

**A FAIR SHARE FOR ALL: PAY EQUITY IN THE
NEW AMERICAN WORKPLACE**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS
SECOND SESSION

ON

EXAMINING PAY EQUITY IN THE NEW AMERICAN WORKPLACE, INCLUDING S.182, TO AMEND THE FAIR LABOR STANDARDS ACT OF 1928 TO PROVIDE MORE EFFECTIVE REMEDIES TO VICTIMS OF DISCRIMINATION IN THE PAYMENT OF WAGES ON THE BASIS OF SEX, AND S.904, 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

MARCH 11, 2010

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A FAIR SHARE FOR ALL: PAY EQUITY IN THE NEW AMERICAN WORKPLACE

THURSDAY, MARCH 11, 2010

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m. in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Dodd, Mikulski, Brown, Casey, Hagan, Franken, Enzi, and Isakson.

Also present: Hon. Rosa L. DeLauro, U.S. Representative.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Committee on Health, Education, Labor, and Pensions will come to order.

We have convened this hearing to examine the issue of fair pay for women. Now, again, it is not a new issue. In 1963, responding to the fact that 25 million female workers in the workforce earned just 60 percent—60 cents of the dollar—of the average pay for men, Congress enacted the Equal Pay Act to end this unfair discrimination.

Now, this hearing is about reaffirming the basic promise of the Equal Pay Act, that every worker should be judged and compensated based on the quality of the work that he or she performs, and not based on gender.

Over the past 47 years, we have made progress toward this important goal, but over the last several years, a decade or so, that progress has been stalled. It is unacceptable that, after all these years, a woman still makes only 77 cents for every dollar that a man makes.

This wage gap exists in every segment of our society. Women of every race and national origin earn less than their counterparts. An African-American woman earns 69 cents for every dollar that a white male earns, while a Latina woman earns only 59 cents for every dollar a white man earns. These differences add up to real hardships for working women and their families.

Now, again, make no mistake—the wage gap is not just a women's issue. It is a family issue. As we will hear today, women represent half of all workers. Millions of families rely on a woman's paycheck to get by.

Two-thirds of mothers are bringing home at least a quarter of their family's earnings. In many families, the woman is the sole

breadwinner. And during the latest economic downturn, more men have lost jobs than women, making households even more dependent than ever on women's earnings.

Just last night while reading before I went to bed, I read a factoid that was in a publication. I forget what magazine it was in—Newsweek, something like that. It said that very soon, for the first time ever in our national history, more women will be working than men, for the first time ever.

So America's women are working harder than ever, but they are not being fairly compensated for their contributions to our economy. As a result, their families are struggling to put food on the table, pay for child care, deal with rising healthcare bills. It isn't fair. It isn't right.

Now it is true that some of the wage gap is explained by how society deals with the realities of working women's lives, such as time away from the workforce to have children, care for family members. But as we will hear today, the substantial gap in earnings between men and women cannot be explained completely by differences in work patterns, or even by differences in education, experience, or occupation. The evidence shows that actual gender discrimination accounts for much of the disparity between men and women's pays, and our laws have not done enough to prevent this from happening.

So, I am pleased and proud that the first piece of legislation that President Obama signed into law was the Lilly Ledbetter Fair Pay Act, but that was only the first step.

Now, too many women are still not getting paid equally for doing the exact same jobs as men. That is, of course, illegal. It is unacceptable. But it happens every day, and there are too many loopholes.

That is why I strongly support the Paycheck Fairness Act, which Senators Dodd and Mikulski have long championed. This critical legislation will strengthen penalties for discrimination, help give women the tools they need to identify and confront unfair treatment. In January, the House of Representatives voted overwhelmingly, on a bipartisan basis, to pass the Paycheck Fairness Act, under the great leadership of Representative DeLauro. I look forward to working with my colleagues in the Senate to pass this bill and send it to the President during this Congress.

I might just add that while strengthening our existing laws is the next step toward wage equality, it can't be the last one. It is not enough to say that women and men performing the same jobs should be paid the same. That is only part of the problem. We also must tackle the more subtle discrimination and more widespread discrimination that occurs when we systematically undervalue the work traditionally done by women, particularly women of color.

Unfortunately, women are making less not only because of insidious discrimination, but because we do not value jobs we traditionally view as "women's jobs" as we value those that we think of as "men's jobs."

Today, millions of female-dominated jobs—for example, social workers, teachers, child care workers, nurses, long-term care workers—are equivalent in skills, effort, responsibility, and working conditions to similar jobs dominated by men. But the female-domi-

nated jobs pay significantly less. This is inexplicable. Why is a housekeeper worth less than a janitor? Why is a parking meter reader worth less than an electrical meter reader? Why is a social worker worth less than a probation officer? Why is a nurse, who still has to lift and have manual dexterity and stuff—why is a nurse paid less than a truck driver?

That is why I introduced the Fair Pay Act. My bill, which is championed in the House by Eleanor Holmes Norton, requires employers to provide equal pay for jobs that are equivalent in skill, effort, responsibility, and working conditions. My bill would require employers to publicly disclose their job categories and their pay scales, without requiring specific information on individual employees.

If we give women information about what their male colleagues are earning, they can negotiate a better deal for themselves in the workplace. In fact, last year, I asked Lilly Ledbetter at a hearing that if my bill, the Fair Pay Act, had been law, would she have been still discriminated against? And she said, no. She said that with the information that she would have had, she would have known right from the beginning that she was a victim of discrimination, before it caused a lifelong drop in her earnings and she had to go all the way to the Supreme Court to try to make things right.

So while I admire Lilly's strength and determination, I would like to say that no American woman ever again should have to go through what she went through just to receive a fair day's pay for a fair day's work.

I want to thank my colleague Senator Dodd publicly, as I have privately, for his great leadership in this area for so many, many years. And I want to thank Senator Enzi as well, as all of our witnesses for being here today, and I look forward to a great hearing.

Unfortunately, pay discrimination is a harsh reality in today's workplace, but it doesn't have to be that way. And hopefully, we can begin to close that gap.

With that, I would recognize my Ranking Member, Senator Enzi.

STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman. Thank you for holding this hearing.

I am confident that there is no member of this committee who would tolerate paying a woman less for the same work simply because she is a woman. As husbands and fathers and mothers of working women, we all recognize the gross inequity of discrimination in pay based on gender.

Congress has put two laws on the books to combat such discrimination—Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.

Undeniably, the last several decades have been transformational with regard to women's opportunities. Today, more women than men are earning college degrees, and women are enrolling in many graduate degree programs in equal numbers. At some of the Nation's top law schools today, women students outnumber men.

As women have become commonplace at every level in the workplace, so have women's earnings increased in comparison to men's. Last month, I noticed several news articles reporting that the num-

ber of dual-income families where the wife out-earns the husband has increased from 4 percent in 1970 to 22 percent in 2009. So times have changed, and certainly, it is appropriate for this committee to survey the fairness of the American workplace.

Some argue that a pay gap continues to exist in terms of the compensation levels between men and women and that this proves current legal protections are not sufficient and must be augmented. Many labor specialists note that pay differentials are a function of labor market economics, that they reflect the choices that individual workers and groups of workers tend to make and their underlying skill sets.

A study released last year found that if you factor in observable choices, such as part-time work, seniority, and occupational choice, the pay gap stands between 5 to 7 percent. I believe the best way to address that gap is by drawing more women into higher-earning fields.

The career choices we all make impact our earnings, and data shows that women are more likely to select fields that pay less. There are many reasons one might make such a choice, including schedule flexibility, job security, and the quality of fringe benefits, such as health, retirement, and child care.

I, for one, would never question the logic of making such a trade-off. In fact, economists have noted that the current economic downturn has had a harsher effect in traditionally male occupations, and the unemployment rate for men has been a full 2 percentage points above that for women throughout the recession.

Yet, to the extent that women may not enter traditionally male fields precisely because they have been traditionally male, they may not be earning to their full potential. I believe the goal of this committee should be to find solutions, and I have two solutions to offer for this potential problem. One is, improve our national job training programs so all Americans, men and women, have access to the skills training they need to enter those fields. And two, fix the economy so that these higher earning jobs are plentiful and hiring again.

I have worked in four Congresses to update the Workforce Investment Act, which has not been reauthorized since its enactment 12 years ago. I am working now with Senators Harkin, Murray, and Isakson, and building on the bill that passed the full Senate in the 109th Congress. We should reauthorize WIA this Congress to ensure workers have access to the education and skill training they need to be successful and that employers have the skilled workforce they need in order to be competitive.

We need to look no further than my home State of Wyoming to find a perfect example of what is happening and what can happen to improve the job skills and training for all Americans. Wyoming, as some of you may know, is nicknamed "The Equality State." It was the first territory and the first State to extend the right to vote to women.

Wyoming was home to our Nation's first woman judge, the Nation's first woman Governor, the Nation's first woman elected to State-wide office, and a whole slew of other firsts. In 1920, the town of Jackson, WY, elected the Nation's first all-woman town

government. Of course, with our change in the law, we were about 50 years ahead of everybody else.

Despite Wyoming's long history of gender equality, its pay gap is among the highest in all the States. I can assure you this is not because Wyoming employers are notoriously discriminatory or grossly undervalue their female workers. Rather, Wyoming demonstrates that markets, choices, education, training, and opportunity all play a role in the establishment of wages and wage differentials.

In Wyoming, important sectors of the economy, such as energy, natural resources, and construction, have faced significant labor shortages and therefore offer very high-paying jobs. The reality is that many of these jobs, from heavy equipment operators to carpenters, and from welders to coal miners, are not positions to which women traditionally gravitate.

In Wyoming, market forces have greatly increased the labor rates for those jobs traditionally held by men, which largely explains the magnitude of the wage gap. Closing this gap requires an increase in training and educational opportunities for women.

The role of education and training is evident in the results of one such program. It is called Climb Wyoming. It is a not-for-profit program funded through a mix of private and public funds. Its mission is to move low-income single mothers to higher-paying careers through training and placement assistance. The program has enjoyed considerable success, with program graduates earning double and even triple their pre-program income levels.

In many instances, these gains have been achieved by encouraging program participants to consider nontraditional work in the energy, natural resources, and construction industries, and providing participants with necessary skills and placement assistance to make the transition into such nontraditional work.

To date, Climb has trained and placed more than 1,000 single mothers in such nontraditional careers as short-haul truck driving, welding, and construction trades. Now that may not sound like a lot, but we only have half a million people that live in Wyoming.

One woman from my home town of Gillette earned a commercial driver's license and now works as a short-haul truck driver for a construction company, more than doubling her pre-program earnings. Another single mother with two children entered the program in Cheyenne. Previously, she worked in a fast food restaurant and earned \$6 an hour. She enrolled in Climb, studied integrated systems technology, and is now employed at a wind energy generation farm and earning nearly three times her pre-program income.

These are all real examples of women that have, with encouragement, training, and education, managed to eliminate the pay gap in their own working careers. A coal haul truck is 35 foot by 35 foot by 35 foot. It is kind of a mountain moving around. But it has super power steering. It has 10-foot tires that turn easily. The cab is air conditioned, and the special-fitting driving seats are even anti-vibration.

Incidentally, these are all-electric trucks. Drivers work 3 days a week 1 week and 4 days a week the next week, and they make \$60,000 to \$80,000 a year. That is one of the areas that women have been moving into with these jobs.

But as good as the programs like Climb Wyoming are, they cannot create jobs in a bad economy. And unfortunately, this prolonged downturn has added another hurdle for the women who graduate from the program.

In Gillette, for the first time, the majority of the most recent class of graduates has not been able to find employment. Women who trained as heavy equipment operators and commercial truck drivers are either still waiting for companies to be in a position to hire or are working just 1 day a week.

This brings me to my second solution—fix the economy. As a Congress, we should be devoting our time to developing ways to encourage private sector job creation. In the energy field, which creates many jobs in Wyoming, this means working to get permits for energy development on Federal lands processed in a timely manner and promoting tax policies that encourage the energy industry to hire workers and continue the domestic energy development. This means scrapping the plans for a cap and trade tax that has created economic fear and uncertainty in many energy sectors, which inevitably depresses job growth.

We must reject proposals that make employers less likely to create new positions and fill vacant ones. Legislation that makes it more costly to employ someone by adding unfunded mandates, increasing litigation burdens, and complicating regulation and increasing taxes are taking us in the wrong direction. Even when these proposals are not enacted, they have a chilling effect on employers who understandably look to congressional hearings and debates to figure out what new government burdens may be placed on them.

The legislative process being promoted here today will not create jobs, except for trial lawyers. The Paycheck Fairness Act will subject employers to more litigation, including far larger class action suits, and increase penalties even when there is no showing that an employer intended to discriminate at all. It will tilt the law so heavily against employers that they will be advised to settle such suits instead of defending their pay practices.

The bill adds more of the burdensome government reporting requirements that don't just waste hours of employers' time, they also cost them money that could be directed toward new hires. Further, we must be exceedingly cautious about proposals that ultimately seek government-set wage rates and would turn our economy down a disastrous road.

I appreciate the chance to review women's pay in the workplace and share the success of Climb Wyoming with my colleagues. The real pathway to closing the remaining wage gap lies not with increased litigation and government intervention, but with increasing opportunities for women to gain lucrative skills and choose high-earning occupations.

We should redouble our efforts to reauthorize the Workforce Investment Act and focus on other job growth policies without delay.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Enzi.

I now recognize Senator Dodd for both a statement and purposes of introduction.

STATEMENT OF SENATOR DODD

Senator DODD. Well, thank you very much, Mr. Chairman. I will be brief. I know we have our witnesses here this morning and am honored to have them with us.

First of all, thank you, Mr. Chairman. You have been a champion of these issues for as long as we have served together, and that is a long time, going back to our years together in the House of Representatives and then almost 30 years we have spent together here in the U.S. Senate. So there is no better champion about fairness in terms of compensation than Tom Harkin of Iowa. So I am pleased to be with you.

I want to thank Mike Enzi. I couldn't agree more. We need to get our economy back on its feet again. Yesterday, the Senate passed a good bill on tax credits to try and increase employment opportunities in the private sector, and the more we can do on that front is going to be beneficial to everyone. So that is important as well.

I am going to introduce briefly my good friend and colleague who is no stranger to this room, by the way. Rosa DeLauro was my chief of staff for 7 years and spent a lot of time in this room as I became a member of this committee, sitting way down at the end in that chair. I think where Michael Bennet sits today is the chair I occupied when I first was a part of this committee and over the 30 years have crawled my way up here.

I want to let Bob Casey and Sherrod Brown know they can get to this chair, Tom Harkin's chair, and hopefully more rapidly than I had the opportunity to along the way. But let me thank them as well. Both of our new members have strong records and background.

In fact, I was mentioning both of you last night in your absence. I spoke to the national child care organization that I worked with for years and, having announced my own retirement from the Senate come next January, was talking about people that I thought would be able to carry on the terrific work on children's issues and work on family issues. I mentioned both Bob Casey and Sherrod Brown as examples of people coming along in the Senate who already are demonstrating a great interest in the subject matter.

So the cause is not going to suffer at all. In fact, I argue it will be enhanced by the people who are coming along in this area. I thank both of you for your continuing interest in this.

Well, Rosa, you have been a champion, as Tom Harkin has been, throughout your career: one of the most vocal and successful advocates for women and families for as long as I have known you—for 30 years. I am delighted to have you here today to be our lead-off witness because, frankly, it is a little embarrassing, to put it mildly, to have to be here today talking about wage gaps.

Obviously, getting improved opportunities for women is great so they can move up the scale and become lawyers and doctors and all these other wonderful occupations. We agree with that. The problem is that when you are talking about people doing the same jobs, the pay scales are different. That is really what we are talking about here.

For every man out there working, women earn 77 percent of what men earn in these areas. So the gap exists. The average woman in my State of Connecticut, which has a good record on many of these issues, needs a bachelor's degree just to earn what a man with a high school diploma earns. So the gap is there. So if you can get that further education, it is great, but understand when you do so, that the wage comparisons fall apart based on educational levels.

The gap is even larger in the African-American and Hispanic communities. It persists across the income spectrum. And astonishingly, in some occupations, it is actually getting worse with time. Now here we are in the year 2010, well into the 21st century. Even when studies control for factors such as education, job tenure, choice of industry, the gap remains.

We will hear from Heather Boushey this morning that labor economists have conducted study after study and controlled for every measurable variable—job characteristics, union membership, ethnic and racial backgrounds, education experience, and on and on and on, and still cannot explain nearly half of the wage gap. The answer is that women are being paid less than men simply because they are women, in my view.

This isn't just a matter of fairness. It is a matter of economic security for millions of families as well. In 2008, two out of every five mothers were their family's breadwinners, as Tom Harkin has pointed out, either as a single parent or as a spouse with higher income. These women are being hurt, and so are their families. And the recession is only increasing the trend and exacerbating the problem.

I am proud that the first law that President Obama signed into law was one that Rosa championed, the Lilly Ledbetter legislation, along with your colleagues and, of course, Barbara Mikulski here and other members of this committee. That law reverses an awful U.S. Supreme Court decision that barred women from the judicial system to fight against pay discrimination. Rosa, as I said, was a lead sponsor of that, along with others.

But as significant achievement as that law was, we still need to act to eliminate pay discrimination—again, a point that Tom Harkin has made—so that women don't have to fight in the first place to get that which they deserve. That is why, for the last seven Congresses, I have co-sponsored the Paycheck Fairness Act, and that is why I was an original co-sponsor of Chairman Harkin's Fair Pay Act as well.

As we will hear today, the wage gap is an anachronism, a relic of discrimination that should be, of course, eliminated. It is not just about women's rights. It is about economic justice in our country. Rosa has been the lead sponsor of the Paycheck Fairness Act in the House year after year after year. Tireless in her devotion to this issue, there is no better advocate for pay equity—a more compelling person or more eloquent—than Rosa is on this issue.

I note, Mr. Chairman, as well, yesterday, along with many of our colleagues—and I am not sure the rest of you were there as well—I went to the ceremony in the new visitors center, where we gave out gold medals to the women WASPs. The women who were pilots—a little over 1,000 women during World War II volunteered.

Twenty-five thousand women applied for those jobs to go out and become pilots to ferry the 150,000 aircraft we built in those 2 or 3 years, built by women, by the way, in the manufacturing facilities in Detroit and elsewhere because men were off fighting in the Pacific and the European theaters. Over 60 million miles these women flew; 38 of them lost their lives in the process.

But what a tragedy it was in so many ways because they had to pay their own way to get to that training facility in Texas, paid their own way once they lost their jobs at the end of the war, never allowed to put a flag on their caskets, having served in the Air Force, because they weren't considered members of the armed services.

One woman told me that her pal died, and her mother put her picture in the window in Arizona when her daughter lost her life as one of those pilots. And the Air Force made her take the picture out of the window because she wasn't considered a member of the Air Force.

Now, the Air Force, obviously, has substantially changed. Today, 20 percent of the Air Force personnel are women. Many women are combat pilots, and they get the same pay, by the way, and same grade in our military forces.

I know that is a long time ago. It is 60 years ago. But it is reflective of where we have been on these issues. And today, once again, we are there.

People I know make all sorts of arguments about these other matters. The fact is, we have discriminated on this basis. And the sooner we come to the reality of that and get this right and equalize this process, there won't be lawsuits. There are not going to be people running to court on this. It is just seeing to it that if a woman or any person works at the same job, they deserve the same pay. This ought not to be complicated, in my view.

So my hope is, in this Congress here, we can get this done right and eliminate these barriers that exist between men and women when it comes to fair pay.

With that, Rosa, delighted you are here, and thank you for your hard work.

[The prepared statement of Senator Dodd follows:]

PREPARED STATEMENT OF SENATOR DODD

Thank you, Chairman Harkin. You have long been a champion on this issue, and I thank you for calling this important hearing. I have the privilege of introducing our first witness this morning, a good friend of mine and a great public servant from Connecticut, Congresswoman Rosa DeLauro. Throughout her career, she has been one of the most vocal and successful advocates for women and families, and I am delighted that she is here to join us today.

It is, frankly, a little embarrassing that we have to be here today talking about the wage gap between men and women. It is, after all, 2010. We have made so much progress as a nation to eradicate discrimination in all its forms.

And yet, as we convene this morning, women still earn just 77 percent of what men earn. The average woman in my State of Connecticut needs a bachelor's degree just to earn what a man with a high school diploma earns. The gap is larger in the African-Amer-

ican and Hispanic communities, it persists across the income spectrum, and, astonishingly, in some occupations it's actually getting worse with time.

Even when studies control for factors such as education, job tenure, and choice of industry, the gap remains. As we'll hear from Heather Boushey (boo-SHAY), labor economists have conducted study after study and controlled for every measurable variable—job characteristics, union membership, ethnic and racial background, educational experience, and on and on—and still cannot explain nearly half of the wage gap. The answer is that women are being paid less than men simply because they are women.

This isn't just a matter of fairness. It's a matter of economic security for millions of American families. In 2008, two out of every five mothers were their families' breadwinners, either as a single parent or as the spouse with the higher income. These women are being hurt, and so are their families. And the recession is only increasing this trend.

I am so proud that the first law President Obama signed was the Lilly Ledbetter Fair Pay Act, which reverses an awful Supreme Court decision that barred women from the judicial system to fight against pay discrimination. And Rosa DeLauro was one of the lead people fighting day and night in the House of Representatives to get that important legislation over the finish line.

But as significant an achievement as that law was, we still need to act to eliminate that pay discrimination so that women don't have to fight it in the first place.

That's why, for the last seven Congresses, I've cosponsored the Paycheck Fairness Act. And that's why I was an original cosponsor of Chairman Harkin's Fair Pay Act.

As we'll hear today, the wage gap is an anachronism, a relic of discrimination that should be stamped out. It's not just about women's rights—it's about economic justice.

Rosa DeLauro has been the lead sponsor of the Paycheck Fairness Act in the House year after year. She is tireless in her devotion to the issue. There is no advocate for pay equity more compelling and more eloquent than Rosa, and she is a true champion for women everywhere. I'm proud to fight with her to see this through and thrilled that she's joined us today to talk about this important issue.

STATEMENT OF HON. ROSA L. DeLAURO, U.S. REPRESENTATIVE FOR CONNECTICUT'S 3d DISTRICT, NEW HAVEN, CT

Ms. DELAURO. Thank you very, very much, Senator. It is wonderful to be with all of you this morning and to get a chance to speak about and to support this critical legislation.

I want to say a thank you to the members of the committee, particularly Chairman Harkin, to Senator Dodd. And I just would say, as we have a long history together, and he has spent so much of his professional career in trying to ensure the economic security of women and families in this Nation. And he is a Senate sponsor of the Paycheck Fairness Act.

Senator Mikulski, for her outstanding work on this issue, Ranking Member Enzi, my colleague—former colleague Senator Brown,

wonderful to be with you, and Senator Casey, thank you for your advocacy.

I am pleased to be invited here today to testify. Mr. Chairman, let me just say to you, as the author of the Fair Pay Act and, as you have pointed out, a bill that I have long supported, you have been such a long-time champion of pay equity for women, and I thank you for your leadership on this issue.

Put simply, the Paycheck Fairness Act is a modest, common-sense reform that closes numerous longstanding loopholes in the Equal Pay Act, and it stiffens penalties for employers who discriminate based on gender. In America today, women now make up half of the workforce. Two-thirds of women are either the sole breadwinner or co-breadwinner in their family.

Women are also more likely, as been pointed out, than men to graduate from college. They run more than 10 million businesses, with combined annual sales of \$1.1 trillion, and they are responsible for making 80 percent of consumer buying decisions. And yet, women are still only paid 78 cents on the dollar as compared to men.

As had been pointed out, women of color even worse off. African-American women 68 cents on the dollar, compared to the highest earners. Hispanic women 57 cents. Unmarried women—and unmarried women are single, widowed, divorced, or separated. They run the age gamut, and their wages determine, particularly for younger women, what their retirement benefits will be. And women live longer than men. It is one of the reasons why women today over 70 years old are the demographic that has the highest level of poverty in this Nation.

Unmarried women have an average household salary that is almost \$12,000 lower than unmarried men. They make a paltry 56 cents on the dollar when compared to married men.

The National Committee on Pay Equity tells us that these pay disparities have a substantial long-term impact on women's lifetime earnings, costing anywhere from \$400,000 to \$2 million over a lifetime. And that lack of pay equity translates into less income toward calculating pension and in some cases, as I have mentioned, Social Security benefits. It is no coincidence that 70 percent of older adults living in poverty are women.

Congress originally passed the Equal Pay Act in 1963. It was to end, and I quote, "serious and endemic problem of unequal wages." Forty-seven years later, it is clear that the act is not quite working as intended in its current form. And with more women responsible for their families' economic security than ever before, we have an obligation to face this continuing pay inequity head-on.

Very early in this Congress, we passed the Lilly Ledbetter Fair Pay Act. It would ensure that women who are discriminated against have the right to sue, as long as their discriminatory pay continues. But this critical law, which reaffirmed a right which had been denied in a short-sighted 2007 U.S. Supreme Court decision, brings us back to where we had been all along.

The Paycheck Fairness Act will represent progress for women who fight pay discrimination in the workplace every single day. It would clarify that "any factor other than sex" defense, so that an employer trying to justify paying a man more than a woman for the

same job must show the disparity is not sex-based, that it is job-related and necessary for the business.

It would also prohibit employers from retaliating against employees who discuss or disclose salary information with their co-workers. Of course, employees such as human resources personnel, who have access to payroll information as part of their job, would not be protected if they disclose workers' salaries of other workers.

That being said, just ask Lilly Ledbetter how much sooner she could have found out that she was being discriminated against had this protection been in place. Thanks to a company policy that is still not uncommon today, she was prohibited from discussing her pay with her co-workers. It was not until someone gave her an anonymous note shortly before she retired that she was alerted to the pay discrimination she had experienced throughout her career.

The Paycheck Fairness Act would also strengthen the remedies available for women to include punitive and compensatory damages. In other words, this act brings equal pay law into line with other civil rights law, and it provides to victims of sex-based discrimination the very same standards for lawsuits and options for damages that are already afforded to victims of race-based discrimination already in the law.

It is sometimes suggested that passing this bill would result in a torrent of class action lawsuits that employers could simply not afford to pay. That is not the pattern we have seen for anti-discrimination legislation. Race-based discrimination laws have been on the books for years. Employers have made adjustments necessary to avoid that circumstance. There is no reason to think that applying the same standards to sex-based discrimination would alter this equation. And for sure, companies are better, more productive, stronger, when they send a signal that there is no place for sex-based discrimination.

So, again, this legislation is a common-sense solution to the lingering problem of pay equity. It extends simply the standards that are already part of our civil rights law to include discrimination against women. And by acting now to ensure that women get paid the same as men for the same work, the Senate can give them, their families, and the entire economy the tools to recover and thrive.

And that is why the Paycheck Fairness Act has been endorsed by over 200 organizations, including the U.S. Women's Chamber of Commerce, the American Association of University Women, Business and Professional Women, the National Women's Law Center, and it is why it has passed twice in the House of Representatives.

It is now 13 years after I first introduced this piece of legislation. I believe that paycheck fairness is legislation whose time has come. I believe we have a moral obligation to ensure that one half of the American workforce is treated as fairly and equitably as the other half. And on behalf of all of America's women, I strongly encourage the Senate to take action and at last to make this bill law.

Let me make one final comment. We men and women who serve in this extraordinary institution, whether in the House or in the Senate, are blessed to have the opportunity to serve here because of the potential of the institution to make a difference in people's lives.

Yes, we are men and women. We come from all over this country. We come with different backgrounds, different educational backgrounds, different training, different skill sets, and yet we are paid the same amount of money for the same job.

Unfortunately, that is not true for most women in this Nation. Whether you are a waitress, whether you are a bus driver, whether you are a university professor, whether you are an engineer, whether you are a news anchor—I hope, Senator Enzi, that in the long-haul transport women are being paid the same amount of money as their male counterparts are doing.

We have an opportunity to make sure that what we have by virtue of serving in this job, that we have the benefit of the same pay as men and women, that we can extend that benefit to women across this country.

Thanks so very, very much for letting me be here this morning. [The prepared statement of Ms. DeLauro follows:]

PREPARED STATEMENT OF HON. ROSA L. DELAURO

Thank you. It is good to be with you this morning, and to get a chance to support this important legislation.

I first want to thank the members of the committee, particularly Chairman Harkin, Senator Dodd—the Senate sponsor of the Paycheck Fairness Act—Senator Mikulski, and Ranking Member Enzi for hosting this important hearing today, and for inviting me to testify. Mr. Chairman, as the author of the Fair Pay Act—a bill I have also long supported—you have been a longtime champion of pay equity for women, and I thank you for your leadership.

Put simply, the Paycheck Fairness Act is a modest, common-sense reform that closes numerous longstanding loopholes in the Equal Pay Act and stiffens penalties for employers who discriminate based on gender.

In America today, women now make up half of the workforce, and two-thirds of women are either the sole breadwinner or co-breadwinner in their family. Women are also more likely than men to graduate from college. They run more than 10 million businesses with combined annual sales of \$1.1 trillion, and are responsible for making 80 percent of consumer buying decisions.

And yet, women are still only being paid 78 cents on the dollar as compared to men. Women of color are even worse off—African-American women make 68 cents on the dollar compared to the highest earners, while Hispanic women make only 57 cents. Unmarried women have an average household salary that is almost \$12,000 lower than unmarried men, and they make a paltry 56 cents on the dollar when compared to married men.

As the National Committee on Pay Equity tells us, these pay disparities have a substantial long term impact on women's lifetime earnings, costing anywhere from \$400,000 to \$2 million over a lifetime. And that lack of pay equity translates into less income toward calculating pension and in some cases Social Security benefits. It is no coincidence that 70 percent of older adults living in poverty are women.

Congress originally passed the Equal Pay Act in 1963 to end the “serious and endemic problem” of unequal wages. Forty-seven years later, it is clear that the act is not quite working as intended in

its current form. And with more women responsible for their families' economic security than ever before, we have an obligation to face this continuing pay inequity head-on.

Very early in this Congress, we passed the Lilly Ledbetter Fair Pay Act, ensuring that women who are discriminated against have the right to sue as long as their discriminatory pay continues. But this critical law—reaffirming a right which had been denied in a shortsighted 2007 Supreme Court decision—only brings us back to where we had been all along.

By contrast, the Paycheck Fairness Act will represent real progress for women who fight pay discrimination in the work place every day. It would clarify the “any factor other than sex” defense, so that an employer trying to justify paying a man more than a woman for the same job must show the disparity is not sex-based; that it is job-related and necessary for the business.

It would also prohibit employers from retaliating against employees who discuss or disclose salary information with their co-workers. Of course, employees such as HR personnel who have access to payroll information as part of their job would not be protected if they disclose workers' salaries of other workers.

That being said, just ask Lilly Ledbetter how much sooner she could have found out she was being discriminated against had this protection been in place. Thanks to a company policy that is still not uncommon today, she was prohibited from discussing her pay with her co-workers. It was not until someone gave her an anonymous note shortly before she retired that she was alerted to the pay discrimination she had experienced throughout her career.

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It is sometimes suggested that passing this bill would result in a torrent of class-action lawsuits that employers could simply not afford to pay. But that is not the pattern we have seen for anti-discrimination legislation. Race-based discrimination laws have been on the books for years, and employers have made the adjustments necessary to avoid that. There is no reason to think that applying the same standards to sex-based discrimination would alter this equation. And for sure, companies are better and more productive when they send a signal that there is no place for sex-based discrimination.

So, again, this legislation is a common-sense solution to the lingering problem of pay inequity. It simply extends standards that are already part of our civil rights law to include discrimination against women. And by acting now to ensure that women get paid the same as men for the same work, the Senate can give them, their families and our entire economy the tools to recover and thrive.

That is why the Paycheck Fairness Act has been endorsed by over 200 organizations, including the U.S. Women's Chamber of Commerce, the American Association of University Women (AAUW), Business and Professional Women (BPW), and the Na-

tional Women's Law Center. And it is why we have passed it twice in the House of Representatives.

Now, 13 years after I first introduced it, I believe that Paycheck Fairness is legislation whose time has come. I believe we have a moral obligation to ensure that one half of the American workforce is treated as fairly and equitably as the other half. And on behalf of all of America's women, I strongly encourage the Senate to take action and at last make this bill law.

Thank you.

Senator DODD. Let us vote.

[Laughter.]

Ms. DELAURO. Thank you. Thank you.

The CHAIRMAN. Well, Congresswoman DeLauro, thank you very much for a very enlightened and enlightening presentation. And thank you for your great leadership on this over all these years. It has been a sheer joy to work with you on this and a lot of other issues, and thank you for your passion.

Ms. DELAURO. Thank you. I am honored to be here today. Thank you.

The CHAIRMAN. It is not enough just to be intellectually good on this, but your passion just comes through. And hopefully, we can act on this bill and join you in the House by getting it done and, hopefully, sending it to the President, hopefully, this Congress.

Ms. DELAURO. Looking forward to that day, Senator. Thank you.

The CHAIRMAN. Thank you very much. I know you are very busy, and you have to leave. Thank you very much, Congresswoman DeLauro.

Senator DODD. Thank you, Rosa.

The CHAIRMAN. Our next panel would be Commissioner Stuart Ishimaru. Stuart Ishimaru was appointed to the EEOC in 2003, and now serves as acting chairman. He is a graduate of the University of California at Berkeley, and received his law degree from George Washington University here.

Mr. Ishimaru spent 7 years as assistant counsel on the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights and then 2 years with the House Armed Services Committee. He has also served as acting staff director of the Civil Rights Commission and as Deputy Assistant Attorney General in the Civil Rights Division at the Department of Justice.

Mr. Ishimaru, again, welcome. Your statement will be made a part of the record in its entirety. And if you could sum it up in 5 or so minutes, we would be most appreciative. Welcome.

**STATEMENT OF STUART J. ISHIMARU, ACTING CHAIRMAN,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC**

Mr. ISHIMARU. Mr. Chairman, thank you very much. Always hard to follow Congresswoman DeLauro, but I will do my best.

So much was raised earlier during the opening statements and by her statement, so it lets me finish mine much quicker. But you know, the one thing that struck me as we were getting ready for this hearing. This is the new American workplace, and here we are, 47 years after enactment of the Equal Pay Act, the act that was

passed before the landmark 1964 Civil Rights Act. And here we are with huge problems still remaining in the country.

The pay gap continues to perpetuate, even though with the existence of the Equal Pay Act and title VII and the other civil rights laws. Obviously, much more work remains to be done to deal with this problem.

Last year, Maria Shriver, the first lady of California, working with the Center for American Progress, released a ground-breaking report entitled, "A Woman's Nation Changes Everything." You will hear later from one of the authors of that report, Heather Boushey. So I won't go into detail. But I would like to talk about some of the findings that they found that we have known for many years at the EEOC.

First, the gender wage gap persists. As have been mentioned by other speakers, it is 77 cents on the dollar that women earn versus their male counterparts. It is even less for minority women, for women with disabilities, for the undocumented workers as well.

Second, caregiver discrimination results in gender pay discrepancies. Women continue to be more likely to bear significant responsibility for providing care to children, elderly family members, and family members with illness or disability.

Discrimination against caregivers in the workplace based on gender stereotypes and presumptions about the competence of working mothers and others with significant caregiving responsibilities continues to drag down wages for women. This is an issue that I have taken a particular interest in at the EEOC, and I am proud that the EEOC during the Bush years, as a part of a bipartisan unanimous effort, adopted caregiver guidance dealing with the issue of gender discrimination. And we issued guidance for employers that was well received so they would not have problems of gender discrimination in their workplace.

Earlier last year, we issued a guidance of best practices that employers were, in fact, doing, which again helps employers know how to deal with this issue.

Third, part-time work leads to lower benefits and pay over both the short- and long-term. Women are more than twice as likely as men to work part time, and they often make the choice to work part time in order to provide care for their children and other family members. Part-time work is less likely to come with benefits, and it is likely to be paid less as well.

Fourth and finally, gender-based wage discrimination is especially untenable now in this economy, as most families have come to rely on the incomes brought in by working women to make ends meet.

I would like to spend a few minutes talking about the role that the EEOC plays in enforcing equal pay laws. We enforce both the Equal Pay Act, Title VII of the 1964 Civil Rights Act, as well as other laws that prohibit pay discrimination.

Over the past 13 years, from fiscal year 1997 to the year 2009, the EEOC received 30,000 charges, over 30,000 charges alleging sex-based pay discrimination. This may sound like a lot, but it was over 13 years. And during that time, we received over 1 million charges of discrimination. This resulted in roughly 3 percent of

charges coming into the EEOC that actually alleged pay discrimination.

Over the past 3 years, we have seen a 30 percent rise in cases or in charges coming before us. Again, though, this is rising from 1,700 roughly to 2,200. Not a very large number. And probably, the largest driver for this is that we just don't know. We just don't know whether wage discrimination is going on because of the secrecy that surrounds pay information in the workplace.

Many workers operate under strict instructions not to discuss their pay with co-workers and fear retaliation if they do go against those instructions. We also face broader systemic barriers in the private sector due to inadequate data on wages. While some data is available in the aggregate, Federal agencies have very little in the way of company-specific wage data in the private sector, and this hinders our possible enforcement.

In my written statement, I talk about a number of cases that we have brought. I leave that for the written record.

I want to spend a minute talking about the Federal sector because I think that is actually an interesting way to compare what is going on.

In the Federal sector, for Federal employees, there is—we get far fewer complaints of wage discrimination. That is partially because it is so transparent. People know what people make. And I think that may serve as a model for us, that the more people know what people are making with a large view, less pay discrimination will go on.

Between 1988 and 2007, the gender gap for women decreased from 28 cents to 11 cents on the dollar. So there was real progress made in dealing with discrimination in the Federal sector.

So now we look forward, and certainly, there are many challenges at the EEOC. I want to thank members of this committee for moving our nominees through so we get a quorum again at the EEOC and a new chair. We are looking forward to having them join us, hopefully soon. But we look forward to working with all members of this committee with the Senate and members in the House.

We were pleased with the passage last year of the Paycheck Fairness Act in the House, and we are delighted that the Senate is holding the hearings today. I want to commend the committee for their leadership on this issue and want to note that the Paycheck Fairness Act provides essential tools toward realizing the promise of equal pay by strengthening provisions to the act.

I would also note that last month, the President announced the establishment of the National Equal Pay Enforcement Task Force to improve compliance, public education, and enforcement of equal pay laws. The EEOC is a key part of this task force, actively coordinating with our colleagues at the Department of Justice and the Department of Labor and the Office of Personnel Management, to ensure that the most rigorous possible enforcement happens with our equal pay laws.

Our work would undoubtedly be strengthened by the passage of the Paycheck Fairness Act, a bill that President Obama has strongly supported since his tenure here in this body.

Again, I would like to thank you for the opportunity to testify today and look forward to answering any questions members may have.

[The prepared statement of Mr. Ishimaru follows:]

PREPARED STATEMENT OF STUART J. ISHIMARU

Mr. Chairman, and distinguished members of the Committee on Health, Education, Labor, and Pensions, thank you for the opportunity to appear before you at this important hearing, "A Fair Share for All: Pay Equity in the New American Workplace."

THE PROBLEM OF GENDER INEQUALITY IN EMPLOYMENT COMPENSATION

In 1963, Congress passed the Equal Pay Act, amending the Fair Labor Standards Act to address pay inequities based on sex. At that time, Congress denounced sex-based wage discrimination as contributing to depressed wages, underutilization of the labor force, obstruction of commerce, and unfair competition. While the passage of the Equal Pay Act and subsequent year's passage of the Civil Rights Act of 1964 have done much to equalize pay for men and women in this country, in 2010 the pay gap continues to perpetuate the very same problems the Equal Pay Act and title VII were intended to combat. Much work remains to close the gap, to end gender pay inequity, and to deliver on the promise of equal pay for equal work.

In 2009, Maria Shriver, working with the Center for American Progress, released a ground breaking report entitled, "A Woman's Nation Changes Everything." This sweeping study of the role of women in our Nation's economies and the economies of our families today provided a wealth of insights into the challenges women still face when it comes to earning equal pay for equal work. This report and other recent studies confirm what we at the EEOC have recognized for some time:

- **The gender wage gap persists.** The wage gap is alive and well in America, with the typical full-time, year-round female worker making \$.77 for every dollar earned by her male counterpart.¹ The gap is even wider for women of color and people with disabilities, and undocumented immigrant workers often don't even manage to earn minimum wage. Although some of the pay gap can be explained by differentials in experience or as a result of the differences in the occupations men and women typically do, the Shriver Report estimates that about 41 percent of the pay gap cannot be explained by these factors.²

- **Caregiver discrimination results in gender pay discrepancies.** Women continue to be more likely to bear significant responsibility for providing care to children, elderly family members, and family members with illnesses or disabilities.³ Discrimination against caregivers in the workplace based on gender stereotypes and presumptions about the competence and commitment of working mothers and others with significant caregiving responsibilities continues to drag down wages for women.⁴ This is an issue I have taken a particular interest in at the EEOC, and I am proud to have been a part of the bipartisan effort to address this kind of discrimination through the Caregiver Guidance⁵ the Commission issued in 2007, and the Best Practices Guide⁶ we issued in 2009.

- **Part time work leads to lower benefits and pay over both the short term and long term.** Women are more than twice as likely as men to work part-time, and they often make the choice to work part time in order to provide care for their children or other family members. According to the Department of Labor Women's Bureau, 24.6 percent of employed women worked part time in 2008, the most recent year for which data is available, as compared to only 11.1 percent of men.⁷

¹THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 57-58 (Heather Boushey and Ann O'Leary, eds., 2009).

²*Id.* at 58.

³See generally Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women's continued role as primary caregivers in our society and citing studies).

⁴See generally Shelley J. Correll, Stephen Benard and In Paik, *Getting a Job: Is There a Motherhood Penalty?*, *AJS* Volume 112 Number 5 (March 2007): 1297-338.

⁵Equal Employment Opportunity Commission Enforcement Guidance, *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007).

⁶Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities* (2009).

⁷DOL Women's Bureau, *Employment Status for Women and Men in 2008*, available at <http://www.dol.gov/wb/factsheets/QJ-ESWM08.htm>.

Part time work is less likely to come with benefits such as health insurance or paid time off, and by its very nature, tends to pay less than full-time work. Because so much of the way our earnings increase over time is based on raises calculated as a percentage of current salary, the fact that women are more likely to work part time causes the pay gap to accumulate and widen over time.

• **Gender-based wage discrimination is especially untenable now, as more families come to rely on the income brought in by women workers to make ends meet.** Recent studies show that the current economic downturn is resulting in more women serving as the primary breadwinners for their families.⁸ This is because men are losing jobs at a much higher rate than women.⁹ You don't have to be a mathematician to figure out that where women make 77 cents on the dollar versus their male counterparts, where a father's wages are lost, an average family can lose over 50 percent of its income. If there ever was a time to act to remedy the gender pay gap, it is now.

EEOC'S ROLE IN ENFORCING EQUAL PAY LAWS

The EEOC's role in enforcing the Nation's equal pay laws is a central one. EEOC is the primary enforcement agency for both the Equal Pay Act and title VII's prohibitions on compensation discrimination. We have further jurisdiction to address pay discrimination under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act. The EEOC has issued a Compliance Manual Chapter of Compensation Discrimination which provides detailed guidance and instructions for investigating and analyzing claims of compensation discrimination under each of the statutes enforced by the EEOC.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 which supersedes the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* *Ledbetter* had required a compensation discrimination charge to be filed within 180 days of a discriminatory pay-setting decision (or 300 days in jurisdictions that have a local or State law prohibiting the same form of compensation discrimination), an unrealistic expectation given the secrecy that usually surrounds pay decisions.

The Ledbetter Act restores the pre-*Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the Federal EEO statutes, regardless of when the discrimination began. As noted in the act, it recognizes the "reality of wage discrimination" and restores "bedrock principles of American law."

RECENT PRIVATE SECTOR CHARGE RECEIPT TRENDS AND LITIGATION

Over the past 13 years (from fiscal year 1997 through fiscal year 2009), the EEOC has received a total of 30,312 charges alleging sex-based pay discrimination in violation of the EPA and/or title VII. This is an average of 2,332 charges per fiscal year (out of an average of 82,022 total charges per fiscal year over the same period).

Over the last 3 fiscal years, the EEOC has experienced a 30 percent increase in gender-based wage discrimination charges. Most recently, in fiscal year 2009, the EEOC received 2,252 sex-based pay discrimination charges out of a total of 93,277 total charges. Of those, 944 charges alleged violations of the EPA, specifically (roughly 1 percent of total receipts). Through our administrative enforcement process alone in 2009, the EEOC obtained almost \$19 million in monetary benefits for victims of wage discrimination. Settlements and judgments obtained in litigation make this figure even greater. A number of reasons may account for the relatively small number of wage claims the EEOC receives, but the single biggest challenge the EEOC faces in identifying wage discrimination is the secrecy that surrounds pay information in the workplace.

Many workers operate under strict instructions not to discuss their pay with their co-workers, and fear retaliation if they go against those instructions. For this reason, many people earn less for potentially discriminatory reasons for many years without knowing it, just as Lilly Ledbetter did until an anonymous co-worker left her a note telling her the salaries of some of her male peers. These policies that prevent workers from discussing pay create a serious barrier to charge filing under our equal pay laws.

⁸Heather Boushey and Ann O'Leary, *OUR WORKING NATION: HOW WORKING WOMEN ARE RESHAPING AMERICA'S FAMILIES AND WHAT IT MEANS FOR POLICYMAKERS* (2010).

⁹Heather Boushey, *Women Breadwinners, Men Unemployed*, available at http://www.americanprogress.org/issues/2009/07/breadwin_women.html. (July 20, 2009).

We also face broader systemic barriers in the private sector due to inadequate data on wages. While some data is available in the aggregate, Federal agencies have very little in the way of company specific wage data in the private sector, and this hinders systemic enforcement efforts by the Commission in the realm of wage discrimination.

Notwithstanding these challenges the EEOC has litigated and resolved a number of important wage discrimination cases in recent years. These include:

- *EEOC v. Woodward Governor Company* (filed 10/4/06)—A title VII/EPA lawsuit filed by the EEOC's Chicago District Office alleging, among other claims, that defendant discriminated against females, blacks, Hispanics and Asians with respect to compensation. This was resolved 2/16/07 for \$9,674,489.

