

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1338
OFFERED BY MR. GEORGE MILLER**

Strike all after the enacting clause and insert the following:

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 in 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;

1 (B) undermines women's retirement secu-
2 rity, which is often based on earnings while in
3 the workforce;

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

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

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

12 (F) constitutes an unfair method of com-
13 petition in commerce;

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

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

19 (I) in many instances, may deprive workers
20 of equal protection on the basis of sex in viola-
21 tion of the 5th and 14th amendments.

22 (4)(A) Artificial barriers to the elimination of
23 discrimination in the payment of wages on the basis
24 of sex continue to exist decades after the enactment
25 of the Fair Labor Standards Act of 1938 (29 U.S.C.

1 201 et seq.) and the Civil Rights Act of 1964 (42
2 U.S.C. 2000a et seq.).

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

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

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

13 (ii) substantially reducing the number of
14 working women earning unfairly low wages,
15 thereby reducing the dependence on public as-
16 sistance;

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

19 (iv) remedying the effects of past discrimi-
20 nation on the basis of sex and ensuring that in
21 the future workers are afforded equal protection
22 on the basis of sex; and

23 (v) ensuring equal protection pursuant to
24 Congress' power to enforce the 5th and 14th
25 amendments.

1 (5) The Department of Labor and the Equal
2 Employment Opportunity Commission have impor-
3 tant and unique responsibilities to help ensure that
4 women receive equal pay for equal work.

5 (6) The Department of Labor is responsible
6 for—

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

9 (B) ensuring that companies receiving
10 Federal contracts comply with anti-discrimina-
11 tion affirmative action requirements of Execu-
12 tive Order 11246 (relating to equal employment
13 opportunity);

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

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

18 (E) being proactive in investigating and
19 prosecuting equal pay violations, especially sys-
20 temic violations, and in enforcing all of its man-
21 dates.

22 (7) The Equal Employment Opportunity Com-
23 mission is the primary enforcement agency for
24 claims made under the Equal Pay Act, and issues

1 regulations and guidance on appropriate interpreta-
2 tions of the law.

3 (8) With a stronger commitment by the Depart-
4 ment of Labor and the Equal Employment Oppor-
5 tunity Commission to their responsibilities, increased
6 information about the provisions added by the Equal
7 Pay Act of 1963, wage data, and more effective rem-
8 edies, women will be better able to recognize and en-
9 force their rights.

10 (9) Certain employers have already made great
11 strides in eradicating unfair pay disparities in the
12 workplace and their achievements should be recog-
13 nized.

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

16 (a) **BONA-FIDE FACTOR DEFENSE AND MODIFICA-**
17 **TION OF SAME ESTABLISHMENT REQUIREMENT.**—Section
18 6(d)(1) of the Fair Labor Standards Act of 1938 (29
19 U.S.C. 206(d)(1)) is amended—

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

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

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

1 “(B) The bona fide factor defense described in sub-
2 paragraph (A)(v) shall apply only if the employer dem-
3 onstrates that such factor (i) is not based upon or derived
4 from a sex-based differential in compensation; (ii) is job-
5 related with respect to the position in question; and (iii)
6 is consistent with business necessity. Such defense shall
7 not apply where the employee demonstrates that an alter-
8 native employment practice exists that would serve the
9 same business purpose without producing such differential
10 and that the employer has refused to adopt such alter-
11 native practice.

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

20 (b) APPLICATION OF PROVISIONS.—Section 6(d)(1)
21 of the Fair Labor Standards Act of 1938 (29 U.S.C.
22 206(d)(1)) is further amended by adding at the end the
23 following: “The provisions of this subsection shall apply
24 to applicants for employment if such applicants, upon em-

1 ployment by the employer, would be subject to any provi-
2 sions of this section.”.

