

PAYCHECK FAIRNESS ACT

APRIL 5, 2021.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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]

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, reports favorably thereon with an amendment and recommends 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. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

(a) **DEFINITIONS.**—Section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203) is amended by adding at the end the following:

“(z) ‘Sex’ includes—

- “(1) a sex stereotype;
- “(2) pregnancy, childbirth, or a related medical condition;
- “(3) sexual orientation or gender identity; and
- “(4) sex characteristics, including intersex traits.

“(aa) ‘Sexual orientation’ includes homosexuality, heterosexuality, and bisexuality.

“(bb) ‘Gender identity’ means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.”

(b) **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.”

(c) **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;

“(B) has opposed any practice made unlawful by this Act; or

“(C) has inquired about, discussed, or disclosed the wages of the employee or another employee (such as by inquiring or discussing with the employer why the wages of the employee are set at a certain rate or salary);”;

(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)(C) 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.”

(d) 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), or who violates the provisions of section 15(a)(3) in relation to a violation of 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”.

(e) ACTION BY THE 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.”.

(f) JOINT ENFORCEMENT AUTHORITY.—

(1) IN GENERAL.—Notwithstanding section 1 of Reorganization Plan No. 1 of 1978 (92 Stat. 3781; 5 U.S.C. App.) and any other provision of law, the Secretary of Labor, acting through the Office of Federal Contract Compliance Programs, and the Equal Opportunity Employment Commission shall jointly carry out the functions and authorities described in such section and any other provision of law to enforce and administer the provisions of section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)) with respect to Federal contractors, Federal subcontractors, and federally-assisted construction contractors, within the jurisdiction of the Office of Federal Contract Compliance Programs under Executive Order 11246 (42 U.S.C. 2000e note; relating to equal employment opportunity) or a successor Executive Order.

(2) COORDINATION.—The Equal Opportunity Employment Commission and the Secretary of Labor shall establish such coordinating mechanisms as necessary to carry out the joint authority under paragraph (1).

SEC. 3. TRAINING.

The Equal Employment Opportunity Commission and the Secretary of Labor, acting through the Office of Federal Contract Compliance Programs, subject to the availability of funds appropriated under section 11, shall provide training to employees of the Commission and the Office of Federal Contract Compliance Programs and to affected individuals and entities on matters involving discrimination in the payment of wages.

SEC. 4. 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. 5. RESEARCH, EDUCATION, AND OUTREACH.

(a) **IN GENERAL.**—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 women who are Asian American, Black or African-American, Hispanic American or Latino, Native American or Alaska Native, Native Hawaiian or Pacific Islander, and White American), including—

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities, with specific attention paid to women and girls from historically underrepresented and minority groups;

(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.

(b) **REPORT ON GENDER PAY GAP IN TEENAGE LABOR FORCE.**—

(1) **REPORT REQUIRED.**—Not later than one year after the date of the enactment of this Act, the Secretary of Labor, acting through the Director of the Women's Bureau and in coordination with the Commissioner of Labor Statistics, shall—

(A) submit to Congress a report on the gender pay gap in the teenage labor force; and

(B) make the report available on a publicly accessible website of the Department of Labor.

(2) **ELEMENTS.**—The report under subsection (a) shall include the following:

- (A) An examination of trends and potential solutions relating to the teenage gender pay gap.
- (B) An examination of how the teenage gender pay gap potentially translates into greater wage gaps in the overall labor force.
- (C) An examination of overall lifetime earnings and losses for informal and formal jobs for women, including women of color.
- (D) An examination of the teenage gender pay gap, including a comparison of the average amount earned by males and females, respectively, in informal jobs, such as babysitting and other freelance jobs, as well as formal jobs, such as retail, restaurant, and customer service.
- (E) A comparison of—
 - (i) the types of tasks typically performed by women from the teenage years through adulthood within certain informal jobs, such as babysitting and other freelance jobs, and formal jobs, such as retail, restaurant, and customer service; and
 - (ii) the types of tasks performed by younger males in such positions.
- (F) Interviews and surveys with workers and employers relating to early gender-based pay discrepancies.
- (G) Recommendations for—
 - (i) addressing pay inequality for women from the teenage years through adulthood, including such women of color;
 - (ii) addressing any disadvantages experienced by young women with respect to work experience and professional development;
 - (iii) the development of standards and best practices for workers and employees to ensure better pay for young women and the prevention of early inequalities in the workplace; and
 - (iv) expanding awareness for teenage girls on pay rates and employment rights in order to reduce greater inequalities in the overall labor force.

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

(a) **IN GENERAL.**—There is established the National Award for Pay Equity in the Workplace, which shall be awarded by the Secretary of Labor in consultation with the Equal Employment Opportunity Commission, 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, in consultation with the Equal Employment Opportunity Commission, shall—

- (1) 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; and
 - (2) 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. 7. 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 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.

“(3)(A) For each 12-month reporting period for an employer, the compensation data collected under paragraph (1) shall include, for each range of taxable compensation described in subparagraph (B), disaggregated by the categories described in subparagraph (E)—

“(i) the number of employees of the employer who earn taxable compensation in an amount that falls within such taxable compensation range; and

“(ii) the total number of hours worked by such employees.

“(B) Subject to adjustment under subparagraph (C), the taxable compensation ranges described in this subparagraph are as follows:

“(i) Not more than \$19,239.

“(ii) Not less than \$19,240 and not more than \$24,439.

“(iii) Not less than \$24,440 and not more than \$30,679.

“(iv) Not less than \$30,680 and not more than \$38,999.

“(v) Not less than \$39,000 and not more than \$49,919.

“(vi) Not less than \$49,920 and not more than \$62,919.

“(vii) Not less than \$62,920 and not more than \$80,079.

“(viii) Not less than \$80,080 and not more than \$101,919.

“(ix) Not less than \$101,920 and not more than \$128,959.

“(x) Not less than \$128,960 and not more than \$163,799.

“(xi) Not less than \$163,800 and not more than \$207,999.

“(xii) Not less than \$208,000.

“(C) The Commission may adjust the taxable compensation ranges under subparagraph (B)—

“(i) if the Commission determines that such adjustment is necessary to enhance enforcement of Federal laws prohibiting pay discrimination; or

“(ii) for inflation, in consultation with the Bureau of Labor Statistics.

“(D) In collecting data described in subparagraph (A)(ii), the Commission shall provide that, with respect to an employee who the employer is not required to compensate for overtime employment under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207), an employer may report—

“(i) in the case of a full-time employee, that such employee works 40 hours per week, and in the case of a part-time employee, that such employee works 20 hours per week; or

“(ii) the actual number of hours worked by such employee.

“(E) The categories described in this subparagraph shall be determined by the Commission and shall include—

“(i) race;

“(ii) national origin;

“(iii) sex; and

“(iv) job categories, including the job categories described in the instructions for the Equal Employment Opportunity Employer Information Report EEO-1, as in effect on the date of the enactment of this subsection.

“(F) The Commission shall use the compensation data collected under paragraph (1)—

“(i) to enhance—

“(I) the investigation of charges filed under section 706 or section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)); and

“(II) the allocation of resources to investigate such charges; and

“(ii) for any other purpose that the Commission determines appropriate.

“(G) The Commission shall annually make publicly available aggregate compensation data collected under paragraph (1) for the categories described in subparagraph (E), disaggregated by industry, occupation, and core based statistical area (as defined by the Office of Management and Budget).

“(4) The compensation data under paragraph (1) shall be collected from each employer that—

“(A) is a private employer that has 100 or more employees, including such an employer that is a contractor with the Federal Government, or a subcontractor at any tier thereof; or

“(B) the Commission determines appropriate.”.

SEC. 8. 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 collect compensation data and other employment-related data (including, hiring, termination,

and promotion data) by demographics and designate not less than half of all non-construction contractors each year to prepare and file such data, and shall review and utilize the responses to such data to identify contractors 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. 9. 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. 10. 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. 11. SMALL BUSINESS ASSISTANCE.

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

(b) **TECHNICAL ASSISTANCE MATERIALS.**—The Secretary of Labor and the Commissioner of the Equal Employment Opportunity Commission shall jointly develop technical assistance material to assist small 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. 12. 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. 13. 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.”¹ Fifty-eight 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.² Despite these gains, women continue to be held back by 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 typically are paid 82 cents for every dollar earned by a man.³ H.R. 7, the *Paycheck 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 \$400,000⁴ to \$2 million⁵ 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; prohibits 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

¹ *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. 25, 2021).

² *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. 25, 2021); see also Am. Express, *The 2018 State of Women-Owned Businesses Report 3* (2018), https://about.americanexpress.com/files/doc_library/file/2018-state-of-women-owned-businesses-report.pdf.

³ Am. Ass’n of Univ. Women, *The Simple Truth about the Gender Pay Gap 2020 Update 2* (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf.

⁴ Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2020), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.

⁵ *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. 25, 2021).

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.⁶ 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 and OFCCP 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 Statistics survey; and requires the Department of Labor to collect employment and pay data from 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,

⁶Based 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.

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 lawsuit⁷; 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 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.⁸ 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.

