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# How the Paycheck Fairness Act Will Strengthen the Equal Pay Act

Nearly sixty years ago, President Kennedy signed the Equal Pay Act (EPA) into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women made merely 59 cents to every dollar made by men. Although enforcement of the EPA as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. Today, women typically make only 82 cents for every dollar earned by men. This wage gap varies by race and is far larger for many women of color: Black women working full time, year round typically make only 63 cents, Native American women only 60 cents, and Latinas only 55 cents, for every dollar paid to their white, non-Hispanic male counterparts. While Asian American and Pacific Islander (AAPI) women make 87 cents for every dollar paid to white, non-Hispanic men, women from many AAPI communities experience drastically wider pay gaps.

Lost earnings due to a stagnant gender wage gap are exacerbating the economic and health consequences of the COVID-19 pandemic for Black and brown women — and for the families who depend on their income. The COVID-19 pandemic has exposed how the work performed primarily by women, and particularly Black and brown women, has long been and continues to be undervalued, even as the rest of the country is depending on it. Black women, Latinas, and other women of color are especially likely to be on the front lines of the crisis, in jobs from personal care and home health aides to grocery store cashiers to child care workers. They are also overrepresented in low-wage occupations and many of the occupations feeling the brunt of COVID-related job loss. These lost earnings not only leave Black and brown women without a financial cushion to weather the current crisis, they also make it harder for them to build wealth, contributing to the racial wealth gap and barriers to economic prosperity.

The Paycheck Fairness Act (S. \_\_\_, H.R. \_\_\_) would update and strengthen the EPA in important ways, including:

## Protecting Employees from Retaliation for Discussing Pay

You can't fight pay discrimination if you have no idea whether you are making less than the man across the hall. Employees need robust legal protections so they can talk about how much they make without fear of retaliation from their employer. The Paycheck Fairness Act prohibits employers from punishing employees

for sharing pay information with their coworkers, and makes clear that employees cannot contract away or waive their rights to discuss and disclose pay. As a result, employees will be better able to learn about pay disparities and to evaluate whether they are experiencing pay discrimination.

## Closing a Loophole in the Employer Defense

Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an affirmative defense that the pay differential is based on a “factor other than sex.” Some courts have interpreted this affirmative defense so broadly that factors such as a male worker’s stronger salary negotiation skills or higher previous salary qualify, even if these factors themselves may be “based on sex.” The Paycheck Fairness Act tightens this affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance and consistent with business necessity, and accounts for the entirety of the pay differential.

## Limiting the Use of Wage History in the Hiring Process

The Paycheck Fairness Act prohibits employers from relying on a prospective employee’s wage history, so that pay discrimination and disparities will no longer follow women and people of color from job to job. The Paycheck Fairness Act prohibits an employer from screening applicants based on their wage history. An employer may only rely on wage history to determine compensation if the prospective employee voluntarily offers the wage history after an offer of employment with compensation has been made. In addition, the prospective employer may verify wage history with a current or former employer only if the prospective employee volunteers wage history in order to negotiate for a higher wage.

## Modifying the “Establishment” Requirement

The Paycheck Fairness Act prevents an employer from paying a male employee more than a female employee who is doing the same job for the employer on the other side of town—because a few miles’ distance is no justification for pay discrimination. Under the EPA, in order to determine that there is wage discrimination, a wage comparison must be made between employees working at the same “establishment.” Some courts have interpreted this to mean that wages paid in different facilities or offices of the same

employer cannot be compared. The Paycheck Fairness Act clarifies that comparisons may be made between employees in workplaces in the same county or similar political subdivision as well as between broader groups of workplaces in some commonsense circumstances.

## Improving Equal Pay Act Remedies

It shouldn’t pay to discriminate. Weak remedies for pay discrimination mean that employers can come out ahead by gambling that they won’t get caught, but the Paycheck Fairness Act will incentivize employers to stop pay discrimination before it happens, by toughening the remedy provisions of the EPA. The Paycheck Fairness Act will allow prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated damages and back pay awards, which tend to be insubstantial. The change would put gender-based wage discrimination on an equal footing with discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available. When a woman is paid less than a man for doing the same work, she is getting a second-class salary. The law should no longer add insult to injury by giving her a second-class remedy for discrimination as well.

## Facilitating Class Action Equal Pay Act Claims

The Paycheck Fairness Act ensures that women can come together to challenge an employer’s company-wide pay discrimination in court, allowing an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently, it is very difficult to bring EPA suits as class actions because the EPA, adopted prior to the current federal class action rule, requires plaintiffs to opt in to a suit. Under the Paycheck Fairness Act, class members are automatically considered part of the class until they choose to opt out of the class, consistent with the FRCP.

## Requiring Collection of Pay Information by the EEOC

Working women can’t end pay discrimination on their own—and they shouldn’t have to. The Paycheck Fairness Act ensures that the EEOC will continue to have the tools it needs to effectively enforce laws against pay discrimination by requiring the EEOC to collect compensation and other employment-related data from employers, as analyzed by race, sex, and ethnicity of employees.

## **Reinstating Pay Equity Programs and Enforcement at the Department of Labor**

The Paycheck Fairness Act also gives the Department of Labor the tools it needs to identify and target pay discrimination. It would reinstate the collection of gender-based data in the Current Employment Statistics survey and sets standards for conducting systematic wage discrimination analyses by the Department of Labor agency that oversees the nondiscrimination and affirmative action obligations of federal contractors. The Paycheck Fairness Act also ensures the Department of Labor will collect information on compensation, a vital tool for detecting discrimination.

## **Requiring Research, Education, and Outreach to Address Pay Disparities Among Women and Girls of Color**

The Paycheck Fairness Act directs the Department of Labor to conduct research, outreach, and educational programs to eliminate pay disparities for women and girls of color (including in the teenage labor force).