

116TH CONGRESS
1ST SESSION

S. 270

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

JANUARY 30, 2019

Mrs. MURRAY (for herself, Ms. BALDWIN, Mr. BENNET, Mr. BLUMENTHAL, Mr. BOOKER, Mr. BROWN, Ms. CANTWELL, Mr. CARDIN, Mr. CARPER, Mr. CASEY, Mr. COONS, Ms. CORTEZ MASTO, Ms. DUCKWORTH, Mr. DURBIN, Mrs. FEINSTEIN, Mrs. GILLIBRAND, Ms. HARRIS, Ms. HASSAN, Mr. HEINRICH, Ms. HIRONO, Mr. JONES, Mr. KAINE, Ms. KLOBUCHAR, Mr. LEAHY, Mr. MANCHIN, Mr. MARKEY, Mr. MENENDEZ, Mr. MERKLEY, Mr. MURPHY, Mr. PETERS, Mr. REED, Ms. ROSEN, Mr. SANDERS, Mr. SCHATZ, Mr. SCHUMER, Mrs. SHAHEEN, Ms. SINEMA, Ms. SMITH, Ms. STABENOW, Mr. TESTER, Mr. UDALL, Mr. VAN HOLLEN, Mr. WARNER, Ms. WARREN, Mr. WHITEHOUSE, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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

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

1 **SECTION 1. SHORT TITLE.**

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

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

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

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

15 (3) The existence of such pay disparities—

16 (A) depresses the wages of working fami-
17 lies who rely on the wages of all members of the
18 family to make ends meet;

19 (B) undermines women’s retirement secu-
20 rity, which is often based on earnings while in
21 the workforce;

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

24 (D) has been spread and perpetuated,
25 through commerce and the channels and instru-

1 mentalities of commerce, among the workers of
2 the several States;

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

5 (F) constitutes an unfair method of com-
6 petition in commerce;

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

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

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

15 (4)(A) Artificial barriers to the elimination of
16 discrimination in the payment of wages on the basis
17 of sex continue to exist decades after the enactment
18 of the Fair Labor Standards Act of 1938 (29 U.S.C.
19 201 et seq.) and the Civil Rights Act of 1964 (42
20 U.S.C. 2000a et seq.).

21 (B) These barriers have resulted, in significant
22 part, because the Equal Pay Act of 1963 has not
23 worked as Congress originally intended. Improve-
24 ments and modifications to the law are necessary to
25 ensure that the Act provides effective protection to

1 those subject to pay discrimination on the basis of
2 their sex.

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

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

7 (ii) substantially reducing the number of
8 working women earning unfairly low wages,
9 thereby reducing the dependence on public as-
10 sistance;

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

13 (iv) remedying the effects of past discrimi-
14 nation on the basis of sex and ensuring that in
15 the future workers are afforded equal protection
16 on the basis of sex; and

17 (v) ensuring equal protection pursuant to
18 Congress' power to enforce the 5th and 14th
19 Amendments.

20 (5) The Department of Labor and the Equal
21 Employment Opportunity Commission have impor-
22 tant and unique responsibilities to help ensure that
23 women receive equal pay for equal work.

24 (6) The Department of Labor is responsible
25 for—

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

3 (B) ensuring that companies receiving
4 Federal contracts comply with anti-discrimina-
5 tion affirmative action requirements of Execu-
6 tive Order 11246 (relating to equal employment
7 opportunity);

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

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

12 (E) being proactive in investigating and
13 prosecuting equal pay violations, especially sys-
14 temic violations, and in enforcing all of its man-
15 dates.

16 (7) The Equal Employment Opportunity Com-
17 mission is the primary enforcement agency for
18 claims made under the Equal Pay Act of 1963, and
19 issues regulations and guidance on appropriate in-
20 terpretations of the law.

21 (8) With a stronger commitment by the Depart-
22 ment of Labor and the Equal Employment Oppor-
23 tunity Commission to their responsibilities, increased
24 information as a result of the amendments made by
25 this Act to the Equal Pay Act of 1963, wage data,

1 and more effective remedies, women will be better
2 able to recognize and enforce their rights.

3 (9) Certain employers have already made great
4 strides in eradicating unfair pay disparities in the
5 workplace and their achievements should be recog-
6 nized.