⁷*Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141–42 (N.D. Cal. 2004).

⁸*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).

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 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 referred 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, Congresswoman 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 and 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 February 13, 2019, the House Committee on Education and Labor held a joint hearing in the Subcommittee on Workforce Protections and the Subcommittee on Civil Rights and Human Services (2019 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 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. H.R. 7 then passed the House on March 27, 2019, with bipartisan support by a vote of 242 Yeas and 187 Nays.

117TH CONGRESS

On January 28, 2021, Congresswoman DeLauro introduced H.R. 7, the *Paycheck Fairness Act*, with 224 original co-sponsors (including 2 Republicans). The bill was referred to the House Committee on Education and Labor. On March 18, 2021, the House Committee on Education and Labor held a joint hearing in the Subcommittee on Workforce Protections and the Subcommittee on Civil Rights and Human Services (2021 Joint Subcommittee Hearing) entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination.*” The Committee heard testimony on how the weaknesses in the EPA have left the law ineffective in preventing gender-based wage discrimination. Witnesses included Fatima Goss Graves, CEO and President of the National Women’s Law Center, Washington, DC; Camille A. Olson, Partner at Seyfarth Shaw, LLP, Chicago, IL; Dina Bakst, Co-Founder & Co-President, A Better Balance: The Work & Family Legal Center, New York City, NY; and Laurie McCann, Senior Attorney, AARP, Washington, DC.

On February 3, 2021, Senator Murray introduced S. 205, the *Paycheck Fairness Act*, with 49 cosponsors. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions.

On March 24, 2021, 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 Congresswoman Suzanne Bonamici

(D-OR-1), and reported the bill favorably, as amended, to the House of Representatives by a vote of 25 Yeas and 22 Nays.

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

- Removes the bill’s findings section;
- Updates the EPA’s definition of sex to include sexual orientation and gender identity;
- Strengthens the nonretaliation provisions by ensuring that workers cannot be retaliated against for opposing unlawful pay discrimination and by authorizing compensatory and punitive damages;
- Ensures that both the EEOC and the Office of Federal Contractor Compliance (OFCCP) in the U.S. Department of Labor (DOL) have joint enforcement authority over the Equal Pay Act with respect to federal contractors;
- Clarifies that the EEOC and the OFCCP coordinate in the establishment of the national award for pay equity in the workplace; and
- Modernizes the OFCCP’s pay data collection requirement.

A substitute amendment was offered by Congresswoman Elise Stefanik (R-NY-21) to: amend the EPA’s employer defense of “any factor other than sex” with a vague and legally ambiguous standard; provide employers with a liability shield to EPA claims if they conduct self-audits; restrict employer reliance on prospective employees’ salary history but allow the employer to rely on salary history at any time in the hiring process if a prospective employee self-discloses; and authorize negotiation skills training grants. The amendment failed by a vote of 19 Yeas and 28 Nays.

SUMMARY

Neither the EPA nor Title VII is sufficient in their current forms to provide protection against illegal wage inequality. 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.⁹ 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.¹⁰

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 discrimi-

⁹29 U.S.C. § 255.

¹⁰29 U.S.C. § 216; 29 U.S.C. § 260.

nation. 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.¹¹ Although a plaintiff bringing a gender-based wage discrimination claim is entitled to back pay, compensatory damages,¹² and punitive damages,¹³ compensatory and punitive damages do have monetary caps. These caps vary depending on the size of the employer¹⁴ and under no circumstance can these damages exceed \$300,000.¹⁵ However, compensatory and punitive damages for Title VII wage discrimination claims based upon race and national origin may be uncapped when combined with Section 1981 claims, creating a two-tiered system where pay discrimination based on race and national origin is sanctioned more severely than pay discrimination based on sex.¹⁶

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 are typically paid 82 cents for every dollar paid to a man.¹⁷ The wage gap is even more substantial for women of color. For every dollar white, non-Hispanic men make, Black women typically make only 63 cents, Latina women only 55 cents, and American Indian or Alaskan Native women only 60 cents.¹⁸ 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.”¹⁹ 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; A Better Balance; AFCPE (Association for Financial Counseling & Planning Education); All-Options; American Association of University Women (AAUW); AAUW of Alabama; AAUW of Alaska (AAUW Fairbanks (AK) Branch); AAUW of Arizona; AAUW of Arkansas; AAUW of California; AAUW of Colorado; AAUW of Connecticut; AAUW of Delaware; AAUW of District of Columbia (AAUW Washington (DC) Branch; AAUW Capitol Hill (DC) Branch); AAUW of Florida; AAUW of Georgia; AAUW of Hawaii; AAUW of Idaho; AAUW of Illinois; AAUW of Indiana; AAUW of Iowa; AAUW of Kansas; AAUW of Kentucky; AAUW of Louisiana; AAUW of Maine; AAUW of Maryland; AAUW of Massachusetts;

¹¹ 42 U.S.C. § 2000e-5(e).

¹² 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).

¹³ *Id.* (punitive damages may be recovered when the employer acted with malice or reckless indifference).

¹⁴ *Id.*

¹⁵ 42 U.S.C. § 1981a.

¹⁶ See 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

¹⁷ Am. Ass'n of Univ. Women, The Simple Truth about the Gender Pay Gap: 2020 Update 2 (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf.

¹⁸ *Id.*

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

AAUW of Michigan; AAUW of Minnesota; AAUW of Mississippi; AAUW of Missouri; AAUW of Montana; AAUW of Nebraska; AAUW of Nevada; AAUW of New Hampshire; AAUW of New Jersey; AAUW of New Mexico; AAUW of New York; AAUW of North Carolina; AAUW of North Dakota; AAUW of Ohio; AAUW of Oklahoma; AAUW of Oregon; AAUW of Pennsylvania; AAUW of Puerto Rico; AAUW of Rhode Island; AAUW of South Carolina; AAUW of South Dakota; AAUW of Tennessee; AAUW of Texas; AAUW of Utah; AAUW of Vermont; AAUW of Virginia; AAUW of Washington; AAUW of West Virginia; AAUW of Wisconsin; AAUW of Wyoming; American Federation of Labor-Congress of Industrial Unions (AFL-CIO); American Federation of State, County and Municipal Employees; American Federation of Teachers; AnitaB.org; Association of Flight Attendants-CWA; Bend the Arc Jewish Action; California Women's Law Center; Catalyst; Center for American Progress; Center for Law and Social Policy (CLASP); Center for LGBTQ Economic Advancement & Research; Clearinghouse on Women's Issues; Coalition of Labor Union Women; Philadelphia Coalition of Labor Union Women; Community Health Councils; Congregation of Our Lady of Charity of the Good Shepherd; U.S. Provinces; Connecticut Women's Education and Legal Fund (CWEALF); Disciples Center for Public Witness; Equal Pay Today; Equal Rights Advocates; Every Texan; Family Forward Oregon; Family Values @ Work; Feminist Majority Foundation; Futures Without Violence; Gender Justice; Holy Spirit Missionary Sisters; USA JPIC; In Our Own Voice: National Black Women's Reproductive Justice Agenda; Indiana Institute for Working Families; Institute for Women's Policy Research; Justice for Migrant Women; KWH Law Center for Social Justice and Change; Labor Council for Latin American Advancement; Leadership Conference on Civil and Human Rights; League of Women Voters of the United States; Legal Aid at Work; Legal Momentum; The Women's Legal Defense and Education Fund; Legal Voice; MANA; A National Latina Organization; Methodist Federation for Social Action; Mi Familia Vota; Michigan League for Public Policy; MomsRising; NAACP; National Advocacy Center of the Sisters of the Good Shepherd; National Asian Pacific American Women's Forum (NAPAWF); National Association of Social Workers; National Center for Law and Economic Justice; National Committee on Pay Equity; National Council of Jewish Women; National Domestic Violence Hotline; National Education Association; National Employment Law Project; National Employment Lawyers Association; National Employment Lawyers Association—Eastern Pennsylvania; National Employment Lawyers Association—Georgia; National Network to End Domestic Violence; National Organization for Women; Florida NOW; Illinois NOW; Indiana NOW; Jacksonville NOW; Kanawha Valley NOW; Maryland NOW; Monroe County NOW; Montana NOW; Northwest Indiana NOW; South Jersey NOW Alice Paul chapter; National Partnership for Women & Families; National WIC Association; National Women's Law Center; National Women's Political Caucus; Native Women Lead; NETWORK Lobby for Catholic Social Justice; New Jersey Citizen Action; NewsGuild-CWA; New York Women's Foundation; North Carolina Justice Center; People For the American Way; PowHer New York; Prosperity Now; Reinventure Capital; Restaurant Opportunities Centers (ROC) United; Service Employ-

ees International Union; Shriver Center on Poverty Law; TIME'S UP Now; U.S. Women's Chamber of Commerce; Union for Reform Judaism; United State of Women; WNY Women's Foundation; Women and Girls Foundation of Southwest Pennsylvania; Women Employed; Women of Reform Judaism; Women's Fund of Rhode Island; Women's Fund of the Greater Cincinnati Foundation; Women's Law Project; Women's Media Center; Women's Rights and Empowerment Network; YWCA USA; YWCA Allentown; YWCA Arizona Metropolitan Phoenix; YWCA Billings; YWCA Butler; YWCA Central Alabama; YWCA Central Indiana; YWCA Central Maine; YWCA Central Virginia; YWCA Dayton; YWCA Duluth; YWCA Elgin; YWCA Genesee County; YWCA Greater Austin; YWCA Greater Baton Rouge; YWCA Greater Cincinnati; YWCA Greater Cleveland; YWCA Greater Portland; YWCA Greenwich; YWCA Hartford Region; YWCA Kalamazoo; YWCA Kauai; YWCA Kitsap County; YWCA Knoxville and the Tennessee Valley; YWCA Lower Cape Fear; YWCA McLean County; YWCA Metro Detroit—Interim House; YWCA National Capital Area; YWCA New Hampshire; YWCA North Central Indiana; YWCA Northern New Jersey; YWCA Oahu; YWCA Pierce County; YWCA Princeton; YWCA QUINCY; YWCA Sauk Valley; YWCA Seattle King Snohomish; YWCA South Hampton Roads; YWCA Southeastern Massachusetts; YWCA Southern Arizona; YWCA University of Illinois; YWCA Utah; YWCA Western New York; YWCA Wheeling; YWCA Yakima; and Zonta USA Caucus.

