

112TH CONGRESS
1ST SESSION

S. 797

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 12, 2011

Ms. MIKULSKI (for herself, Mr. AKAKA, Mrs. BOXER, Ms. CANTWELL, Mr. CARDIN, Mr. CASEY, Mr. COONS, Mr. DURBIN, Mr. FRANKEN, Mrs. GILLIBRAND, Mr. HARKIN, Mr. KERRY, Ms. KLOBUCHAR, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mrs. MCCASKILL, Mrs. MURRAY, Mr. REED, Mr. REID, Mrs. SHAHEEN, Ms. STABENOW, Mr. WHITEHOUSE, Mr. WYDEN, Mr. MERKLEY, and Mrs. HAGAN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

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

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

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

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

12 (3) The existence of such pay disparities—

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

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

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

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

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

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

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

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

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

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

17 (B) These barriers have resulted, in significant
18 part, because the Equal Pay Act of 1963 has not
19 worked as Congress originally intended. Improve-
20 ments and modifications to the provisions added by
21 the Act are necessary to ensure that the provisions
22 provide effective protection to those subject to pay
23 discrimination on the basis of their sex.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 (7) The Equal Employment Opportunity Com-
13 mission is the primary enforcement agency for
14 claims made under the provisions added by the
15 Equal Pay Act of 1963, and issues regulations and
16 guidance on appropriate interpretations of the law.

17 (8) With a stronger commitment by the Depart-
18 ment of Labor and the Equal Employment Oppor-
19 tunity Commission to their responsibilities, increased
20 information about the provisions added by the Equal
21 Pay Act of 1963, wage data, and more effective rem-
22 edies, women will be better able to recognize and en-
23 force their rights.

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

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

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

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

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

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

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

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

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

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

12 (1) in subsection (a)(3), by striking “employee
13 has filed” and all that follows through “committee;”
14 and inserting “employee—

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

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

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

5 “(c) Subsection (a)(3)(B) shall not apply to instances
6 in which an employee who has access to the wage informa-
7 tion of other employees as a part of such employee’s essen-
8 tial job functions discloses the wages of such other employ-
9 ees to an individual who does not otherwise have access
10 to such information, unless such disclosure is in response
11 to a charge or complaint or in furtherance of an investiga-
12 tion, proceeding, hearing, or action under section 6(d), in-
13 cluding an investigation conducted by the employer. Noth-
14 ing in this subsection shall be construed to limit the rights
15 of an employee provided under any other provision of
16 law.”.

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

20 (1) by inserting after the first sentence the fol-
21 lowing: “Any employer who violates section 6(d)
22 shall additionally be liable for such compensatory
23 damages, or, where the employee demonstrates that
24 the employer acted with malice or reckless indiffer-
25 ence, punitive damages as may be appropriate, ex-

1 cept that the United States shall not be liable for
2 punitive damages.”;

3 (2) in the sentence beginning “An action to”,
4 by striking “either of the preceding sentences” and
5 inserting “any of the preceding sentences of this
6 subsection”;

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

11 (4) by inserting after the sentence referred to
12 in paragraph (3), the following: “Notwithstanding
13 any other provision of Federal law, any action
14 brought to enforce section 6(d) may be maintained
15 as a class action as provided by the Federal Rules
16 of Civil Procedure.”; and

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

18 (A) by striking “in such action” and in-
19 serting “in any action brought to recover the li-
20 ability prescribed in any of the preceding sen-
21 tences of this subsection”; and

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

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

4 (1) in the first sentence—

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

9 (B) by inserting before the period the fol-
10 lowing: “, or such compensatory or punitive
11 damages, as appropriate”;

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

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

19 (4) in the last sentence—

20 (A) by striking “commenced in the case”
21 and inserting “commenced—
22 “(1) in the case”;

23 (B) by striking the period and inserting “;
24 or”; and

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

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

4 **SEC. 4. TRAINING.**

5 The Equal Employment Opportunity Commission
6 and the Office of Federal Contract Compliance Programs,
7 subject to the availability of funds appropriated under sec-
8 tion 10, shall provide training to Commission employees
9 and affected individuals and entities on matters involving
10 discrimination in the payment of wages.

11 **SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND**
12 **WOMEN.**

13 (a) PROGRAM AUTHORIZED.—

14 (1) IN GENERAL.—The Secretary of Labor,
15 after consultation with the Secretary of Education,
16 is authorized to establish and carry out a grant pro-
17 gram.

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

22 (3) ELIGIBLE ENTITIES.—To be eligible to re-
23 ceive a grant under this subsection, an entity shall
24 be a public agency, such as a State, a local govern-
25 ment in a metropolitan statistical area (as defined

1 by the Office of Management and Budget), a State
2 educational agency, or a local educational agency, a
3 private nonprofit organization, or a community-
4 based organization.

5 (4) APPLICATION.—To be eligible to receive a
6 grant under this subsection, an entity shall submit
7 an application to the Secretary of Labor at such
8 time, in such manner, and containing such informa-
9 tion as the Secretary of Labor may require.

10 (5) USE OF FUNDS.—An entity that receives a
11 grant under this subsection shall use the funds made
12 available through the grant to carry out an effective
13 negotiation skills training program that empowers
14 girls and women. The training provided through the
15 program shall help girls and women strengthen their
16 negotiation skills to allow the girls and women to ob-
17 tain higher salaries and rates of compensation that
18 are equal to those paid to similarly situated male
19 employees.

