sup> The motherhood penalty is particularly staggering for Latina, African American, and American Indian/Alaskan Native mothers who are paid 46, 54, and 49 cents to the dollar, respectively, as compared to White non-Hispanic fathers.<sup>73</sup> Households headed by working mothers are also more likely to be in poverty than their single father counterparts. Only about one in four households headed by single mothers in the United States are economically secure.<sup>74</sup> Conversely, households headed by single fathers are nearly twice as likely to have incomes that provide economic security.<sup>75</sup> Eliminating pay inequality would cut the poverty rate for working single mothers in nearly half, from 28.9 percent to 14.5 percent.<sup>76</sup>

The total increase in earnings by women through pay equity would be 16 times what the Federal Government and all state governments combined spent on Temporary Assistance to Needy Families (TANF) in Fiscal Year 2015.<sup>77</sup> Additionally, approximately 25.8 million children would benefit from the increased earnings of their

<sup>67</sup> Asaf Levanon et al., *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950–2000 U.S. Census Data*, 88 *Social Forces* 865 (2009); see also Jasmine Tucker, *Women Experience a Wage Gap in Nearly Every Occupation 2* (2018), <https://nwlc-w49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2018/04/Wage-Gap-Fact-Sheet-Occupation.pdf>.

<sup>68</sup> Asaf Levanon, et al., *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950–2000 U.S. Census Data*, 88 *Social Forces* 865 (2009).

<sup>69</sup> Sarah Jane Glynn, *Breadwinning Mothers are Increasingly the U.S. Norm*, *Center for American Progress* (Dec. 19, 2016, 11:59 AM), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>.

<sup>70</sup> *Id.*; see also Rowe-Finkbeiner Testimony at 3.

<sup>71</sup> Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 *American Sociological Review* 204, 204–25 (2001).

<sup>72</sup> Nat’l Women’s Law Ctr., *Equal Pay for Mothers is Critical for Families 1* (2017), <https://nwlc.org/wp-content/uploads/2017/05/Motherhood-Wage-Gap.pdf>; see also Michelle J. Budig & Melissa J. Hodges, *Differences in Disadvantage: Variation in the Motherhood Penalty across White Women’s Earnings Distribution*, 75 *American Sociological Review* 1, 1–24 (2010).

<sup>73</sup> Nat’l Women’s Law Ctr., *Equal Pay for Mothers is Critical for Families 2* (2017), <https://nwlc.org/wp-content/uploads/2017/05/Motherhood-Wage-Gap.pdf>.

<sup>74</sup> Institute for Women’s Policy Research, *Basic Economic Security in the United States: How much Income Do Working Adults Need in Each State?* 4 (2018), [https://iwpr.org/wp-content/uploads/2018/10/R590\\_National.pdf](https://iwpr.org/wp-content/uploads/2018/10/R590_National.pdf).

<sup>75</sup> *Id.*

<sup>76</sup> Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy 2* (2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf>; see also Am. Ass’n of Univ. Women, *The Simple Truth about the Gender Pay Gap 6* (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The\\_Simple\\_Truth](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth).

<sup>77</sup> Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy 2* (2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf>.

mothers, and the number of children with working mothers living in poverty would drop from 5.6 million to 3.1 million.<sup>78</sup>

*Pay discrimination is difficult to detect*

In today's workplace, pay discrimination is often extremely difficult to detect. Discriminatory salary decisions are seldom obvious to employees because pay is often cloaked in secrecy.<sup>79</sup> As Justice Ginsburg observed in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, "comparative pay information is often hidden from the employee's view."<sup>80</sup> This lack of transparency creates significant obstacles for employees to gather information that would indicate that they have experienced pay discrimination.<sup>81</sup> Ultimately, this undermines an employee's ability to challenge pay discrimination.<sup>82</sup> Also, many employers have policies prohibiting salary discussions.<sup>83</sup> About 60 percent of private sector employers have adopted specific rules prohibiting or strongly discouraging employees from discussing their wages with co-workers.<sup>84</sup> Finally, for those employees who do know what their colleagues earn, they often lack information about the contributing factors that might influence pay levels, such as performance, education, or training.

Disparate pay might not begin with a woman's initial salary determination, but can readily develop with a decision to increase the pay of male colleagues. Women risk being looked over for promotions and raises, the impact of which compounds throughout their careers.<sup>85</sup> "If your employer was paying you \$5,000 less a year because you're a woman, that's a \$50,000 loss over ten years."<sup>86</sup>

Discussions about wages are necessary to identify pay disparity because "without this knowledge, [women] are unable to report these problems to the EEOC."<sup>87</sup> Once a lawsuit is filed, the discovery of wage data is available to help aggrieved employees develop their cases; however, in order learn more about employee salaries, women need to have some basis to file suit in the first place. Tens of thousands of pay discrimination charges were filed with the EEOC between 2010 and 2016, and the agency recovered over \$85 million in monetary relief for victims. However, in her testimony at the Joint Subcommittee Hearing, Jenny Yang characterized these resolutions as "just the tip of the iceberg."<sup>88</sup>

<sup>78</sup>*Id.*

<sup>79</sup>*The Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Fatima Goss Graves, President and CEO of National Women's Law Center, at 7) [Hereinafter Goss Graves Testimony].

<sup>80</sup>*Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162, 2179 (2007) (Ginsburg, J., dissenting).

<sup>81</sup>Goss Graves Testimony at 7.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>Rowe-Finkbeiner Testimony at 2.

<sup>86</sup>*Id.*

<sup>87</sup>*The Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 116th Cong. (2019) (written testimony of Jenny Yang, Partner at Working Ideal, at 2) [Hereinafter Yang Testimony].

<sup>88</sup>*Id.*

*Lack of data on pay disparity*

Data about pay discrimination is an invaluable tool for enforcement agencies such as the EEOC and the Office of Federal Contract Compliance Programs (OFCCP). Experts agree that these agencies currently receive minimal information about gender-based disparities in pay at the establishment level.<sup>89</sup>

*Bureau of Labor Statistics—Occupational Employment Statistics.* For over forty years, the Bureau of Labor Statistics (BLS) had been collecting data on female workers and comparing them to their male counterparts. This data had formed the basis for its monthly report on the employment situation.<sup>90</sup> In 2005, BLS stopped collecting this data, citing employer inconvenience.<sup>91</sup> In response to this, Congress included in the Fiscal Year 2006, 2007, 2008, 2009, and 2010 Labor, Health and Human Services, Education, and Related Agencies appropriations bills that were enacted into law a provision requiring BLS to continue to collect data on women workers. However, beginning in Fiscal Year 2011 and continuing through Fiscal Year 2019, Congress did not include the requirement for BLS to collect data on women workers as part of the Current Employment Statistics (CES) survey. Recognizing the value of collecting these statistics, the *Paycheck Fairness Act* makes permanent a requirement for BLS to gather these statistics as part of the CES.

*Equal Employment Opportunity Commission.* The EEOC was created by the *Civil Rights Act of 1964* and was given litigation enforcement authority in 1972.<sup>92</sup> The EEOC has collected employment data categorized by race/ethnicity, gender, and job category through the Employer Information Report EEO-1 (EEO-1) from employers since 1966. The EEOC has also collected and maintained sensitive employer information gathered through its investigations since it opened its doors in 1965. Title VII requires that the EEOC keep this information confidential and imposes criminal sanctions on EEOC employees who unlawfully disclose confidential information.

In 2016, the Obama Administration expanded the data collection requirements for the EEO-1 to include, in addition to employment data, wage data disaggregated by race/ethnicity, gender, and job category. Collecting pay data can expose trends in the hiring, payment, and promotion of employees; the sex-segregation of jobs; and the inequity of salaries, benefits, or bonuses. Data may show that employees of the opposite sex are not paid comparably for the same job, or for different jobs that require similar skills, education, and experience. Some businesses may not be aware of the discriminatory practices until the data is collected and analyzed. Once these issues are brought to light, businesses can create interventions aimed at correcting or eliminating the problem before it even starts.

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<sup>89</sup> *Id.*

<sup>90</sup> H.R. Rep. No. 110-783 at 18 (2008) (internal citations and quotations omitted).

<sup>91</sup> *Id.* at 18 n.76.

<sup>92</sup> *35 Years of Ensuring the Promise of Opportunity*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Mar. 11, 2019).

The Trump Administration indefinitely stayed the expanded pay data collection reporting requirements.<sup>93</sup> Additionally, the Trump Administration has delayed<sup>94</sup> the regular collection of the EEO-1 data.<sup>95</sup> The *Paycheck Fairness Act* requires the Department of Labor and the EEOC to collect data on compensation and other employment-related data by race, nationality, and sex in order to enhance the ability of both agencies to detect violations and improve enforcement of the EPA.

*Office of Federal Contract Compliance Programs.* The OFCCP is unique in that it is required by law to affirmatively conduct reviews to ensure that contractors with federal contracts are in compliance with equal employment measures, including Executive Order 11246, which prohibits discrimination in employment on the basis of race, color, religion, national origin, and gender. An estimated 4.1 million individuals work for an employer who contracts with the federal government.<sup>96</sup>

*Equal Opportunity Survey.* The Equal Opportunity (EO) Survey was developed over three administrations to ensure nondiscrimination in federal contractor employment. It was intended to track employment data and to improve the enforcement of anti-discrimination requirements, including gender-based wage discrimination, on federal contractors.<sup>97</sup> Prior to the EO Survey, the OFCCP conducted targeted compliance reviews. Because of limited resources, the OFCCP only reviewed approximately four percent of contractors each year.<sup>98</sup>

The EO Survey was designed to enable the OFCCP to be far more effective in detecting and remedying wage discrimination and encouraging self-awareness and self-evaluation among contractors as a means of increasing compliance.<sup>99</sup> It was developed to query employers on an annual basis (to be eventually sent to at least one-half of all contractors each year) about their affirmative action program activities, personnel actions (e.g., hires and promotions), and compensation of full-time employees, all aggregated by job group, race, and gender.<sup>100</sup>

The first survey was sent out in 2000 during the last year of the Clinton Administration, but the Bush Administration that followed did not take any action on the surveys that were returned and did not follow up on those surveys that were not returned.<sup>101</sup>

In 2003 and 2004, the Bush Administration sent out fewer and fewer surveys, and in 2005 it failed to send out any at all. In January 2006, the OFCCP proposed eliminating the EO Survey alto-

<sup>93</sup> *What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, <https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm> (last visited Mar. 11, 2019).

<sup>94</sup> *Id.* (A stay was placed on the pay data collection aspects of the EEO-1 form that was revised on September 29, 2016. The original date to submit the EEO-1 data using the old form was “the previously set filing date of March 2018.” It has continuously been extended and has recently been postponed until “early March 2019.”)

<sup>95</sup> *Natl Women’s Law Ctr. v. OMB*, No. 17-cv-2458, 2019 U.S. Dist. LEXIS 33828, at \*59–61 (D.D.C. Mar. 4, 2019) (Here, the stay of the revised EEO-1 pay data collection form issued by the Trump administration was vacated. Further legal action is indeterminate at this time, underscoring the need for the legal certainty H.R. 7 provides.)

<sup>96</sup> Janet Nguyen, *The U.S. Government is Becoming More Dependent on Contract Workers*, Marketplace (January 17, 2019, 2:17 PM), <https://www.marketplace.org/2019/01/17/business/rise-federal-contractors>.

<sup>97</sup> H.R. Rep. No. 110–783 at 18 (2008) (internal citations and quotations omitted).

<sup>98</sup> *Id.* at 19 (internal citations and quotations omitted).

<sup>99</sup> *Id.* (internal citations and quotations omitted).

<sup>100</sup> *Id.* (internal citations and quotations omitted).

<sup>101</sup> *Id.* (internal citations and quotations omitted).

gether.<sup>102</sup> The Obama Administration recognized that the gender pay gap continued to exist despite the prohibitions against gender-based pay discrimination. In May 2014, President Barack Obama issued a Memorandum instructing the Secretary of Labor to establish regulations requiring federal contractors and subcontractors to submit summary data on employee compensation, including data by sex and race.<sup>103</sup> However, this important data is still not being collected due to actions taken by the Trump Administration.<sup>104</sup> As Jenny Yang testified at the Joint Subcommittee Hearing:

During my tenure as Chair, the EEOC moved forward in September 2016 to collect summary pay data from employers with 100 or more employees to more effectively combat pay discrimination.<sup>105</sup> The data collection would have required these employers to provide confidential annual reports to the EEOC about employee pay, broken down by job category, sex, race, and ethnicity. Because the data would be disaggregated by sex, race, and ethnicity, the information would help to address the intersectional nature of pay discrimination for women of color. The data would help to address discrimination in the form of occupational segregation in lower paying jobs. Collecting this information would be a significant step forward in addressing pay discrimination.

The collection of employer pay data would support and enhance voluntary compliance by motivating employers to strengthen their systems and practices to collect and review compensation data. Many organizations still do not regularly collect and analyze pay data by demographics for potential disparities and have inconsistent or non-existent formal reviews. Because employers would need to compile and file this report, many more employers would establish a regular practice of reviewing their pay data by demographics at least at a summary level every year. Formalized and institutionalized pay data reporting would encourage employers to identify and address pay equity on their own—increasing the positive impact of reporting requirements. The EEOC also would publish aggregate pay information to enable employers to evaluate their pay data against industry benchmarks, consistent with its long-standing practice of reporting aggregate workforce demographic data.

Through extensive consultation with stakeholders, the EEOC sought to minimize the burden on employers by building on existing annual reporting requirements. The pay data collection enhances the existing Employer Information Report, also known as the EEO-1 report, to include pay information along with the workforce demographic information that has been collected for over fifty years. The EEOC and the Department of Labor have long used the

<sup>102</sup> *Id.* (internal citations and quotations omitted).

