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## Pay Equity Legislation in the 109th Congress

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## Pay Equity Legislation in the 109th Congress

### Abstract

The term "pay equity" originates from the fact that women as a group are paid less than men. In 2003, for example, women with a strong commitment to the work force earned about 76-79 cents for every dollar earned by men. As women's earnings as a percentage of men's earnings have narrowed by just 15 percentage points over the past 40-plus years (from about 60% in the 1960s and 1970s to more than 70% since 1990), some members of the public policy community have argued that current anti-discrimination laws should be strengthened and that additional measures should be enacted. Others, in contrast, believe that further government intervention is unnecessary because the gender wage gap will narrow on its own as women's labor market qualifications continue to more closely resemble those of men.

### Keywords

Pay, equity, 109, Congress, women, men, work, earn, labor, Equal Pay Act, EPA, wage, market, employer, employee

### Comments

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# CRS Report for Congress

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## **Pay Equity Legislation in the 109th Congress**

**Updated May 11, 2005**

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# Pay Equity Legislation in the 109<sup>th</sup> Congress

## Summary

The term “pay equity” originates from the fact that women as a group are paid less than men. In 2003, for example, women with a strong commitment to the work force earned about 76-79 cents for every dollar earned by men. As women’s earnings as a percentage of men’s earnings have narrowed by just 15 percentage points over the past 40-plus years (from about 60% in the 1960s and 1970s to more than 70% since 1990), some members of the public policy community have argued that current anti-discrimination laws should be strengthened and that additional measures should be enacted. Others, in contrast, believe that further government intervention is unnecessary because the gender wage gap will narrow on its own as women’s labor market qualifications continue to more closely resemble those of men.

The Equal Pay Act (EPA), which amends the Fair Labor Standards Act (FLSA), prohibits covered employers from paying lower wages to female than male employees for “equal work” on jobs requiring “equal skill, effort, and responsibility” and performed “under similar working conditions” at the same location. The FLSA exempts some jobs (e.g., hotel service workers) from EPA coverage, and the EPA makes exceptions for wage differentials based on merit or seniority systems, systems that measure earnings by “quality or quantity” of production, or “any factor other than sex.” The “equal work” standard embodies a middle ground between demanding that two jobs be either exactly alike or that they be merely comparable. The test applied by the courts focuses on job similarity and whether, given all the circumstances, they require substantially the same skill, effort, and responsibility. The EPA may be enforced by the government, or individual complainants, in civil actions for wages unlawfully withheld and liquidated damages for willful violations. And, Title VII of the 1964 Civil Rights Act provides for the award of compensatory and punitive damages to victims of “intentional” wage discrimination, subject to caps on the employer’s monetary liability.

The issue of pay equity attracted substantial attention in recent Congresses. The Senate Committee on Health, Education, Labor, and Pensions held a hearing on gender-based wage discrimination in June 2000. The following month, during floor debate on marriage tax penalty legislation, an amendment was offered allowing wage discrimination victims suing under the EPA – who may presently collect only backpay and liquidated damages – full recovery of compensatory and punitive damages for their injury, including emotional suffering and distress. The defeated amendment was based on S. 74 (the Paycheck Fairness Act) in the 106<sup>th</sup> Congress, which was reintroduced in each subsequent Congress – most recently as H.R. 1687/S. 841 in the 109<sup>th</sup> Congress. Also reappearing in the 109<sup>th</sup> Congress is the Fair Pay Act of 2005 (H.R. 1697/S. 840), mandating “equal pay for equivalent jobs” without regard to sex, race, or national origin. Another measure in the 109<sup>th</sup> Congress, the Equal Pay Improvement Report Act of 2005 (H.R. 157), directs the Equal Employment Opportunity Commission to prepare a report on how the Fair Labor Standards Act of 1938 has been used by public and private sector employees to foster or exacerbate pay inequity. This report will be updated as warranted.