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

1 (1) in the case of the Secretary of Education,
2 the Elementary and Secondary Education Act of
3 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins
4 Career and Technical Education Act of 2006 (20
5 U.S.C. 2301 et seq.), the Higher Education Act of
6 1965 (20 U.S.C. 1001 et seq.), and other programs
7 carried out by the Department of Education that the
8 Secretary of Education determines to be appro-
9 priate; and

10 (2) in the case of the Secretary of Labor, the
11 Workforce Investment Act of 1998 (29 U.S.C. 2801
12 et seq.), and other programs carried out by the De-
13 partment of Labor that the Secretary of Labor de-
14 termines to be appropriate.

15 (c) REPORT.—Not later than 1 year after the date
16 of enactment of this Act, and annually thereafter, the Sec-
17 retary of Labor and the Secretary of Education shall pre-
18 pare and submit to Congress a report describing the ac-
19 tivities conducted under this section and evaluating the ef-
20 fectiveness of such activities in achieving the purposes of
21 this Act.

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

23 The Secretary of Labor shall conduct studies and
24 provide information to employers, labor organizations, and

1 the general public concerning the means available to elimi-
2 nate pay disparities between men and women, including—

3 (1) conducting and promoting research to de-
4 velop the means to correct expeditiously the condi-
5 tions leading to the pay disparities;

6 (2) publishing and otherwise making available
7 to employers, labor organizations, professional asso-
8 ciations, educational institutions, the media, and the
9 general public the findings resulting from studies
10 and other materials, relating to eliminating the pay
11 disparities;

12 (3) sponsoring and assisting State and commu-
13 nity informational and educational programs;

14 (4) providing information to employers, labor
15 organizations, professional associations, and other
16 interested persons on the means of eliminating the
17 pay disparities;

18 (5) recognizing and promoting the achievements
19 of employers, labor organizations, and professional
20 associations that have worked to eliminate the pay
21 disparities; and

22 (6) convening a national summit to discuss, and
23 consider approaches for rectifying, the pay dispari-
24 ties.

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

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

8 (b) **CRITERIA FOR QUALIFICATION.**—The Secretary
9 of Labor shall set criteria for receipt of the award, includ-
10 ing a requirement that an employer has made substantial
11 effort to eliminate pay disparities between men and
12 women, and deserves special recognition as a consequence
13 of such effort. The Secretary shall establish procedures for
14 the application for and presentation of the award.

15 (c) **EMPLOYER.**—In this section, the term “em-
16 ployer” includes—

17 (1)(A) a corporation, including a nonprofit cor-
18 poration;

19 (B) a partnership;

20 (C) a professional association;

21 (D) a labor organization; and

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

24 (2) an entity carrying out an education referral
25 program, a training program, such as an apprentice-

1 ship or management training program, or a similar
2 program; and

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

6 **SEC. 8. COLLECTION OF PAY INFORMATION BY THE EQUAL**
7 **EMPLOYMENT OPPORTUNITY COMMISSION.**

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

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

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

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

1 “(2) In implementing paragraph (1), the Commission
 2 shall have as its primary consideration the most effective
 3 and efficient means for enhancing the enforcement of Fed-
 4 eral laws prohibiting pay discrimination. For this purpose,
 5 the Commission shall consider factors including the im-
 6 position of burdens on employers, the frequency of required
 7 data collection reports (including which employers should
 8 be required to prepare reports), appropriate protections
 9 for maintaining data confidentiality, and the most effec-
 10 tive format for the data collection reports.”.

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

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

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

21 (1)(A) shall use the full range of investigatory
 22 tools at the Office’s disposal, including pay grade
 23 methodology;

24 (B) in considering evidence of possible com-
 25 pensation discrimination—

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

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

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

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

18 (3) shall reinstate the Equal Opportunity Sur-
19 vey, as required by section 60–2.18 of title 41, Code
20 of Federal Regulations (as in effect on September 7,
21 2006), designating not less than half of all non-
22 construction contractor establishments each year to
23 prepare and file such survey, and shall review and
24 utilize the responses to such survey to identify con-

1 tractor establishments for further evaluation and for
2 other enforcement purposes as appropriate.

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

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

15 (a) AUTHORIZATION OF APPROPRIATIONS.—There is
16 authorized to be appropriated \$15,000,000 to carry out
17 this Act.

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

1 **SEC. 11. SMALL BUSINESS ASSISTANCE.**

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

5 (b) **TECHNICAL ASSISTANCE MATERIALS.**—The Sec-
6 retary of Labor and the Commissioner of the Equal Em-
7 ployment Opportunity Commission shall jointly develop
8 technical assistance material to assist small businesses in
9 complying with the requirements of this Act and the
10 amendments made by this Act.

11 (c) **SMALL BUSINESSES.**—A small business shall be
12 exempt from the provisions of this Act to the same extent
13 that such business is exempt from the requirements of the
14 Fair Labor Standards Act of 1938 pursuant to clauses
15 (i) and (ii) of section 3(s)(1)(A) of such Act (29 U.S.C.
16 203(s)(1)(A)).

17 **SEC. 12. RULE OF CONSTRUCTION.**

18 Nothing in this Act, or in any amendment made by
19 this Act, shall affect the obligation of employers and em-
20 ployees to fully comply with all applicable immigration
21 laws, including any penalties, fines, or other sanctions.

○