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

9 (a) BONA FIDE FACTOR DEFENSE AND MODIFICA-
10 TION OF SAME ESTABLISHMENT REQUIREMENT.—Section
11 6(d)(1) of the Fair Labor Standards Act of 1938 (29
12 U.S.C. 206(d)(1)) is amended—

13 (1) by striking “No employer having” and in-
14 serting “(A) No employer having”;

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

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

19 “(B) The bona fide factor defense described in sub-
20 paragraph (A)(iv) shall apply only if the employer dem-
21 onstrates that such factor (i) is not based upon or derived
22 from a sex-based differential in compensation; (ii) is job-
23 related with respect to the position in question; (iii) is con-
24 sistent with business necessity; and (iv) accounts for the
25 entire differential in compensation at issue. Such defense

1 shall not apply where the employee demonstrates that an
2 alternative employment practice exists that would serve
3 the same business purpose without producing such dif-
4 ferential and that the employer has refused to adopt such
5 alternative practice.

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

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

17 (1) in subsection (a)—

18 (A) in paragraph (3), by striking “em-
19 ployee has filed” and all that follows and insert-
20 ing “employee—

21 “(A) has made a charge or filed any com-
22 plaint or instituted or caused to be instituted
23 any investigation, proceeding, hearing, or action
24 under or related to this Act, including an inves-
25 tigation conducted by the employer, or has tes-

1 tified or is planning to testify or has assisted or
2 participated in any manner in any such inves-
3 tigation, proceeding, hearing or action, or has
4 served or is planning to serve on an industry
5 committee; or

6 “(B) has inquired about, discussed, or dis-
7 closed the wages of the employee or another
8 employee;”;

9 (B) in paragraph (5), by striking the pe-
10 riod at the end and inserting “; or”; and

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

12 “(6) to require an employee to sign a contract
13 or waiver that would prohibit the employee from dis-
14 closing information about the employee’s wages.”;
15 and

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

17 “(c) Subsection (a)(3)(B) shall not apply to instances
18 in which an employee who has access to the wage informa-
19 tion of other employees as a part of such employee’s essen-
20 tial job functions discloses the wages of such other employ-
21 ees to individuals who do not otherwise have access to such
22 information, unless such disclosure is in response to a
23 complaint or charge or in furtherance of an investigation,
24 proceeding, hearing, or action under section 6(d), includ-
25 ing an investigation conducted by the employer. Nothing

1 in this subsection shall be construed to limit the rights
2 of an employee provided under any other provision of
3 law.”.

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

7 (1) by inserting after the first sentence the fol-
8 lowing: “Any employer who violates section 6(d)
9 shall additionally be liable for such compensatory
10 damages, or, where the employee demonstrates that
11 the employer acted with malice or reckless indiffer-
12 ence, punitive damages as may be appropriate, ex-
13 cept that the United States shall not be liable for
14 punitive damages.”;

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

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

23 (4) by inserting after the sentence referred to
24 in paragraph (3), the following: “Notwithstanding
25 any other provision of Federal law, any action

1 brought to enforce section 6(d) may be maintained
2 as a class action as provided by the Federal Rules
3 of Civil Procedure.”; and

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

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

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

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

14 (1) in the first sentence—

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

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

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

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

4 (4) in the sixth sentence—

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

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

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

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

14 **SEC. 4. TRAINING.**

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

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

23 (a) PROGRAM AUTHORIZED.—

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

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

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

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

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

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

1 negotiation skills to allow the girls and women to ob-
2 tain higher salaries and rates of compensation that
3 are equal to those paid to similarly situated male
4 employees.

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

10 (1) in the case of the Secretary of Education,
11 the Elementary and Secondary Education Act of
12 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins
13 Career and Technical Education Act of 2006 (20
14 U.S.C. 2301 et seq.), the Higher Education Act of
15 1965 (20 U.S.C. 1001 et seq.), and other programs
16 carried out by the Department of Education that the
17 Secretary of Education determines to be appro-
18 priate; and

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

24 (c) REPORT.—Not later than 1 year after the date
25 of enactment of this Act, and annually thereafter, the Sec-

1 retary of Labor and the Secretary of Education shall pre-
2 pare and submit to Congress a report describing the ac-
3 tivities conducted under this section and evaluating the ef-
4 fectiveness of such activities in achieving the purposes of
5 this Act.