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# Pay Equity Legislation in the 109<sup>th</sup> Congress

The persistence of gender-based wage disparities – commonly referred to as the pay or wage gap – has been the subject of extensive debate and commentary. Congress first addressed the issue nearly four decades ago in the Equal Pay Act of 1963,<sup>1</sup> mandating an “equal pay for equal work” standard, and again the following year in Title VII of the 1964 Civil Rights Act.<sup>2</sup> Collection of compensation data, and elimination of male/female pay disparities, are also integral to Labor Department enforcement of Executive Order 11246, mandating nondiscrimination and affirmative action by federal contractors. During the 1980's, some members of the public policy community sought to advance the earnings of women relative to men by pressing a “comparable worth” theory before state legislatures and in federal court litigation. During the last decade of the 20<sup>th</sup> century and the initial years of the 21<sup>st</sup> century, initiatives to strengthen and expand current federal remedies available to victims of unlawful sex-based wage discrimination have been taken up in Congress.

This report begins by showing the trend in the male-female wage gap and by examining the explanations that have been offered for its enduring presence. It next discusses the major laws directed at eliminating sex-based wage discrimination as well as the relevant federal court suits. The report closes with a description of bills introduced thus far in the 109<sup>th</sup> Congress that address the pay equity issue.

## The Gender Wage Gap

### The Male-Female Pay Differential Over Time

The term “pay equity” originates from the fact that women as a group are paid less than men. In 1960, half of all women employed year-round full-time (i.e., 50-52 weeks and at least 35 hours per week) earned more than \$3,257 and half earned less than that amount. In the same year, the median annual earnings of men employed year-round full-time were \$5,368. More than four decades later, according to U.S. Bureau of the Census data for 2003, the median earnings of women with a strong commitment to the labor force were \$30,724 while those of men were a substantially higher \$40,668.

It often is noted that even when comparisons are made between similar groups, women still are paid less than men. Women with a bachelor's degree employed year-round full-time earned \$47,910 in 2003, while similarly educated men earned an

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<sup>1</sup> 29 U.S.C. § 206(d).

<sup>2</sup> 42 U.S.C. §§ 2000e et seq.

average of \$69,913. Male high school graduates were paid \$38,331 on average, well above the \$27,956 paid to female high school graduates. Women typically earn less than men of the same age, as well. The wage gap is narrowest among young adults, and then it generally widens: according to Census Bureau data for 2003, female 15-24 year olds were paid 79% as much as male 15-24 year olds; female 25-44 year olds earned 67% as much as males in the same age group; and, female 45-64 year olds were paid 59% as much as male 45-64 year olds. Although these disparities between seemingly comparable men and women sometimes are taken as proof of sex-based wage inequities, the data have not been adjusted to reflect gender differences in *all* characteristics that can legitimately affect relative wages (e.g., college major or uninterrupted years of employment).

The size of the male-female wage gap has shrunk at a slow and uneven pace over time. As shown in **Table 1**, the pay differential narrowed steadily during the 1980s so that by the end of the decade women were being paid about 70 cents on the dollar. The trend for the 1990s is less clear: according to both data series shown in the table, the ratio of female-to-male wages fluctuated erratically over the decade; and ratios derived from series of the Bureau of the Census (columns 2 and 5) and of the Bureau of Labor Statistics (columns 3 and 6) moved in different directions. The extent of improvement in the gender wage gap that occurred during the 1980s does not appear to have been sustained during the 1990s. The trend, to date, during the current decade seems largely positive.

Despite women's greatly increased commitment to the labor force over the past 40-plus years,<sup>3</sup> the observed or unadjusted wage gap has narrowed by just 15 percentage points. Consequently, women with a strong attachment to the job market earned an average of 76-79 cents for every dollar earned by men in 2003.

## **Explanations of and Remedies for the Gender Pay Differential**

The existence and persistence of the gender wage gap has led to a search for explanations. Basically, two schools of thought have developed. The human capital explanation has a supply-side focus, that is, it looks at the personal characteristics of working women and men. The sex-segregation-in-the-workplace or discrimination explanation has a demand-side focus, that is, it looks at the characteristics of the jobs in which women and men typically work.