<sup>103</sup> Memorandum on Advancing Pay Equality through Compensation Data Collection, 2014 Daily Comp. Pres. Doc. 20751 (Apr. 11, 2014).

<sup>104</sup> Neomi Rao, EEO-1 Form; Review Stay, 1-2 (2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

<sup>105</sup> *EEOC to Collect Summary Pay Data*, EEOC, <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm> (last visited Mar. 11, 2019).

EEO-1 workforce demographic data to identify trends, inform investigations, and focus resources. To report pay information, employers would provide data electronically, drawing from their existing human resources databases without incurring significant burden.

Despite this extensive process with two opportunities for public comment, the Trump Administration, after consulting with business groups, announced a “review and immediate stay” of the EEO-1 pay data collection in August 2017.<sup>106</sup> *The Paycheck Fairness Act* would address the critical need for better pay data by codifying a requirement for employers to report pay data, which would provide the EEOC with a powerful tool to better focus its resources to combat pay discrimination.<sup>107</sup>

*Standards in Conducting Systematic Wage Discrimination Analysis.* As a way of measuring whether employers were engaged in gender-based wage discrimination, the Clinton Administration developed a methodology to be used in the OFCCP’s compliance reviews. The OFCCP asked employers to provide data on its pay levels (or pay grades), and then using the data, compare wages based on race, ethnicity, and gender. If there were any pay disparities, the OFCCP requested employers to correct them.

Generally, employers were not supportive of this analysis, arguing that differences in wages between men and women did not necessarily prove that they were engaging in gender-based discrimination. As a result, the Bush Administration published a formal guidance document that expressly prohibited the OFCCP from using a “pay grade” analysis in conducting its compliance reviews. Under this guidance, the OFCCP is required to conduct time-consuming analyses, including the gathering of anecdotal evidence before determining that a contractor is engaged in wage discrimination.<sup>108</sup>

The *Paycheck Fairness Act* allows the use of “pay grade” analysis in conjunction with other tools the OFCCP can use in determining if non-construction contractors for federal contracts are engaged in gender based wage discrimination.

#### *Women Are Less Likely to Negotiate*

High numbers of women fail to negotiate for higher salaries and promotions.<sup>109</sup> Although lack of negotiation is a contributing factor to the wage gap, it does not justify gender-based pay discrimination. Researchers have discovered several reasons women fail to negotiate for themselves in the workplace. Women often do not promote their own interests, choosing instead to focus on others believing that employers will recognize and reward them for good work. Women tend to be more successful when negotiating for others—negotiating 18 percent greater salaries for others than they negotiate for themselves.<sup>110</sup>

<sup>106</sup>Neomi Rao, EEO-1 Form; Review Stay, 1-2 (2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

<sup>107</sup>Yang Testimony at 12.

<sup>108</sup>H.R. Rep. No. 110-783 at 19 (internal citations and quotations omitted).

<sup>109</sup>Shankar Vedantam, *Salary, Gender and the Social Cost of Hagglng*, Washington Post (July 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900827.html>.

<sup>110</sup>Dina W. Pradel et al., *When Gender Changes the Negotiation*, Harvard Business School (Feb. 13, 2006), <https://hbswk.hbs.edu/item/when-gender-changes-the-negotiation>.

The hesitation of women to negotiate for themselves is not unreasonable. “Employers tend to penalize women who initiate negotiations for higher compensation more than they do men, as women are often judged more harshly for seeking higher pay than men.”<sup>111</sup> Even when women do negotiate, they often ask for less than their male counterparts.<sup>112</sup> H.R. 7 authorizes the Secretary of Labor to award competitive grants to eligible entities to provide negotiation skills training programs for the purposes of addressing pay disparities, including through outreach to women and girls.

*Reliance on salary history perpetuates historic discrimination*

Asking job applicants their prior salary history has long been a routine part of the hiring process. However, the practice of utilizing prior salary, or pay history, in the hiring process perpetuates gender and racial wage gaps in the workplace. Salary history is not an objective factor because it assumes that prior salaries were fairly established in the first place.<sup>113</sup> Using salary histories, which may have been tainted by bias or impacted by gender-based wage discrimination, whether intentional or not, means that discriminatory pay follows workers wherever they go. As the EEOC’s Compliance Manual states, “[p]rior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination.”<sup>114</sup>

Ms. Rowe-Finkbeiner exemplified this perpetuation of wage discrimination during her testimony at the Joint Subcommittee Hearing when relaying the story of a woman named Julia:

Julia’s employer used her salary history as an excuse to reduce her pay. Julia was offered a job at \$65,000 per year but when her offer letter arrived, she was offered just \$55,000. It was for the same job, but not at the same salary. Julia was told the reason was her salary history. She decided to take the job anyway. In time, she asked a male colleague about his salary and learned he was being paid \$62,000 for *the same* job. When Julia asked about the disparity, she was told her male colleague was fresh out of college and that’s what they decided to start him at. So he benefited from having no experience and no salary history, while her seven years of relevant experience was used against her. Salaries at her next two jobs were premised on her salary there, so the harm compounded over time. She’s lost tens of thousands of dollars to this discrimination, as have millions of other women in similar situations.<sup>115</sup>

Businesses often decide what to pay new hires based in-part, or in whole, on how much they earned from a previous job. This practice, however, may unduly exclude otherwise qualified individuals from the candidate pool. “A recent study demonstrated that em-

<sup>111</sup> Yang Testimony at 6.

<sup>112</sup> Goss Graves Testimony at 6.

<sup>113</sup> Nat’l Women’s Law Ctr., *Asking for Salary History Perpetuates Pay Discrimination from Job to Job 2* (2018), <https://nwlc-ciw49tixgw5lhab.stackpathdns.com/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf>.

<sup>114</sup> EEOC Compliance Manual, No. 915.003 § 10–IV.F.2.g (Dec. 5, 2000), <https://www.eeoc.gov/policy/docs/compensation.html>.

<sup>115</sup> Rowe-Finkbeiner Testimony at 6.

employers are limiting their talent pools when they rely on salary history. When salary history information was taken out of the equation, the employers studied ended up widening the pool of workers under consideration and interviewing and ultimately hiring individuals who had made less money in the past.”<sup>116</sup> Relying on a prospective employee’s skills and abilities rather than prior pay ensures that employers reduce past discrimination in the hiring and pay decision process.

THE EQUAL PAY ACT MUST BE STRENGTHENED TO EFFECTIVELY  
ERADICATE PAY DISPARITY

The *Paycheck Fairness Act* strengthens the EPA as a tool to achieve pay parity by addressing the shortcomings described below.

*Establishment*

A plaintiff raising a claim under the EPA carries a heavy burden of proof in establishing a case for gender-based wage discrimination. To make out a *prima facie* case, a plaintiff must not only show that a pay disparity exists between employees of the same “establishment,” but she must also identify specific employees of the opposite sex holding equal positions who are paid higher wages.<sup>117</sup> The courts have strictly defined the term “same establishment” to mean “a distinct physical place of business.”<sup>118</sup> “This can be an obstacle for an employee who seeks to compare her job to a male employee who does the same work in a different physical location for the same employer in the same town.”<sup>119</sup>

The establishment requirement limits the ability of women to prevail in EPA claims since many women might not have a true comparator in their physical workplace. Today’s employers are much different than they were fifty-six years ago when the EPA was first enacted. Some employers may have multiple facilities at which the same jobs are performed. However, other locations may have only one person in a certain position (e.g., manager or supervisor), and employers have successfully asserted that women in higher-level positions have unique job duties and therefore have no comparator in the same establishment.<sup>120</sup>

*Georgen-Saad v. Texas Mutual Insurance Company* illustrates the obstacle the establishment requirement creates for executive and professional women.<sup>121</sup> In that case, the complainant was a senior vice-president of finance who was being paid less than the other senior-vice presidents in the company. The court rejected *Georgen-Saad’s* claim that any of the positions required “equal skill, effort, and responsibility,” and elaborated:

According to Defendant, there are no male comparators working in a position requiring equal skill, effort, and responsibility under similar working conditions. The Court agrees. The sealed exhibits filed with Defendant’s Motion for Summary Judgment include job descriptions for the

<sup>116</sup> Goss Graves Testimony at 11.

<sup>117</sup> *Id.* at 13.

<sup>118</sup> *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945); 29 C.F.R. § 1620.9(a).

<sup>119</sup> Goss Graves Testimony at 13.

<sup>120</sup> Juliene James, *The Equal Pay Act in the Courts: A De-Facto White-Collar Exemption*, 79 N.Y.U. L. Rev. 1873 (2004).

<sup>121</sup> *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002).

Senior Vice Presidents of Investments, Insurance Services, Underwriting Services, Underwriting and Policy Holder Services, Public Affairs, Internal Audit, Benefits/Loss Prevention, Administration, Data Processing Services, and Branch Operations/Marketing.

The assertion that any one of these jobs requires “equal skill, effort, and responsibility” as Plaintiff’s Senior Vice President of Finance position cannot be taken seriously. These are Senior Vice Presidents in charge of different aspects of Defendant’s operations; these are not assembly-line workers or customer-service representatives. In the case of such lower level workers, the goals of the *Equal Pay Act* can be accomplished due to the fact that these types of workers perform commodity-like work and, therefore, should be paid commodity-like salaries. However, the practical realities of hiring and compensating high-level executives deal a fatal blow to *Equal Pay Act* claims.<sup>122</sup>

In 1986, the EEOC issued regulations interpreting the definition of “establishment” under the EPA.<sup>123</sup> The regulation provides in part that an establishment can encompass more than a single physical establishment when the employer has a central administrative unit charged with making salary and employee decisions.

Courts have interpreted “establishment” to apply to different locations. In *Grumbine v. United States*,<sup>124</sup> the Court held that for purposes of the EPA, “the ‘establishment’ was the Civil Service in its entirety and that a woman could not be paid less than a man merely because she worked in a different location.”<sup>125</sup> The plaintiff in *Grumbine* was a Regional Counsel of Customs Service working in Baltimore, Maryland and was the only female among the nine Regional Counsels. The counsels were spread out among nine regions; however, the eight males were paid more than the one female counsel. Consequently, the plaintiff raised a claim of pay discrimination under the EPA. The government argued that the Regional Counsels each worked in different “establishments” for purposes of the EPA. The court rejected this defense and found, “[i]t would hardly make sense to permit an employer to rely on [the] geographic ‘establishment’ concept in defense of an equal pay practice when that employer has itself adopted a uniform, non-geographic pay policy, and system.”<sup>126</sup>

In 2000, a Texas court<sup>127</sup> held that a female district sales manager in the Dallas/Fort Worth facility could compare herself to other district sales managers in the state of Texas for purposes of the plaintiff’s EPA claim. The plaintiff in the case had no comparator in her physical establishment. As a result, the court reasoned that limiting her comparators to a single physical establishment “would effectively permit a large employer with national operations to exempt its managerial staff (each of whom is in charge

<sup>122</sup> *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002).

<sup>123</sup> 29 C.F.R. § 1620.9(a)-(b).

<sup>124</sup> *Grumbine v. United States*, 586 F. Supp. 1144 (D.D.C. 1984).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1148.

<sup>127</sup> *Vickers v. Int’l Baking Co.*, No. 398CV1864D, 2000 U.S. Dist. LEXIS 17995 (N.D. Tex. Dec. 7, 2000).

of a single facility) from the reach of the EPA.”<sup>128</sup> The Fifth Circuit held that a school district in Dallas with 182 schools was a single establishment for purposes of an EPA claim<sup>129</sup> as were 13 elementary schools operated by a single school district near Houston.<sup>130</sup>

Numerous courts have recognized that there is a trend in the law interpreting “establishment” to include all places of business of one corporation or a multi-site employer.<sup>131</sup> Under these circumstances, the courts have recognized that accountability flows from the decision-making structure. The single-location establishment interpretation is an unworkable standard in today’s workplace and threatens to eliminate a large number of women from the EPA’s protections.

Recognizing that the single-site “establishment” definition is linked to an outdated employer-employee system and that it has limited women’s ability to assert an EPA claim, H.R. 7 expands a worker’s opportunity to find a true comparator. Under the Act, a woman can look to a similarly situated male co-worker anywhere in the same county or similar political subdivision of a state. Workplaces in the same county operate under the same cost of living and labor market conditions. County-wide comparisons are already the law in Illinois under the state’s *Equal Pay Act*.<sup>132</sup> However, consistent with EEOC rules and guidance, including 29 C.F.R. 1620.9, the Act does not restrict courts from applying establishment more broadly than the county.

#### ANY FACTOR OTHER THAN SEX

Under the EPA, employers can affirmatively defend and justify unequal pay if it is based on: (1) seniority systems; (2) merit systems; (3) systems that measure earnings by quality or quantity of production; or (4) “any factor other than sex.”<sup>133</sup> Historically, courts interpret the “any factor other than sex” criteria so broadly that it embraces an almost limitless number of factors, so long as they do not involve sex.<sup>134</sup> Employers have been able to prevail in EPA cases by asserting a range of “other than sex” factors.

Many courts have found that the “factors other than sex” need not be business-related or even related to the particular position in question.<sup>135</sup> Moreover, there is no consensus among the circuit courts as to whether a factor other than sex under the EPA needs to be business related, and the Supreme Court has failed to resolve this issue. The Court denied *certiorari* in the case of *Randolph Cen-*

<sup>128</sup> *Id.* at \* 15.

<sup>129</sup> *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1979).

<sup>130</sup> *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975).

<sup>131</sup> *Meeks v. Computer Ass’n Int’l*, 15 F.3d 1013, 1017 (courts presume that multiple offices are not a single establishment unless unusual circumstances are demonstrated); *see also Kassman v. KPMG LLP*, No. 11 Civ. 3743, 2018 U.S. Dist. LEXIS 203561, at \*81 (S.D.N.Y. Nov. 30, 2018) (denying class status of plaintiff and holding that “[p]lay and promotion decisions were not sufficiently ‘centralized’ to amount to ‘unusual circumstances’ warranting a finding that the many offices and practice areas represented in the 1,100-member proposed collective qualify as a single ‘establishment’ under the EPA”).

