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

IN THE SENATE OF THE UNITED STATES

APRIL 4, 2017

Mrs. Murray (for herself, Mr. Schumer, Mr. Durbin, Mr. Menendez, Mr. Coons, Mr. Brown, Mr. Udall, Mr. Casey, Ms. Baldwin, Mr. Van Hollen, Mrs. Shaheen, Mrs. Gillibrand, Ms. Klobuchar, Mr. Markey, Ms. Hirono, Mrs. Feinstein, Mr. Menchino, Mr. Heinrich, Mr. Blumenthal, Mr. Leahy, Mr. Booker, Mr. Reed, Mr. Sanders, Ms. Warren, Ms. Stabenow, Mr. Carper, Mr. Whitehouse, Mrs. McCaskill, Ms. Cantwell, Mr. Franken, Mr. Warner, Ms. Harris, Mr. Murphy, Mr. Nelson, Mr. Wyden, Mr. Kaine, Ms. Hassan, Mr. Merkley, Mr. Tester, Ms. Duckworth, and Mr. Bennet) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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

Be it enacted by the Senate and House of Representa-

Consider the caption text.
SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS.

Congress finds the following:

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

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

(3) The existence of such pay disparities—

(A) depresses the wages of working families who rely on the wages of all members of the family to make ends meet;

(B) undermines women’s retirement security, which is often based on earnings while in the workforce;

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

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

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

(F) constitutes an unfair method of competition in commerce;

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

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

(I) in many instances, may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th Amendments.


(B) These barriers have resulted, in significant part, because the Equal Pay Act of 1963 has not worked as Congress originally intended. Improvements and modifications to the law are necessary to ensure that the Act provides effective protection to
those subject to pay discrimination on the basis of their sex.

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

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

(ii) substantially reducing the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance;

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

(iv) remedying the effects of past discrimination on the basis of sex and ensuring that in the future workers are afforded equal protection on the basis of sex; and

(v) ensuring equal protection pursuant to Congress’ power to enforce the 5th and 14th Amendments.

(5) The Department of Labor and the Equal Employment Opportunity Commission have important and unique responsibilities to help ensure that women receive equal pay for equal work.

(6) The Department of Labor is responsible for—
(A) collecting and making publicly available information about women’s pay;

(B) ensuring that companies receiving Federal contracts comply with anti-discrimination affirmative action requirements of Executive Order 11246 (relating to equal employment opportunity);

(C) disseminating information about women’s rights in the workplace;

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

(E) being proactive in investigating and prosecuting equal pay violations, especially systemic violations, and in enforcing all of its mandates.

(7) The Equal Employment Opportunity Commission is the primary enforcement agency for claims made under the Equal Pay Act of 1963, and issues regulations and guidance on appropriate interpretations of the law.

(8) With a stronger commitment by the Department of Labor and the Equal Employment Opportunity Commission to their responsibilities, increased information as a result of the amendments made by this Act to the Equal Pay Act of 1963, wage data,
and more effective remedies, women will be better able to recognize and enforce their rights.

(9) Certain employers have already made great strides in eradicating unfair pay disparities in the workplace and their achievements should be recognized.

SEC. 3. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

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

(1) by striking “No employer having” and inserting “(A) No employer having”;

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

(3) by inserting at the end the following:

“(B) The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue. Such defense
shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

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

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

(1) in subsection (a)—

(A) in paragraph (3), by striking “employee has filed” and all that follows and inserting “employee—

“(A) has made a charge or filed any complaint or instituted or caused to be instituted any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer, or has tes-
tified or is planning to testify or has assisted or participated in any manner in any such investigation, proceeding, hearing or action, or has served or is planning to serve on an industry committee; or

“(B) has inquired about, discussed, or disclosed the wages of the employee or another employee;”;

(B) in paragraph (5), by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(6) to require an employee to sign a contract or waiver that would prohibit the employee from disclosing information about the employee’s wages.”;

and

(2) by adding at the end the following:

“(c) Subsection (a)(3)(B) shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee’s essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under section 6(d), including an investigation conducted by the employer. Nothing
in this subsection shall be construed to limit the rights of an employee provided under any other provision of law.”.