- *EEOC v. Morgan Stanley* (filed 9/10/2001)—A title VII lawsuit filed by the EEOC's New York office alleging discrimination against women in compensation, promotions, and terms and conditions of employment. The case was resolved on 7/12/2004 for \$54 million.

- *EEOC v. Tavern on the Green* (filed 9/24/07)—A title VII lawsuit filed by the EEOC's New York District Office alleging, among other claims, that defendant discriminated against females, Blacks, and Hispanics with respect to wages when they complained of harassment. This was resolved on 6/3/08 for \$2,200,000.

- *EEOC v. New York State Department of Corrections* (filed 3/29/07)—An EPA lawsuit filed by the EEOC's New York District Office alleging that defendant discriminatorily transferred at least 13 female employees from workers' compensation leave to less lucrative maternity leave on or before the birth of their children without determining whether the underlying work-related injuries were ongoing. This was resolved on 5/20/08 for \$971,961.

The EEOC is currently actively engaged in 14 cases in which wage discrimination is alleged. Five of those cases involve EPA claims. These include:

- *EEOC v. Southeastern Telecom Inc.* (filed 9/22/09)—A title VII/EPA case filed by the EEOC's Memphis District Office alleging that Charging Party, an account executive, was discharged after complaining of sex discrimination in commissions in violation of title VII and the EPA.

- *EEOC v. The Health Management Group* (filed 7/29/09)—A title VII/EPA case filed by the EEOC's Philadelphia District Office alleging that defendant, a weight loss enterprise, failed to pay Charging Party and another employee equal wages because of their sex, female.

EEOC'S ROLE IN ENFORCING FEDERAL SECTOR EQUAL PAY LAWS

The EEOC plays an important role in enforcing equal pay laws for Federal employees through our Federal sector hearings program, our Federal sector appeals program, and our Federal sector training programs.

Federal sector pay discrimination complaints are relatively rare, due in part to the transparency of the GS pay scale. There were 44 EPA complaints filed against Federal agencies in fiscal year 2008 out of a total of 16,752, 40 EPA complaints out of a total of 16,363 in fiscal year 2007, and 33 such complaints out of 16,723 total complaints in fiscal year 2006. In any given year, approximately .2 percent of all complaints filed by Federal employees allege EPA claims.

Since fiscal year 2006, the EEOC's Office of Federal Operations has issued approximately 59 decisions on appeal in which an EPA violation was asserted. Of these, only four cases resulted in a finding of discrimination based on pay.

As in the private sector, gender-based compensation discrimination claims can also be made under title VII. In fiscal year 2008, there were 388 complaints alleging discrimination on the basis of gender under title VII that raised pay-related discrimination issues. In fiscal year 2007, that number was 366, and in fiscal year 2006, it was 364. From October 2006 through the end of February 2010, the EEOC issued approximately 300 appellate decisions raising wage-related discrimination (on the basis of gender and other protected traits) under title VII.

In March 2009, the government Accountability Office issued a Report entitled: "Women's Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education and Experience Diminish." This report found that while a pay gap between men and women in the Federal workforce still exists, it has narrowed considerably since the 1980s. Between 1988 and 2007, the gender pay gap declined from 28 cents to 11 cents on the dollar. The GAO also found that much of the gap was explained by measurable factors such as occupations, experience and education. However, 7 cents of the gap could not be accounted for in its study.

The GAO study suggests several factors that may be contributing to the lessening of the gender pay gap in the Federal Government. These include the fact that some occupational categories have become better integrated by gender, the decline in the

clerical workforce, and the fact that men and women have increasingly similar levels of education and Federal work experience.

The EEOC is committed to working with Federal agencies to eliminate pay discrimination in Federal employment, so the Federal Government can truly set the standard for fair pay in this country, and serve as a model workplace for others to follow.

LOOKING FORWARD

There remain many challenges on the road ahead, and the EEOC stands ready to work with Congress to successfully meet these challenges. I was very pleased by the House's passage last year of the Paycheck Fairness Act, and I am encouraged that the Senate is holding this hearing today in order to bring attention to the important issues addressed by this legislation. I would also like to thank this committee for their leadership on the issue of pay equity. This hearing provides an opportunity to bring attention to the issue, and to the legislation in the Senate.

The Paycheck Fairness Act provides essential tools toward realizing the promise of equal pay, and I look forward to working with the Senate to strengthen and move forward on this important legislation soon.

Passage of this legislation would make it easier to establish violations of the Equal Pay Act, by clarifying the affirmative defense for "factors other than sex," and refining the "establishment" requirement to comply with commonsense notions of how employers set wages.

The Paycheck Fairness Act would enhance the EEOC's data collection capabilities, allowing us to detect violations of the law and more readily engage in targeted enforcement of equal pay laws.

The bill would also enhance remedies to allow for compensatory and punitive damages, putting gender-based pay discrimination on a more equal footing with pay discrimination on other bases such as race. It would further allow class action claims to proceed under the EPA under the Federal Rules of Civil Procedure.

Last month, the President announced the establishment of a National Equal Pay Enforcement Task Force "to improve compliance, public education, and enforcement of equal pay laws." The EEOC is a key participant in this Task Force, actively coordinating with our colleagues in the Department of Justice Civil Rights Division, at the Department of Labor, and at the Office of Personnel Management to ensure the most rigorous possible enforcement of our Federal equal pay laws. Our work would undoubtedly be strengthened by the passage of the Paycheck Fairness Act, a bill President Obama has strongly supported since his tenure in the Senate.

CONCLUSION

I'd like to thank you again for inviting me here today to testify on this very important issue. I look forward to your questions.

The CHAIRMAN. Thank you very much, Mr. Ishimaru, and thank you for your leadership at EEOC.

I just have one brief question. Again, a lot of people say, "well, you had a lot of success." People might argue that you have plenty enough tools, that current law is sufficient. Again, briefly for the record, what is it in the bill that would give you additional tools to better enforce the law?

Mr. ISHIMARU. Well, one would be knowing, having pay data about what people are generally making. We do not collect data like that, and it is very limited. The Lilly Ledbetter case is instructive to us. Nobody would have known that, and she didn't know it until somebody slipped her that note.

Pay data, certainly in the private sector, quite often is kept very close. People don't talk about it. They are told not to talk about it. We have no real way of knowing what people are making so people can make that determination whether they want to file a charge with us. That is really a huge driver for this, giving us the tools we need to actively take a look, to see whether employees are having problems.

The one thing that I have found, having been a civil rights lawyer for many years now and having worked on Capitol Hill and going to the EEOC somewhat skeptical about whether employers do a good job, what I have learned is that employers want to do a good job, generally. They want to know what the law is. They want to know what the requirements are. And I have been truly pleased to find that many employers and certainly most big employers understand this, and they want to do better. They want to know what the standards are.

And that, I think, will cut down on any worries or the big worries about litigation and undue action against employers. I have found that there has been a lot of progress made.

The CHAIRMAN. Thank you very much, Mr. Ishimaru.

Senator Enzi.

Senator ENZI. Thank you.

One of the things that I note as I go through a lot of these hearings is that it all seems so simple as long as we are not the ones running the business and looking at the specifics. But to get into the questions, the U.S. District Court for the Northern District of Iowa recently issued a decision in which it dismissed all claims brought by the EEOC against CRST Trucking in Cedar Rapids, IA, and ordered the EEOC to pay the trucking company some \$4.5 million to defray its costs and attorneys' fees dollars defending this lawsuit.

Many observers have characterized the EEOC's conduct in this case is one of sue first and ask questions later. They also allege that the kind of legal overreaching and slipshod investigating that was evident in the trucking case is not uncommon and that the only thing uncommon was an employer with the wherewithal to fight the agency's legal bullying.

As you know, in 2010, the omnibus appropriations bill, the EEOC was provided with an extra \$23 million. Nearly a quarter of the extra appropriations have been effectively wasted on a single case because of the agency's mishandling of the claim.

As chairman, what specific steps have you taken to review the procedures and decisions of the agency, which culminated in the pursuit of this legislation and the eventual ruling in the court in Iowa? What steps can and should be taken to be sure that the agency doesn't again fail to meet its legal obligations and does not again pursue claims without a factual legal or procedural basis?

Mr. ISHIMARU. Senator, thank you for the question.

I will note that that case is still in litigation. So I can't talk about the specifics of the case and won't talk about the specifics of the case. But I will talk to the broader issue of whether our people have their ducks lined up in a row.

First, I would like to thank Senator Mikulski for her leadership and her help in getting us the resources we need to rebuild the agency. In recent years, the EEOC budget was basically flat, which meant we had a declining budget, given all the increases that pop up over time. We lost, over the last 8 years, approximately 25 percent of our front-line workforce. And due to the help of the appropriators and the Congress as a whole, we have been able to start to rebuild the agency, start to hire people again. We have really

brought in a tremendous cadre of new people that will help us do our work.

What I have found, both at the EEOC and having served time at the Department of Justice in the 1990s, Federal cases are not brought frivolously, or they are not brought without much preparation and thought behind it. In every case that comes before us and is brought by our Office of General Counsel, as I found earlier at the Department of Justice, we pre-litigate these cases in memoranda going back and forth before we are ready to go. Very seldom do we get in a situation like this where a judge has ruled against us.

I think the quality of our legal work is first rate, and I think that is shown over the years. There are times when—rare times when we have been in a situation like this where a judge has ruled against us, and we believe at the end of the day, we will prevail on this case. But this does happen from time to time. That is the beauty of our court system that courts can rule this way if they see fit. But we believe that we have a solid case here, and at the end of the day, we will prevail.

Senator ENZI. Well, the government has a lot more resources and a lot more capability to pursue these things than private individuals do. But to shift gears here a little bit because my time is limited, from a plaintiff's perspective, one of the main differences between filing an Equal Pay Act claim or a title VII claim is the requirement to initiate all the title VII charges through the EEOC or a State employment agency initially.

What purpose does filing a charge with the EEOC fulfill? Why shouldn't the law require Equal Pay Act charges to be similarly initiated with your agency?

Mr. ISHIMARU. Well, certainly, when the Equal Pay Act was enacted back in 1963, there wasn't an EEOC. There wasn't a Title VII of this 1964 Civil Rights Act. And that act, like many other civil rights acts, Congress set up an administrative mechanism to try to deal with these cases before they went to court. And that has worked to a large extent, but there are still issues with that. There are ways to make it better, I think.

And as we worked on civil rights legislation over the years, there has always been an active debate whether we should let people go to court directly or whether they should come to the administrative agency. And Congress, in its wisdom, chose to go a certain route, and that is why we do what we do at the EEOC.

Senator ENZI. Thank you. My time has expired.

The CHAIRMAN. Senator Dodd.

Senator DODD. Well, very quickly—and again, we want to thank you for your service and thank your staff and others at the EEOC because, for a number of years, they were just gutted. There was a concerted effort to just virtually eliminate the EEOC, if they could, by strangling it financially and starving it. And as a result, you have ended up where you have. So thank you for your work. Thank you for those who hung on and stayed there to try and make this work as well along the way.

The Equal Pay Act, I wonder if you might just share or discuss how the current language of the Equal Pay Act allows an affirmative defense based on “any factor other than sex” inhibits your de-

partment's ability to effectively protect victims of pay discrimination under the EPA.

Mr. ISHIMARU. Well, I think that the language in the Paycheck Fairness Act tries to adopt the framework used by other civil rights acts, which I think will help employers understand what the requirements are under the law. Using any factor other than sex, we found to be a rather large loophole, and we think that the framework laid out in the bill will help tighten it. So it is linked to business purposes.

Senator DODD. Don't you have some practical examples? What are some of the defenses that you hear?

Mr. ISHIMARU. Well, one of the practical examples is that someone may say, "well, that is what you made in your old job, and that is why we are paying you less." It would perpetuate discrimination that has gone on in other places.

We think that the better approach is to look at how the wage scale is dealt with for this job, rather than comparing it to something else that may or may not have relevance to that job. What you were making in a past job may or may not be relevant to what you should be making in this job for these tasks.

Senator DODD. Would the Paycheck Fairness Act's provision prohibiting employers from retaliating against employees who share wage information help the EEOC better protect women against discrimination?

Mr. ISHIMARU. Oh, it is huge. The fact that people are prohibited from talking about their wages in many cases stifles the conversation. People have no idea what their colleagues are making. They don't know if there is a disparity, whether it is based on gender or race or some other factor.

Having worked for the Federal Government for so long, you sort of get used to having your rate of pay as a matter of public record. And certainly, in the private sector, that is not always so. And for people who were strictly told that they cannot do it, it is totally inhibiting that people cannot share this information with their colleagues. They have no way of knowing. And I think Lilly Ledbetter showed that.

Senator DODD. And last, let me ask you, and again, I don't know if these numbers are correct or not. You can tell me if they are. But I am told that for fiscal year 2009, EEOC received 2,250 sex-based pay discrimination charges. But of those, only about 900, a little more than 900 charges alleged violations of the Equal Pay Act, which is just over 40 percent.

Why are the Equal Pay Act charges brought so much less frequently than under title VII?

Mr. ISHIMARU. Hard to say. It could be based on jurisdictional reasons. It could be based because the person wants to bring it under one statute versus another. It could be based on our need to having to educate our employees more on the various parts of the Equal Pay Act.

As I stated, very few charges come in under the Equal Pay Act. The bulk of our work is carried on under title VII of the 1964 act. People are used to going to title VII as sort of the go-to law, and that is quite often the framework that they use.

Senator DODD. Very good. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman. I appreciate it.

Thank you very much for being here, Mr. Ishimaru. You stated there were 1 million claims over 13 years before the EEOC. Is that correct?

Mr. ISHIMARU. Right.

Senator ISAKSON. What percentage of those were pay claims, equal pay claims?

Mr. ISHIMARU. Equal pay claims was about 3 percent.

Senator ISAKSON. OK. And you stated that you were very formidable in your victories in court in those cases that were litigated, I think?

Mr. ISHIMARU. Right.

Senator ISAKSON. What percentage of those were litigated? How many do you litigate?

Mr. ISHIMARU. We litigate year-to-year between 300 and 400 cases a year.

Senator ISAKSON. Out of how many?

Mr. ISHIMARU. Out of every year, 80,000 charges come into the agency, roughly speaking.

Senator ISAKSON. How many of them are dismissed—how many of those that you don't litigate are dismissed and how many are settled?

Mr. ISHIMARU. I don't know exactly. I am happy to provide that for the record.

Senator ISAKSON. There is a reason—you know, I ran a company for 22 years. And 96 percent of my employees and 100 percent of my independent contractors were women. I never had a sex discrimination for pay case filed against me. I want that to go on the record.

[Laughter.]

However, the second most-sensitive thing among employees is their age, and age discrimination, which is also under EEOC jurisdiction. And oftentimes, those are filed because someone either was dismissed from their job or felt like they didn't get the raise somebody else got. Really, it was because of performance, but they would use the age discrimination law as a reason to bring the case to EEOC.

And quite frankly, most all the time, the EEOC investigators would suggest settling rather than pursuing a defense of the claim. And if you open up liability, tort liability, which I understand this does greatly open up punitive damages. Is that correct?

Mr. ISHIMARU. The Paycheck Fairness Act provides for compensatory and punitive damages. Yes.

Senator ISAKSON. I know tort issue is always a big Republican and Democrat issue, and I don't want to—I am not playing partisan politics. But when you have a case filed against you as a business person and there is a potential unlimited liability in the court system, there is even more of a tendency to settle rather than take the risk of a runaway jury, runaway verdict, or what may not always be justice at the courthouse.

The same thing is true—I am all for transparency and disclosure, but you know, we have antitrust laws against two business people discussing what they charge for a product or how they structure it. Yet you publish publicly what is paid for performance in the production of that business, and you skew in which the way the business operates.

Now I am not trying to defend discrimination. I am against discrimination. And obviously, with the number of women I hired, I am all for—women were a lot better workers than men were, I will tell you as a matter of fact in my particular—

But I do know that there is a balance between disclosure and worker's privacy, and there is a balance between appropriate damages and intimidation for the threat of a runaway award. And if you open that up too greatly, you have the unintended consequence of lessening pay-for-performance, lessening opportunity, and businesses trying to run themselves defensively, which runs counter-productive to the free enterprise system. So I know that is not a question, and I apologize for making a statement.

But having gone through those types of filings and then having had it suggested, well, just settle is cheaper than defending yourself, if you open up the liability to be more skewed one way or the other, you run the risk of that type of intimidation of small businesses, which the end result is not good, I don't think, for performance or not good for the operation of the business. I would love your comment on that.

Mr. ISHIMARU. If I could comment first about getting the pay information, we realize how sensitive this issue can be, and I think before we—if the Paycheck Fairness Act was enacted, we would take special pains to make sure that we did it right. One thing that I have been sensitive to at the agency is that when the government collects data, it needs to analyze it. It needs to use it.

We just can't put the burden on businesses to collect and not use it. I think we would use this data prudently, and I think we would have to figure out ways to make sure that it is collected in a fair way that would not have unintended consequences.

Senator ISAKSON. But you do understand what I am talking about in the risk of the pervasive availability of that information?

Mr. ISHIMARU. Oh, surely. Surely. And I think we would certainly factor that in to make sure that we would not have unintended consequences result from it. I think that would definitely be on the table, and we would be very sensitive to that.

I think as to the question of settling, those are larger questions. I think one of the things that the Congress wanted us to do when it created the EEOC in 1964 as part of the act is that they wanted to have this alternative mechanism so it didn't have to go to court. And we have found, especially with our mediation program, that people, if they can, want to resolve cases before it results in litigation. And we have found that employers who have participated in our mediation program have actually found it to be a useful activity. They have not felt intimidated. They felt that it was worth their while to actually participate.

So that gives us some hope that the path we are on is making sense. There are obviously ways to make it better, and we are working to try to make that happen.

Senator ISAKSON. Thank you very much for your time.
 Thank you, Mr. Chairman.
 The CHAIRMAN. Thank you, Senator.
 Senator Mikulski.

STATEMENT OF SENATOR MIKULSKI

Senator MIKULSKI. Thank you. I am here this morning wearing two hats—one, the authorizing committee and one of the original co-sponsors of the paycheck fairness, but I am also the appropriator for the EEOC. My problem has been that the EEOC has been leadership starved, revenue deficient, and expectations that they have been unable to fulfill, no matter what the intent of its civil service is there.

So let me get right to my questions. First of all, when I took over the subcommittee—that is, the appropriations—my ranking member, Senator Shelby, and I took a look at the EEOC. And on a bipartisan basis, we held the first oversight hearing.

We were shocked at the backlog, the dysfunction of the call centers that gave contradictory information, the administration in shambles, etc. That was in an old regime. Now we have this regime. Tell me, what is the backlog at the EEOC?

Mr. ISHIMARU. The backlog of the EEOC is approaching 100,000, I believe.

Senator MIKULSKI. One hundred thousand cases. Now, one of the arguments against our bill that was being discussed here is, enforce the law on the books.

Mr. ISHIMARU. Right.

Senator MIKULSKI. That is actually a very good position, to enforce the law that is currently on the books where we know that. Why is there a backlog? Is it because you don't have the commissioners, you don't have the resources? What is the problem? That would be in race, gender, age, which was an excellent point made by our Georgia colleague? Why do you have a 100,000 backlog?

Mr. ISHIMARU. I think a large reason for the backlog is that over the last 8 years, we lost 25 percent of our front-line people. We also created, as you stated, a call center, an outsourced call center, which I opposed as a member of the commission.

We have brought that in-house. We are trying to make that work better so people can get the information they need from EEOC employees. That is a work in progress. I think we are making progress.

But the key factor is, I think, in trying to deal with the backlog is that, thanks to the appropriations that we have been able to get in 2009 and 2010, we have hired front-line employees to bring the level of service up, to actually hire investigators, to hire lawyers, to hire clerical staff to do the job that needs to be done. Backlog is a tough issue, as I have found.

Senator MIKULSKI. Well, jumping in, so over—and again, this isn't rehashing the last 10 years. What happened there was the CEO was a good person, but not a good manager.

Mr. ISHIMARU. Right.

Senator MIKULSKI. So that was one problem. The other was the contracting out of call centers with no oversight or supervision. And then there was a lack of revenue. Is that right?

Mr. ISHIMARU. Right.

Senator MIKULSKI. So, yes, we should enforce the laws on the books, but we need to have—don't you need, No. 1—I mean, you are doing a great job as an acting director. But don't we need a director? And isn't one of the reasons for the backlog is that there are three vacancies on the commission? Can you make decisions and make adjudications?

Mr. ISHIMARU. We are certainly empowered and have been running the agency. It will be an enormous help to have the three other members of the commission confirmed.

Senator MIKULSKI. If those members are confirmed, will that also provide the leadership to reduce the backlog?

Mr. ISHIMARU. I think it is always helpful to have permanent leadership in place. I think having a permanent chair will help move the agency toward fulfilling the expectations that people have.

Senator MIKULSKI. See, I am observing a pattern here, which is not only with the EEOC, but a variety of agencies. No. 1, don't give good management. So we all have had uneven management in our agencies. Shrink the budget. Reduce the workforce. Contract it out with no supervision. And then when the agency starts to sink, say government is a dud and it can't do the job.

I think you have been given an enormous responsibility. And even if this law doesn't pass—which I hope it does—if we give you more responsibility, we have to give you more resources. But at the same time, you need the resources that you need now, and I hope I have on this committee for those who will say enforce the laws on the books, that I will have the support to do that.

Mr. ISHIMARU. Well, I hope so, too, Senator.

Senator MIKULSKI. I do have it from Senator Shelby, and I want to be very clear. He has been a very able and an enormously helpful ally with me on this issue.

Mr. ISHIMARU. One thing that we have done as a management matter over this last year, besides hiring the new people to come in, we have actually spent the resources to train people. You have to train new people coming in. You have to train the people you have onboard to deal with the new laws as well as to deal with the current developments in the law. That had not happened for many years, and I think it will pay big benefits in the upcoming years.

But I think having a permanent chair at the EEOC, and the person who has been nominated is superb, and we look forward to having her help lead us to a better level at the EEOC.

Senator MIKULSKI. Well, and we look forward to having a real appropriations process.

Thank you.

Senator DODD [presiding]. Thank you very much, Senator Mikulski.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

Thank you, Mr. Chairman, for your testimony today. In their written testimony, today's witnesses really get into the details of the various provisions in Federal law and State law to help right

the injustice of unequal pay. And these are provisions in the Equal Pay Act, provisions under title VII, and new ones that might be added with the Paycheck Fairness Act and the Fair Pay Act.

We are looking for ways to ensure that victims of discrimination have adequate recourse and adequate remedies available to them if they can prove discrimination. But this entire discussion assumes one thing, that the aggrieved worker hasn't signed away all her rights by way of mandatory arbitration, a mandatory arbitration provision in her employment contract.

The EEOC is sometimes still able to take action, but the individual women, victims of sex discrimination can have all their legal remedies made entirely irrelevant if their employer forces them into arbitration.

I understand the EEOC has taken a policy position on this issue, which I would like consent to have submitted into the record. Is that OK, Mr. Chairman? It is right here.

[The information referred to follows.]

EEOC NOTICE

1. SUBJECT: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.

2. PURPOSE: This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Programs, Office of Legal Counsel.

6. INSTRUCTIONS: File in Volume II of the EEOC Compliance Manual.

7. SUBJECT MATTER: The U.S. Equal Employment Opportunity Commission (EEOC or Commission), the Federal agency charged with the interpretation and enforcement of this Nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).¹ This policy statement sets out in further detail the basis for the Commission's position.

I. BACKGROUND

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 33 (1991).² Nonetheless, for the reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.

¹ Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

² The *Gilmer* decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in *Gilmer* was not contained in an employment contract. 500 U.S. at 25 n.2. Even if *Gilmer* had involved an agreement with an employer, the issue would

II. THE FEDERAL CIVIL RIGHTS LAWS ARE SQUARELY BASED IN THIS NATION'S HISTORY AND CONSTITUTIONAL FRAMEWORK AND ARE OF A SINGULAR NATIONAL IMPORTANCE

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this Nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the 14th amendment to the Constitution.³ Congress considered this national policy against discrimination to be of the "highest priority" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*)),⁴ reprinted in 1964 Leg. Hist. at 2123.⁵ The Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*, was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation—the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*), reprinted in 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the Nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.

The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).⁶

Title VII is but one of several Federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). See the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101

remain open given the active role of the legislative branch in shaping the development of employment discrimination law. See discussion *infra* at section IV. B.

³See, e.g., H.R. Rep. No. 88-914, pt. 1 (1963), reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 "designed primarily to protect and provide more effective means to enforce . . . civil rights"); H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch, *et al.*), reprinted in 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, *The Longest Debate: A legislative history of the 1964 Civil Rights Act 104* (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to title VII are a "reaffirmation of our national policy of equal opportunity in employment").

⁴William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His views, which were joined by six members of Congress, are thus particularly noteworthy.

⁵See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

⁶Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

Our greatest responsibility is to embrace a new spirit of community for a new century . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?

The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . These forces have nearly destroyed our Nation in the past. They plague us still.

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 27, 1997).

et seq. The ADEA was enacted “as part of an ongoing congressional effort to eradicate discrimination in the workplace” and “reflects a societal condemnation of invidious bias in employment decisions.” *McKennon*, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the fourteenth amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that “the American people have once again given clear expression to our most basic ideals of freedom and equality.” President George Bush’s Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. THE FEDERAL GOVERNMENT HAS THE PRIMARY RESPONSIBILITY FOR THE ENFORCEMENT OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS

The Federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. *See* text and notes *supra* in section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the Federal Government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate and conciliate claims of discrimination and to interpret the law, *see* §§ 706(b) and 713 of title VII, 42 U.S.C. §§ 2000e–5(b) and 2000e–12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, *see* § 706(f)(1) of title VII, 42 U.S.C. § 2000e–5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving State and local governments. *See* §§ 706(f)(1) and 707 of title VII, 42 U.S.C. §§ 2000e–5(f)(1) and 2000e–6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the Federal courts, after first administratively bringing their claims to the Commission. *See* § 706(f)(1) of title VII, 42 U.S.C. § 2000e–5(f)(1).⁷

While providing the States with an enforcement role, *see* 42 U.S.C. §§ 2000e–5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, *see* 42 U.S.C. § 2000e–5(b), Congress emphasized that it is the Federal Government that has ultimate enforcement responsibility. As Senator Humphrey stated, “[t]he basic rights protected by [title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected.” 110 Cong. Rec. 12725 (1964). *Cf. General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (in bringing enforcement actions under title VII, the EEOC “is guided by ‘the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement’”) (*quoting* 118 Cong. Rec. 4941 (1972)).

The importance of the Federal Government’s role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include “ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities.” 42 U.S.C. § 12101(b)(3).

IV. WITHIN THIS FRAMEWORK, THE FEDERAL COURTS ARE CHARGED WITH THE ULTIMATE RESPONSIBILITY FOR ENFORCING THE DISCRIMINATION LAWS

While the Commission is the primary Federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.⁸ *See, e.g., Kremer v. Chemical Constr. Grp.*, 454 U.S. 461, 479 n.20 (1982) (“Federal courts were entrusted with ultimate enforcement responsibility” of title VII); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) (“Of course the ‘ultimate authority’ to secure compliance with title VII resides in the Federal courts”).⁹

⁷Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in title VII with respect to the Commission, the Attorney General, and aggrieved individuals. *See* 42 U.S.C. § 12117. Similar enforcement provisions are contained in the ADEA. *See* 29 U.S.C. §§ 626 and 628.

⁸In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

⁹*See also* H.R. Rep. No. 88–914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was “preferred that the ultimate determination of discrimination rest with the Federal judiciary”).

A. The Courts Are Responsible for the Development and Interpretation of the Law

As the Supreme Court emphasized in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), “the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to title VII, whose broad language frequently can be given meaning only by reference to public law concepts.” This principle applies equally to the other employment discrimination statutes.

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1974), or sexual harassment, see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature of the Judicial Process Enables the Public, Higher Courts, and Congress to Ensure That the Discrimination Laws Are Properly Interpreted and Applied

Through its public nature—manifested through published decisions—the exercise of judicial authority is subject to public scrutiny and to systemwide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Connor v. Consolidated Coin Caterers, Corp.*, 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under 40); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris* 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1978), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (*United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful (*Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), overruled by Older Workers Benefits Protection Act of 1990).

C. The Courts Play a Crucial Role in Preventing and Deterring Discrimination and in Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, back pay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right of Action With Its Guarantee of Individual Access to the Courts is Essential to the Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. *See, e.g., McKennon*, 513 U.S. at 358 (granting a right of action to an injured employee is “a vital element” of title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, “courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims: It is the duty of courts to assure the full availability of this forum.” *Gardiner-Denver*, 415 U.S. at 60 n.21.¹⁰

Under the enforcement scheme for the Federal employment discrimination laws, individual litigants act as “private attorneys general.” In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as “the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). *See also McKennon*, 513 U.S. at 358 (“[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA”).

V. MANDATORY ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES “PRIVATIZES” ENFORCEMENT OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS, THUS UNDERMINING PUBLIC ENFORCEMENT OF THE LAWS

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. *Mandatory Arbitration has Limitations That Are Inherent and Therefore Cannot Be Cured By the Improvement of Arbitration Systems*

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process is Private in Nature and Thus Allows for Little Public Accountability

The nature of the arbitral process allows—by design—for minimal, if any, public accountability of arbitrators or arbitral decisionmaking. Unlike her or his counterparts in the Judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

A proper conception of the arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .

United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960) (quoting from Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator’s selection; s/he is hired by the private parties to a dispute. Similarly, the arbitrator’s authority is defined and conferred, not by public law, but by private agreement.¹¹ While the courts are charged with

¹⁰*See also* 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, “as the individual’s rights to redress are paramount under the provisions of title VII, it is necessary that all avenues be left open for quick and effective relief”).

¹¹Article III of the Constitution provides Federal judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to “vest

giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, [a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the State in officials who act as trustees for the public; who are highly visible, and who are committed to reason.” Owen Fiss, *Ou of Eden*, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence (*see* discussion *supra* at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. The disclosure through litigation of incidents, or practices which violate national policies respecting nondiscrimination in the workforce is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of (title VII’s) operation or entrenched resistance to its commands, either of which can be of industry-wide significance.” *McKennon*, 513 U.S. at 358–59.

2. Arbitration, By Its Nature, Does Not Allow for the Development of the law

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.¹² As a result, arbitration affords no opportunity to build a jurisprudence through precedent.¹³ Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decisionmaking. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. *See discussion supra* at section IV. B.

3. Additional Aspects of Arbitration Systems Limit Claimants’ Rights in Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isola-

adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure.” 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

¹²Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, “dominant” and ascertainable from the law, *see United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), or where it is in “manifest disregard” of the law, *see Wilko v. Swan*, 346 U.S. 427, 436–37 (1953). The latter standard of review has been described by one commentator as “a virtually insurmountable” hurdle. *See* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. Rev. 759, 767. *But cf. Cole v. Burns Intl Sec. Servs.*, 105 F.3d 1465, 1486–87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the “manifest disregard” standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

¹³Congress has recognized the inappropriateness of ADR where “a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent,” *see Alternative Dispute Resolution Act*, 5 U.S.C. § 572(b)(1) (providing for use of ADR by Federal administrative agencies where the parties agree); or where “the case involves complex or novel legal issues,” *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties’ consent to arbitrate constitutional or statutory civil rights claims). Similar findings were made by the U.S. Secretary of Labor’s Task Force on Excellence in State and Local Government Through Labor-Management Cooperation (“Brock Commission”), which was charged with examining labor-management cooperation in State and local government. The Task Force’s report, “Working Together for Public Service” (1996) (“Brock Report”), recommended “Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes” which include that “ADR should normally not be used in cases that represent tests of significant legal principles or class action.” Brock Report at 82.

tion, without reference to a broader—and more accurate—view of an employer’s conduct.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.¹⁴

First, the employer accrues a valuable structural advantage because it is a “repeat player.” The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a “one-shot player”; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator’s record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.¹⁵ A recent study of nonunion employment law cases¹⁶ found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.¹⁷

In addition, unlike voluntary post-dispute—which must be fair enough to be attractive to the employee—the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator’s authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer—the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer’s superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fall far short of basic concepts of fairness. Indeed, the Commission has challenged—by litigation, *amicus curiae* participation, or Commissioner charge—particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.¹⁸

The Commission’s conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the “Dunlop Commission”) was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) (“Dunlop Report”), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include “mechanisms that

¹⁴ A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that all brokers resolve employment disputes through arbitration, found that “employers stand a greater chance of success in arbitration than in court before a Jury” and are subjected to “smaller” damage awards. See Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

¹⁵ See, e.g., Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (1979) (“an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process”); Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) (“statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes,” given “the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator’s desire to be acceptable to one side”).

¹⁶ Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

¹⁷ See Lisa Bingham, “Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes,” (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

¹⁸ Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to “out-of-pocket” damages; (3) deny any award of attorney’s fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator’s discretion, to pay the employer’s share of arbitration costs as well.

appear to be of dubious merit for enforcing the public values embedded in our laws.” Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers’ use of ADR mechanisms, found that existing employer arbitration systems vary greatly and that “most” do not conform to standards recommended by the Dunlop Commission to ensure fairness. See “Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution” at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

The public rights embodied in State and Federal employment law—such as freedom from discrimination in the workplace . . .—are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your Job.

Dunlop Report at 32. The Brock Commission (see *supra* n. 13) agreed with the Dunlop Commission’s opposition to mandatory arbitration of employment disputes and recommended that all employee agreements to arbitrate be voluntary and post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment “when it requires waiver of direct access to either a Judicial or administrative forum for the pursuit of statutory rights.” See National Academy of Arbitrators’ Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect the Commission’s Ability to Enforce the Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC’s statutory responsibility to enforce the Federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals’ protected participation in investigations or proceedings under these laws,¹⁹ employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.²⁰ These chilling effects on charge filing undermine the Commission’s enforcement efforts by decreasing channels of information, limiting the agency’s awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. VOLUNTARY, POST-DISPUTE AGREEMENTS TO ARBITRATE APPROPRIATELY BALANCE THE LEGITIMATE GOALS OF ALTERNATE DISPUTE RESOLUTION AND THE NEED TO PRESERVE THE ENFORCEMENT FRAMEWORK OF THE CIVIL RIGHTS LAWS

The Commission is on record in strong support of *voluntary* alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.²¹

¹⁹ See “Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes,” Volt. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

²⁰ The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts “to vindicate the public interest in preventing employment discrimination,” *General Tel.*, 446 U.S. at 326. Cf. S. Rep. No. 101-263 (1990), *reprinted in*, Legislative History of The Older Workers Benefits Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that “no waiver agreement may affect the Commission’s rights and responsibilities to enforce [the ADEA],” was intended “as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest”). As a practical matter, however, the Commission’s ability to litigate is limited by its available resources.

²¹ Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator’s fee and expenses; fees charged by the entity providing arbitration services,

Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.²²

VII. CONCLUSION

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from Federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts—an avenue of redress determined by Congress to be essential to enforcement.

PROCESSING INSTRUCTIONS FOR THE FIELD AND HEADQUARTERS

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, see § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. See, e.g., Briefs of the EEOC as *Amicus Curiae* in *Seus v. John Nuveen & Co.*, No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); *Johnson v. Hubbard Broadcasting, Inc.*, No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996); *Great Western Mortgage Corp. v. Peacock*, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

GILBERT F. CASELLAS,
Chairman.

Senator FRANKEN. And I can read from it. It says,

“The EEOC has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws.”

Could you tell us about the EEOC's position and its relationship to the legislation that we are discussing today?

Mr. ISHIMARU. Well, the EEOC has a longstanding policy against mandatory arbitration, as you pointed out, going back to 1997. There was talk when I first joined the commission about repealing that, and I opposed any sort of repeal of our existing policy. I think it is the right thing to do to oppose mandatory arbitration.

Senator FRANKEN. In these kinds of matters? I mean, let us make sure certain—

Mr. ISHIMARU. In employment discrimination matters, in matters under our jurisdiction.

Senator FRANKEN. Sure. Yes.

Mr. ISHIMARU. I have opposed that. There was no attempt to actually bring that up for a vote. So the policy, the continuing policy

which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

²²The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

of the EEOC is that we oppose mandatory arbitration, and we stand by the—

Senator FRANKEN. And this has survived over several administrations with bipartisan composition?

Mr. ISHIMARU. Yes.

Senator FRANKEN. You retain that policy, right?

Mr. ISHIMARU. There was no effort to repeal the longstanding policy. Like many of our policies, it will stay on the books until repealed.

Senator FRANKEN. OK. And can you just explain what the reasoning behind it is?

Mr. ISHIMARU. Well, I think the reasoning behind it is that we, as an entity, believe that persons aggrieved under the civil rights laws should have the right to come to the Federal agency involved, to make the complaint, to pursue resolution of that through either the administrative process or through the courts. And they should not be precluded, just as the agency itself is not precluded, from enforcing the law when it happens.

As you pointed out—

Senator FRANKEN. Not just before the agency, but they should be able to go before the courts.

Mr. ISHIMARU. Courts. Courts as well.

Senator FRANKEN. Yes.

Mr. ISHIMARU. And that is why we oppose this. We believe civil rights laws stand up on their own and that Congress has recognized the need for people to be able to vindicate their rights in whatever forum that they choose.

But you know, as you point out, mandatory arbitration has taken on a life of its own in recent years. But it has affected the EEOC far less, and we are not bound by the various rulings on mandatory arbitration. The courts have been fairly clear on that.

Senator FRANKEN. Thank you.

And thank you, Mr. Chairman.

Senator DODD. Thank you very much, Senator.

Senator Mikulski, do you have any additional questions? I just asked Senator Enzi. He doesn't either.

We would like to leave the record open, if we could? I think there are several members, including Senator Enzi, and maybe others who would like to, who were not able to be with us this morning, to have you respond to some questions in writing, if you would do that for us?

Mr. ISHIMARU. Happy to do that.

Senator DODD. But you have been very helpful, and again, I think picking up on what Senator Mikulski has said and I have said, please extend to your staff and others how much we appreciate the job they are doing with the resources and personnel you have at your disposal. And we are very grateful to you, and Americans need to know how hard people work with limited resources, limited personnel.

So we thank you.

Mr. ISHIMARU. Mr. Chairman, thank you very much. Our staff does work extremely hard. And as I have learned, as a former staffer, it is really those people who make the trains run on time, and

I will pass on your kind words back to our staff. Thanks very much.

Senator ENZI. And I would agree with your words, too. Thank you very much.

Senator DODD. Thank you very much.

Our next panel I will introduce very briefly. Heather Boushey—I hope I pronounced that correctly. Did I pronounce that correctly, Heather? Heather Boushey is the senior economist at the Center for American Progress, research focus on unemployment, social policy, family economic well-being. Received her doctorate in economics from the New School for Social Research, her Bachelor of Arts degree from Hampshire College. Previously served as an economist for the Joint Economic Committee, the Center for Economic and Policy Research, and the Economic Policy Institute.

Deborah Brake is a professor of law at the University of Pittsburgh. She is a nationally recognized expert on gender discrimination. Before joining the faculty at Pittsburgh, Professor Brake was senior counsel at the National Women's Law Center in Washington. She is a graduate of Stanford University and Harvard Law School, and we thank you, Ms. Brake.

Deborah Frett is the chief executive officer of the Business and Professional Women's Foundation, an accomplished executive with over 30 years of experience providing strategic direction and executive management to associations for profit and start-up organizations. Prior to joining BPW, Ms. Frett served as executive director of Senior Navigator, an award-winning, innovative public service program designed to link seniors, their families, and caregivers with community-level health and aging information.

Jan McFetridge? Did I pronounce that correctly?

Ms. MCFETRIDGE. Jane.

Senator DODD. Excuse me. Jane McFetridge. Jane is the managing partner of Jackson Lewis's Chicago office. She has broad experience dealing with the Equal Employment Opportunity Commission and the U.S. Department of Labor, as well as State and local labor and employment agencies throughout the United States.

Ms. McFetridge graduated from the University of Illinois, received her law degree from Northwestern University, and we welcome you here as well this morning. So thank you for joining all of us, and we will begin in the order in which I have introduced you.

Try and take around 5 minutes and all of your statements and supporting data and information that you think would be constructive for this hearing will be made part of the record. Any additional data you want to provide to us later on, I will make that unanimous consent as well.

And so, we welcome you again, and we will begin with you, Ms. Boushey.

**STATEMENT OF HEATHER BOUSHEY, SENIOR ECONOMIST,
CENTER FOR AMERICAN PROGRESS, WASHINGTON, DC**

Ms. BOUSHEY. Thank you. Thank you, Chairman Dodd, Ranking Member Enzi, and Senator Mikulski, for providing me with the opportunity to speak to you today.

I welcome this opportunity to argue in favor of equal pay for women in the workforce as a proven means to strengthen American families and to grow our middle class.

Women are now half of the workers on U.S. payrolls. Increases in women's workforce participation and their increasingly important contributions to their families' income have been dramatic across racial and class lines, but they are particularly striking among low-income women who are now primary breadwinners in two-thirds of their families.

The gender pay gap is not just a women's issue. It is a family issue that affects the millions of young, old, and middle-aged Americans who rely on a woman breadwinner or co-breadwinner for their family.

The Great Recession has made the issue of pay equity even more urgent, as women are increasingly their families' breadwinner. Since the Great Recession began, men have accounted for 7 out of every 10 jobs lost, and now only two-thirds of adult men hold a job.

This gender disparity in unemployment means that in the first half of 2009, for example, there were 2 million working wives supporting an unemployed husband. If these families are typical, they are living on the wife's lower earnings. Making sure that every woman earns a fair day's pay is increasingly important to family economic well-being.

To close the gender pay gap, we must address the segregation of men and women into different kinds of jobs and the inflexibility of the workplace to women's greater responsibilities for family care. For every dollar a man earns, women earn only 77 cents.

And for specific groups of women, as been discussed earlier this morning—women of color, disabled workers—the gap with respect to the wages of white men is larger than for white women. And this inequity accumulates over a woman's lifetime. Women lose an average of \$434,000 in income over a lifetime due to the gender pay gap.

It is also a myth that women choose low-paying jobs because they provide more flexibility. In fact, the empirical evidence shows that women, and particularly single mothers, are the least likely to have on-the-job workplace flexibility.

Economists find that about half of the total pay gap can be explained by differences in the industries and occupations that men and women work in. Many of the jobs historically held by women are underpaid relative to men's jobs that require similar levels of skill. Women's jobs have been undervalued for so long, we think it is natural. But in fact, this is an ongoing legacy of past discrimination.

Even if women work in the same jobs as men, however, and have the same education and experience levels, the same propensity to be in a union, the same racial and ethnic makeup as the men they are sitting next to at the workplace, all these factors, which we can measure, economists simply cannot explain about 40 percent of the gender pay gap. That gap begins the moment a woman begins to work and graduates from school.

The American Association of University Women has examined this pay gap between college-educated men and women among graduates just a year out of school. They found that even once you

account for all the measurable factors that we think affect pay—the individual’s job, whether that job has a flexible schedule, the kind of education credentials, including GPA and the selectivity of the college—they find a 5 percent unexplainable pay gap among college graduates. That gap only increases over time.

The two pieces of legislation before your committee today, the Paycheck Fairness Act and the Fair Pay Act, are critical to addressing the gender pay gap. In particular, the data provisions of the Paycheck Fairness Act will not solve the gender pay gap, but they will allow employees to access the information they need to understand if their pay is at the market rate.

This will go a long way toward closing that gap and helping people understand whether or not their pay is actually at the market rate. Combined with the provision to give employees an opportunity to improve their salary negotiation skills, this is an important step forward toward gender pay equality.

The Paycheck Fairness Act will also increase training, research, and education to identify and respond to wage discrimination claims and improve our data collection of pay information. Without access to aggregate data, the EEOC has no idea whether there are signs that unfair pay practices are occurring across firms.

Finally, as I noted earlier, the largest chunk of the gender pay gap is due to the combined effect of the segregation of men and women into different industries and occupations. The Fair Pay Act will require employers to provide equal pay for jobs that are comparable in skills, efforts, responsibility, and working conditions.

In these tough economic times, with millions of women supporting their families, with millions as breadwinners, I encourage you to do what you can to ensure that they earn a fair day’s pay.

Thank you for your important work on this issue, and I look forward to your questions.

[The prepared statement of Ms. Boushey follows:]

PREPARED STATEMENT OF HEATHER BOUSHEY

STRENGTHENING THE MIDDLE CLASS: ENSURING EQUAL PAY FOR WOMEN

SUMMARY

The two pieces of legislation now before your committee, the Paycheck Fairness Act and the Fair Pay Act, are critical to making this happen. This is important legislation before you today. I cannot stress how important the issue of fair pay is to women and to their families. In these tough economic times, with millions of women supporting their families, I encourage you to do what you can to ensure that they earn a fair day’s pay.

A key way to strengthen the middle class is to ensure equal pay for women. Most women are in the labor force, yet women continue to earn less than men even if they have similar educational levels and work in similar kinds of jobs. The typical full-time, full-year working woman earns only 77 percent of what her male counterparts make.

To close the gender pay gap, we must address the root causes of women’s lower wages, which includes the segregation of men and women into different kinds of jobs and the inflexibility of the workplace to women’s greater responsibilities for family care.

The gender pay gap is not just a woman’s issue, it is a family issue. Women are now half of all workers on U.S. payrolls and two-thirds of mothers bring home at least a quarter of their family’s earnings.

Making sure that every woman earns a fair day’s pay is increasingly important for family economic well-being. In the first 5 months of 2009, there were 2.0 million working wives with an unemployed husband. Families are indeed experiencing an

economic hardship directly because of the gender pay gap: if these families are typical, then they are living on the wife's lower earnings and likely to be without health insurance because the family secured that employer-provided benefit from his job.

The data provisions of the Paycheck Fairness Act are of utmost importance in enforcing the law already on the books. The act prohibits employer from retaliating against employees who share salary information. This provision will not solve the gender pay gap, but it will allow employees to access the information they need to understand if their pay is at the market rate. Combined with the provision to give employees an opportunity to improve their salary negotiation skills, this could be a powerful step towards greater pay equity, especially among men and women in similar jobs within a single firm.