<sup>132</sup> 820 Ill. Comp. Stat. 112/10 (2003) (“Nothing in this Act may be construed to require an employer to pay, to any employee at a workplace in a particular county, wages that are equal to the wages paid by that employer at a workplace in another county to employees in jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”).

<sup>133</sup> 29 U.S.C. § 206(d)(1); *see also* Yang Testimony at 4.

<sup>134</sup> *See Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989).

<sup>135</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *see also* Yang Testimony at 4.

*tral School District v. Aldrich*<sup>136</sup> with three justices dissenting and acknowledging the conflict among the circuits.<sup>137</sup>

In addition, under the “factors other than sex” defense, employers found to participate in gender-based wage discrimination are able to successfully raise factors such as market forces and prior salaries (even if they are based on a discriminatory wage) as defenses that, in themselves, undermine the goals of the EPA. In her testimony at the Joint Subcommittee Hearing, Jenny Yang explained to the Committee that “[c]onsideration of market forces shifts focus from the central question of whether an employer is providing equal pay for equal work. Bias can taint pay decisions when the employer assesses an artificially higher or nebulous ‘market value’ to male candidates.”<sup>138</sup>

Courts continue to permit employers to defend equal pay claims based on market forces or differences in prior experience and qualifications despite Supreme Court precedent to the contrary. In 1974, the Supreme Court rejected the argument that employers should be permitted to pay women less than men on the basis of market forces. In *Corning Glass Works v. Brennan*, the Court recognized that the pay differential arose simply because men would not work at the low rates paid to women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work.<sup>139</sup>

If we are serious about eradicating the gender-based wage gap between women and men performing equal work, the EPA’s affirmative defense of “any factor other than sex” must be clarified to require that the factor be job-related, not derived or based upon a sex-based differential, and consistent with business necessity. A review of court cases reveals loopholes that the *Paycheck Fairness Act* will close.

*Job-Relatedness.* In *Boriss v. Addison Farmers Insurance Company*,<sup>140</sup> the plaintiff brought an EPA claim alleging that in the ten years she worked for the employer as an underwriter, she was paid less than her male colleagues while performing substantially equal work. When comparing the plaintiff to three of her male colleagues, the employer alleged that the difference in pay was due to factors other than sex, including more underwriting experience and college education, even though a college degree was not a prerequisite for the position.

The court found that the employer successfully met its burden; the difference in pay was due to a “factor other than sex.” The court noted that the higher salaries of the male employees were based on the pay they received at their prior employment.<sup>141</sup> The court relied on a very broad interpretation of the “factor other than sex” and that the factor need not be related to the “requirements of the particular position in question, nor that it be a ‘business-related’ reason.”<sup>142</sup> All that needs to be evaluated is “whether the

<sup>136</sup> *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992).

<sup>137</sup> *Id.*

<sup>138</sup> Yang Testimony at 6.

<sup>139</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

<sup>140</sup> *Boriss v. Addison Farmers Ins. Co.*, No. 91 C 3144, 1993 U.S. Dist. LEXIS 10331 (N.D. Ill. July 27, 1993).

<sup>141</sup> *Id.* at 23.

<sup>142</sup> *Id.* (citing *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321-22 (1987)); see also *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989).

factor is discriminatorily applied or if it causes a discriminatory effect.”<sup>143</sup>

In addition, the court held that employers can lawfully pay a male more than a similarly situated female employee if the motivation is to induce the male worker to take the job and/or if employers take into account what the employee was making at his prior job.<sup>144</sup> Even though these situations may result in female employees being paid less, the court stated that none of these situations violate the EPA.<sup>145</sup>

In *Warren v. Solo Company*,<sup>146</sup> the court reaffirmed its position that the defendant need not show that a “factor other than sex” is related to the requirements of the particular position or a “business-related” decision when it found that unequal pay is justified because the male employee had a college degree and two masters degrees, despite the fact that the degrees were unrelated to the jobs they were both performing.

*Derived from or based upon sex-based differentials.* In 1974, the Supreme Court held that “market forces”—such as the value given by the market to men’s and women’s work or the more effective bargaining power that men historically have—cannot be cited as a “factor other than sex” to evade liability.<sup>147</sup> The court in *Corning Glass Works* noted that the company’s decision to pay women less for the same work that men performed “took advantage of the market and was illegal under the EPA.”<sup>148</sup>

Despite clear direction from the Supreme Court, lower courts have accepted market forces as a defense to a pay disparity.<sup>149</sup> In *Merillat v. Metal Spinners, Incorporated*,<sup>150</sup> the plaintiff, who was with the company for nearly 20 years, was promoted to a senior buyer position in the materials department. Around that time, the employer created a new position entitled “Vice President of Procurement and Materials Management.”<sup>151</sup> While the duties of both jobs were similar, the new position also included managing materials department employees (including the plaintiff). The job was offered to a male with a starting salary of \$62,500.<sup>152</sup> At that time, the plaintiff earned \$49,800, and she helped to train the new employee for his position.<sup>153</sup>

The *Merillat* plaintiff brought an EPA claim against the employer who asserted the affirmative defense that the pay disparity was due to factors other than sex such as education, experience, and market forces. The employer alleged that the male hired to fill the new position was paid more, in part because of education and experience, but also because his salary represented the market rate for the position in question. The court agreed and held that the pay

<sup>143</sup> *Boriss v. Addison Farmers Ins. Co.*, No. 91 C 3144, 1993 U.S. Dist. LEXIS 10331 at \*27 (N.D. Ill. July 27, 1993).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Warren v. Solo Cup Co.*, 516 F.3d 627 (7th Cir. 2008); see *Lauderdale v. Ill. Dep’t of Human Servs.*, 210 F. Supp. 3d 1012, 1019 (C.D. Ill. 2016) (“[T]he EPA’s fourth affirmative defense is a broad catch-all exception that embraces an almost limitless number of factors, as long as they do not involve sex.”); see also *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994).

<sup>147</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

<sup>148</sup> *Id.* at 233.

<sup>149</sup> See *Brokaw v. Weiser Sec. Servs., Inc.*, 780 F. Supp. 2d 1233, 1252 (S.D. Ala. 2011).

<sup>150</sup> *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685 (7th Cir. 2006).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

disparity was due to factors other than sex, including education, experience, and “the market forces at the time of [his] hire.”<sup>154</sup> The court noted that it previously “held that an employer may take into account market forces when determining the salary of an employee,”<sup>155</sup> although cautioning in a footnote against employers taking advantage of market forces to justify discrimination.

Similarly, the Third Circuit, in the case of *Hodgson v. Robert Hall Clothes*,<sup>156</sup> found that the employer was justified in paying the female workers less than the male workers because the “economic benefits to the employer justified a wage differential even where the men and women were performing the same task.”<sup>157</sup> In *Hodgson*, the court compared the higher wages of male salespeople working in the men’s department of a store with the lower wages being paid to female salespeople working in the ladies’ department.

In finding for the employer, the court based its decision on the fact that the men’s department was more profitable than the ladies’ department even though the products sold by the women were of lesser quality and cost less than the goods sold in the men’s department. It concluded, “[w]ithout a more definite indication from Congress, it would not seem wise to impose the economic burden of higher compensation on employers. It could serve to weaken their competitive position.”<sup>158</sup>

Some courts hold that it is acceptable for an employer to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by the male workers. In addition, employers can successfully justify paying a male employer more if the higher salary is a business tactic to lure or retain an employee.

In *Drury v. Waterfront Media, Incorporated*,<sup>159</sup> the plaintiff was hired as the Director of Project Management—responsible for organizing and managing all corporate projects—at a salary of \$85,000 with an annual bonus of \$15,000 and \$25,000 in stock options (in her previous position, she had earned \$85,000).<sup>160</sup> Over a year later she was promoted to Vice-President of Production and Operations with a salary of \$95,000 and a bonus potential of \$20,000.<sup>161</sup>

However, another vice-president (for customer service) was paid \$110,000 with the possibility of a \$25,000 bonus and \$50,000 in stock options. This difference was the basis of the plaintiff’s equal pay claim. In asserting its affirmative defense, the employer claimed that it was forced to pay the male vice-president more, not based on any sex-based wage differential but in order to lure him away from his prior employer. The court agreed and held that “salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as a “factor other than sex.”<sup>162</sup>

<sup>154</sup>*Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 698 (7th Cir. 2006).

<sup>155</sup>*Id.* at 697.

<sup>156</sup>*Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973).

<sup>157</sup>*Id.* (In addition, women were not allowed to apply to work in the men’s department in this case.)

<sup>158</sup>*Id.* at 596.

<sup>159</sup>*Drury v. Waterfront Media, Inc.*, 05 Civ. 10646 (JSR), 2007 U.S. Dist. LEXIS 18435 (S.D.N.Y. Mar. 8, 2007).

<sup>160</sup>*Id.*

<sup>161</sup>*Id.*

<sup>162</sup>*Drury v. Waterfront Media, Inc.*, 05 Civ. 10646 (JSR), 2007 U.S. Dist. LEXIS 18435 (S.D.N.Y. Mar. 8, 2007).

The same conclusion was reached in *Glunt v. GES Exposition Services*,<sup>163</sup> where the plaintiff brought a claim that her employer violated the EPA in two ways. First, she alleged that in her capacity as a project coordinator she was paid less than three male co-workers while performing essentially the same function. Second, she alleged that after being promoted to account executive, her employer failed to raise her salary to a level parallel to the starting salaries of the three male account executives. The court found that in each case, factors other than sex justified the employer paying Glunt less than her similarly situated male co-workers.

In its decision, the court noted that “offering a higher starting salary in order to induce a candidate to accept the employer’s offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity.”<sup>164</sup> Furthermore, “prior salary may be one of several gender-neutral factors employed in setting the higher salary of a male coming in from the outside.”<sup>165</sup> In cases where a male employee is transferred or reassigned, “it is widely recognized that an employer may continue to pay [a transferred or reassigned employee] his or her previous higher wage without violating the EPA, even though the current work may not justify the higher wage.”<sup>166</sup>

Several other court decisions have similarly upheld such pay disparities. In *Horner v. Mary Institute*,<sup>167</sup> the Eighth Circuit allowed a private school to justify paying a male teacher it wanted to hire from the outside more pay because such payment was necessary to secure him for the position. In *Engelmann v. NBC*,<sup>168</sup> the court found that “salary matching” was a valid defense to pay disparity. In *Sobol v. Kidder, Peabody & Company*,<sup>169</sup> the court held that a pay disparity is permissible when an employer paid males more as a “premium to attract and hire talented new bankers.”<sup>170</sup>

Finally, in *Kouba v. Allstate Insurance Company*,<sup>171</sup> and *Wernsing v. Department of Human Services*,<sup>172</sup> the courts allowed the employer to use prior salaries as a justifiable “factor other than sex.” In *Kouba*, the Ninth Circuit found that the employer had shown that the prior salary at issue corresponded roughly to “the employee’s ability . . . and predict[ed] a new employee’s performance as a sales agent,” while in *Wernsing*, the Seventh Circuit upheld the policy of the Illinois Department of Human Services that based its salary levels on prior earnings.

In all of these cases, the courts essentially relied upon “market forces” or “prior pay” arguments for pay differentials between men and women without requiring further evidence of the nature of that market force. Such evidence might include, for example, evidence

<sup>163</sup> *Glunt v. GES Exposition Servs.*, 123 F. Supp. 2d 847 (D. Md. 2000).

<sup>164</sup> *Id.* at 859.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Horner v. Mary Inst.*, 613 F.2d 706 (8th Cir. 1980).

<sup>168</sup> *Engelmann v. Nat’l Broad. Co.*, 94 Civ. 5616 (MBM), 1996 U.S. Dist. LEXIS 1865 (S.D.N.Y. Feb. 22, 1996).

<sup>169</sup> *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208, 220 (S.D.N.Y. 1999).

<sup>170</sup> *Id.*

<sup>171</sup> *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

<sup>172</sup> *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005); see also *Lauderdale v. Ill. Dep’t of Human Servs.*, 210 F. Supp. 3d 1012, 1018 (C.D. Ill. 2016) (finding that, “it is not the [court’s] role to determine an appropriate standard for what is an ‘acceptable’ business practice . . . [t]he statute asks whether the employer has a reason other than sex—not whether it has a ‘good’ reason.”).

that women's earnings in a given position are not frequently or consistently lower than men's, thereby demonstrating that the lower salary offered to a woman at hiring did not piggy-back on a sex-based differential. In some cases, "[m]arket forces may be a legitimate basis for determining pay, market forces tainted with sex discrimination are not."<sup>173</sup> The broadly remedial purpose of the EPA is undermined where a seemingly gender-neutral excuse for unequal pay between similarly situated employees of the opposite sex is based on or derived from a sex-based differential.

While the EPA affords employers opportunities to defend their practices, as previously explained, the "factor other than sex" defense under the EPA has been interpreted by the courts so broadly that nearly any explanation for a wage differential is acceptable.<sup>174</sup> This is one of the main loopholes found in the EPA that has perpetuated the gender-wage gap, and which the *Paycheck Fairness Act* resolves.

*Business Necessity.* Under Title VII, in order to justify an employment practice that has the effect of discriminating against an employee on the basis of race, color, religion, national origin, or sex (i.e., a disparate impact case), an employer must assert that the practice is consistent with business necessity. Like a disparate impact case under Title VII, cases brought under the EPA do not require a showing of intent. So, just as a practice (which includes the payment of wages) that may be "fair in form but discriminatory in operation"<sup>175</sup> is prohibited under Title VII, the same is true with regard to the EPA.