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

(1) by inserting after the first sentence the following: “Any employer who violates section 6(d) shall additionally be liable for such compensatory damages, or, where the employee demonstrates that the employer acted with malice or reckless indifference, punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.”;

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

(3) in the sentence beginning “No employees shall”, by striking “No employees” and inserting “Except with respect to class actions brought to enforce section 6(d), no employee”;

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

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

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

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

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

(1) in the first sentence—

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

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

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

(4) in the last sentence—

(A) by striking “commenced in the case” and inserting “commenced—

“(1) in the case”;

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

(C) by adding at the end the following:

“(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.”.

SEC. 4. TRAINING.

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

SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND WOMEN.

(a) PROGRAM AUTHORIZED.—

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

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

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

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

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

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

(1) in the case of the Secretary of Education, the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), and other programs carried out by the Department of Education that the Secretary of Education determines to be appropriate; and

(2) in the case of the Secretary of Labor, the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), and other programs carried out by the Department of Labor that the Secretary of Labor determines to be appropriate.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Sec-
Secretary of Labor and the Secretary of Education shall prepare and submit to Congress a report describing the activities conducted under this section and evaluating the effectiveness of such activities in achieving the purposes of this Act.

SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.

The Secretary of Labor shall conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including—

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the media, and the general public the findings resulting from studies and other materials, relating to eliminating the pay disparities;

(3) sponsoring and assisting State and community informational and educational programs;

(4) providing information to employers, labor organizations, professional associations, and other interested persons on the means of eliminating the pay disparities;
(5) recognizing and promoting the achievements of employers, labor organizations, and professional associations that have worked to eliminate the pay disparities; and

(6) convening a national summit to discuss, and consider approaches for rectifying, the pay disparities.

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

(a) IN GENERAL.—There is established the Secretary of Labor’s National Award for Pay Equity in the Workplace, which shall be awarded, as appropriate, to encourage proactive efforts to comply with section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

(b) CRITERIA FOR QUALIFICATION.—The Secretary of Labor shall set criteria for receipt of the award, including a requirement that an employer has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence of such effort. The Secretary shall establish procedures for the application and presentation of the award.

(c) BUSINESS.—In this section, the term “employer” includes—

(1)(A) a corporation, including a nonprofit corporation;
(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in any of subparagraphs (A) through (D);

(2) an entity carrying out an education referral program, a training program, such as an apprenticeship or management training program, or a similar program; and

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

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

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

“(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall issue regulations to provide for the collection from employers of compensation data and other employment-related data (including hiring, termination, and promotion data) disaggregated by the sex, race, and national origin of employees.
“(2) In carrying out paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for reports containing such data.”.

SEC. 9. REINSTATEMENT OF PAY EQUITY PROGRAMS AND PAY EQUITY DATA COLLECTION.

(a) BUREAU OF LABOR STATISTICS DATA COLLECTION.—The Commissioner of Labor Statistics shall continue to collect data on women workers in the Current Employment Statistics survey.

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

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

(B) in considering evidence of possible compensation discrimination—
(i) shall not limit its consideration to a small number of types of evidence; and

(ii) shall not limit its evaluation of the evidence to a small number of methods of evaluating the evidence; and

(C) shall not require a multiple regression analysis or anecdotal evidence for a compensation discrimination case;

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

(3) shall implement a survey to collect compensation data and other employment-related data (including hiring, termination, and promotion data) and designate not less than half of all nonconstruction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify contractor es-
establishments for further evaluation and for other enforcement purposes as appropriate.