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<sup>3</sup> The percentage of all women who were in the labor force rose from 38% in 1960 to 60% in 2003. Women today account for almost one-half of those in the labor force (47%) compared to 33% some four decades earlier. The heightened commitment to paid employment of married women with children under age 18 at home is particularly noteworthy.

**Table 1. Ratio of Female-to-Male Earnings**

Year	Year-round full-time workers <sup>a</sup>	Full-time workers <sup>b</sup>	Year	Year-round full-time workers <sup>a</sup>	Full-time workers <sup>b</sup>
2003	75.5	79.4	1981	59.2	64.6
2002	76.6	77.9	1980	60.2	64.4
2001	76.3	76.1	1979	59.7	62.5
2000	73.7	76.0	1978	59.4	n.a.
1999	72.2	76.5	1977	58.9	n.a.
1998	73.2	76.3	1976	60.2	n.a.
1997	74.2	74.4	1975	58.8	n.a.
1996	73.8	75.0	1974	58.8	n.a.
1995	71.4	75.5	1973	56.6	n.a.
1994	72.0	76.4	1972	57.9	n.a.
1993	71.5	77.1	1971	59.5	n.a.
1992	70.8	75.8	1970	59.4	n.a.
1991	69.9	74.2	1969	58.9	n.a.
1990	71.6	71.9	1968	58.2	n.a.
1989	68.7	70.1	1967	57.8	n.a.
1988	66.0	70.2	1966	57.6	n.a.
1987	65.2	70.0	1965	59.9	n.a.
1986	64.3	69.2	1964	59.1	n.a.
1985	64.6	68.2	1963	58.9	n.a.
1984	63.7	67.8	1962	59.3	n.a.
1983	63.6	66.7	1961	59.2	n.a.
1982	61.7	65.4	1960	60.7	n.a.

**Source:** U.S. Bureau of the Census data on year-round/full-time workers, and U.S. Bureau of Labor Statistics data on full-time workers.

**Note:** The wage gap based on annual data is wider than the wage gap based on weekly data because women generally work fewer weeks and hours per week than men. In addition, the annual data include self-employed workers who have larger earnings differences by gender than the wage and salary workers covered by the weekly series. Regardless of the interval, the gender wage gap would be wider if all workers were compared because relatively more women than men work part-time or part-year schedules.

n.a. = not available

a. Based on median annual earnings of all workers age 15 or older (14 or older before 1980) employed year-round full-time (i.e., 50-52 weeks in a year and at least 35 hours in a week), including the self-employed. Before 1989, earnings covered civilian workers only.

b. Based on median weekly earnings of wage and salary workers age 16 or older employed full-time.

Some researchers have tried to explain the pay gap by examining differences in the average amounts of human capital (e.g., educational attainment) accumulated by women and men. Other researchers have looked to job-related factors for an explanation of the wage gap, with some particularly focusing on the relationship between sex segregation in the workplace and women's comparatively low wages. (In this instance, segregation refers to the clustering of women and men in different occupational groups, in different occupations within these groups, in different jobs within these occupations, and in different industries or firms performing the same jobs.) Still others have attributed the wage gap to a combination of personal characteristics (e.g., number of hours worked per week or year) and job characteristics (e.g., extent of unionization or size of firm). Although adjusting women's and men's wages for human capital and job-related differences considerably narrows the pay gap, it does not entirely eliminate it.<sup>4</sup>

Those who ascribe to the human capital explanation of the gender wage disparity argue that as women increasingly become like men in terms of their participation in the workforce, women's earnings will further approach those of men. They thus believe that no government intervention is warranted to achieve pay equity beyond current anti-discrimination measures. Others believe that sex-based wage discrimination is responsible for the pay gap that remains after accounting for gender differences in labor market qualifications. They support strengthened government enforcement of anti-discrimination laws and regulations, enhanced government dissemination of information about and provision of training in comparatively high-paying nontraditional jobs for women,<sup>5</sup> or employers paying female and male employees in comparable jobs the same wages. In the 1980s, the latter perspective led to largely unsuccessful lawsuits that brought "comparable worth" claims under Title VII of the Civil Rights Act. (These lawsuits are discussed in the next section of this report.)