Both Title VII and the EPA afford the employer opportunities to defend their practices, but as previously explained, the "factor other than sex" defense under the EPA has been interpreted by the courts so broadly that nearly any explanation for a wage differential is acceptable. This is one of the main reasons that the EPA is ineffective.<sup>176</sup>

The business necessity defense originated in the case of *Griggs v. Duke Power Company*,<sup>177</sup> decided in 1975. In that case, the Supreme Court determined that an employment practice that resulted in the exclusion of Black employees from certain jobs could only be justified in the case of "business necessity."<sup>178</sup> However, because the Court also introduced the concept of "job relatedness," and it appeared to use the two concepts interchangeably, there was some confusion over the years as to what the correct standard should be.<sup>179</sup> This culminated in the case of *Wards Cove Packing Company, Incorporated, et al. v. Antonio et al.*,<sup>180</sup> where the Court abandoned the concept of business necessity altogether:

[T]he dispositive issue is whether a challenged practice serves, in a significant way the legitimate employment goals of the employer [citations omitted]. The touchstone of this inquiry is a reasoned review of the employer's jus-

<sup>173</sup> H.R. Rep. No. 110-783, at 28 (2008) (internal citations and quotations omitted).

<sup>174</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

<sup>175</sup> *Griggs v. Duke Power*, 515 F.2d 86 (4th Cir. 1975).

<sup>176</sup> H.R. Rep. No. 110-783 at 12 (2008) (internal citations and quotations omitted).

<sup>177</sup> *Griggs v. Duke Power*, 401 U.S. 424 (1971).

<sup>178</sup> *Id.* at 431.

<sup>179</sup> See Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 Utah L. Rev. 1353, 1371-72 (1994).

<sup>180</sup> *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

tification for his use of the challenged practice. A mere insubstantial justification will not suffice . . . [a]t the same time, though, there is no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business.<sup>181</sup>

Congress responded with the passage of the *Civil Rights Act of 1991*, which overturned *Wards Cove Packing* and enshrined the business necessity defense into law in Title VII cases of disparate impact.<sup>182</sup> Subsequent cases applying the business necessity standard illustrate that the more rigorous showing an employer must make to justify disparate treatment furthers the remedial purposes of Title VII.<sup>183</sup>

*The Paycheck Fairness Act* strengthens the EPA by insisting that the “factor other than sex” defense be limited to a legitimate business purpose.<sup>184</sup> Requiring an employer to show that a job is consistent with business necessity applies a term that is already specifically defined in civil rights law and thereby provides workers and employers with a known legal standard for assessing pay disparities.<sup>185</sup>

#### *Class actions*

The EPA requires plaintiffs to affirmatively “opt-in” to a collective action.<sup>186</sup> This is contrary to other employment discrimination laws, which allow women with a pay discrimination claim within a certified class to “opt-out” of a multiple-claim case pursuant to Rule 23 of the Federal Rules of Civil Procedure.<sup>187</sup> Title VII, for example, provides for claimants to “opt-out” of multi-party claims.<sup>188</sup>

The current EPA rule excludes women who may not be aware they have a claim and also excludes women who may even be aware they have a claim but are afraid that they will be retaliated against in the workplace if they affirmatively opt-in. H.R. 7 puts claimants under the EPA in the same position as other victims of discrimination who automatically become part of a class-action unless they affirmatively opt-out of the class.<sup>189</sup>

#### *Damages*

Damages under the EPA are limited to backpay and liquidated damages in the form of double back pay. No compensatory or punitive damages are available under the EPA, and liquidated damages may only be recovered if the employer fails to demonstrate good faith and reasonable grounds for believing it complied with the law.<sup>190</sup> By contrast, claims for discrimination based on race and national origin under Title VII permit successful complainants to recover compensatory and punitive damages, except that damages for gender based discrimination under Title VII are capped and cannot

<sup>181</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

<sup>182</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071.

<sup>183</sup> *Lanning v. SEPTA*, 308 F.3d 286 (3d. Cir. 2002); see also *United States v. Delaware*, Civ. A. No. 01-020-KAJ, 2004 U.S. Dist. LEXIS 4560 (D. Del. March 22, 2004).

<sup>184</sup> Yang Testimony at 8.

<sup>185</sup> H.R. Rep. No. 110-783 at 12 (2008) (internal citations and quotations omitted).

<sup>186</sup> Class-action lawsuits filed under the EPA are called collective actions because plaintiffs must “opt-in” in order to participate.

<sup>187</sup> Yang Testimony at 13.

<sup>188</sup> 42 U.S.C. § 2000e-2(n).

<sup>189</sup> Goss Graves Testimony at 14.

<sup>190</sup> 29 U.S.C. § 260.

exceed \$300,000.<sup>191</sup> Caps under EPA and Title VII have created a two-tiered system that prioritizes remedies for wage discrimination based upon race and national origin over gender-based wage discrimination. The lack of punitive or compensatory damages, as well as caps on damages, does little to further the actual purpose of punitive damages, which is to punish the defendant and deter future misconduct by the defendant and others similarly situated.<sup>192</sup>

“These limitations on remedies not only deprive women subjected to wage discrimination of full relief—they also substantially limit the deterrent effect of the *Equal Pay Act*.”<sup>193</sup> Fatima Goss Graves, testifying at the Joint Subcommittee Hearing, explained:

Limited remedies and damages caps mean that employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure. Arbitrary limits on damages also encourage employers to frame the discrimination faced by women of color as only sex-based, and therefore subject to limitations—ignoring the complex nature of the discrimination employees have suffered.<sup>194</sup>

*The Paycheck Fairness Act* provides for uncapped damages under the EPA so that damages for discrimination based upon sex are consistent with damages for discrimination based upon race and national origin.

The injustice of capped damages is illustrated in *Brady v. Wal-Mart Stores, Incorporated*.<sup>195</sup> In this case, the plaintiff Patrick Brady brought a suit against Wal-Mart and the store manager, alleging violations of the *Americans with Disabilities Act of 1990* (ADA) and the New York Human Rights Law. In his suit, Brady, who has cerebral palsy, claimed Wal-Mart subjected him to adverse work conditions and a hostile work environment based on his disability. The jury agreed with Brady and awarded him a settlement for back pay and emotional pain and suffering, as well as a \$5 million award in punitive damages. Unfortunately, the ADA’s remedies are capped, and the judge was required to reduce the award to \$300,000.<sup>196</sup> In his opinion, Judge Orenstein stated that his ruling “respects the law, but it does not achieve a just result,”<sup>197</sup> especially for one of the biggest companies in America.<sup>198</sup>

Punitive damages, especially uncapped punitive damages, are necessary to deter unscrupulous businesses from harming workers

<sup>191</sup> 42 U.S.C. § 1981a (Section 1981 of the *Civil Rights Act of 1866*, forbids discrimination on the basis of race or national origin in the making and enforcement of contracts. Plaintiffs in Section 1981 cases may recover compensatory and punitive damages. However, unlike gender discrimination claims under Title VII, damages sought pursuant to Section 1981 are not limited.).

<sup>192</sup> Vanessa Ruggles, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 Conn. Pub. Interest L.J. 143, 147 (2006); see also *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (noting that “deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages.”).

<sup>193</sup> Goss Graves Testimony at 15.

<sup>194</sup> *Id.*

<sup>195</sup> *Brady v. Wal-Mart Stores, Inc.*, CV 03–3843 (JO), 2005 U.S. Dist. LEXIS 12151 ( E.D.N.Y. June 21, 2005).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at \*10.

<sup>198</sup> *Id.*

and consumers to gain a competitive advantage.<sup>199</sup> Often, without punitive damages, a business may treat its labor violations as merely a cost of doing business.

There is precedent for uncapped damages against employers who discriminate;<sup>200</sup> damages awarded under Section 1981 for race or national origin discrimination are not subject to statutory limitations.

Still, even in those cases, courts generally do not award unjustifiable or excessive damages and instead base relief upon sound factors, such as the willfulness or egregiousness of the violation<sup>201</sup> and the effectiveness of damages as a deterrent.<sup>202</sup> Because decisions are made by each court on a case by case basis, courts can strike the needed balance between assessing damages based upon particular facts and circumstances and assessing the severity of the discrimination.<sup>203</sup> The *Paycheck Fairness Act* provides for uncapped damages in order to strengthen the EPA as a vehicle for addressing unlawful pay disparities. Longstanding judicial discretion under Section 1981 directly addresses and alleviates concerns about frivolous and excessive claims for relief.<sup>204</sup>

#### *Retaliation for discussing or disclosing salary information*

The EPA does not explicitly protect employees who discuss or disclose salary information. As previously noted, many employers discourage and may even have workplace policies against sharing salary information among coworkers. This makes it extremely difficult to detect pay discrimination. For example, in *Ledbetter v. Goodyear Tire*,<sup>205</sup> the plaintiff didn't discover that she was paid less than her male co-workers for years; company policy had prohibited her from discussing her pay with her co-workers. The only reason she discovered the pay discrimination was because someone sent her an anonymous note.<sup>206</sup>

As Fatima Goss-Graves testified at the Joint Subcommittee Hearing:

[A]ccording to the most recent data available, about 60 percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.<sup>207</sup> As a result, employees face significant obstacles in gathering the information that would suggest that they have experienced pay discrimination, which undermines their ability to challenge such dis-

<sup>199</sup>Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 12 (1992).

<sup>200</sup>42 U.S.C. § 1981.

<sup>201</sup>*See Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir. 1987) (finding that it is improper to award punitive damages in the absence of evidence of egregious conduct, willfulness, or malice on the part of the employer).

<sup>202</sup>*See Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004) (finding that the employer's discriminatory act was minor and quickly remedied; reducing the punitive award amount; reasoning that a higher penalty would remove the monetary incentive to remedy minor violations).

<sup>203</sup>*Id.*

<sup>204</sup>*See Jones v. W. Geophysical Co.*, 761 F.2d 1158 (5th Cir. 1985) (finding that an employer engaged in racial discrimination need not pay punitive damages to plaintiff if said employer is taking steps to eliminate discrimination, and if evidence against employer is, at times, ambiguous and does not necessarily lead to the conclusion that the employer behaved maliciously in practice of racial discrimination).

<sup>205</sup>*Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162 (2007).

<sup>206</sup>*Id.*

<sup>207</sup>*See* Institute for Women's Policy Research, *Pay Secrecy and Wage Discrimination 1* (2014), [https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20\(1\).pdf](https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20(1).pdf).

crimination. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized.<sup>208</sup>

Employers are prohibited from retaliating against employees who seek to assert their rights under the FLSA. This protection extends to women claiming an EPA violation who have filed, instituted, initiated, or participated in any capacity in a proceeding under or related to the FLSA.<sup>209</sup> However, in some cases interpreting the anti-retaliatory provision,<sup>210</sup> courts have limited the protection afforded by the anti-retaliation provision, particularly denying protection when they find that an aggrieved worker has not stepped outside her role representing the employer.

For example, in *McKenzie v. Reinberg's Incorporated*,<sup>211</sup> the plaintiff alleged that she was fired in violation of the FLSA's anti-retaliation provision because she questioned whether her employer complied with the overtime provisions of the FLSA. The plaintiff was a personnel director who, as part of her job, monitored compliance with state and federal wage and hour laws. After attending a training on the FLSA, she determined that her employer was likely in violation of the law's overtime provisions. She brought this to her employer's attention and was fired as a result.<sup>212</sup> The court held that because McKenzie merely articulated her concerns about the wage and hour violations with her employer:

[She] did not engage in activity protected under 215(a)(3). To qualify for the protections, the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise, engage in activity that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA.<sup>213</sup>

A key component in eliminating the wage gap is protecting workers who discuss wages or participate in an EPA suit by ensuring that they can do so without fear of reprimand. Even when employers do not have explicit policies "legal or not, workers are expected to keep their lips sealed about their salaries. It's the unwritten law."<sup>214</sup> As one employer advised other employers, "sit down with people, talk to them . . . be clear: it's not OK to talk salary at the office."<sup>215</sup>

H.R. 7 protects the rights of employees to discuss and disclose wage information with each other in the workplace and affirms the rights of workers to disclose this information as part of an employer or government investigation. Its provisions are intended to give robust protection to those employees who act to oppose violations of the EPA, as well as to provide a shield of protection for the kinds of discussions that will allow employees to uncover un-

<sup>208</sup> Goss Graves Testimony at 6.

<sup>209</sup> 29 U.S.C. § 215(a)(3).

<sup>210</sup> *Id.*

<sup>211</sup> *McKenzie v. Reinberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996).

<sup>212</sup> *Id.*; see also *Hagan v. Echostar*, 529 F.3d 617 (2008) (finding that the plaintiff was not protected from termination after participating in activities that were "neither adverse to the company nor supportive of adverse action to the company.>").

<sup>213</sup> *McKenzie v. Reinberg's Inc.*, 94 F.3d 1478, 1487 (10th Cir. 1996).

<sup>214</sup> H.R. Rep. No. 110-783, at 34-35 (2008).

<sup>215</sup> *Id.*

equal pay. However, the Act recognizes that employers may entrust some employees with access to wage information as part of an essential function of their job. These confidential employees will not be protected for disclosing information about wages to those who do not otherwise have access to the information. However, they could: (1) disclose their own wages; (2) disclose wage issues “up the chain” or “horizontally” if they become aware of potential pay discrimination regarding other employees; or (3) disclose wages in response to or in furtherance of an employer or government investigation or other proceeding under H.R. 7.