COMMITTEE VIEWS

The Committee on Education and Labor (Committee) is committed to protecting the rights of individuals in the workplace. Fifty-eight 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 58 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 pay²⁰ when it passed the EPA as an amendment to the *Fair Labor Standards Act of 1938* (FLSA).²¹ 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

²⁰Support 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).

²¹29 U.S.C. §206(d).

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.²²

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.²³ 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.”²⁴ 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.²⁵

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.”²⁶

In passing the EPA, Congress intended that “men and women doing the same job under the same working conditions . . . receive equal pay.”²⁷ 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.²⁸

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.”²⁹

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,

²² H.R. Rep. No. 110–783 at 12 (2008) (internal citations and quotations omitted).

²³ *Id.* (internal citations and quotations omitted).

²⁴ *Id.* (internal citations and quotations omitted).

²⁵ *Id.* (internal citations and quotations omitted).

²⁶ *Id.* (internal citations and quotations omitted).

²⁷ *Id.* at 12–13 (internal citations and quotations omitted).

²⁸ H.R. Rep. No. 110–783 at 12 (2008) (internal citations and quotations omitted).

²⁹ *Id.* at 13 (internal citations and quotations omitted).

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.³⁰

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 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.³¹

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,³² 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."³³

EPA, TITLE VII, AND SECTION 1981

On July 2, 1964, President Lyndon Johnson signed the Civil Rights Act of 1964³⁴ into law. It was historic legislation prohibiting discrimination in employment, among other things, on the basis of race, color, religion, national origin, and sex.³⁵ The EPA and Title VII, passed only one year apart, both prohibited sex discrimination in pay and provided overlapping coverage.

Although the *Civil Rights Act of 1991* amended Title VII to allow 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 rather than the amount of harm to the victim.³⁶ 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.³⁷ 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."³⁸

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

³⁰ *Id.* (internal citations and quotations omitted).

³¹ 29 U.S.C. §206(d)(1).

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

³³ *Id.* (internal citations and quotations omitted).

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

³⁵ 42 U.S.C. §2000e et seq.

³⁶ 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).

³⁷ *Id.* at 301.

³⁸ *Id.* at 271 n.162.

gender, distinct differences remain between the application of Title VII and the EPA in sex-based wage discrimination cases.³⁹ 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.⁴⁰ Generally, under Title VII, the aggrieved person must file a charge with the EEOC within 180 days. In *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, the U.S. Supreme Court found that Lilly Ledbetter's equal pay claim was time-barred because it was filed more than 180 days after the initial act of discrimination.⁴¹ The *Lilly Ledbetter Fair Pay Act of 2009* directly addressed the 180-day statute of limitation and 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.⁴²

Burden of Proof. When alleging discrimination under the EPA, an employee is required to show that two employees working in the same establishment and doing substantially similar jobs are receiving unequal pay. However, the plaintiff does not bear the burden of proving that the employer intentionally committed wage-based gender discrimination. Once the plaintiff 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.⁴³

In contrast, a plaintiff under Title VII must typically prove that the employer engaged in intentional discrimination and retains the burden of proving discrimination throughout the case. However, unlike an EPA complainant, Title VII plaintiffs are not required to demonstrate that the performance of substantially similar (or equal) work so long as plaintiffs have other evidence of discrimination. (E.g. Proof that a male employee worked fewer hours or evidence that a female employee would have been paid more had she been a man).⁴⁴

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.⁴⁵ Conversely, under Title VII, a prevailing plaintiff for a gender-based wage claim is entitled to back pay, compensatory damages,⁴⁶ and punitive damages⁴⁷ for intentional wage discrimination.⁴⁸ 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

³⁹ H.R. Rep. No. 110-783 at 14 n.28 (2008) (internal citations and quotations omitted).

⁴⁰ 29 U.S.C. § 255.

⁴¹ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

⁴² 42 U.S.C. § 2000-e-5(e).

⁴³ EEOC Compliance Manual, No. 915.003 § 10-5 (Dec. 5, 2000), <https://www.eeoc.gov/policy/docs/compensation.html>.

⁴⁴ *Id.*

⁴⁵ 29 U.S.C. § 216; 29 U.S.C. § 260.

⁴⁶ H.R. Rep. No. 110-783 at 14 (2008) (internal citations and quotations omitted).

⁴⁷ *Id.* (internal citations and quotations omitted) (punitive damages may be recovered when the employer acted with malice or reckless indifference).

⁴⁸ *Id.*

of a victim's injuries.⁴⁹ However, in no event may these damages exceed \$300,000.⁵⁰

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.⁵¹ Such contracts may be between employee and employer or between businesses. Plaintiffs in Section 1981 cases may recover compensatory and punitive damages, and 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 BE PAID LESS THAN MEN

While progress has been made, equal pay for women is not yet a reality. As previously noted, a woman working full-time, year-round is typically paid 82 cents for every dollar a man makes.⁵² 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 \$406,280 in earnings over a 40-year career.⁵³ To make up for the gender pay gap in lifetime earnings, a working woman would have to work almost nine years longer than her male counterpart.⁵⁴ 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.⁵⁵ In 2011, women aged 65 and older received a total income of \$22,069 on average compared to \$41,134 for men.⁵⁶ The average Social Security benefit is \$15,846 for women compared to \$20,153 for men of the same age.⁵⁷

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).⁵⁸ In addition to boosting the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 42 U.S.C. § 1981(a).

⁵² Am. Ass'n of Univ. Women, *The Simple Truth about the Gender Pay Gap: 2020 Update 1* (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf.

⁵³ Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

⁵⁴ *Id.*

⁵⁵ 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/iwpr-general/the-importance-of-social-security-in-the-incomes-of-older-americans-differences-by-gender-age-race-ethnicity-and-marital-status/>.

⁵⁶ *Id.*

⁵⁷ Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.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/iwpr-general/the-importance-of-social-security-in-the-incomes-of-older-americans-differences-by-gender-age-race-ethnicity-and-marital-status/> (see figure 4).

⁵⁸ Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy 2* (2017), <https://iwpr.org/iwpr-publications/briefing-paper/the-impact-of-equal-pay-on-poverty-and-the-economy/>.

economy, pay equity would cut the poverty rate for all working women by more than half, from 8 percent to 3.8 percent.⁵⁹

Research indicates that women experience a pay gap in nearly every line of work, regardless of education, experience, occupation, industry, and job title.⁶⁰ In fact, 38 percent of the pay gap remains unexplained even when accounting for these variables.⁶¹ “Most researchers attribute this portion [of the wage gap] to factors such as discrimination and socially constructed gender norms. . .”⁶² The wage gap remains even when controlling for educational attainment.⁶³ Women with a bachelor’s degree earn less than do men with an associate’s degree and men with only a high school degree but no college education typically make more than women with an Associate’s degree.⁶⁴ Even in fields where women make up a substantial share of the workforce and controlling for experience, skills, education, race, and region, a gender wage gap remains in 98 percent of occupations.⁶⁵ Additionally, research demonstrates that when women move into a field of work in large numbers, wages decline.⁶⁶

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.”⁶⁷ 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).⁶⁸ 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.⁶⁹ Mothers on average are paid less than fathers, with mothers receiving 75 cents for every dollar a father earns, and low-wage working mothers see the biggest penalty of all groups in the workforce.⁷⁰ The

⁵⁹*Id.*

⁶⁰Council 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.

⁶¹Washington Ctr 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/>.

⁶²*Id.*

⁶³Anthony P. Carnevale et al., *Women Can’t Win 4* (2018), https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Women_FR_Web.pdf; see also Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why and What to Do 2* (2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

⁶⁴*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.

⁶⁵Asaf 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-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/Wage-Gap-Fact-Sheet-Occupation.pdf>; see also Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why and What to Do* (2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

⁶⁶Asaf Levanon, et al., *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950–2000 U.S. Census Data*, 88 *Social Forces* 865 (2009).

