

109TH CONGRESS  
1ST SESSION

# S. 840

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

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## IN THE SENATE OF THE UNITED STATES

APRIL 19, 2005

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

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# A BILL

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

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

3       **SECTION 1. SHORT TITLE.**

4       (a) SHORT TITLE.—This Act may be cited as the  
5       “Fair Pay Act of 2005”.

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

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

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

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

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

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

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

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

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

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

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

7 (5)(A) A study of 400 fields that employed  
8 10,000 full-time, year-round workers conducted by  
9 the United States Census Bureau in 2000, found  
10 that women were able to earn at least as much as  
11 men in just 5 fields, hazardous material removal,  
12 telecommunications line installation and repair,  
13 meeting and convention planning, food preparation,  
14 and construction trade assistant work.

15 (B) An Institute for Women's Policy Research  
16 2004 analysis of data collected in the Current Popu-  
17 lation Survey by the United States Bureau of Labor  
18 Statistics found that women were paid only 76 cents  
19 for every dollar that a man makes.

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

23 (7) Title VII of the Civil Rights Act of 1964  
24 prohibits discrimination in compensation because of  
25 race, color, religion, national origin, and sex. The

1 Supreme Court, in its decision in County of Wash-  
2 ington v. Gunther, 452 U.S. 161 (1981), held that  
3 title VII's prohibition against discrimination in com-  
4 pensation also applies to jobs that do not constitute  
5 "equal work" as defined in section 6(d) of the Fair  
6 Labor Standards Act of 1938 (29 U.S.C. 206(d)).  
7 Decisions of lower courts, however, have demon-  
8 strated that further clarification of existing legis-  
9 lation is necessary in order effectively to carry out  
10 the intent of Congress to implement the Supreme  
11 Court's holding in its Gunther decision.

12 (8) Artificial barriers to the elimination of dis-  
13 crimination in compensation based upon sex, race,  
14 and national origin continue to exist more than 3  
15 decades after the passage of section 6(d) of the Fair  
16 Labor Standards Act of 1938 and the Civil Rights  
17 Act of 1964 (42 U.S.C. 2000a et seq.). Elimination  
18 of such barriers would have positive effects, includ-  
19 ing—

20 (A) providing a solution to problems in the  
21 economy created by discrimination through  
22 wage rate differentials;

23 (B) substantially reducing the number of  
24 working women and people of color earning low

1                   wages, thereby reducing the dependence on pub-  
2                   lic assistance; and

3                   (C) promoting stable families by enabling  
4                   working family members to earn a fair rate of  
5                   pay.

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

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

9                   “(h)(1)(A) Except as provided in subparagraph (B),  
10                   no employer having employees subject to any provision of  
11                   this section shall discriminate, within any establishment  
12                   in which such employees are employed, between employees  
13                   on the basis of sex, race, or national origin by paying  
14                   wages to employees in such establishment in a job that  
15                   is dominated by employees of a particular sex, race, or  
16                   national origin at a rate less than the rate at which the  
17                   employer pays wages to employees in such establishment  
18                   in another job that is dominated by employees of the oppo-  
19                   site sex or of a different race or national origin, respec-  
20                   tively, for work on equivalent jobs.

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

24                   “(i) a seniority system;

25                   “(ii) a merit system;

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

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

7           “(I) the employer demonstrates that—

8           “(aa) such factor—

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

11           “(BB) furthers a legitimate busi-  
12        ness purpose, except that this item  
13        shall not apply if the employee dem-  
14        onstrates that an alternative employ-  
15        ment practice exists that would serve  
16        the same business purpose without  
17        producing such differential and that  
18        the employer has refused to adopt  
19        such alternative practice; and

20           “(bb) such factor was actually applied  
21        and used reasonably in light of the as-  
22        serted justification; and

23           “(II) upon the employer succeeding under  
24        subclause (I), the employee fails to demonstrate  
25        that the differential produced by the reliance of

1           the employer on such factor is itself the result  
2           of discrimination on the basis of sex, race, or  
3           national origin by the employer.

4           “(C) The Equal Employment Opportunity Commis-  
5 sion shall issue guidelines specifying criteria for deter-  
6 mining whether a job is dominated by employees of a par-  
7 ticular sex, race, or national origin for purposes of sub-  
8 paragraph (B)(iv). Such guidelines shall not include a list  
9 of such jobs.