*Prior salary history*

H.R. 7 provides:

It shall be an unlawful practice for an employer to (1) rely on the wage history of a prospective employee in considering the prospective employee for employment, including requiring that a prospective employee’s prior wages satisfy minimum or maximum criteria as a condition of being considered for employment; (2) rely on the wage history of a prospective employee in determining the wages for such prospective employee, except that an employer may rely on wage history if it is voluntarily provided by a prospective employee, after the employer makes an offer of employment with an offer of compensation to the prospective employee, to support a wage higher than the wage offered by the employer; (3) seek from a prospective employee or any current or former employer the wage history of the prospective employee, except that an employer may seek to confirm prior wage information only after an offer of employment with compensation has been made to the prospective employee and the prospective employee responds to the offer by providing prior wage information to support a wage higher than that offered by the employer.<sup>216</sup>

With this provision, the *Paycheck Fairness Act* prevents employers from seeking or relying on a prospective employee’s wage or salary history that has been sought from the prospective employee or their former employer. The employer can only rely on the prospective employee’s prior wage if it is voluntarily provided by the prospective employee after the employer has made an offer of employment. The employer may seek a prospective (or current) employee’s wage history to confirm prior wage information after the employer has made an employment offer. The Act does not provide for a complete ban on the usage of an individual’s salary history.

H.R. 7’s requirements are similar to other anti-discrimination statutes like the ADA and the *Genetic Information Nondiscrimination Act* (GINA), which have been valuable tools in fighting against other forms of discrimination. The ADA prohibits employers from asking job applicants disability-related questions and forbids employers from relying on disability status in making employment decisions. Similarly, GINA prohibits employers from relying on genetic history when making an employment decision, and it also re-

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<sup>216</sup>H.R. 7, 116th Cong. § 10(a) (2019).

stricts employers' and employment agencies' ability to "request, require, or purchase genetic information" regarding applicants and employees or their family members.<sup>217</sup> Notwithstanding the minority witness' testimony at the February 13, 2019, hearing,<sup>218</sup> it should be noted that the provisions in the Paycheck Fairness Act are analogous to the pre-employment inquiry restrictions in GINA and the ADA. In all three cases, the restrictions on pre-employment inquiries are necessary to advance the government's compelling interest in eliminating unlawful discrimination.

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This section states that the title of the bill is the Paycheck Fairness Act (the Act).

##### *Section 2. Findings*

This section states that despite the enactment of the EPA, gender based-pay disparity still exists and some of the disparity is due to gender-based pay discrimination. Such disparity depresses wages of working families, undermines women's retirement security, negatively impacts commerce and the free flow of goods in commerce, and may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th Amendments to the U.S. Constitution.

Decades after enactment of the FLSA and the *Civil Rights Act of 1964*, barriers to the elimination of sex-based wage discrimination still exist. The EPA has not worked as Congress originally intended, and modifications to the EPA are necessary to ensure protections to those who are subject to gender-based wage discrimination. Elimination of such barriers would solve problems in the economy created by such wage disparity, reduce dependence on public assistance, promote stable families, remedy the effects of past discrimination, and ensure equal protection under the 5th and 14th Amendments.

The Department of Labor and the EEOC have important and unique responsibilities to help ensure that women receive equal pay for equal work. With a stronger commitment by these entities, increased information as a result of the Amendments this Act makes to the EPA, wage data, and more effective remedies, women will be better able to recognize and enforce their rights.

##### *Section 3. Enhanced enforcement of equal pay requirements*

*Bona Fide Factor Defense and Modification of Same Establishment Requirement.* The Act amends the EPA by defining the statute's "any factor other than sex" employer affirmative defense as requiring employers to provide non-gender, business reasons for the difference in wages. The amended language lays out the requirement that to successfully raise this affirmative defense, an employer must demonstrate that the wage disparity is based on a

<sup>217</sup> See Facts about the Genetic Information Nondiscrimination Act, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-gina.cfm> (last visited Mar. 11, 2019).

<sup>218</sup> The Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor, 116th Cong. (2019) (written testimony of Camille A. Olson, Partner at Seyfarth Shaw LLP, at 11).

bona fide factor other than sex, such as education, training, or experience. The differential must be: (1) not based upon or derived from a sex-based differential in compensation; (2) related to the position in question; (3) consistent with business necessity; and (4) fully accounted for in the compensation at issue. Such defense shall not apply if the employee can then demonstrate that her employer has an alternative employment practice that would serve the same business purpose without producing the pay differential, and the employer refused to adopt the alternative practice.

The Act broadens the definition of “establishment” used to compare compensation with the compensation of an employee of the opposite gender who performs substantially equal work. Under the Act, an establishment now includes workplaces located in the same county or similar political subdivision of a state. In addition, the Act allows broader applications of the term “establishment” as long as they are consistent with EEOC.

*Nonretaliation Provision.* The Act protects employees from retaliation for seeking redress, inquiring about an employer’s wage practices, or disclosing their own wages to coworkers. The Act provides that employers are prohibited from retaliating against employees who have made a charge, filed any complaint, or instituted any investigation, proceeding, hearing, or action under the EPA. Employers are also prohibited from requiring an employee to sign a contract or waiver that would prohibit the employee from disclosing their wages. Employees are protected from retaliation for initiating an employer investigation, or for testifying or participating in any sort of investigation, proceeding, hearing, or action. Employees are also protected from inquiries and discussions about each other’s wages.

The Act does not provide anti-retaliation protections to employees with access to wage information of other employees as an essential function of their job if they disclose that wage information to individuals who do not otherwise have access to this information. However, they would be protected if they were disclosing that wage information to someone who also has access to such information, or the disclosure was in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under the EPA, including an internal employer investigation.

*Enhanced Penalties.* The Act provides that uncapped compensatory and punitive damages are available in private EPA suits and suits brought by the Secretary of Labor. The Act provides that class action lawsuits brought under the EPA shall proceed as opt-out class actions in conformity with the Federal Rules of Civil Procedure, rather than the current law requiring plaintiffs to opt-in.

#### *Section 4. Training*

This section requires the EEOC and the OFCCP to provide training to EEOC employees and affected individuals on pay discrimination.

#### *Section 5. Negotiation skills training*

*Program Authorization.* The Act authorizes the Secretary of Labor (after consultation with the U.S. Secretary of Education) to establish and carry out a grant program to provide negotiation skills training programs that aim to address all pay disparities, in-

cluding through outreach to women and girls. Eligible entities apply to the Secretary of Labor to obtain grants. Eligible entities include states, local governments, state or local educational agencies, private nonprofit organizations, or community-based organizations.

*Incorporating Training into Existing Programs.* The Act requires the Secretary of Labor to issue regulation or policy guidance on how it will, to the extent practicable, integrate negotiation skills training into existing education and work training programs, including those authorized under the Elementary and Secondary Education Act, the Carl D. Perkins Career and Technical Education Act, the Higher Education Act, and the Workforce Innovation and Opportunity Act.

*Report.* The Act mandates the Secretary of Labor, in consultation with the U.S. Secretary of Education, to submit an annual report to Congress on the grant program.

*Section 6. Research, education, and outreach*

The Act requires the Secretary of Labor to conduct studies and provide information to employers, labor organizations, and the public on ways to eliminate pay disparities. This includes conducting and promoting research, publishing and making available findings from studies and other materials; sponsoring and assisting state and community informational and educational programs; providing information on the means of eliminating pay disparities; and recognizing and promoting achievements.

*Section 7. Establishment of the National Award for Pay Equity in the Workplace*

The Act establishes an annual award entitled the “Secretary of Labor’s National Award for Pay Equity in the Workplace” for an employer that demonstrates substantial effort in eliminating pay disparities by complying with the EPA. The Secretary of Labor will set the criteria for the award. Eligible employers include corporations (including nonprofit corporations); partnerships; professional associations; labor organizations; and entities carrying out educational referral programs or training programs.

*Section 8. Collection of pay information by the Equal Employment Opportunity Commission*

This section requires the EEOC, within 18 months of enactment, to issue regulations to provide for the collection of compensation data, including hiring, termination, and promotion data, and other employment-related data from employers. This information will be disaggregated by the sex, race and national origin of employees. In collecting this data, the EEOC will consider the most effective and least burdensome means for enforcing the federal laws prohibiting pay discrimination, including the consideration of employer burden.

*Section 9. Reinstatement of pay equity programs and pay equity data collection*

*Bureau of Labor Statistics.* This section requires the continued collection by the Commissioner of Labor Statistics of gender-based data in the Current Employment Statistics survey.

*Office of Federal Contract Compliance Programs.* This section sets standards for the OFCCP in addressing systematic wage discrimination. It requires the OFCCP to use the full range of investigatory tools, including pay grade methodology, in considering evidence of possible compensation discrimination. It does not require the OFCCP to use multiple regression analysis or anecdotal evidence for these cases. It instructs the OFCCP to define similarly situated employees in a way that is consistent with the EEOC Compliance Manual and to consider only factors that were used in making compensation decisions in its enforcement activities. It directs the OFCCP to implement a yearly survey to collect compensation and other employment-related data. Finally, it directs the Secretary of Labor to distribute information and statistics to the public on wage discrimination.

*Section 10. Prohibitions relating to prospective employees' salary and benefit history*

This section makes it unlawful for employers to use wage history to decide whether to hire a prospective employee. Employers are prohibited from relying on or seeking a prospective employee's wage history to determine their wages. The employer can only rely on the prospective employee's prior wage if the employee voluntarily provides it after the employer makes an employment offer. Similarly, the employer may only seek a prospective employee's wage history to confirm prior wage information. The employer can obtain this information only after an employment offer (with compensation) has been made, and the employee responded by volunteering the prior wage information. An employer may not retaliate against an employee or prospective employee who has filed a complaint regarding the use of the salary history. Employers who violate this provision are subject to civil penalties.

*Section 11. Authorization of appropriations*

This section authorizes such sums as may be necessary to carry out the Act.

*Section 12. Small business assistance*

*Effective Date.* This section states that the Act and amendments made by the Act will take effect six months after the date of enactment.

*Small Business.* This section also requires the Secretary of Labor and the EEOC to jointly develop technical assistance materials to assist small businesses in complying with the Act. It further clarifies that to the extent small businesses are exempt from the FLSA, they will also be exempt from the Act.

*Section 13. Rule of construction*

This section states that nothing in the Act will affect the obligation of employers and employees to fully comply with all applicable immigration laws.

*Section 14. Severability*

This section adds a standard severability clause.

## EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the descriptive portions of this report.

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act*, Pub. L. No. 104-1, H.R. 7, as amended, applies to terms and conditions of employment within the legislative branch by amending the EPA and the FLSA.

## UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act* (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act*, Pub. L. No. 104-4) the Committee adopts as its own the estimate of and statement regarding federal mandates in H.R. 7, as amended, prepared by the Director of the Congressional Budget Office.

## EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 7 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

## ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 7:

Date: 2/26/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 1

Bill: H.R. 7

Amendment Number: 2

Disposition: Defeated by a vote of 21-25

Sponsor/Amendment: Byrne/to limit attorney fees in contingency fee cases to no more than 15%

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)			X	Mr. ROE (TN)	X		
Mr. GRUJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)			X	Mr. GUTHRIE (KY)	X		
Mr. SABLAN (MP)		X		Mr. BYRNE (AL)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. ROONEY (FL)			X
Mr. DESAULNIER (CA)			X*	Mr. SMUCKER (PA)	X		
Mr. NORCROSS (NJ)		X		Mr. BANKS (IN)	X		
Ms. JAYAPAL (WA)		X		Mr. WALKER (NC)	X		
Mr. MORELLE (NY)		X		Mr. COMER (KY)	X		
Ms. WILD (PA)		X		Mr. CLINE (VA)	X		
Mr. HARDER (CA)		X		Mr. FULCHER (ID)	X		
Mrs. MCBATH (GA)		X		Mr. TAYLOR (TX)	X		
Ms. SCHRIER (WA)		X		Mr. WATKINS (KS)	X		
Ms. UNDERWOOD (IL)		X		Mr. WRIGHT (TX)	X		
Mrs. HAYES (CT)		X		Mr. MEUSER (PA)	X		
Ms. SHALALA (FL)		X		Mr. TIMMONS (SC)	X		
Mr. LEVIN (MI)		X		Mr. JOHNSON (SD)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)		X					
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 21

Nos: 25

Not Voting: 4

Total: 50 / Quorum: 26 / Report:

(28 D - 22 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 2/26/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 2

Bill: H.R. 7

Amendment Number: 3

Disposition: Defeated by a vote of 20-25

Sponsor/Amendment: Allen/directs the Secretary to study the effects on recruitment, hiring, and promotions under the requirements of section 3

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)			X	Mr. ROE (TN)	X		
Mr. GRIJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)			X	Mr. GUTHRIE (KY)	X		
Mr. SABLAN (MP)		X		Mr. BYRNE (AL)			X
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. ROONEY (FL)			X
Mr. DESAULNIER (CA)		X		Mr. SMUCKER (PA)	X		
Mr. NORCROSS (NJ)		X		Mr. BANKS (IN)	X		
Ms. JAYAPAL (WA)		X		Mr. WALKER (NC)	X		
Mr. MORELLE (NY)		X		Mr. COMER (KY)	X		
Ms. WILD (PA)		X		Mr. CLINE (VA)	X		
Mr. HARDER (CA)		X		Mr. FULCHER (ID)	X		
Mrs. MCBATH (GA)		X		Mr. TAYLOR (TX)	X		
Ms. SCHRIER (WA)		X		Mr. WATKINS (KS)	X		
Ms. UNDERWOOD (IL)		X		Mr. WRIGHT (TX)	X		
Mrs. HAYES (CT)		X		Mr. MEUSER (PA)	X		
Ms. SHALALA (FL)		X		Mr. TIMMONS (SC)	X		
Mr. LEVIN (MI)		X		Mr. JOHNSON (SD)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)			X*				
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 20

Nos: 25

Not Voting: 5

Total: 50 / Quorum: 26 / Report:

(28 D - 22 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 2/26/2019

## COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 3

Bill: H.R. 7

Amendment Number: 4

Disposition: Defeated by a vote of 19-26

Sponsor/Amendment: Byrne/ replaces "bona fide business-related factor defense" with "business-related reasons"