⁶⁷Sarah 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/>.

⁶⁸*Id.*

⁶⁹Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 *American Sociological Review* 204, 204–25 (2001).

⁷⁰Nat’l Women’s Law Ctr., *The Wage Gap Has Robbed Women of Their Ability to Weather COVID–19 2* (2021), <https://nwlc.org/wp-content/uploads/2021/03/EPD-2021-v1.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).

motherhood penalty is particularly staggering for Latina, Black, and Native American mothers who are paid 46, 52, and 50 cents to the dollar, respectively, compared to white non-Hispanic fathers.⁷¹ 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.⁷² Conversely, households headed by single fathers are nearly twice as likely to have incomes that provide economic security.⁷³ Eliminating pay inequality would cut the poverty rate for working single mothers in nearly half, from 28.9 percent to 14.5 percent.⁷⁴

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 2015.⁷⁵ Additionally, approximately 25.8 million children would benefit from the increased earnings of their mothers, and the number of children with working mothers living in poverty would drop from 5.6 million to 3.1 million.⁷⁶

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.⁷⁷ As Justice Ginsburg observed in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, "comparative pay information . . . is often hidden from the employee's view."⁷⁸ This lack of transparency creates significant obstacles for employees to gather information that would indicate that they have experienced pay discrimination.⁷⁹ Ultimately, this undermines an employee's ability to challenge pay discrimination.⁸⁰ Also, many employers have policies prohibiting salary discussions.⁸¹ About 60 percent of workers in the for-profit, private sector are subject to rules prohibiting or strongly discouraging employees from discussing their wages with co-workers.⁸² Finally, for those employees who do know what their colleagues earn, they

⁷¹ Nat'l Women's Law Ctr., *The Wage Gap Has Robbed Women of Their Ability to Weather COVID-19* 2 (2021), <https://nwlc.org/wp-content/uploads/2021/03/EPD-2021-v1.pdf>.

⁷² 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/job-quality-income-security/basic-economic-security-in-the-united-states/>.

⁷³ *Id.*

⁷⁴ Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy* 2 (2017), <https://iwpr.org/iwpr-publications/briefing-paper/the-impact-of-equal-pay-on-poverty-and-the-economy/>; see also Am. Ass'n of Univ. Women, *The Simple Truth about the Gender Pay Gap: 2020 Update* 6 (2020), https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf.

⁷⁵ Jessica Milli et al., *The Impact of Equal Pay on Poverty and the Economy* 2 (2017), <https://iwpr.org/iwpr-publications/briefing-paper/the-impact-of-equal-pay-on-poverty-and-the-economy/>.

⁷⁶ *Id.*

⁷⁷ *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 117th Cong. (2021) (written testimony of Fatima Goss Graves, President and CEO of National Women's Law Center, at 4) [Hereinafter Goss Graves Testimony].

⁷⁸ *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162, 2179 (2007) (Ginsburg, J., dissenting).

⁷⁹ Goss Graves Testimony at 6.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Shengwei Sun et al., *On the Books, Off the Record: Examining the Effectiveness of Pay Secrecy Laws in the U.S.* 7 (2021), <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf>.

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 it can readily develop with a decision to increase the pay of male colleagues. Women risk being overlooked for promotions and raises, the impact of which compounds throughout their careers.

Discussions about wages are necessary to identify pay disparity because "without this knowledge, [women] are unable to report these problems to the EEOC."⁸³ 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.

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.⁸⁴

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.⁸⁵ In 2005, BLS stopped collecting this data, citing employer inconvenience.⁸⁶ 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 1972.⁸⁷ 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

⁸³ *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].

⁸⁴ *Id.*

⁸⁵ H.R. Rep. No. 110-783 at 18 (2008) (internal citations and quotations omitted).

⁸⁶ *Id.* at 18 n.76.

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

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 demographic data (Component 1), pay data disaggregated by race/ethnicity, gender, and job category (Component 2). 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.

The Trump Administration indefinitely stayed the expanded pay data collection reporting requirements,⁸⁸ but following litigation, a court ordered the EEOC to collect pay data from employers for 2017 and 2018, and it did so. Nevertheless, in 2019, the EEOC revised the EEO-1 form to eliminate future pay data reporting, and the OFCCP announced that it would neither seek nor rely on the Component 2 pay data collected by the EEOC for its enforcement efforts. While the EEOC recently announced that it will resume the EEO-1 Component 1 demographic data collection, which was paused in 2020, this does not include the expanded pay data reporting requirements. 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.⁸⁹

The OFCCP's 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.⁹⁰ Prior to the EO Survey, the OFCCP conducted targeted compliance reviews. Because of limited resources, the OFCCP only audited approximately four percent of contractors each year for compliance.⁹¹

⁸⁸ *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).

⁸⁹ Janet Nguyen, *The U.S. Government is Becoming More Dependent on Contract Workers*, Marketplace (Jan. 17, 2019, 2:17 PM), <https://www.marketplace.org/2019/01/17/business/rise-federal-contractors>.

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

⁹¹ *Id.* at 19 (internal citations and quotations omitted).

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.⁹² 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.⁹³ 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.⁹⁴

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 altogether.⁹⁵ 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.⁹⁶ As discussed above, this important data was not collected due to actions taken by the Trump Administration.⁹⁷

H.R. 7 expands the EEOC's and the OFCCP's authority to collect pay data from certain employers, in addition to data already collected from employers in Component 1, on employment by race, gender, and national origin. This data will help employers and these enforcement agencies identify gender-based pay discrimination.

Women are less likely to negotiate

High numbers of women fail to negotiate for higher salaries and promotions.⁹⁸ 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.⁹⁹

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

⁹²*Id.* (internal citations and quotations omitted).

⁹³*Id.* (internal citations and quotations omitted).

⁹⁴*Id.* (internal citations and quotations omitted).

⁹⁵*Id.* (internal citations and quotations omitted).

⁹⁶Memorandum on Advancing Pay Equality through Compensation Data Collection, 2014 Daily Comp. Pres. Doc. 20751 (Apr. 11, 2014).

⁹⁷Neomi Rao, EEO-1 Form; Review Stay, 1–2 (2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

⁹⁸Shankar 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>.

⁹⁹Dina 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>.

are often judged more harshly for seeking higher pay than men.”¹⁰⁰ H.R. 7 authorizes the Secretary of Labor, in conjunction with the EEOC, 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.¹⁰¹ 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.”¹⁰²

Businesses often decide what to pay new hires based in-part, or in whole, on how much they earned from a previous job, which can exacerbate prior pay discrimination. As Fatima Goss Graves explained in her testimony at the 2021 Joint Subcommittee Hearing:

According to a recent study by Harvard Business Review, a significant percentage of employers who conduct pay equity audits found that relying on applicants’ salary history is a key driver of gender pay gaps within their companies. . . . By using a woman’s salary history to evaluate her suitability for a position or to set her new salary, new employers allow past discrimination to drive hiring and pay decisions, which in turn, keeps women’s pay stagnant. Gender based discrimination in pay is further compounded by race for women of color. . . . Recent research shows that state salary history bans are helping to narrow gender and racial wage gaps, including increasing employer transparency when it comes to pay. These bans have resulted in higher wages for job-changers by an average of 8% for women and 13% for African Americans compared to control groups.¹⁰³

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.

Salary history bans are becoming increasingly popular; 15 states, Puerto Rico, and at least 17 cities or counties have enacted salary history bans.¹⁰⁴ Recent research also suggests that these efforts are

¹⁰⁰ Yang Testimony at 6.

¹⁰¹ Nat’l Women’s Law Ctr., Asking for Salary History Perpetuates Pay Discrimination from Job to Job 2 (2020), <https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.14.2020-v2.pdf>.

¹⁰² EEOC Compliance Manual, No. 915.003 § 10–IV.F.2.g (Dec. 5, 2000), <https://www.eeoc.gov/policy/docs/compensation.html>.

¹⁰³ Goss Graves Testimony at 8.

¹⁰⁴ Am. Ass’n of Univ. Women, Pay Equity Laws Chart (2020), https://www.aauw.org/app/uploads/2021/01/Pay-Equity-Laws-Chart_2020-for-website.pdf; Am. Ass’n of Univ. Women, State

working; Black and female candidates who took new jobs in states with a ban appear to have achieved notable pay increases.¹⁰⁵

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

Plaintiffs 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, plaintiffs must not only show that a pay disparity exists between employees of the same “establishment,” but plaintiffs must also identify specific employees of the opposite sex holding equal positions who are paid higher wages.¹⁰⁶ The courts have strictly defined the term “same establishment” to mean “a distinct physical place of business.”¹⁰⁷ “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.”¹⁰⁸

The establishment requirement limits the ability of plaintiffs to prevail in EPA claims since many plaintiffs may not have a true comparator in their physical workplace. Today’s employers are much different than they were fifty-eight 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 plaintiffs in higher-level positions have unique job duties and therefore have no comparator in the same establishment.¹⁰⁹

Georgen-Saad v. Texas Mutual Insurance Company illustrates the obstacle the establishment requirement creates for executive and professional women.¹¹⁰ 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 Senior Vice Presidents of Investments, Insurance Services, Underwriting Services, Underwriting and Policy Holder Services, Public Affairs, Internal Audit, Benefits/Loss Pre-

and Local Salary History bans, <https://www.aauw.org/resources/policy/state-and-local-salary-history-bans/>.