The Paycheck Fairness Act will also increase training, research, and education to help the Equal Employment Opportunity Commission identify and respond to wage discrimination claims and improve our data collection of pay information. Discrimination is something that's hard to prove at the individual level, but often easy to see in the aggregate data. Without access to that aggregate data, the EEOC has no idea whether there are signs that unfair pay practices are occurring.

The Fair Pay Act will require employers to provide equal pay for jobs that are comparable in skill, efforts, responsibility, and working conditions. The largest chunk of the gender pay gap is due to the combined effect of the segregation of men and women into different industries and occupations. The act delineates a process to evaluate jobs within a firm and ascertain the actual skills required then ensures that jobs with similar skills are paid the same, even if one is predominately held by women and one predominately held by men.

Thank you Chairman Harkin and members of the committee for providing me with the opportunity to speak to you today.

My name is Heather Boushey and I am a senior economist at the Center for American Progress Action Fund, a non-partisan think tank in Washington, DC. My area of expertise is the U.S. labor market, with an emphasis on the interconnections between labor and social policy. I welcome this opportunity to argue in favor of equal pay for women in the workforce as a proven means to strengthen American families and grow our middle class. The two pieces of legislation now before your committee, the Paycheck Fairness Act and the Fair Pay Act, are critical to making this happen.

To close the gender pay gap, we must address the root causes of women's lower wages, which includes the segregation of men and women into different kinds of jobs and the inflexibility of the workplace to women's greater responsibilities for family care. There could not be a more important time to address the issue of gender pay equity. Women are now half of all workers on U.S. payrolls and two-thirds of mothers are bringing home at least a quarter of their family's earnings. This means the gender pay gap is not just a woman's issue, it is a family issue that affects the millions of young, old and middle-aged Americans who rely on a woman breadwinner or co-breadwinner in their family.

With the Great Recession leading to many more lay offs among men than women, millions of women today are supporting their families through these tough economic times. Making sure that every woman earns a fair day's pay is increasingly important for family economic well-being. The Paycheck Fairness Act and the Fair Pay Act address these specific issues.

As an economist, I'll highlight some of the gender pay issues that I think are most important with respect to these two pieces of legislation and then tell you why there could not be a better time to move forward on them.

WOMEN'S EARNINGS MATTER TO FAMILY WELL-BEING NOW MORE THAN EVER

First, I want to lay out the issue of the gender pay gap. When we look back over the 20th century to understand what's happened to American workers and their families, the movement of women out of the home and into paid employment stands out as one of the most important social and economic transformations in our Nation's history. Although it changed the way we work and live today, our institutions in the 21st century have yet to fully adapt.

A key way to strengthen the middle class is to ensure equal pay for women. Most women are in the labor force, yet women continue to earn less than men even if they have similar educational levels and work in similar kinds of jobs. The typical full-time, full-year working woman earns only 77 percent of what her male counterparts make.

In 2008, 4-in-10 mothers were their family's breadwinner—either as a single, working mother or one who brought home as much or more than their spouse. This is up from 27.7 percent in 1967.¹ Women have been steadily increasing their labor force participation for decades, rising from 43.3 percent in 1970 to 55.8 percent this February (among women over age 20). Today, over 70 percent of all mothers work outside the home.² This increase in women's workforce participation and contribution to the family income has been dramatic across all racial and class lines, but is particularly striking among low-income women who are now primary breadwinners in two-thirds of their families.

The Great Recession, however, has made pay equity even more urgent because women recently became half of all U.S. payroll workers. This feat, recorded for the first time in October 2009, sadly was not because more women were finding more and better paying jobs. Instead, since December 2007 when the Great recession began, men have accounted for 7 out of every 10 jobs lost. The reason for this is because half of all job losses have been in construction or manufacturing—industries that disproportionately employ men.

These job losses are testament to the current economic malaise. The share of adult men with a job has never been lower since the U.S. government began recording employment data in 1948. In February 2010, it was only 66.6 percent, meaning that only two-thirds of adult men have a job. This is a remarkably low figure. Prior to this recession, the share of men with a job had never fallen below 70.5 percent.

This gender disparity in unemployment has real implications for family economic well-being. In the first 5 months of 2009, there were 2.0 million working wives with an unemployed husband.³ If these families are typical, then they are living on the wife's lower earnings and likely to be without health insurance because the family secured that employer-provided benefit from his job. The upshot: In the typical married-couple family where both spouses work, the wife brings home less than half—42.2 percent—of the family's earnings, which means families are indeed experiencing an economic hardship directly because of the gender pay gap and are dangerously exposed to the financial pitfalls of a medical emergency.

Nor are women working outside the home a short-term blip in response to the recession. It is a long-term trend that shows no signs of reversing. The reality is that women support families in greater numbers than ever before. We need to do more to ensure pay equity for them and for the economic security of their families. The gender pay gap is not just a women's issue. This is a pressing family issue for working Americans striving to enter or remain in the middle class.

For many families, having a working wife makes all the difference. When we look across income distribution in our country, families in the higher income brackets are more likely to have a working wife and she puts in more hours than less-well off families. In recent decades, the families that were upwardly mobile were those who had a working wife. Recent research by economists at the Boston Federal Reserve shows that over the 1980s and 1990s, the families that moved up the income ladder were those who had a working wife. The shift in women's workforce participation is not simply about women wanting to work but also about their families' needing them to work.

PAY EQUITY: WHERE ARE WE?

Women have not achieved equality in the workplace but they have made progress. The gender gap has narrowed over time and women now occupy a far wider range of jobs. Further, women are more likely to be in positions of power compared to only a few decades ago.

Yet, even with these accomplishments, the gender pay gap among full-time, full-year workers is now at 23 cents, meaning that for every dollar a man earns, women earn only 77 cents.⁴ And, for specific groups of women—such as women of color or disabled workers—the gap with respect to the wages of white men is larger than for white women.

There are various ways to measure the gender pay gap, but the overall trends are similar. Figure 1 below shows two different measures: the gender annual earnings ratio among full-time, full-year workers and the gender wage ratio among full-time

¹ Heather Boushey, "The New Breadwinners," in *The Shriver Report: A Woman's Nation Changes Everything*, ed. Heather Boushey and Ann O'Leary (Washington, DC: Center for American Progress, 2009).

² Bureau of Labor Statistics, "Women in the Labor Force: A Databook," (Washington, DC: U.S. Department of Labor, 2008).

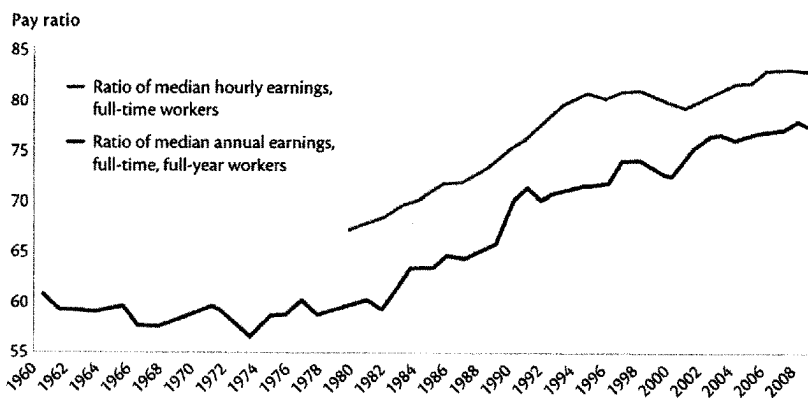
³ Heather Boushey, "Women Breadwinners, Men Unemployed," (Washington, DC: Center for American Progress, 2009).

⁴ Census.

workers. Over time, both measures show the same trend—the gender gap has narrowed but the pace of convergence has slowed to a crawl in recent years.⁵

The most significant compression in the gender pay gap appeared during the 1980s, but this was because men's wages fell, rather than because women's wages rose. This is not an unlikely outcome again in future years. Given the current economic conditions, with men losing the majority of jobs during the Great Recession, there is potential for men's wages to fall relative to women but this is not an acceptable way to close the gender pay gap.

Ratio of women's pay to men's, 1960 to 2009



Source: U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplements.

This inequity in pay accumulates over a woman's lifetime. The Institute for Women's Policy Research examined worker's employment and earnings data and found that over a 15-year period prime-age women workers earn 38 percent of what men earn.⁶ My colleague Jessica Arons calls the cumulative impact of the gender pay gap over a 40-year period the "career wage gap," finding that women lose \$434,000 in income, on average, due to the career wage gap.

Women at all education levels lose significant amounts of income due to the career wage gap, but women with the most education lose the most in earnings. Women with a college degree or higher lose \$713,000 over a 40-year period versus a \$270,000 loss for women who did not finish high school.⁷ The pay gap accumulates for a variety of reasons, but chief among them is that pay raises are typically given as a percent of current salary, leaving women further behind each year. Because almost all employers ask any job applicant for a salary history when determining their starting salary, women's salary gains are crimped from the start.

Research also shows that the gap in pay between men and women is only partially attributable to the decisions that men and women make in terms of college major, choice of occupation, and work experience. The first two of these—college major and choice of occupation—can be considered an honest choice. Women now have access to higher education and more kinds of jobs than their mothers did. Yet there are many aspects of women's employment patterns and pay that cannot reasonably be attributed to choices that can reasonably explain the pay gap.

To better understand the gender pay gap, economists use so-called regression-adjusted estimates of pay for men and women, controlling for all measurable productivity-related characteristics of workers. This method allows us to compare the pay of men and women with similar characteristics and determine what factors contribute to the pay gap and what the model cannot explain.

Using regression analysis, labor economists Francine Blau and Lawrence Kahn found that educational attainment levels lowered the discrepancy in pay between men and women but also that other productivity-related factors, such as experience,

⁵ Francine Blau and Lawrence Kahn, "Swimming Upstream: Trends in the Gender Wage Differential in the 1980s," *Journal of Labor Economics* 15, no. 1 (1997).

⁶ Heidi Hartmann and Stephen Rose, "Still a Man's Labor Market: The Long-Term Earnings Gap," (Washington, DC: Institute for Women's Policy Research, 2004).

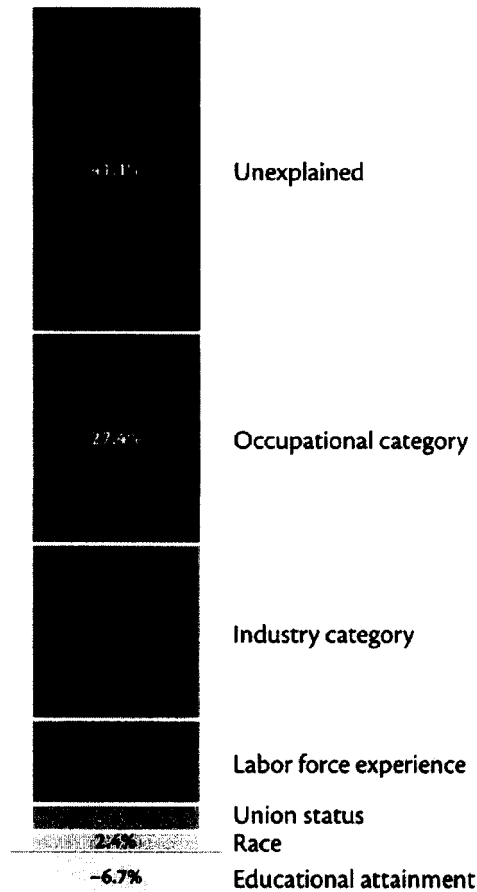
⁷ Jessica Arons, "Lifetime Losses: The Career Wage Gap," (Washington, DC: Center for American Progress, 2008).

occupation, and industry all widened the gap. Overall, nearly a third of the gender pay gap (27.4 percent) can be explained by differences in occupations, one-fifth (21.9 percent) can be explained by industry, and 10.5 percent can be explained by labor force experience.

This means that if women worked in the same jobs as men and had the same educational and experience levels, same propensity to be in a union, same racial and ethnic make-up as men—all factors we can measure—the gender pay ratio would rise from 80 percent to 91 percent of men's pay levels. In other words, most of gender pay inequity can be explained by these factors. But, this leaves that final 10 percent gap in pay between men and women—nearly half, 41.1 percent of the total pay gap—as not explainable by anything we can measure.

How women earn less

Breaking down the gender pay gap



Source: Francine Blau and Lawrence Kahn, "The Gender Pay Gap: Have Women Gone as Far as They Can?" *Academy of Management Perspectives*, February 2007, pp. 7–23.

To get at the nub of gender pay inequity, let's first go through the things Blau and Kahn's work does seem to explain, then discuss the large "unexplained" portion of the gender pay gap. As Blau and Kahn point out, half (49.3 percent) of the total pay gap can be explained by differences in the industries and occupations that men and women work in. Men continue to be more likely to hold jobs as managers and professionals, transportation or construction workers, or in heavy manufacturing.

In contrast, women are disproportionately represented in nursing, teaching, retail sales, and clerical work. While the extent to which jobs in the U.S. economy, that are segregated by sex, has fallen since the 1950s—more so for workers with a college degree than for other workers—there remains a high degree of occupational segregation by gender (See chart below).

Who works where

Top 20 occupations for women and men, 2008

Occupation	Share of female workers	Occupation	Share of male workers
Secretaries and administrative assistants	4.7	Driver/sales workers and truck drivers	4.1
Registered nurses	3.8	All other managers	2.9
Elementary and middle school teachers	3.7	First-line supervisors/managers of retail stores	2.6
Cashiers	3.0	Construction laborers	2.1
Retail salespersons	2.5	Carpenters	2.1
Nursing, psychiatric, and home health aides	2.5	Retail salespersons	2.0
First-line supervisors/managers of retail stores	2.3	Laborers and freight, stock, and material movers, hand	2.0
Waiters and waitresses	2.1	Janitors and building cleaners	1.8
Bookkeeping, accounting, and auditing clerks	1.9	Chief executives	1.6
Receptionists and information clerks	1.9	Cooks	1.5
All other managers	1.9	Grounds maintenance workers	1.5
Customer service representatives	1.9	Construction managers	1.5
Maids and housekeeping cleaners	1.9	Sales representatives, wholesale and manufacturing	1.3
Child care workers	1.8	First-line supervisors/managers of non-retail sales workers	1.2
First-line supervisors/managers of office and administrative support workers	1.8	Stock clerks and order fillers	1.2
Accountants and auditors	1.6	Electricians	1.1
Office clerks, general	1.5	Automotive service technicians and mechanics	1.1
Teacher assistants	1.4	First-line supervisors/managers of construction trades and extraction workers	1.1
Cooks	1.1	Computer software engineers	1.1
Personal and home care aides	1.1	First-line supervisors/managers of production and operating workers	1.0
Share employed in the top 20 occupations			
Females	44.4	Males	34.8

Source: Author's analysis of the Center for Economic and Policy Research Extracts of the Current Population Survey Outgoing Rotation Group Files. Includes workers aged 18 to 64.

Note: Bold items appear on the list for both women and men.

But many of these jobs that were historically held by women are underpaid, relative to men's jobs that require similar levels of skill. Political scientist Ellen Frankel Paul, for example, points out that zookeepers—a traditionally male job—earn more than workers caring for children—a traditionally female job. It's not that zookeepers have a much higher level of skills than child care workers, but that our society values these jobs differently and this is a choice we make. In her words, "Are not our children more valuable to society than zoo animals?"⁸ Women's jobs have been systemically undervalued for so long, we think it's natural, but in fact this is an ongoing legacy of past discrimination.

It is also myth that women choose less-paying occupations because they provide flexibility to better manage work and family. The empirical evidence shows that mothers are actually less likely to be employed in jobs that provide greater flexibility. In general, workers who hold higher positions and are privileged in general (better educated, white, male) have more access to all kinds of workplace flexibility. Women are less likely than men to have access to flexibility, but parents—especially

⁸ Ellen Frankel Paul, *Equity and Gender: The Comparable Worth Debate* (New Brunswick, NJ: Transaction, 1988).

single mothers—are the least likely to have access to workplace flexibility. In fact, parents are more likely to have nonstandard shifts and rotating hours, making work/family balance more difficult to achieve.

Education Narrows the Gap, but Doesn't Close It

As women have taken their careers more seriously, they have worked hard to get more education. That is paying off in terms of narrowing the gender pay gap, even if it hasn't fully eliminated it. According to Blau and Kahn, women's education choices are narrowing the gap by 6.7 percent. Women now are more likely than men to graduate from high school as well as college. It's worth noting though, that among women aged 25 to 45 only a quarter have at least a college degree, while nearly two-thirds have a high school degree, but no 4-year college degree (and this is similar for men as well).⁹

An important research finding that flies in the face of women's educational attainment, however, is that the gender pay gap emerges as soon as women graduate. The American Association of University Women examined the pay gap in pay between college-educated men and women and found that even once they accounted for the measurable factors that affect pay, such as the individual's job, whether the job boasts a flexible schedule, the kind of educational credentials they have (including their grade point average and the selectivity of the college that they attended),¹⁰ among graduates just 1 year out of school, a 5 percent unexplainable pay gap remained.

This means that a woman who goes to the same school, gets the same grades, has the same major, takes the same kind of job with similar workplace flexibility perks and has the same personal characteristics—such as marital status, race, and number of children—as her male colleague earns 5 percent less the *first year* out of school. Ten years later, even if she keeps pace with the men around her, this research found that she'll earn 12 percent less. This is not about the “choices” a woman makes because the model compares men and women who have made nearly identical choices.

Work History Matters, but not as Much as Simply Being Female or a Caregiver

Differences in men's and women's work histories explain a large chunk—10.5 percent—of the gender wage gap. But the AAUW study cited above shows that the gender pay gap emerges right out of college—at a point in their lives when differences in work experience between them and their male colleagues do play a large role in determining pay.

At least some of the wage gap between men and women is attributable to women taking on greater parenting responsibilities and working fewer hours. Women are more than twice as likely as men to be employed part-time and since few jobs offer part-time work, the part-time jobs available tend to pay less than comparable full-time jobs.¹¹ But, the reality is that this cannot fully explain the gap in pay.

Indeed, differences in work history are treated differently depending on whether a woman is a mother or not. In a 2001 paper, sociologists Michele Budig and Paula England found that interruptions from work, working part-time, and decreased seniority/experience explain no more than about one-third of the gap in pay between women with and without children, and that “mother-friendly” job characteristics explained very little of the gap. They conclude that two-thirds of the wage gap between mothers and non-mothers must be either because employed mothers are less productive at work or because of discrimination against mothers.

A body of new research focuses on the role of the “maternal wall” in accounting for at least some—if not most—of the unexplained pay gap. In groundbreaking work, Cornell University sociologists Shelley Correll, Stephen Benard, and In Paik used a laboratory experiment to find out whether being a mother simply means being paid less, all else equal. They had study participants evaluate application materials for a pair of job candidates that were designed specifically to be equally

⁹ Author's analysis of the Center for Economic and Policy Research Extracts of the Current Population Survey Outgoing Rotation Group Files.

¹⁰ It is worth noting their variables: Occupation, Industry, Employer sector (e.g., nonprofit), Hours worked per week, Whether employee worked multiple jobs, Workplace flexibility, ability to telecommute, Months at employer, Educational attainment (bachelor's and any graduate, enrollment or completion), Current enrollment status, Other license or certification, Work-related training, Undergraduate GPA, Undergraduate major, Ever attended less-than-4-year institution, Institution sector, Institution selectivity, Gender, Age, Highest education of either parent, Race/ethnicity, U.S. citizen, Disabled, Region of residence, Marital status, Has children, Volunteered in past year.

¹¹ Jeffrey B. Wenger, “The Continuing Problem with Part-Time Jobs,” (Washington, DC: Economic Policy Institute, 2001).

qualified, but one person was identified as a parent and the other was not.¹² The two candidates had equal levels of education and work experience at similarly ranked schools.

Their findings were simply astonishing. The job candidates identified as mothers were perceived to be less competent, less promotable, less likely to be recommended for management, less likely to be recommended for hire, and had lower recommended starting salaries even though their actual credentials were no different from those of the non-mothers. The job candidates identified as fathers were not penalized in the same way, and often saw a boost. Study participants also held mothers to higher standards than non-mothers (both women without children and men with or without children) by requiring a higher score on a management exam and significantly fewer times of being late to work before being considered hireable or promotable.

The Unexplainable Wage Gap

Women make decisions that have an impact on how much they earn. They get an education, which raises their pay (but does not close the gap) and many work part-time or take extended time off to care for children. What kinds of jobs women seek and what kinds of educational credentials they acquire affect future earnings: one study found that 95 percent of the gender differential in starting salaries can be explained by differences in college majors.¹³ Even so, within occupations, women are typically paid less than their male colleagues.¹⁴

If time away from employment for caregiving is important to explaining the gender pay gap, separate from its affect on work history, then how do we as a society intend to deal with the new reality of working women? As more women work, more families do not have a stay-at-home caretaker, which means that both men and women workers are now more likely to balance a job with care responsibilities—either for a child or for an elderly or ill family member—and more are concerned about caregiver discrimination.

Recent polling confirms that these are challenges for both men and women. The 2008 National Survey Changing Workforce reports that the majority of fathers (59 percent) in dual-earner families report experiencing “some or a lot” of work/family conflict, as do 45 percent of mothers.¹⁵ Clearly, we need to find a new way of addressing how families provide care.

RECOMMENDATIONS

I have a few comments to make on why I think that the Paycheck Fairness Act and the Fair Pay Act make for good economic policy. First, as I said at the outset, this is probably the most important time for families to ensure equal pay for all workers, men and women, including caregivers. Women are increasingly breadwinners and ensuring they are paid fairly is good for them and our economy.

The Paycheck Fairness Act

Markets only work when all the participants have full information. If I don’t know how much other economists are paid, I cannot know if my salary is at the market wage. The Paycheck Fairness Act prohibits employer from retaliating against employees who share salary information. This provision will not solve the gender pay gap, but it will allow employees to access the information they need to understand if their pay is at the market rate. Combined with the provision to give employees an opportunity to improve their salary negotiation skills, this could be a powerful step towards greater pay equity, especially among men and women in similar jobs within a single firm.

The Paycheck Fairness Act will also increase training, research, and education to help the Equal Employment Opportunity Commission identify and respond to wage

¹²The differences were that one resume listed the applicant as “Parent-Teacher Association coordinator” and included phrase “Mother/father to Tom and Emily. Married to John/Karen,” while the other listed fundraiser for his/her neighborhood association and “Married to John/Karen.”

¹³Judith A. McDonald and Robert J. Thornton, “Do New Male and Female College Graduates Receive Unequal Pay?”, *Journal of Human Resources* XLII, no. 1 (2007); L.A. Morgan, “Major Matters: A Comparison of the within-Major Gender Pay Gap across College Majors for Early-Career Graduates,” *Industrial Relations* 47, no. 4 (2008).

¹⁴McDonald and Thornton, “Do New Male and Female College Graduates Receive Unequal Pay?”. Morgan, “Major Matters: A Comparison of the within-Major Gender Pay Gap across College Majors for Early-Career Graduates.”

¹⁵Ellen Galinsky, Kerstin Aumann, and James T. Bond, “NSCW 2008: Times Are Changing: Gender and Generation at Work and Home,” in *National Study of the Changing Workforce* (New York, NY: Families and Work Institute, 2009).

discrimination claims and improve our data collection of pay information. Discrimination is something that's hard to prove at the individual level, but often easy to see in the aggregate data. If a firm employs a thousand men and a thousand women, but men are systemically promoted or are paid more in similar jobs, then this indicates a gender disparity that should be investigated. Without access to that kind of data, the EEOC has no idea whether there are signs that unfair pay practices are occurring. The data provisions of the Paycheck Fairness Act are of utmost importance in enforcing the law already on the books.

The Fair Pay Act

The Fair Pay Act will require employers to provide equal pay for jobs that are comparable in skill, efforts, responsibility, and working conditions. The largest chunk of the gender pay gap is due to the combined effect of the segregation of men and women into different industries and occupations.

One of the challenges of our current economy is that many of the new jobs being created are replacing the work women historically did inside the home for free and these jobs are clearly undervalued. Child care workers, for example, are paid much less than school teachers, even though we are learning more every day about the importance of this development stage and the key role of the skills of these providers in nurturing young minds. The Fair Pay Act delineates a process to evaluate jobs within a firm and ascertain the actual skills required then ensures that jobs with similar skills are paid the same, even if one is predominately held by women and one predominately held by men.

This is important legislation before you today. I cannot stress how important the issue of fair pay is to women and to their families. In these tough economic times, with millions of women supporting their families, I encourage you to do what you can to ensure that they earn a fair day's pay.

Thank you.

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Senator DODD. Thank you, Ms. Boushey. Thank you very much.
Ms. Brake.

**STATEMENT OF DEBORAH L. BRAKE, PROFESSOR OF LAW,
UNIVERSITY OF PITTSBURGH, PITTSBURGH, PA**

Ms. BRAKE. Senator Dodd and members of the committee, I appreciate the opportunity to discuss the need for stronger discrimination laws to close the longstanding gender wage gap. This gap exists at every level of earnings, from teacher's assistants to physicians. Even when all other factors are accounted for, a substantial portion of the gap remains attributable to sex.

In considering these issues, it is important to keep in mind just how high a bar the Equal Pay Act sets for employees to prove discrimination. A claimant must prove she is paid less for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Courts have interpreted this standard strictly. To give just one example, female vice presidents have failed in court under this standard because they are responsible for different aspects of the company's operations than higher-paid male vice presidents, even when their responsibilities were equally challenging and the jobs were classified at the same level.

Indeed, it appears that a plaintiff can even lose an Equal Pay Act case due because she has more responsibility than higher-paid male peers. The fact of the matter is, it is extremely difficult to prove that jobs are substantially equal when we are dealing with nonstandardized, noncommodity jobs, the kinds of jobs common in the modern economy.

In discussing the strictness of proof required to prove equal work, I do not mean to endorse this State of the law. In my view, many of the cases cited in my written testimony take too narrow an approach. But in considering legislation in this area, it is important to keep in mind that proving a case under the Equal Pay Act is no easy matter.

Once an employee proves unequal pay for equal work, the employer will still prevail if it can prove one of four affirmative defenses. In recent years, the fourth defense, a factor other than sex, has become the exception that swallows the rule.

An early U.S. Supreme Court decision admonished that market forces—the fact that women's labor brings a lower wage in the open market—are not a "factor other than sex." But some lower courts have allowed virtually any nominally gender-neutral reason to justify unequal pay for equal work.

For example, courts have allowed a man's higher prior salary to justify paying him more than an equally qualified woman to do the same work. Courts have also applied the defense where the man negotiated for his higher pay. Yet such factors can perpetuate the very discrimination the act was supposed to combat. Prior salary can reflect unjustified pay gaps in employee salary history, and differences in negotiation are not necessarily gender neutral, nor related to job performance.

For complex reasons, men and women tend to differ in their approach to salary negotiations, and employers respond differently to them. Recent research has shown significant gender differences in negotiating salaries. One study found that among Carnegie Mellon University graduates, 57 percent of the men, but only 7 percent of the women, negotiated for a higher starting salary. And those who negotiated received salaries an average of 7.4 percent higher than those who did not.

It turns out that women have good reason for not negotiating. In a follow-up to her acclaimed book, "Women Don't Ask," Linda Babcock and her fellow researchers found that sometimes it does hurt to ask. Their research showed that part of the reason why women don't negotiate is that they accurately perceive a risk from doing so, a risk that is both gender specific to women and all too real.

Yet courts blithely accept negotiation as a factor other than sex, even in cases where women were told their pay was nonnegotiable. Some courts and the EEOC have taken a more searching approach, scrutinizing the business reasons and job relatedness of the factors put forward. The Paycheck Fairness Act would take sides in this dispute, drawing on the same standard Congress used when it amended title VII in 1991 and which courts have applied to other claims since 1971. This would ensure that women are not paid less for doing the same job unless there is a job-related reason for doing so.

No Federal law now provides full remedies to victims of sex-based employment discrimination. The Equal Pay Act provides only back pay and an equal amount in liquidated damages. Title VII damages are capped at modest levels, depending on the size of the employer. However, race discrimination claims under a separate statute, 42 U.S.C., section 1981, allow for the full range of remedies, including compensatory and punitive damages without caps.

This statute has been in place since the reconstruction era, and we have not seen financial ruin of businesses, nor out-of-control jury verdicts. In fact, the U.S. Supreme Court has set a high bar for recovering punitive damages, requiring egregious misconduct and bad faith. Courts are well-equipped to limit excessive damage awards with the uniform rules that apply to civil cases generally. What we have under current law is a special rule for sex discrimination and a policy judgment that sex discrimination is not as bad as other kinds of discrimination.

The Paycheck Fairness Act would fill other holes in the equal pay laws as well. It would ameliorate the strict same establishment rule to proving equal pay cases. It would provide for better access to the information needed to enforce the pay laws. It would strengthen protections from retaliation, and it would extend the same class action rules that apply to other civil lawsuits.

And finally, to the Fair Pay Act, just three short sentences. Neither title VII nor the Equal Pay Act addresses the problem of the devaluation of female-dominated jobs that are equivalent to male-dominated jobs in skill, effort, responsibility, and work conditions. But research examining pay scales in cases where such practices have been challenged has shown that far from deriving from neutral market-based criteria, the under payment of traditionally female jobs reflects institutional gender bias.

In other words, predominantly female jobs were paid below their actual worth precisely because they were held by women. The Fair Pay Act would bring much-needed scrutiny to these practices.

Thank you.

[The prepared statement of Ms. Brake follows:]

PREPARED STATEMENT OF DEBORAH L. BRAKE

SUMMARY

The gender wage gap continues to suppress the wages of American women; it is not explained by non-sex based factors; and it is not on a trajectory that makes it likely to close any time soon.

The standard for proving a violation of the Equal Pay Act is a burdensome one; to establish a *prima facie* case under the act, employees must show that they are paid less than an employee of the opposite sex for performing substantially equal work, a standard courts have applied strictly.

The requirement of proving unequal work in the “same establishment” poses a further, unjustified hurdle in Equal Pay Act claims; the Paycheck Fairness Act takes a more commonsense approach to this requirement.

The “factor other than sex” defense to Equal Pay Act claims has been given too broad a sweep by some courts, opening the door to pay differences based on factors such as prior salary or differences in negotiation that are not tied to the employer’s business needs or the requirements of the job in question, and which can operate to perpetuate sex-based differences in pay.

Federal employment discrimination laws create a hierarchy of remedies depending on the type of discrimination involved; racially based pay discrimination is remediable by make-whole relief, including uncapped damages, while sex-based pay discrimination is not. Both the Paycheck Fairness Act and the Fair Pay Act would finally treat sex-based pay discrimination with the seriousness it deserves, amending the Equal Pay Act to provide for compensatory and punitive damages.

Neither the Equal Pay Act nor title VII addresses that portion of the gender-wage gap that is due to occupational segregation and the devaluation of predominantly female jobs. The Fair Pay Act would address this problem.

Chairman Harkin and members of the Senate Committee on Health, Education, Labor, and Pensions, I appreciate the opportunity to come before you today to discuss the inadequacy of existing employment discrimination laws to close the long-standing gender wage gap that continues to undermine the ability of women to support their families. Today more than ever, American women need and deserve strong legal protections from pay discrimination.

We now have abundant evidence that the gender wage gap persists and is not on track to close any time soon.¹ This gap exists at every level of earnings, from teacher’s assistants, where the female median salary of \$15,000 is 75 percent of the male median salary of \$20,000, to physicians, where the female median salary, \$88,000, is 63 percent of the male median salary, \$140,000.² As economists debate how much of the gender wage gap is explained by discrimination, one incontrovertible truth

¹ See Bureau of Labor Statistics, U.S. Dep’t of Labor, Highlights of Women’s Earnings in 2003, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (women’s median weekly earnings were 79.5 percent of men’s in 2003, and 73.6 percent for college graduates); Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. Rev. 707, 715 (2000) (explaining that most of the progress in narrowing the wage gap since 1970, when it was 59 cents on the dollar, was made in the 1980s, and studies show little additional progress since 1990).

² See Daniel H. Weinberg, U.S. Dep’t of Commerce, Census 2000 Special Reports, Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women 7, 12 tbl.5, 13 tbl. 6 (May 2004).

emerges: even when non sex-based factors are accounted for—factors such as age, education, years of work, hours worked, job tenure, occupation and jobs held—a substantial portion of the gender wage gap remains and is only explainable by sex.³ The bills now under consideration, the Paycheck Fairness Act and the Fair Pay Act, would help strengthen the ability of our existing employment discrimination laws to more effectively address the gender wage gap.

BACKGROUND: THE EQUAL PAY ACT SETS A VERY HIGH BURDEN ON EMPLOYEES TO PROVE UNEQUAL PAY FOR EQUAL WORK

Both the Paycheck Fairness Act and the Fair Pay Act would make changes to the Equal Pay Act of 1963.⁴ In considering these bills, it is important to understand how the Equal Pay Act applies. Employees must meet a strict standard to establish a *prima facie* case of unequal pay under the act. The Equal Pay Act applies only to unequal pay for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” This turns out to pose a high hurdle for employees invoking the act. In order to establish a violation, an employee must first identify a higher-paid comparator of the opposite sex who performs substantially the same job, as measured by skill, effort, responsibility and working conditions.⁵ This standard has been construed strictly, in ways that make it difficult for employees to identify comparators doing substantially equal work.⁶

For example in one representative case, the plaintiff, a senior vice-president of finance, failed to establish a *prima facie* case under the Equal Pay Act in comparing her pay to that of the company’s other senior vice-presidents.⁷ The courts’ analysis left little room for meeting the “substantially equal” requirement for jobs that are managerial or executive in nature. The court described the Equal Pay Act as having greater applicability to “lower-level workers” who perform “commodity-like work” than to higher level jobs which are necessarily more unique.⁸ Likewise, a different court found the jobs of an insurance company’s male vice-presidents different in substance from the company’s only female vice-president, who was paid less than all of the company’s male vice-presidents.⁹ The court ruled that the jobs involved different responsibilities, even though they shared “a common core of substantially similar tasks” in managing divisions, the plaintiff managed the largest division, and the company’s official salary administration program ranked all of the vice-presidents equally.¹⁰ In fact, it seems a plaintiff can even lose an Equal Pay Act case

³See, e.g., U.S. Gen. Acct. Office, Women’s Earnings: Work Patterns Partially Explain Difference Between Men’s and Women’s Earnings, GAO-04-35 at 2 (Oct. 2003) (examining nationally representative longitudinal data set and concluding that women in 2000 earned only 80 percent of what men earned after accounting for education, occupation, hours worked, and time away from the workplace because of family care responsibilities); Weinberg, *supra*, at 21 (“There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience—education, and occupation.”); Council of Econ. Advisers, Explaining Trends in the Gender Wage Gap 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator, 49 Soc. Prob. 258, 269–70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs); Selmi, *supra*, at 719–43 (concurring, reviewing data); Stephen J. Rose & Heidi I. Hartmann, Inst. for Women’s Pol’y Res., *Still a Man’s Labor Market: The Long-Term Earnings Gap* 9–10 (2004) (differences in men’s and women’s labor force attachment do not explain the gap); Bureau of Labor Statistics, *supra*, at 2, 25 tbl. 9, 26 tbl. 10, 35–36 tbl. 15, 37–36 tbl. 16 (differences in hours worked do not explain the gap).

⁴29 U.S.C. § 206(d)(1).

⁵See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); see generally Harold S. Lewis, Jr., and Elizabeth J. Norman, *Employment Discrimination Law and Practice* § 7.3 (2d ed. 2004).

⁶See, e.g., *Houck v. Virginia Polytechnic Institute*, 10 F.3d 204, 206 (4th Cir. 1993) (requiring plaintiff to compare her pay to that of an actual male comparator, not a hypothetical male or a composite of male colleagues, and jobs must be equal on a “factor by factor” basis); *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992) (describing the burden on employees to show “substantially similar work” as “a fairly strict standard”).

⁷*Georgen-Saad v. Texas Mutual Ins. Co.*, 195 F. Supp.2d 853 (W.D. Tex. 2002). The comparators were senior vice presidents over other aspects of the employer’s business.

⁸*Id.* at 857.

⁹*Stopka v. Alliance of American Insurers*, 141 F.3d 681 (7th Cir. 1998).

¹⁰*Id.* at 685–86.

due to job differences that give her *more* responsibility than her higher-paid male colleagues.¹¹

The degree of similarity required by courts makes it difficult for women to identify comparators even in jobs that seem very similar.¹² The strictness with which courts approach the equal work requirement has led one legal scholar, who conducted an empirical review of all reported Federal appellate cases decided under the act, to conclude that the Equal Pay Act as interpreted by the courts is not broad enough to reach “non-standardized jobs” in the modern economy.¹³

In discussing the strictness of how courts approach Equal Pay Act claims, I do not mean to endorse the cases cited or the overly narrow approach to job similarity taken—indeed, in my view, many of these cases are wrongly decided. However, it is important for Congress to understand a key aspect of the legal background in this area: establishing a *prima facie* case under the Equal Pay Act is no easy matter. It is very difficult for employees to establish a violation of the act, and the plaintiff who does so has proven that her employer has paid her less than a man for performing a job that is the same in virtually all respects.

1. *The “Same Establishment” Requirement of the Equal Pay Act Further Narrows the Ability of Employees to Prove Pay Discrimination*

Not only must the employee show that the employer paid her less for performing substantially the same work as a male employee; she and her male comparator must also work in the “same establishment.”¹⁴ 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.¹⁵ The term “same establishment” is not defined in the Fair Labor Standards Act, but the Supreme Court has interpreted it to mean “a distinct physical place of business.”¹⁶ In order for different physical sites to be counted as part of the same establishment, thereby allowing the use of comparators at different physical locations, the plaintiff must prove “unusual circumstances,” such as the exercise of centralized control in one location over important aspects of running the entire business.¹⁷

¹¹ See *Pajic v. Cigna Corp.*, 56 Fair Empl. Prac. Cas. (BNA) 1624, 1990 U.S. Dist. LEXIS 11588 (E.D. Pa. 1990) (even though male co-workers were paid more for doing less than the female managers, their jobs were not similar enough to allow for an EPA claim).

¹² See, e.g., *Howard v. Lear Corp. EEDS and Interiors*, 234 F.3d 1002 (7th Cir. 2000) (female human resources coordinator’s job was not substantially similar to men’s human resources jobs where the men’s jobs were in unionized plants with a mix of salaried and hourly workers and plaintiff’s job was in a nonunionized plant with only salaried workers); *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577 (7th Cir. 1987) (male and female coaching jobs at the high school and junior high level were not substantially similar where the jobs involved coaching different sports with different rules).

¹³ See Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, University of Maryland Legal Studies Research Paper No. 2009–54, 63 S.M.U. L. Rev. 101 (forthcoming, 2010), available at <http://ssrn.com/abstract=1521172>. This failing is particularly unfortunate because the gender wage gap for managerial and professional employees is even greater than it is for employees generally, and the improvement in this sector has been especially slow. *Id.* at 108–113; see also Ruben Bolivar Pagan, *Defending the “Acceptable Business Reason” Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Department of Human Services*, 33 J. Corp. Law 1007 (2008) (noting that the gender wage gap in managerial, professional, and related occupations has improved by only about 10 percent since the 1960s, and citing 2007 Department of Labor report finding that in management, professional, and related occupations, women earn only 73 percent as much as men).

¹⁴ 29 U.S.C. 206(d).

¹⁵ See, e.g., *Thompson v. City of Albuquerque*, 950 F. Supp. 1098, 1102 (D. N.M. 1996) (holding that veterinarians at city’s animal services division and zoo did not work at the “same establishment” where they are under different city departments); *Winther v. City of Portland*, Civ. No. 91–1232–JU, 1992 WL 696529 at *5 (D. Or. July 10, 1992) (holding that although the Portland Fire Bureau and Bureau of Emergency Communications were integrated with respect to a 911 system, they were separate establishments because they were administratively separate and had separate management); *EEOC v. State of Del. Dept. of Health and Social Services*, Civ. A. No. 83–412–JRR., 1986 WL 15944 at *2 (D. Del. Nov. 7, 1986) (holding “same establishment” to constitute only individual medical clinics and not entire system of clinics); *Davis v. Western Elec. Co.*, No. C–78–65–WS, 1979 WL 15383 (M.D.N.C. July 6, 1979) (justifying a holding of separate establishments because of different management, separate personnel system and no rotation between plants); *Gerlach v. Michigan Bell Tel. Co.*, 448 F.Supp. 1168, 1172 (D. Mich. 1978) (holding the local office to be the relevant establishment because although Engineering Layout Clerks occasionally transfer or are loaned to other offices, they are primarily supervised at local offices); *Shultz v. Corning Glass Works*, 319 F. Supp. 1161, 1164 (W.D.N.Y. 1970) (finding that two plants that were physically connected constituted the “same establishment,” but a third plant from which employees do not transfer back and forth did not constitute the “same establishment”).

¹⁶ *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945).

¹⁷ 29 CFR 1620.9(a).

This showing of unusual circumstances requires proof that the employer maintains centralized control over decisions such as hiring employees, setting salaries, and assigning employees to various work sites.¹⁸ While a plaintiff who works in a branch office of a company with one central administration may be able to meet this standard and identify comparators at other branch offices, many companies are organized so that different branches exercise control over important elements of the job relationship at that site, such as hiring, setting salaries, and job assignments.¹⁹ As more employers move to a decentralized structure, this standard is likely to become increasingly difficult to meet.²⁰

While it makes sense to have different pay scales for employees in different parts of the country where there are different costs of living, the current “same establishment” requirement goes well beyond accommodating such regional differences. The Paycheck Fairness Act would alleviate this problem by allowing the use of comparators who work for the same employer at different physical locations in the same county or similar political subdivision of a State, taking a more commonsense approach to pay inequality among persons who do equal work for the same employer.

2. The “Factor Other than Sex” Defense Excuses Far Too Much Pay Inequality

Once an employee proves that she was paid less for performing a job equal to that of a male comparator in the same establishment, the employer may avoid liability by establishing one of four affirmative defenses: that the wage disparity is based on (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. It is the fourth defense that has become increasingly problematic.

Early in the act’s history, the Supreme Court took a searching approach to this defense, admonishing that a disparity based on market forces—e.g., the fact that women’s labor brings a lower wage in the open market—was not a “factor other than sex” under the act.²¹ In that case, the Court rejected the employer’s defense that male nightshift workers were paid more because they demanded more money than the female day shift workers to perform substantially the same work.²² The Court was on firm ground in doing so, since the Equal Pay Act was enacted precisely to address biases in the market that valued women’s labor less than men’s labor.²³ Despite this auspicious beginning, lower courts have increasingly opened the door to a broader “factor other than sex” defense that accepts virtually any superficially gender-neutral explanation for paying women less.

Over the years, stark differences have emerged in how lower courts interpret the factor other than sex defense. The courts most skeptical of equal pay claims have

¹⁸ 29 CFR 1620.9(b).

¹⁹ Cf. *Mulhall*, 19 F.3d at 591 (separate locations were part of “same establishment” where plaintiff demonstrated “centralized control of job descriptions, salary administration and job assignments” and project managers at different locations reported to supervisor in central office); *Meeke v. Computer Assocs., Int’l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (different physical locations were not part of the same establishment where local offices made their own hiring decisions and set specific employee salaries, albeit within a range defined by central administration); *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1464 (9th Cir. 1985) (physically separate offices of defense contractor were not part of “same establishment” where offices maintained independent management of projects for different customers, had separate budgets, and had delegated authority to make personnel decisions).

²⁰ Cf. Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* 165 (2004) (discussing the decentralization of authority and flattening of hierarchy in the modern workplace).

²¹ *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). Cf. *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (indicating that the relative average greater costs of employing one sex would not qualify as a factor other than sex); *County of Washington v. Gunther*, 452 U.S. 161, 170–71 (1981) (in pay discrimination claim under title VII, which incorporates “factor other than sex” defense, describing the fourth defense as applying to “bona fide” factors other than sex).

²² The Court allowed that working a nightshift as opposed to a dayshift might be a factor other than sex that justified a difference in pay, but in that case the employer had already paid a premium for all nightshift workers; the difference between the male nightshift inspectors and female dayshift inspectors had been superimposed on the existing difference in base pay for night and day workers because of the company’s belief that the male workers would demand more pay.

²³ Cf. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, University of Maryland Legal Studies Research Paper No. 2009–54, 63 S.M.U. L. Rev. 101, 138–19 (forthcoming, 2010), available at <http://ssrn.com/abstract=1521172> (employers asserting a market defense to Equal Pay Act claims usually do not have actual market supporting their position and instead rely on their own subjective belief about what the market requires; there is “no one magic market rate” for any particular job; instead, “[t]here are many human agency factors that can affect the structure and outcome of market compensation analysis that can allow subjective judgments and unconscious biases to affect the results”).

allowed employers to justify pay disparities based on anything other than explicitly sex-based criteria or intentional discrimination against women, even if the purportedly gender-neutral reason is lacking in a solid business justification. For example, the Seventh Circuit has refused flat-out to undertake any inquiry into whether there is a business justification or legitimate business reason for the employer's explanation for the disparity under the "factor other than sex" defense.²⁴ That court has described the defense as "embrac[ing] an almost limitless number of factors, so long as they do not involve sex," even if they are not "related to the requirements of the particular position in question, nor . . . even . . . business-related."²⁵ Likewise, the Eighth Circuit has pointedly refused to require an acceptable business reason underlying the employer's assertion of a factor other than sex.²⁶ Contrary to this view, several circuit courts and the EEOC have taken a more searching approach to the factor other than sex defense, limiting it to factors based on legitimate business reasons.²⁷ Other courts have yet to take a clear stand on the question.²⁸

The allowance of any non-sex-based factor to justify a wage disparity, however unconnected to the job at issue or unrelated to the needs of the business, has the potential to eviscerate the protections of the Equal Pay Act. As the Second Circuit recognized, "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned."²⁹ It would allow employers to rely on factors that are sex-linked and perpetuate the suppression of women's wages, without regard to the responsibilities of the jobs or the qualifications of the employees who fill them.³⁰

One area in which this dispute over the scope of the defense plays out is the question of whether employees' prior salaries may be used to justify a current pay disparity for employees doing equal work. Some courts allow this as a "factor other than sex" without further scrutiny. For example, the Seventh Circuit allows employers to base pay differentials on prior salary without any further justification.³¹ Some courts even in those circuits that do require an acceptable business reason have ex-

²⁴ *Wernsing v. Dept. of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the Eighth) and those that require an 'acceptable business reason' is established, and we are not even slightly tempted to change sides"); *id.* at 468 ("The statute asks whether the employer has a reason other than sex—not whether it has a 'good reason.'"); see also *Fallon v. State of Ill.*, 882 F.2d 1206 (7th Cir. 1989) (there is no requirement that a "factor other than sex" be "related to the requirements of a particular position in question, nor that it be a 'business-related' reason.") (citation omitted); see also *Boriss v. Addison Farmers Ins. Co.*, 1993 WL 284331 (N.D. Ill. 1993) (male employees' different qualifications could be a "factor other than sex" even if those qualifications were not related to the job at issue).

