

112TH CONGRESS  
1ST SESSION

# S. 788

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, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 12, 2011

Mr. HARKIN (for himself, Mr. LEAHY, Mr. KERRY, Mr. AKAKA, Mrs. BOXER, Mrs. MURRAY, Mr. LAUTENBERG, and Mr. MERKLEY) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

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, 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,*

3 **SECTION 1. SHORT TITLE.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Fair Pay Act of 2011”.

6 (b) **REFERENCE.**—Except as provided in section 8,  
7 whenever in this Act an amendment or repeal is expressed  
8 in terms of an amendment to, or repeal of, a section or

1 other provision, the reference shall be considered to be  
2 made to a section or other provision of the Fair Labor  
3 Standards Act of 1938 (29 U.S.C. 201 et seq.).

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) Wage rate differentials exist between equiv-  
7 alent jobs segregated by sex, race, and national ori-  
8 gin in Government employment and in industries en-  
9 gaged in commerce or in the production of goods for  
10 commerce.

11 (2) The existence of such wage rate differen-  
12 tials—

13 (A) depresses wages and living standards  
14 for employees necessary for their health and ef-  
15 ficiency;

16 (B) prevents the maximum utilization of  
17 the available labor resources;

18 (C) tends to cause labor disputes, thereby  
19 burdening, affecting, and obstructing com-  
20 merce;

21 (D) burdens commerce and the free flow of  
22 goods in commerce; and

23 (E) constitutes an unfair method of com-  
24 petition.

1           (3) Discrimination in hiring and promotion has  
2 played a role in maintaining a segregated work  
3 force.

4           (4) Many women and people of color work in  
5 occupations dominated by individuals of their same  
6 sex, race, and national origin.

7           (5)(A) In 2009, a woman in the United States  
8 working in a full-time, year-round job earned 77  
9 cents for every dollar earned by a man working in  
10 a full-time, year-round job.

11           (B) A 2007 study found that—even when ac-  
12 counting for key factors generally known to influ-  
13 ence earnings such as race, educational attainment,  
14 and experience—nearly half (49.3 percent) of the  
15 pay gap can be explained by differences in the indus-  
16 tries and occupations that men and women work in,  
17 and 41 percent of the pay gap cannot be accounted  
18 for but may be partially explained by discrimination  
19 in the workplace.

20           (6) Section 6(d) of the Fair Labor Standards  
21 Act of 1938 prohibits discrimination in compensa-  
22 tion for “equal work” on the basis of sex.

23           (7) Artificial barriers to the elimination of dis-  
24 crimination in compensation based upon sex, race,  
25 and national origin continue to exist more than 4

1 decades after the passage of section 6(d) of the Fair  
2 Labor Standards Act of 1938, the Equal Pay Act of  
3 1963, and the Civil Rights Act of 1964 (42 U.S.C.  
4 2000a et seq.). Elimination of such barriers would  
5 have positive effects, including—

6 (A) providing a solution to problems in the  
7 economy created by discrimination through  
8 wage rate differentials;

9 (B) substantially reducing the number of  
10 working women and people of color earning low  
11 wages, thereby reducing the dependence on pub-  
12 lic assistance; and

13 (C) promoting stable families by enabling  
14 working family members to earn a fair rate of  
15 pay.

16 **SEC. 3. EQUAL PAY FOR EQUIVALENT JOBS.**

17 (a) AMENDMENT.—Section 6 (29 U.S.C. 206) is  
18 amended by adding at the end the following:

19 “(h)(1)(A) Except as provided in subparagraph (B),  
20 no employer having employees subject to any provision of  
21 this section shall discriminate, within any establishment  
22 in which such employees are employed, between employees  
23 on the basis of sex, race, or national origin by paying  
24 wages to employees in such establishment in a job that  
25 is dominated by employees of a particular sex, race, or

1 national origin at a rate less than the rate at which the  
2 employer pays wages to employees in such establishment  
3 in another job that is dominated by employees of the oppo-  
4 site sex or of a different race or national origin, respec-  
5 tively, for work on equivalent jobs.