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)			X	Mr. ROE (TN)	X		
Mr. GRIJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)		X		Mr. GUTHRIE (KY)	X		
Mr. SABLAN (MP)		X		Mr. BYRNE (AL)			X
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. ROONEY (FL)			X
Mr. DESAULNIER (CA)		X		Mr. SMUCKER (PA)	X		
Mr. NORCROSS (NJ)		X		Mr. BANKS (IN)	X		
Ms. JAYAPAL (WA)		X		Mr. WALKER (NC)	X		
Mr. MORELLE (NY)		X		Mr. COMER (KY)	X		
Ms. WILD (PA)		X		Mr. CLINE (VA)	X		
Mr. HARDER (CA)		X		Mr. FULCHER (ID)	X		
Mrs. MCBATH (GA)		X		Mr. TAYLOR (TX)	X		
Ms. SCHRIER (WA)		X		Mr. WATKINS (KS)	X		
Ms. UNDERWOOD (IL)		X		Mr. WRIGHT (TX)			X^
Mrs. HAYES (CT)		X		Mr. MEUSER (PA)	X		
Ms. SHALALA (FL)		X		Mr. TIMMONS (SC)	X		
Mr. LEVIN (MI)		X		Mr. JOHNSON (SD)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)			X*				
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 19

Nos: 26

Not Voting: 5

Total: 50 / Quorum: 26 / Report:

(28 D - 22 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 2/26/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 4

Bill: H.R. 7

Amendment Number: 5

Disposition: Defeated by a vote of 18-27

Sponsor/Amendment: Foxx/to strike section 8

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mrs. DAVIS (CA)			X	Mr. ROE (TN)	X		
Mr. GRIJALVA (AZ)		X		Mr. THOMPSON (PA)	X		
Mr. COURNTEY (CT)		X		Mr. WALBERG (MI)	X		
Ms. FUDGE (OH)		X		Mr. GUTHRIE (KY)	X		
Mr. SABLAN (MP)		X		Mr. BYRNE (AL)			X
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)			X
Ms. ADAMS (NC)		X		Mr. ROONEY (FL)			X
Mr. DESAULNIER (CA)		X		Mr. SMUCKER (PA)	X		
Mr. NORCROSS (NJ)		X		Mr. BANKS (IN)	X		
Ms. JAYAPAL (WA)		X		Mr. WALKER (NC)	X		
Mr. MORELLE (NY)		X		Mr. COMER (KY)	X		
Ms. WILD (PA)		X		Mr. CLINE (VA)	X		
Mr. HARDER (CA)		X		Mr. FULCHER (ID)	X		
Mrs. MCBATH (GA)		X		Mr. TAYLOR (TX)	X		
Ms. SCHRIER (WA)		X		Mr. WATKINS (KS)	X		
Ms. UNDERWOOD (IL)		X		Mr. WRIGHT (TX)			X <sup>^</sup>
Mrs. HAYES (CT)		X		Mr. MEUSER (PA)	X		
Ms. SHALALA (FL)		X		Mr. TIMMONS (SC)	X		
Mr. LEVIN (MI)		X		Mr. JOHNSON (SD)	X		
Ms. OMAR (MN)		X					
Mr. TRONE (MD)		X					
Ms. STEVENS (MI)		X					
Mrs. LEE (NV)		X					
Mrs. TRAHAN (MA)		X					
Mr. CASTRO (TX)		X					

TOTALS: Ayes: 18

Nos: 27

Not Voting: 5

Total: 50 / Quorum: 26 / Report:

(28 D - 22 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 2/26/2019

**COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE**

Roll Call: 5

Bill: H.R. 7

Amendment Number: Motion

Disposition: Agreed to by a vote of 27-19

Sponsor/Amendment: Bonamici/to report to the House with amendment and with the recommendation

that the amendment be agreed to, and the bill as amended, do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mrs. DAVIS (CA)			X	Mr. ROE (TN)		X	
Mr. GRIJALVA (AZ)	X			Mr. THOMPSON (PA)		X	
Mr. COURNTEY (CT)	X			Mr. WALBERG (MI)		X	
Ms. FUDGE (OH)	X			Mr. GUTHRIE (KY)		X	
Mr. SABLAN (MP)	X			Mr. BYRNE (AL)			X
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)		X	
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)		X	
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)			X*
Ms. ADAMS (NC)	X			Mr. ROONEY (FL)			X
Mr. DESAULNIER (CA)	X			Mr. SMUCKER (PA)		X	
Mr. NORCROSS (NJ)	X			Mr. BANKS (IN)		X	
Ms. JAYAPAL (WA)	X			Mr. WALKER (NC)		X	
Mr. MORELLE (NY)	X			Mr. COMER (KY)		X	
Ms. WILD (PA)	X			Mr. CLINE (VA)		X	
Mr. HARDER (CA)	X			Mr. FULCHER (ID)		X	
Mrs. MCBATH (GA)	X			Mr. TAYLOR (TX)		X	
Ms. SCHRIER (WA)	X			Mr. WATKINS (KS)		X	
Ms. UNDERWOOD (IL)	X			Mr. WRIGHT (TX)		X	
Mrs. HAYES (CT)	X			Mr. MEUSER (PA)		X	
Ms. SHALALA (FL)	X			Mr. TIMMONS (SC)		X	
Mr. LEVIN (MI)	X			Mr. JOHNSON (SD)		X	
Ms. OMAR (MN)	X						
Mr. TRONE (MD)	X						
Ms. STEVENS (MI)	X						
Mrs. LEE (NV)	X						
Mrs. TRAHAN (MA)	X						
Mr. CASTRO (TX)	X						

TOTALS: Ayes: 27

Nos: 19

Not Voting: 4

Total: 50 / Quorum: 26 / Report:

(28 D - 22 R)

\*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

\*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

## STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, H.R. 7 would strengthen current law in an effort to close the gender pay gap and provide more effective remedies to victims of discrimination in the payment of wages on the basis of gender.

## DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 7 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## HEARINGS

Pursuant to section 103(i) of H. Res. 6 for the 116th Congress, the Committee held a legislative hearing entitled “*Paycheck Fairness Act* (H.R. 7): Equal Pay for Equal Work,” which was used to consider H.R. 7. The Committee heard testimony on: wage discrimination on the basis of gender; how weaknesses in current law have made it difficult to prevent gender-based wage discrimination; and remedies that would provide more effective relief to victims of discrimination on the basis of gender. The Committee heard testimony from: Congresswoman DeLauro; Congresswoman Holmes Norton; Congressman Beyer; Fatima Goss Graves, CEO and President of the National Women’s Law Center; Camille A. Olson, Partner at Seyfarth Shaw, LLP; Kristin Rowe-Finkbeiner, CEO of Moms Rising; and Jenny Yang, former EEOC Chair and Partner of Working Ideal.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the following estimate for H.R. 7 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, DC, March 12, 2019.

Hon. ROBERT C. "BOBBY" SCOTT,  
Chairman, Committee on Education and Labor,  
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 7, the Paycheck Fairness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Meredith Decker.

Sincerely,

KEITH HALL,  
Director.

Enclosure.

<b>H.R. 7, Paycheck Fairness Act</b>				
As ordered reported by the House Committee on Education and Labor on February 26, 2019				
Millions of Dollars	Direct Spending	Revenues	Deficit Effect	Spending Subject to Appropriation
2019	0	0	0	0
2019-2024	0	*	*	68
2019-2029	0	*	*	n.a.
Pay-as-you-go procedures apply?	Yes	<b>Mandate Effects</b>		
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	Yes, Under Threshold	
		Contains private-sector mandate?	Yes, Under Threshold	
n.a. = not applicable; * = between -\$500,000 and \$500,000.				
<b>The bill would</b>				
<ul style="list-style-type: none"> <li>Amend federal statutes governing labor standards and wage discrimination</li> <li>Increase civil penalties for violations of equal pay provisions</li> <li>Authorize appropriations for research, education, public outreach, and data collection</li> <li>Impose mandates by restricting employers' use of wage, salary, and benefit history</li> </ul>				
<b>Estimated budgetary effects would primarily stem from</b>				
<ul style="list-style-type: none"> <li>Authorizing appropriations for the Department of Labor and the Equal Employment Opportunity Commission to undertake various activities to address wage discrimination</li> </ul>				
Detailed estimate begins on the next page.				

Bill summary: H.R. 7 would revise the equal pay provisions of the Fair Labor Standards Act and increase civil penalties for their violation. That law prohibits wage discrimination by employers on the basis of sex. Specifically, H.R. 7 would restrict the use of the bona fide factor defense to wage discrimination claims, enhance nonretaliation prohibitions, and prohibit contracts that disallow employees from disclosing their wages. Additionally, the bill would increase civil penalties for violations of wage discrimination provi-

sions. Finally, the bill would authorize the appropriation of whatever amounts are necessary for the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) to conduct various activities to address wage discrimination.

Estimated Federal cost: The estimated budgetary effects of H.R. 7 are detailed in Table 1. The costs of the legislation fall within budget functions 500 (education, training, employment, and social services) and 750 (administration of justice).

TABLE 1—ESTIMATED INCREASES IN SPENDING SUBJECT TO APPROPRIATION UNDER H.R. 7

	By fiscal year, millions of dollars—						2019–2024
	2019	2020	2021	2022	2023	2024	
Department of Labor:							
Estimated Authorization .....	0	10	10	10	10	10	50
Estimated Outlays .....	0	8	8	9	9	10	44
Equal Employment Opportunity Commission:							
Estimated Authorization .....	0	5	5	5	5	5	25
Estimated Outlays .....	0	4	5	5	5	5	24
Total Changes:							
Estimated Authorization .....	0	15	15	15	15	15	75
Estimated Outlays .....	0	12	13	14	14	15	68

Enacting the bill also would increase revenues by an insignificant amount over the 2019–2029 period.

Basis of estimate: CBO assumes that the bill will be enacted early in 2020 and that the estimated amounts will be appropriated for each fiscal year. Estimated outlays are based on historical patterns for existing and similar activities. CBO estimates that under H.R. 7, DOL and the EEOC would need appropriations of \$75 million over the 2019–2024 period, and that those appropriations would result in outlays of \$68 million over the same period.

H.R. 7 would authorize DOL to undertake several activities related to wage discrimination. Based on similar programs within the Women’s Bureau in DOL, programs in the Office of Federal Contract Compliance, and information from the department CBO estimates that implementing the following measures would result in outlays of \$44 million over the 2019–2024 period, assuming appropriation of estimated amounts. Those activities include:

- Surveying and collecting certain employment-related data from federal contractors (\$15 million),
- Making competitive grants to state, local, and community organizations to provide women and girls with training in negotiation skills (\$11 million),
- Conducting research, publishing educational materials, and sponsoring educational programs about wage discrimination (\$8 million),
- Training affected individuals and providing technical assistance to help small businesses comply with the act (\$6 million); and
- Establishing an annual National Award for Pay Equity in the Workplace (\$4 million).

H.R. 7 also would direct the EEOC to provide training on wage discrimination issues and assist small businesses in complying with the bill’s requirements. CBO estimates those efforts would cost \$5 million a year over the 2019–2024 period.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures

for legislation affecting direct spending or revenues. CBO estimates that enacting H.R. 7 would increase federal revenues from the collection of new civil penalties. However, we estimate that such collections would be insignificant because of the small number of cases that the EEOC would likely resolve and because of the high degree of uncertainty about how employers would behave under the bill.

Increase in long-term direct spending and deficits: None

Mandates: CBO has not reviewed section 3 of H.R. 7 for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that would establish or enforce statutory rights prohibiting discrimination. CBO has determined that the exclusion applies because section 3 would enforce protections against discrimination on the basis of sex.

Other provisions in H.R. 7 would impose intergovernmental and private-sector mandates as defined in UMRA by restricting employers' use of wage, salary, and benefit history. Specifically, under section 10 public and private employers could not:

- Rely on wage history in considering a person for employment,
- Rely on wage history in determining wages for a prospective employee,
- Seek the wage history of any prospective employee before an offer of employment is made, and
- Retaliate against employees who exercise their right to protections under section 10.

Those restrictions would not require covered employers to take any action and would not impose any direct cost. Therefore, CBO estimates that the cost of complying with the bill's mandates would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$82 million and \$164 million in 2019, respectively, adjusted annually for inflation).

The bill also would require the EEOC to issue regulations requiring large employers to report compensation data. That provision would not impose a mandate on large employers because such information already must be reported. CBO does not consider that provisions that codify existing regulatory practice are mandates because those regulations already carry the force of law.

Estimate prepared by: Federal costs: Department of Labor—Meredith Decker, Equal Employment Opportunity Commission—Mark Grabowicz; Revenues: Bayard Meiser; Mandates: Andrew Laughlin.

Estimate reviewed by: Sheila Dacey, Chief, Income Security and Education; Susan Willie, Chief, Mandates Unit; H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis; Theresa Gullo, Assistant Director for Budget Analysis.

#### COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 7. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Con-

gressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 7, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**FAIR LABOR STANDARDS ACT OF 1938**

\* \* \* \* \*

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) \$5.85 an hour, beginning on the 60th day after the date of enactment of the Fair Minimum Wage Act of 2007;

(B) \$6.55 an hour, beginning 12 months after that 60th day; and

(C) \$7.25 an hour, beginning 24 months after that 60th day;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the propor-

tion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(4) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(d)(1) **[No employer having]** (A) *No employer having* employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on **[any other factor other than sex]** *a bona fide factor other than sex, such as education, training, or experience* : *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(B) *The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates 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; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue. Such defense shall not apply where the employer demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative 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 Employment Opportunity Commission.*

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employees which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime-compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e)(1) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act constitute wages for the purpose of title II of such Act, or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b).  
 (g)(1) In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.