10          “(D) An employer who is paying a wage rate differen-  
11 tial in violation of subparagraph (A) shall not, in order  
12 to comply with the provisions of such subparagraph, re-  
13 duce the wage rate of any employee.

14          “(2) No labor organization or its agents representing  
15 employees of an employer having employees subject to any  
16 provision of this section shall cause or attempt to cause  
17 such an employer to discriminate against an employee in  
18 violation of paragraph (1)(A).

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

24          “(4) In this subsection:

1           “(A) The term ‘labor organization’ means any  
2           organization of any kind, or any agency or employee  
3           representation committee or plan, in which employ-  
4           ees participate and that exists for the purpose, in  
5           whole or in part, of dealing with employers con-  
6           cerning grievances, labor disputes, wages, rates of  
7           pay, hours of employment, or conditions of work.

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

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

16 **SEC. 4. PROHIBITED ACTS.**

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

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

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

21           “(6) to discriminate against any individual be-  
22           cause such individual has opposed any act or prac-  
23           tice made unlawful by section 6(h) or because such  
24           individual made a charge, testified, assisted, or par-

1       ticipated in any manner in an investigation, pro-  
2       ceeding, or hearing to enforce section 6(h); or

3               “(7) to discharge or in any other manner dis-  
4       criminate against, coerce, intimidate, threaten, or  
5       interfere with any employee or any other person be-  
6       cause the employee inquired about, disclosed, com-  
7       pared, or otherwise discussed the employee’s wages  
8       or the wages of any other employee, or because the  
9       employee exercised, enjoyed, aided, or encouraged  
10      any other person to exercise or enjoy any right  
11      granted or protected by section 6(h).”.

12 **SEC. 5. REMEDIES.**

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

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

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

5 (4) in the sentence beginning “The court in”,  
6 by striking “in such action” and inserting “in any  
7 action brought to recover the liability prescribed in  
8 any of the preceding sentences of this subsection”;  
9 and

10 (5) by striking “section 15(a)(3)” each place it  
11 occurs and inserting “paragraphs (3), (6), and (7)  
12 of section 15(a)”.

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

15 (1) in the first sentence—

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

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

1       tion of subsection (d) or (h) of section 6, additional  
2       compensatory or punitive damages”; and

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

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

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

14 **SEC. 6. RECORDS.**

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

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

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

19               “(2) Every employer subject to section 6(h) shall pre-  
20      serve records that document and support the method, sys-  
21      tem, calculations, and other bases used by the employer  
22      in establishing, adjusting, and determining the wage rates  
23      paid to the employees of the employer. Every employer  
24      subject to section 6(h) shall preserve such records for such  
25      periods of time, and shall make such reports from the

1 records to the Equal Employment Opportunity Commis-  
2 sion, as shall be prescribed by the Equal Employment Op-  
3 portunity Commission by regulation or order as necessary  
4 or appropriate for the enforcement of the provisions of sec-  
5 tion 6(h) or any regulation promulgated pursuant to sec-  
6 tion 6(h).”.

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

10 “(3) Every employer subject to section 6(h) that has  
11 25 or more employees on any date during the first or sec-  
12 ond year after the effective date of this paragraph, or 15  
13 or more employees on any date during any subsequent  
14 year after such second year, shall, in accordance with reg-  
15 ulations promulgated by the Equal Employment Oppor-  
16 tunity Commission under paragraph (8), prepare and sub-  
17 mit to the Equal Employment Opportunity Commission  
18 for the year involved a report signed by the president,  
19 treasurer, or corresponding principal officer, of the em-  
20 ployer that includes information that discloses the wage  
21 rates paid to employees of the employer in each classifica-  
22 tion, position, or job title, or to employees in other wage  
23 groups employed by the employer, including information  
24 with respect to the sex, race, and national origin of em-

1 employees at each wage rate in each classification, position,  
2 job title, or other wage group.”.

