AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 7
OFFERED BY MR. SCOTT OF VIRGINIA

Strike all after the enacting clause and insert the following:

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.

(3) In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination. After controlling for educational attainment, occupation, industry, union status, race, ethnicity, and labor
force experience roughly 40 percent of the pay gap remains unexplained.

(4) 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 women from realizing their full economic potential, particularly in terms of labor force participation and attachment;

(D) has been spread and perpetuated, through commerce and the channels and instrumentalities 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) tends to cause labor disputes, as evidenced by the tens of thousands of charges filed with the Equal Employment Opportunity Commission against employers between 2010 and 2016;
(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 to the Constitution.


(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 to the Constitution.

(6) The Department of Labor and the Equal Employment Opportunity Commission carry out functions to help ensure that women receive equal pay for equal work.

(7) 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) investigating and prosecuting systemic gender based pay discrimination involving government contractors.

(8) 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.

(9) Vigorous implementation by the Department of Labor and the Equal Employment Opportunity Commission, increased information as a result of the amendments made by this Act, wage data, and more effective remedies, will ensure that women are better able to recognize and enforce their rights.

(10) 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 RE-
QUIREMENTS.

(a) BONA FIDE FACTOR DEFENSE AND MODIFICA-
TION 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 in-
serting “(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 sub-
paragraph (A)(iv) shall apply only if the employer dem-
onstrates 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 con-
sistent 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 dif-
ferential 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 Employment Opportunity 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 testified 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 “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 inserting “in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection”; and

(B) by inserting before the period the following: “, 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 violation 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 following: “, 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 violation of section 6(d), additional compensatory or punitive 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 sixth 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 en-
force section 6(d), on the date on which the indi-
vidual 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 sec-
tion 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.

(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 the purposes of addressing pay disparities, including through outreach to women and girls.

(3) ELIGIBLE ENTITIES.—To be eligible to receive a grant under this subsection, an entity shall be a public agency, such as a State, a local government 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 information 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 for the purposes described in paragraph (2).

(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 18 months after the date of enactment of this Act, and annually thereafter, the Secretary of Labor, in consultation with 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 section.
SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.

Not later than 18 months after the date of enactment of this Act, and periodically thereafter, 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, local, 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; and

(5) recognizing and promoting the achievements of employers, labor organizations, and professional associations that have worked to eliminate 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, on an annual basis, to an employer to encourage proactive efforts to comply with section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), as amended by this Act.

(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 apprentice-
ship 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 fol-
lowing:

“(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 em-
ployees.

“(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 Fed-
eral laws prohibiting pay discrimination. For this purpose,
the Commission shall consider factors including the impo-
sition of burdens on employers, the frequency of required
reports (including the size of employers required to pre-
pare reports), appropriate protections for maintaining
data confidentiality, and the most effective format to report 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 establishments for further evaluation and for other enforcement purposes as appropriate.

d)(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 discrimina-
tion, instructions for employers on compliance, and any
other information that will assist the public in under-
standing and addressing such discrimination.

SEC. 10. PROHIBITIONS RELATING TO PROSPECTIVE EM-
PLOYEES’ 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 max-
imum 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 prospec-
tive employee, except that an employer may rely on
wage history if it is voluntarily provided by a pro-
spective 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 prospec-
tive 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 be-
cause the employee or prospective employee—

“(A) opposed any act or practice made un-
lawful by this section; or

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

“(b) DEFINITION.—In this section, 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 employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees 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 such sums as may be necessary 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 amendments 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 Secretary of Labor and the Commissioner of the Equal Employment Opportunity Commission shall jointly develop technical assistance material to assist small enterprises in complying with the requirements of this Act and the amendments made by this Act.

(c) SMALL BUSINESSES.—A small enterprise shall be exempt from the provisions of this Act, and the amendments made by this Act, to the same extent that such enterprise is exempt from the requirements of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) 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 being subject to any penalties, fines, or other sanctions.

SEC. 14. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of that provision or amendment to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this Act, the amendments made by this Act, or the application of that provision to other persons or circumstances shall not be affected.