The idea motivating comparable worth is that the size of a worker's paycheck should be related to job content rather than to the predominant sex of employees in an occupation. Comparable worth proponents argue that some jobs are undervalued – that is, pay relatively low wages – *because* they are largely held by women. Instead of continuing to largely rely on supply-demand conditions in the labor market to set wages and instead of waiting for further lessening of sex segregation in the workplace, comparable worth advocates typically propose that a job evaluation be conducted on all positions within a firm so they can be compared with each other in terms of such attributes as skill, effort, responsibility, and working conditions. Employers would then raise the wages of workers in all jobs or in female-dominated

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<sup>4</sup> For more information see CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*

<sup>5</sup> Congress has attempted to reduce occupational segregation. The Women in Apprenticeship and Nontraditional Occupations Act (WANTO, P.L. 102-530) provides technical assistance to employers and unions to promote women's employment in apprenticeable and other nontraditional jobs. Through FY1995, the Nontraditional Employment for Women Act (P.L. 102-235) had authorized the use of the Job Training Partnership Act's discretionary funds to develop demonstration programs to help women enter high-paying jobs where they were underrepresented.

jobs deemed to be underpaid on the basis of the evaluation (i.e., jobs with wages below other jobs having the same total scores on the attributes included in the evaluation would be awarded raises).<sup>6</sup>

## Legal and Legislative Background

### Laws that Combat Sex-Based Wage Discrimination

The Equal Pay Act (EPA) is a 1963 amendment to the Fair Labor Standards Act that makes it illegal to pay different wages to employees of the opposite sex for equal work on jobs the performance of which requires “equal skill, effort, and responsibility,” and which are “performed under similar working conditions.”<sup>7</sup> The act also prohibits labor organizations and their agents from causing or attempting to cause sex-based wage discrimination by employers. Specifically permitted by the EPA, however, are wage differentials based on seniority systems, merit systems, systems that measure earnings by quality or quantity of production, or “any factor other than sex.”<sup>8</sup> The “equal work” standard embodies a middle ground between demanding that two jobs be either exactly alike or that they merely be comparable. The test applied by the courts focuses on job similarity and whether, in light of all the circumstances, they require substantially the same skill, effort, and responsibility.<sup>9</sup> An employer may not attempt to equalize wages to comply with the EPA by lowering the rate of pay for any employee.<sup>10</sup>

A year after the EPA, Congress enacted the comprehensive code of anti-discrimination rules based on race, color, national origin, religion and sex found in Title VII of the Civil Rights Act. The EPA and Title VII provide overlapping coverage for claims of sex-based wage discrimination, but differ in important substantive, procedural and remedial aspects. A crucial difference is that the “equal work” standard of the EPA – requiring “substantial” identity between compared male and female jobs – does not limit an employer’s liability for intentional wage discrimination under Title VII. For example, in *Miranda v. B & B Cash Grocery Store, Inc.*,<sup>11</sup> the plaintiff’s inability to demonstrate that she performed the same work as higher paid males did not preclude a Title VII claim based on evidence male employees who performed fewer duties were paid more than she, or that the employer would have paid her more had she been a male. Thus, a violation of the

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<sup>6</sup> See CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, for information on job evaluation as a wage-setting mechanism and the potential labor market effects of implementing the comparable worth approach to remedying gender wage differentials.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> E.g. *EEOC v. Madison Community United School District*, 818 F.2d 577 (7<sup>th</sup> Cir. 1987)(“equal work” requires a substantial identity rather than an absolute identity).

<sup>10</sup> 29 U.S.C. § 206(d)(1).

<sup>11</sup> 975 F.2d 1518 (11<sup>th</sup> Cir. 1992).