3 (c) NONRETALIATION PROVISION.—Section 15 of the
4 Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3))
5 is amended—

6 (1) in subsection (a)(3), by striking “employee
7 has filed” and all that follows and inserting “em-
8 ployee—

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

20 “(B) has inquired about, discussed or dis-
21 closed the wages of the employee or another
22 employee.”; and

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

24 “(c) Subsection (a)(3)(B) shall not apply to instances
25 in which an employee who has access to the wage informa-

1 tion of other employees as a part of such employee's essen-
2 tial job functions discloses the wages of such other employ-
3 ees to individuals who do not otherwise have access to such
4 information, unless such disclosure is in response to a
5 complaint or charge or in furtherance of an investigation,
6 proceeding, hearing, or action under section 6(d) or an
7 investigation conducted by the employer. Nothing in this
8 subsection shall be construed to limit the rights of an em-
9 ployee provided under any other provision of law.”.

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

13 (1) by inserting after the first sentence the fol-
14 lowing: “Any employer who violates section 6(d)
15 shall additionally be liable for such compensatory
16 damages or punitive damages as may be appro-
17 priate, except that the United States shall not be lia-
18 ble for punitive damages.”;

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

23 (3) in the sentence beginning “No employees
24 shall”, by striking “No employees” and inserting

1 “Except with respect to class actions brought to en-
2 force section 6(d), no employee”;

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

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

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

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

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

19 (1) in the first sentence—

20 (A) by inserting “or, in the case of a viola-
21 tion of section 6(d), additional compensatory or
22 punitive damages,” before “and the agree-
23 ment”; and

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

4 (2) in the second sentence, by inserting before
5 the period the following: “and, in the case of a viola-
6 tion of section 6(d), additional compensatory or pu-
7 nitive damages”;

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

11 (4) in the last sentence—

12 (A) by striking “commenced in the case”
13 and inserting “commenced—
14 “(1) in the case”;

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

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

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

21 **SEC. 4. TRAINING.**

22 The Equal Employment Opportunity Commission
23 and the Office of Federal Contract Compliance Programs,
24 subject to the availability of funds appropriated under sec-
25 tion 11, shall provide training to Commission employees

1 and affected individuals and entities on matters involving
2 discrimination in the payment of wages.

3 **SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND**
4 **WOMEN.**

5 (a) PROGRAM AUTHORIZED.—

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

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

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

22 (4) APPLICATION.—To be eligible to receive a
23 grant under this subsection, an entity shall submit
24 an application to the Secretary of Labor at such

1 time, in such manner, and containing such informa-
2 tion as the Secretary of Labor may require.

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

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

18 (1) in the case of the Secretary of Education,
19 the Elementary and Secondary Education Act of
20 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins
21 Vocational and Technical Education Act of 1998 (20
22 U.S.C. 2301 et seq.), the Higher Education Act of
23 1965 (20 U.S.C. 1001 et seq.), and other programs
24 carried out by the Department of Education that the

1 Secretary of Education determines to be appro-
2 priate; and

3 (2) in the case of the Secretary of Labor, the
4 Workforce Investment Act of 1998 (29 U.S.C. 2801
5 et seq.), and other programs carried out by the De-
6 partment of Labor that the Secretary of Labor de-
7 termines to be appropriate.

8 (c) REPORT.—Not later than 1 year after the date
9 of enactment of this Act, and annually thereafter, the Sec-
10 retary of Labor and the Secretary of Education shall pre-
11 pare and submit to Congress a report describing the ac-
12 tivities conducted under this section and evaluating the ef-
13 fectiveness of such activities in achieving the purposes of
14 this Act.

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

16 The Secretary of Labor shall conduct studies and
17 provide information to employers, labor organizations, and
18 the general public concerning the means available to elimi-
19 nate pay disparities between men and women, including—

20 (1) conducting and promoting research to de-
21 velop the means to correct expeditiously the condi-
22 tions leading to the pay disparities;

23 (2) publishing and otherwise making available
24 to employers, labor organizations, professional asso-
25 ciations, educational institutions, the media, and the

1 general public the findings resulting from studies
2 and other materials, relating to eliminating the pay
3 disparities;

4 (3) sponsoring and assisting State and commu-
5 nity informational and educational programs;

6 (4) providing information to employers, labor
7 organizations, professional associations, and other
8 interested persons on the means of eliminating the
9 pay disparities;

10 (5) recognizing and promoting the achievements
11 of employers, labor organizations, and professional
12 associations that have worked to eliminate the pay
13 disparities; and

14 (6) convening a national summit to discuss, and
15 consider approaches for rectifying, the pay dispari-
16 ties.