(c) Department of Labor Distribution of Wage Discrimination Information.—The Secretary of Labor shall make readily available (in print, on the Department of Labor website, and through any other forum that the Department may use to distribute compensation discrimination information), accurate information on compensation discrimination, including statistics, explanations of employee rights, historical analyses of such discrimination, instructions for employers on compliance, and any other information that will assist the public in understanding and addressing such discrimination.

SEC. 10. PROHIBITIONS RELATING TO PROSPECTIVE EMPLOYEES’ SALARY AND BENEFIT HISTORY.

(a) In General.—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended by inserting after section 7 the following new section:

“SEC. 8. REQUIREMENTS AND PROHIBITIONS RELATING TO WAGE, SALARY, AND BENEFIT HISTORY.

“(a) In General.—It shall be an unlawful practice for an employer to—

“(1) rely on the wage history of a prospective employee in considering the prospective employee for employment, including requiring that a prospective
employee’s prior wages satisfy minimum or maximum criteria as a condition of being considered for employment;

“(2) rely on the wage history of a prospective employee in determining the wages for such prospective employee, except that an employer may rely on wage history if it is voluntarily provided by a prospective employee, after the employer makes an offer of employment with an offer of compensation to the prospective employee, to support a wage higher than the wage offered by the employer;

“(3) seek from a prospective employee or any current or former employer the wage history of the prospective employee, except that an employer may seek to confirm prior wage information only after an offer of employment with compensation has been made to the prospective employee and the prospective employee responds to the offer by providing prior wage information to support a wage higher than that offered by the employer; or

“(4) discharge or in any other manner retaliate against any employee or prospective employee because the employee or prospective employee—

“(A) opposed any act or practice made unlawful by this section; or
“(B) took an action for which discrimination is forbidden under section 15(3).

“(b) DEFINITIONS.—In this section:

“(1) WAGES; COMPENSATION.—The term ‘wages’ or ‘compensation’ has the meaning given the term ‘wages’ in section 6(d).

“(2) WAGE HISTORY.—The term ‘wage history’ means the wages paid to the prospective employee by the prospective employee’s current employer or previous employer.”.

(b) PENALTIES.—Section 16 of such Act (29 U.S.C. 216) is amended by adding at the end the following new subsection:

“(f)(1) Any person who violates the provisions of section 8 shall—

“(A) be subject to a civil penalty of $5,000 for a first offense, increased by an additional $1,000 for each subsequent offense, not to exceed $10,000; and

“(B) be liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed $10,000 plus attorneys’ fees, and shall be subject to such injunctive relief as may be appropriate.

“(2) An action to recover the liability described in paragraph (1)(B) may be maintained against any em-
ployer (including a public agency) in any Federal or State
court of competent jurisdiction by any one or more em-
ployees or prospective employees for and on behalf of—
“(A) the employees or prospective employees;

and

“(B) other employees or prospective employees
similarly situated.”.

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

(a) Authorization of Appropriations.—There
are authorized to be appropriated $15,000,000 to carry
out this Act.

(b) Prohibition on Earmarks.—None of the funds
appropriated pursuant to subsection (a) for purposes of
the grant program in section 5 of this Act may be used
for a congressional earmark as defined in clause 9(e) of
rule XXI of the Rules of the House of Representatives.

SEC. 12. SMALL BUSINESS ASSISTANCE.

(a) Effective Date.—This Act and the amend-
ments made by this Act shall take effect on the date that
is 6 months after the date of enactment of this Act.

(b) Technical Assistance Materials.—The Sec-
retary of Labor and the Commissioner of the Equal Em-
ployment Opportunity Commission shall jointly develop
technical assistance material to assist small businesses in
complying with the requirements of this Act and the amendments made by this Act.

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

SEC. 13. RULE OF CONSTRUCTION.

Nothing in this Act, or in any amendments made by this Act, shall affect the obligation of employers and employees to fully comply with all applicable immigration laws, including any penalties, fines, or other sanctions.