

109TH CONGRESS
1ST SESSION

S. 841

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

IN THE SENATE OF THE UNITED STATES

APRIL 19, 2005

Mrs. CLINTON (for herself, Mr. REID, Mr. KENNEDY, Mr. HARKIN, Mr. DURBIN, Ms. LANDRIEU, Mr. CORZINE, Mr. LEAHY, Mr. SCHUMER, and Ms. STABENOW) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Paycheck Fairness
5 Act”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

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

3 (2) Even today, women earn significantly lower
4 pay than men for work on jobs that require equal
5 skill, effort, and responsibility and that are per-
6 formed under similar working conditions. These pay
7 disparities exist in both the private and govern-
8 mental sectors. In many instances, the pay dispari-
9 ties can only be due to continued intentional dis-
10 crimination or the lingering effects of past discrimi-
11 nation.

12 (3) The existence of such pay disparities—

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

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

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

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

1 (E) burdens commerce and the free flow of
2 goods in commerce;

3 (F) constitutes an unfair method of com-
4 petition in commerce;

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

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

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

13 (4)(A) Artificial barriers to the elimination of
14 discrimination in the payment of wages on the basis
15 of sex continue to exist decades after the enactment
16 of the Fair Labor Standards Act of 1938 (29 U.S.C.
17 201 et seq.) and the Civil Rights Act of 1964 (42
18 U.S.C. 2000a et seq.).

19 (B) Elimination of such barriers would have
20 positive effects, including—

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

23 (ii) substantially reducing the number of
24 working women earning unfairly low wages,

1 thereby reducing the dependence on public as-
2 sistance;

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

5 (iv) remedying the effects of past discrimi-
6 nation on the basis of sex and ensuring that in
7 the future workers are afforded equal protection
8 on the basis of sex; and

9 (v) ensuring equal protection pursuant to
10 Congress' power to enforce the 5th and 14th
11 amendments.

12 (5) The Department of Labor has important
13 and unique responsibilities to help ensure that
14 women receive equal pay for doing work that is sub-
15 stantially equal to men's work.

16 (6) The Department of Labor is responsible
17 for—

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

20 (B) ensuring that companies receiving
21 Federal contracts comply with the antidiscrimi-
22 nation and the affirmative action requirements
23 of Executive Order 11246 (relating to equal
24 employment opportunity);

1 (C) disseminating information about wom-
2 en’s rights in the workplace;

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

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

9 (7) With a stronger commitment by the Depart-
10 ment of Labor to its responsibilities, increased infor-
11 mation about the provisions added by the Equal Pay
12 Act of 1963, wage data, and more effective rem-
13 edies, women will be better able to recognize and en-
14 force their rights.

15 (8) Certain employers have already made great
16 strides in eradicating unfair pay disparities in the
17 workplace and their achievements should be recog-
18 nized.

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

21 (a) **REQUIRED DEMONSTRATION FOR AFFIRMATIVE**
22 **DEFENSE.**—Section 6(d)(1) of the Fair Labor Standards
23 Act of 1938 (29 U.S.C. 206(d)(1)) is amended by striking
24 “(iv) a differential” and all that follows through the period
25 and inserting the following: “(iv) a differential based on

1 a bona fide factor other than sex, such as education, train-
2 ing or experience, except that the bona fide factor defense
3 shall apply only if—

4 “(I) the employer demonstrates that—

5 “(aa) such factor—

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

8 “(BB) furthers a legitimate business
9 purpose, except that this item shall not
10 apply where the employee demonstrates
11 that an alternative employment practice
12 exists that would serve the same business
13 purpose without producing such differen-
14 tial and that the employer has refused to
15 adopt such alternative practice; and

16 “(bb) such factor was actually applied and
17 used reasonably in light of the asserted jus-
18 tification; and

19 “(II) upon the employer succeeding under sub-
20 clause (I), the employee fails to demonstrate that
21 the differential produced by the reliance of the em-
22 ployer on such factor is itself the result of discrimi-
23 nation on the basis of sex by the employer.

1 An employer that is not otherwise in compliance with this
2 paragraph may not reduce the wages of any employee in
3 order to achieve such compliance.”.

4 (b) APPLICATION OF PROVISIONS.—Section 6(d)(1)
5 of the Fair Labor Standards Act of 1938 (29 U.S.C.
6 206(d)(1)) is amended by adding at the end the following:
7 “The provisions of this subsection shall apply to applicants
8 for employment if such applicants, upon employment by
9 the employer, would be subject to any provisions of this
10 section.”.

11 (c) ELIMINATION OF ESTABLISHMENT REQUIRE-
12 MENT.—Section 6(d) of the Fair Labor Standards Act of
13 1938 (29 U.S.C. 206(d)) is amended—

14 (1) by striking “, within any establishment in
15 which such employees are employed,”; and

16 (2) by striking “in such establishment” each
17 place it appears.