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

19 (a) **IN GENERAL.**—There is established the Secretary
20 of Labor’s National Award for Pay Equity in the Work-
21 place, which shall be awarded, as appropriate, to encour-
22 age proactive efforts to comply with this Act.

23 (b) **CRITERIA FOR QUALIFICATION.**—The Secretary
24 of Labor shall set criteria for receipt of the award, includ-
25 ing a requirement that an employer has made substantial

1 effort to eliminate pay disparities between men and
2 women, and deserves special recognition as a consequence
3 of such effort. The secretary shall establish procedures for
4 the application and presentation of the award.

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

7 (1)(A) a corporation, including a nonprofit cor-
8 poration;

9 (B) a partnership;

10 (C) a professional association;

11 (D) a labor organization; and

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

14 (2) an entity carrying out an education referral
15 program, a training program, such as an apprentice-
16 ship or management training program, or a similar
17 program; and

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

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

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

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

3 “(A) complete a survey of the data that is cur-
4 rently available to the Federal Government relating
5 to employee pay information for use in the enforce-
6 ment of Federal laws prohibiting pay discrimination
7 and, in consultation with other relevant Federal
8 agencies, identify additional data collections that will
9 enhance the enforcement of such laws; and

10 “(B) based on the results of the survey and
11 consultations under subparagraph (A), issue regula-
12 tions to provide for the collection of pay information
13 data from employers as described by the sex, race,
14 and national origin of employees.

15 “(2) In implementing paragraph (1), the Commission
16 shall have as its primary consideration the most effective
17 and efficient means for enhancing the enforcement of Fed-
18 eral laws prohibiting pay discrimination. For this purpose,
19 the Commission shall consider factors including the im-
20 position of burdens on employers, the frequency of required
21 reports (including which employers should be required to
22 prepare reports), appropriate protections for maintaining
23 data confidentiality, and the most effective format for the
24 data collection reports.”.

1 **SEC. 9. REINSTATEMENT OF PAY EQUITY PROGRAMS AND**
2 **PAY EQUITY DATA COLLECTION.**

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

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

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

14 (B) in considering evidence of possible com-
15 pensation discrimination—

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

18 (ii) shall not limit its evaluation of the evi-
19 dence to a small number of methods of evalu-
20 ating the evidence; and

21 (C) shall not require a multiple regression anal-
22 ysis or anecdotal evidence for a compensation dis-
23 crimination case;

24 (2) for purposes of its investigative, compliance,
25 and enforcement activities, shall define “similarly
26 situated employees” in a way that is consistent with

1 and not more stringent than the definition provided
2 in item 1 of subsection A of section 10–III of the
3 Equal Employment Opportunity Commission Com-
4 pliance Manual (2000), and shall consider only fac-
5 tors that the Office’s investigation reveals were used
6 in making compensation decisions; and

7 (3) shall reinstate the Equal Opportunity Sur-
8 vey, as required by section 60-2.18 of title 41, Code
9 of Federal Regulations, designating not less than
10 half of all nonconstruction contractor establishments
11 each year to prepare and file such survey, and shall
12 review and utilize the responses to such survey to
13 identify contractor establishments for further evalua-
14 tion and for other enforcement purposes as appro-
15 priate.

16 (c) DEPARTMENT OF LABOR DISTRIBUTION OF
17 WAGE DISCRIMINATION INFORMATION.—The Secretary of
18 Labor shall make readily available (in print, on the De-
19 partment of Labor website, and through any other forum
20 that the Department may use to distribute compensation
21 discrimination information), accurate information on com-
22 pensation discrimination, including statistics, explanations
23 of employee rights, historical analyses of such discrimina-
24 tion, instructions for employers on compliance, and any

1 other information that will assist the public in under-
2 standing and addressing such discrimination.

3 **SEC. 10. AUTHORIZATION OF APPROPRIATIONS.**

4 There are authorized to be appropriated \$15,000,000
5 to carry out this Act.