6 “(B) Nothing in subparagraph (A) shall prohibit the  
7 payment of different wage rates to employees where such  
8 payment is made pursuant to—

9 “(i) a seniority system;

10 “(ii) a merit system;

11 “(iii) a system that measures earnings by quan-  
12 tity or quality of production; or

13 “(iv) a differential based on a bona fide factor  
14 other than sex, race, or national origin, such as edu-  
15 cation, training, or experience, except that this  
16 clause shall apply only if—

17 “(I) the employer demonstrates that—

18 “(aa) such factor—

19 “(AA) is job-related with respect  
20 to the position in question; or

21 “(BB) furthers a legitimate busi-  
22 ness purpose, except that this item  
23 shall not apply if the employee dem-  
24 onstrates that an alternative employ-  
25 ment practice exists that would serve

1 the same business purpose without  
2 producing such differential and that  
3 the employer has refused to adopt  
4 such alternative practice; and

5 “(bb) such factor was actually applied  
6 and used reasonably in light of the as-  
7 serted justification; and

8 “(II) upon the employer succeeding under  
9 subelause (I), the employee fails to demonstrate  
10 that the differential produced by the reliance of  
11 the employer on such factor is itself the result  
12 of discrimination on the basis of sex, race, or  
13 national origin by the employer.

14 “(C) The Equal Employment Opportunity Commis-  
15 sion shall issue guidelines specifying criteria for deter-  
16 mining whether a job is dominated by employees of a par-  
17 ticular sex, race, or national origin for purposes of sub-  
18 paragraph (B)(iv). Such guidelines shall not include a list  
19 of such jobs.

20 “(D) An employer who is paying a wage rate differen-  
21 tial in violation of subparagraph (A) shall not, in order  
22 to comply with the provisions of such subparagraph, re-  
23 duce the wage rate of any employee.

24 “(2) No labor organization or its agents representing  
25 employees of an employer having employees subject to any

1 provision of this section shall cause or attempt to cause  
2 such an employer to discriminate against an employee in  
3 violation of paragraph (1)(A).

4 “(3) For purposes of administration and enforcement  
5 of this subsection, any amounts owing to any employee  
6 that have been withheld in violation of paragraph (1)(A)  
7 shall be deemed to be unpaid minimum wages or unpaid  
8 overtime compensation under this section or section 7.

9 “(4) In this subsection:

10 “(A) The term ‘labor organization’ means any  
11 organization of any kind, or any agency or employee  
12 representation committee or plan, in which employ-  
13 ees participate and that exists for the purpose, in  
14 whole or in part, of dealing with employers con-  
15 cerning grievances, labor disputes, wages, rates of  
16 pay, hours of employment, or conditions of work.

17 “(B) The term ‘equivalent jobs’ means jobs that  
18 may be dissimilar, but whose requirements are  
19 equivalent, when viewed as a composite of skills, ef-  
20 fort, responsibility, and working conditions.”.

21 (b) CONFORMING AMENDMENT.—Section 13(a) (29  
22 U.S.C. 213(a)) is amended in the matter before paragraph  
23 (1) by striking “section 6(d)” and inserting “sections 6  
24 (d) and (h)”.

1 **SEC. 4. PROHIBITED ACTS.**

2 Section 15(a) (29 U.S.C. 215(a)) is amended—

3 (1) by striking the period at the end of para-  
4 graph (5) and inserting a semicolon; and

5 (2) by adding after paragraph (5) the following:

6 “(6) to discriminate against any individual be-  
7 cause such individual has opposed any act or prac-  
8 tice made unlawful by section 6(h) or because such  
9 individual made a charge, testified, assisted, or par-  
10 ticipated in any manner in an investigation, pro-  
11 ceeding, or hearing to enforce section 6(h); or

12 “(7) to discharge or in any other manner dis-  
13 criminate against, coerce, intimidate, threaten, or  
14 interfere with any employee or any other person be-  
15 cause the employee inquired about, disclosed, com-  
16 pared, or otherwise discussed the employee’s wages  
17 or the wages of any other employee, or because the  
18 employee exercised, enjoyed, aided, or encouraged  
19 any other person to exercise or enjoy any right  
20 granted or protected by section 6(h).”.

21 **SEC. 5. REMEDIES.**

22 (a) **ENHANCED PENALTIES.**—Section 16(b) (29  
23 U.S.C. 216(b)) is amended—

24 (1) by inserting after the first sentence the fol-  
25 lowing: “Any employer who violates subsection (d) or  
26 (h) of section 6 shall additionally be liable for such

1       compensatory or punitive damages as may be appro-  
2       priate, except that the United States shall not be lia-  
3       ble for punitive damages.”;

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

8           (3) in the sentence beginning “No employees”,  
9       by striking “No employees” and inserting “Except  
10      with respect to class actions brought under sub-  
11      section (f), no employee”;

12          (4) in the sentence beginning “The court in”,  
13      by striking “in such action” and inserting “in any  
14      action brought to recover the liability prescribed in  
15      any of the preceding sentences of this subsection”;  
16      and

17          (5) by striking “section 15(a)(3)” each place it  
18      occurs and inserting “paragraphs (3), (6), and (7)  
19      of section 15(a)”.