²⁵ *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994); see also *Fallon v. State of Ill.*, 882 F.2d 1206, 1211 (7th Cir. 1989) (suggesting that even a practice with a discriminatory effect might qualify as a "factor other than sex").

²⁶ *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003) (stating that "the wisdom or reasonableness" of the factor other than sex is irrelevant). The Court of Federal Claims has also aligned itself with the Seventh and Eighth Circuits on this question. *Behm v. United States*, 68 Fed. Cl. 395, 400 (Fed. Cl. 2005).

²⁷ See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (requiring a "bona fide business-related reason"); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1992) (stating that the defense "does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason"); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (factor must be based on "an acceptable business reason"); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (factor other than sex defense applies "when the disparity results from the unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business"). See also EEOC Compliance Manual, § 10-IV(F)(2), Dec. 5, 2000 available at <http://www.eeoc.gov/policy/docs/compensation.html> (requiring employer to "show that the factor is related to job requirements or otherwise is beneficial to the employer's business" and that it is "used reasonably in light of the employer's stated business purpose as well as its other practices.").

²⁸ Ruben Bolivar Pagan, *Defending the "Acceptable Business Reason" Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Department of Human Services*, 33 *Journal of Corporate Law* 1007 (Summer 2008) (identifying the First, Third, Fourth, Fifth, Tenth and D.C. Circuits as "yet to consider whether the EPA's 'factor other than sex' exception contains an implicit 'acceptable business reason' requirement" and recommending that all circuits join majority view to require an acceptable business reason).

²⁹ *Aldrich*, 963 F.2d at 525.

³⁰ *Cf. Engelman v. Nat'l Broadcasting Co., Inc.*, 1996 WL 76107, at *7 (SDNY Feb. 22, 1996) (warning that without a legitimate business justification required for the "factor other than sex" defense, an employer could rely on sex-linked factors such as height and weight even if those qualities were unrelated to the job in question).

³¹ *Wernsing v. Dept. of Human Servs.*, 427 F.3d 466 (7th Cir. 2005). See also *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 617 & n.14 (4th Cir. 1999) (stating that salary history can be a "factor other than sex," and declining to decide whether to super-impose a "job-relatedness requirement" on this defense, while noting a split in the circuits over whether to do so).

pressed blanket approval of the use of prior salary without any inquiry into whether that differential is related to the skills and responsibilities needed to do the present job, or whether prior salaries reflect any differences in the skills and qualifications of the employees in those jobs.³² Other courts have been more circumspect about reliance on prior salary to justify a present salary differential, requiring the employer to show that its reliance on prior salary was justified by sufficient business reasons.³³ These courts have recognized that reliance on prior salary to set current pay risks perpetuating ongoing pay discrimination against women, since women on average earn less than men.

The Paycheck Fairness Act would take sides in this dispute, ensuring that gender gaps in pay are not simply perpetuated by employers who set starting salaries based on employees' prior pay. Employers would have to prove that the differential in prior salary was not itself sex-based, and was job-related for the job in question and consistent with business necessity. This is an eminently fair standard and necessary to the vitality of the Equal Pay Act. Employers should not reflexively incorporate differences in prior salary when they hire male and female employees with similar experience and qualifications to do the same job. Otherwise, the Equal Pay Act will become little more than a rubber-stamp of the very wage disparities it was enacted to address.³⁴

Another issue on which the dispute over the scope of the defense has emerged is the role of salary negotiations in justifying a pay differential under the "factor other than sex" defense. Courts generally have allowed employers to rely on differences in how employees negotiate their salary to support pay disparities under the defense.³⁵ However, a wealth of recent research suggests cause for concern about interpreting the defense so broadly.

For complex reasons, men and women tend to differ in their approach to salary negotiations, and, importantly, employers tend to differ in how they respond to the men and women who do attempt to negotiate their salary. Behavioral researchers Linda Babcock and Sara Laschever, widely recognized experts in the field of gender differences in negotiation, found that among Carnegie Mellon University graduates,

³² See, e.g., *Sparrock v. NYP Holdings, Inc.*, 2008 WL 744733, *15 (S.D.N.Y. Mar. 4, 2008) ("matching an employee's former salary has been found to be a factor other than sex justifying wage differential"); *Drury v. Waterfront Media, Inc.*, 2007 WL 737486, *4 (S.D.N.Y. Mar. 8, 2007) (paying male employee hiring salary to lure him away from prior employer was a factor other than sex); *Engelmann v. National Broadcasting Co., Inc.*, 1996 WL 76107, *10 (S.N.D.Y. Feb. 22, 1996) (also approving salary-matching of employee's salary with a previous employer as a factor other than sex).

³³ See, e.g., *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (rejecting reliance on prior salary alone; prior salary must be connected to experience to justify a present salary disparity); *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988) (rejecting as a "factor other than sex" employer's decision to pay male clerks more because they transferred from higher paying positions); cf. *Kouba v. Allstate*, 691 F.2d 873, 878 (9th Cir. 1982) (employer must show reliance on prior salary justified by business reasons particular to the employer's business). The EEOC also places a higher burden on employers relying on prior salary to justify a pay differential. See EEOC Compliance Manual, § 10-IV(F)(2)(g), Dec. 5, 2000, available at <http://www.eeoc.gov/policy/docs/compensation.html> (stating that "[p]rior salary cannot, by itself, justify a compensation disparity," and requiring employer to "prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered," for example, by showing employer "(1) determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and (2) considered the prior salary, but did not rely solely on it in setting the employee's current salary").

³⁴ Indeed, because of historic wage patterns and male wage earners' continuing comparative strength in the market, adopting salary-matching or differences in prior salary as "a factor other than sex" is practically a recipe for perpetuating the gender wage gap indefinitely. See Jeffrey Lax, *Do Employer Requests for Salary History Discriminate Against Women?* 58 *Labor Law Journal* 47 (2007) (employers frequently use prior salary to set the wages of new employees, a practice which perpetuates women's lower earnings relative to men; therefore, urging Congress to close the loophole that allows employers to invoke such a reason as a factor other than sex); Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 *Colum. L. Rev.* 1085 (1989) (arguing for judicial skepticism toward use prior salary as a factor other than sex).

³⁵ See Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiations is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 *Geo. J. Gender & Law* 1, 10-12 (2009) (stating that of the eight published decisions that address negotiation as a factor other than sex, only one, *Futran v. Ring Radio Co.*, 501 F. Supp. 734 (N.D. Ga. 1980), has rejected it as a factor other than sex, and that case also involved direct evidence of discriminatory intent); id. at 10, 13-19 (citing and discussing the cases that have permitted employers to consider salary negotiation as a factor other than sex). See also *Day v. Bethlehem Center Sch. Dist.*, No. 07-159, 2008 WL 2036903 (W.D. Pa. May 9, 2008) ("Although Plaintiffs present a compelling argument as to why the Defendant's factor other than sex, i.e., negotiation, fails as a matter of law, they do not cite any cases directly on point that support their position.").

57 percent of the men, but only 7 percent of the women, negotiated for a higher starting salary.³⁶ The applicants who negotiated received salaries that were an average of 7.4 percent higher than those who did not negotiate—a difference that corresponded almost exactly to the gap in the male and female graduates' starting salaries. Their subsequent research replicated these findings, and corroborated other research finding that men are significantly more likely than women to negotiate higher salaries.³⁷

These findings must be evaluated in light of complementary research suggesting that women face a greater likelihood of being penalized by employers when they do attempt to negotiate salary. As Babcock and her fellow researchers found, “sometimes it hurts to ask.”³⁸ In a series of experiments, they found that men and women triggered different reactions when they attempted to negotiate for more money. Women who used identical “scripts” as men to ask for more money were penalized by male evaluators, who were then less inclined to work with the women who had asked for more money. Their research suggests that women are less likely to negotiate salary at least in part because they accurately perceive a risk from negotiating, a risk that is both gender-specific and all too real.³⁹

Given this reality, an employer who uses differences in negotiation to justify a disparity in paying men and women for equal work should have the burden to prove that this difference is not itself based on sex. In several of the cases in which courts have allowed employers to rely on negotiation to justify a pay disparity, the employer reacted differently to the men and women who tried to negotiate, rewarding men for negotiating while treating women's salaries as non-negotiable.⁴⁰ Moreover, employers should shoulder a substantial burden to justify pay disparities stemming from differences in salary negotiation by male and female employees who have similar qualifications and are hired to do equal work.⁴¹ At a minimum, employers should have to demonstrate that the difference is related to the job in question and consistent with business necessity.

The Paycheck Fairness Act would help close what has become a gaping loophole in the Equal Pay Act's promise of a nondiscriminatory wage. The bill would limit the “factor other than sex” defense to ensure that an employer's reason for paying women less is a bona fide one, such as differences in education, training or experience, that it is not based upon or derived from a sex-based differential in compensation, and that it is job-related and consistent with business necessity. This language is borrowed from title VII's disparate impact framework, under which facially neutral practices that disadvantage workers based on sex, race, color, religion or national origin must be shown to be job-related and consistent with business necessity. This standard has been the law in title VII cases since 1971, when *Griggs v. Duke Power Co.* was decided, and was later codified in the Civil Rights Act of 1991, and courts have a wealth of experience applying this standard in a way that is fair to both employees and employers. The other three existing defenses to Equal Pay Act claims would continue to apply unchanged, excusing pay differentials that are based on merit, seniority, or quantity or quality of production.

3. Existing Federal Laws Provide Inadequate Remedies for Gender-Based Pay Discrimination

Currently, employment discrimination law sets up a hierarchy of remedies for employees who experience different kinds of pay discrimination. Although full and uncapped remedies are available to victims of pay discrimination on the basis of race, no Federal statute provides complete remedies to women who are paid less because of their sex. Under the Equal Pay Act, an employee may recover only the amount of her unlawfully withheld wages (up to 2 years' back pay, or 3 years' back pay for

³⁶ Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* 1–2 (2003).

³⁷ *Id.*; Elzer, 10 *Geo. J. Gender & L.* at 4–9 (describing social science research on the gender divide in negotiations).

³⁸ Hannah Riley Bowles, Linda Babcock, & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 *Organizational Behav. & Hum. Decision Processes* 84 (2007).

³⁹ *Id.* at 88–100; see also M.E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 *Psychology of Women Q.* 65 (2001); Elzer, 10 *Geo. J. Gender & L.* at 7–9 (describing this research in greater detail).

⁴⁰ See Elzer, 10 *Geo. J. Gender & L.* at 20 (citing cases).

⁴¹ Cf. Charles B. Craver, “If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and title VII,” 102 *Mich. L. Rev.* 1104, 1116 (2004) (arguing that an employer who succumbs to a male applicant's entreaties for more money than it pays a woman to do substantially equal work presents “the exact situation the enactment was designed to proscribe—the willingness of females to work for less based upon the ‘outmoded belief that a man . . . should be paid more than a woman, even though his duties are the same.’”) (citation omitted).

“willful” violations) and an equal amount in “liquidated damages.”⁴² Title VII of the Civil Rights Act of 1964 also prohibits discrimination in compensation, and a woman who wins a title VII pay discrimination claim may obtain somewhat better relief under that statute, since title VII authorizes compensatory and punitive damages. However, here too her relief will be cut short. Title VII caps damages at very modest levels. For example, in Lilly Ledbetter’s case against Goodyear, the jury awarded over \$3.5 million for Goodyear’s egregious discrimination. However, the trial court was forced to cap Ms. Ledbetter’s damages at \$300,000, the statutory limit for combined compensatory and punitive damages applicable to large employers such as Goodyear.⁴³ As a result, the jury’s award was reduced to \$360,000, the maximum allowable combined compensatory and punitive damages, plus an award of \$60,000 in back pay—a relatively small sum considering the seriousness of Goodyear’s misconduct, the deterrent value of such an award against a company like Goodyear, and the longstanding harm of the pay discrimination that continues to this day to follow Ms. Ledbetter into her retirement in the form of a lower pension.

In contrast, a claim for pay discrimination on the basis of race is actionable under a different statute, 42 U.S.C. § 1981, which bars race discrimination in the making and enforcement of contracts, including employment contracts. A successful pay discrimination claimant under section § 1981 receives the full panoply of legal remedies, including uncapped compensatory and punitive damages.

This inequity in remedies, for discrimination Congress has declared unlawful, is not justified by any principle of fairness or justice. Moreover, it puts employees in a position of having to finely parse their claims into either sex- or race-based claims, with significant consequences for how the claim is categorized. Women of color face a particular bind. A woman of color who is underpaid compared to white male employees would be better off categorizing her claim as one based on race rather than sex, even though the discrimination may combine elements of both, or fit better as a gender claim. The employer, on the other hand, may be able to limit its remedies if it can convincingly argue that she was paid less because of her gender and not because of her race, thereby restricting her to the much more limited remedies available under the Equal Pay Act and title VII. The law should not take such a rigid approach to these categories, nor should it place a lower priority on eradicating pay discrimination based on gender.

I am aware that some opponents of amending the Equal Pay Act to authorize compensatory and punitive damages have called the law a “strict liability” statute, not deserving of a damages remedy. I strongly take issue with this characterization. The Equal Pay Act is not a “strict liability” law in any legally correct sense of that term. Strict liability was developed in tort law to allocate responsibility for harm in certain instances notwithstanding the absence of a breach of the duty of care owed by the defendant. The idea behind it is that some endeavors (such as harboring wild animals or working with extremely hazardous materials) are so inherently dangerous that defendants should be responsible for any harm they cause even if they are not negligent or otherwise at fault.

The liability scheme established by the Equal Pay Act could not be further from a no-fault, strict liability rule. As explained above, an employer is liable under the act only if the plaintiff succeeds in establishing the very difficult burden of proving that she was paid less than a man for performing substantially the same work, and then only if the defendant fails to prove that the pay disparity was justified by one of four affirmative defenses, including a factor other than sex. In other words, the plaintiff who wins an Equal Pay Act claim has been paid less for doing substantially the same job as a man because of her sex. Critics of the Paycheck Fairness Act who call the Equal Pay Act a “strict liability” law base their claim on the argument that the Equal Pay Act, unlike title VII, does not require proof of intentional discrimination. However, they make far too much of this difference. Both statutes are asking the same fundamental question in such claims, whether an employee was paid less because of her sex, and proof of an Equal Pay Act violation almost always establishes a title VII violation as well, without any additional evidence of discriminatory motive.⁴⁴ When a plaintiff wins a claim under the Equal Pay Act, she has proven

⁴² 29 U.S.C. § 216.

⁴³ The limit for smaller employers is even lower, set at \$50,000 for employers with fewer than 100 employees, \$100,000 for employers with 101–200 employees, \$200,000 for employers with 200–500 employees, and \$300,000 for all employers with more than 500 employees.

⁴⁴ In many courts, proof of an Equal Pay Act violation also establishes a title VII violation *per se* because proof that the plaintiff was paid less for substantially equal work also proves that she was paid less because of sex in violation of title VII. Other courts apply title VII’s distinct proof model to pay discrimination claims, with the ultimate inquiry being whether the

that she is paid less than a man for performing substantially similar work and the employer has failed to show a sufficient justification for the disparity. This is anything but a “no fault” liability scheme, and the employee who proves such discrimination should be entitled to a complete remedy under the law.

4. *The Existence of Title VII Does Not Alleviate the Need for a Strengthened Equal Pay Act*

Although there is a fair amount of overlap between title VII and the Equal Pay Act, as discussed above, the existence of title VII in no way alleviates the need for a strengthened Equal Pay Act. As an initial matter, some employees will only have access to the Equal Pay Act and not to title VII due to differences in the scope and procedures of the two statutes.⁴⁵ Moreover, even if an employee proceeded under title VII instead of the Equal Pay Act, the same defenses that apply to the Equal Pay Act, including the “factor other than sex” defense, also apply to title VII under the so-called “Bennett Amendment.”⁴⁶ Accordingly, title VII incorporates the same problems discussed above with respect to the “factor other than sex” defense. Finally, as discussed above, title VII also provides inadequate remedies to victims of discrimination because of its cap on damages.

5. *Better Access to Salary Information is Crucial to the Effective Enforcement of the Equal Pay Laws*

Access to salary information is crucial for both individual employees and government enforcement agencies in order to effectively enforce the guarantees of the equal pay laws. Without salary information, employees have no way of knowing if they are paid a discriminatory wage. Employers rarely disclose workers’ salaries and workplace norms often discourage frank and open conversations among employees about salaries. Lilly Ledbetter’s case is typical in this respect. She worked for Goodyear for many years, unaware that she was paid less than the lowest-paid male manager until she received an anonymous note disclosing her colleagues’ pay. Goodyear’s policy of pay secrecy was calculated to keep her and other employees in the dark. Many employers have similar policies and informal practices discouraging the sharing of such information.⁴⁷ Currently, both employees and the relevant Federal enforcement agencies lack access to the salary information they need to effectively enforce Federal pay discrimination laws. Both the Paycheck Fairness Act and the Fair Pay Act would improve access to the pay information that is necessary for both individual and government enforcement of the laws.

6. *The Fair Pay Act is Needed to Address an Aspect of the Gender Wage Gap Left Out of Both Title VII and the Equal Pay Act: The Effects of Occupational Segregation and the Devaluation of Women’s Labor*

The Fair Pay Act would address an aspect of the gender wage gap that existing law does not: the devaluation of jobs predominantly held by women. Neither title VII nor the Equal Pay Act meaningfully addresses this problem. As noted above, occupational segregation does not fully explain the gap in men’s and women’s earnings; a substantial wage gap exists even controlling for occupation and job held. But some portion of the gap is attributable to the lower levels of pay drawn by workers in female-dominated occupations compared to workers in predominantly male occupations performing work of equivalent skill, effort and responsibility. Because the Equal Pay Act applies only if male and female employees are paid differently to do

plaintiff established intentional discrimination. See Lewis & Norman, § 7.15. Even in this latter set of courts, however, the same evidence that establishes an Equal Pay Act violation will also generally establish a title VII violation; however, it is possible, in theory, that a plaintiff bringing both claims in such a court might win under the Equal Pay Act, but lose under title VII because of the different allocations of the burden of proof on the question of whether the lower pay was because of sex. See *Fallon v. Illinois*, 882 F.2d 1206, 1217 (7th Cir. 1989) (“It is possible that a plaintiff could fail to meet its burden of proving a title VII violation, and at the same time the employer could fail to carry its burden of proving an affirmative defense under the Equal Pay Act.”).

⁴⁵ See generally Harold S. Lewis, Jr., and Elizabeth J. Norman, *Employment Discrimination Law and Practice*, § 7.2 (2d ed. 2004) (explaining that, unlike title VII, the Equal Pay Act is triggered by an employer’s connection to commerce, with limited exceptions for a few very specific industries, and not by the number of employees); *id.* at § 7.21 (explaining that the EPA has a longer statute of limitations—2 years, or 3 years for a violation that is willful—as compared to title VII’s much shorter limitations period).

⁴⁶ 42 U.S.C. 2000e–2(h).

⁴⁷ See Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 *Berkeley J. Emp. & Labor L.* 167, 168, 171 (2004) (noting that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries and that many more communicate informally an expectation of confidentiality with respect to employee salaries).

substantially the same jobs, it has no application in this setting. While title VII encompasses a broader set of claims than the Equal Pay Act, it too has a very limited applicability to the suppression of women's wages due to occupational segregation.

In theory, title VII provides a remedy for employees whose wages are suppressed because they work in jobs predominantly filled by women. To succeed on such a claim, however, the plaintiffs must prove that the employer paid those jobs less precisely because they were held by women, that is, because of intentional discrimination. The leading case is *County of Washington v. Gunther*,⁴⁸ in which female prison guards (who guarded female prisoners) claimed pay discrimination because they were paid less than male prison guards (who guarded male prisoners), even though the lower court had found these jobs not to be similar enough for the Equal Pay Act. The plaintiffs argued that the underpayment of the women violated title VII, and relied on a pay equity study commissioned by the county which had thoroughly analyzed the jobs and recommended that the women guards earn 95 percent of what the male guards earned. The county did not implement this recommendation and continued to pay the women guards substantially less, a decision that the plaintiffs attributed to discriminatory intent. The Supreme Court allowed the plaintiffs to proceed on this claim under title VII, but reiterated the requirement that they prove intentional discrimination underlying the decision to pay them less.

In practice, this is a nearly insurmountable hurdle.⁴⁹ For example, in one of the more well-known, large-scale pay discrimination challenges to be brought under title VII, *AFSCME v. Washington State*,⁵⁰ female State employees lost their title VII challenge to the State's practice of paying substantially lower salaries for jobs predominantly held by women. The plaintiffs failed to show that the State's failure to implement the recommendations of a pay equity study it had commissioned amounted to a discriminatory intent.

And yet, the absence of a demonstrable discriminatory intent in these and similar cases should not be taken to mean that pay differentials between male-dominated and female-dominated jobs involving equivalent work are based on gender-neutral, unbiased market criteria. An analysis of the underlying data in the *AFSCME* case by two sociologists who study large organizations found that the State's pay scales did not passively reflect market wages, but stemmed from a discretionary and subtle sex-stereotyping of jobs that linked the pay of certain women's jobs to benchmarks comprised of other women's jobs, instead of comparing them to more highly paid and more objectively similar male-dominated jobs. The resulting pay differential reflected a sex-stereotyping of jobs and the lesser political clout of women workers in the State's very political and subjective pay-setting process.⁵¹

In a similar case, female clerical workers lost their title VII case against a public university because the court found that the lower pay for those jobs compared to male-dominated jobs requiring a similar level of skill was not based on a demonstrable discriminatory intent.⁵² However, the same organizational sociologists cited above found, after scouring the records in the case, that the university had rejected a consulting firm's recommendations to close this pay gap because of institutional bias favoring the male workers. In particular, the male workers were more confrontational in their dealings with the university while the clerical workers were more patient and cooperative. As a result, organizational politics and institutional bias led the university to "give selective attention to the demands of workers in predominantly male jobs," resulting in their higher pay.⁵³ Current law does not reach this kind of institutionalized gender bias. The Fair Pay Act would bring much-needed scrutiny to these kinds of discriminatory practices.

In conclusion, it is heartening to see this committee turn its attention to the important issue of pay equity. Both the Paycheck Fairness Act and the Fair Pay Act would go a long way toward strengthening the ability of existing Federal discrimination laws to ensure that all American workers are paid a nondiscriminatory wage without regard to gender, race, national origin or religion.

⁴⁸ *County of Washington v. Gunther*, 452 U.S. 161 (1981).

⁴⁹ See, e.g., *E.E.O.C. v. Sears Roebuck & Co.*, 839 F.2d 302, 340-42 (7th Cir. 1988) (stressing the "limited scope" of *Gunther* and holding that only "clear and straightforward" evidence of discriminatory intent would suffice to make out a title VII pay discrimination claim not based on equal work); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983) (in a title VII claim for pay discrimination not involving equal work, plaintiffs must show a "transparently sex-biased system for wage determination" or "direct evidence" of discriminatory intent).

⁵⁰ 770 F.2d 1401 (9th Cir. 1985).

⁵¹ See Martha Chamallas, *The Market Excuse*, 68 U. Chicago L. Rev. 579 (2001) (reviewing Robert L. Nelson and William P. Bridges, *Legalizing Gender Inequality: Courts, Markets and Unequal Pay for Women in America* (1999)).

⁵² *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977).

⁵³ Chamallas at 587 (quoting Nelson and Bridges at 166).

Senator DODD. Thank you very much, Ms. Brake.
Ms. Frett.

STATEMENT OF DEBORAH L. FRETT, CHIEF EXECUTIVE OFFICER, BUSINESS AND PROFESSIONAL WOMEN'S FOUNDATION, WASHINGTON, DC

Ms. FRETT. Chairman Dodd, Ranking Member Enzi, distinguished members of the committee, and my fellow panelists, thank you for this opportunity to testify today on behalf of the Business and Professional Women's Foundation in support of equal pay for women and the Paycheck Fairness Act.

Business and Professional Women's Foundation partners with women, employers, and policymakers to create successful workplaces that practice and embrace diversity, equity, and work-life balance. We have a network of supporters, which includes both employers and employees across the country. And both our employee and employer members support pay equity because they know it is good for business and workers.

We submitted written remarks for you, which you all have. Today, I would just like to highlight a few key points.

One of the most significant trends of the past 50 years has been the movement of women into the paid labor force and the growth of women-owned businesses. Women now make up half of the U.S. workforce, and women-owned firms represent 30 percent of all U.S. businesses. But despite all these gains, the Census Bureau reports that, on average, full-time working women only earn 77 cents to every dollar earned by men.

And things are even worse for African-American and Latino women who earn an average of 10 to 20 percent less than their Caucasian female colleagues. This wage gap is not simply a result of women's education levels or personal choices and hurts working women, their families, employers, and the economy now and in the future.

According to a World Economic Forum study released this week, the gender gap is costing companies profits and the Nation a significant amount in economic growth. Additionally, wage discrimination lowers a woman's total lifetime earnings and reduces benefits from Social Security and retirement plans, inhibiting the ability to save not only for retirement, but for other lifetime goals, such as buying a home and paying for a college education.

The Paycheck Fairness Act will empower women to negotiate for equal pay, create incentives for employers to follow the law, and strengthen Federal outreach, training, and enforcement efforts. Investing in policies that attract women is simply good for business. Companies that hire and retain more women gain a competitive edge, show stronger financial performance, and are able to access a larger pool of talent.

Simply put, equitable pay practices improve the bottom line and result in improved employee retention, positive human capital outcomes, and a much more productive workforce. In fact, the World Economic Forum's research estimates that closing the employment gender gap could increase the U.S. gross domestic product by up to 9 percent.

Women business owners know that hiring women and paying them equally is good for business. A quest for fair pay is often the reason women leave an employer to start their own company. Business owners like Debra Ruh support the Paycheck Fairness Act. Ms. Ruh owns TecAccess in Rockville, VA. She told BPW Foundation it would never occur to her to pay a woman less than a man. It would be short-sighted and bad for business because she would lose out on a creative, innovative, and loyal workforce.

It is supremely unfair to business owners like Debra Ruh, who are doing right by their employees, to have to compete on an unfair playing field against companies that discriminate and pay their women workers less. The current system creates a competitive advantage for discriminatory employers, and that is just not fair.

Now, businesses have nothing to fear from this bill. Under the Paycheck Fairness Act, businesses will still be allowed to pay their employees differently based on merit, quantity or quality of production, seniority, education, training, experience, or cost-of-living.

The clarification of the establishment requirement for comparing wages will help businesses because it will be more clear and consistent. There is funding for education programs, technical assistance for employers, and negotiation training to educate and empower women and girls. Employers that do right by their employees will be recognized by the Department of Labor.

The premise that this bill will bankrupt employers through an explosion of litigation and damages awards is just not true. As long as employers are paying equal pay for equal work, they have nothing to fear. And employers will not have to pay damages if the pay disparity was unintentional.

Businesses with written policies and a transparent evaluation process will find compliance easy and litigation less. The Paycheck Fairness Act's approach would ensure that women can obtain the same remedies as those subject to discrimination on the basis of race or national origin. Businesses already operate under these regulations. So there is nothing new for them to understand or learn.

In conclusion, BPW Foundation believes in a three-pronged approach to creating a successful workplace. Legislation, like the Paycheck Fairness Act and Fair Pay Act, partnering with businesses to proactively implement and update their own workplaces.

As Senator Dodd pointed out, the military is a business with clear pay equity policies. Military pay is published annually in a table available for all to see. BPW Foundation has conducted ground-breaking research on this unique cohort of women as they transition from active duty to the civilian workforce.

What we have found out is that among the women veterans we surveyed, 72.3 percent said the one thing that was very important to them in a civilian job was fair compensation. Isn't it noteworthy and a rather sad commentary that women veterans start to experience unequal pay practices when they transition to the civilian workforce?

We also believe in the final prong being empowering women through education. In fact, BPW Foundation's Red to Green Project, which trains women in jobs for the green economy, has Climb Wyoming as one of the benefactors. We must ensure that all careers can be pursued equally by all genders.

Pay equity is important to Business and Professional Women's Foundation because it is important to the well-being of working women, their families, and workplaces. The Paycheck Fairness Act will help to rebuild the workforce and transform workplaces into those that work for women, their families, and employers.

Thank you.

[The prepared statement of Ms. Frett follows:]

PREPARED STATEMENT OF DEBORAH L. FRETT

PAY EQUITY IS GOOD FOR BUSINESS AND GOOD FOR WORKING WOMEN

SUMMARY

Business and Professional Women's Foundation partners with women, employers and policymakers to create successful workplaces that practice and embrace diversity, equity and work-life balance. We have a network of supporters which includes both employers and employees across the country and both our employee and employer members support pay equity because they know it's good for business and workers.

One of the most significant trends of the past 50 years has been the movement of women into the paid labor force and the growth of women-owned businesses. Women now make up half of the U.S. workforce and women-owned firms represent 30 percent of all U.S. businesses. But despite all these gains, the Census Bureau reports that, on average, full-time working women earn only 77 cents to every dollar earned by men. This wage gap is not simply a result of women's education levels or personal choices and hurts working women and employers today and in the future.

The Paycheck Fairness Act and the Fair Pay Act will empower women to negotiate for equal pay, create incentives for employers to follow the law, and strengthen federal outreach, training and enforcement efforts.

Investing in policies that attract women is simply good for business. Companies that hire and retain more women gain a competitive edge, show stronger financial performance and are able to access a larger pool of talent. Equitable pay practices result in improved employee retention, positive human capital outcomes and a more productive workforce. Women business owners know that hiring women and paying them equally is good for business. The current system is unfair to those employers who treat their employees fairly because it creates a competitive advantage for discriminatory employers.

Business has nothing to fear from the Paycheck Fairness Act.

- Under the Paycheck Fairness Act, businesses will still be allowed to pay their employees differently based on merit, quantity or quality of production, seniority, education, training, experience or cost of living.

- The clarification of the "establishment" requirement for comparing wages will help businesses because it is clear and consistent.

- There is funding for education programs, technical assistance for employers and negotiation training to educate and empower women and girls.

- Employers that do right by their employees will be recognized by Department and Labor.

As long as employers are paying equal pay for equal work, they have nothing to fear. Businesses with clearly written policies and practices which are implemented as well as a proactive review of the wages of existing employees will find compliance easy.

BPW Foundation believes in a three-pronged approach to creating a successful workplace.

1. Legislation like the Paycheck Fairness Act and the Fair Pay Act;
2. Partnering with businesses to proactively implement and update their own workplace policies; and
3. Empowering women through education.

Pay equity is important to Business and Professional Women's Foundation because it is important to the well-being of working women, their families and workplaces. The Paycheck Fairness Act and the Fair Pay Act will help to rebuild the workforce and transform workplaces into those that "work" for women, their families and employers.

INTRODUCTION

Chairman Harkin, Ranking Member Enzi and distinguished members of the committee, thank you for this opportunity to testify today on behalf of Business and Professional Women's Foundation in support of equal pay for women and the Paycheck Fairness Act (S. 182) and the Fair Pay Act (S. 904).

Business and Professional Women's Foundation (BPW Foundation) partners with women, employers and policymakers to create successful workplaces that practice and embrace diversity, equity and work-life balance. Through our groundbreaking research and our unique role as a convener of employers and employees, BPW Foundation leads the way in developing and advocating for policies and programs that "work" for both women and businesses. A *successful workplace* is one where women can succeed and businesses can profit.

BPW Foundation has a network of supporters that includes both employers and employees in every community across the country. Both our employee and employer members support pay equity because they know it's good for business and workers.

SEVENTY-SEVEN CENTS ON THE DOLLAR

Forty-seven years after President John F. Kennedy signed the Equal Pay Act ensuring "equal pay for equal work," the Census Bureau reports that in 2008, on average, full-time working women earn 77 cents to every dollar earned by men *annually*. At the time of the Equal Pay Act's passage in 1963, women earned 59 cents to every dollar earned by men, but progress has slowed and the gender wage gap closed by less than a penny between 2007 and 2008. Things are even worse for women of color. In 2009, the ratio of women's to men's *weekly* earnings was 80.2 percent, but African-American women on average only earned 68.9 percent for every dollar earned by a white male per week, and Hispanic/Latina women only 60.2 cents.¹

This wage gap is not simply a result of women's education levels or personal choices.² A 2003 Government Accountability Office study concluded that even after accounting for "choices" such as work patterns and education, women earn an average of 80 cents for every dollar that men earn.³ Moreover, the Government Accountability Office has found that women with children earn about 2.5 percent less than women without children, while men with children enjoy an earnings boost of 2.1 percent, compared with men without children. So mothers pay a penalty for their choices while fathers receive a bonus.

This persistent wage gap not only impacts the current economic security of women and their families; it directly affects the future financial security of many U.S. families. Women lose an average of \$434,000 in income over a 40-year career due to the gender wage gap.⁴ Wage discrimination lowers total lifetime earnings, reducing women's benefits from Social Security and pension plans and inhibiting their ability to save not only for retirement but for other lifetime goals such as buying a home and paying for a college education.

Although enforcement of the Equal Pay Act as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. Senators, although the gap has narrowed, it is now time for you to weigh in with your votes to help to continue to close the gap. This issue is still vital to both the growth and economic health of businesses but also the growth and economic health of individual women. The Paycheck Fairness Act (S. 182) and the Fair Pay Act (S. 904) will strengthen the Equal Pay Act in ways necessary to guarantee that women workers are not shortchanged solely because of their gender.

The Lilly Ledbetter Fair Pay Act, signed into law on January 23, 2009, ensured that victims of discrimination have fair access to the courts. Passage of the Lilly Ledbetter Fair Pay Act in the first days of the 111th Congress was clear recognition that wage discrimination is still a very real problem in the United States, but additional changes are still needed to close the persistent gap between men's and women's wages.

¹Institute for Women's Policy Research Fact Sheet. *The Gender Wage Gap: 2009*. March 2010. <http://www.iwpr.org/pdf/C350.pdf>. Annual data for 2009 is not yet available.

²U.S. Department of Education, National Center for Education Statistics, *Baccalaureate and Beyond Longitudinal Study, 1993/2003*; Bureau of Labor Statistics, *Employment Status of Women by Presence and Age of Youngest Child, Marital Status, Race, and Hispanic or Latino Ethnicity*, 2004, <http://www.bls.gov/cps/wlf-table6-2005.pdf>.

³General Accounting Office, *Women's Earnings: Works Patterns Partially Explain Difference Between Men's and Women's Wages*, GAO-04-35, October 2003, <http://www.gao.gov/new.items/d0435.pdf>.

⁴Jessica Arons, *Lifetime Losses: The Career Wage Gap*, Center for American Progress Action Fund, December 2008, http://www.americanprogressaction.org/issues/2008/pdf/equal_pay.pdf.

One of the most significant trends of the past 50 years has been the movement of women into the paid labor force and the growth of women-owned businesses. Women now make up half of the U.S. workforce and are projected to account for 49 percent of the increase in total labor force growth between 2006 and 2016.⁵ Women-owned firms represent 30 percent of all U.S. businesses and between 1997 and 2004 the number of women-owned firms increased by 17 percent nationwide—twice the rate of all firms.⁶

Investing in policies that attract women is simply good for business. Companies that hire and retain more women gain a competitive edge. These companies show stronger financial performance and are able to draw from a broader pool of talent in an era of talent shortages.

The jobs of the future are going to call for more education, more critical thinking and more compassion—all skills women have in abundance. Research shows a correlation between high numbers of female senior executives and stronger financial performance. According to McKinsey and Company research, companies worldwide with the highest scores on nine key dimensions of organization—from leadership and direction to accountability and motivation—are likely to have higher operating margins than their lower ranked counterparts. Among the companies for which information on the gender of senior managers was available, those with three or more women on their senior-management teams scored higher on all nine organizational criteria than did companies with no senior-level women.⁷ Companies that have moved successfully to increase the hiring, retention and promotion of female executives tend to perform better financially.

Pay equity is good for business and will result in improved employee retention, positive human capital outcomes, and a more productive work force. In addition to talent, acquisition gender diversity helps companies meet business goals. One European Commission study showed that 58 percent of companies with diversity programs reported higher productivity as a result of improved employee motivation and efficiency, and 62 percent said that the programs helped attract and retain highly talented people.⁸

Women business owners know that hiring women and paying them equal pay is good for business. A quest for fair pay is often the reason highly skilled women leave an employer to start their own companies. Business owners like Debra Ruh support the Paycheck Fairness Act. Ms. Ruh owns TecAccess in Rockville, VA. TecAccess is a consulting firm that helps companies update their web and information technology systems in order to reach and better serve people with disabilities. Like many women business owners, Ms. Ruh struck out on her own so that she could run a business her way. She told BPW Foundation it would never occur to her to pay a woman less than a man; it would be short-sighted and bad for business—she would lose out on a creative, innovative and loyal workforce. It would be supremely unfair to business owners like Debra Ruh who are doing right by their employees to have to compete on an unfair playing field against companies that discriminate and pay their women workers less.

Ms. Ruh could not be here today because she is busy running her business, but she wanted me to tell her story.

“I created my business because people with disabilities do not have equal access to employment. It is sad that after so many years in the workforce, women still do not get paid the same as their male counterparts. If we can’t pay women equal pay, it causes all other minority groups to become more and more disenfranchised. It is hard to believe that today, women are not paid fair and equal wages compared to their male peers. Many countries look to the United States to lead the way with civil rights and it is time to pay women what they deserve. Please support the Paycheck Fairness Act.”

Many employers recognize that eliminating pay differentials makes good business sense and can help with competitiveness, worker retention and productivity. Another such employer is business owner Heather Jernberg, a partner at Boreas Group, a management consulting firm that specializes in technology planning for utility companies in Denver, CO. The Boreas Group is 7-years old and nets over \$1 million a year. Ms. Jernberg supports the Paycheck Fairness Act.

⁵ U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, 2008 Annual Averages and the *Monthly Labor Review*, November 2007.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

“I believe that all workers have a right to know what their peers are earning, in order to negotiate the best possible salary for themselves. By prohibiting employer retaliation, women and men will be able to research wages without fear of recrimination at their company. I have worked for organizations where my salary was published in the local paper and companies where I risked being fired for discussing my paycheck with co-workers. I prefer full disclosure of wage information.”

PAYCHECK FAIRNESS ACT (S. 182)

The Paycheck Fairness Act will update and strengthen the Equal Pay Act, closing loop holes and improving the law’s effectiveness. The Equal Pay Act of 1963 has not lived up to its promise to provide “equal pay for equal work.” The Paycheck Fairness Act would take meaningful steps to empower women to negotiate for equal pay, create incentives for employers to follow the law and strengthen Federal outreach and enforcement efforts. BPW Foundation has been fighting for equal pay for women for over 90 years and supports the Paycheck Fairness Act because it is a common-sense approach to closing the gap between men’s and women’s wages.

The Paycheck Fairness Act will:

- clarify the justifiable reasons for wage disparities and what “establishment” means when comparing wages;
- prohibit retaliation for disclosing wages;
- increase training, data collection and education on the gender wage gap; and
- develop voluntary guidelines for employers and recognize model employers.

Under the Paycheck Fairness Act, businesses will still be allowed to reward employees with merit and performance-related increases. Wage differentials based on merit, quantity or quality of production, seniority, education, training or experience are still allowed under the law. However, if a business wants to pay men and women doing the same job differently, there must be a business reason for doing so. Discrimination based on factors that are used as substitutes for gender such as a male worker’s stronger salary negotiation skills or an assumption that women will work for less would not be allowed.

The clarification of the “establishment” requirement will help businesses. Currently, courts in different jurisdictions have interpreted the establishment requirement in the Equal Pay Act differently which has led to unpredictability. Some courts have defined the term “establishment” narrowly to mean only employees in the same building. The Paycheck Fairness Act clarifies that a comparison between employees to determine fair wages need not be between employees in the same physical place of business. The Paycheck Fairness Act allows plaintiffs to compare their pay to individuals doing the same job at a location within the same county, parish or similar geographic jurisdiction.

The Paycheck Fairness Act addresses the causes of the wage gap along with the results. This legislation would provide funding for education programs, employer guidelines and technical assistance as well as recognition of good practices by employers. In addition, there is a competitive grant program to develop salary negotiation training for women and girls. The Paycheck Fairness Act also recognizes that there are many employers doing right by their employees and establishes a recognition program through the Department of Labor for those employers.

Employers in violation of the Equal Pay Act receive an unfair advantage. The current system is unfair to those employers who treat their employees fairly because it creates a competitive advantage for discriminatory employers. Currently, it is worthwhile for some businesses to pay a woman less than her male counterparts, and gamble that she won’t sue for back wages in the future. If she doesn’t sue, the employer keeps the “savings”; if she does, the employer only has to pay 2 years of back pay. This encourages discriminatory pay.

Employers will NOT have to pay damages if the pay disparity was unintentional. Punitive damages are only awarded if the plaintiff can demonstrate that the employer acted with malice or reckless indifference.

Employers are allowed to pay workers at some work sites more because the cost of living is higher in that location. Under the Paycheck Fairness Act, employers can justify wage disparity based on objective and identifiable differences in the cost of living. The Paycheck Fairness Act clarifies that a plaintiff can only compare her pay to that of an individual doing the same job at a location within the same county.

The Paycheck Fairness Act does not impose onerous data collection. The Paycheck Fairness Act would require the Equal Employment Opportunity Commission to develop regulations directing employers to collect gender wage data which they already collect for race and national origin in compliance with title VII.

BUSINESS HAS NOTHING TO FEAR

The Paycheck Fairness Act will not bankrupt employers through an explosion of court cases, class-action lawsuits and damages awards as long as they are paying equal pay for equal work. Businesses which have clearly written policies and practices and proactively review the wages of existing employees will find compliance with the Paycheck Fairness Act easy. Development and adoption of formal, written pay equity policies are crucial to addressing the gender wage gap. Such policies lay the groundwork for unbiased compensation systems and provide metrics for analyzing salaries to identify disparities.

The Paycheck Fairness Act would ensure that women can obtain the same remedies as those subject to discrimination on the basis of race or national origin. The Paycheck Fairness Act extends to victims of sex-based discrimination the same standards for class action lawsuits and the same options for damages that are currently available in cases of race-based or national origin discrimination. The Equal Pay Act does not currently allow the award of compensatory or punitive damages. Currently, women who have been unfairly paid less than their male counterparts are only entitled to recover 2 years of their unpaid wages. Those subject to race and national origin discrimination are eligible for compensatory or punitive damages and are not subject to damages caps. Women and men who endure sex-based wage discrimination should be entitled to the same remedies as those available in race and national origin cases. These are regulations familiar to business and with which they are already complying.

There are protections for business in existing law. There are limits on improperly high verdicts. Punitive damages are only awarded if the employer intentionally discriminated and acted with “malice or reckless indifference to the plaintiff’s federally protected rights.” In addition, there are protections for business against excessive damages awards in the legal process. If a judge feels a jury award is excessive, the judge can reduce or vacate the amount. Finally, there are constitutional limitations on the amount of punitive damages that a plaintiff can receive.

FAIR PAY ACT (S. 904)

The persistent gap between men’s and women’s wages requires a many pronged approach. That is why BPW Foundation also supports the Fair Pay Act (S. 904). The Fair Pay Act would require equal pay for equivalent jobs—jobs that are comparable in skill, effort, responsibility and working conditions. This “equivalent” requirement is not present in the Paycheck Fairness Act. The Paycheck Fairness Act does not address “comparable worth” or apply any such guidelines to employers.

The Fair Pay Act would also require employers to disclose pay scales and pay rates, but not individual salary information, for all job categories at a given company. Providing information will prevent costly litigation and encourage informed pay discussions between employees and employers. Right now, women who suspect pay discrimination must file a lawsuit and go into a drawn out legal discovery process to find out whether they make less than the man beside them. With pay statistics readily available, this expensive process could be avoided. The number of lawsuits would surely decrease if employees could see up front that they were being treated fairly.

ELIMINATING THE WAGE GAP IS GOOD FOR FAMILIES AND FOR BUSINESS

Making the workplace a level “paying” field is good for women, their families and business. If the wage gap were eliminated, annual family income would increase by \$4,000. Single mothers would take home an average of 17 percent more; single women, 13.4 percent; and married women, 6 percent in income if they were paid fairly.⁹ Additionally, society loses out on tax revenue and purchasing power from women who are not paid a fair wage.

BPW Foundation believes in a three-pronged approach to creating a successful workplace.

1. Legislation like the Paycheck Fairness Act and the Fair Pay Act;
2. Working with businesses to proactively implement and update their own workplace policies; and
3. Empowering women through education.

Pay equity is important to BPW Foundation because it is important to the well-being of working women, their families and workplaces. The Paycheck Fairness Act

⁹AFL-CIO & Institute for Women’s Policy Research, *Equal Pay for Working Families: National and State Data on Pay Gap and its Costs, 1999*. <http://www.iwpr.org/pdf/C343.pdf>.

will move us along the road toward successful workplaces for employers and employees.

Thank you.

Senator DODD. Thank you very, very much. Appreciate it.

Ms. McFetridge, thank you.

**STATEMENT OF JANE M. McFETRIDGE, ESQ., PARTNER,
JACKSON LEWIS LLP, CHICAGO, IL**

Ms. McFETRIDGE. Mr. Chairman and members of the committee, thank you for this opportunity to testify here today.

I represent employers in claims of employment discrimination. My firm represents thousands of employers who will be severely impacted should the Paycheck Fairness Act become law.

For the last 30 years, I have been an active member of the U.S. workforce, and for more than 20 of those years, I have represented companies in labor and employment disputes. I am an employer myself. I am also a working mother of two daughters, one of whom is in college and, hopefully, will be joining the workforce herself in the near future.