EPA will always violate Title VII, but the converse is not true.<sup>12</sup> Additionally, the remedies for violation of the two laws differ. Under the EPA, a prevailing plaintiff may obtain backpay for any wages unlawfully withheld as the result of pay inequality and twice that amount in liquidated damages for a willful violation. By contrast, the Civil Rights Act of 1991 added to the back pay remedy authorized by Title VII a provision for jury trials and compensatory and punitive damages for victims of “intentional” sex discrimination, in wage cases and otherwise.<sup>13</sup> Such damages may only be recovered, however, in cases of intentional discrimination, not in so-called “disparate impact” cases alleging the adverse effect of a facially neutral employment practice on a protected group member. In addition, the Title VII damages remedy is limited by dollar “caps,” which vary depending on the size of the employer.<sup>14</sup>

### “Comparable Worth” Litigation

During the 1980s, some tried to substitute job equivalency for the “equal work standard” in the EPA through so-called comparable worth Title VII cases. As previously mentioned, whole classes of jobs are undervalued according to comparable worth theory because they traditionally have been predominately held by women. Because of alleged labor market bias against female-dominated jobs, Title VII plaintiffs contended that pay discrimination claims should not be limited by the EPA standard, requiring that jobs be substantially “equal” or similar for different pay rates to be considered discriminatory. Instead, Title VII wage-based discrimination actions against employers could be predicated on job evaluation studies, they argued, which compared the value of women’s jobs to those of men who perform work that is dissimilar, but of equivalent or comparable worth to the employer.

Although not a comparable worth case, *County of Washington v. Gunther*,<sup>15</sup> held that the EPA’s equal work standard was not a restriction on Title VII relief for intentional sex-based discrimination in pay between dissimilar male and female jobs. But the Supreme Court did not speak specifically to the Title VII standard of proof for wage discrimination, since in *Gunther* the county’s intention was clearly demonstrated by its failure to redress underpayment of wages to female employees revealed by its own pay evaluation study. Outside of such “refusal to pay” cases, however, where no market surveys or pay evaluations were done, the courts have

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<sup>12</sup> 29 C.F.R. § 1620.27(a).

<sup>13</sup> 42 U.S.C. § 1981A.. Compensatory damages include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses.” Punitive damages may be recovered where the employer acted “with malice or with reckless indifference” to the complaining employee’s federally protected rights.

<sup>14</sup> The sum total of compensatory and punitive damages awarded may not exceed \$50,000 in the case of an employer with more than 14 and fewer than 101 employees; \$100,000 in the case of an employer with more than 100 and fewer than 201 employees; \$200,000 in the case of an employer with more than 200 and fewer than 500 employees; and \$300,000 in the case of an employer with more than 500 employees.

<sup>15</sup> 452 U.S. 161 (1981).

been reluctant to second-guess the wage rate dictated by the local labor market for dissimilar jobs. In a pair of decisions, the Ninth Circuit firmly rejected Title VII liability for a public employer's failure to pay equal wages to male and female employees allegedly performing comparable duties. *AFSCME v. State of Washington*<sup>16</sup> ruled that the state lawfully paid employees in predominantly male job classifications more than it paid employees in predominantly female classifications, even though a state-commissioned study concluded that the male and female classifications were "comparable." Reliance on market forces of supply and demand to set compensation for dissimilar male and female jobs was not *per se* illegal since "[n]either law nor logic deems the free market system a suspect enterprise." The state "may" have discretion to enact a comparable worth plan, the court held, but "Title VII does not obligate it to eliminate an economic inequality which it did not create." Earlier, in *Spaulding v. University of Washington*<sup>17</sup> the same court denied a comparable worth claim by members of the female nursing faculty of the University of Washington who alleged that they were underpaid by comparison to other faculty departments.<sup>18</sup>

Some more recent judicial developments in equal pay and promotional opportunities for women should also be noted. On June 21, 2004, a federal district judge in San Francisco permitted to go forward a class action on behalf of more than 1.5 million current and former female employees of Wal-Mart retail stores nationwide. Plaintiffs in *Dukes et al. v. Wal-Mart Stores, Inc.*<sup>19</sup> claim that women over the past five years have been paid less than male workers in comparable positions and that the company systematically passed over female employees when awarding promotions to management. According to two studies conducted by a sociologist and a statistician for the plaintiffs, 65 percent of Wal-Mart's hourly employees were women, but women make up only 33 percent of all management positions. The gender gap was even more striking when employment categories are further broken down; while the vast majority of Wal-Mart's cashiers are women, only a small fraction are store managers, the top in-store management position. The studies also found that women employed on a full-time hourly basis earned less per year on average than their male counterparts, and the short fall was substantial for female store managers.