3 (c) PROTECTION OF CONFIDENTIALITY.—Section  
4 11(c) (as amended by subsections (a) and (b)) is further  
5 amended by adding at the end the following:

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

12 (d) USE; INSPECTIONS; EXAMINATION; REGULA-  
13 TIONS.—Section 11(c) (as amended by subsections (a)  
14 through (c)) is further amended by adding at the end the  
15 following:

16 “(5) The Equal Employment Opportunity Commis-  
17 sion may publish any information and data that the Equal  
18 Employment Opportunity Commission obtains pursuant to  
19 the provisions of paragraph (3). The Equal Employment  
20 Opportunity Commission may use the information and  
21 data for statistical and research purposes, and compile  
22 and publish such studies, analyses, reports, and surveys  
23 based on the information and data as the Equal Employ-  
24 ment Opportunity Commission may consider appropriate.

1       “(6) In order to carry out the purposes of this Act,  
2 the Equal Employment Opportunity Commission shall by  
3 regulation make reasonable provision for the inspection  
4 and examination by any person of the information and  
5 data contained in any report submitted to the Equal Em-  
6 ployment Opportunity Commission pursuant to paragraph  
7 (3).

8       “(7) The Equal Employment Opportunity Commis-  
9 sion shall by regulation provide for the furnishing of copies  
10 of reports submitted to the Equal Employment Oppor-  
11 tunity Commission pursuant to paragraph (3) to any per-  
12 son upon payment of a charge based upon the cost of the  
13 service.

14       “(8) The Equal Employment Opportunity Commis-  
15 sion shall issue rules and regulations prescribing the form  
16 and content of reports required to be submitted under  
17 paragraph (3) and such other reasonable rules and regula-  
18 tions as the Equal Employment Opportunity Commission  
19 may find necessary to prevent the circumvention or eva-  
20 sion of such reporting requirements. In exercising the au-  
21 thority of the Equal Employment Opportunity Commis-  
22 sion under paragraph (3), the Equal Employment Oppor-  
23 tunity Commission may prescribe by general rule sim-  
24 plified reports for employers for whom the Equal Employ-  
25 ment Opportunity Commission finds that because of the

1 size of the employers a detailed report would be unduly  
2 burdensome.”.

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

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

7 “(4) The Equal Employment Opportunity Commis-  
8 sion shall conduct studies and provide information and  
9 technical assistance to employers, labor organizations, and  
10 the general public concerning effective means available to  
11 implement the provisions of section 6(h) prohibiting wage  
12 rate discrimination between employees performing work in  
13 equivalent jobs on the basis of sex, race, or national origin.

14 Such studies, information, and technical assistance shall  
15 be based on and include reference to the objectives of such  
16 section to eliminate such discrimination. In order to  
17 achieve the objectives of such section, the Equal Employ-  
18 ment Opportunity Commission shall carry on a continuing  
19 program of research, education, and technical assistance  
20 including—

21 “(A) conducting and promoting research with  
22 the intent of developing means to expeditiously cor-  
23 rect the wage rate differentials described in section  
24 6(h);

1           “(B) publishing and otherwise making available  
2        to employers, labor organizations, professional asso-  
3        ciations, educational institutions, the various media  
4        of communication, and the general public the find-  
5        ings of studies and other materials for promoting  
6        compliance with section 6(h);

7           “(C) sponsoring and assisting State and com-  
8        munity informational and educational programs; and

9           “(D) providing technical assistance to employ-  
10      ers, labor organizations, professional associations  
11      and other interested persons on means of achieving  
12      and maintaining compliance with the provisions of  
13      section 6(h).

14        “(5) The report submitted biennially by the Secretary  
15      to Congress under paragraph (1) shall include a separate  
16      evaluation and appraisal regarding the implementation of  
17      section 6(h).”.

18 **SEC. 8. CONFORMING AMENDMENTS.**

19        (a) CONGRESSIONAL EMPLOYEES.—

20           (1) APPLICATION.—Section 203(a)(1) of the  
21      Congressional Accountability Act of 1995 (2 U.S.C.  
22      1313(a)(1)) is amended—

23           (A) by striking “subsections (a)(1) and (d)  
24      of section 6” and inserting “subsections (a)(1),  
25      (d), and (h) of section 6”; and

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

7 (b) EXECUTIVE BRANCH EMPLOYEES.—

## 19 SEC. 9. EFFECTIVE DATE.

20 The amendments made by this Act shall take effect  
21 1 year after the date of enactment of this Act.