¹⁰⁵ James Beesen et al., Stop Asking Job Candidates for Their Salary History, *Harvard Business Review* (July 2020), <https://hbr.org/2020/07/stop-asking-job-candidates-for-their-salary-history>.

¹⁰⁶ *Id.*, at 13.

¹⁰⁷ *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945); 29 C.F.R. § 1620.9(a).

¹⁰⁸ Goss Graves Testimony at 10.

¹⁰⁹ Juliene James, *The Equal Pay Act in the Courts: A De-Facto White-Collar Exemption*, 79 *N.Y.U. L. Rev.* 1873 (2004).

¹¹⁰ *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002).

vention, 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.¹¹¹

In 1986, the EEOC issued regulations interpreting the definition of “establishment” under the EPA.¹¹² 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*,¹¹³ 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.”¹¹⁴ 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.”¹¹⁵

In 2000, a Texas court¹¹⁶ 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 of a single facility) from the reach of the EPA.”¹¹⁷ The Fifth Circuit held that a school district in Dallas with 182 schools was a single

¹¹¹ *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F. Supp. 2d 853 (W.D. Tex. 2002).

¹¹² 29 C.F.R. § 1620.9(a)–(b).

¹¹³ *Grumbine v. United States*, 586 F. Supp. 1144 (D.D.C. 1984).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1148.

¹¹⁶ *Vickers v. Int’l Baking Co.*, No. 398CV1864D, 2000 U.S. Dist. LEXIS 17995 (N.D. Tex. Dec. 7, 2000).

¹¹⁷ *Id.* at *15.

establishment for purposes of an EPA claim¹¹⁸ as were 13 elementary schools operated by a single school district near Houston.¹¹⁹

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.¹²⁰ 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 valid comparator. Under H.R. 7, 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*.¹²¹ However, consistent with EEOC rules, guidance, and regulations, 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.”¹²² 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.¹²³ Employers have been able to prevail in EPA cases by asserting a range of “other than sex” factors.

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.¹²⁴ Additionally, employers have been able to successfully argue that factors such as market forces and prior salaries (even if they are based on a discriminatory wage) fall within the “any factor other than sex” defense, undermining the goals of the EPA. “Consideration of market forces shifts focus from the central question of whether an employer is providing equal pay for equal work. Bias can taint pay de-

¹¹⁸ *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1979).

¹¹⁹ *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975).

¹²⁰ *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]ay 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”).

¹²¹ 820 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.”).

¹²² 29 U.S.C. § 206(d)(1); see also *Yang Testimony* at 4.

¹²³ See *Fallon v. Illinois*, 882 F.2d 1206 (7th Cir. 1989).

¹²⁴ *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (denying cert and acknowledging the conflict among the circuits).

cisions when the employer assesses an artificially higher or nebulous ‘market value’ to male candidates.”¹²⁵

In *Boriss v. Addison Farmers Insurance Company*,¹²⁶ 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 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.¹²⁷ 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.”¹²⁸ All that needs to be evaluated is “whether the factor is discriminatorily applied or if it causes a discriminatory effect.”¹²⁹

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.¹³⁰ Even though these situations may result in female employees being paid less, the court stated that none of these situations violate the EPA.¹³¹

In *Warren v. Solo Company*,¹³² 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.

Despite clear direction from the Supreme Court,¹³³ lower courts have accepted market forces as a defense to a pay disparity.¹³⁴ In *Merillat v. Metal Spinners, Incorporated*,¹³⁵ 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

¹²⁵ Yang Testimony at 6.

¹²⁶ *Boriss v. Addison Farmers Ins. Co.*, No. 91 C 3144, 1993 U.S. Dist. LEXIS 10331 (N.D. Ill. July 27, 1993).

¹²⁷ *Id.* at 23.

¹²⁸ *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).

¹²⁹ *Boriss v. Addison Farmers Ins. Co.*, No. 91 C 3144, 1993 U.S. Dist. LEXIS 10331 at *27 (N.D. Ill. July 27, 1993).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *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).

¹³³ See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (holding 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. 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”).

¹³⁴ See *Brokaw v. Weiser Sec. Servs., Inc.*, 780 F. Supp. 2d 1233, 1252 (S.D. Ala. 2011).

¹³⁵ *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685 (7th Cir. 2006).

employer created a new position entitled “Vice President of Procurement and Materials Management.”¹³⁶ 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 \$62,500.¹³⁷ At that time, the plaintiff earned \$49,800, and she helped to train the new employee for his position.¹³⁸

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 disparity was due to factors other than sex, including education, experience, and “the market forces at the time of [his] hire.”¹³⁹ The court noted that it previously “held that an employer may take into account market forces when determining the salary of an employee,”¹⁴⁰ 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*,¹⁴¹ 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.”¹⁴² 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.”¹⁴³

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*,¹⁴⁴ 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

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 698 (7th Cir. 2006).

¹⁴⁰ *Id.* at 697.

¹⁴¹ *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973).

¹⁴² *Id.* (in addition, women were not allowed to apply to work in the men’s department in this case).

¹⁴³ *Id.* at 596.

¹⁴⁴ *Drury v. Waterfront Media, Inc.*, 05 Civ. 10646 (JSR), 2007 U.S. Dist. LEXIS 18435(S.D.N.Y. Mar. 8, 2007).

her previous position, she had earned \$85,000).¹⁴⁵ 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 \$20,000.¹⁴⁶

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."¹⁴⁷

The same conclusion was reached in *Glunt v. GES Exposition Services*,¹⁴⁸ 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."¹⁴⁹ 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."¹⁵⁰ 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."¹⁵¹

Several other court decisions have similarly upheld such pay disparities. In *Horner v. Mary Institute*,¹⁵² 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*,¹⁵³ the court found that "salary matching" was a valid defense to pay disparity. In *Sobol v. Kidder, Peabody & Company*,¹⁵⁴ 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."¹⁵⁵

While the EPA affords employers opportunities to defend their practices, the "factor other than sex" defense under the EPA has

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Drury v. Waterfront Media, Inc.*, 05 Civ. 10646 (JSR), 2007 U.S. Dist. LEXIS 18435 (S.D.N.Y. Mar. 8, 2007).

¹⁴⁸ *Glunt v. GES Exposition Servs.*, 123 F. Supp. 2d 847 (D. Md. 2000).

¹⁴⁹ *Id.* at 859.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Horner v. Mary Inst.*, 613 F.2d 706 (8th Cir. 1980).

¹⁵³ *Engelmann v. Nat'l Broad. Co.*, 94 Civ. 5616 (MBM), 1996 U.S. Dist. LEXIS 1865 (S.D.N.Y. Feb. 22, 1996).

¹⁵⁴ *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208, 220 (S.D.N.Y. 1999).

¹⁵⁵ *Id.*

been interpreted by the courts so broadly that nearly any explanation for a wage differential is acceptable. This is one of the main loopholes found in the EPA that has perpetuated the gender-wage gap. The *Paycheck Fairness Act* resolves this loophole by requiring that 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.

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"¹⁵⁶ 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.¹⁵⁷

The business necessity defense originated in the case of *Griggs v. Duke Power Company*,¹⁵⁸ 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."¹⁵⁹ 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 what the correct standard should be.¹⁶⁰ This culminated in the case of *Wards Cove Packing Company, Incorporated, et al. v. Atonio et al.*,¹⁶¹ 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 justification 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.¹⁶²

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

¹⁵⁶ *Griggs v. Duke Power*, 515 F.2d 86 (4th Cir. 1975).

¹⁵⁷ H.R. Rep. No. 110-783 at 12 (2008) (internal citations and quotations omitted).

¹⁵⁸ *Griggs v. Duke Power*, 401 U.S. 424 (1971).

¹⁵⁹ *Id.* at 431.

¹⁶⁰ 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).

¹⁶¹ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

¹⁶² *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

impact.¹⁶³ 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.¹⁶⁴

The *Paycheck Fairness Act* strengthens the EPA by insisting that the “factor other than sex” defense be limited to a legitimate business purpose.¹⁶⁵ 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.¹⁶⁶

Class actions

The EPA requires plaintiffs to affirmatively “opt-in” to a collective action.¹⁶⁷ 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.¹⁶⁸ Title VII, for example, provides for claimants to “opt-out” of multi-party claims.¹⁶⁹

The current EPA rule excludes workers who may not be aware they have a claim and also excludes workers 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.¹⁷⁰

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.¹⁷¹ 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 under Title VII are capped depending on the size of the employer.¹⁷² “For a plaintiff succeeding in a Title VII case against an employer with 15–100 employees, damages are capped at \$50,000, no matter how severe the harassment or how culpable the employer. Even for employers with more than 500 employees, dam-

¹⁶³ Civil Rights Act of 1991, Pub. L. No. 102–166, § 2, 105 Stat. 1071.