At this initial stage, Judge Jenkins only considered whether the evidence raised issues of law and fact common to all members of the proposed class sufficient for a class action to proceed under federal law. The court did not decide the merits of plaintiffs' discrimination claims or any issue of Wal-Mart liability. In its opinion, however, the court noted that

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<sup>16</sup> 770 F. 2d 1401, 1407 (9<sup>th</sup> Cir. 1985).

<sup>17</sup> 740 F. 2d 686 (9<sup>th</sup> Cir. 1984).

<sup>18</sup> See also *American Nurses Ass'n v. State of Illinois*, 606 F. Supp. 1313 (N.D.Ill. 1985)(Congress never intended to incorporate a comparable worth standard in Title VII and such a concept is neither sound nor workable).

<sup>19</sup> 22 F.R.D. 137 (N.D.Cal. 2004).

Plaintiffs present largely uncontested descriptive statistics which show that women working at Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time, that women take longer to enter management positions, and that the higher one looks in the organization the lower the percentage of women.<sup>20</sup>

Wal-Mart argued that any disparities were the result of decentralized decision-making at the regional and local level, not the result of any systematic employer bias, and that a massive class-action would be too large to administer. Judge Jenkins rejected that argument, however, noting that Title VII “contains no special exception for large employers.” Moreover, “[i]nsulating our nation’s largest employers from allegations that they have engaged in a pattern or practice of gender or racial discrimination – simply because they are large – would seriously undermine these imperatives.” Thus, any “inference” of discrimination in company compensation and promotion policies was found to “affect all plaintiffs in a common manner,” and warranted the requested class certification.

Wal-Mart has stated that it will appeal Judge Jenkins’ class action certification. If that appeal fails, and the case goes to trial, the female plaintiffs carry the burden of proving that the company engaged in an intentional pattern and practice of discriminating in pay and promotions. The record to date suggests that this may be no easy task, in part due to subjectivity in the company’s personnel procedures and the fact that, prior to January 2003, the company apparently failed to post or document most available promotion opportunities.<sup>21</sup> There may be limited data on how many employees, male or female, applied for most of these positions. But if they prevail, whether at trial or by settlement, substantial monetary damages may be available to members of plaintiff class under Title VII. Since Judge Jenkins’ ruling, for example, the investment firm Morgan Stanley has reportedly agreed to pay \$54 million to settle government claims that it systematically underpaid and failed to promote its women executives. Allegations of sexual harassment were also involved in the case. Beyond \$12 million set aside to pay the lead plaintiff, a consent decree provides \$40 million for any of about 340 other potential discrimination victims who are able prove their claims, and another \$2 million to establish internal anti-discrimination programs. For a period of three years, the decree requires appointment of a firm ombudsman for sex discrimination issues and of an external monitor to review Morgan Stanley’s adherence to the settlement and its progress at preventing discrimination.<sup>22</sup>

## Legislation in the 109<sup>th</sup> Congress

The issue of pay equity has garnered considerable attention in recent years. The Senate Committee on Health, Education, Labor, and Pensions held a hearing on

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<sup>20</sup> *Id.* at p. 28.

<sup>21</sup> *Id.* at p. 17.

<sup>22</sup> See Washington Post, E-1,5 (7-13-2004).

gender-based wage discrimination in June 2000.<sup>23</sup> A month later, during floor debate on marriage tax penalty legislation, Senator Harkin offered an amendment for the Democratic Leadership allowing wage discrimination victims suing under the EPA – which presently permits only backpay and liquidated damages awards – to obtain full recovery of compensatory and punitive damages for their injury, including emotional suffering and distress. The defeated amendment was based on S. 74 (the Paycheck Fairness Act) in the 106<sup>th</sup> Congress,<sup>24</sup> a measure since reintroduced in each succeeding Congress.<sup>25</sup> Another measure, the Fair Pay Act of 2005 (H.R. 1697 and S. 840), which has predecessors dating back to the 103rd Congress, could reawaken the comparable worth legal debate by redefining the basic statutory standard of the EPA to require that employers pay equal wages for work in jobs determined to be “equivalent” in some largely undefined manner. Another pay equity proposal in the new Congress is H.R. 157, the “Equal Pay Improvement Report Act of 2005.” It directs the Equal Employment Opportunity Commission to prepare a report on how the Fair Labor Standards Act of 1938 has been used by public and private sector employees to foster or exacerbate pay inequity.