18 (d) NONRETALIATION PROVISION.—Section 15(a)(3)
19 of the Fair Labor Standards Act of 1938 (29 U.S.C.
20 215(a)(3)) is amended—

21 (1) by striking “or has” each place it appears
22 and inserting “has”; and

23 (2) by inserting before the semicolon the fol-
24 lowing: “, or has inquired about, discussed, or other-
25 wise disclosed the wages of the employee or another

1 employee, or because the employee (or applicant) has
2 made a charge, testified, assisted, or participated in
3 any manner in an investigation, proceeding, hearing,
4 or action under section 6(d)”.

5 (e) ENHANCED PENALTIES.—Section 16(b) of the
6 Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is
7 amended—

8 (1) by inserting after the first sentence the fol-
9 lowing: “Any employer who violates section 6(d)
10 shall additionally be liable for such compensatory or
11 punitive damages as may be appropriate, except that
12 the United States shall not be liable for punitive
13 damages.”;

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

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

22 (4) by inserting after the sentence referred to
23 in paragraph (3), the following: “Notwithstanding
24 any other provision of Federal law, any action
25 brought to enforce section 6(d) may be maintained

1 as a class action as provided by the Federal Rules
2 of Civil Procedure.”; and

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

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

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

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

13 (1) in the first sentence—

14 (A) by inserting “or, in the case of a viola-
15 tion of section 6(d), additional compensatory or
16 punitive damages,” before “and the agree-
17 ment”; and

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

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

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

4 (4) in the last sentence—

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

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

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

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

14 **SEC. 4. TRAINING.**

15 The Equal Employment Opportunity Commission
16 and the Office of Federal Contract Compliance Programs,
17 subject to the availability of funds appropriated under sec-
18 tion 11, shall provide training to Commission employees
19 and affected individuals and entities on matters involving
20 discrimination in the payment of wages.

21 **SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND**
22 **WOMEN.**

23 (a) PROGRAM AUTHORIZED.—

24 (1) IN GENERAL.—The Secretary of Labor,
25 after consultation with the Secretary of Education,

1 is authorized to establish and carry out a grant pro-
2 gram.

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

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

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

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

1 negotiation skills to allow the girls and women to ob-
2 tain higher salaries and the best compensation pack-
3 ages possible for themselves.

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

9 (1) in the case of the Secretary of Education,
10 the Elementary and Secondary Education Act of
11 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins
12 Vocational and Technical Education Act of 1998 (20
13 U.S.C. 2301 et seq.), the Higher Education Act of
14 1965 (20 U.S.C. 1001 et seq.), and other programs
15 carried out by the Department of Education that the
16 Secretary of Education determines to be appro-
17 priate; and

18 (2) in the case of the Secretary of Labor, the
19 Workforce Investment Act of 1998 (29 U.S.C. 2801
20 et seq.), and other programs carried out by the De-
21 partment of Labor that the Secretary of Labor de-
22 termines to be appropriate.

23 (c) REPORT.—Not later than 1 year after the date
24 of enactment of this Act, and annually thereafter, the Sec-
25 retary of Labor and the Secretary of Education shall pre-

1 pare and submit to Congress a report describing the ac-
2 tivities conducted under this section.

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

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

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

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

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

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

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

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

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

6 **SEC. 7. TECHNICAL ASSISTANCE AND EMPLOYER RECOGNITION PROGRAM.**
7

8 (a) GUIDELINES.—

9 (1) IN GENERAL.—The Secretary of Labor shall
10 develop guidelines to enable employers to evaluate
11 job categories based on objective criteria such as
12 educational requirements, skill requirements, inde-
13 pendence, working conditions, and responsibility, in-
14 cluding decisionmaking responsibility and de facto
15 supervisory responsibility.

16 (2) USE.—The guidelines developed under
17 paragraph (1) shall be designed to enable employers
18 voluntarily to compare wages paid for different jobs
19 to determine if the pay scales involved adequately
20 and fairly reflect the educational requirements, skill
21 requirements, independence, working conditions, and
22 responsibility for each such job with the goal of
23 eliminating unfair pay disparities between occupa-
24 tions traditionally dominated by men or women.

1 (3) PUBLICATION.—The guidelines shall be de-
2 veloped under paragraph (1) and published in the
3 Federal Register not later than 180 days after the
4 date of enactment of this Act.

5 (b) EMPLOYER RECOGNITION.—

6 (1) PURPOSE.—It is the purpose of this sub-
7 section to emphasize the importance of, encourage
8 the improvement of, and recognize the excellence of
9 employer efforts to pay wages to women that reflect
10 the real value of the contributions of such women to
11 the workplace.

12 (2) IN GENERAL.—To carry out the purpose of
13 this subsection, the Secretary of Labor shall estab-
14 lish a program under which the Secretary shall pro-
15 vide for the recognition of employers who, pursuant
16 to a voluntary job evaluation conducted by the em-
17 ployer, adjust their wage scales (such adjustments
18 shall not include the lowering of wages paid to men)
19 using the guidelines developed under subsection (a)
20 to ensure that women are paid fairly in comparison
21 to men.