20      (b) ACTION BY SECRETARY.—Section 16(c) (29  
21 U.S.C. 216(c)) is amended—

22          (1) in the first sentence—

23              (A) by inserting “or, in the case of a viola-  
24      tion of subsection (d) or (h) of section 6, addi-

1           tional compensatory or punitive damages,” be-  
2           fore “and the agreement”; and

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

6           (2) in the second sentence, by inserting before  
7           the period the following: “and, in the case of a viola-  
8           tion of subsection (d) or (h) of section 6, additional  
9           compensatory or punitive damages”; and

10           (3) in the third sentence, by striking “the first  
11           sentence” and inserting “the first or second sen-  
12           tence”.

13           (c) FEES.—Section 16 (29 U.S.C. 216) is amended  
14           by adding at the end the following:

15           “(f) In any action brought under this section for a  
16           violation of section 6(h), the court shall, in addition to  
17           any other remedies awarded to the prevailing plaintiff or  
18           plaintiffs, allow expert fees as part of the costs. Any such  
19           action may be maintained as a class action as provided  
20           by the Federal Rules of Civil Procedure.”.

21           **SEC. 6. RECORDS.**

22           (a) RECORDS.—Section 11(c) (29 U.S.C. 211(c)) is  
23           amended—

24                   (1) by inserting “(1)” after “(c)”; and

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

1       “(2) Every employer subject to section 6(h) shall pre-  
2 serve records that document and support the method, sys-  
3 tem, calculations, and other bases used by the employer  
4 in establishing, adjusting, and determining the wage rates  
5 paid to the employees of the employer. Every employer  
6 subject to section 6(h) shall preserve such records for such  
7 periods of time, and shall make such reports from the  
8 records to the Equal Employment Opportunity Commis-  
9 sion, as shall be prescribed by the Equal Employment Op-  
10 portunity Commission by regulation or order as necessary  
11 or appropriate for the enforcement of the provisions of sec-  
12 tion 6(h) or any regulation promulgated pursuant to sec-  
13 tion 6(h).”.

14       (b) SMALL BUSINESS EXEMPTIONS.—Section 11(c)  
15 (as amended by subsection (a)) is further amended by  
16 adding at the end the following:

17       “(3) Every employer subject to section 6(h) that has  
18 25 or more employees on any date during the first or sec-  
19 ond year after the effective date of this paragraph, or 15  
20 or more employees on any date during any subsequent  
21 year after such second year, shall, in accordance with reg-  
22 ulations promulgated by the Equal Employment Oppor-  
23 tunity Commission under paragraph (8), prepare and sub-  
24 mit to the Equal Employment Opportunity Commission  
25 for the year involved a report signed by the president,

1 treasurer, or corresponding principal officer, of the em-  
2 ployer that includes information that discloses the wage  
3 rates paid to employees of the employer in each classifica-  
4 tion, position, or job title, or to employees in other wage  
5 groups employed by the employer, including information  
6 with respect to the sex, race, and national origin of em-  
7 ployees at each wage rate in each classification, position,  
8 job title, or other wage group.”.

9 (c) PROTECTION OF CONFIDENTIALITY.—Section  
10 11(c) (as amended by subsections (a) and (b)) is further  
11 amended by adding at the end the following:

12 “(4) The rules and regulations promulgated by the  
13 Equal Employment Opportunity Commission under para-  
14 graph (8), relating to the form of such a report, shall in-  
15 clude requirements to protect the confidentiality of em-  
16 ployees, including a requirement that the report shall not  
17 contain the name of any individual employee.”.

18 (d) USE; INSPECTIONS; EXAMINATION; REGULA-  
19 TIONS.—Section 11(c) (as amended by subsections (a)  
20 through (c)) is further amended by adding at the end the  
21 following:

22 “(5) The Equal Employment Opportunity Commis-  
23 sion may publish any information and data that the Equal  
24 Employment Opportunity Commission obtains pursuant to  
25 the provisions of paragraph (3). The Equal Employment

1 Opportunity Commission may use the information and  
2 data for statistical and research purposes, and compile  
3 and publish such studies, analyses, reports, and surveys  
4 based on the information and data as the Equal Employ-  
5 ment Opportunity Commission may consider appropriate.

6       “(6) In order to carry out the purposes of this Act,  
7 the Equal Employment Opportunity Commission shall by  
8 regulation make reasonable provision for the inspection  
9 and examination by any person of the information and  
10 data contained in any report submitted to the Equal Em-  
11 ployment Opportunity Commission pursuant to paragraph  
12 (3).