(2) In lieu of the rate prescribed by subsection (a)(1), the Governor of Puerto Rico, subject to the approval of the Financial Oversight and Management Board established pursuant to section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act, may designate a time period not to exceed four years during which employers in Puerto Rico may pay employees who are initially employed after the date of enactment of such Act a wage which is not less than the wage described in paragraph (1). Notwithstanding the time period designated, such wage shall not continue in effect after such Board terminates in accordance with section 209 of such Act.

(3) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1) or (2).

(4) Any employer who violates this subsection shall be considered to have violated section 15(a)(3) (29 U.S.C. 215(a)(3)).

(5) This subsection shall only apply to an employee who has not attained the age of 20 years, except in the case of the wage applicable in Puerto Rico, 25 years, until such time as the Board described in paragraph (2) terminates in accordance with section 209 of the Act described in such paragraph.

#### MAXIMUM HOURS

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes.

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale;

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for

employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to any employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant facts, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the

rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by

him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h)(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period,

the employee receives compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days;

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be ex-

cluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r)(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the

size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

**SEC. 8. REQUIREMENTS AND PROHIBITIONS RELATING TO WAGE, SALARY, AND BENEFIT HISTORY.**

(a) *IN GENERAL.*—It shall be an unlawful practice for an employer to—

(1) *rely on the wage history of a prospective employee in considering the prospective employee for employment, including requiring that a prospective employee's prior wages satisfy minimum or maximum criteria as a condition of being considered for employment;*

(2) *rely on the wage history of a prospective employee in determining the wages for such prospective employee, except that an employer may rely on wage history if it is voluntarily provided by a prospective employee, after the employer makes an offer of employment with an offer of compensation to the prospective employee, to support a wage higher than the wage offered by the employer;*

(3) *seek from a prospective employee or any current or former employer the wage history of the prospective employee, except that an employer may seek to confirm prior wage information only after an offer of employment with compensation has been made to the prospective employee and the prospective employee responds to the offer by providing prior wage information to support a wage higher than that offered by the employer; or*

(4) *discharge or in any other manner retaliate against any employee or prospective employee because the employee or prospective employee—*

(A) *opposed any act or practice made unlawful by this section; or*

(B) *took an action for which discrimination is forbidden under section 15(a)(3).*

(b) *DEFINITION.*—In this section, the term “wage history” means the wages paid to the prospective employee by the prospective employer's current employer or previous employer.

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PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act

shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such [employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;] *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;*

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect[.]; or

*(6) to require an employee to sign a contract or waiver that would prohibit the employee from disclosing information about the employee's wages.*

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

*(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 individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge 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.*

## PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *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, except that the United States shall not be liable for punitive damages.* Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in ~~the preceding sentences~~ *any of the preceding sentences of this subsection* may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. ~~No employees~~ *Except with respect to class actions brought to enforce section 6(d), no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. 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. The court in such action in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action, including expert fees.* The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, or, in the case of a violation of section 6(d), additional compensatory or punitive damages, as described in subsection (b), and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages, or such compensatory or punitive damages, as appropriate. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages and, in the case of a violation of section 6(d), additional compensatory or punitive damages, as described in subsection (b). The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in [the first sentence] *the first or second sentence* of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be [commenced in the case] *commenced—*

(1) *in the case* of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action[.]; or

(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.* The authority and requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any pro-

vision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone, or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 12 or 13(c), relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) \$11,000 for each employee who was the subject of such a violation; or

(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term “serious injury” means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 6 or 7, relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation. Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in

an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 12, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 2 of the Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof and for other purposes" (29 U.S.C. 9a). Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.

*(f)(1) Any person who violates the provisions of section 8 shall—*

*(A) be subject to a civil penalty of \$5,000 for a first offense, increased by an additional \$1,000 for each subsequent offense, not to exceed \$10,000; and*

*(B) be liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed \$10,000 plus attorneys' fees, and shall be subject to such injunctive relief as may be appropriate.*

*(2) An action to recover the liability described in paragraph (1)(B) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees or prospective employees for and on behalf of—*

*(A) the employees or prospective employees; and*

*(B) other employees or prospective employees similarly situated.*

\* \* \* \* \*

**CIVIL RIGHTS ACT OF 1964**

\* \* \* \* \*

**TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY**

\* \* \* \* \*

**INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES**

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwith-

standing any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from

any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

*(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall issue regulations to provide for the collection from employers of compensation data and other employment-related data (including hiring, termination, and promotion data) disaggregated by the sex, race, and national origin of employees.*

*(2) In carrying out 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 reports (including the size of employers required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format to report such data.*

\* \* \* \* \*

## MINORITY VIEWS

### INTRODUCTION

Committee Republicans are united in their belief that equal work should be rewarded with equal pay, irrespective of a worker's sex. Indeed, that very principle has been the law of the land for decades. It is already—as it should be—against federal law to discriminate, in pay or other employment practices, on the basis of sex. Committee Republicans are committed to eliminating unfair and illegal wage disparities that are a product of workplace discrimination to ensure a fair, productive, and competitive workforce.

In 1963, Congress enacted the *Equal Pay Act* (EPA) within the *Fair Labor Standards Act* (FLSA). The EPA makes it illegal to pay different wages to workers of the opposite sex for equal work. One year later, Congress enacted comprehensive anti-discrimination civil rights protection based on race, color, national origin, religion, and sex under Title VII of the *Civil Rights Act*. Together, these laws protect against sex discrimination and provide a range of remedies for victims. In short, the question is not whether sex discrimination in the workplace should be permitted. That question has been answered as Committee Republicans agree that such discrimination should not be tolerated, which is why it is a direct violation of not one but two federal laws.

It is against this backdrop that Committee Republicans reject H.R. 7, the so-called *Paycheck Fairness Act*. Simply put, H.R. 7 does little to protect the wages and paychecks of American workers and does far more to line the pockets of the plaintiffs' trial-lawyer bar. First, the bill dramatically limits and likely eliminates the ability of business owners to defend claims of discrimination based on pay differences that arise from lawful and legitimate business purposes, while radically expanding liability and damages under the EPA. The bill also obstructs the recruitment and hiring process by restricting use of information related to a prospective employee's current compensation. Further, the bill requires a burdensome, intrusive, and unnecessary government collection of questionable utility of worker pay data. The data is broken down by race, sex, and national origin, and raises significant confidentiality and privacy concerns. For these reasons, and as set forth more fully below, Committee Republicans are united in their opposition to H.R. 7.

### CONCERNS WITH H.R. 7

Committee Republicans identify the following as some of the bill's most objectionable provisions:

#### *H.R. 7 Dramatically Limits Legitimate and Lawful Defenses*

H.R. 7 dramatically scales back and likely eliminates a business owner's ability to defend itself from claims of pay discrimination

where disparities arise from wholly lawful business decisions. For example, H.R. 7 strictly limits a business owner’s ability to defend pay differentials that are accounted for by reasons wholly unrelated to a worker’s sex. Under current law, a business owner can defend him or herself from a claim of pay discrimination by proffering evidence and convincing a trier of fact that the differential is based not on sex, but on another factor. H.R. 7 dramatically and unfairly curtails the scope of that defense and requires that a business owner convince a judge or jury, potentially years later, that the reason was required by “business necessity”—essentially putting courts in charge of determining what a business owner must do to avoid going bankrupt. Ms. Camille A. Olson, a partner at Seyfarth Shaw LLP, explained at the only hearing on H.R. 7 why requiring proof of “business necessity” is unworkable:

Business necessity suggests that the very viability of the business is dependent upon the compensation decision. Requiring an employer to prove that a wage differential between two individuals is a business necessity is unworkable. It would require an employer to meet an impossible threshold—to prove that it is a business necessity for the employer to pay one person more than another based on innumerable intangible criteria such as relative levels of education, experience, or job performance. . . . This highly onerous standard would place an unrealistic burden on employers that would be virtually impossible to achieve.<sup>1</sup>

Further, H.R. 7 requires the business owner to justify the entire pay difference between a male worker and female worker. This is yet another unworkable standard. Business owners make compensation decisions based on many factors that are not easily quantifiable. Requiring businesses to explain every cent of a pay differential could only be satisfied by rigid pay grades, as governments use for civil servants. Ms. Olson commented on how this provision in H.R. 7 is also unworkable:

Compensation decisions in the private sector are made based on a variety of factors that are not capable of an exact dollar-for-dollar comparison. Differences in experience, education and performance, among other job-related factors, matter significantly for purposes of setting compensation. How would an employer ever be able to explain that it credited an employee with X dollars for their 6.3 years of prior experience, and Y dollars because the candidate went to a top tier school versus Z dollars for a mid-tier school? It will be virtually impossible for employers to meet such a standard.<sup>2</sup>

Even more egregious, if a business owner somehow persuades the factfinder that 100 percent of the differential was not based on sex, an employee is still entitled to argue that there are other ways to address this business need without a pay differential. In short,

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<sup>1</sup>*Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work: Hearing on H.R. 7 Before the Subcomm. on Civil Rights and Human Serv. and Subcomm. on Workforce Protections of the H. Comm. on Educ. and Labor, 116th Cong. (2019) (statement of Camille Olson, Partner, Seyfarth Shaw LLP, at 8).*

<sup>2</sup>*Id.* at 9.

H.R. 7 takes core management decisions out of the hands of business owners and places them squarely in the realm of judges, juries, and trial lawyers. This brazen attack on market economies and on private-sector discretion must be rejected.

Moreover, H.R. 7 significantly limits the ability of business owners to justify differences in pay based on different work locations (as has been the case throughout the 56-year history of the EPA). Rather, under the bill as reported, an employee can compare his or her pay to any other coworker in the same county or political subdivision (or perhaps more broadly, given the bill's provision allowing for the Equal Employment Opportunity Commission (EEOC) to define "work establishment" even more broadly) to prove pay discrimination. Ms. Olson pointed out in her testimony that a county can include urban and suburban areas with different commuting costs that could justify a pay differential.<sup>3</sup> The practical elimination of a legitimate defense available to business owners under current law simply fails to recognize economic reality and our market-based economy.

#### *H.R. 7 Radically Expands Remedies*

H.R. 7 radically expands remedies under the EPA to provide for unlimited compensatory damages, even where there is absolutely no showing that any pay disparity was the effect of intentional discrimination, as well as uncapped punitive damages. In doing so, H.R. 7 places claims of discrimination in wages based on sex in a more favorable position than similar claims of pay discrimination under Title VII or the *Americans with Disabilities Act*, which properly provide for limited compensatory and punitive damages. Indeed, taken in concert with the remedies available under Title VII, remedies for claims of pay discrimination under H.R. 7 would be greater than those available under any of our nation's current civil rights laws. Ms. Olson discussed in her testimony why these expanded remedies are inappropriate:

The required showing for proof of an EPA violation is lower than under Title VII, but the available damages are higher. What is more, H.R. 7 would also allow for uncapped punitive damages in addition to the EPA's existing double recovery of economic damages. The current damage mechanisms under the EPA serve their intended purpose of eliminating wage disparities, making employees whole, compensating employees with an equal amount of special liquidated damages, and paying all attorneys' fees and costs. These remedies are appropriately proportional as a remedy for an employer's actions that produce unintentional, unlawful wage disparities. To upend this design through a contortionist's attempt to carry over parts of Title VII's remedial scheme in a selected manner, and expand damages under lower proof requirements is not appropriate.<sup>4</sup>

This radical expansion of remedies, particularly where they may be assessed without showing any discriminatory intent, tips the scales

<sup>3</sup>*Id.* at 21.

<sup>4</sup>*Id.* at 17.

to favor outsized judgments unrelated to actual damages, and calls the entire rationale for the bill into question.

*H.R. 7 Encourages Frivolous Class Action Lawsuits*

Perhaps nowhere is this bill's true intent—to generate more lawsuits and to line the pockets of trial lawyers—made more evident as in its provisions expanding class action lawsuits. Currently, under the FLSA, plaintiffs may sue on behalf of themselves and those similarly situated, and thereby pursue a collective action. To ensure that these suits are merit-based—and brought by those who wish to pursue them—workers must opt in to these collective suits. H.R. 7 reverses that presumption and eliminates those safeguards, instead deeming all potential class members to be joined to a suit, placing the affirmative burden on these plaintiffs—who may not even know of the suit's existence—to opt out of a claim.

Supporters of H.R. 7 have not adequately explained why a change is needed for collective actions under the EPA. Ms. Olson reached the conclusion that “the current mechanism sufficiently balances the interests of employers and aggrieved employees, and the proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul.”<sup>5</sup> The class action provisions in the bill are plainly designed to ensure that plaintiffs' lawyers get handsome financial payoffs to pursue class-action lawsuits, trumping any legitimate interest in protecting the paychecks of American workers, and these special-interest provisions should be rejected.

*H.R. 7 Obstructs Recruitment and Hiring*

H.R. 7 includes highly prescriptive prohibitions relating to recruitment and hiring. The bill prohibits a business owner from relying on the current or previous wage of a prospective employee in considering the individual for employment or determining the wages of the individual unless the individual voluntarily provides the wage information after a job offer has been made. These restrictions are included even though, as Ms. Olson notes in her testimony, courts and the EEOC have said that wage information can be a legitimate factor in determining current wages because it can accurately reflect job-related ability or qualifications. Ms. Olson elaborated on legitimate uses of wage information:

Employers routinely rely on prior salary information for competitive purposes as a way to gather real time market data. It is also used to benchmark against the pay of current employees or to target offers to top performing employees at competitor firms. It can also be used as an indicator of a candidate's experience, performance or level of expertise in an area.<sup>6</sup>

Ms. Olson further explained how H.R. 7 obstructs recruitment and hiring:

Prohibiting employers from relying on prior salary information, even if it's voluntarily provided, until after an offer that includes compensation information has been ex-

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<sup>5</sup>*Id.* at 18.