The Paycheck Fairness Act is theoretically designed to help people like me and to lay a better foundation for my daughters and women of their generation. If I thought for a moment that the act would help women generally or, more specifically, my daughters and their peers, I would not be here testifying today.

The Paycheck Fairness Act will very negatively impact businesses in this country and the people who comprise them, including women, for a number of reasons. First, the act would provide unlimited punitive and compensatory damages for any size business. In effect, the act proposes a legal and regulatory schematic akin to what is currently in effect in California, pursuant to that State's laws, which provide for unlimited damages in discrimination cases.

One does not need to be a practitioner of labor and employment law, or even a lawyer, to take note of the problems this has caused in California. California has many, many times more litigation of this nature than any other State in the country. And the cost of doing business there is significantly higher than in other locations.

Indeed, I have clients who have made the affirmative decision not to do business in California for this very reason, even though the State has large markets that would otherwise readily lend themselves to their business models.

The act also provides for opt-out class actions. When coupled with unlimited damages, there would be a watershed of this type of extraordinarily oppressive and expensive litigation. Historically, damages caps have been effective to both deter frivolous lawsuits and to protect employers, especially small businesses, from financial ruin as a result of unusually large awards. The pending legislation has no such constraints and thus has the potential to cripple companies, particularly smaller businesses.

The result is untenable in light of President Obama's recent statements about small businesses being one of the biggest drivers of employment that we have, as well as recent efforts by Congress to spur job creation through a variety of record-setting costly stimulus and job creation initiatives. In the midst of this financial cri-

sis, we should be encouraging small businesses to expand, not making it more difficult for them to operate and survive.

Second, the act proposes extraordinarily complex changes to affirmative defenses available to employers in claims of this nature. It will take years of costly litigation to sort out what is meant by these new affirmative defenses with our courts serving as super human resources departments, a role they have long decried.

In the meantime, employers are left with little guidance as to how to conduct their businesses under this new paradigm. Small businesses may not have a human resources professional, let alone a compensation expert or an in-house counsel. Such businesses are not going to be in a position to determine if their pay practices comply with the new affirmative defense parameters.

As a practical matter, there is simply no way an employer will be able to demonstrate that each and every pay determination it makes is consistent with business necessity. There may be dozens or hundreds of factors that go into determining an employee's compensation—some objective and some subjective, and all of which are legitimate nondiscriminatory bases.

Consider, for example, jobs that require personal interaction, like a waitress or a salesperson. Under title VII, employers may consider unquantifiable qualities, such as a friendly disposition or positive attitude. This is also true currently under the Equal Pay Act. Under the Paycheck Fairness Act, however, pay differentials based upon such immeasurable qualities may be impermissible.

Consider also a company, for instance, a retail establishment, that has made the decision to give hiring preferential for entry-level sales positions to applicants with college degrees, even though a salesperson probably doesn't need a college degree to do that particular job.

Under the proposed legislation, the company's nondiscriminatory preference for college graduates could be challenged as not consistent with business necessity. In this scenario, it is the government and not the business owner who would be making decisions about how businesses should run.

The fact that there is an unexplained gender wage gap, which, by many calculations, is as little as 5 percent, does not mean that the differential is attributable to discrimination, as proponents of the Paycheck Fairness Act suggest. Rather, it means only what it states, that there is an unexplained differential.

The pay differential has steadily improved over the last 40 years, and there is no reason to believe that the current legal landscape, which has ushered in this change, will not continue to address the issues that remain, particularly with robust diversity initiatives and training programs, such as that discussed by Senator Enzi, that enable women to assume higher-paying nontraditional positions.

A review of EEOC statistics further demonstrates the point. In 2009, the EEOC found reasonable cause in only 4.6 percent of the EPA charges and 5 percent of the title VII sex discrimination charges that it received, demonstrating the vast majority of employees who filed charges do not have valid claims. Moreover, in claims where the EEOC found a basis to proceed, successful parties received over \$126 million in compensation, proof positive that the

EEOC is already identifying and compensating the true victims of pay discrimination.

The Paycheck Fairness Act would not only discourage employers from creating new jobs. It may force them to eliminate existing jobs if large components of their operating budgets are diverted from payroll to defending unnecessary litigation prompted by the passage of this legislation.

I have heard proponents of this suggest that baseless claims would be readily dismissed. Anyone suggesting that has not personally been involved with litigation of this nature. I know firsthand that baseless claims can take years to resolve, years during which companies spend thousands and thousands of dollars responding to discovery, diverting personnel to assist the lawyers with the litigation, and paying their outside counsel.

And I should also note that many of the people involved with that litigation are women themselves, either in managerial roles or as witnesses. Many companies just throw in the towel early on to avoid these protracted costs and disruptions. Creating greater incentives for baseless litigation will only increase the problem.

At its core, the Paycheck Fairness Act will cause confusion in the workplace and in the courts. It will take years of expensive litigation to understand and define its terms. The plaintiffs' bar will benefit. My firm, and me personally, may well benefit. My daughters and working women across the country, however, will not.

Though we are not quite at the finish line, our existing legal framework, including title VII and the EPA and the Lilly Ledbetter Act, has proven successful in narrowing the wage gap. It would be ill-advised to disrupt this framework with legislation that will do nothing but impede the ability of American companies to compete in the global marketplace.

Thank you.

[The prepared statement of Ms. McFetridge follows:]

PREPARED STATEMENT OF JANE M. MCFETRIDGE, ESQ.

Mr. Chairman and members of the committee, thank you for this opportunity to testify on S. 182, the Paycheck Fairness Act. My name is Jane McFetridge. I am a Partner at Jackson Lewis LLP, where I manage the firm's Chicago office.¹ Jackson Lewis is a national law firm of over 600 lawyers in 45 offices, all of whom are dedicated exclusively to the practice of labor and employment law. For over 20 years, I have represented employers in all types of employment discrimination litigation, including class actions, collective actions, and multi-plaintiff lawsuits brought both by private parties and by the Equal Employment Opportunity Commission. I also routinely counsel businesses, from very small to extremely large, on a wide variety of human resources and employment law-related issues and concerns, and have spoken and written frequently on employment law topics in this subject area. I have extensive experience dealing with the Equal Employment Opportunity Commission and the U.S. Department of Labor, as well as State and local labor and employment agencies throughout the United States.

You have asked me to speak about the Paycheck Fairness Act. As you might expect, given my background and my area of practice, I have some strong opinions on this topic. Those opinions are informed not just by experience as an employment litigator, but as a working mother who has been an active participant in the U.S. workforce for the last 30 years. I am the mother of two daughters. One is in college now and will hopefully join the workforce soon, and the other is a few years behind. If I believed the Paycheck Fairness Act would advance the goal of eradicating gender discrimination in the workplace, I would ardently support the measure—not just for myself and others like me, but for my two daughters and women of their genera-

¹The views expressed herein are my own.

tion. However, based upon my own personal experience, as well as my legal work representing employers, it is my unequivocal belief that passage of the Paycheck Fairness Act is not the solution.

The Paycheck Fairness Act would preclude employers from making market-based pay determinations, encourage frivolous litigation, and expose companies to financial ruin by way of uncapped punitive damages and massive class action litigation. Rather than eliminating discrimination, the legislation, if passed, would provide a windfall to attorneys who litigate employment discrimination cases, but result in no meaningful change in the extant wage differential. Furthermore, the Paycheck Fairness Act would levy enormous cost on companies and employers already reeling from the worst economic crisis we have seen in most of our lives.

Numerous studies demonstrate that women have made vast strides in the workforce since enactment of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.

Though we are not quite at the finish line, the existing legal framework has proven successful in narrowing the wage gap and compensating victims of unlawful discrimination. It would be ill advised to disrupt that framework with onerous legislation that will do nothing but impede the ability of American companies to compete in the global marketplace, and serve no real ameliorative or beneficial purpose, other than to increase financial opportunities for both the plaintiffs' and defense bar.

CURRENT PROTECTIONS AGAINST GENDER-BASED PAY DISCRIMINATION

While women have not always enjoyed the same wages for the same work as men, great inroads have been made over the past 45 years to bring about pay equality between the sexes. Most notably, Congress has passed two comprehensive pieces of legislation—the Equal Pay Act of 1963 (“EPA”) and Title VII of the Civil Rights Act of 1964 (“title VII”)—which strike at the heart of gender-based pay discrimination. In addition to the EPA and title VII, which will be discussed in more detail below, many States also have their own laws that prohibit employers from discriminating against women. For instance, my home State of Illinois has passed both the Illinois Equal Pay Act and the Illinois Human Rights Act, both of which prohibit Illinois employers—many of whom are not covered by the Federal EPA or title VII—from discriminating on the basis of sex with respect to compensation. Additionally, Executive Order 11246, enforced by the Office of Federal Contract Compliance Programs (“OFCCP”), prohibits Federal contractors and subcontractors from discriminating in employment decisions on the basis of sex. This legislative and executive framework, when taken in conjunction with voluntarily-implemented diversity initiatives and training programs, provides sufficient assurances that we as a country are well on our way to addressing any remaining pay disparity that may exist between the sexes as a result of unlawful discrimination.

Mechanics of the EPA.—Enacted by Congress in 1963, the EPA provides that no employer may pay a female employee less than a male employee for “substantially equal” work. To present a *prima facie* case of discrimination under the EPA, a plaintiff must show that an employer pays workers of one sex more than workers of the opposite sex for jobs substantially equal in skill, effort, and responsibility, assuming those jobs are performed under similar working conditions within the same establishment. Where this is the case, an employer will be held liable unless it can demonstrate that the differential results from: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) any factor other than sex.² Critically, there is no requirement that a plaintiff prove any discriminatory intent or animus on the part of her employer in order to recover.³

Successful plaintiffs may recover back pay, front pay (if unlawful retaliation is proven), prejudgment interest, attorneys’ fees and costs.⁴ Moreover, where willfulness is shown, an additional amount equal to the back pay found to be due and owing may be awarded as liquidated damages, and the defendant may also be fined up to \$10,000 and imprisoned for up to 6 months.⁵

² 29 U.S.C. § 206(d)(1).

³ See 29 U.S.C. § 206(d)(1) (making clear that the only relevant inquiry is whether the alleged pay disparity resulted from “any factor other than sex”); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310–11 (10th Cir. 2006).

⁴ 29 U.S.C. § 216(b).

⁵ *Id.*; 29 U.S.C. § 216(a).

Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission (the “EEOC”), which may bring its own suits to enforce the law.⁶

Mechanics of Title VII.—Similarly, title VII also prohibits compensation discrimination on the basis of enumerated protected characteristics—including sex.⁷ An employee may assert a claim for gender-based pay discrimination by filing a charge of discrimination with the EEOC and later bringing a lawsuit in Federal court upon receipt of her notice of right to sue (regardless of whether the EEOC finds “cause” for concluding that discrimination occurred). Employees need not be represented by counsel to participate in the EEOC processes, including the investigation of their charge. Indeed, as the U.S. Supreme Court has reiterated, title VII “sets up a ‘remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process.’”⁸ An attorney may also not be necessary at the litigation stage should the EEOC determine to file suit on the employee’s behalf.

Plaintiffs alleging gender-based pay discrimination in violation of title VII may do so by either showing disparate treatment or disparate impact. Generally, in a disparate treatment case, the McDonnell Douglas burden-shifting analysis applies. A plaintiff must first establish a *prima facie* case of pay discrimination. The burden then shifts to the employer to offer evidence of a legitimate, non-discriminatory reason for the pay differential. If the defendant meets this burden of production, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the employer’s explanation is a pretext for unlawful sex discrimination.

In contrast, in a typical title VII disparate impact case, a plaintiff must first identify a specific policy or practice with a statistically significant adverse impact on women; the plaintiff need not allege any discriminatory intent. Once the plaintiff has made this showing, the burden then shifts to the employer to produce evidence that the policy or action was “job-related for the position in question and consistent with business necessity.”⁹ Ultimately, the plaintiff may still prevail if she can prove that the employer refused to adopt “an available alternative employment practice that has less disparate impact and serves the employer’s legitimate needs.”¹⁰

Historically, an employer found guilty of pay discrimination under title VII was subject to injunctive relief, as well as back and front pay. When Congress passed the Civil Rights Act of 1991, however, it made compensatory and punitive relief available in cases involving unlawful *intentional* discrimination.¹¹ To receive punitive damages, which are subject to a statutory cap, the complaining party must show that “the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”¹²

THE EXISTING LEGAL FRAMEWORK IS WORKING AND THERE IS NO EVIDENCE THE WAGE GAP TODAY, SUCH AS IT IS, STEMS FROM EMPLOYER DISCRIMINATION

Proponents of S.182 oft-cite that, despite the existing legal framework, women continue to make only 77 percent of men’s wages. Not only is this figure overly simplistic in that it is based on the median earnings of men and women as compiled by the U.S. Census Bureau, but the statistic is bandied about as if it were an automatic indication of employers’ discrimination against women. This is simply not the case.

During the past three decades, women have made notable gains in the workforce and in pay equity, including significant gains in real earnings, increased labor force participation, advances in educational attainment, and employment growth in higher paying occupations. Indeed, the U.S. Department of Labor (“DOL”) has recognized that while the median usual weekly earnings for women working full-time in 1970 was only 62.1 percent of those for men, the raw wage gap had shrunk from 37.9 percent to just 21.5 percent by 2007.¹³

Moreover, there are observable differences in the workforce attributes of men and women that account for much of the remaining wage gap. According to a January

⁶In 1986, the EEOC issued detailed regulations entitled “EEOC’s Interpretations of the Equal Pay Act,” 29 CFR § 1620, *as amended*. In 2006, additional regulations were issued, 29 CFR § 1621, *as amended*.

⁷42 U. S. C. § 2000e–2(a).

⁸*Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (Feb. 27, 2008).

⁹42 U. S. C. § 2000e–2(k)(1)(A)(i).

¹⁰*Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (June 29, 2009) (referencing 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C)).

¹¹42 U.S.C. § 1981a(a)(1).

¹²42 U.S.C. § 1981a(b)(1).

¹³U.S. Department of Labor, *Foreword to CONSAD RESEARCH CORPORATION, AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN*, at 1 (Jan. 12, 2009).

2009 report prepared for the DOL by CONSAD Research Corp., these variables include:

- A greater percentage of women than men work part-time, which tends to pay less than full-time work.
- A greater percentage of women than men tend to leave the labor force for child birth, or to care for their children or elderly relatives. Part of the wage gap is explained by the percentage of women who were not in the labor force during previous years, the number of children in the home, and the age of women.
- Women, especially working mothers, tend to value “family friendly” employment policies more than men, and are often willing to accept a lower paying job in return for such policies. Part of the wage gap is therefore explained by industry and occupation, particularly, the percentage of women who work in a particular industry and occupation.¹⁴

After adjusting for these non-discriminatory variables, the adjusted gender wage gap is between 4.8 and 7.1 percent, and some, or all, of the remaining differential may be explained by factors not included in the CONSAD study due to data limitations.¹⁵ For instance, the CONSAD study focused on wages rather than total compensation.¹⁶ Research indicates that women may value non-wage benefits more than men do, and consequently choose to take a greater part of their compensation in fringe benefits, such as health insurance.¹⁷ Furthermore, the fact that there is an unexplained gender wage gap does not mean that the differential is attributable to discrimination, as proponents of the Paycheck Fairness Act suggest. Rather it means only what it states—that there is an *unexplained* differential.

Similarly, according to a study of the Federal workforce conducted by the U.S. Government Accountability Office (the “GAO”), “all but about 7 cents of the [wage] gap can be explained by differences in measurable factors such as the occupations of men and women and, to a lesser extent, other factors such as education levels and years of Federal experience.”¹⁸ “[F]actors for which we lacked data or are difficult to measure, such as experience outside the Federal Government, may account for some or all of the remaining pay gap.”¹⁹ Even looking at the “raw” data, the wage gap in the Federal workforce declined from 28 percent in 1988 to 11 percent in 2007.²⁰

It is my firm belief that any wage gap between men and women is unacceptable. However, it is important that we talk about real numbers and not the misleading “raw wage gap” proponents of the Paycheck Fairness Act repeatedly point to. Employers cannot control their employees’ educational and career choices. Nor can employers interfere with an employee’s choice to enter or leave the workforce, or work a part or flex-time schedule, in order to care for her family. All an employer can do is pay two similarly-situated employees the same salary regardless of gender. That is what the law requires. Based on the results of the CONSAD and GAO studies, this is also what most employers appear to be doing. As the DOL stated in its Foreword to the CONSAD report, “[T]he raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of individual choices being made by both male and female workers.”²¹

THE EXISTING LEGAL FRAMEWORK PROTECTS VICTIMS OF UNFAIR PAY DISCRIMINATION

This is not to say that employers do not occasionally, intentionally or otherwise, make discriminatory pay decisions based on gender. When this occurs, both the EPA and title VII, as well as commensurate State and local laws, provide multiple avenues for women to pursue claims of unequal pay for equal work, including directly bringing a lawsuit on their own behalf, filing a charge with the EEOC, having the EEOC bring a lawsuit on their behalf, or bringing a collective action or class action on behalf of similarly-situated employees.

Multiple forms of redress are available to plaintiffs.—From an employee’s perspective, the EPA may be the most favorable and lenient of the statutes with

¹⁴ *Id.* at –1–2.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN’S PAY: CONVERGING CHARACTERISTICS OF MEN AND WOMEN IN THE FEDERAL WORKFORCE HELP EXPLAIN THE NARROWING PAY GAP, at 2 (Apr. 28, 2009) (Statement of Andrew Sherrill, Director, Education, Workforce, and Income Security Issues, Before the Joint Economic Committee, U.S. Congress).

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.S. Department of Labor, *supra* note 13, at 2.

respect to both the ease of pursuing a claim against an employer (without the need to first exhaust administrative remedies) and the relatively low standard for establishing liability (what amounts to strict liability). However, an employee may also choose to bring a title VII claim in order to recover punitive and compensatory damages (as opposed to back pay and liquidated damages) or in order to institute an opt-out class action. Indeed, it is not uncommon for women alleging pay discrimination to bring parallel claims under both the EPA and title VII, as well as under State and local antidiscrimination laws, to ensure that they receive the fullest protection of the law. When parallel claims are brought, plaintiffs may recover under both statutes for the same period of time provided they do not receive duplicative recovery for the same “injury.” As such, they may recover back pay, front pay, compensatory damages, liquidated damage, punitive damages, and injunctive relief. As more fully illustrated in the chart attached as Appendix 1, the passage of the Paycheck Fairness Act will not increase the protections afforded to women allegedly suffering pay discrimination.

Plaintiffs are taking advantage of existing statutes.—Proponents of the Paycheck Fairness Act may point to EEOC and employment litigation statistics to demonstrate that women are still victims of unlawful compensation discrimination. What these statistics prove to me, however, is that the average employee is well aware of her right to be free of discrimination in the workforce, and readily seeks redress when she feels her rights have been violated.²² Indeed, according to the Statistical Abstract of the United States 2010, there were 13,036 employment cases commenced and 15,452 cases pending in U.S. District Courts in 2008.²³ There are thousands more pending in State courts throughout the country.

At the administrative level, charge receipt statistics also remain strong. In 2009, the EEOC received a total of 942 charges under the EPA.²⁴ The EEOC found “reasonable cause” in only 4.6 percent of the charges, and successful parties received approximately \$4.8 million in compensation.²⁵ In addition to EPA charges, in 2009, the EEOC received 28,028 title VII sex discrimination charges generally, but found “reasonable cause” in only 5 percent of the charges, with successful parties receiving \$121.5 million in compensation.²⁶ These statistics demonstrate that the EEOC identifies and obtains compensation for true victims of pay discrimination. The statistics also demonstrate, however, that the vast majority of charges lack merit, as shown in the statistically small number of cause findings made by the EEOC after they have thoroughly investigated and evaluated the charging party’s allegations of discrimination. Passage of the Paycheck Fairness Act would only encourage additional frivolous charges.

Moreover, class-actions continue to serve as an aggressive mechanism for both vindicating the rights of victims of pay discrimination and incentivizing employers to root out any vestiges of such discrimination. For example:

- In 2004, Boeing Co. agreed to pay up to \$72.5 million to settle a sex-discrimination lawsuit filed on behalf of 29,000 current and former female employees at its Seattle area facilities. Under the settlement, Boeing also agreed to monitor salaries and overtime assignments, and to conduct annual performance reviews, in an effort to hold managers responsible for how they make salary and overtime decisions. The settlement affected non-executive salaried and hourly female workers, from janitors to first-level managers.²⁷

- In July 2007, a Federal district court in New York certified a class of female sales employees at Novartis Pharmaceuticals in a \$200 million lawsuit against the company. Among other evidence presented to the court, statistical evidence revealed that female employees were paid approximately \$75 per month less than their male counterparts.²⁸

- In July 2009, a Federal district court in Texas preliminarily approved a \$9.1 million settlement of a sex discrimination class action against Dell Inc. alleging that the company systematically discriminated against female employees in pay, pro-

²² Kevin M. Clermont & Stuart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, JOURNAL OF EMPIRICAL LEGAL STUDIES 429 (2004); See UNITED STATES COURTS JUDICIAL FACTS AND FIGURES, available at <http://www.uscourts.gov/judicialfactsfigures/2008/all2008judicialfactsfigures.pdf> (last visited Mar. 4, 2010).

²³ U.S. District Courts—Civil Cases Commenced and Pending: 2000 to 2008, available at <http://www.census.gov/compendia/statab/2010/tables/10s0323.pdf> (last visited Mar. 3, 2010).

²⁴ EEOC Equal Pay Act Charges, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm> (last visited Mar. 5, 2010).

²⁵ *Id.*

²⁶ EEOC Sex-Based Charges, available at <http://www.eeoc.gov/eeocstatistics/enforcement/sex.cfm> (last visited Mar. 5, 2010).

²⁷ *Beck v. Boeing*, 2004 U.S. Dist. LEXIS 27622 (W.D. Wash. April 4, 2004).

²⁸ *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243 (S.D.N.Y. July 31, 2007).

motions, terminations, and other terms and conditions of employment. In addition to the monetary award, the settlement agreement requires Dell to hire a labor economist to analyze existing compensation practices and recommend pay equity adjustments for current female employees. Dell is also required to hire an industrial psychologist to assist in policy formation regarding compensation, performance evaluations, hiring, promotions, and assignments.²⁹

- In the historic *Wal-Mart v. Dukes* gender discrimination class action, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's decision to certify a class of over 1.5 million past and present employees spread across 3,400 stores and positions throughout the country.³⁰ In February 2009, the Ninth Circuit agreed to an *en banc* rehearing. Several days before oral argument, on March 19, 2009, the EEOC submitted an *amicus curiae* brief to the Ninth Circuit, taking the position that class-wide punitive damages can be determined by a jury in title VII pattern or practice cases and back pay determinations may be made without individualized hearings when appropriate. The EEOC's decision to file an *amicus brief* in the *Wal-Mart* case is no doubt connected to its aggressive pursuit of potential systemic discrimination cases.

Given the media attention paid to such lawsuits, employers fully understand the seriousness of pay discrimination, and are keenly aware that any failure to take steps to eliminate unjustified pay disparities between men and women may lead to a tarnished reputation, significant financial expense in the form of legal fees and awards, the loss of valued employees, and the potential for judicial intervention in their business practices. The passage of the Paycheck Fairness Act will contribute nothing to employers' existing commitment to gender pay parity. What it will do, however, is place further stress on an already struggling business community, which is suffering through the worst economic crisis since the Great Depression.

RATHER THAN AMEND THE EPA, THE PAYCHECK FAIRNESS ACT WOULD CREATE A NEW LAW MORE BURDENSOME THAN ALL EXISTING FEDERAL ANTI-DISCRIMINATION LEGISLATION

By eliminating the EPA's "any factor other than sex" defense, the Paycheck Fairness Act would fundamentally change the EPA, contradict existing title VII precedent, and place an enormous drain on judicial resources.—The Paycheck Fairness Act seeks to replace the EPA's any factor other than sex" defense with a much more demanding "business necessity" requirement. Eliminating the EPA's "any factor other than sex" defense could essentially prohibit companies from making the kinds of individual pay decisions that are currently permissible under both the EPA and title VII, such as determinations based upon prior education and experience. As a result, employers could lose their ability to attract and retain the best talent by way of market-based incentives, and judges and courts across the country could be called upon to serve as "super-human resource departments," scrutinizing the reasoning behind pay decisions that have nothing to do with gender. Courts routinely denounce this role for good reason.

Under the EPA, employers are prohibited from paying women less than men for performing the same or "substantially equal" work in the same "establishment" unless the differential results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any . . . factor other than sex."³¹ If passed, the Paycheck Fairness Act would essentially eliminate the EPA's long-standing "any . . . factor other than sex" defense. Instead, employers would have to demonstrate that any pay differential is based on a "bona fide factor other than sex, such as education, training, or experience" and, among other requirements, is "consistent with business necessity." The defense would be inapplicable if the plaintiff demonstrates that "an alternative employment practice exists that would serve the same business purpose." If the employer fails to meet its evidentiary burden, it would be strictly liable for the pay disparity without any showing of intentional discrimination.

To understand the significance of this change, consider a common "factor other than sex": mergers and acquisitions. When one company acquires another, it absorbs differing pay scales, often times resulting in pay disparities that are wholly unconnected to sex. However, under the Paycheck Fairness Act's "business necessity" requirement, employers would arguably have to undertake a prompt review of these differing pay scales upon consolidation and normalize the disparities by ele-

²⁹ *Huble et al. v. Dell Inc.*, No. 08-cv-00804 (W.D. Tex.).

³⁰ *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. Dec. 11, 2007).

³¹ 29 U.S.C. §206(d)(1).

vating the lower salaries to the higher-paid salary (as the EPA does not allow employers to reduce salaries in response to a pay disparity).

Consider another, more routine example: a male store manager at a supermarket is paid more than a female store manager because he holds a college degree. Such a disparity could be illegal under the Paycheck Fairness Act if a court finds that enhanced compensation for supermarket managers with college degrees is not “consistent with business necessity.”³² Further, the female manager could argue that a program instituted by the supermarket where store managers without college degrees are taught the same skills they would have learned in college would serve the same business purpose. Even if the supermarket could ultimately prevail in a lawsuit, it may eliminate the “college degree incentive” and equalize pay just to avoid costly litigation.

The Paycheck Fairness Act could jettison an existing body of case law in which courts have said that, under title VII, employers can consider subjective factors in employment decisions so long as they are not discriminatory. Consider, for example, jobs that require frequent personal interaction. Under title VII, employers may consider unquantifiable qualities like a friendly disposition or positive attitude. As the U.S. Court of Appeals for the Eleventh Circuit has explained, “It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.”³³ “[S]ubjective reasons,” the Court said, “are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions.”³⁴ “Traits such as ‘common sense, good judgment, originality, ambition, loyalty, and tact,’ often must be assessed primarily in a subjective fashion.” . . .³⁵ Under the Paycheck Fairness Act, however, pay differentials based upon such immeasurable qualities may not be deemed “consistent with business necessity.”

In addition to challenging subjective determinations, the Paycheck Fairness Act could even be interpreted as prohibiting employers from considering factors such as educational and professional experience in occupations that may not strictly require a degree or prior experience. Without the ability to make pay decisions based on such factors, U.S. companies would be forced to standardize compensation to the detriment of both male and female employees. The inevitable result may be a gradual decline toward mediocrity as prospective employees have no incentive to make the types of investments that would otherwise allow them to excel at a particular job, and advance within an organization or their chosen field.

*Further, replacing the EPA’s “any factor other than sex” defense with a “business necessity” requirement would place an enormous drain on judicial resources, turning courts into “super-human resource departments”—a role they consistently eschew.*³⁶ Unlike the “any factor other than sex” defense, the “business necessity” test could result in drawn out litigation regarding what is and is not consistent with business necessity and whether there is an alternative employment practice that would serve the same business purpose. It would be much more difficult for employers to prevail on summary judgment as almost every case will involve a factual dispute regarding the business necessity behind any pay differential.

Ultimately, courts will be responsible for making the very type of business judgments that they have denounced time and time again. As one Federal court explained, “[t]he Court is not here to second guess [a company’s] hiring and firing de-

³²If the Paycheck Fairness Act is enacted, litigation interpreting the legislation’s “business necessity” requirement will likely ensue. Courts will be forced to assess “business necessity”—finally being forced to assume the mantle of a “super human resources department” they have so long and consistently decried.

³³*Chapman v. A.I. Transport*, 229 F.3d 1012, 1034 (11th Cir. 2000) (en banc). *See also Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986).

³⁴*Id.*

³⁵*Id.*

³⁶*See, e.g., Byrne v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. Mar. 15, 2001) (“we are not a super-personnel department”); *Pinkerton v. Colo. DOT*, 563 F.3d 1052, 1066 (10th Cir. Apr. 16, 2009) (“court should not ‘act as a super personnel department that second guesses employers’ business judgments” (internal citations omitted)); *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. Mar. 22, 2002) (refusing to determine “whether a business decision is wise or nice or accurate”); *Lewis v. Two’s Comp.*, 2008 U.S. Dist. LEXIS 109030, at *14 (S.D.N.Y. Mar. 16, 2008)[I]t is not the province of the Court to sit as a super-human resources department; a company is legally entitled to make bad [nondiscriminatory] employment decisions”; *Framularo v. Bd. of Educ.*, 549 F. Supp. 2d 181, 187 (D. Conn. Apr. 30, 2008) (same); *Smith v. Home Depot U.S.A., Inc.*, 1999 U.S. Dist. LEXIS 22207, at *17 (N.D. Ga. Mar. 3, 1999) (“it is not the court’s province to second guess an employer’s business judgment”)(internal citations omitted); *Tutman v. WBBM-TV/CBS Inc.*, 1999 U.S. Dist. LEXIS 5103, at *31 (N.D. Ill. Mar. 30, 1999) (“[t]he Court is not here to second guess [the company’s] hiring and firing decisions”).

cisions.”³⁷ Passing legislation that would divert judicial resources for the purpose of scrutinizing market-based pay determinations that have nothing to do with sex discrimination is not only bad law, it is also bad policy.

The Paycheck Fairness Act would expand the EPA’s definition of “same establishment,” imposing an unfair burden on employers with operations in certain counties.—The proposed legislation would amend the EPA to define “establishment” as “workplaces located in the same county or similar political subdivision of a State.” Because the EPA requires equal pay for men and women who perform “substantially equal” work in the same “establishment,” the Paycheck Fairness Act would require some employers to look beyond individual worksites and ensure that employees who perform similar work in different locations are paid the same. Though this change may have little effect on employers with operations in counties—such as New York County—comprised entirely of an urban population (or a suburban population), it would have an enormous effect on employers with operations in counties encompassing both urban and suburban communities.

My hometown of Chicago, for example, is located in Cook County. The population of Cook County is larger than 29 individual States³⁸ and encompasses both the city of Chicago and collar communities up to an hour and a half outside city limits, and even further from Chicago’s central business area (the “Loop”). The cost of living is significantly higher in Chicago than in the surrounding suburbs; so, too, is the average salary. If the Paycheck Fairness Act were to become law, employers with operations in Cook County would be required to pay similar employees the same salary regardless of whether they worked in the Loop or in a remote collar community.

Expanding the EPA’s definition of “establishment” could also lead to unnecessary litigation involving employers with their main corporate headquarters located within the same county as non-corporate facilities. For instance, a company with its main corporate headquarters in midtown Manhattan and a remote distribution site elsewhere may pay employees who work at the corporate headquarters higher salaries because those positions are more demanding and integral to the company. Although a court may ultimately determine that the corporate positions are not “substantially equal” to the non-corporate positions, this is one more issue employers will have to address in litigation. Consider also a company that wants to incentivize or reward employees who agree to work in less desirable neighborhoods or work less desirable shifts—for instance, a bank teller working in an area with a greater history of hold ups, or a data entry clerk working the “graveyard” shift. The EPA could eliminate a company’s ability to make such decisions. For all these reasons, EPA claims should be limited to the “same establishment.”

The Paycheck Fairness Act would add unlimited compensatory and punitive damages to an employer’s exposure, despite congressional efforts to limit such damages in title VII cases.—Whereas the EPA currently provides for equitable relief, such as back pay awards, the Paycheck Fairness Act seeks to add compensatory and punitive damages to the types of recovery available to EPA litigants. Though S. 182 (unlike former versions of the Paycheck Fairness Act) would require a showing of “malice or reckless indifference” before subjecting employers to punitive damages, the proposed legislation—which places no limit on compensatory and punitive damages—would still expose employers to frivolous lawsuits and enormous verdicts. And, unlike title VII, it makes no attempt to ameliorate the size of available damages for smaller employers, who are arguably less capable of surviving such an award, or the cost of the litigation itself. In addition, employers could still be liable for compensatory damages without any showing of intentional discrimination.

When Congress added compensatory and punitive damages to the relief available in title VII disparate treatment cases through passage of the Civil Rights Act of 1991, it was careful to include a statutory cap on such damages.³⁹ That cap is set at \$50,000 to \$300,000 total for compensatory and punitive damages, depending on the employer’s size. As the U.S. Court of Appeals for the Second Circuit has pointed out, a review of the act’s legislative history reveals that “the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards.”⁴⁰ Without such a cap, the Paycheck Fairness Act will be

³⁷ *Tutman*, 1999 U.S. Dist. LEXIS 5103, at *31.

³⁸ Wikipedia, Cook County, IL, http://en.wikipedia.org/wiki/Cook_County_Illinois (last visited Feb. 26, 2010).

³⁹ Congress did not make compensatory and punitive damages available in title VII disparate impact cases, in which employers are held to a “business necessity” defense similar to that proposed by the Paycheck Fairness Act.

⁴⁰ *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. Mar. 21, 1997) (referencing 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); 137 Cong. Rec. S15478-79 (1991) (statement of Sen. Bumpers)).

a bonanza for plaintiffs' attorneys, and will subject small businesses to much greater comparative risk. This result is untenable in light of President Obama's recent statements that small businesses are "one of the biggest drivers of employment that we have," as well as recent efforts by Congress to spur job creation via a \$15 billion jobs bill.⁴¹ In the midst of this financial crisis, we should be encouraging small businesses to expand, not making it more difficult for them to operate and survive.

The Paycheck Fairness Act would impose title II's class action mechanism on the EPA, which has always been governed by the FLSA's procedural rules.—The Paycheck Fairness Act would specifically allow for "opt-out" class actions under Rule 23 of the Federal Rules of Civil Procedure—a right already provided to women who sue their employers for pay discrimination under title VII. Unlike title VII, the EPA is governed by the FLSA's procedural rules, which require plaintiffs to "opt-in" to a class action by giving consent in writing. The distinction between the two provisions is important, as class size is likely to be much larger with an opt-out certification where employees need not affirmatively decide to join the case.

Title VII cases—which provide for "opt-out" class actions—are procedurally different from EPA cases precisely because they have different pleading requirements. The EPA is and always has been part of the FLSA, which, unlike title VII, specifically provides for "opt-in" class actions. Allowing "opt-out" class actions under a law that makes it very difficult for employers to defend legitimate decisions while exposing them to unlimited punitive damages serves only one purpose: it encourages plaintiffs' attorneys to bring class action lawsuits against employers who may be forced to settle even when they did nothing wrong, or face financial ruin from the extraordinary costs associated with litigation of this nature.

The Paycheck Fairness Act would not require the OFCCP to use multiple regression analysis when investigating potential discrimination.—The proposed legislation would direct the EEOC to collect pay information from employers and impose obligations on the OFCCP for performing compensation discrimination analyses. Among other things, the OFCCP would be directed to use the "full range of investigatory tools" to determine the presence of potential discrimination in Federal contractors' compensation systems. This would include the "pay grade methodology," which the OFCCP rejected in 2006, likening that approach to the discredited legal theory of comparable worth. Among other problems, the pay grade methodology assumes all individuals in the same pay "band" are similarly situated. Instead, the OFCCP has been using multiple regression analyses—which generally allows the OFCCP to consider the impact of variables, such as years of work experience, education, and past performance—to determine the presence of potential discrimination.

Under the Paycheck Fairness Act, the OFCCP would no longer need to perform multiple regression analysis to identify potential compensation discrimination and could instead rely on the flawed pay grade methodology. As a result, the OFCCP would likely bring more actions against employers based on inadequate and faulty data. Despite the fact that the data is inaccurate, employers would be forced to spend money defending themselves while the OFCCP wastes its own resources pursuing employers that have done nothing wrong. Given the OFCCP's own recognition that multiple regression analysis is a superior method for identifying discrimination, Congress should not force the agency to use an inferior—and discredited—method.

The Paycheck Fairness Act would also reintroduce another discredited tool: the OFCCP equal opportunity survey. Again, requiring the OFCCP to use a method it has rejected will impose an unnecessary burden on both the OFCCP and Federal contractors, many of whom are small businesses who lack formal human resource departments, while doing nothing to reduce discrimination.

The Paycheck Fairness Act would require the EEOC to collect employer wage data information, raising confidentiality issues that will need to be resolved.—As drafted, the Paycheck Fairness Act would require the EEOC to issue regulations providing for collection of pay information data from employers "as described by the sex, race, and national origin of employees." Though S.182 directs the EEOC to "consider factors including the imposition of burdens on employers, the frequency of required data collection reports (including which employers should be required to prepare reports), [and] appropriate protections for maintaining data confidentiality . . ." nothing in the proposed legislation prohibits the EEOC from dis-

⁴¹ Obama Vows to Help Small Businesses, CNN POLITICS.COM, Mar. 16, 2009, available at <http://www.cnn.com/2009/POLITICS/03/16/obama.small.business/index.html> (last visited Mar. 7, 2010); Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Cong. (2010); Carl Hulse, Senate Approves \$15 Billion Job Bills, N.Y. TIMES, Feb. 24, 2010, available at <http://www.nytimes.com/2010/02/25/us/politics/25jobs.html> (last visited Mar. 7, 2010).

closing such data, including to competitors and trial lawyers. If the Paycheck Fairness Act becomes law, private employers may be required to provide extensive information to the EEOC with little assurance that the information will be protected from disclosure to the public, or to competitors.

The Paycheck Fairness Act would encourage frivolous litigation by prohibiting employers from retaliating against employees who share salary information.—Although the National Labor Relations Act already protects employees who share salary information with co-workers, the Paycheck Fairness Act would provide broader protection. Employers and courts are already besieged by retaliation claims that often lack merit; adding another cause of action to rectify a problem that does not exist will only lead to unnecessary litigation and additional wasted resources.

In all of my 20-plus years of employment law experience, I have never encountered a situation where an employer terminated—or even disciplined—an employee for communicating with co-workers regarding his or her salary. That is not to say that it does not happen but, in my experience, it would be extremely rare. And there is nothing in the extant laws that would keep someone penalized in this fashion from raising that theory under the current statutory structure. If the Paycheck Fairness Act becomes law, however, every employee who has previously communicated with co-workers regarding his or her pay and is later disciplined or terminated for a completely unrelated reason will consider pursuing a retaliation claim. Though most employers would ultimately prevail by demonstrating that the employment decision was unrelated to the employee's sharing salary information, companies will be forced to spend money and devote resources to defending these frivolous lawsuits.

Our Nation's courts are already inundated with retaliation claims, which often go hand in hand with employment discrimination claims. In 2009, the EEOC received 28,948 retaliation charges filed under title VII alone, encompassing over 31 percent of all charges filed with the EEOC.⁴² Just 10 years earlier, title VII retaliation charges accounted for only 23.1 percent of all charges filed with the EEOC.⁴³ Creating a new retaliation cause of action for something that hardly ever happens will only further burden courts with needless litigation.

THE FAIR PAY ACT OF 2009

The Fair Pay Act would amend the EPA by extending its coverage to claims of race and national origin discrimination and broaden the statute's requirement that the plaintiff show different pay for equal work and instead require only "equivalent" work. Similar to the Paycheck Fairness Act, the Fair Pay Act would expose employers to punitive and compensatory damages. It would also require all employers to keep records of the methods they use to set employee wages and provide yearly reports to the EEOC describing their workforce by position and salary, as well as gender, race, and ethnicity. The Fair Pay Act is unnecessary and harmful for many of the same reasons that the Paycheck Fairness Act is unnecessary and harmful. In addition, the Fair Pay Act—which is premised on the rejected theory of "comparable worth"—would require employers to provide the same pay for very different jobs. Comparable worth legislation will impose massive recordkeeping and reporting costs on employers, while doing nothing to deter discrimination.

CONCLUSION

Discrimination on the basis of sex is abhorrent. Pay differentials stemming from discriminatory practices clearly must be remedied, but our existing legal framework adequately provides protection.

My firm represents thousands of employers. Our 600-plus attorneys counsel our clients about how to ensure a workplace free of discrimination. Our clients affirmatively want that advice and embrace it for many positive reasons, among them the fact that effective human resources policies are a key competitive factor in the success of any organization.

The legislation before you will cause confusion in the workplace, and in the courts. It will take years and years of expensive litigation to understand and define its terms. The plaintiffs' bar will benefit. My firm may benefit as well.

But the U.S. workforce will not benefit. Passing a law which upends the current employment discrimination paradigm, and creates costly uncertainty in the marketplace, will do nothing to help this country emerge from its current economic crisis. The proposed legislation will certainly not bring down our unemployment rate, nor

⁴²EEOC Charge Statistics FY 1997 Through FY 2009, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 8, 2010).

⁴³*Id.*

will it remedy gender-based discrimination, especially since the vast majority of employers today embrace equal employment as an essential component of their core values. The small rate of EEOC for cause findings certainly supports this conclusion.

Women have come a long way in the workplace. I am but one of millions of examples of that fact. And I am confident my daughters will prosper and make even more progress during their lives. They do not need this legislation to help them achieve their goals and dreams. Let them be evaluated based on what they do and not who they are. We ask for no more and should demand no less. Our laws today provide us with that dignity.

APPENDIX 1

	Employees covered	Statute of limitations	Exhaustion of administrative remedies	Compensatory damages	Punitive damages	Class actions allowed	Affirmative defenses
Title VII	15 or more.	300 days to file administrative charge with the EEOC.	Required	Capped* ..	Capped*	Opt-out	Disparate Treatment: Legitimate, non-discriminatory reason for pay differential; Disparate Impact: Job-related and consistent with business necessity and no alternative employment practice exists.
EPA	2 or more	2 years; 3 years if willful/intentional.	Not required	Back Pay ..	Liquidated Damages (equal to back pay) if willful violation.	Opt-in	Seniority system; merit system; measure earnings by quantity or quality of production; a differential based on any factor other than sex.
PFA	2 or more	2 years; 3 years if willful/intentional.	Not required	Uncapped	Uncapped ...	Opt-out	Seniority system; merit system; measure earnings by quantity or quality of production; bona fide factor other than sex if business necessity demands it and no alternative employment practice exists.

*Title VII limits damage awards based on the number of employees the employer had during the current or preceding calendar year. The sum amount of compensatory and punitive damages that may be awarded is dependent on the number of employees as shown below:

No. of Employees	Damage Cap
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
500-plus	\$300,000

Senator DODD. Thank you very much.
Did you support the Lilly Ledbetter legislation?
Ms. MCFETRIDGE. Did I support it?

Senator DODD. Yes.

Ms. MCFETRIDGE. That is a good question. I supported components of it.

Senator DODD. Everybody supported components of it. Did you support the bill?

Ms. MCFETRIDGE. No, I did not.

Senator DODD. OK. Let me jump back here and just—because one of the questions raised and one of the points that has been raised is the notion of the cumulative effect, and it struck me as well. I mean, it begins sort of a self-fulfilling prophecy, as I am trying to understand this, where you start at a certain level and there is a discrimination at that, at the earliest level, then it has a way of carrying forward based on previous jobs. At least that is the point, Ms. Boushey, I thought—I think several of you made that.

I wonder if you might sort of expand that a little bit. You talk about the cumulative effects of the wage gap on women over the course of a career or retirement. Congresswoman DeLauro talked about women over the age of 70 are the poorest sector of our society. Again, some reflection, I think, of over the years of the discrimination that has occurred in wages and salaries. But you might want to address that a little more thoroughly and fully, if you would?

Ms. BOUSHEY. Certainly. I think that that is one of the critical issues, that the pay gap not only starts the moment a woman graduates from school and enters the labor market, but that it is aggravated over time and accumulates over time.

To throw a few numbers at you, first off, I think that the study that we have seen many economists do, but in particular a very recent one that the American Association of University Women did, economists have worked very hard to look at all the things that we can measure—the kind of job you have, the kind of education you have, where you got your degree. And once you take all of that into account, it is very hard to not notice that there still is a pay gap.

And this 5 percentage point gap that occurs among men and women fresh out of college from similar schools and all of that really does sort of—that is the starting point. But then as some of my colleagues up here on the panel have talked about this morning, one of the things that happens as a woman goes through her career is that you are asked at every job, “Well, how much did you make at your last job?” And then that exacerbates the pay gap.

So if women start off at a lower level, even if they switch jobs, which is one of the ways that young people especially experience the biggest jumps in pay is when they switch jobs, and they are asked what their salary history is, if a firm doesn’t want to equalize that internally but uses that to perpetuate inequality, then women are stuck on a lower path moving forward.

Research at the Center for American Progress has found that that leads to a career pay gap of about \$434,000 in income on average. But that this gap is larger for women with the most education. So for women with a college degree or more, they lose over \$700,000 over a lifetime.

And I want to stress this isn’t just about women and their purchasing power. This is about families. Four in ten mothers in America right now are their family’s primary breadwinner. This gap is affecting their family’s well-being. And this accumulation over time affects their retirement security. It affects their ability

to save to put their kid through college and all the other things that we think are important for families.

Senator DODD. Let me ask you, Ms. Brake, if I can, Ms. McFetridge raised a couple of points. And if I don't State this accurately, Ms. McFetridge, you can re-frame the question, if you want. But her point, I think, was, well, look, you have Title VII of the Civil Rights Act. We have the Equal Pay Act. These are working pretty well. They are not perfect yet, but we are moving along. Things are getting better.

If you take some of the proposals that I supported when I was here that Mike Enzi has talked about in terms of these workforce issues, combine that, getting our economy moving again, these seem all to be getting us in the right direction. Why don't we just let well enough alone and allow these acts to continue to work? What is the problem with these two laws in terms of not being able to close this gap that she has suggested?

Right? Is that a fair question?

Ms. BRAKE. Thank you. That is a very good question.