¹⁶⁴ *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).

¹⁶⁵ Yang Testimony at 8.

¹⁶⁶ H.R. Rep. No. 110–783 at 12 (2008) (internal citations and quotations omitted).

¹⁶⁷ Class-action lawsuits filed under the EPA are called collective actions because plaintiffs must “opt-in” in order to participate.

¹⁶⁸ Yang Testimony at 13.

¹⁶⁹ 42 U.S.C. § 2000e–2(n).

¹⁷⁰ Goss Graves Testimony at 10.

¹⁷¹ 29 U.S.C. § 260.

¹⁷² 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.).

ages are capped at \$300,000.”¹⁷³ The lack of punitive or compensatory damages in the EPA, as well as caps on damages in Title VII, 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.¹⁷⁴

“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*.”¹⁷⁵ Fatima Goss Graves, testifying at the 2021 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.¹⁷⁶

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*.¹⁷⁷ 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 \$300,000.¹⁷⁸ In his opinion, Judge Orenstein stated that his ruling “respects the law, but it does not achieve a just result,”¹⁷⁹ especially for one of the biggest companies in America.¹⁸⁰

Punitive damages, especially uncapped punitive damages, are necessary to deter unscrupulous businesses from harming workers and consumers to gain a competitive advantage.¹⁸¹ Often, without punitive damages, a business may treat its labor violations as merely a cost of doing business.

¹⁷³Nat’l Women’s Law Ctr., #Metoowhatnext: Strengthening Workplace Sexual Harassment Protections and Accountability 4 (2017), <https://nwlc.org/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>.

¹⁷⁴Vanessa 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.”).

¹⁷⁵Goss Graves Testimony at 11.

¹⁷⁶*Id.*

¹⁷⁷*Brady v. Wal-Mart Stores, Inc.*, CV 03–3843 (JO), 2005 U.S. Dist. LEXIS 12151 (E.D.N.Y. June 21, 2005).

¹⁷⁸*Id.*

¹⁷⁹*Id.* at *10.

¹⁸⁰*Id.*

¹⁸¹Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 12 (1992).

There is precedent for uncapped damages against employers who intentionally discriminate;¹⁸² damages awarded under Section 1981 for race or national origin discrimination are not subject to statutory limitations. Additionally, some states allow for uncapped compensatory and punitive damages within their antidiscrimination laws.¹⁸³

It is important to note that courts generally do not award unjustifiable or excessive damages and instead base relief upon sound factors, such as the willfulness or egregiousness of the violation¹⁸⁴ and the effectiveness of damages as a deterrent.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

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*,¹⁸⁸ the plaintiff did not 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.¹⁸⁹

As Fatima Goss Graves testified at the 2021 Joint Subcommittee Hearing:

About 60% of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues. The significantly narrower gender wage gap for employees working in the public sector—where pay secrecy rules are uncommon and pay is often publicly disclosed—suggests the difference that transparency makes. Only 15.1% of public sector em-

¹⁸² 42 U.S.C. § 1981.

¹⁸³ California, Hawaii, Massachusetts, New Jersey, Ohio, Oregon, Vermont, and West Virginia do not limit plaintiffs' compensatory and punitive damages, ensuring that victims of harassment can be fully compensated for the harm they suffered. Nat'l Women's Law Ctr., #MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability 4 (2017), <https://nwlc.org/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>.

¹⁸⁴ 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).

¹⁸⁵ 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).

¹⁸⁶ *Id.*

¹⁸⁷ 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).

¹⁸⁸ *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162 (2007).

¹⁸⁹ *Id.*

ployees report that discussing their wages is either prohibited or discouraged. In the federal government, where pay rates and scales are more transparent and publicly available, and unionization rates are higher, the overall gender wage gap is 7%—significantly smaller than the overall gender wage gap of 18%.¹⁹⁰

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.¹⁹¹ However, in some cases interpreting the anti-retaliatory provision,¹⁹² 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 Inc.*,¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

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.”¹⁹⁶ 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.”¹⁹⁷

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. It also protects workers who

¹⁹⁰ Goss Graves Testimony at 5–6 (internal citations omitted).

¹⁹¹ 29 U.S.C. § 215(a)(3).

¹⁹² *Id.*

¹⁹³ *McKenzie v. Reinberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996).

¹⁹⁴ *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”).

¹⁹⁵ *McKenzie v. Reinberg's Inc.*, 94 F.3d 1478, 1487 (10th Cir. 1996).

¹⁹⁶ H.R. Rep. No. 110–783, at 34–35 (2008).

¹⁹⁷ *Id.*

oppose unlawful discrimination. 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 unequal pay. However, H.R. 7 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.¹⁹⁸

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

¹⁹⁸ H.R. 7, 116th Cong. § 10(a) (2019).

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 restricts employers' and employment agencies' ability to "request, require, or purchase genetic information" regarding applicants and employees or their family members.¹⁹⁹ In all three cases, the restrictions on pre-employment inquiries are necessary to advance the government's compelling interest in eliminating unlawful discrimination.

Joint EEOC-OFCCP enforcement

In the *Reorganization Act of 1977*,²⁰⁰ Congress authorized the President to restructure Executive branch agencies to "promote the better execution of the laws."²⁰¹ Reorganization Plan No. 1 of 1978²⁰² transferred all functions related to enforcing or administering the EPA from the DOL to the EEOC. In response to the U.S. Supreme Court's ruling in *I.N.S. v. Chadha*,²⁰³ in 1984, Congress passed legislation codifying each part of the initial reorganization plan, thus solidifying EEOC's enforcement authority over the EPA. H.R. 7 would ensure that the EEOC and the OFCCP have joint enforcement authority of the EPA over federal contracts. This will not impact the EEOC's ability to adopt separate, additional, or different policies for other private sector employers under the EPA.

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. Enhanced enforcement of equal pay requirements

Definitions. This section clarifies that the definition of "sex" includes sex stereotypes, pregnancy, childbirth or a related medical condition, sexual orientation or gender identity, and sex characteristics including intersex traits.

Bona Fide Factor Defense and Modification of Same Establishment Requirement. This section 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 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

¹⁹⁹ See *Facts about the Genetic Information Nondiscrimination Act*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-gina.cfm> (last visited Mar. 11, 2019).

²⁰⁰ 5 U.S.C. § 901.

²⁰¹ *Id.*

²⁰² 43 Fed. Reg. 19,807 (July 1, 1978).

²⁰³ 462 U.S. 919 (1983).

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.

This section 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. This section protects employees from retaliation for seeking redress, inquiring about an employer’s wage practices, or disclosing their own wages to coworkers. This section provides that employers are prohibited from retaliating against employees who have made a charge; filed any complaint; instituted any investigation, proceeding, hearing, or action under the EPA; or opposed unlawful actions under the Act. 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.

This section 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. This section provides that uncapped compensatory and punitive damages are available in private EPA suits and suits brought by the Secretary of Labor. This section 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. This section requires the EEOC and the OFCCP to jointly enforce the Act with respect to federal contractors.

Section 3. Training

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

Section 4. Negotiation skills training

Program Authorization. This section 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, including 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 agen-

cies, private nonprofit organizations, or community-based organizations.

Incorporating Training into Existing Programs. This section 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. This section 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 5. Research, education, and outreach

This section 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 6. Establishment of the National Award for Pay Equity in the Workplace

This section 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, in consultation with the EEOC, 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 7. 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. This section requires that the compensation data the EEOC collects be taxable compensation data. This data must be collected from employers in accordance with twelve “pay bands” listed in the section, and it may be adjusted for inflation.

Section 8. 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 directs the OFCCP to collect compensation and other employment data by demographics. It requires the Secretary of Labor to make available information on pay information including analyses of discrimination.

Section 9. 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 10. Authorization of appropriations

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

Section 11. 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 12. 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 13. 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 of 1974*, Pub. L. No. 93-344 (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104-4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the *Congressional Budget and Impoundment Control Act of 1974*. The Committee reports that because this cost estimate was not timely submitted to the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.R. 7, as amended.