The Paycheck Fairness Act, returns to the 109<sup>th</sup> Congress as H.R. 1687 and S. 841. These companion bills propose an increase in penalties for employers who pay different wages to men and women for “equal work,” and add programs for training, research, technical assistance and pay equity employer recognition awards. The proposals would also make it more difficult for employers to avoid EPA liability by invoking the act’s affirmative defense for differential wage payments “based on a bona fide factor other than sex.” In short, while these bills adhere to current equal work standards of the EPA, they would reform the procedures and remedies for enforcing the law.

Under the EPA, as noted, prevailing plaintiffs may recover backpay in an amount equal to the total difference between wages actually received and those to which they are lawfully entitled and an additional amount equal to the backpay award as liquidated damages.<sup>26</sup> Compensatory damages are not authorized, and consequently, awards do not include sums for physical or mental distress, medical expenses, or other costs.<sup>27</sup> But new provisions proposed by the Paycheck Fairness Act would authorize EPA class actions and “such compensatory and punitive damages as may be appropriate.”<sup>28</sup> In addition, the bills proposed more restrictive standards for proof by employers of an affirmative defense to EPA liability based on any “bona fide factor other than sex.” Thus, for a pay factor to be “bona fide,” the

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<sup>23</sup> See “Hearing on Examining Gender-Based Wage Discrimination,” before the Senate Comm. On Health, Education, Labor, and Pensions, 106<sup>th</sup> Cong. 2d Session (June 8, 2000).

<sup>24</sup> 146 Cong. Rec. S7047 (daily ed. 7-17-2000).

<sup>25</sup> H.R. 781 and S. 77, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess.; and H.R. 1688 and S. 16, S. 76, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess.; H.R. 1687 and S. 841, 109<sup>th</sup> Congress, 1st Sess.

<sup>26</sup> 29 U.S.C. §§ 216-17.

<sup>27</sup> E.g. *Hybki v. Alexander & Alexander, Inc.*, 536 F. Supp. 483 (W.D.Mo. 1982)(emphasizing damages for pain and suffering are not available under the EPA).

<sup>28</sup> S. 841, H.R. 1687, § 3(e).

employer would have to prove that it was “job related” or furthered a “legitimate business purpose,” that it was “actually applied and used reasonably in light of the asserted justification,” and that the employer’s purpose could not be accomplished by less discriminatory alternative means.<sup>29</sup> New safeguards are also proposed to protect employees from retaliation for making inquiries or disclosures concerning employee wages and for filing a charge or participating in any manner in EPA proceedings.<sup>30</sup>

The Fair Pay Act of 2005 would go further by proposing a fundamental expansion to the scope of the EPA, which is presently confined to sex-based wage differentials, by adding racial and ethnic minorities as protected classes under that law. Intentional wage discrimination against these groups is already prohibited by Title VII. But Title VII and the EPA have different standards of proof, and because proof of intent to discriminate is not required by the “equal pay for equal work” standard of the EPA,<sup>31</sup> it may provide greater protection to minority groups than Title VII in many cases. The EPA’s catchall exception, affording employers broad immunity for pay differentials attributable to “factors other than sex,” significantly narrowed by the Fair Pay Act.<sup>32</sup> A compensatory and punitive damages remedy, without statutory limit, would have replaced the present EPA backpay and liquidated damages scheme, based on the Fair Labor Standards Act.<sup>33</sup>

Significantly, H.R. 1697 and S. 840 also redefine the basic statutory standard of the EPA by requiring employers to pay equal wages regardless of sex, race, or national origin to workers in “equivalent jobs.” Unlike the current law, Equal Pay Act claims based on wage disparities between dissimilar jobs – e.g., a janitor and a clerk – would be permitted if they are determined to be “equivalent” in some largely undefined manner. According to the bills, “equivalent jobs” are those “whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”<sup>34</sup> By substituting job equivalency for the “equal work standard” in the EPA, the Fair Pay Act arguably could revive legal issues similar to those confronted by the federal courts during the 1980’s in so-called “comparable worth” Title VII cases.