I guess I would disagree with the basic premise that they are working so well. The pay gap has not been closing at a steady level such that we can see it close, like a window over time. In fact, the majority of progress since the 1970s was made in the 1980s, very little since the 1990s.

And I think that the reason you see so few claims filed under the Equal Pay Act, as Mr. Ishimaru had noted, a small percentage, is because the Equal Pay Act is not such a great vehicle for remedying pay discrimination. As I mention in my testimony, it is extremely hard to prove the equal work requirement period. But even if you get past that, the factor other than sex defense is enormously broad. The courts are applying it as the exception that swallows the rule. And again, I can't emphasize this enough. You have very limited remedies under the Equal Pay Act.

Unlike most legal claims, you are limited to the wrongfully withheld wages, plus an equal amount in so-called liquidated damages. And not only does that not fully remedy the victims of pay discrimination who have these costs throughout the course of their working lives once they start, it also doesn't put a sufficient incentive on employers to really look at these things.

And so, you have a case with an employer like Goodyear in the Lilly Ledbetter case who, for years and years and years, allowed her to be the lowest-paid manager, earning lower than any of the lowest-paid male managers, even when she had more seniority and higher job performance. And unfortunately, that goes on far too often.

I would say that the remedies need to be strengthened certainly in the Equal Pay Act, and title VII is no panacea either. So I am delighted that this committee is looking at these things to make these laws more effective.

Senator DODD. Some have pointed out that in the 1980s we saw the gap really begin to close and, therefore, further evidence that, actually, existing laws are beginning to work. And yet it seems to me that during the 1980s, what we saw and since then is, of course, the men's wages declined as well or didn't increase at all.

Is that a fair description of what occurred, or is it a better reflection, in fact, that the wage gap has been closing?

Ms. BRAKE. Well, I would defer to Ms. Boushey on the particulars of that. I know that it hasn't been closing since the 1990s.

Ms. BOUSHEY. Certainly. And when it did close the sharpest, it was during the 1980s, when men's wages were falling. So while we had the Equal Pay Act and there were these legal remedies, a large piece of closing of the gap was because of the decline in male wages that made it look like there was progress for women when, in fact, it was men sort of falling behind.

I think, looking forward, this is something that I, as an economist, am very concerned about. With men losing so many jobs in this recession, we may see some movement forward in the gender pay gap. But that is illusive because it well may be because men's wages are again falling rather women are actually catching up.

Senator DODD. Let me just ask one question of Deborah Frett, and then I want to give you, Ms. McFetridge, a chance to respond. And then I will jump to Mike on this thing.

One of the arguments in opposition to the bill is that the Paycheck Fairness Act would unduly block businesses from making salary decisions based on market forces. What is your view on that?

Ms. FRETT. I disagree with that. I think that the Paycheck Fairness Act will not impede businesses being able to use a variety of mechanisms in order to evaluate their salaries. We have been working with a number of employers in a number of industry groups, and one of them in particular being the women in cable television.

They have had a program for about 7 years now where they are focusing on pay equity and making sure that they are disclosing the salaries so everybody in the companies are aware of, in various programming or operators and such, what each one is being paid. But they are also doing market analysis with that in terms of the bands for those salaries and looking at other markets and comparing.

So I think you can have both in terms of that. But the Paycheck Fairness Act will not prohibit businesses from taking into consideration market factors.

Senator DODD. Ms. McFetridge, do you want to answer? Having raised your name here, I will give you a chance to respond.

Ms. MCFETRIDGE. Yes. I obviously disagree. I have a completely different point of view. The proposed affirmative defenses are very, very complicated. And having lived in this area of law for the last 20 years and represented employers, I can tell you that over that period of time, the McDonnell Douglas burden-shifting analysis, for instance, has developed, but it has taken a long time for people to understand and be able to apply that effectively.

And if you look at the types of changes to the affirmative defenses that we are talking about here, these are not easy concepts to grasp. Most employers in this country are not Goodyears. Most employers—and I hearken back to what the acting chair of the EEOC said about most employers wanting to do the right thing. Most employers do want to do the right thing, but most employers

are relatively small. They don't have the resources to make this sort of analytical assessment.

Let us look for a second at what is being discussed here. They want to change "any factor other than sex" to "a bona fide factor other than sex." Well, what is "bona fide?" OK. I mean, I think most of us in this room might have some idea of what that means in sort of general lay terms, but what does it mean in a legal sense? It will take years to ferret that out.

Furthermore, business necessity. What is business necessity? Do we want the government deciding what is business necessity? Isn't that for the business owner to decide?

And then the employers themselves cannot use the affirmative defense unless they can show that it is—if the plaintiff demonstrates that this goal, whatever it is that they are trying to achieve, could have been achieved—they could have achieved the same purpose without gender differential. These are very complicated things, and they aren't easy to apply, and it will affect how employers set pay decisions.

There are many, many different factors that go into a pay decision. I gave the example of a salesperson. I mean, there are intangible things that people look at when they hire people.

Senator DODD. Well, I appreciate that, and I thank you. I wanted to give you the chance to respond to all this.

Let me just say respectfully that, having been around here over the last 35 years, and where a lot of these documents are based both on issues involving disabilities, other areas of discrimination in our country, many of the same arguments have been made in the past. How these things are subjective tests and hard to apply and open up to a lot of litigation.

And had we lived with those over the years, I think we would be a very different country today. So, my concern would be while I don't underestimate your point here, and we need to deal with that as legislators as we write language here, too often those are the arguments raised as barriers to achieving that fairness in terms of equal opportunity. And so, I appreciate your point.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

In listening to this, it has occurred to me that having been in business, that there are a lot of questions that you can't ask somebody who is a potential employee. Maybe we ought to add to that list that you can't ask them what they made on their previous job.

I am still convinced that a lot of the gap is due to occupational segregation that exists, not due to an employer, but the decisions that are made by an employee and often while they are still a student. They make a lot of decisions that are heavily influenced by their teachers, their school environment, family environment, peers, experiences that they have had. And I think it leads them into some directions where they are going to make less money.

Ms. Boushey, in your testimony, you cite research acknowledging that one-third of the pay gap can be explained by occupational choice, one-fifth by industry, and a tenth by career experience, which leaves I think you said a 10 percent gap. Am I correct to assume that this research would compare, for example, a man and a woman who graduated from medical school in the same year,

began working as doctors, and didn't take any breaks in their career?

Ms. BOUSHEY. Well, the particular numbers you are citing were from one study that wouldn't have looked at that level of detail, but there is a lot of research that looks at that level of detail, and some of it is cited here, where economists have looked at people graduating from similar kinds of schools, making similar decisions.

I mean, I think your point about the decisions that men and women make is very important. We all make decisions about our career paths, and we know that women have not made the same kinds of decisions in terms of sciences that certainly does play a role in the overall gender gap in our society.

But when economists look at the pay gap, we try to account for those differences in decisions, and you still see a difference. Women and men making the same choices, you are still seeing a pay gap between those people that are making similar kinds of choices. And that is where the problem is.

Senator ENZI. So you are saying that some of those categories would make a difference if one became a radiologist and one became a family practitioner, and if one worked in a large practice and one worked in a small practice, or one worked in a city practice or one worked in a rural practice? Is it possible that the portion of the pay gap that is not explained by occupation or tenure is attributed to different specialties and where they work, how urban/rural it is?

Ms. BOUSHEY. Certainly, some of it would be, but not nearly the majority of it. So you can take it down as fine as you want, but even when you take it down to as fine as we can measure, you still see unexplainable gaps in men's and women's pay.

But the second issue is the differences between a radiologist and a family practitioner. Men and women tend to go into different kinds of fields, and there is a question about how we value those different fields, which is really more about the Fair Pay Act than issues that the Paycheck Fairness Act is looking at.

Senator ENZI. Thank you.

When I first got married, my wife and I started a shoe store in Gillette, WY. And a few years later, I got elected mayor. It was supposed to be a part-time job. It turned out to be a full-time job. So my wife ran the store. She not only ran the store, she added two more stores. And it was going very well. When I finished being mayor, I told her I was ready to come back to work, and she said, "Why?"

[Laughter.]

And she had a real good point. So that is when my accounting career began.

So I know the talent that women have. They are more organized. They are better schedulers. So there shouldn't be that gap, and it is no surprise to me that there are more women's businesses that are being started and that the men are the ones being laid off when we have a decrease in employment.

Ms. Frett, you mentioned the phenomenal growth for women-owned firms in recent years, and I am pleased with that. Do you believe that women-owned firms are less likely to be sued for discriminatory pay disparities?

Ms. FRETT. Based on what we hear and the research that we have done related to our members, all of our members are talking about making sure that they have disclosure on their pay policies. And so, I would think, based on hearing that from them in terms of their kinds of practices around equal pay and disclosure and transparency, that there would be a reduction in terms of legislation risk.

Senator ENZI. OK. Ms. McFetridge, some of today's witnesses have argued that should the Paycheck Fairness Act become law, meritless lawsuits would not be a concern for employers because they would be easily dismissed by the courts. Given your 20 years of experience defending against claims, do you think that is a true assertion?

Ms. MCFETRIDGE. Perhaps more than anything I have said here today, I couldn't disagree with that more. I have lived this for 20 years, over 20 years now, and I will tell you that while there are some lawsuits that certainly have valid basis, and we typically counsel our clients in those situations to settle the case and address the issues that gave rise to the lawsuit, many of these claims are specious to begin with.

That is not to say that discrimination doesn't exist and that there isn't a societal cost associated with it. But what it does mean is that businesses lose otherwise good employees when that happens and they move on to alternative, different jobs.

What you do see happening, the cost associated with litigation of this nature is directly—first of all, the quantity of litigation is directly related to the available remedies. The higher the remedies, the more likely you are to get litigation. That is demonstrated by what has happened in California, and it is certainly demonstrated by what has been happening with wage and hour class actions across the country.

So the greater the available remedy, the more likely you are to get litigation. And the costs associated with this are astronomical in both financial and human terms. It is devastating to the people that are involved with the defense of these lawsuits, many of whom—I would say that in at least 90 to 95 percent of my lawsuits, I have company representatives, people who are actively involved in the litigation that are women themselves. People are distracted from their business purpose. They are personally upset. They are invested in the litigation itself, and it costs them thousands and thousands of dollars.

Frequently—there were questions earlier to the acting director of the EEOC about whether the threat of litigation will force people, whether it is intimidating. It would force people to settle cases that they wouldn't otherwise settle. I can't tell you how many times that people have just thrown in the towel when they have a very defensible case just to avoid incurring additional legal costs, disruption to their business, and that sort of thing.

It is absolutely without a doubt—I am absolutely positive it will increase litigation. It will benefit me because I am involved with that litigation, but it won't benefit women.

Senator ENZI. Thank you. It reminds me of the old West, where when one attorney came to town, they starved to death. When there were two, they did pretty well.

I will go back to Ms. Frett because I appreciate your testimony on the growth of women-owned firms and encourage that entrepreneurship and know that that has some significant advantages for women.

You noted a number of studies showing that companies with women executives and diversity programs in place are more productive, efficient, and generally successful. Given this, isn't it in business's best interest to take those steps? Do most businesses do what is in their best interest?

Ms. FRET. I think we are finding that a lot of employers are doing the right thing. They see a lot of advantages in terms of making sure that their employees are paid equally for equal work and a lot of the work-life balance issues, and they know this because they want to continue to recruit and retain employees.

If you look at the women becoming more and more of that workforce or that pool of talent that they are going to be looking at, they need to be doing that. Their bottom line is going to improve because of that.

The other thing we need to be aware of is to make sure we understand that the primary purchaser of goods and services or decisionmakers in terms of goods and services are primarily women. So that customer loyalty is a big factor in terms of how successful a business is going to be.

So that is why the Business and Professional Women's Foundation looks at it as a three-pronged approach. It is legislation, but it is also education in terms of employers and education in terms of women.

Senator ENZI. Thank you.

I want to thank all of you for your testimony. It has been very helpful. I have more than used my time here, but I have a lot of questions left. So I hope that you will allow me to submit some written questions to you so I can get more answers for doing it right?

Ms. FRET. Absolutely.

Senator ENZI. Thank you.

Senator DODD. We will certainly do that, Mike.

And we will leave the record open for 10 days. I believe that is adequate, but if you need more time, we will make more time available.

It was very, very helpful and just excellent testimony as well. I think you witnessed earlier on, we had a lot of members showing up. But the way these committee hearings go with other schedules and the busyness around here, people can't stay for as much as they would like. But that should not be any reflection of lack of interest in the subject matter that exists.

So we thank all of you for coming here this morning, and we will ask you to respond to the questions when they are submitted as quickly as you possibly can for the record. Thank you all for being here.

The committee will stand adjourned.
[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Chairman Harkin for holding this important hearing.

As families across the country continue to struggle in these tough economic conditions, I am working hard to support programs that will get our economy moving again and get our workers back on the job. We still have a long way to go, but I am confident that the steps we have taken have begun to move us down the path to recovery. But as we work to create jobs, we must also remain committed to ensuring that all of our workers benefit equally from equal work.

Despite years of progress, our country has still not yet completely eliminated discrimination and unfairness in the workplace. There have been improvements, but we are still not yet at the point where our daughters can expect to earn the same amount over their lifetime as our sons. And that has got to change.

On average, women earn just 78 cents for every dollar paid to their male co-workers. This pay discrimination has real and harmful impacts on families and for our Nation as a whole. It hurts an individual's ability to earn a living and save for retirement, care for her children, and contribute fully to society.

Yet it's so deeply ingrained in our society that many jobs dominated by women pay less than jobs dominated by men—even when the work they do is almost the same.

That's why I was such a strong supporter of the Lily Ledbetter Fair Pay Act that restored a worker's ability to fight for her rights in court. The law reversed the extremely damaging 2007 U.S. Supreme Court decision, *Ledbetter v. Goodyear*, and clarifies that each time an employee is paid less than her co-workers for doing the same job, that unfair paycheck is a violation of the law that can then be challenged in court.

This was a great step forward for economic equality. But it's not enough. We need to keep fighting against discrimination in the workplace.

I co-sponsored S.182, the Paycheck Fairness Act, which gives America's working women additional support to fight for equal pay. It takes critical steps to empower women to negotiate for equal pay, closes loopholes that courts have created in the law, creates strong incentives for employers to obey the laws that are in place, and strengthens Federal outreach and enforcement efforts.

I also co-sponsored S.904, the Fair Pay Act. This bill requires employers to provide equal pay for jobs that are comparable in skill, effort, responsibility, and working conditions. It will give workers the information they need to determine whether female-dominated jobs are being under-valued, and it provides a remedy for workers who are victims of such systemic discrimination.

Now that we have passed the Lily Ledbetter Fair Pay Act that gives women the ability to challenge discrimination in court, we need to give them more tools to understand and fight for equal pay for equal work.

The Paycheck Fairness Act and the Fair Pay Act will not end discrimination in America. And they will not fix the wage gap imme-

diately. But they are steps in the right direction, and I am committed to pushing hard for their passage.

PREPARED STATEMENT OF SENATOR BROWN

Mr. Chairman, thank you for holding this important hearing.

And thank you, as well as Congresswoman DeLauro and Commissioner Ishimaru, for your service and dedication to social and economic justice.

I want to also thank our expert witnesses for their testimony today.

Some people in Washington never want to talk about issues like the minimum wage, or workplace safety, or pay equity.

And, during an economic crisis like the one we are in, they especially try to distract policymakers from examining these issues so important to our Nation's middle class.

They insist that now, when we're focused on economic recovery, is not the time to talk about fair pay.

And you can bet your bottom dollar that when our economy is fully recovered, they will again insist it's the wrong time to talk about pay equity, because any change in wages could rock the boat.

So when is the right time to talk about pay equity?

The answer is that as long as there are unfair disparities in pay, it is always the right time to talk about pay equity. And as a matter of fact, no time is better than the present.

That's because the negative effects of unjustifiable pay disparities amplify the economic hardship for struggling Americans.

If you look at the foreclosure crisis, you know that women are disproportionately at risk, since women are 32 percent more likely than men to have subprime mortgages.

Existing pay disparities for women exacerbate the economic strain on women and on households run by women, since women earn only 77 cents for every dollar earned by men.

Women have significantly fewer savings to fall back on during times of economic hardship. Non-married women have a net worth 48 percent lower than non-married men, and women are less likely than men to participate in employer-sponsored retirement savings programs.

That's disturbing, but not surprising, given that they typically don't receive the same pay for the same work. You can't squeeze blood from a stone, and you can't squeeze savings from wages that barely cover your month-to-month expenses.

Women are less likely than men to participate in employer-sponsored retirement savings programs, largely because their lower pay levels make it far harder to put money aside for retirement.

While the Equal Pay Act established that women should be paid equally for doing the exact same jobs as men, we still see widespread discrimination when comparing the pay scales of jobs traditionally held by men vs. jobs traditionally held by women.

We need to stop and ask why a parking meter reader is worth less than an electrical meter reader, or why a child care worker is worth less than a maintenance worker.

It's not hard to find excuses for ignoring difficult social issues like pay inequity . . . it's not hard to point to our economic challenges and say the timing is wrong.

But our job is not to take the easy way out. It's to promote the best interests of Americans, women and men alike.

I want to again thank our witnesses and Chairman Harkin for holding this very timely hearing. And I look forward to our discussion.

PREPARED STATEMENT OF SENATOR BENNET

I would like to thank Chairman Harkin and Ranking Member Enzi for holding this important hearing. The persistent pay gap between male and female workers is unacceptable. Through this forum, we can convene various stakeholders and figure out what policy solutions are fair to American workers.

According to the U.S. Census Bureau, women who work full-time earn, on average, only \$0.78 for every dollar men earn. In Colorado, women are paid \$0.80 for every dollar men earn. This is \$0.02 above the national average. This wage gap persists at all levels of education. Women in Colorado with a high school diploma earned only 67 percent of what men with a high school diploma earned and only 64 percent of the amount that men with a bachelor's degree were paid. On average, the Census reports that women have lower earnings than men (\$24,146 compared to \$35,875 in 2007) and are more likely to live in poverty (12 percent of Colorado women compared to 9 percent of men living in poverty in 2007).

Correcting these wage disparities is even more important as women have taken a greater role in our economy and in many cases are the main source of income for families. From 1980 to 2006, women's income as a share of total family income rose from 26.7 percent to 35.6 percent. As the role of women in the workforce has changed and women take on new financial responsibilities in providing for their homes in the current recession, these disparities will directly impact the pace and ability of our economy to recover.

There is no doubt that the current recession is exacerbating the effect of these wage disparities. Traditionally male-dominated industries such as construction have struggled to maintain their workforce, while traditionally female-dominated industries, such as health care and education, have remained steady. As more and more households become dependent on female wages in the current recession, these disparities will slow the ability of the economy to recover. Women will have less money to spend and even fewer dollars to save for the long-term. These trends will affect our ability to recover economically, and they will also shape what our economy, once recovered, will look like.

While the Lily Ledbetter Fair Pay Act, which I was a proud cosponsor of and supported when it passed this Congress, sought to preserve the rights of victims of pay discrimination to challenge their wrongful termination, it mostly marked a return to the status quo prior to an adverse Supreme Court 2007 decision. It did not fundamentally address the continued disparity in wages.

I am a cosponsor of the Paycheck Fairness Act because I believe we need to do more to address gender wage disparity. We need publicly accessible explanations for wage gaps between male and female workers doing the same work, and there needs to be a means to remedy discriminatory wage gaps. We also need to find ways to empower women to be able to better negotiate their wages.

I look forward to listening to today's panelists dissect the problem and look forward to hearing their ideas on how to address wage disparities. This is an important conversation, and I thank the Chairman for convening it.

Thank you.

PREPARED STATEMENT OF HR POLICY ASSOCIATION

Mr. Chairman and distinguished members of the committee: Thank you for this opportunity to present HR Policy Association's views on the Paycheck Fairness Act (H.R. 12/S. 182). HR Policy Association represents the chief human resource officers of 300 of the largest corporations in the United States, collectively employing over 12 million employees in the United States, and over 18 million worldwide. One of HR Policy's principal missions is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the workplace.

S. 182, the Paycheck Fairness Act (PFA), would significantly amend the Equal Pay Act (EPA) by allowing unlimited compensatory and punitive damages, in addition to make whole remedies and liquidated damages, now authorized for equal pay violations. Furthermore, the proposed legislation would:

- ease restrictions on commencing equal pay class action lawsuits by requiring participants to "opt-out" if they do not wish to be part of the class;
- prohibit payroll confidentiality policies;
- mandate the collection of wage data from employers for disclosure to the general public;
- limit legitimate nondiscriminatory defenses an employer could raise to justify wage differentials in equal pay claims;
- permit plaintiffs to bring equal pay claims based on wage differentials with employees located in different geographic locations (present law limits comparisons to employees located in the same establishment); and
- allow applicants, as well as employees, to make Equal Pay Act claims.

Moreover, the bill retains its fundamental flaw of imposing new mandated costs on employers at a time when the economic recovery is uncertain at best. In addition, it would impose significant new administrative burdens on employers. This statement provides a detailed analysis of the HFA and examines some of the concerns employers would have in seeking to implement it.

The following HR Policy Association analysis discusses in detail the proposed legislation.

I. INTRODUCTION TO THE PAYCHECK FAIRNESS ACT DEBATE

In his January 2010 State of the Union Address, President Obama declared that ensuring "equal pay for an equal day's work" was a priority for his Administration.¹ Some have interpreted this as a call to move forward with the Paycheck Fairness Act. The President's words are redundant to those who have been following equal pay issues. After all, the second piece of legislation President Obama signed in January 2009 was the "Lilly Ledbetter Fair Pay Restoration Act,"² which in his words "guaranteed equal pay for equal work."³ Considering that President Obama guaranteed that the Ledbetter Act solved the equal pay for equal work issue, it begs the question of the need to proceed with the PFA.

Moving forward with the PFA has been questioned on all sides. For example, *The Washington Post* called for the Senate to "rethink" the PFA legislation.⁴ While the *Post* supported the passage of the Ledbetter Fair Pay Restoration Act it warned that passage of the PFA "risks tilting the scales too far against employers and would remove, rather than restore, a sense of balance."⁵

¹The White House, Office of the Press Secretary, Remarks By The President In The State of the Union Address, Jan. 27, 2010, at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

²Pub. L. 111-2 (2009).

³The White House, Office of the Press Secretary, Remarks By The President At AFL-CIO Labor Day Picnic, Sept. 7, 2009, at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-AFL-CIO-Labor-Day-Picnic/.

⁴Two Sides of Fair Pay, *The Washington Post*, Jan. 15, 2009, A-18.

⁵*Id.*

Even so, PFA advocates tout the legislation as a way to give the Equal Pay Act “new teeth.”⁶ Such a statement would lead one to believe that there is currently little to no protection against wage discrimination on the basis of gender under Federal law. To the contrary, both the EPA and Title VII of the Civil Rights Act of 1964 already contain blanket provisions prohibiting gender-based pay discrimination in the workplace. The EPA provides back pay, plus that amount doubled, injunctive relief and attorney’s fees if an employee simply shows a wage disparity between themselves and a person of the opposite gender (intentional or unintentional) so long as the employer cannot provide a legitimate nondiscriminatory reason for the wage disparity. Title VII also provides an even broader array of remedies including compensatory and punitive damages, front pay, back pay, and attorney’s fees and costs if an employee can demonstrate that he or she is receiving lower wages on the basis of gender because of the employer’s intentional discrimination. In addition, title VII also provides a more limited array of damages if a plaintiff successfully demonstrates that an employer’s pay practice, decisions or systems are fair in form but discriminatory in operation (i.e., unintentional discrimination) under a disparate impact theory of discrimination. Such remedies include back pay, injunctive relief and attorney’s fees and costs. Indeed, both statutes already provide the plaintiff a broad array of remedies and damages in challenging an employer’s pay practices, systems or decisions under both intentional and unintentional theories of discrimination. Thus, the two statutes provide robust mechanisms for both the government and private plaintiffs to challenge wage disparities or wage discrimination.

But, in fact, the underlying motivation for proposing the PFA goes beyond the legal parameters of discrimination against a protected class (i.e., gender) and into determining the rate of compensation a company should pay an individual for the performance of their job based on theoretical understanding of “fairness” which is nearly impossible to agree upon, much less legislate. The purpose of the legislation is to provide the courts and plaintiffs, including the Equal Employment Opportunity Commission (EEOC), the ability to second guess an employer’s pay systems, practices or decision. This would include such decisions that are based on legitimate nondiscriminatory reasons causing a wage disparity. In other words, under the PFA it would not matter if a wage disparity is based on a legitimate nondiscriminatory reason or factor, if the plaintiff can show that the factor was not job-related or not necessary for the operation of the business, the employer loses. Such an intrusion on legitimate management functions is unprecedented.

Supporters often cite a simplistic raw gender wage gap statistic as proof that pay discrimination exists today in the American workplace on a large scale and that the PFA is necessary. For example, this past June, Senator Barbara Mikulski (D-MD) said in support of the PFA that women “still just earn 78 cents for every dollar our male counterpart makes.”⁷ However, a recent study commissioned by the Department of Labor (DOL) casts significant doubt on the accuracy of the 78 cents for every dollar “gender wage gap” statistic.⁸ In fact, the study determined that “it can be confidently concluded that, collectively,” the numerous explanatory factors discussed in the report “account for a major portion and, possibly, almost all of the raw gender wage gap.”⁹

This analysis begins with discussing the protections against pay discrimination under current law and then discusses the flaws in the PFA. Furthermore, this memorandum demonstrates how current nondiscrimination law is more than sufficient in preventing gender compensation discrimination in the workplace.

Note: The Equal Pay Act and Title VII of the Civil Rights Act of 1964 are preexisting laws which work together to prevent discriminatory practices in the workplace, including gender-based pay discrimination. These laws render the Paycheck Fairness Act redundant and unnecessary.

⁶Press Release, U.S. Senator Barbara Mikulski, *Mikulski, Dodd Urge Support for the Paycheck Fairness Act*, June 16, 2009, <http://mikulski.senate.gov/Newsroom/PressReleases/record.cfm?id=314516>.

⁷*Id.* The statistics cited by Sen. Mikulski in the statement comes from a general study conducted by the DOL’s Bureau of Labor Statistics.

⁸The DOL Study was conducted by CONSAD Research Corporation and is entitled, “An Analysis of Reasons for the Disparity in Wages Between Men and Women,” prepared for the U.S. Department of Labor Office Employment Standards Administration (January 2009).

⁹Charles E. James, Sr., Forward by the U.S. Department of Labor to “An Analysis of Reasons for the Disparity in Wages Between Men and Women,” prepared for the U.S. Department of Labor Office Employment Standards Administration (January 2009), 1 (emphasis added). The complete report can be accessed at <http://www.hrpolicy.org/downloads/2009/Gender%20Wage%20Gap%20Final%20Report.pdf>.

II. EXISTING FEDERAL LAWS ADEQUATELY ADDRESS GENDER-BASED
WAGE DISCRIMINATION

Currently, two Federal laws protect employees from gender-based wage discrimination: the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The Federal agency responsible for enforcement of these two laws is the EEOC. Under these laws, women cannot be:

- denied equal pay for equal work;
- paid differently than men because of their gender;
- discriminated against in initial job assignments;
- intentionally segregated into “women’s” jobs;
- denied the right to apply for any job, particularly higher paying jobs dominated by males;
- denied training, transfers, promotions, or any other job opportunities because of their gender; or
- subjected to intentional job evaluation manipulations that downgrade women’s pay because of their gender.

As explained in more detail below, Congress has already created statutory provisions that prohibit all forms of gender-based wage discrimination and provided effective remedies.

A. *The Equal Pay Act*

The EPA was originally passed in 1963 as an amendment to the Fair Labor Standards Act (FLSA) to prohibit gender-based wage discrimination.¹⁰

Elements of an EPA Case

The EPA requires “equal pay for equal work.” In order to establish a *prima-facie* case discriminatory pay “an employee must prove an employer paid different wages to men and women performing equal work,”¹¹ which is demonstrated by demonstrating the following:

- the work performed by an employee must be “substantially equal” to the work performed by another employee of the opposite sex;
- the work must be performed at the same establishment; and
- the employee’s pay rate must be less than that of an employee of the opposite sex who performed the same work.

“Substantially equal” work is proven by showing that the jobs being compared require equal skill, effort, and responsibility, and that they are performed under similar working conditions.¹² The “same establishment” requirement has generally been interpreted to mean the same “distinct physical place of business” or “physically separate place of business.”¹³

This framework essentially requires a plaintiff to establish only the mere *existence* of disparate pay for the performance of equal work, leaving the defendant with the burden to establish that any demonstrated pay differential is *not* due to the aggrieved employee’s sex.¹⁴ Importantly, a plaintiff asserting an EPA claim does not need to prove the existence of “intentional discrimination.”¹⁵ In fact, “the [EPA] prescribes a form of strict liability: Once the disparity in pay between substantially similar jobs is demonstrated, the burden shifts to the defendant to prove that a ‘factor other than sex’ is responsible for the differential. If the defendant fails, the plaintiff wins.”¹⁶

Defenses

After the employee proves each of the above elements, the burden shifts to the employer to show, by a preponderance of the evidence, that the wage differential is justified by one of four affirmative defenses set forth in the EPA.¹⁷ The four affirmative defenses are whether wages are set according to:

¹⁰ 29 U.S.C. § 206(d) (2008).

¹¹ *Drum v. Leeson Electric Corp.*, 565 F.3d 1071, 1072 (8th Cir. 2009).

¹² *Lavin-McEleney v. Marist College*, 239 F.3d 476, 480 (2d Cir. 2001); *Virginia v. Tufenkian Import-Export Ventures*, 2008 U.S. Dist. LEXIS 72139 *26 (S.D. N.Y. 2008).

¹³ 29 CFR § 1620.9 (1998).

¹⁴ *Vereen v. Woodland Hills School Dist.*, 2008 U.S. Dist. LEXIS 23075 *63 (W.D. Pa. 2008) (citation omitted).

¹⁵ *Ledbetter v. Goodyear Tire*, 550 U.S. 618, 639 (2009).

¹⁶ *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

¹⁷ *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) (“Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his

- (i) a seniority system;
 - (ii) a merit system;
 - (iii) a system that measures earnings by the quantity or quality of production;
- or
- (iv) a differential based on any other factor other than sex.

If the employer is unable to meet its burden of proving one of the four defenses, it has violated the EPA. The fourth affirmative defense is used by employers in the great majority of EPA cases to show that any wage disparity is the result of legitimate nondiscriminatory business factors. The PFA, however, would completely eviscerate this defense. The burden of proving that a factor other than gender is a reason for a wage differential under the EPA “is a heavy one”¹⁸ and employers must establish that gender was “no part of the basis” of the alleged wage disparity.¹⁹ Courts have permitted employers to raise the fourth defense successfully for many nondiscriminatory reasons such as when wage differentials exist as a result of temporary reassignments, training programs, prior salary history, prior experience, education, shift differentials, and “red circle” rates.²⁰

Damages

Available remedies to a successful EPA plaintiff include back pay for 2 or 3 years and liquidated damages (i.e., double back pay).²¹ Back pay may be awarded for up to 3 years, rather than 2, if the employer’s actions are found to have been willful.²² Liquidated damages (an amount equal to back pay) are generally awarded to a prevailing plaintiff unless the employer demonstrates that its actions were in “good faith” and that it had “objectively reasonable grounds for believing” that its actions did not violate Federal law.²³ While attorneys’ fees may be awarded, expert fees are not recoverable.

B. Title VII of the Civil Rights Act

Employees may also bring gender-based wage discrimination claims under Title VII of the Civil Rights Act of 1964.²⁴ Indeed, many pay discrimination plaintiffs allege violations of both statutes. Under title VII, there are two theories by which a plaintiff can pursue a pay discrimination claim: (1) disparate treatment and (2) disparate impact.²⁵ Disparate treatment occurs when a plaintiff is intentionally treated less favorably than others because of gender.²⁶ Disparate impact, on the other hand, exists where a neutral employment practice has a disproportionately impact on the plaintiff’s gender²⁷ in such a manner that the practice is “fair in form but discriminatory in operation.”²⁸ In other words, proof of discriminatory motive is not required under the disparate impact theory of discrimination whereas disparate treatment discrimination requires a showing of intentional discrimination.²⁹ Understanding the difference between these two theories of discrimination is important as different remedies and damages are available under each.

burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act’s four exceptions.”)

¹⁸ *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006); *Mahan v. Peake*, 2009 U.S. Dist. LEXIS, at * 23 (E.D. Mich. 2009).

¹⁹ *Mahan v. Peake*, 2009 U.S. Dist. LEXIS, at *23 (E.D. Mich. 2009) (emphasis in original).

²⁰ “Red circles rate” has been defined to mean “certain unusual, higher than normal, wage rates which are maintained for many reasons” unrelated to gender. *Gosa v. Bryce Hosp.*, 780 F.2d 917, 918 (11th Cir. 1986).

²¹ 29 U.S.C. § 216(b) (2008).

²² 29 U.S.C. § 255(a) (2008). “Willful” is only applicable for the period of recovery (i.e. 2 or 3 years) and not whether liquidated damages should be awarded. See *Brown v. Fred’s Inc.*, 494 F.3d 736, 744 (8th Cir. 2007) (“A different statute provides that if the employee shows a willful violation, then the statute of limitations is extended from 2 to 3 years, but this is not the standard for liquidated damages.”).

²³ 29 U.S.C. § 260 (2008); *Brown v. Fred’s Inc.*, 494 F.3d 736, 743–44 (8th Cir. 2007).

²⁴ 42 U.S.C. § 2000e–2(a) (2008).

²⁵ *Moore v. The Boeing Co.*, 2004 U.S. Dist. LEXIS 5959 (E.D. Mo. 2004) (“Plaintiffs seek class certification on their salary claims, both under a disparate treatment theory and under a theory of disparate impact.”).

²⁶ *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977).

²⁷ *Id.*

²⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²⁹ *International Brotherhood of Teamsters v. U.S.*, 431 U.S. at 335 n.15.

Broader Than EPA

Title VII is broader than the EPA in several ways. First, unlike the EPA, which is limited to wage discrimination, title VII prohibits gender discrimination in areas that have an impact on wages and have compensation-related consequences such as hiring, firing, assigning, promotion, and transfers. Indeed, courts have recognized that the burden on employers is “meaningfully” different than under title VII. One court noted, “this standard differs meaningfully from the standard applicable under title VII. In a title VII case, the plaintiff . . . must establish that the employer discriminated against [him or her] with respect to the terms of her compensation *because of her sex*. In contrast, in an Equal Pay Act case, the defendant employer relying on the [EPA’s fourth affirmative] defense must establish that an aggrieved employee . . . is *not* being paid less *because of her sex*.”³⁰

Moreover, under title VII, plaintiffs are not required to demonstrate that the jobs are “substantially” equal as long as the plaintiff can prove that the wage disparity is due to intentional discrimination.³¹ Title VII also allows for recovery without the comparison of wages with another employee of the opposite gender.³² For example, if an employer intentionally lowered an individual’s pay on account of gender “even if there were no employees of the opposite sex doing equal work for higher pay.”³³

Defenses

As to defenses, the same four affirmative defenses available under the EPA are also available under title VII.³⁴ The defenses include wages that are set according to a seniority system, a merit system, a system that measures earnings by the quantity or quality of production, or any other factor other than gender.

Damages

Title VII and the EPA differ in the area of available remedies. There is no provision for liquidated damages under title VII. However, under title VII, in addition to receiving back pay for 2 years, disparate treatment (i.e., intentional discrimination) plaintiffs may also recover injunctive relief, front pay, capped compensatory and punitive damages and attorney’s fees and costs. Depending on the number of employees of the employer, compensatory and punitive damage awards may range from \$50,000 to \$300,000.³⁵ However, under a disparate impact theory of discrimination (i.e., unintentional discrimination), a successful plaintiff may only recover injunctive relief, back pay and attorney’s fees and costs. The remedies available for plaintiffs suing a disparate impact theory of discrimination are limited because there is no requirement to prove the employer acted with discriminatory motive whereas remedies available for disparate treatment discrimination are much more expansive but there must be a showing of intentional discrimination.

Admittedly, pay discrimination does occur in some cases. But the pertinent question at hand is whether these occurrences can be adequately addressed by the robust nondiscrimination protections currently in the law or whether a drastic change in current law is needed that the PFA represents. The ramifications of the PFA are discussed below.

III. THE PAYCHECK FAIRNESS ACT

The PFA has very little to do with punishing and deterring pay discrimination thus ensuring equal pay for equal work, which since 1963 has been required by the EPA. Representative George Miller (D–CA), Chairman of the House Education and Labor Committee, has gone on the record admitting that the issue is not really gender discrimination, but instead, about how employers compensate their employees, even in cases where unlawful discrimination is decidedly absent. Rep. Miller stated:

Currently, an employer can refute a pay discrimination claim if he or she provides the difference of pay is based upon any factor other than gender, even fac-

³⁰ *Vereen v. Woodland Hills School Dist.*, 2008 U.S. Dist. LEXIS 23075 *71 (W.D. Pa. 2008) (emphasis in original).

³¹ *Sims-Fingers v. City of Indianapolis*, 2007 U.S. App. LEXIS 15253 *8 (7th Cir. 2007).

³² *County of Washington v. Gunther*, 452 U.S. 159, 178–80 (1981); *Drury v. Waterfront Media, Inc.*, 2007 U.S. Dist. LEXIS 18435 at *15 (S.D. N.Y. Mar. 7, 2007).

³³ *Drury v. Waterfront Media, Inc.*, 2007 U.S. Dist. LEXIS 18435 at *15 (S.D. N.Y. Mar. 7, 2007); *Brennan v. City of White Plains*, 1998 U.S. Dist. LEXIS 1931 at *9 (S.D.N.Y. 1998).

³⁴ *Gunther*, 452 U.S. at 170–71.

³⁵ 42 U.S.C. § 1981a(b)(3) (2008) (employers of 15–100 employees, \$50,000 cap; employers of 101–200 employees, a \$100,000 cap; employers of 201–500 employees, a \$200,000 cap; employers of over 500 employees, a \$300,000 cap).

tors unrelated to the job. That is just unacceptable. An excuse for equal pay that is not related to the job is no excuse at all.³⁶

It is important to note that Rep. Miller does not distinguish between differences in pay that are the result of discriminatory motive or one that is nondiscriminatory. Indeed, other proponents of the PFA have noted that the legislation would require employers to show that pay disparities are not only nondiscriminatory (i.e., not based on gender), but also that such disparities are job-related and necessary to the operation of the business, which is a very high standard once a practice, system or decision has already been deemed nondiscriminatory. Proponents noted the following:

Permitting an employer to assert an affirmative defense in an EPA action, only where the pay differential between men and women is not related to gender, is related to job performance, and is consistent with business necessity.³⁷

Effectively Eliminates Legitimate Nondiscriminatory Reasons as an Adequate Legal Justification for Wage Differentials

The PFA substantially changes the affirmative defenses available under the EPA. In particular, the bill would revamp the fourth affirmative defense (i.e., any factor other than sex). An employer demonstrating that a wage differential is the result of a legitimate nondiscriminatory factor, by itself, would no longer be sufficient to prevail against allegations of wage discrimination. As described above, this defense has been successfully raised by employers when wage differentials exist for several reasons including, but not limited to, education, experience, training, prior salary history, profitability and revenue production. The PFA would create a confusing scheme requiring the employer to go beyond showing that a nondiscriminatory reason is the basis for the wage difference. The employer would then be required to prove that such legitimate nondiscriminatory factors are job-related and consistent with business necessity. The PFA would invoke a fundamental change in Federal nondiscrimination law by going beyond the question of discrimination (i.e., whether the employment action or pay disparity was based on a protected classification such as gender). The legislation would require a business to establish that its pay structure, systems or decisions were necessary to the operation of the business or consistent with an overriding business objective.

A Bona Fide Factor. The first step in this scheme would require an employer attempting to assert this defense to prove, first, that the factor causing the wage disparity is “bona fide.” “Bona fide” could be interpreted to require an employer to prove that this factor is part of a “systematic, formal system guided by objective, written standards.”³⁸ Moreover, although not expressly making them exclusive, the bill identifies three factors as examples of “bona fide” factors, namely, education, training, and experience. If such factors are considered non-exclusive, this step closes mirrors, the current fourth affirmative defense, which considers whether the wage disparity is based on a factor other than gender (i.e., not based on gender—not discriminatory).

Job-Related & Consistent With Business Necessity Standard. Yet under the PFA, whether a wage disparity is discriminatory does not end the inquiry. Indeed, after the employer demonstrates that the factor is “bona fide,” the second step in the new scheme would be to require an employer to prove that the factor is both “job-related” and “consistent with business necessity.” This very high burden is reserved for unique situations arising in Federal employment law.

In fact, there are two unique situations where the courts apply the job-related and business necessity standard. The first is under title VII where a plaintiff establishes that an employer’s practice is fair in form but has a disproportionate impact on a particular protected classification (i.e., disparate impact).³⁹ The second scenario under which the job-related and business necessity standard is used is under the ADA where an individual challenges an employer test or standard that screens out disabled individuals.

³⁶ 155 Cong. Rec. H127 (daily ed. Jan. 9, 2009) (statement of Rep. Miller).

³⁷ Commission on Women in the Profession, Report to the House of Delegates ABA, 1.

³⁸ See *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 901 (5th Cir. 1974).

³⁹ In a disparate impact action, “a plaintiff establishes a *prima facie* violation by showing that an employer uses ‘a particular employment practice’ that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” An employer defends against liability by demonstrating that the contested practice is “job-related for the position in question and consistent with business necessity.” Even if the “employer carries that substantial burden, the [plaintiff] may respond by identifying ‘an alternative employment practice’ which the employer ‘refuses to adopt.’” *Ricci v. Destefano*, 129 S. Ct 2658, 2673 (2009) (quotations omitted).

In order to show “job-relatedness” an employer “must demonstrate that the qualification standard fairly and accurately measures the individual’s actual ability to perform the essential functions of the job.”⁴⁰ To establish that the disputed employment practice such as a pay structure is consistent with “business necessity,” the employer “must show that it substantially promotes the business’s needs.”⁴¹ Indeed, “the ‘business necessity’ standard is quite high, and is not to be confused with mere expediency.”⁴²

In referring to the test for showing “business necessity” under title VII’s disparate impact theory of discrimination, Justice Ginsburg explained that otherwise neutral employment practices which had a disproportionate impact on a particular protected group “could be maintained only upon an employer’s showing of ‘an overriding and compelling business purpose.’”⁴³ Moreover, she noted “that a practice served ‘legitimate management functions did not . . . suffice to establish business necessity.’”⁴⁴ Ginsburg cited a series of cases setting forth the high standard of the business necessity defense including the following:

- “a discriminatory employment practice must be shown to be *necessary* to safe and efficient job performance”⁴⁵;
- “the term ‘necessity’ connotes that the exclusionary practice must be shown to be of *great importance to job performance*”⁴⁶;
- “the proper standard for determining whether ‘business necessity’ justifies a practice which has a racially discriminatory result is not whether it is justified by routine business considerations but whether there is a *compelling need* for the employer to maintain that practice and whether the employer can prove there is no alternative to the challenged practice”⁴⁷;
- “this doctrine of business necessity . . . connotes an *irresistible demand*”⁴⁸;
- “an exclusionary practice must not only directly foster safety and efficiency of a plant, but also be *essential* to those goals”⁴⁹;

In fact, the business necessity defense demands that there is no other less impactful way to achieve the employer’s compelling need. Justice Stevens, noted in comparing the business necessity standard to the “reasonable factor other than age” defense under the ADEA, that “unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”⁵⁰ As noted above, it would not be enough that a pay practice, system or decision is a legitimate nondiscriminatory management decision or even reasonable. Such decisions would still have to run the gauntlet of job relatedness and business necessity. If such practices failed to pass the scrutiny of a judge or jury—regardless of whether it was not based on gender—an employer would be subject to the full range of damages under Federal law.

No Other Means to Accomplish the Business Goal or Purpose. Under the PFA, if the employer establishes that a wage difference is based on a bona fide factor and if the employer is also able to satisfy the very high burden of showing that the factor is job-related and consistent with business necessity, the employee would then be given an opportunity to defeat the employer’s use of this defense altogether by showing that an alternative means to achieve the legitimate business purpose exists without resulting in a wage differential. If the employee is able to make that showing, the employer would lose. In other words, the plaintiff would be given the final opportunity to defeat the employer’s use of this so-called “bona fide factor” defense. Indeed, the deck is heavily stacked against the employer simply because an employee can show that a wage disparity exists.

⁴⁰ *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (citations omitted).

⁴¹ *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (citations omitted). See also, *EEOC v. Dial Corp.*, 475 F.3d 735, 743 (8th Cir. 2006) (“part of the employer’s burden to establish business necessity is to demonstrate the need for the challenged procedure”).

⁴² *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (citations omitted).

⁴³ *Ricci v. Destefano*, 129 S. Ct. 2658, 2697 (2009) (dissenting, Ginsburg) quoting *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1261 n.9 (6th Cir. 1981).

⁴⁴ *Ricci v. Destefano*, 129 S. Ct. 2658, 2697–2698 (2009) (dissenting, Ginsburg) quoting *Williams v. Colorado Springs*, 641 F.2d 835, 840–41 (10th Cir. 1981).

⁴⁵ *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14 (1977).

⁴⁶ *Williams v. Colorado Springs*, 641 F.2d 835, 840–41 (10th Cir. 1981).

⁴⁷ *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980).

⁴⁸ *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 244 n.87 (5th Cir. 1974).

⁴⁹ *U.S. v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

⁵⁰ *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

Unprecedented Penalty Provisions

The PFA would establish penalties for equal pay violations that are unprecedented in Federal equal employment opportunity (EEO) law. The bill would provide plaintiffs with unlimited monetary remedies, including back pay, liquidated damages, unlimited compensatory and punitive damages, attorneys' fees, costs of the action, and expert fees.⁵¹ No other Federal EEO law provides such a wide array of monetary relief to successful plaintiffs. (See Table 1).