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: 3/24/21

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 19 - 28

Sponsor/Amendment: Stefanik/STEFNY_111.XML

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)		X		Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)	X		
Mr. SABLAN (MP)		X		Mr. WALBERG (MI)	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. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)			X	Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)	X		
Mrs. HAYES (CT)		X		Mr. GOOD (VA)		X	
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)		X		Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)		X		Mrs. SPARTZ (IN)	X		
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)	X		
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)	X		
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		<i>Vacancy</i>			
Mr. POCAN (WI)		X		<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)			X				
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 19

Nos: 28

Not Voting: 4

Total: 53 / Quorum: 27 / Report: 27

(29 D - 24 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: 3/24/2021

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 2

Bill: H.R. 7

Amendment Number: Motion

Disposition: Adopted by a vote of 25 - 22

Sponsor/Amendment: Bowman/to report to the House with an 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	
Mr. GRIJALVA (AZ)	X			Mr. WILSON (SC)		X	
Mr. COURNTEY (CT)	X			Mr. THOMPSON (PA)		X	
Mr. SABLAN (MP)	X			Mr. WALBERG (MI)		X	
Ms. WILSON (FL)			X	Mr. GROTHMAN (WI)		X	
Ms. BONAMICI (OR)	X			Ms. STEFANK (NY)		X	
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. BANKS (IN)		X	
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)		X	
Mr. NORCROSS (NJ)			X	Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)		X	
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)		X	
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)		X	
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)		X	
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)		X	
Ms. OMAR (MN)	X			Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)	X			Mrs. SPARTZ (IN)		X	
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)		X	
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)		X	
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)		X	
Mr. BOWMAN (NY)	X			<i>Vacancy</i>			
Mr. POCAN (WI)	X			<i>Vacancy</i>			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)	X						
Mr. YARMUTH (KY)	X						
Mr. ESPAILLAT (NY)			X				
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 25

Nos: 22

Not Voting: 4

Total: 53 / Quorum: 27 / Report: 27

(29 D - 24 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 clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing entitled “*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*,” which was used to consider H.R. 7. The Committee heard testimony on how the weaknesses in the EPA have left the law ineffective in preventing gender-based wage discrimination. Witnesses included Fatima Goss Graves, CEO and President of the National Women’s Law Center, Washington, DC; Camille A. Olson, Partner at Seyfarth Shaw, LLP, Chicago, IL; Dina Bakst, Co-Founder & Co-President, A Better Balance: The Work & Family Legal Center, New York City, NY; and Laurie McCann, Senior Attorney, AARP, Washington, DC.

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 and Impoundment Control 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 and Impoundment Control Act of 1974*, the Committee has requested but not received a cost estimate for the bill from the Director of the Congressional Budget Office.

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 Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*. The Committee reports that because this cost estimate was not timely submitted to the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.R. 7, as amended.

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 italics, and existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * * *

DEFINITIONS

SEC. 3. As used in this Act—

(a) “Person” means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) “Commerce” means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) “State” means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

- (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,
- (v) in the Library of Congress, or
- (vi) the Government Printing Office;
- (B) any individual employed by the United States Postal Service or the Postal Rate Commission; and
- (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—
 - (i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
 - (ii) who—
 - (I) holds a public elective office of that State, political subdivision, or agency,
 - (II) is selected by the holder of such an office to be a member of his personal staff,
 - (III) is appointed by such an officeholder to serve on a policymaking level,
 - (IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or
 - (V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any

forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Producer" means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m)(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the

wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 6(a)(1).

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this

subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive rights to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency.

shall be deemed to be activities performed for a business purpose.

(s)(1) “Enterprise engaged in commerce or in the production of goods for commerce” means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining

the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) “Tipped employee” means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.

(u) “Man-day” means any day during which an employee performs any agricultural labor for not less than one hour.

(v) “Elementary school” means a day or residential school which provides elementary education, as determined under State law.

(w) “Secondary school” means a day or residential school which provides secondary education, as determined under State law.

(x) “Public agency” means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

(z) “Sex” includes—

(1) a sex stereotype;

(2) pregnancy, childbirth, or a related medical condition;

(3) sexual orientation or gender identity; and

(4) sex characteristics, including intersex traits.

(aa) “Sexual orientation” includes homosexuality, heterosexuality, and bisexuality.

(bb) “Gender identity” means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.

* * * * *

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 proportion 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).

(c)

(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 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.

(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.

* * * * *

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.

* * * * *

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;

(B) has opposed any practice made unlawful by this Act;

or

(C) has inquired about, discussed, or disclosed the wages of the employee or another employee (such as by inquiring or discussing with the employer why the wages of the employee are set at a certain rate or salary);

(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)(C) 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), or who violates the provisions of section 15(a)(3) in relation to a violation of 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 sub-

ject 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 provision 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 determina-

tion 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.

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CIVIL RIGHTS ACT OF 1964

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TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

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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, notwithstanding 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 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.

(3)(A) For each 12-month reporting period for an employer, the compensation data collected under paragraph (1) shall include, for each range of taxable compensation described in subparagraph (B), disaggregated by the categories described in subparagraph (E)—

(i) the number of employees of the employer who earn taxable compensation in an amount that falls within such taxable compensation range; and

(ii) the total number of hours worked by such employees.

(B) Subject to adjustment under subparagraph (C), the taxable compensation ranges described in this subparagraph are as follows:

(i) Not more than \$19,239.

(ii) Not less than \$19,240 and not more than \$24,439.

(iii) Not less than \$24,440 and not more than \$30,679.

(iv) Not less than \$30,680 and not more than \$38,999.

(v) Not less than \$39,000 and not more than \$49,919.

(vi) Not less than \$49,920 and not more than \$62,919.

(vii) Not less than \$62,920 and not more than \$80,079.

(viii) Not less than \$80,080 and not more than \$101,919.

(ix) Not less than \$101,920 and not more than \$128,959.

(x) Not less than \$128,960 and not more than \$163,799.

(xi) Not less than \$163,800 and not more than \$207,999.

(xii) Not less than \$208,000.

(C) *The Commission may adjust the taxable compensation ranges under subparagraph (B)—*

(i) if the Commission determines that such adjustment is necessary to enhance enforcement of Federal laws prohibiting pay discrimination; or

(ii) for inflation, in consultation with the Bureau of Labor Statistics.

(D) *In collecting data described in subparagraph (A)(ii), the Commission shall provide that, with respect to an employee who the employer is not required to compensate for overtime employment under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207), an employer may report—*

(i) in the case of a full-time employee, that such employee works 40 hours per week, and in the case of a part-time employee, that such employee works 20 hours per week; or

(ii) the actual number of hours worked by such employee.

(E) *The categories described in this subparagraph shall be determined by the Commission and shall include—*

(i) race;

(ii) national origin;

(iii) sex; and

(iv) job categories, including the job categories described in the instructions for the Equal Employment Opportunity Employer Information Report EEO-1, as in effect on the date of the enactment of this subsection.

(F) *The Commission shall use the compensation data collected under paragraph (1)—*

(i) to enhance—

(I) the investigation of charges filed under section 706 or section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)); and

(II) the allocation of resources to investigate such charges; and

(ii) for any other purpose that the Commission determines appropriate.

(G) *The Commission shall annually make publicly available aggregate compensation data collected under paragraph (1) for the categories described in subparagraph (E), disaggregated by industry, occupation, and core based statistical area (as defined by the Office of Management and Budget).*

(4) *The compensation data under paragraph (1) shall be collected from each employer that—*

(A) is a private employer that has 100 or more employees, including such an employer that is a contractor with the Federal Government, or a subcontractor at any tier thereof; or

(B) the Commission determines appropriate.

* * * * *

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 and ensuring 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 protections based on race, color, national origin, religion, and sex in Title VII of the *Civil Rights Act* (Title VII). Together, these laws protect against sex discrimination and provide a range of remedies for victims. Committee Republicans agree that such discrimination should not be tolerated, which is why not one, but two federal laws already prohibit such actions.

It is against this backdrop that Committee Republicans reject H.R. 7, the so-called *Paycheck Fairness Act* (PFA). 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. The bill radically 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 drastically expanding liability and damages under the EPA. Further, the bill requires a burdensome, intrusive, and unnecessary government collection of questionable utility of worker pay data. The data is disaggregated by race, sex, and national origin (including hiring, termination, and promotion data) 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 Radically Limits Legitimate and Lawful Defenses

H.R. 7 radically 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.¹ 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 proving the pay differential is based on factors other than sex. 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 pay differential was required by "business necessity," essentially putting courts in charge of determining what a business owner must do to avoid bankruptcy. Ms. Camille A. Olson, a partner at Seyfarth Shaw LLP, explained at the lone hearing on H.R. 7 (a catch-all hearing that also covered three other, disparate bills) 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.²

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 business owners to justify every cent of a pay differential is a mandate that could only be satisfied by establishing 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 can-

¹ A provision in H.R. 7 as reported by the Committee was not included in the bill as introduced in the House. H.R. 7 as reported adds a definition of "sex" to the FLSA, a statute that currently does not define "sex." The bill as reported defines "sex" as including a "sex stereotype," "sexual orientation or gender identity," and "sex characteristics, including intersex traits," while defining "sexual orientation" as including "homosexuality, heterosexuality, and bisexuality," and defining "gender identity" as "gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth." Such a substantial change to the FLSA, the nation's foremost wage-and-hour law, should have been subject to examination at a Committee hearing. However, because the Democrats' Amendment in the Nature of a Substitute to H.R. 7 made this change at the markup, no such examination occurred or was possible.

² *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civ. Rights & Human Serv. & Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (statement of Camille Olson, Partner, Seyfarth Shaw LLP, at 9).

didate 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.³

Even more egregious is that if a business owner somehow persuades the judge or jury 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, 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 (a standard which has existed 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.⁴ 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 Drastically Expands Remedies

H.R. 7 drastically 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 provide for limited compensatory and punitive damages in cases of intentional discrimination.

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

³*Id.* at 14.

⁴*Id.* at 30.