<sup>6</sup>*Id.* at 12.

tended will invoke an unnatural cadence that does not reflect the realities of the workforce. Indeed, human resources representatives will be forced to issue “Miranda-type” warnings to applicants advising them that they cannot provide information regarding prior salary . . . . The only effect that the current proposal is guaranteed to have are steeper recruiting costs which will be borne by both employers and applicants.<sup>7</sup>

H.R. 7 additionally prohibits a business owner from seeking wage information from a prospective employee or any current or former business owner. A similar provision in a City of Philadelphia ordinance has been struck down as violating the First Amendment speech rights of business owners.<sup>8</sup> The judge wrote that the Philadelphia City Council’s evidence that prohibiting business owners from inquiring about wage information could reduce discrimination was based on “unsubstantiated conclusions,” and the court found a lack of evidence that knowing an individual’s wage information results in discrimination:

[N]one of the testimony addressed why asking about wage history necessarily results in the perpetuation of an initial discriminatory wage. Moreover, no witness cited to evidence that prior wage history inquiry contributes to a discriminatory wage gap.<sup>9</sup>

Likewise, H.R. 7 lacks a basis for its assumption that a business owner seeking wage information will perpetuate discriminatory compensation or that prohibiting this practice will reduce unlawful, gender-based pay discrepancies.

*H.R. 7 Eliminates business owners’ ability to protect the confidentiality of wage and salary data*

H.R. 7 attempts to further undermine the ability of business owners to manage their enterprises by adopting broad new anti-retaliation provisions relating to discussions of pay or compensation, extending protection far beyond the scope of protection already provided to employees under federal law. Title VII among other federal civil rights laws protect employees from asserting their rights with respect to nondiscrimination in pay. The *National Labor Relations Act* also protects employees who discuss their wages as part of a concerted activity.

However, H.R. 7 effectively eliminates the ability of a business owner to maintain any policy protecting the privacy and confidentiality of its payroll and wage information, even for supervisory and managerial employees, long considered to be part of the legitimate management of a business. Ms. Olson explained the problems with this open-ended provision:

H.R. 7 is written so broadly that employees would have the right to inquire about, discuss, or disclose wage information without limitation . . . . There is no consideration

<sup>7</sup>*Id.*

<sup>8</sup>*Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, 319 F. Supp. 773 (E.D. Pa. 2018), *appealed*, No. 18-2175 (3d Cir. May 30, 2018).

<sup>9</sup>*Id.* at 797.

of the reasonableness of the employee's actions with respect to their inquiries, discussions, or disclosures, nor is the permissibility of such action tethered to the alleged underlying pay disparity. Further, the proposed bill does not take into account or protect the privacy rights of other employees with respect to publicly disseminating information about their pay, nor does it contain a mechanism for balancing and protecting employers' legitimate business concerns in maintaining confidentiality of certain compensation information. Under H.R. 7, an employee who chooses to post on social media the wages of all other employees, by name, would be deemed to be engaging in protected activity, against which other employees and the employer would have no recourse.

These provisions of the bill contain no limiting principle and will very likely harm workers and business owners, and they should be defeated.

*H.R. 7 Mandates intrusive government collection of worker pay data*

H.R. 7 directs the EEOC, for the first time ever, to collect compensation data from business owners disaggregated by the sex, race, and national origin of workers, including hiring, termination, and promotion data. This collection would go further than the Obama administration proposal in 2016 to collect pay data,<sup>10</sup> which did not include hiring, termination, and promotion data.

As with the Obama administration proposal, this mandate raises serious privacy and confidentiality concerns. Time and again there have been massive and harmful data breaches of federal agencies. This data would create yet another valuable target, and H.R. 7 fails to address how the data will be protected. Aggregated data published at the regional and industrial level could reveal salaries of individual workers, which is proprietary data. The EEOC would also share the data with the Department of Labor, which could release sensitive data pursuant to a *Freedom of Information Act* request.

It is highly unlikely that the data in question will be useful to the EEOC or the public. To the extent pay discrimination exists, it is doubtful that amassing pay data in this manner will effectively combat such discrimination. The raw data collected will not account for the many factors that may explain pay differences, such as skill levels and regional differences in compensation, and will result in information that is misleading and confusing.

Finally, this mandate is uniquely burdensome. The U.S. Chamber of Commerce estimated that the annual burden of complying with the current EEOC Employer Information Report (EEO-1) if pay data were added to the report would be between \$693 and \$729 million.<sup>11</sup>

In addition to the intrusive government collection of pay data, the previous section of this report has summarized substantive concerns with changes to the EPA contained in H.R. 7 that make it

<sup>10</sup> Press Release, Equal Emp. Opportunity Comm'n, EEOC to Collect Summary Pay Data (Sept. 29, 2016).

<sup>11</sup> Letter from U.S. Chamber of Commerce to EEOC 22 (Apr. 1, 2016), [https://www.uschamber.com/sites/default/files/documents/files/uscc\\_eeo1\\_comments\\_april\\_1.pdf](https://www.uschamber.com/sites/default/files/documents/files/uscc_eeo1_comments_april_1.pdf).

impossible to defend legitimate pay differences, improperly allow unlimited compensatory and punitive damages, and inappropriately expand class actions, as well as obstructing the recruiting and hiring process. These concerns represent but a few of the most egregious policy flaws in H.R. 7. There are numerous others, ranging from the ill-conceived resurrection of flawed statistical models at the Department of Labor's Office of Federal Contract Compliance Programs to the creation of new negotiation skills "training" programs that have yet to be shown necessary and have a paternalistic view toward workers. Whether singly or taken as a whole, the provisions of H.R. 7 should be rejected.

#### THE FLAWED "WAGE GAP" THEORY

Advocates of H.R. 7 claim that despite two federal laws prohibiting pay discrimination, female workers are still paid on average considerably less than male workers, and, as a result, a pernicious "wage gap" exists. According to Bureau of Labor Statistics (BLS) data, female weekly earnings were 82 percent of male weekly earnings in 2017, as compared to 62 percent in 1979.<sup>12</sup> Supporters of H.R. 7 argue that this flawed theory makes enactment of the bill necessary.

However, many experts effectively argue the "wage gap" between men and women is not necessarily the product of workplace discrimination. In fact, most of the gap disappears when factors such as hours worked per week, rate of leaving the labor force, and industry and occupation are considered.<sup>13</sup> For example, among full-time workers, men are more likely than women to choose to work more than 40 hours per week. In 2017, 25 percent of men who usually work full time worked 41 or more hours per week, compared with 14 percent of women. For those who worked exactly a 40-hour workweek, women earned 88 percent as much as men.<sup>14</sup> Factoring work experience, job tenure, and preferences for non-wage benefits, such as health insurance and other fringe benefits, also further reduces the gap.<sup>15</sup>

A 2018 Harvard University study found that the gap in pay between female and male bus and train operators working for the Massachusetts Bay Transportation Authority (MBTA) can be explained by the workplace choices that women and men make rather than other factors such as discrimination.<sup>16</sup> The study found that the earnings gap for MBTA bus and train operators is explained by the fact that the male operators took 48 percent fewer unpaid hours off and worked 83 percent more overtime hours per year than the female operators. These differences are not due to any different work options faced by female and male operators. Rather,

<sup>12</sup> U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, BLS REPORTS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2017 (Aug. 2018).

<sup>13</sup> See, e.g., CONSAD RESEARCH CORP., AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN 1-2 (prepared for the U.S. Dep't of Labor) (Jan. 12, 2009), <https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf>.

<sup>14</sup> U.S. DEPT OF LABOR, *supra* note 12.

<sup>15</sup> See CONSAD RESEARCH CORP., *supra* note 13.

<sup>16</sup> Valentin Bolotnyy and Natalia Emanuel, *Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators* (Harvard Univ., Working Paper, Jan. 2, 2019), <https://scholar.harvard.edu/bolotnyy/publications/why-do-women-earn-less-men-evidence-bus-and-train-operators-job-market-paper>.

the study found that the female operators had a greater demand for workplace flexibility and a lower demand for overtime work hours than the male operators.

The Harvard MBTA study is noteworthy because the workplace characteristics of the female operators are entirely comparable to those of the male operators. All operators are represented by the same union, and all are covered by the same collective bargaining agreement. The study found the earnings gap persists even when seniority was the same, which means that differences in choices that women and men made when faced with the same options in the MBTA workplace can fully explain the earnings gap. Because of the strict seniority system, the study debunked discrimination as a cause of the gender earnings gap at the MBTA.

In sum, there is a lack of definitive evidence that a “wage gap” exists which is caused by gender-based discrimination in pay. The flawed premise of the “wage gap” does not justify the enactment of radical, sweeping reforms to the EPA and other federal laws contained in H.R. 7.

#### REPUBLICAN AMENDMENTS

Recognizing the fundamental failures of policy contained in H.R. 7, Committee Republicans offered several amendments during Committee markup to highlight Republican priorities and solutions for working women and men.

To demonstrate just how far afield the Majority has gone with this legislation, Representative Bradley Byrne (R-AL) offered two common-sense amendments during the Committee’s consideration of H.R. 7. The first amendment offered by Representative Byrne underscored the true beneficiaries of this bill—the trial lawyers’ lobby. Under the FLSA (and unchanged by H.R. 7), a successful plaintiff may recover a “reasonable” attorney’s fee. Representative Byrne’s amendment would simply have provided that if a plaintiff entered into a contingency fee arrangement, the attorney’s contingency fee cannot exceed 15 percent of the judgment awarded the plaintiff to be considered “reasonable.” Democrats unanimously rejected the simple proposition that no trial lawyer can “reasonably” be paid a contingency fee of more than 15 percent of the judgment awarded to the plaintiff.

Representative Byrne’s second amendment would have strengthened the EPA while eliminating the multiple provisions in H.R. 7 that make it impossible for a business owner to defend a pay differential. This amendment strengthened the EPA by replacing the “any factor other than sex” defense with the language “a bona fide business-related reason other than sex.” This change would make clear to the courts that the “other than sex” defense cannot be used as a loophole or excuse for relying on sex as a factor when there is a pay differential. The Byrne amendment also struck the remaining provision in H.R. 7 relating to defenses. These unnecessary provisions require that, even when a business owner already shows the factor causing the pay differential is “other than sex,” it must meet several illogical and insurmountable burdens, effectively paving an unimpeded path to the promise of unlimited punitive and compensatory damages to line the pockets of trial lawyers. Committee Democrats unanimously rejected this amendment that

would have strengthened the EPA while eliminating the unworkable provisions that would make it impossible for a business owner to defend legitimate business practices.

A third amendment would have ensured H.R. 7 does not harm the very people it is supposedly aimed at helping. H.R. 7 escalates liability, eliminates a business owner's ability to contest gender-based pay discrimination cases, dramatically expands damages, and encourages frivolous litigation. As a whole, the bill will limit or obstruct business owners' efforts to recruit, hire, and promote workers, and to increase their pay. In addition, to avoid the unlimited liability created by this bill, business owners will be hesitant to reward merit and success on the job, which will harm workers by restricting their opportunities for increased compensation. H.R. 7 will likely force business owners to use rigid compensation formulas, such as those used in government employment.

In response to these fundamental flaws in H.R. 7, Representative Rick Allen (R-GA) offered an amendment directing the Secretary of Labor to study and certify the effects of the bill's changes to the EPA on business owners' ability to recruit, hire, promote, and increase the pay of workers, and report back to the Congress within 90 days. Under the amendment, these provisions in H.R. 7 would not become effective until Congress receives and is given 90 days to review the Secretary's report. Further, the amendment provides that the EPA changes in the bill will not take effect if the Secretary of Labor determines that they "significantly hinder" business owners in recruiting, hiring, promoting, and increasing the pay of workers, irrespective of gender. Democrats unanimously rejected this prudent amendment that would ensure the bill doesn't make it harder for workers to find jobs and get pay raises.

Committee Republicans offered a final amendment reflecting their grave concerns with the government collection of pay data mandated in H.R. 7. The bill requires the EEOC, for the first time ever, to collect worker compensation data from business owners broken down by sex, race, and national origin of employees, including hiring, termination, and promotion data. This astounding government collection of worker pay data raises significant privacy and confidentiality concerns. Further, the utility of this data is questionable, and it is doubtful the EEOC would be able to manage and interpret this massive amount of pay data appropriately. Finally, the data collection requirement would impose an extremely costly and uniquely burdensome mandate on business owners with reams of proprietary data being provided to the government, the uses of which are not adequately explained in the bill. Representative Virginia Foxx (R-NC), the Committee's Republican Leader, offered an amendment to strike this pay data collection from the bill, which the Democrats unanimously rejected.

#### CONCLUSION

H.R. 7 is a fundamentally flawed bill that does nothing to ensure "paycheck fairness." The bill's proponents have failed to demonstrate that its provisions are needed or will prove workable. H.R. 7 is instead a gift for trial lawyers, who are the main beneficiaries of the bill. For these reasons, and all of those set forth above, we

oppose enactment of H.R. 7 as reported from the Committee on Education and Labor.

VIRGINIA FOXX,  
*Ranking Member.*  
DAVID P. ROE.  
GLENN "GT" THOMPSON.  
TIM WALBERG.  
BRETT GUTHRIE.  
BRADLEY BYRNE.  
GLENN GROTHMAN.  
RICK W. ALLEN.  
FRANCIS ROONEY.  
LLOYD SMUCKER.  
JIM BANKS.  
MARK WALKER.  
JAMES COMER.  
BEN CLINE.  
RUSS FULCHER.  
VAN TAYLOR.  
STEVE C. WATKINS.  
RON WRIGHT.  
DANIEL MEUSER.  
WILLIAM R. TIMMONS, IV.  
DUSTY JOHNSON.

○