Table 1
Comparison of Employment Law Damages

Statute	Protected Categories	Special Proof Requirements	Remedies Available						Limitations On Damages	Class Action		
			Backpay	Liquidated Damages	Compensatory Damages	Punitive Damages	Attorney's Fees	Expert Fees		Separate Relief	Opt-In	Opt-Out
PFA	Sex	Intent	✓		✓		✓	✓	✓	None		✓
		Intent & Malice Or Recklessness	✓		✓	✓	✓	✓	✓	None		
ADA	Individuals with Disabilities	Intent	✓		✓		✓	✓	✓	Compensatory Damages Limited To \$300,000		✓
ADEA	Individuals 40 Years or Older	None	✓				✓	✓			✓	
EPA	Sex	None	✓				✓	✓			✓	
FLSA	Non-Exempt Employees	None	✓				✓	✓			✓	
FMLA	Individuals with serious medical conditions	None	✓		✓		✓	✓				✓
GINA	Genetic Information	None	✓				✓	✓	✓			
		Intent & Malice Or Recklessness	✓		✓	✓	✓	✓	✓	Compensatory & Punitive Damages Limited To \$150,000		✓
Title VII	Race, Color, Sex, National Origin, Religion	None	✓				✓	✓	✓			
		Intent & Malice Or Recklessness	✓		✓	✓	✓	✓	✓	Compensatory & Punitive Damages Limited To \$300,000		✓
42 U.S.C. § 1981	Race, National Origin	None	✓				✓	✓	✓			
		Intent & Malice Or Recklessness	✓		✓	✓	✓	✓	✓	None		✓

For example, Title VII of the Civil Rights Act, which prohibits discrimination based on race, gender, religion, and national origin, provides for recovery of back pay, attorney and expert fees, and awards of compensatory and punitive damages.⁵² Unlike the PFA, however, liquidated damages are not available under title VII, and compensatory and punitive damages (collectively) are capped at \$300,000 depending on the size of the employer.⁵³ The Americans with Disabilities Act (ADA), which prohibits discrimination against qualified individuals with disabilities, provides a remedial scheme identical to that of title VII.⁵⁴

The Age Discrimination in Employment Act (ADEA), on the other hand, provides back pay and liquidated damages remedies, but does not permit recovery of compensatory and punitive damages or expert fees. Furthermore, under the ADEA, liquidated damages are capped at an amount equal to the sum recovered in back pay.⁵⁵

The outlier is the Civil Rights Act of 1866, which is also known as Section 1981. This law was originally enacted to enforce the 13th, 14th, and 15th amendments

⁵¹ The expert fee provision of the PFA is not limited to equal pay claims but also would amend the ADEA and FLSA to permit the award of such fees under those statutes as well.

⁵² 42 U.S.C. § 2000e-5 (g), (k) (2008).
⁵³ Like title VII, the Civil Rights Act of 1866, 42 U.S.C. § 1981, also prohibits discrimination in employment based on race. Under this section, successful plaintiffs may recover back pay, compensatory and punitive damages, and attorneys' fees. *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n. 4 (1989). Liquidated damages and expert fees, however, may not be awarded under the 1866 Act.

⁵⁴ 42 U.S.C. § 12.117 (2008); 42 U.S.C. § 1981a (a) (2), (b) (3) (2008); *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997).

⁵⁵ 29 U.S.C. § 626 (b) (2008).

to the U.S. Constitution following the Civil War. The act prohibits race discrimination in making and enforcing contracts. The courts determined that the act's prohibition applied to the employer-employee relationship. Section 1981 only applies to race and national origin discrimination.⁵⁶ It allows uncapped compensatory and punitive damages⁵⁷ but does not provide for liquidated damages as under the EPA.

Thus, unlike every other nondiscrimination law, under the PFA a plaintiff is eligible to recover every remedy available under all other Federal nondiscrimination laws combined. Clearly, such an expansive measure exceeds the scope of the relief available under any existing Federal EEO law.

Minimal Proof Requirements

No Proof of Intent Required. A troubling aspect of the PFA remedial scheme is the lack of proof that is required under the bill to recover the full panoply of damages. As noted above, the current standard for proving an EPA violation is a form of strict liability and there is no requirement that an individual be subjected to intentional discrimination (though the damages are increased for bad-faith violations).⁵⁸ Whether a wage differential results accidentally, or from an explicit intent on the part of the employer to discriminate based on gender, makes no difference. The PFA in no way changes this standard, but nonetheless provides for unlimited compensatory and punitive damages under the act. The low standard established by the PFA for recovery of compensatory and punitive damages is contrary to long established Federal EEO policy unprecedented in Federal law. For example, to recover such damages under title VII and ADA, plaintiffs must prove that the employer *intentionally* discriminated against them because of their race, gender, religion, national origin or disability.⁵⁹ Moreover, even where intent is proven under these laws, damages are limited to no more than \$300,000. The 1866 Civil Rights Act also requires proof of *intentional* discrimination in order to recover damages. Even the ADEA, which provides limited liquidated damages, requires some demonstration of intent. Under that statute, an employer is liable for damages only where the discrimination was *willful*—that is, where the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.”⁶⁰ However, as noted above, when a plaintiff advances a disparate impact (i.e., unintentional discrimination) theory of discrimination the plaintiff's remedies are limited to back pay, injunctive relief and attorney's fees.

Employer Defenses Restricted. Finally, unlike the EPA, the PFA will penalize employers even when they acted with a reasonable belief that their pay policies were lawful. Because of the complexity of wage cases, Congress long ago recognized a defense to liquidated damages awards under the FLSA and EPA where an employer acted in “good faith” and with “reasonable grounds for believing” its conduct was lawful.⁶¹ In such cases, the court is authorized to limit or deny liquidated damages. In the past, this has been a just and important defense for employers, limiting their liability in cases where they had acted in reliance on advice from their lawyers,⁶² on opinions of the EEOC,⁶³ or upon reasonable, but ultimately incorrect, wage comparison data.⁶⁴ While this defense remains available under the PFA for liquidated damages, it would not affect awards for compensatory and punitive damages. Given the factual and legal complexities associated with EPA compliance, the absence of a good faith defense to compensatory and punitive damages in the PFA could pose significant problems for employers.

Dubious Policy for Confronting Workplace Discrimination

PFA Will Increase Litigation. As one can see from its remedial scheme, the PFA adopts what has become an all-too-familiar policy for confronting societal problems—expanding civil monetary penalties against employers. History demonstrates

⁵⁶ Civil Rights Act of 1866, 14 Stat. 27.

⁵⁷ 42 U.S.C. § 1981 (2008).

⁵⁸ *Beck-Wilson v. Principi*, 441 F.3d 353, 360 (6th Cir. 2006) (stating that “unlike the showing required under title VII's disparate treatment theory, proof of discriminatory intent is not required to establish a *prima facie* case under the Equal Pay Act.”); *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989); *Brewster v. Barnes*, 788 F.2d 985, 993 n.12 (4th Cir. 1986) (discriminatory intent is not an element of a claim under the EPA); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 410 (10th Cir. 1993) (same).

⁵⁹ 42 U.S.C. § 1981a(a)(1) (2008).

⁶⁰ *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

⁶¹ 29 U.S.C. § 260 (2008).

⁶² E.g., *Hill v. J.C. Penney Co.*, 688 F.2d 370, 375 (5th Cir. 1982).

⁶³ E.g., *EEOC v. Tree of Life Christian Sch.*, 751 F. Supp. 700, 707 (S.D. Ohio 1990).

⁶⁴ E.g., *Clymore v. Far-Mar-Co.*, 709 F.2d 499, 505 (8th Cir. 1983).

that an expansion of civil monetary remedies will only encourage the filing of meritless charges and lawsuits.

A case in point is the Civil Rights Act of 1991. That statute was designed to help deter workplace discrimination by drastically increasing—in the form of compensatory and punitive damages—the penalties for such discrimination. Federal charge and caseload data indicate, however, that the 1991 Act has served more to encourage the filing of frivolous charges and lawsuits, thereby imposing its own costs on society.

Even the courts themselves have begun to take notice of the proliferation of meritless employment claims. For example, one district court stated:

This Court has observed too many cases where an individual who has been rejected for a job or who has been fired from a position will make totally unsupported claims of discrimination. Indeed, some persons make multiple, non-substantiated claims, i.e., race, religion, gender, age, in the same case in the hope that maybe one of the claims will “stick.”⁶⁵

And another district court said:

This case is yet another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court’s resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop.⁶⁶

As former Justice O’Conner prudently observed over 20 years ago, the value of any increase in the availability of monetary relief must be evaluated by weighing the likely increase in deterrent effect against the additional incentive for meritless litigation.⁶⁷ Statistics have shown that the addition of *limited* damages under the 1991 Act failed this test. It appears likely that the *unlimited* damages provisions of the PFA are destined to repeat that mistake.

Class Action Changes: “Opt-In” to “Opt-Out”

The PFA would also change the procedural requirements for bringing class action claims under the EPA from “opt-in” class actions to “opt-out” actions. This is an especially troubling aspect of the new bill, as it would dramatically increase the magnitude of class actions brought under the EPA.

Under existing law, equal pay claims are subject to the class action provisions contained in 29 U.S.C. §216(b). This section—which also applies to actions brought under the FLSA and ADEA—permits individual employees to bring “collective” or “class” lawsuits on behalf of “similarly situated” employees against the employer. Section 216(b) specifically states, however, that “no employee shall be a party plaintiff to any . . . action [under this section] unless he gives his consent in writing to become such a party and such consent is filed with the court in which such action is brought.” Thus, presently, employees who desire to participate in an equal pay class action must take affirmative steps to join the class. This kind of class action device often is referred to as an “opt-in” class action.

The PFA, however, amends the EPA to exclude equal pay claims from Section 216(b) coverage. Under the proposed legislation, EPA class actions instead would be subject to the requirements of Federal Rule of Civil Procedure (Rule 23), the procedural rule that governs all other class action cases in Federal court. This change is significant because Rule 23 uses an “opt-out” procedure. That is, in a Rule 23 class action all similarly situated employees automatically become members of the class unless they take affirmative steps to withdraw from the class.⁶⁸ Since most individuals, when notified that a class action is pending, do nothing at all, the magnitude of “opt-out” class actions is invariably larger than “opt-in” actions.⁶⁹ This is

⁶⁵ *Bray v. Georgetown Univ.*, 917 F. Supp. 55, 60 (D.D.C. 1996), *aff’d without op.*, 116 F.3d 941 (D.C. Cir. 1997).

⁶⁶ *Keegan v. Dalton*, 899 F. Supp. 1503, 1515 (E.D. Va. 1995).

⁶⁷ *Smith v. Wade*, 461 U.S. at 93–94 (O’Connor, J. dissenting).

⁶⁸ Fed. R. Civ. P. 23(c)(2) (2008).

⁶⁹ Rule 23 also permits a court to certify class actions without the opt-out right. Fed. R. Civ. P. 23(b)(1), (2). Under 23(b)(1) and (2) cases, all potential class members are included in the action regardless of their desires. Fed. R. Civ. P. 23(c)(3). Obviously, classes certified under these provisions generate class sizes at least as large as those certified with the opt-out provision. In the past, employment discrimination cases commonly had been certified under either approach. Thus, it is at least theoretically possible that PFA claims likewise could be certified without an opt-out right. However, many courts now question whether claims involving compensatory and punitive damages, such as those that would arise under the PFA, can be certified

particularly concerning because many individuals would remain (or not opt-out) as part of a putative class even though they do not believe they have been the subject of discrimination, which will waste judicial resources, simply serve to drive up litigation or settlement costs and result in significantly higher attorney's fees awards for the plaintiffs' attorneys.

One Federal court of appeals has noted that these large opt-out damages cases create insurmountable pressure on defendants to settle regardless of the merits of the case. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."⁷⁰ Other Federal courts have referred to these kinds of cases as "judicial blackmail."⁷¹

Indeed, the real benefit goes to the lawyers who will bring suits under the PFA. A PFA proponent admitted that one reason for adding compensatory and punitive damages is to entice the plaintiffs' bar. Representative Rob Andrews (D-NJ) stated:

Now, the problem with the Equal Pay Act is its remedies are limited so much to just twice what your salary is that the damages are never high enough to justify legal representation. This is about getting lawyers for people who have a valid claim who cannot afford the thousands of dollars it would be.⁷²

A key element that Rep. Andrews does not address, however, is that both the EPA and title VII currently provide attorney's fees to the prevailing party. Representative Tom Price (R-GA), concerned that the plaintiffs' bar would aggressively use the PFA to attack employers' pay systems, practice and decisions on a grand scale in order to achieve high dollar settlements, offered an amendment in a House Committee hearing that would have limited an award of "reasonable attorney's fees" in PFA cases to \$2,000 per hour.⁷³ The proponents of the PFA, however, rejected the amendment because it would unduly interfere with the plaintiffs' bar pay.⁷⁴ Indeed, the PFA provides every incentive for the plaintiffs' bar to challenge employers pay systems, practices or decisions regardless of whether a pay disparity is the result of discrimination.

Wage Differentials Based on Work Location No Longer Permissible

As part of a plaintiff's initial or *prima facie* EPA case, he or she must also show that the show a wage disparity compared with another employee working in *the same establishment*.⁷⁵ EEOC regulations define "establishment" as follows:

It refers to a distinct physical place of business rather than to an entire business or enterprise which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment.⁷⁶

This requirement recognizes real business and economic differences that may exist from facility to facility and serves to prevent an employee from comparing wages with other employees in separate plants, or geographical regions.⁷⁷ The regulations, however, recognize exceptions to the rule in "unusual circumstances."⁷⁸

The PFA would expand "establishment" to mean any of the employer's facility within the same county or similar political subdivision. Importantly, however, the PFA would invite the EEOC to draft new regulations on the meaning of "establishment."

without affording potential class members the opportunity to opt-out. See, e.g., *Ticor Title Ins. Co. v. Brown*, 114 U.S. 1359, 1361 (1994).

⁷⁰ *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (1996).

⁷¹ See, e.g. *Id.* at 746; *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 U.S. 767 (1995).

⁷² 153 Cong. Rec. H128 (daily ed. Jan. 9, 2009) (statement of Rob Andrews).

⁷³ H.R. Rep. No. 110-783, at 53 (2008).

⁷⁴ Notes of the legislative debate during the mark-up of the bill in the House Education and Labor Committee between Reps. Price (R-GA), McKeon (R-CA) and Andrews (D-NJ) on file with the author.

⁷⁵ 29 U.S.C. § 206(d) (2008).

⁷⁶ 29 CFR § 1620.9 (a).

⁷⁷ *Collins v. Landmark Military Newspapers*, 2007 U.S. Dist. LEXIS 57572 at **46-47 (E.D. Va. 2007) (holding that a plaintiff located in Norfolk, VA, could not adequately be compared with employees of the opposite gender in North Carolina because the EPA precludes "comparison of jobs across establishments" and the plaintiff failed to set forth any "unusual circumstances" justifying consideration of employees outside her establishment).

⁷⁸ 29 CFR § 1620.9 (b).

Applicants Eligible to Make Equal Pay Act Claims

Presently, only employees are able to present Equal Pay Act claims. Job applicants are not “employees” for purposes of the Equal Pay Act.⁷⁹ Under the revised PFA, applicants (who would be employees if employed by the employer) would now be able to make Equal Pay Act claims. Under this revision, an individual who was offered a job but declined it could potentially make an EPA claim. Claims of pay discrimination (i.e., wage disparity) brought by, or on behalf of, individuals who have never worked for the employer is simply illogical as the case would have to be constructed on hypothetical assertion after hypothetical assertion. Indeed, the real purpose of such a provision would be to significantly expand the scope of eligible plaintiffs in class actions, which, as noted above, would simply serve to drive up litigation costs (pushing employers to settle) and increase the return to plaintiff attorneys on behalf of individuals who could bring these claims. In the end, there is no rational justification for this expansion of the EPA.

Nonretaliation Provision for Wage Disclosure

Under Section 3 of the PFA, it would be illegal for an employer to discharge or discipline an employee who “has inquired about, discussed, or otherwise disclosed the wages of the employee or another employee.” This provision would prevent employers from enforcing company policies concerning the privacy and confidentiality of employee payroll and wage information.

The National Labor Relations Board in its enforcement of the National Labor Relations Act (NLRA) has similarly protected employees who have shared or disclosed pay information. However, the PFA language is even broader in terms of which employees would be protected. Under the NLRA, supervisors and managerial employees are not covered employees and, therefore, are not afforded this protection from being disciplined or discharged. Under the PFA, supervisors and managerial employees would be protected from discipline or discharged if they disclose wage-related information. Importantly, it is supervisors and managerial employees who have far greater access to pay data.

Mandatory and Public Wage Data Collection and Reporting

Section 8 of the bill does not amend the EPA, but instead, creates a new enforcement mechanism by enabling the EEOC to collect pay and compensation data from all covered employers. The PFA directs the EEOC to determine what wage data information would be helpful in strengthening the enforcement of wage discrimination laws. The EEOC would then issue regulations regarding how and what type of information it would require from employers. Although the bill provides that, in promulgating such regulations, the EEOC must consider the burden on employers, the frequency of reporting, and protections to maintain pay data confidentiality, the EEOC would be given virtually unlimited discretion in determining what wage data employers must report. Nothing in the bill prevents the wage data from being publicly disclosed by the EEOC. Employers would be required to report the wage data by the gender, race and *national origin* of their employees. In the end, it is highly likely that the EEOC would require all employers to file something very similar to the Equal Opportunity Survey (discussed below), which was ultimately rescinded by the DOL in 2006 because of its ineffectiveness. The PFA would essentially permit the EEOC to mandate that employers provide more information than Federal contractors currently provide to the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP).

Reinstatement of the Flawed EO Survey

Like the previous section, Section 9 of the PFA has nothing to do with the EPA, but instead establishes a new enforcement regime for the Department of Labor’s OFCCP. The OFCCP is responsible for administering and enforcing certain non-discrimination and affirmative action obligations which are applicable only to covered Federal contracts and subcontracts.⁸⁰

The Flawed Equal Opportunity Survey. On September 8, 2006, the OFCCP rescinded its regulation requiring it to conduct an Equal Opportunity Survey (EO Survey) every year. Originally adopted in 2000, primarily for the purpose of effectively

⁷⁹ *Torres v. Action for Boston Community Dev., Inc.*, 32 FEP 1516, 1519 (D. Mass. 1983).

⁸⁰ See Exec. Order No. 11246 (1965); Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793; § 402 (2008) of the Vietnam Era Veterans Readjustment Assistance Act of 1972, 38 U.S.C. §§ 4211–4212 (2008).

targeting OFCCP compliance review resources, the EO Survey gathered detailed information concerning personnel hiring, compensation practices, and worker tenure from Federal contractors.⁸¹

Although the initial objectives of the EO Survey were laudable,⁸² the survey was severely flawed as a targeting tool; largely duplicative of other information OFCCP collects; and provided no information to contractors that would encourage self-evaluations. In fact, its usefulness and integrity came under question as early as April 2000, when Bendick and Eagan Economic Consultants Inc. provided a report to OFCCP highlighting serious problems with the pilot EO Survey and recommending that the usefulness of the survey be validated before it was fully implemented.⁸³ Such a validation study was not conducted before the EO Survey was implemented and the final rule published on November 13, 2000. In 2002, the OFCCP contracted with Abt Associates, Inc. to evaluate and validate the reliability and usefulness of the EO Survey methodology.

The Abt report, “An Evaluation of OFCCP’s Equal Opportunity Survey,” was highly critical of the ability of EO survey data to be used as an effective targeting tool for OFCCP’s compliance reviews. According to the report, the EO Survey had, on many occasions, mistakenly identified discrimination where the OFCCP determined there was none.⁸⁴ Specifically, the Abt report found that the EO Survey model lacked in basic predictive power and yielded a very high number—93 percent—of “false positives” or instances where the model predicted systemic discrimination but where none existed.

Note: The Abt report concluded that the accuracy of the methodology of the EO Survey was little better than chance. Consequently, the OFCCP concluded that there are better ways to target its enforcement resources and rescinded the EO Survey requirement . . . The PFA, however, rejects [the Abt report] and reinstates the flawed EO Survey by statute . . .”

The Abt report concluded that the accuracy of the methodology of the EO Survey was little better than chance. Consequently, the OFCCP concluded that there are better ways to target its enforcement resources and rescinded the EO Survey requirement.

Supporters of the EO Survey argue that it is the only reliable way to collect compensation data. However, in response to this objection the OFCCP reaffirmed its belief that “remediating compensation discrimination is important to [the OFCCP] mission,” and determined that using proven tools for determining discrimination, such as multiple regression analysis and anecdotal evidence, is more effective than the EO Survey’s categorical failure in targeting systemic discrimination.⁸⁵

The PFA, however, rejects out of hand two credible Department of Labor studies and re-instates the flawed EO Survey by statute *before* any additional research is conducted on the efficacy of using any at all survey. There is simply no justification to reinstate such a duplicative data collection.

Real Indicators of Discrimination Not Required. Not only would the PFA reinstate the EO Survey and require the OFCCP to use the widely discredited “pay grade methodology” in attempting to locate discrimination, the bill would also prohibit OFCCP from requiring “multiple regression analysis or anecdotal evidence for a compensation discrimination case.”⁸⁶ Indeed, the OFCCP’s 2006 standards for evaluating compensation practices provided contractors with the first definitive guidance on the subject and resolved previous conflicts between the rules applied by OFCCP and the courts.

Multiple regression analysis and anecdotal evidence are widely accepted as important evidentiary tools used to ferret out and defend against claims of systematic pay discrimination. In fact, Justice Brennan explained that “it is clear that a regression analysis . . . may serve to prove a plaintiff’s case” of a pattern or practice of pay discrimination, if the regression incorporates the major factors influencing compensation under the employer’s pay system.⁸⁷ Similarly, Justice Ruth Bader Gins-

⁸¹ “Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey,” 71 Federal Register 174 (8 September 2006), 53032.

⁸² *Id.* The hope was that the survey would: (1) increase compliance with equal opportunity requirements by improving contractor self-awareness and encouraging self-evaluations; (2) improve the deployment of Federal Government resources toward contracts most likely to be out of compliance; and (3) increase agency efficiency by building on the tiered-review process already authorized by OFCCP’s regulatory reform efforts.

⁸³ Abt Associates Inc., *An Evaluation of OFCCP’s Equal Opportunity Survey*, (Cambridge, MA: Feb. 2005), 1.

⁸⁴ *Id.* at 10–11.

⁸⁵ 71 Fed. Reg. 174, 53038.

⁸⁶ Paycheck Fairness Act, S. 182, 111th Cong. §9(b)(1)(A)–(C) (2009).

⁸⁷ *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

burg, then a judge on the D.C. Circuit, noted that, “in Title VII class actions, statistical proof is a prominent part of the *prima facie* case.”⁸⁸ Justice Ginsburg also noted in that case that, “generally, as part of their *prima facie* case, class action plaintiffs offer a combination of statistical proof and individual testimony of specific instances of discrimination.”⁸⁹ Indeed, it is generally accepted by the courts that the parties will use multiple regression analysis and anecdotal evidence to prevail.⁹⁰ In light of the wide acceptance of multiple regression analysis and anecdotal evidence in support of and defense of systemic pay discrimination claims, it is unclear what policy objective could be achieved by legislation that precludes OFCCP from requiring its investigators to use these types of evidentiary tools.

Moreover, OFCCP will use the pay grade analysis and its conciliation process to pressure employers to voluntarily settle allegations of discrimination where none exists. Only those employers who decide to incur substantial legal expenses will dispute the allegations. In fact, those employers who make remedial pay adjustments to female or minority employees based on the pay grade analysis may be subject to reverse discrimination claims under title VII or State law, as pay adjustments to female or minority employees that are unsupported by adequate multiple regression analyses may result in employer liability.⁹¹

IV. CONCLUSION

The PFA would unjustifiably expand the EPA to provide a remedy scheme unlike any other Federal nondiscrimination law. Moreover, it would increase litigation by permitting uncapped damages and making it easier to bring class actions, which will ultimately benefit the plaintiffs’ bar. In addition, the bill would permit the EEOC to gather large amounts of information in an unprecedented manner from all employers with 15 or more employees. Similarly, the bill would reinstate the fundamentally flawed pay grade methodology and EO Survey, which was recently rejected by the OFCCP. In sum, there are simply no good policy reasons for such provisions.

LETTERS OF OPPOSITION

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
ARLINGTON, VA 22203,
March 10, 2010.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: On behalf of Associated Builders and Contractors (ABC), a national association with 77 chapters representing 25,000 merit shop construction and construction-related firms with 2 million employees, I am writing to express our strong opposition to S.182, the “Pay-check Fairness Act,” scheduled for a hearing in the Senate Committee on Health, Education, Labor, and Pensions tomorrow.

ABC is adamantly opposed to discrimination of any kind and is strongly committed to equal employment, but believes current laws already in place properly ad-

⁸⁸ *Valentino v. U.S. Postal Service*, 674 F.2d 56, 68 (D.C. Cir. 1982).

⁸⁹ *Id.*

⁹⁰ See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1182 (9th Cir. 2007) (“anecdotal evidence of discrimination is commonly used in title VII ‘pattern and practice’ cases to bolster statistical proof by bringing ‘the cold numbers’ convincingly to life.”); *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984) (“Multiple regression is a form of statistical analysis used increasingly in title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels.”).

⁹¹ See e.g., *Mailland v. Univ. of Minn.*, 155 F.3d 1013, 1016–18 (8th Cir. 1998) (reversing district court’s grant of summary judgment to employer on reverse discrimination claim and ruling that “the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court’s conclusion at the summary judgment stage of this case that there was a manifest imbalance in faculty salaries.”); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676–77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

dress problems with wage disparities and discrimination in the workplace. We are concerned with many provisions contained in this legislation, specifically:

- S. 182 would make unlimited punitive and compensatory damages available for violations of the Equal Pay Act (EPA), even when a disparity in pay was unintentional. It is one thing to require employers to correct improper wage differentials, but quite another to impose unlimited punitive damages for unintentional conduct. Appropriate remedies for intentional discrimination, including punitive and compensatory damages, are available under Title VII of the Civil Rights Act of 1964.

- S. 182 includes changes to the EPA that would make it easier to file large class actions against employers and to make it more difficult for employers to justify legitimate pay disparities, promoting costly litigation against well-intentioned employers.

- S. 182 would allow for employees to have their pay compared between jobs, in different labor markets with different market wages and costs of living, for purposes of litigation.

- S. 182 would force the Department of Labor to return to debunked statistical models and inaccurate survey tools in an effort to enforce civil rights laws among Federal contractors.

The impact of passage of S. 182, the “Paycheck Fairness Act” would be significant from both a compliance and litigation standpoint. Given the broad and overreaching aspects of this legislation, ABC strongly urges you to oppose this legislation.

Sincerely,

GEOFFREY BURR,
Vice President, Government Affairs.

March 11, 2010.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: We write on behalf of the undersigned organizations in opposition to S.182, the “Paycheck Fairness Act.” While our organizations and members are committed to ensuring equal employment opportunities and abhor unlawful discrimination, we vigorously oppose S. 182.

S.182 would impose unprecedented government control over how employees are paid at even the Nation’s smallest businesses. The flawed legislation could outlaw many legitimate practices that employers currently use to set employee pay rates, even where there is no evidence of intentional discrimination. Common practices that a court could find unlawful under S. 182 include premium pay for professional experience, education, shift differentials or hazardous work, as well as pay differentials based on local labor market rates or an organization’s profitability.

Furthermore, S. 182 would:

- threaten employee bonus or incentive pay that, by definition, provides some employees a higher wage than others;
- prohibit employees from negotiating higher pay either before being hired or during employment;
- allow employees’ wages to be disclosed to peers, friends, family and competitors;
- require employers to submit pay data on their employees to the Federal Government;
- force the Labor Department to reinstate a flawed and duplicative pay grade survey that has proven ineffective at enforcing civil rights laws among Federal contractors;
- make it easier for trial lawyers to file large class actions against employers; and
- establish unlimited punitive and compensatory liability under the Equal Pay Act against employers of every size.

In sum, S.182 would jeopardize employee incentive pay and employee privacy, and promote costly litigation against even well-intentioned employers—all while doing little to prevent actual wage discrimination. As you know, two Federal laws already protect employees from being paid lower wages on the basis of sex: the Lilly Ledbetter Fair Pay Act—amended Civil Rights Act of 1964 and the Equal Pay Act

of 1963. Both statutes prohibit unequal pay based on sex and both make available substantial remedies to employees for gender-based pay differentials. But as the *Washington Post* editorial board stated, adding S. 182 to these existing laws “risks tilting the scales too far against employers and would remove, rather than restore, a sense of balance.”

For these reasons, we urge you to oppose S. 182.

Sincerely,

AMERICAN BAKERS ASSOCIATION; AMERICAN HOTEL AND LODGING ASSOCIATION; ASSOCIATED BUILDERS AND CONTRACTORS; COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES; FOOD MARKETING INSTITUTE; HR POLICY ASSOCIATION; INDEPENDENT ELECTRICAL CONTRACTORS; INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION; INTERNATIONAL FRANCHISE ASSOCIATION; INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS; NATIONAL COUNCIL OF TEXTILE ORGANIZATIONS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION; NATIONAL RETAIL FEDERATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; RETAIL INDUSTRY LEADERS ASSOCIATION; SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; U.S. CHAMBER OF COMMERCE.

March 23, 2010.

Hon. TOM HARKIN, *Chairman*,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

Hon. MICHAEL B. ENZI, *Ranking Member*,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: The undersigned organizations represent State and local government employers. We are writing to draw your attention to a particularly troubling aspect of S. 182, the “Paycheck Fairness Act.” The enhanced penalties section allows for unlimited punitive damages and exempts only the Federal Government from this provision.

As you are aware, State and local governments are exempt from punitive damages under Title VII of the Civil Rights Act. States and localities faced with large punitive damage awards would be forced to raise taxes or cut services. Ultimately, the burden of paying a large damages award would fall on the citizens of the State or locality. We believe allowing punitive damages would be detrimental under any circumstances but would be devastating to State and local budgets in the current economy.

We urge you to add State and local governments in the exemption provision along with the Federal Government in S. 182.

Sincerely,

INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES;
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION;
NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION.

RESPONSE TO QUESTIONS OF SENATORS HARKIN, ENZI, AND COBURN
BY STUART J. ISHIMARU

SENATOR HARKIN

Question 1. In her oral testimony on March 11, Jane McFetridge testified that “in 2009, the EEOC found reasonable cause in only 4.6 percent of the EPA charges and 5 percent of the title VII sex discrimination charges that it received, demonstrating the vast majority of employees who filed charges do not have valid claims.”

Do you agree with Ms. McFetridge’s conclusion?

Answer 1. No. The “reasonable cause” rate does not provide a complete picture of the percentage of meritorious charges of discrimination filed with EEOC. Charges of discrimination are resolved in several ways, not just through the issuance of a “cause” or “no cause” determination. The statutes enforced by EEOC encourage vol-

untary compliance and early resolution of charges of discrimination, and significant numbers of charging parties and respondents choose to settle their charges prior to a finding on the merits of the charge. This choice is consistent with the statutory schemes and does not indicate that those charges do not have merit.

Charges often are settled through a negotiated settlement procedure, settled through mediation, and/or are withdrawn by the charging party with or without benefits. Many of the charges that are settled prior to a finding or that are withdrawn with benefits are meritorious claims. The EEOC's "merit factor" rate captures and reflects all charge resolutions in which the charging party received a benefit (including negotiated settlements, mediations, conciliations, and withdrawals with benefits). This "merit factor" rate thus is a better measure of the percentage of meritorious claims filed with the EEOC than the "reasonable cause" rate. In fiscal year 2009, the merit factor rate for all charge resolutions was 20.3 percent. The merit factor rate for EPA charges was 19.5 percent, the merit factor rate for title VII sex-based wage charges was 21 percent, and the merit factor rate for all sex-based charges was 21.7 percent, all significantly higher than the cause rate.

Question 2. Ms. McFetridge further testified that "in claims where the EEOC found a basis to proceed, successful parties received over \$126 million in compensation, proof positive that the EEOC is already identifying and compensating the true victims of pay discrimination."

Do you agree with Ms. McFetridge's conclusion?

Answer 2. To the extent Ms. McFetridge's comments suggest that all victims of pay discrimination are being identified and appropriately compensated, we would not agree. To be sure, the Commission has recovered significant relief for some of these victims. In fiscal year 2009, the agency obtained \$4.8 million in monetary benefits in Equal Pay Act charges, \$17 million in title VII sex-based wage charges, and \$121.5 million in all sex-based charges. Examining just wage discrimination charges, from fiscal year 2000 to fiscal year 2009, EEOC obtained \$120,825,776 in total monetary benefits for sex-based wage charges filed by women, and \$222,253,820 in monetary benefits for all sex-based wage charges.

However, there undoubtedly are other victims of compensation discrimination who are unaware that they are being discriminated against. (Indeed, Lilly Ledbetter was unaware for decades that she was being paid less than men performing the exact same job.) Further, even workers who do know that they are the victims of pay discrimination may be choosing not to come forward to file charges, many perhaps out of fear that they will be retaliated against for challenging company pay practices. The Paycheck Fairness Act would provide the Commission with much-needed tools to help some of these victims vindicate their right to be free from compensation discrimination and free from retaliation for discussing pay in the workplace.

Question 3. Given the successes you have had, why do you believe that the EEOC needs additional tools to combat sex-based wage discrimination? What tools does the EEOC need to better enforce the laws prohibiting sex-based wage discrimination?

Answer 3. The Paycheck Fairness Act would make significant changes to the Equal Pay Act that would enhance EEOC's capacity to combat gender-based wage discrimination, while at the same time preserving an employer's ability to base wages on bona fide factors other than sex.

One of the most significant barriers to eradicating pay discrimination is the fact that workers are often in the dark about what their coworkers make. The Paycheck Fairness Act will help to address this problem by making it unlawful for an employer to penalize workers for asking about or discussing wage information. Critically, however, these protections would not apply to employees who as part of their essential job functions have access to information about the wages of other employees and who disclose the wages of other employees to an individual who does not otherwise have access to this information (unless the disclosure is in response to a charge or complaint or in furtherance of an investigation, proceeding, hearing or other action related to the Equal Pay Act).

Similarly, the Paycheck Fairness Act would make it clear that Congress expects the Commission to begin collecting wage data. The EEOC currently does not collect any compensation-related data from private sector employers. Appropriate compensation data would reveal wage disparities based on sex, race, or national origin in particular occupations at particular companies and/or in particular industries. This data would enable the Commission to identify employers that may be engaging in unlawful wage discrimination. This information could also be useful in fulfilling our obligations to provide technical assistance to employers and help them comply with Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.

The Paycheck Fairness Act also would aid enforcement by allowing workers to compare their wages to workers of the opposite sex who work for the same employer anywhere in the same county or similar political subdivision of a State, rather than only to workers in the same physical location. This change would not prevent an employer from being able to justify pay differences in appropriate circumstances, such as where the differential is based on geographic disparities.

Currently under the Equal Pay Act, employers are able to justify a pay differential between a man and a woman who are performing substantially equal work by pointing to "any other factor other than sex." The Paycheck Fairness Act would require employers to establish that a pay discrepancy is based on a bona fide factor other than sex, such as education, training, or experience. This new standard would help to close the loophole in current law that has allowed employers to defend wage discrepancies by pointing to factors that are inherently gender-based without having to establish that they reflect job-related qualifications.

Further, by expanding EPA remedies to include compensatory and punitive damages, the Paycheck Fairness Act would provide the necessary incentive to promote employer compliance, deter violations, and ensure that victims receive complete make-whole relief.

SENATOR ENZI

Question 1. Please describe your personal experience as an employer in a private sector, non-government-funded workplace. Have you hired employees in a private sector workplace? Have you been charged with setting compensation in a setting where salary and wage levels were not government-set? Have you been responsible for determining raises and fringe benefits in a setting where these costs were not born by taxpayers? If so, was your business profitable?

Answer 1. Other than hiring a limited number of household employees, I have not previously served as an employer in the private sector.

Question 2. Section 8 of S.182 directs your agency to survey available wage data and issue regulations to collect pay information from employers as described by sex, race, and national origin of employees for enforcement use. Please describe how you envision EEOC using this data for enforcement.

Answer 2. The EEOC currently does not collect any compensation-related data from private sector employers. Appropriate compensation data could reveal wage disparities based on sex, race, or national origin in particular occupations at particular companies and/or in particular industries. This data would enable the Commission to identify employers that may be engaging in unlawful wage discrimination. This information could also be useful in fulfilling our obligations to provide technical assistance to employers and help them comply with Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.

Additionally, when EEOC identifies potential issues of compensation discrimination, EEOC may, to the extent authorized by law, share such information, as appropriate, with the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), as well as any other information that will enhance the effectiveness of OFCCP and DOL's Wage and Hour Division as enforcement agencies or programs. (EEOC-ESA Memorandum of Understanding Providing for Cross-Training, Referrals and Information Sharing on Compensation Discrimination Cases (April 7, 1999)).

Question 3. Would you advocate EEOC collecting this data from all employers?

Answer 3. The Commission has not yet determined which employers (if any) would be required to collect or report compensation data.

Question 4. How frequently would you recommend requiring this data reporting?

Answer 4. The Commission has not determined how often or the circumstances under which employers would be required to collect or report compensation data.

Question 5. Do you plan to require employers to update this data when pay levels or workforce makeup change?

Answer 5. The Commission has not yet determined how often or the circumstances under which employers would be required to collect or report compensation data.

Question 6. Would you suggest that EEOC collect compensation data on employees who work on commission or tips? Why or why not?

Answer 6. The Commission has not yet determined the type or categories of compensation data (if any) that should be collected or reported.

Question 7. Would you support exempting small employers for whom these reporting requirements will be overly burdensome?

Answer 7. The Commission has not yet determined which employers (if any) would be required to collect or report compensation data. However, section 709(c) of Title VII of the Civil Rights Act of 1964, which provides the Commission with the authority to require employers to collect and/or report various types of data, only applies to employers with 15 or more employees. Currently, only private sector employers with 100 or more employees (or Federal contractors with 50 or more employees and a contract amounting to \$50,000 or more) must file the Employer Information Report EEO-1.

Question 8. Would you support a hardship exemption for employers with valid conditions making the reporting impossible, such as natural disasters, economic distress, personnel loss, etc?

Answer 8. The Commission has not yet determined the circumstances under which employers would be required to collect or report compensation data. However, section 709(c) of Title VII of the Civil Rights Act of 1964, which provides the Commission with the authority to require employers to collect and/or report various types of data, explicitly allows any employer to apply to the Commission for an exemption from the collection or reporting requirement if the employer believes that the requirement would result in undue hardship.

Question 9. Would you support penalizing employers who fail to submit data by scheduled deadlines?

Answer 9. The Commission has not yet determined the circumstances under which employers would be required to collect or report compensation data. However, by way of comparison, the filing of Employer Information Report EEO-1 is mandatory. Under section 709(c), which provides the commission with the authority to require employers to file the Report EEO-1, any employer who fails or refuses to file the Report EEO-1 when required to do so may be compelled to file it by order of a U.S. District Court (upon application by the Commission).

Question 10. How could EEOC protect the privacy of this data, should it choose to do so? Would the data be accessible via Freedom of Information requests?

Answer 10. Section 709(e) of Title VII of the Civil Rights Act of 1964 would make it unlawful for any officer or employee of the Commission to make this type of information public. In fact, section 709(e) provides that any Commission official who makes this type of information public in violation of section 709(e) shall be guilty of a misdemeanor and subject to a fine and/or imprisonment. For this reason, company-specific data submitted by employers who currently file the Employer Information Report EEO-1 is never made available to members of the public—even in response to a Freedom of Information Act (FOIA) request. Only data aggregating information by industry or area, in such a way as not to reveal any particular employers statistics, is made public. Company-specific Report EEO-1 data may be disclosed to a charging party who files a FOIA request to obtain information in the EEOC's investigative file on the charging party's charge if the data was obtained by the investigator during the investigation, deemed relevant to the charge, and included in the charge file, so long as the deadline for filing suit on the charge has not yet expired. In such a case, the charging party is not a member of the public for purposes of title VII's confidentiality restrictions. Report EEO-1 data also could be provided to the charging party after he or she has filed suit on a title VII charge if the EEO-1 data is involved in the lawsuit, or could be made public in conjunction with an enforcement lawsuit filed by the Commission against the company which submitted the data (as permitted by section 709(e) of title VII).

Question 11. Based on EEOC's ability to fulfill other mandates and duties, how many employees will be necessary to collect and analyze this data? What additional personnel, information technology and budget resources will be required?

Answer 11. The number of additional employees or resources the EEOC would need to collect and analyze this data cannot be determined until the Commission has determined the precise nature of the compensation data to be collected and/or reported, the form in which this data should be collected and/or reported, and the number of employers that would be subject to the collection and/or reporting requirement.

SENATOR COBURN

Question 1. In January of 2009, the Department of Labor released a detailed statistical analysis of the wage gap carried out by the non-partisan Consad Research

Corporation. The study, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women*, found that most of the so-called wage gap was an artifact of the different choices men and women make—such as different fields of study, different professions, different balance between home and work. In the Foreword, a Labor Department official writes:

“This study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.”

Do you think it is appropriate for “wage gap” calculations to ignore these differences?

Answer 1. Former Assistant Secretary Charles James’ quote is one interpretation of the report’s findings. To be sure, a portion of the gap between men’s and women’s earnings is likely attributable to other measurable factors like occupational segregation, time spent in the labor force, and education. However, different studies have also found that such measurable factors do not account for all of the gender wage gap, and that a significant portion remains unexplained. For example, in 2009, Maria Shriver, working with the Center for American Progress, released a ground breaking report entitled, “A Woman’s Nation Changes Everything.” This sweeping study of the role of women in our Nation’s economies and the economies of our families today provided a wealth of insights into the challenges women still face when it comes to earning equal pay for equal work. This study found that although some of the pay gap can be explained by differentials in experience or as a result of the differences in the occupations men and women typically do, about 41 percent of the pay gap cannot be explained by these factors.¹

As the Supreme Court has recognized in analyzing employment discrimination claims, once nondiscriminatory reasons for differential treatment have been eliminated, “discrimination may well be the most likely alternative explanation.”² In the wage context, the Supreme Court has explained that discrimination need not be proven with scientific certainty and that statistical evidence of a wage disparity may be sufficient to prove a plaintiff’s case of discrimination even if the evidence does not account for all measurable variables.³ Thus, the EEOC’s Compliance Manual Section on Compensation Discrimination notes that a rough but plausible measure of the extent of gender-based pay discrimination may be the portion of the wage gap that is unexplained by measurable factors.⁴

Moreover, even as to measurable factors contributing to the wage gap, it is not necessarily clear that all such factors are gender-neutral. In particular, the Consad Research study includes “motherhood” among the measurable factors contributing to the wage gap but does not appear to examine the effect of fatherhood on wages. Courts have long recognized that treating mothers less favorably than fathers constitutes unlawful gender discrimination.⁵ Wage discrepancies between working mothers and working fathers may reflect gender-based stereotypes about motherhood. For example, a recent study found that mothers were offered lower starting salaries than similarly situated childless women whereas fathers were offered higher starting salaries than similarly situated childless men.⁶

Question 2. Many critics of the Paycheck Fairness Act, including the editorial board of the *Washington Post*, say that it is intrusive, impractical, and potentially injurious to the free enterprise system. For example, it gives government the power to determine what constitutes fair wages. It requires any employer accused of wage discrimination to cite a “bona fide” reason for paying a particular male employee more than a female; potential reasons for the wage difference include the male’s superior education or his special skills. However, the Paycheck Fairness Act further

¹THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING 58 (Heather Boushey and Ann O’Leary, eds., 2009).

²*Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000).

³*Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

⁴Section 10: *Compensation Discrimination*, EEOC Compliance Manual, Volume II (2000), available at <http://www.eeoc.gov/policy/docs/compensation.html> (citing President’s Council of Economic Advisers, *Explaining Trends in the Gender Wage Gap* (June 1998)); see also GAO Rep. 09–729 (portion of the Federal wage gap that could not be explained by measurable factors may be based in part on gender discrimination).

⁵See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (treating women with preschool-age children less favorably than men with preschool-age children violates title VII).

⁶Shelley Correll & Stephen Benard, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1316 (2005).

stipulates that the alleged “bona fide” explanation “shall not apply” if the employee “demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differentials and the employer has refused to adopt such alternative practice.” What happens in a case where an employer judges the “alternative” (e.g. a special training program for female employees) to be prohibitively expensive? Business owners protest that this vaguely worded second provision turns the Federal courts into a quasi business partner with unlimited authority to second guess key business decisions? Do you think such fears are unfounded?

Answer 2. The concept of “alternative employment practices” already exists in Federal employment discrimination law.⁷ The concept was codified almost 20 years ago as part of the Civil Rights Act of 1991,⁸ and it is a standard with which courts are familiar.⁹ Under the current law, the plaintiff bears the burden of proving the availability of an alternative employment practice, and the alternative must be equally effective in meeting the employer’s business needs.¹⁰

H.R. Rep. 110–783 of the House Committee on Education and Labor made clear that the Paycheck Fairness Act would adopt the well established title VII standard on “business necessity” because doing so would “provide[] workers and employers with a known legal standard for assessing pay disparities.”¹¹ Similarly, the concept of “alternative employment practice”—codified at the same time and as part of the same statutory section as the concept of “business necessity”¹²—would provide workers and employers with a known legal standard. Accordingly, we think that fears that it gives courts “unlimited authority to second guess key business decisions” are unfounded. That has not proved to be the case with respect to the application of the same concept under current law.

Question 3. According to the Paycheck Fairness Act, an employer is legally vulnerable if an employee can show that she was paid less than a male colleague because of intentional discrimination or the “lingering effects of past discrimination.” Could this prevent employers from paying market wages? For example, universities typically cite “market forces” as the reason professors of business are paid more than professors of social work. In many universities there are far more women teaching social work than business. Should they be able to sue on the grounds that “market forces” reflect the lingering effects of discrimination? They could surely find expert witnesses in women’s studies programs who would testify that sexist attitudes led society to place a higher value on male-centered fields like business than female-centered fields like social work. Is it your view that such litigation would be helpful in promoting the goals of the act?