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.⁵

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

This bill's true intent to generate more lawsuits and line the pockets of trial lawyers is nowhere more evident than in its provisions to expand class action lawsuits. Currently under the FLSA, plaintiffs may sue on behalf of themselves and those similarly situated, thereby pursuing 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 individuals—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.”⁶ 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, unworkable 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 with a salary offer*, and then only if the information will increase the salary offer. Ms. Olson explained the overly complex, impractical nature of this scheme:

Prohibiting employers from relying on prior salary information, even if it's voluntarily provided, until after an offer that includes compensation information has been extended will invoke an unnatural cadence that does not reflect the realities of the workforce. Indeed, human resources representatives will be forced to issue “Miranda-

⁵*Id.* at 25.

⁶*Id.* at 18.

type” warnings to applicants advising them that they cannot provide information regarding prior salary. And that even if they do, the employer must make a salary offer unrelated to their prior salary.⁷

This provision is representative of how extreme and unrealistic H.R. 7 is in its approach to addressing compensation issues in the workplace. If enacted, workers and employers would be stuck trying to implement a stream of provisions that are unworkable.

H.R. 7 Eliminates Business Owners’ Ability to Protect the Confidentiality of Wage and Salary Data

H.R. 7 undermines the ability of business owners to manage their enterprises by adopting broad, new anti-retaliation provisions relating to employee discussions of pay or compensation, extending restrictions far beyond what is already provided under federal law. Title VII, among other federal civil rights laws, protects employees in 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 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.⁸

These provisions in the bill contain no limiting principle and will very likely harm workers and business owners. They should be eliminated.

H.R. 7 Mandates Intrusive and Unnecessary Government Collection of Worker Pay Data

H.R. 7 directs EEOC to collect compensation data from business owners disaggregated by the sex, race, and national origin of work-

⁷*Id.* at 21.

⁸*Id.* at 23.

ers, including, for the first time ever, hiring, termination, and promotion data. This sweeping collection would go even further than the Obama administration’s discredited proposal in 2016 to collect pay data,⁹ which did not include hiring, termination, and promotion data. Pursuant to the Obama administration proposal, EEOC collected pay data for 2017 and 2018, but the agency has since discontinued the pay data collection.¹⁰

As with the Obama administration scheme, this mandate raises serious privacy and confidentiality concerns. Time and again there have been massive and harmful data breaches of federal agencies. These reams of 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. EEOC would also share the data with the U.S. Department of Labor (DOL), 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 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. In 2019, EEOC estimated that annual costs to employers of submitting information reports with pay data to the agency was more than \$610 million in 2017 and 2018. EEOC also determined that the “unproven utility to its enforcement program of the pay data . . . is far outweighed by the burden imposed on employers that must comply with the reporting obligation.”¹¹

In addition to the intrusive government collection of pay data, there are substantive concerns with changes to the EPA contained in H.R. 7—changes that make it 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. The concerns outlined here represent but a few of the most egregious policy flaws in H.R. 7. Whether singly or taken as a whole, the provisions of H.R. 7 must 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 2019, as compared to 62 percent in 1979.¹² Supporters of

⁹Press Release, EEOC to Collect Summary Pay Data (Sept. 29, 2016).

¹⁰Notice of Information Collection—Request for new Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2, 84 Fed. Reg. 48,138, 48,141 (Sept. 12, 2019).

¹¹*Id.*

¹²U.S. DEPT OF LAB, BUREAU OF LAB. STATISTICS, BLS REPORTS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2019 (Dec. 2020).

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.¹³ For example, among full-time workers, men are more likely than women to choose to work more than 40 hours per week. In 2019, 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 work week, women earned 87 percent as much as men.¹⁴

Other factors, including work experience, job tenure, and preferences for non-wage benefits, such as health insurance and other fringe benefits, further reduce the “gap.” A 2020 study by the compensation software company PayScale found that when accounting for job title, years of experience, industry, location, and other compensable factors, women earned 98 percent as much as men.¹⁵ A 2020 research paper funded by the U.S. Census Bureau found that 41 percent of the gender wage gap can be explained by standard demographic and economic characteristics, including work history, industry, and occupation.¹⁶ A 2009 study commissioned by DOL found a gender wage gap between 4.8 and 7.1 percent when controlling for economic variables between men and women.¹⁷

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.¹⁸ The study found 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, 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

¹³See, 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>.

¹⁴U.S. DEPT OF LABOR, *supra* note 12.

¹⁵PAYSCALE, THE STATE OF THE GENDER PAY GAP 2020, <https://www.payscale.com/data/gender-pay-gap>.

¹⁶Thomas B. Foster et al., *An Evaluation of the Gender Wage Gap Using Linked Survey and Administrative Data*, Working Paper No. CES–20–34 (U.S. Census Bureau Ctr. for Econ. Studies, Nov. 2020), <https://www2.census.gov/ces/wp/2020/CES-WP-20-34.pdf>. This paper has not undergone the review accorded Census Bureau publications and is not endorsed by the agency.

¹⁷CONSAD Research Corp., *supra* note 13, at 1.

¹⁸Valentin 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>.

seniority was the same, which means that differences in choices 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” caused by gender-based discrimination in pay exists. 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 AMENDMENT

Recognizing the fundamental failures of policy contained in H.R. 7, Representative Elise Stefanik (R-NY) offered a substitute amendment during the Committee markup to highlight Republican priorities and solutions for working women and men.

Representative Stefanik’s amendment strengthens 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 strengthens the EPA by replacing the “factor other than sex” defense with the language “a bona fide business-related factor 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 Stefanik amendment also strikes 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.

To encourage proactive steps by employers, and taking its cue from Massachusetts’ pay equity law¹⁹ and Ms. Olson’s testimony, Representative Stefanik’s amendment provides an affirmative defense to an EPA claim if an employer self-audits its pay practices to identify potentially unlawful pay differentials and takes action to address pay differentials. The audit must be conducted in good faith, reasonable in detail and scope relative to the size of the employer, and conducted within the prior three years. If a self-audit is not reasonable in detail and scope but meets the other criteria, then the employer will not be liable for liquidated damages. In addition, the employer’s audit and subsequent actions related to the audit cannot be used in a claim against the employer, and no negative inference can be made against an employer who conducts a self-audit. Ms. Olson’s testimony endorsed provisions such as this to encourage more employers to conduct self-evaluations to identify and rectify potentially unlawful pay differentials.²⁰

To ensure recruitment and hiring practices are not unduly interfered with, Representative Stefanik’s amendment ensures employers may act on wage information that has been voluntarily provided by a prospective employee. The amendment also ensures that

¹⁹Mass. Gen. Laws ch. 149, § 105A(d).

²⁰Olson statement, *supra* note 2, at 30–32.

the employer may have a salary expectation conversation with a prospective employee. In contrast, H.R. 7 forbids employers from relying on wage history voluntarily provided by the prospective employee *until after the employer makes a job offer*, including a salary offer, to the prospective employee. This seemingly requires the employer to warn the prospective employee, with a Miranda-style warning, not to volunteer any of the prospective employee's wage history. Even then, the employer can only rely on the voluntarily provided wage history to increase the salary offer. This scheme in H.R. 7 is unworkable and may harm prospective employees who have unrealistic salary expectations. The business necessity requirement in the PFA also makes discretionary salary offers, such as to recruit a prospective employee from another firm, likely to be unlawful.

To protect employees from violations of their privacy, Representative Stefanik's amendment ensures employers may place reasonable limitations on the time, place, and manner of employees' discussions, disclosures, or inquiries about employee wages, including that any disclosures must be voluntary. In contrast, H.R. 7 does not allow the employer to place reasonable limits on these disclosures. This could result in disclosures that may violate the privacy of employees and the confidentiality of proprietary information.²¹

Crucially, Representative Stefanik's amendment does not require EEOC to collect pay data from employers. This wise omission reflects Committee Republicans' grave concerns with the government collection of pay data mandated in H.R. 7. The bill requires EEOC to collect worker compensation data from business owners disaggregated by sex, race, and national origin of employees, including, for the first time ever, 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 doubtful, and whether EEOC would be able to manage and interpret this massive amount of pay data appropriately is questionable. Finally, the data collection requirement would impose an extremely costly and uniquely burdensome mandate on business owners, requiring them to submit reams of proprietary data to the government, the uses of which are not adequately explained in the bill.

Representative Stefanik's amendment embodies a responsible, workable approach to address compensation issues in the workplace, which the Democrats unanimously rejected in favor of H.R. 7's numerous top-down, impractical, and ludicrous provisions.

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, the main beneficiaries of the bill. For these reasons, and all of those set forth above, Committee Republicans oppose the enactment of H.R. 7 as reported from the Committee on Education and Labor.

²¹ See *id.* at 21–24.

VIRGINIA FOXX,
Ranking Member.
JOE WILSON.
GLENN "GT" THOMPSON.
TIM WALBERG.
GLENN GROTHMAN.
ELISE M. STEFANIK.
RICK W. ALLEN.
JIM BANKS.
JAMES COMER.
FRED KELLER.
GREGORY F. MURPHY, M.D.
MARIANNETTE MILLER MEEKS,
M.D.
BURGESS OWENS.
LISA C. McCLAIN.
DIANA HARSHBARGER.
SCOTT FITZGERALD.
MADISON CAWTHORN.