13       “(7) The Equal Employment Opportunity Commis-  
14 sion shall by regulation provide for the furnishing of copies  
15 of reports submitted to the Equal Employment Oppor-  
16 tunity Commission pursuant to paragraph (3) to any per-  
17 son upon payment of a charge based upon the cost of the  
18 service.

19       “(8) The Equal Employment Opportunity Commis-  
20 sion shall issue rules and regulations prescribing the form  
21 and content of reports required to be submitted under  
22 paragraph (3) and such other reasonable rules and regula-  
23 tions as the Equal Employment Opportunity Commission  
24 may find necessary to prevent the circumvention or eva-  
25 sion of such reporting requirements. In exercising the au-

1 thority of the Equal Employment Opportunity Commis-  
2 sion under paragraph (3), the Equal Employment Oppor-  
3 tunity Commission may prescribe by general rule sim-  
4 plified reports for employers for whom the Equal Employ-  
5 ment Opportunity Commission finds that because of the  
6 size of the employers a detailed report would be unduly  
7 burdensome.”.

8 **SEC. 7. RESEARCH, EDUCATION, AND TECHNICAL ASSIST-**  
9 **ANCE PROGRAM; REPORT TO CONGRESS.**

10 Section 4(d) (29 U.S.C. 204(d)) is amended by add-  
11 ing at the end the following:

12 “(4) The Equal Employment Opportunity Commis-  
13 sion shall conduct studies and provide information and  
14 technical assistance to employers, labor organizations, and  
15 the general public concerning effective means available to  
16 implement the provisions of section 6(h) prohibiting wage  
17 rate discrimination between employees performing work in  
18 equivalent jobs on the basis of sex, race, or national origin.  
19 Such studies, information, and technical assistance shall  
20 be based on and include reference to the objectives of such  
21 section to eliminate such discrimination. In order to  
22 achieve the objectives of such section, the Equal Employ-  
23 ment Opportunity Commission shall carry on a continuing  
24 program of research, education, and technical assistance  
25 including—

1           “(A) conducting and promoting research with  
2           the intent of developing means to expeditiously cor-  
3           rect the wage rate differentials described in section  
4           6(h);

5           “(B) publishing and otherwise making available  
6           to employers, labor organizations, professional asso-  
7           ciations, educational institutions, the various media  
8           of communication, and the general public the find-  
9           ings of studies and other materials for promoting  
10          compliance with section 6(h);

11          “(C) sponsoring and assisting State and com-  
12          munity informational and educational programs; and

13          “(D) providing technical assistance to employ-  
14          ers, labor organizations, professional associations  
15          and other interested persons on means of achieving  
16          and maintaining compliance with the provisions of  
17          section 6(h).

18          “(5) The report submitted biennially by the Secretary  
19          to Congress under paragraph (1) shall include a separate  
20          evaluation and appraisal regarding the implementation of  
21          section 6(h).”.

22       **SEC. 8. CONFORMING AMENDMENTS.**

23          (a) CONGRESSIONAL EMPLOYEES.—

1           (1) APPLICATION.—Section 203(a)(1) of the  
2 Congressional Accountability Act of 1995 (2 U.S.C.  
3 1313(a)(1)) is amended—

4           (A) by striking “subsections (a)(1) and (d)  
5 of section 6” and inserting “subsections (a)(1),  
6 (d), and (h) of section 6”; and

7           (B) by striking “206 (a)(1) and (d)” and  
8 inserting “206 (a)(1), (d), and (h)”.

9           (2) REMEDIES.—Section 203(b) of such Act (2  
10 U.S.C. 1313(b)) is amended by inserting before the  
11 period the following: “or, in an appropriate case,  
12 under section 16(f) of such Act (29 U.S.C. 216(f))”.

13 (b) EXECUTIVE BRANCH EMPLOYEES.—

14           (1) APPLICATION.—Section 413(a)(1) of title 3,  
15 United States Code, as added by section 2(a) of the  
16 Presidential and Executive Office Accountability Act  
17 (Public Law 104–331; 110 Stat. 4053), is amended  
18 by striking “subsections (a)(1) and (d) of section 6”  
19 and inserting “subsections (a)(1), (d), and (h) of  
20 section 6”.

21           (2) REMEDIES.—Section 413(b) of such title is  
22 amended by inserting before the period the fol-  
23 lowing: “or, in an appropriate case, under section  
24 16(f) of such Act”.

1 **SEC. 9. EFFECTIVE DATE.**

2       The amendments made by this Act shall take effect

3 1 year after the date of enactment of this Act.

○