Answer 3. As the Supreme Court has recognized, the passage of the Equal Pay Act was intended to correct those market forces that had led employers to pay male workers more than female workers performing the same work simply because the men were unwilling to perform the work for the same low wages as the female workers.¹³ Nevertheless, because of the broadly worded “any other factor other than sex” defense, some courts have continued to permit employers to justify wage discrepancies by pointing to market forces or prior salary history without any showing that the market or prior salary history compensates employees for job-related skills and not merely their gender.¹⁴

⁷ See 42 U.S.C. § 2000e–2(k)(1)(A)(ii).

⁸ See Pub. L. 102–166, title I §105(a).

⁹ See, e.g., *Allen v. City of Chicago*, 351 F.3d 306, 315–17 (7th Cir. 2003) (neither the officers’ proposed alternative to the merit-based component of the promotion process nor their alternative to the requirement that they pass the test were equally valid-less discriminatory alternatives); *Bryant v. City of Chicago*, 200 F.3d 1092, 1095 (7th Cir. 2000) (City liable because it failed to adopt a less discriminatory alternative for its Lieutenant’s promotion exam); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1122 (11th Cir. 1993) (plaintiffs failed to introduce enough evidence to show that their proposal to allow firefighters to wear short beards was an equally effective alternative).

¹⁰ See, e.g., *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 998 (1988) (“Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”); see also EEOC Fact Sheet: Employment Tests and Selection Procedures, available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html. (“If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.”).

¹¹ H.R. Rep. No. 110–783, at 30 (2008).

¹² See 42 U.S.C. § 2000e–2(k)(1)(A).

¹³ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).

¹⁴ H.R. Rep. No. 110–783, at 25–28 (2008).

The EEOC Compliance Manual Section on Compensation Discrimination states that, under current law, “[m]arket value qualifies as a factor other than sex only if the employer proves that it assessed the marketplace value of the particular individual’s job-related qualifications, and that any compensation disparity is not based on sex.”¹⁵ The Paycheck Fairness Act would not affect employers’ ability to base pay discrepancies on qualifications—including market forces—that are job-related with respect to the position in question and consistent with business necessity, as long as such criteria are not based upon or derived from a sex-based differential in compensation. As H.R. Rep. 110–783 of the House Committee on Education and Labor on the Paycheck Fairness Act points out, “[w]hile market forces may be a legitimate basis for determining pay, market forces tainted with sex discrimination are not.”¹⁶

Critically, however, the Paycheck Fairness Act would not alter the requirement that the jobs being compared are substantially equal. Thus, an employer would not need to establish that “market forces” constitute a legitimate defense to a gender-based pay differential unless the employee has first demonstrated that the jobs being compared require substantially equal skill, effort, and responsibility and are performed under similar working conditions.

Question 4. The 1963 Equal Pay Act awards victims of intentional discrimination up to \$300,000 in compensatory damage and limited punitive damages. The Paycheck Fairness would change that by allowing for unlimited multi-million dollar settlements. This is good news for trial lawyers, but is it a good policy for a nation facing an unemployment crisis? Employers are nervous and fearful of making new hires. Won’t the act reinforce fear?

Answer 4. Under current law, the Equal Pay Act does not allow victims of sex-based wage discrimination to recover compensatory or punitive damages. Rather, the EPA allows victims to recover a maximum of 2 years of back pay (or 3 years for willful violations), and to recover “liquidated damages” in an amount equal to the amount of back pay awarded if an employer cannot show that it acted in “good faith.” Under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, victims may recover compensatory and/or punitive damages, up to a total of \$300,000 depending upon the size of the employer. Thus, victims of discrimination, including sex-based wage discrimination, who bring suit under the EPA and/or title VII are unable to recover complete relief in a case in which their actual damages exceed \$300,000.

By contrast, under 42 U.S.C. § 1981, victims who prevail on claims of wage discrimination based on race or national origin *can* recover complete relief, since section 1981 contains no cap on damages. Since wage discrimination based on sex is no less illegal, intolerable, or pernicious than wage discrimination based on race and/or national origin, sex-based wage discrimination claims should be placed on an equal legal footing with race- and national origin-based wage discrimination claims. The Paycheck Fairness Act would accomplish this objective by authorizing victims of sex-based wage discrimination to recover compensatory and/or punitive damages that are not artificially restricted by an arbitrary cap. At the same time, however, the bill would impose critical constraints on a jury’s ability to award punitive damages. Under the Paycheck Fairness Act, punitive damages could only be awarded in cases in which the employee proves that the employer acted with “malice or reckless indifference.” In title VII cases, this same statutory qualification has proven to be a significant limitation on plaintiffs’ ability to recover punitive damages.

Question 5. To help the agency increase hiring and reduce the backlog, the EEOC requests an increased budget in fiscal year 2011 of \$385 million. However, EEOC data shows that “reasonable cause” was present in *only* 4.5 percent of the 93,277 discrimination charges received in fiscal year 2009. Given the low percentage of charges for which reasonable cause is ultimately determined, please explain how the EEOC’s “Education and Outreach” program balances its responsibility of preventing discrimination with deterring frivolous charges that consume the EEOC’s time and resources?

Answer 5. The “reasonable cause” rate does not provide a complete picture of the percentage of meritorious charges of discrimination filed with EEOC. Charges of discrimination are resolved in several ways, not just through the issuance of a “cause” or “no cause” determination. The statutes enforced by EEOC encourage voluntary compliance and early resolution of charges of discrimination, and significant numbers of charging parties and respondents choose to settle their charges prior to a

¹⁵Section 10: *Compensation Discrimination*, EEOC Compliance Manual, Volume II, at § 10–IV F.2.g (2000), available at <http://www.eeoc.gov/policy/docs/compensation.html>.

¹⁶H.R. Rep. No. 110–783, at 28 (2008).

finding on the merits of the charge. This choice is consistent with the statutory schemes and does not indicate that those charges do not have merit.

Charges often are settled through a negotiated settlement procedure, settled through mediation, and/or are withdrawn by the charging party with or without benefits. Many of the charges that are settled prior to a finding or that are withdrawn with benefits are meritorious claims. The EEOC's "merit factor" rate captures and reflects all charge resolutions in which the charging party received a benefit (including negotiated settlements, mediations, conciliations, and withdrawals with benefits). The "merit factor" rate thus is a better measure of the percentage of meritorious claims filed than the "reasonable cause" rate. In fiscal year 2009, the merit factor rate for all charge resolutions was 20.3 percent. The merit factor rate for EPA charges was 19.5 percent, the merit factor rate for title VII sex-based wage charges was 21 percent, and the merit factor rate for all sex-based charges was 21.7 percent, all significantly higher than the cause rate.

In enacting Title VII of the Civil Rights Act of 1964, Congress recognized that the fight against employment discrimination requires a variety of tools for enforcing the law. Therefore, the Commission seeks to maintain a comprehensive enforcement program, which includes education, outreach, and technical assistance. Indeed, title VII specifically requires the EEOC to engage in outreach and educational activities.¹⁷ The Commission conducts both free and fee-based outreach and education. In 1992, Congress passed the Educational, Technical Assistance and Training Revolving Fund Act of 1992, which authorizes the Commission to charge a fee to recover its costs for education, technical assistance and training programs. The EEOC Training Institute conducts the EEOC's fee-based training program.

The purpose of these outreach efforts is to educate employees, employers, advocacy groups, and others about the laws enforced by EEOC and rights and responsibilities under those laws. This work is vital to our mission. Outreach and education to the employer community helps to prevent discrimination from occurring in the first place. Outreach and education to employees not only informs them of the right to be free from discrimination in the workplace, but also helps them make informed decisions about whether to file a charge of discrimination, thus deterring the filing of frivolous charges.

The agency's outreach program reached 238,017 persons in fiscal year 2009. EEOC offices participated in 4,240 educational, training, and outreach events. In addition, in fiscal year 2009, the EEOC Training Institute trained over 20,000 individuals from the private sector and State, local, and Federal Governments at more than 500 events. The Commission has engaged in extensive outreach efforts on wage discrimination issues. Over the last 3½ years, we have conducted 491 outreach events where the Equal Pay Act or wage discrimination generally was discussed. Almost 38,000 people attended these events.

Question 6. As you know, in February a Federal judge in Iowa dismissed a discrimination case brought by your agency brought against CRST, a Cedar Rapids, IA trucking company, and ordered the EEOC to pay CRST \$4.5 million to cover defense costs and attorneys' fees. In dismissing the EEOC's complaint on behalf of 67 claimants, the court found the EEOC ". . . did not conduct any investigation of the specific allegations [of these claimants] . . . let alone issue a reasonable cause determination as to th[eir] allegations or conciliate them." Given the judge's ruling, which consumes 20 percent of the agency's fiscal year 2010 budget increase, can you explain your rationale for filing suit in this particular case? What processes does the EEOC go through when considering whether or not to file a suit?

Answer 6. This matter remains in litigation and is presently pending with the U.S. Court of Appeals for the Eighth Circuit. We believe it would be inappropriate to comment further on this matter at this time.

RESPONSE TO QUESTIONS OF SENATORS ENZI AND COBURN BY HEATHER BOUSHEY

SENATOR ENZI

Question 1. Please describe your personal experience as an employer in a private sector, non-government-funded workplace. Have you hired employees in a private sector workplace? Have you been charged with setting compensation in a setting where salary and wage levels were not government-set? Have you been responsible

¹⁷ See U.S.C. § 2000e-4(h)(2) (providing that the Commission "shall carry out educational and outreach activities"); 42 U.S.C. § 2000e-4(j) (requiring the EEOC to "establish a Technical Assistance Training Institute through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission").

for determining raises and fringe benefits in a setting where these costs were not born by taxpayers? If so, was your business profitable?

Answer 1. I have worked as a staff-person with management responsibilities, but not as the employer with the final decisionmaking power on these issues.

Question 2. More than two-thirds of employees working in human resources are female and, as was stated at the hearing, 30 percent of businesses are women-owned. Do you believe that women HR professionals and employers could possibly create and perpetuate gender-based pay discrepancies? If those pay discrepancies are not found to further a legitimate business purpose, is the only possible cause discrimination?

Answer 2. In a market-based economy, pay should be based on legitimate business purposes because pay should be based by the contribution of an employee to an organization. Pay gaps that are not based on legitimate business purposes make no sense. Systemic pay gaps that are not tied to the job or the skills of the employee must therefore be discriminatory as there is no legitimate business purpose for them.

The first question is whether women can perpetuate pay discrimination. Any employer can discriminate, regardless of their race, gender or other characteristics. Further, simply because women are commonly HR professionals does not mean that they have final decisionmaking power within an organization. The vast majority of CEO's are men and that power gap may play a role in perpetuating pay discrimination.

SENATOR COBURN

Question 1. In January 2009, the Department of Labor released a detailed statistical analysis of the wage gap carried out by the non-partisan Consad Research Corporation. The study, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women*, found that most of the so-called wage gap was an artifact of the different choices men and women make—such as different fields of study, different professions, different balance between home and work. In the Foreword, a Labor Department official writes:

“This study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.”

Do you think it is appropriate for “wage gap” calculations to ignore these differences?

Answer 1. Analysis of the wage gap does not ignore productivity-related differences between men and women. What economists find is that once we account for measurable, productivity-related differences between men and women, a pay gap remains.

To better understand the gender pay gap, economists use so-called regression-adjusted estimates of pay for men and women, controlling for all measurable productivity-related characteristics of workers. This method allows us to compare the pay of men and women with similar characteristics and determine what factors contribute to the pay gap and what the model cannot explain. Using regression analysis, labor economists Francine Blau and Lawrence Kahn found that educational attainment levels lowered the discrepancy in pay between men and women but also that other productivity-related factors, such as experience, occupation, and industry all widened the gap. Overall, nearly a third of the gender pay gap (27.4 percent) can be explained by differences in occupations, one-fifth (21.9 percent) can be explained by industry, and 10.5 percent can be explained by labor force experience.

This means that if women worked in the same jobs as men and had the same educational and experience levels, same propensity to be in a union, same racial and ethnic make-up as men—all factors we can measure—the gender pay ratio would rise from 80 percent to 91 percent of men's pay levels. In other words, just over half of gender pay inequity can be explained by these factors. But, this leaves nearly half of the total pay gap (41.1 percent of the pay gap) as not explainable by measurable productivity-related characteristics.

As Blau and Kahn point out, half (49.3 percent) of the total pay gap can be explained by differences in the industries and occupations that men and women work in. Men continue to be more likely to hold jobs as managers and professionals, transportation or construction workers, or in heavy manufacturing.

In contrast, women are disproportionately represented in nursing, teaching, retail sales, and clerical work. While the extent to which jobs in the U.S. economy are segregated by sex has fallen since the 1950s, more so for workers with a college degree than for other workers, there remains a high degree of occupational segregation by gender. But many of these jobs that were historically held by women are underpaid, relative to men's jobs that require similar levels of skill.

As women have taken their careers more seriously, they have worked hard to get more education. That is paying off in terms of narrowing the gender pay gap, even if it hasn't fully eliminated it. According to Blau and Kahn, women's education choices are narrowing the gap by 6.7 percent. Women now are more likely than men to graduate from high school as well as college. It's worth noting though, that among women aged 25 to 45 only a quarter have at least a college degree, while nearly two-thirds have a high school degree, but no 4-year college degree (and this is similar for men as well).

An important research finding that flies in the face of women's educational attainment, however, is that the gender pay gap emerges as soon as women graduate. The American Association of University Women examined the pay gap in pay between college-educated men and women and found that even once they accounted for the measurable factors that affect pay, such as the individual's job, whether the job boasts a flexible schedule, the kind of educational credentials they have (including their grade point average and the selectivity of the college that they attended), among graduates just 1 year out of school, a 5 percent unexplainable pay gap remained.

This means that a woman who goes to the same school, gets the same grades, has the same major, takes the same kind of job with similar workplace flexibility perks and has the same personal characteristics—such as marital status, race, and number of children—as her male colleague earns 5 percent less the first year out of school. Ten years later, even if she keeps pace with the men around her, this research found that she'll earn 12 percent less. This is not about the “choices” a woman makes because the model compares men and women who have made nearly identical choices.

Differences in men's and women's work histories explain a large chunk—10.5 percent—of the gender wage gap. But the AAUW study cited above shows that the gender pay gap emerges right out of college—at a point in their lives when differences in work experience between them and their male colleagues do play a large role in determining pay.

At least some of the wage gap between men and women is attributable to women taking on greater parenting responsibilities and working fewer hours. Women are more than twice as likely as men to be employed part-time and since few jobs offer part-time work, the part-time jobs available tend to pay less than comparable full-time jobs. But, the reality is that this cannot fully explain the gap in pay.

For example, it is a myth that women choose less-paying occupations because they provide flexibility to better manage work and family. The empirical evidence shows that mothers are actually less likely to be employed in jobs that provide greater flexibility. In general, workers who hold higher positions and are privileged in general (better educated, white, male) have more access to all kinds of workplace flexibility. Women are less likely than men to have access to flexibility, but parents—especially single mothers—are the least likely to have access to workplace flexibility. In fact, parents are more likely to have nonstandard shifts and rotating hours, making work/family balance more difficult to achieve.

Indeed, differences in work history are treated differently depending on whether a woman is a mother or not. In a 2001 paper, sociologists Michele Budig and Paula England found that interruptions from work, working part-time, and decreased seniority/experience explain no more than about one-third of the gap in pay between women with and without children, and that “mother-friendly” job characteristics explained very little of the gap. They conclude that two-thirds of the wage gap between mothers and non-mothers must be either because employed mothers are less productive at work or because of discrimination against mothers.

A body of new research focuses on the role of the “maternal wall” in accounting for at least some—if not most—of the unexplained pay gap. In groundbreaking work, Cornell University sociologists Shelley Correll, Stephen Benard, and In Paik used a laboratory experiment to find out whether being a mother simply means being paid less, all else equal. They had study participants evaluate application materials for a pair of job candidates that were designed specifically to be equally qualified, but one person was identified as a parent and the other was not. The two candidates had equal levels of education and work experience at similarly ranked schools.

Their findings were simply astonishing. The job candidates identified as mothers were perceived to be less competent, less promotable, less likely to be recommended for management, less likely to be recommended for hire, and had lower recommended starting salaries even though their actual credentials were no different from those of the non-mothers. The job candidates identified as fathers were not penalized in the same way, and often saw a boost. Study participants also held mothers to higher standards than non-mothers (both women without children and men with or without children) by requiring a higher score on a management exam and significantly fewer times of being late to work before being considered hireable or promotable.

Question 2. Many critics of the Paycheck Fairness Act, including the editorial board of the *Washington Post*, say that it is intrusive, impractical, and potentially injurious to the free enterprise system. For example, it gives government the power to determine what constitutes fair wages. It requires any employer accused of wage discrimination to cite a “bona fide” reason for paying a particular male employee more than a female; potential reasons for the wage difference include the male’s superior education or his special skills. However, the Paycheck Fairness Act further stipulates that the alleged “bona fide” explanation “shall not apply” if the employee “demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differentials and the employer has refused to adopt such alternative practice.” What happens in a case where an employer judges the “alternative” (e.g. a special training program for female employees) to be prohibitively expensive? Business owners protest that this vaguely worded second provision turns the Federal courts into a quasi business partner with unlimited authority to second guess key business decisions? Do you think such fears are unfounded?

Answer 2. This seems to be a legal, not economic question as the key issue is how the courts interpret “bona fide” explanation and “alternative employment practice.” A lawyer familiar with these issues would be better suited to address how the courts interpret that phrase.

Question 3. According to the Paycheck Fairness Act, an employer is legally vulnerable if an employee can show that she was paid less than a male colleague because of intentional discrimination or the “lingering effects of past discrimination.” Could this prevent employers from paying market wages? For example, universities typically cite “market forces” as the reason professors of business are paid more than professors of social work. In many universities there are far more women teaching social work than business. Should they be able to sue on the grounds that “market forces” reflect the lingering effects of discrimination? They could surely find expert witnesses in women’s studies programs who would testify that sexist attitudes led society to place a higher value on male-centered fields like business than female-centered fields like social work. Is it your view that such litigation would be helpful in promoting the goals of the act?

Answer 3. This seems to be a legal, not economic question as the key issue is how the courts define “lingering effects of past discrimination.” A lawyer familiar with these issues would be better suited to address how the courts interpret that phrase.

Question 4. The 1963 Equal Pay Act awards victims of intentional discrimination up to \$300,000 in compensatory damage and limited punitive damages. The Paycheck Fairness Act would change that by allowing for unlimited multi-million dollar settlements. This is good news for trial lawyers, but is it a good policy for a nation facing an unemployment crisis? Employers are nervous and fearful of making new hires. Won’t the act reinforce fear?

Answer 4. There is no logical reason for an employer who is paying their workers fairly to be nervous or fearful of making new hirers. In fact, because this law will level the playing field, the Paycheck Fairness Act will be a boon to employers who are currently paying their workers fairly. Competitors who now may choose to violate the law in hopes of not getting caught will now think twice as there will be real penalties. Therefore, many firms currently engaging in illegal pay practices will stop and discontinue their discriminatory pay, leveling the playing field between them and those firms who have been abiding by the law.

For the law to be effective, it must include a sufficient penalty to act as a deterrent. Currently, employers have few real penalties for engaging in wage discrimination: if they are caught, they have to pay back wages—the fair pay level—but if they are not caught, they have been able (illegally) to pay some workers less wages. As Deborah Brake noted in her testimony, the law as it stands does not provide sufficient deterrents:

Currently, employment discrimination law sets up a hierarchy of remedies for employees who experience different kinds of pay discrimination. Although full and uncapped remedies are available to victims of pay discrimination on the basis of race, no Federal statute provides complete remedies to women who are paid less because of their sex. Under the Equal Pay Act, an employee may recover only the amount of her unlawfully withheld wages (up to 2 years' back pay, or 3 years' back pay for "willful" violations) and an equal amount in "liquidated damages." (p. 10)

Question 5. You speak of "the segregation of men and women into different kinds of jobs." Do you rule out the possibility that men and women, as groups, might have different preferences? Is it really gender segregation that explains women's preference for say, teaching over oil drilling, or veterinary medicine over astrophysics? In your testimony, you imply that it is unjust that zookeepers make more than childcare workers. There are many people who know how to take care of children; there are very few who know how to bathe and feed a giraffe. Why is it wrong for a zookeeper to make more than a childcare worker when the zookeeper has a more specialized knowledge set?

Answer 5. Certainly, each individual has their preferences. The challenge is that these preferences cannot explain the gender pay gap. For example, the gender pay gap emerges as soon as women graduate from college *even if they made the same decisions as their male peers*. The American Association of University Women examined the pay gap in pay between college-educated men and women and found that among graduates just 1 year out of school, a 5 percent unexplainable pay gap remained even once they accounted for the measurable factors that affect pay, such as the individual's job, whether the job boasts a flexible schedule, the kind of educational credentials they have including their grade point average and the selectivity of the college that they attended.

Thus, what we learn from this research is that in analysis that compares men and women who have made identical choices, there remains a gap in pay. A woman who goes to the same school, gets the same grades, has the same major, takes the same kind of job with similar workplace flexibility perks and has the same personal characteristics—such as marital status, race, and number of children—as her male colleague earns 5 percent less than him the first year out of school. Ten years later, even if she keeps pace with the men around her, this research found that she'll earn 12 percent less.

RESPONSE TO QUESTIONS OF SENATORS ENZI AND COBURN
BY DEBORAH L. FRETT

SENATOR ENZI

Question 1. Please describe your personal experience as an employer in a private sector, non-government-funded workplace. Have you hired employees in a private sector workplace? Have you been charged with setting compensation in a setting where salary and wage levels were not government-set? Have you been responsible for determining raises and fringe benefits in a setting where these costs were not born by taxpayers? If so, was your business profitable?

Answer 1. Business and Professional Women's Foundation is a non-profit, 501(c)(3) organization and a non-government-funded workplace. As CEO, I am responsible for hiring all employees and setting compensation and wage levels. Washington, DC is a very competitive market for top-notch nonprofit employees and I have found that it is in the best interest of our organization to offer competitive salaries and benefits to attract the best talent. In addition, BPW Foundation has a written and transparent pay policy. Wages are reviewed annually and each time a new hire is made. I believe our organization is very profitable in that we successfully serve our mission to empower working women to achieve their full potential and partner with employers to build successful workplaces through education, research, knowledge and policy.

In terms of the private sector, my for-profit experience includes a proven track record of leadership and influence as an executive in association management and for-profit businesses. I have served as Chief Operating Officer of a \$29 million for-profit company providing an integrated portfolio of health care communications, information, education and research products and services. I have also served as President and CEO of a \$7 million for-profit company market leader in health care provider data and information. For both companies, I was involved in hiring employees, setting compensation and benefits as well as determining raises and fringe benefits. And, yes, both companies were profitable.

As an employer I support the Paycheck Fairness Act.

Question 2. At the hearing we discussed the phenomenal growth of women-owned firms in recent years. You stated that women-owned firms would have “a reduction in risk” of being sued for discriminatory pay disparities. If that is the case, should the Equal Pay Act provide an exemption for women employers? If not, do you have reservations about attributing a gender pay disparity to discrimination when both the employer and the plaintiff employee are women?

Answer 2. BPW Foundation believes in pay equity for both men and women and does not support an exemption for female employers. The Equal Pay Act prescribes “equal pay for equal work” and that protection is available to everyone regardless of the gender of the employer or employee.

To clarify my statement, *any* firm that has written and transparent pay equity policies would have “a reduction of risk” of liability with regard to pay discrimination. Women business owners know that hiring women and paying them equally is good for business. A quest for fair pay is often the reason highly skilled women leave an employer to start their own companies. Business owners like Debra Ruh support the Paycheck Fairness Act. Ms. Ruh owns TecAccess in Rockville, VA. TecAccess is a consulting firm that helps companies update their web and information technology systems in order to reach and better serve people with disabilities. Like many women business owners, Ms. Ruh struck out on her own so that she could run a business her way. She told BPW Foundation it would never occur to her to pay a woman less than a man; it would be short-sighted and bad for business—she would lose out on a creative, innovative and loyal workforce. It would be supremely unfair to business owners like Debra Ruh who are doing right by their employees to have to compete on an unfair playing field against companies that discriminate and pay their women workers less.

SENATOR COBURN

Question 1. In January 2009, the Department of Labor released a detailed statistical analysis of the wage gap carried out by the non-partisan Consad Research Corporation. The study, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women*, found that most of the so-called wage gap was an artifact of the different choices men and women make—such as different fields of study, different professions, different balance between home and work. In the Foreword, a Labor Department official writes:

“This study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.”

Do you think it is appropriate for “wage gap” calculations to ignore these differences?

Answer 1. The wage gap calculations do not ignore these differences. Even when researchers hold for differences in education, time out of the workforce and other factors—a gap between men’s and women’s wages still remains.¹ Further, the median gender wage gap calculation is useful because it raises questions about the persistent gap between men’s and women’s wages and challenges us to look for answers. The gender wage gap is a complex social problem attributable to many factors including discrimination and the different choices men and women make about employment.

A 2003 Government Accounting Office (GAO) study concluded that even after accounting for “choices” such as work patterns and education, women earn an average of 80 cents for every dollar that men earn.² Even when women choose traditionally male fields such as business they receive lower salaries. Catalyst, Inc. found that on average, women MBA’s are being paid \$4,600 less in their first job than men.³ That is long before time out of the workforce for child rearing comes into play. Blau and Kahn, who are cited several times in the Consad report referenced in the question, found that once they controlled for education, labor force experience race, occu-

¹ AAUW Educational Foundation. (2007). *Behind the Pay Gap*, by Catherine Hill and Judy Goldberg Dey. Washington, DC. <http://www.aauw.org/research/behindPayGap.cfm> and Jessica Arons, *Lifetime Losses: The Career Wage Gap*, Center for American Progress Action Fund, December 2008, http://www.americanprogressaction.org/issues/2008/lifetime_losses.html.

² General Accounting Office, *Women’s Earnings: Works Patterns Partially Explain Difference Between Men’s and Women’s Wages*, GAO-04-35, October 2003, <http://www.gao.gov/new.items/d0435.pdf>.

³ Nancy M. Carter, Ph.D. and Christine Silva, *Pipelines Broken Promise*, Catalyst, February 2010. <http://www.catalyst.org/publication/372/pipelines-broken-promise>.

pation, industry, and unionized workplace, 41.1 percent of the wage gap still could not be explained.⁴

In 2008, women working full-time, year-round earned only about 77 cents for every dollar earned by men. Things are even worse for women of color. African-American women make only 61 cents, and Latinas only 52 cents, for every dollar earned by white, non-Hispanic men. Gender wage discrimination has been illegal since President Kennedy signed the Equal Pay Act in 1963 but the wage gap persists. Women earned 59 cents to every dollar earned by men in 1963, but progress has slowed and the gender wage gap widened slightly from 77.8 to 77.1 percent between 2007 and 2008.

No matter how you count it and what you hold for, a gender wage gap remains. Just as the differences in men's and women's wages *may* be the result of individual choices, the differences in wages *may* be the result of sex-based discrimination. And in instances where that gap is due to discrimination, it should be illegal and punishable to the fullest extent of the law.

The Paycheck Fairness Act addresses the causes of the wage gap along with the results. This legislation would provide funding for education programs, employer guidelines and technical assistance as well as recognition of good practices by employers. In addition, there is a competitive grant program to develop salary negotiation training for women and girls. The Paycheck Fairness Act also recognizes that there are many employers doing right by their employees and establishes a recognition program through the Department of Labor for those employers.

Question 2. Many critics of the Paycheck Fairness Act, including the editorial board of the *Washington Post*, say that it is intrusive, impractical, and potentially injurious to the free enterprise system. For example, it gives government the power to determine what constitutes fair wages. It requires any employer accused of wage discrimination to cite a "bona fide" reason for paying a particular male employee more than a female; potential reasons for the wage difference include the male's superior education or his special skills. However, the Paycheck Fairness Act further stipulates that the alleged "bona fide" explanation "shall not apply" if the employee "demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differentials and the employer has refused to adopt such alternative practice." What happens in a case where an employer judges the "alternative" (e.g. a special training program for female employees) to be prohibitively expensive? Business owners protest that this vaguely worded second provision turns the Federal courts into a quasi business partner with unlimited authority to second guess key business decisions? Do you think such fears are unfounded?

Answer 2. These fears are unfounded; business owners that are paying equal pay for equal work have nothing to fear from the Paycheck Fairness Act. The Paycheck Fairness Act will not interfere in employer wage setting decisions or require costly trainings. This legislation will still allow businesses to reward employees with merit and performance-related increases. Wage differentials based on seniority, merit, quantity or quality of production are also allowable under the law. However, if a business wants to pay men and women doing the same job differently, there must be a business reason for doing so. Discrimination based on factors that are used as substitutes for gender such as a male worker's stronger salary negotiation skills or an assumption that women will work for less would not be allowed.

The "bona fide" business necessity language is borrowed from Title VII of the Civil Rights Act, which has been the law for over 40 years and is a familiar standard to employers. Title VII does not require employers to develop cost prohibitive programs to satisfy the comparable alternative requirement and neither would the Paycheck Fairness Act.

Businesses which have clearly written pay policies and practices and proactively review the wages of existing employees will find compliance with the Paycheck Fairness Act easy. Development and adoption of formal, written pay equity policies lay the groundwork for unbiased compensation systems and provide metrics for analyzing salaries to identify disparities.

Question 3. According to the Paycheck Fairness Act, an employer is legally vulnerable if an employee can show that she was paid less than a male colleague because of intentional discrimination or the "lingering effects of past discrimination." Could this prevent employers from paying market wages? For example, universities typically cite "market forces" as the reason professors of business are paid more than

⁴Blau, F., Kahn, L., "The gender pay gap: have women gone as far as they can?", *Academy of Management Perspectives*, February, pp.1-23. (2007).

professors of social work. In many universities there are far more women teaching social work than business. Should they be able to sue on the grounds that “market forces” reflect the lingering effects of discrimination? They could surely find expert witnesses in women’s studies programs who would testify that sexist attitudes led society to place a higher value on male-centered fields like business than female-centered fields like social work. Is it your view that such litigation would be helpful in promoting the goals of the act?

Answer 3. The Paycheck Fairness Act will not prevent employers from paying market wages. This legislation will still allow businesses to reward employees with merit and performance-related increases. Wage differentials based on merit, quantity or quality of production and seniority are also allowable under the law. However, if a business wants to pay men and women doing the same job differently, there must be a business reason for doing so. Discrimination based on factors that are used as substitutes for gender such as a male worker’s stronger salary negotiation skills or an assumption that women will work for less would not be allowed.

An employee alleging gender wage discrimination under the Equal Pay Act must identify a comparable male employee who makes more money for performing equal work, requiring “equal skill, effort and responsibility” under similar working conditions.⁵ This high burden of proof protects employers. If there is no comparator, then there is no case and the employer does not need to mount a defense.

In addition, an employer is able to justify the wage disparity based on the most common business reasons for wage differentials which are seniority, merit, and quantity or quality of production.⁶ In the unlikely event that the employer would even get to the “factor other than sex” defense, they would still be able to say the wage differential was based on a gender-neutral factor, job related and consistent with business necessity.

Businesses which have clearly written policies and practices and proactively review the wages of existing employees will find compliance with the Paycheck Fairness Act easy.

Question 4. The 1963 Equal Pay Act awards victims of intentional discrimination up to \$300,000 in compensatory damage and limited punitive damages. The Paycheck Fairness Act would change that by allowing for unlimited multi-million dollar settlements. This is good news for trial lawyers, but is it a good policy for a nation facing an unemployment crisis? Employers are nervous and fearful of making new hires. Won’t the act reinforce fear?

Answer 4. The Equal Pay Act does not currently allow the award of compensatory or punitive damages. Currently, women who have been paid less than their male counterparts are entitled to recover only their unpaid minimum wages. Those subject to race and national origin discrimination are eligible for compensatory or punitive damages. Punitive damages are only awarded if the employer intentionally discriminated and acted with “malice or reckless indifference to the plaintiff’s federally protected rights. Women and men who endure sex-based wage discrimination should be entitled to the same remedies as those available in race and national origin cases.

The Paycheck Fairness Act will not bankrupt employers through an explosion of court cases, class-action lawsuits, damages awards and damage awards would be limited by the usual limits in law.

The Paycheck Fairness Act ensures that women can obtain the same remedies as those subject to discrimination on the basis of race or national origin. The Paycheck Fairness Act extends to victims of sex-based discrimination the same standards for class action lawsuits. These are familiar regulations that business are already complying with and have been for some time.

Employers that want to be profitable are not fearful about making new hires. Those that look to recruit and retain the best talent as well as maintain a competitive edge believe in equal pay for equal work.

Pay equity is good for business and will result in improved employee retention, positive human capital outcomes, and a more productive work force. In addition to talent acquisition, gender diversity helps companies meet business goals. A recent European Commission study showed that 58 percent of companies with diversity programs reported higher productivity as a result of improved employee motivation

⁵ 29 U.S.C. § 206(d)(1).

⁶ Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It be Fixed?*, 56 Rutgers L. Rev. 849, 868 (2004).

and efficiency, and 62 percent said that the programs helped attract and retain highly talented people.⁷

Business owners that are paying equal pay for equal work have nothing to fear from the Paycheck Fairness Act. The current system is unfair to those employers who treat their employees fairly because it creates a competitive advantage for discriminatory employers. Currently, it is worthwhile for some businesses to pay a woman less than her male counterparts, and gamble that she won't sue for back wages in the future. If she doesn't sue, the employer keeps the "savings"; if she does, the employer only has to pay 2 years of back pay. This encourages discriminatory pay and unfair treatment of female employees.

As we face this unemployment crisis, it is the best time to institute such a policy. Women are now half of workers on U.S. payrolls and many families are trying to make ends meet on women's earnings alone. Paying women equally is not only good for the women but their families and the Nation as a whole. As they help rebuild the national economy and workforce, shouldn't they be equally compensated?

RESPONSE TO QUESTIONS OF SENATOR ENZI BY JANE M. MCFETRIDGE

Question 1. At the hearing there was some discussion of the phenomenal growth of women-owned firms in recent years, and it was claimed that women-owned firms had a reduced risk of being sued for pay discrimination. In your personal experience as an employment lawyer, is that the case?

Answer 1. No, I have not seen a discernible difference in the litigation risks faced by women-owned businesses. Unfortunately, in my experience, a company's litigation risk often has less to do with its policies and practices—or its leadership—than one might think. The companies I work with, regardless of ownership, are committed to ensuring gender pay parity and work hard to eradicate discrimination in the workplace. However, that does not mean they don't get sued. As evidenced by EEOC statistics, the vast majority of Equal Pay Act of 1963 (the "EPA") and title VII of the Civil Rights Act of 1964 ("title VII") charges filed with the agency lack merit. In 2009, for example, after thoroughly investigating and evaluating the charging party's allegations of discrimination, the EEOC found "reasonable cause" in only 4.6 percent of the EPA and 5 percent of the title VII charges it received.¹ These statistics demonstrate that the vast majority of claims lack merit, irrespective of the gender of the business owner. Furthermore, many (if not most) of the businesses I work with are corporations with diverse ownership, so it is a little difficult to assign "gender" to such entities. I will say that the majority of corporate representatives with whom I deal are women—both in the corporate counsel's department and as decisionmakers in Human Resources or management. The presence of female decisionmakers and management does not appear to influence the likelihood of a business being sued, nor does it affect the outcome of litigation.

Question 2. How difficult is it for a woman who believes she may be the victim of gender-based pay discrimination to commence an investigation?

Answer 2. It is very simple for an employee who believes she may be the victim of gender-based pay discrimination to commence an investigation under both the EPA and title VII: all she must do is file a charge of discrimination with the EEOC.² The EEOC charge-filing process is intentionally designed so that employees do not have to rely on lawyers to prompt the EEOC to initiate an investigation.

A complaint can be filed with the EEOC through a phone call or a visit to a local EEOC office, as well as by mail. Although a formal charge cannot be filed by phone, anyone who believes she has been subjected to discrimination can call the EEOC's hotline and provide basic information, which the EEOC will then forward to a local office that will contact the caller.³ Where necessary, the EEOC provides special assistance, such as a foreign language interpreter, at local offices.⁴ The EEOC also allows an individual, organization or agency to file a charge on someone else's behalf.⁵

⁷ Desvaux, Georges, Devillard-Hoellinger, Sandrine and. Meaney, Mary C, *A Business Case for Women*, McKinsey and Company, September 2008.

¹ EEOC Sex-Based Charges, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm> (last visited Mar. 5, 2010).

² Although plaintiffs are not required to file a charge of discrimination with the EEOC prior to commencing an EPA lawsuit, the EEOC has the authority to investigate EPA charges and commence litigation. See 29 CFR §1620.30 (2008).

³ The Charge Handling Process, available at <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Mar. 30, 2010).

⁴ *Id.*

⁵ *Id.*

As the U.S. Supreme Court has explained, title VII “sets up a ‘remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process.’”⁶ A filing constitutes a “charge,” the Court has said, when it can be “reasonably construed as a request for the agency to take remedial action to protect the employee’s rights or otherwise settle a dispute between the employer and the employee.”⁷ A Federal district court recently reiterated this reasoning in a sex-based pay discrimination case, holding that a plaintiff’s intake questionnaire, with allegations of unequal pay, was sufficient to constitute filing of an EEOC charge. “While a formal charge was not signed by [plaintiff], the . . . questionnaire contained an allegation of discrimination, the name of the charged party and a request for the agency to take action.”⁸

Not only is the charge-filing process simple, but employees also have a substantial period of time to file. The Lilly Ledbetter Fair Pay Act of 2009 provides that the charge-filing period (300 days in most States and 180 days in States that do not have a fair employment agency) for title VII pay discrimination claims restarts each time an employee receives a paycheck based on a discriminatory compensation decision. For the EPA, an employee must file an EEOC charge or a lawsuit “within 2 years of the alleged unlawful compensation practice or, in the case of a willful violation, within 3 years.”⁹

Beyond investigating a charge of pay discrimination, the EEOC may also pursue mediation or file a lawsuit on an employee’s behalf.¹⁰ In some cases, the EEOC even decides on its own to investigate whether a company is engaging in discrimination outside of what is alleged in a particular charge. A Federal appeals court in New York recently held that the EEOC has authority to request company-wide information regarding an employer’s religious exemptions to company policy after two employees filed religious discrimination charges.¹¹ In other words, if one or two female employees file EEOC charges alleging their employer engaged in gender-based pay discrimination, the EEOC could request nationwide pay data for all employees. The end result is that a single EEOC charge filed by an individual employee in Chicago can result in a massive litigation initiated by the EEOC against a company with operations across the country. In such a scenario, the EEOC could pursue class-wide relief for a group of female employees. Furthermore, the EEOC can take notice of possibly discriminatory practices through third party sources such as news reports and investigate employers for potential civil rights violations, such as gender pay disparities.¹² In this scenario, no complainant is necessary to prompt an investigation.

Question 3. What would be the effect of S. 182 on litigation levels and liability exposure for small employers?

Answer 3. S. 182 would undoubtedly increase litigation levels and liability exposure for small employers. The proposed legislation not only makes it more difficult for employers to establish an affirmative defense to EPA liability, but, by making uncapped punitive and compensatory damages available in EPA cases regardless of the employer’s size, it both encourages plaintiffs’ attorneys to bring such claims and increases potential exposure.

When Congress added compensatory and punitive damages to the relief available in title VII disparate treatment cases through passage of the Civil Rights Act of 1991, it was careful to include a statutory cap on such damages. That cap is set at \$50,000 (for companies with 15–100 employees) to \$300,000 total for compensatory and punitive damages, depending on the employer’s size. As the U.S. Court of Appeals for the Second Circuit has pointed out, a review of the act’s legislative

⁶ *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 402 (Feb. 27, 2008).

⁷ *Id.*

⁸ *Glodek v. Jersey Shore State Bank*, 2009 U.S. Dist. LEXIS 77118, at *31 (M.D. Pa. Aug. 28, 2009).

⁹ Equal Pay/Compensation Discrimination, available at <http://www.eeoc.gov/laws/types/equalcompensation.cfm> (last visited Mar. 30, 2010).

¹⁰ The Charge Handling Process, available at <http://www.eeoc.gov/employees/process.cfm> (last visited Mar. 30, 2010).

¹¹ *EEOC v. UPS*, 587 F.3d 136 (2d Cir. Nov. 19, 2009).

¹² See 42 U.S.C. § 2000e–5(b) (granting EEOC Commissioners authority to issue charges on their own initiative under title VII); see also Press Release, U.S. Equal Employment Opportunity Commission, \$27.5 Million Consent Decree Resolves EEOC Age Bias Suit Against Sidley Austin (Oct. 5, 2007), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-5-07.cfm> (last visited Apr. 29, 2010) (noting that “[t]he litigation has yielded a number of important legal decisions, . . . [including] ratifying the authority of EEOC to investigate and obtain relief for victims of age discrimination on its own initiative.”)

history reveals that “the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards.”¹³

S. 182, on the other hand, makes no attempt to ameliorate the size of available damages for smaller employers, who are arguably less capable of surviving such an award, or the cost of the litigation itself. Thus, S. 182 exposes small employers to significantly greater liability than what they currently face under both the EPA and title VII. The promise of uncapped damages will also provide added incentive for plaintiffs’ counsel to bring EPA claims against employers in the first place, including small employers.

To better understand how enhanced damage remedies affect litigation levels, a good place to look is the Civil Rights Act of 1991. According to one article, “In the decade following the passage of the Civil Rights Act of 1991, the number of employment discrimination trials jumped 26 percent, while other civil trials declined by a roughly equivalent percentage.”¹⁴

Further, by allowing “opt-out” class actions under a law that makes it very difficult for employers to defend legitimate decisions while exposing them to unlimited damages, S. 182 would also encourage plaintiffs’ attorneys to bring class action lawsuits against employers who may be forced to settle even when they did nothing wrong, or face financial ruin from the extraordinary costs associated with litigation of this nature. This is true for both large and small employers, but the threat of financial ruin is even greater for small employers.

Question 4. 4. In your view could S. 182 impose liability on employers that have not engaged in any discriminatory behavior?

Answer 4. Yes, I absolutely believe S. 182 could impose liability on employers that have not engaged in any discriminatory behavior. There are three specific aspects of the legislation that lead me to this conclusion: (1) Sec. 3(a)(2)(B), which would replace the EPA’s “any factor other than sex” defense with a “business necessity” requirement; (2) Sec. 3(a)(2)(C), which would amend the EPA to define “establishment” as “workplaces located in the same county or similar political subdivision of a State;” and (3) Sec. 9, which would no longer require the OFCCP to use multiple regression analysis when performing compensation discrimination analyses. Further, if S. 182 is enacted, employers who have not engaged in any discriminatory behavior could be liable for uncapped compensatory damages. I will address each of these provisions in turn.

First, the Paycheck Fairness Act would eliminate the EPA’s “any factor other than sex” defense, replacing it with a “bona fide factor other than sex” that is “consistent with business necessity.” That defense would be unavailable if a plaintiff demonstrates that “an alternative employment practice exists that would serve the same business purpose.” As I stated in my opening remarks, as a practical matter, there is simply no way an employer will be able to demonstrate that each and every pay determination it makes is consistent with business necessity. There may be dozens or hundreds of factors that go into determining an employee’s compensation, some objective and some subjective, and all of which can be legitimate, non-discriminatory considerations. Under S. 182, however, there is a clear dichotomy: either the reason for the pay differential is “consistent with business necessity” or it is discriminatory.

In my testimony, I highlighted a few examples of how pay determinations that have nothing to do with discrimination would not fit into S. 182’s “business necessity” defense. I gave the example of jobs that require frequent personal interaction, like a waitress. If S. 182 is enacted, employers could be liable for pay differentials based upon qualities like a friendly disposition or positive attitude if a court does not consider them “consistent with business necessity.” This is just one example. There are an infinite number of scenarios in which an employer may decide to pay one employee more than a similarly situated employee for reasons having nothing to do with gender discrimination. Consider a company that decides to give a male manager a larger raise than a female manager because he has successfully implemented initiatives to improve employee morale, demonstrated excellent judgment and decisionmaking skills in high pressure situations, and has generally impressed senior-level management for reasons that cannot necessarily be quantified. In this

¹³*Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. Mar. 21, 1997) (referencing 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole); 137 Cong. Rec. S15478–79 (1991) (statement of Sen. Bumpers)).

¹⁴Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo. L. Rev. 481, 510 (2008). In addition, as I mentioned in my Opening Remarks, the State of California has many times more discrimination cases than any other State in the country—and the cost of doing business there is significantly higher than in other locations—because State law provides for unlimited damages.

situation, S. 182 could impose liability on employers that have not engaged in any discriminatory behavior.

Another example is mergers and acquisitions. When one company acquires another, it absorbs differing pay scales, oftentimes resulting in pay disparities that are wholly unrelated to sex. However, by requiring the justification to be job-related and consistent with business necessity, employers would arguably have to undertake a prompt review of these differing pay scales upon consolidation and normalize the disparities by elevating the lower salaries to the higher-paid salary (as the EPA does not allow employers to reduce salaries in response to a pay disparity).

The inevitable result of S. 182's "business necessity" reformulation of the "any factor other than sex" defense is that employers may be liable for making individual pay determinations. Even if employers are not found liable, that result will only come after costly and protracted litigation.

Second, S. 182 would amend the EPA to define "establishment" as "workplaces located in the same county or similar political subdivision of a State." This change would make it illegal for employers to incentivize employees who agree to work in less desirable neighborhoods or work less desirable shifts, even though the pay differential has nothing to do with discrimination. The same would be true for counties that encompass both urban and rural populations: employers could be liable for discrimination if they pay workers employed in an urban center more than workers employed in a rural setting, even though the cost of doing business is significantly higher in the rural location.

Third, S. 182 would direct the OFCCP to use the "full range of investigatory tools" to determine the presence of potential discrimination in Federal contractors' compensation systems, including the "pay grade methodology," which the OFCCP rejected in 2006. Instead, the OFCCP has been using multiple regression analyses—which generally allows the OFCCP to consider the impact of variables, such as years of work experience, education, and past performance—to determine the presence of potential discrimination. As a result, the OFCCP would likely bring more actions against employers based on inadequate and faulty data. Even if employers are not found liable, they would be forced to spend money defending themselves.

For all of these reasons, I believe S. 182 could impose liability on employers that have not engaged in any discriminatory behavior.

[Whereupon, at 12:03 p.m., the hearing was adjourned.]