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

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

11 (1) conducting and promoting research to de-
12 velop the means to correct expeditiously the condi-
13 tions leading to the pay disparities;

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

20 (3) sponsoring and assisting State and commu-
21 nity informational and educational programs;

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

- 1 (B) a partnership;
- 2 (C) a professional association;
- 3 (D) a labor organization; and
- 4 (E) a business entity similar to an entity de-
- 5 scribed in any of subparagraphs (A) through (D);
- 6 (2) an entity carrying out an education referral
- 7 program, a training program, such as an apprentice-
- 8 ship or management training program, or a similar
- 9 program; and
- 10 (3) an entity carrying out a joint program,
- 11 formed by a combination of any entities described in
- 12 paragraph (1) or (2).

13 **SEC. 8. COLLECTION OF PAY INFORMATION BY THE EQUAL**

14 **EMPLOYMENT OPPORTUNITY COMMISSION.**

15 Section 709 of the Civil Rights Act of 1964 (42

16 U.S.C. 2000e–8) is amended by adding at the end the fol-

17 lowing:

18 “(f)(1) Not later than 18 months after the date of

19 enactment of this subsection, the Commission shall issue

20 regulations to provide for the collection from employers

21 of compensation data and other employment-related data

22 (including hiring, termination, and promotion data)

23 disaggregated by the sex, race, and national origin of em-

24 ployees.

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

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

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

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

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

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

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

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

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

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

18 (3) shall implement a survey to collect com-
19 pensation data and other employment-related data
20 (including hiring, termination, and promotion data)
21 and designate not less than half of all nonconstruc-
22 tion contractor establishments each year to prepare
23 and file such survey, and shall review and utilize the
24 responses to such survey to identify contractor es-

1 employee's prior wages satisfy minimum or maximum criteria as a condition of being considered for
2 employment;
3

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

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

21 “(4) discharge or in any other manner retaliate
22 against any employee or prospective employee because the employee or prospective employee—
23

24 “(A) opposed any act or practice made unlawful by this section; or
25

1 “(B) took an action for which discrimina-
2 tion is forbidden under section 15(a)(3).

3 “(b) DEFINITIONS.—In this section:

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

7 “(2) WAGE HISTORY.—The term ‘wage history’
8 means the wages paid to the prospective employee by
9 the prospective employee’s current employer or pre-
10 vious employer.”.

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

14 “(f)(1) Any person who violates the provisions of sec-
15 tion 8 shall—

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

19 “(B) be liable to each employee or prospective
20 employee who was the subject of the violation for
21 special damages not to exceed \$10,000 plus attor-
22 neys’ fees, and shall be subject to such injunctive re-
23 lief as may be appropriate.

24 “(2) An action to recover the liability described in
25 paragraph (1)(B) may be maintained against any em-

1 ployer (including a public agency) in any Federal or State
2 court of competent jurisdiction by any one or more em-
3 ployees or prospective employees for and on behalf of—

4 “(A) the employees or prospective employees;
5 and

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

8 **SEC. 11. AUTHORIZATION OF APPROPRIATIONS.**

9 (a) **AUTHORIZATION OF APPROPRIATIONS.**—There
10 are authorized to be appropriated \$15,000,000 to carry
11 out this Act.

12 (b) **PROHIBITION ON EARMARKS.**—None of the funds
13 appropriated pursuant to subsection (a) for purposes of
14 the grant program in section 5 of this Act may be used
15 for a congressional earmark as defined in clause 9(e) of
16 rule XXI of the Rules of the House of Representatives.

17 **SEC. 12. SMALL BUSINESS ASSISTANCE.**

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

21 (b) **TECHNICAL ASSISTANCE MATERIALS.**—The Sec-
22 retary of Labor and the Commissioner of the Equal Em-
23 ployment Opportunity Commission shall jointly develop
24 technical assistance material to assist small businesses in

1 complying with the requirements of this Act and the
2 amendments made by this Act.

3 (c) SMALL BUSINESSES.—A small business shall be
4 exempt from the provisions of this Act, and the amend-
5 ments made by this Act, to the same extent that such busi-
6 ness is exempt from the requirements of the Fair Labor
7 Standards Act of 1938 pursuant to clauses (i) and (ii)
8 of section 3(s)(1)(A) of such Act (29 U.S.C.
9 203(s)(1)(A)).

10 **SEC. 13. RULE OF CONSTRUCTION.**

11 Nothing in this Act, or in any amendments made by
12 this Act, shall affect the obligation of employers and em-
13 ployees to fully comply with all applicable immigration
14 laws, including any penalties, fines, or other sanctions.

○