Another aspect of EPA enforcement addressed by the current bills concerns employer recordkeeping and the conduct of technical assistance, research and educational programs by federal agencies. The Fair Pay Act of 2005 requires all covered employers to maintain comprehensive records of “the method, system, calculations, and other bases used” to set employee wages and to file annual reports with the Equal Employment Opportunity Commission (EEOC) detailing the racial, ethnic, and gender composition of the employer’s workforce broken down by job

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<sup>29</sup> Id. at § 3(a).

<sup>30</sup> Id. at § 3(d).

<sup>31</sup> See *Fallon v. State of Illinois*, 882 F.2d 1206 (7<sup>th</sup> Cir. 1989).

<sup>32</sup> S. 840, H.R. 1697, § 3(a).

<sup>33</sup> Id. § 5(b).

<sup>34</sup> H.R. 1697, § 3(a); S 840, § 3(a).

classification and wage or salary level. Such reports would be available for “reasonable” inspection and examination upon request of any person, pursuant to EEOC regulations, and could be used by the Commission for such “statistical and research purposes . . . as it may deem appropriate.”<sup>35</sup> The EEOC would also have been required to “carry on a continuing program of research, education, and technical assistance” to implement the proposed ban on racial, ethnic, or gender discrimination between employees working “in equivalent jobs.”<sup>36</sup>

The Paycheck Fairness Act also mandates record-keeping and data collection for better enforcement of the law. The measure directs the EEOC to survey data currently available to the government and, in consultation with sister agencies, to identify additional sources of pay information that may be marshaled to support federal anti-discrimination efforts. The EEOC must issue regulations for the collection of pay data from employers based on sex, race, and ethnicity, taking into consideration the burden placed on employers and the need to protect the confidentiality of required reports.<sup>37</sup> In addition, the Secretary of Labor is directed to develop job evaluation guidelines based on objective factors of education, skill, independence, and decision-making responsibility for *voluntary* use by employers in eliminating unfair pay disparities between traditionally male- and female-dominated occupations.<sup>38</sup> Technical assistance and a recognition program would be rewarded to employers who voluntarily adjust their wage scales pursuant to such a job evaluation.<sup>39</sup> Finally, a “National Award for Pay Equity in the Workplace” would have been established by these bills to recognize employers who demonstrate “substantial effort to eliminate pay disparities between men and women.”<sup>40</sup>

As noted, another proposal in the 109<sup>th</sup> Congress addressing pay equity issues is H.R. 157, the “Equal Pay Improvement Report Act of 2005.” The bill, introduced by Representative Millender-McDonald on January 4, 2005 proposes no substantive amendments to the EPA or other federal anti-discrimination laws, as do the Paycheck Fairness and Fair Pay Act bills. Instead, it directs the EEOC, in collaboration with other federal agencies, to report to the Congress respecting the Fair Labor Standards Act’s impact on discriminatory wage inequities. Thus, § 2 of the bill would require:

Not later than one year after the date of enactment of this Act, the Equal Employment Opportunity Commission, using information supplied by the Department of Labor, the Office of Management and Budget, and the General Accounting Office, [sic] shall submit a report to the Congress making findings and recommendations relating to how the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) has been used by public and private sector employers to foster or exacerbate pay inequities, especially such inequities based on an

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<sup>35</sup> Id at § 6(e).

<sup>36</sup> Id. at § 7.

<sup>37</sup> S. 841, H.R. 1687, § 9.

<sup>38</sup> Id. at § 7(a).

<sup>39</sup> Id.

<sup>40</sup> Id. at § 8.

employee's gender, race, color, religion, or national origin, or such other factor as the Commission finds relevant.