22 (3) TECHNICAL ASSISTANCE.—The Secretary of
23 Labor may provide technical assistance to assist an
24 employer in carrying out an evaluation under para-
25 graph (2).

1 (c) REGULATIONS.—The Secretary of Labor shall
2 promulgate such rules and regulations as may be nec-
3 essary to carry out this section.

4 **SEC. 8. ESTABLISHMENT OF THE NATIONAL AWARD FOR**
5 **PAY EQUITY IN THE WORKPLACE.**

6 (a) IN GENERAL.—There is established the Secretary
7 of Labor’s National Award for Pay Equity in the Work-
8 place, which shall be evidenced by a medal bearing the
9 inscription “Secretary of Labor’s National Award for Pay
10 Equity in the Workplace”. The medal shall be of such de-
11 sign and materials, and bear such additional inscriptions,
12 as the Secretary of Labor may prescribe.

13 (b) CRITERIA FOR QUALIFICATION.—To qualify to
14 receive an award under this section a business shall—

15 (1) submit a written application to the Sec-
16 retary of Labor, at such time, in such manner, and
17 containing such information as the Secretary may
18 require, including at a minimum information that
19 demonstrates that the business has made substantial
20 effort to eliminate pay disparities between men and
21 women, and deserves special recognition as a con-
22 sequence; and

23 (2) meet such additional requirements and
24 specifications as the Secretary of Labor determines
25 to be appropriate.

1 (c) MAKING AND PRESENTATION OF AWARD.—

2 (1) AWARD.—After receiving recommendations
3 from the Secretary of Labor, the President or the
4 designated representative of the President shall an-
5 nually present the award described in subsection (a)
6 to businesses that meet the qualifications described
7 in subsection (b).

8 (2) PRESENTATION.—The President or the des-
9 ignated representative of the President shall present
10 the award under this section with such ceremonies
11 as the President or the designated representative of
12 the President may determine to be appropriate.

13 (d) BUSINESS.—In this section, the term “business”
14 includes—

15 (1)(A) a corporation, including a nonprofit cor-
16 poration;

17 (B) a partnership;

18 (C) a professional association;

19 (D) a labor organization; and

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

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

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

4 **SEC. 9. COLLECTION OF PAY INFORMATION BY THE EQUAL**
5 **EMPLOYMENT OPPORTUNITY COMMISSION.**

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

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

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

18 “(B) based on the results of the survey and
19 consultations under subparagraph (A), issue regula-
20 tions to provide for the collection of pay information
21 data from employers as described by the sex, race,
22 and national origin of employees.

23 “(2) In implementing paragraph (1), the Commission
24 shall have as its primary consideration the most effective
25 and efficient means for enhancing the enforcement of Fed-

1 eral laws prohibiting pay discrimination. For this purpose,
 2 the Commission shall consider factors including the im-
 3 position of burdens on employers, the frequency of required
 4 reports (including which employers should be required to
 5 prepare reports), appropriate protections for maintaining
 6 data confidentiality, and the most effective format for the
 7 data collection reports.”.

8 **SEC. 10. REINSTATEMENT OF PAY EQUITY PROGRAMS AND**
 9 **ENFORCEMENT EFFORTS.**

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

14 (b) OFFICE OF FEDERAL CONTRACT COMPLIANCE
 15 PROGRAMS INITIATIVES.—

16 (1) IN GENERAL.—The Director of the Office of
 17 Federal Contract Compliance Programs shall ensure
 18 that employees of the Office—

19 (A)(i) shall use the full range of investiga-
 20 tory tools at the Office’s disposal, including pay
 21 grade methodology;

22 (ii) in considering evidence of possible com-
 23 pensation discrimination—

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

1 (II) shall not limit its evaluation of
2 the evidence to a small number of methods
3 of evaluating the evidence; and

4 (iii) shall not require a multiple regression
5 analysis or anecdotal evidence for a compensa-
6 tion discrimination case;

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

17 (C) shall designate not less than half of all
18 nonconstruction contractor establishments each
19 year to prepare and file the Equal Opportunity
20 Survey, required by section 60–2.18 of title 41,
21 Code of Federal Regulations, and shall review
22 and utilize the responses to the survey to iden-
23 tify contractor establishments for further eval-
24 uation.

1 (2) REGULATIONS.—In promulgating any regu-
2 lations with respect to the compensation discrimina-
3 tion cases, the Secretary of Labor, in establishing
4 standards for similarly situated employees, shall in-
5 clude examples of similar jobs.

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

17 **SEC. 11. AUTHORIZATION OF APPROPRIATIONS.**

18 There are authorized to be appropriated such sums
19 as may be necessary to carry out this Act.

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