STATEMENT

ON THE

PAYCHECK FAIRNESS ACT (H.R. 7): EQUAL PAY FOR EQUAL WORK

TO: **THE HOUSE SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES**

THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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DATE: **FEBRUARY 13, 2019**

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES AND THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE PAYCHECK FAIRNESS ACT: EQUAL PAY FOR EQUAL WORK

FEBRUARY 13, 2019

Good morning Education & Labor Committee Chair Scott and Ranking Member Foxx; Civil Rights and Human Services Subcommittee Chair Bonamici and Ranking Member Comer; Workforce Protections Subcommittee Chair Adams and Ranking Member Byrne; and members of the Subcommittees. Thank you for inviting me to testify on H.R. 7, the "Paycheck Fairness Act" ("PFA" or "H.R. 7").[1]

I am a partner with the law firm Seyfarth Shaw LLP,[2] where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group and am a core leader within the Firm's Pay Equity Practice Group. I testify today as an attorney committed to ensuring that there are equal employment opportunities for all applicants and employees; and, specifically, that any differences in pay between employees performing equal work under similar working conditions be based on job-related factors.

I have represented companies nationwide in all areas of proactive workplace compliance and litigation matters involving the issues of legally compliant and appropriate compensation practices. I provide counsel to employers designing, reviewing, evaluating, and, as appropriate, taking remedial steps with respect to their pay practices, to ensure compliance with federal and local equal employment opportunity laws. My litigation practice has specialized in representing employers in individual, multi-plaintiff, and class action litigation in federal and state court involving claims of employment discrimination, including claims of pay discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071 ("Title VII") (*see* 41 U.S.C. Sections 12117(a), 1981a(2), the Equal Pay Act of 1964, 29 U.S.C. Section 206(d)(1) ("EPA") and state equal pay laws.

I have also represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Dukes v. Wal-Mart*, and testified before the Equal

[1] I would like to acknowledge Seyfarth Shaw LLP attorneys Annette Tyman, Richard B. Lapp, Lawrence Z. Lorber, Randel K. Johnson, Matthew Gagnon, Christine F. Hendrickson, Michael L. Childers, Andrew Cockroft, Hillary Massey, Rhandi C. Anderson and Amy L. Stoklasa, Seyfarth labor economist Dr. Christopher L. Haan, as well as Korin T. Isotalo and Peter Newman, for their invaluable assistance in the preparation of this testimony. Special thanks to Dr. Michael DuMond of Economists Inc. for his insights.

[2] Seyfarth Shaw LLP is a global law firm of over 900 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 400 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

Employment Opportunity Commission on issues involving non-discrimination in compensation. I also frequently speak and write on equal employment opportunity law topics.[3]

I. EMPLOYERS ARE DEDICATED TO ENSURING COMPLIANCE WITH THE EQUAL PAY ACT AND WHILE ADDITIONAL STEPS CAN BE TAKEN TO FURTHER ENHANCE COMPLIANCE, H.R. 7 IS UNWORKABLE FOR LEGAL AND PRACTICAL REASONS

Reflecting on my experience in counseling employers regarding compensation practices, at the highest levels of organizations, employers have a deep commitment to paying all employees based on bona fide, job-related factors. Many employers across the country are proactively evaluating and modifying their pay practices, policies, and procedures, through voluntary compensation reviews and implementing educational programs to ensure compliance with the law. In doing so, they are identifying, and if necessary, correcting unexplained pay differentials that are not a function of job related factors. Compensation is an evolving concept designed to keep the enterprise productive, successful and able to attract and retain competent employees.

The focus that employers have on creating and maintaining compensation systems that pay employees based on the work performed under similar conditions and job-related factors is not surprising. Key objectives of sound compensation systems include: (1) attracting qualified talent through competitive wages that recognize an applicant's potential based on past experiences, education and other job-related factors; (2) retaining and rewarding current employees for their contributions and dedicated service to the company; (3) driving motivation and performance to boost employee engagement; (4) enhancing job satisfaction, commitment and productivity; (5) optimizing company resources; and (6) compliance with applicable laws and collective bargaining agreements.

Employers seek predictability and clear guidance in applying legal standards to their employment policies and practices. Thus, adding the proposed language to the EPA that expressly states that an employer's differences in pay between workers performing the same work under similar work conditions must be based on job-related reasons would further this objective and the goals of the Equal Pay Act. Providing employees with an express protection within the Equal Pay Act against retaliation for engaging in reasonable discussions and gathering information regarding compensation for the purpose of determining whether an unlawful wage disparity exists promotes informed compensation discussions and is also consistent with existing protections in Title VII and other employment laws. The PFA could go even further, though, in promoting the polices underlying the EPA. For example, providing employers with incentives to engage in voluntary self-critical compensation analyses would be effective for encouraging self-evaluation and the implementation of concrete steps to eliminate unjustified pay discrepancies without the need for litigation.

However, H.R. 7 seeks to provide a rigid, one-size-fits-all solutions to one of the most complex issues facing U.S. employers. The American workforce is among the most varied workforces in the world. Because there is no one-size-fits-all workplace, there is no one-size-fits-all

[3] I am a member of the Board of Directors of Inland Press Association and the University Club of Chicago Foundation, and Chairwoman of the Equal Employment Opportunity Subcommittee of the United States Chamber of Commerce's Labor and Employment Policy Committee. The views expressed in my written and verbal testimony are those personally held by me, and should not be attributed to Seyfarth Shaw LLP, or any other organization or private employer.

compensation program. Employers need flexibility in making key decisions about their businesses, including compensation decisions. With limited exception, existing workplace protection laws such as Title VII and the ADEA acknowledge this need and allow employers the latitude to make employment decisions that best fit the particular employer's workplace and prohibit the second guessing of these kinds of decisions.

Compensation is dynamic and complex; driven by job, business and local and national economic factors. Employers place different values on worker skills, experience, education, certifications and abilities.[4] Employers have different components of compensation.[5] These differences are, in fact, the core strength of the American economy, not a flaw. Employers and employees flourish because of the diversity of the American workplaces. H.R. 7, if passed in its current form, would not ensure greater equal pay compliance but would, instead, blunt the very diversity that is a core asset of the United States' economy.

For these reasons and others contained in my written testimony, I express my significant concerns with respect to certain components of H.R. 7. Chairman and other Members of the Committee, I thank you for the opportunity to share some of those concerns with you today.

In today's testimony I discuss the application and impact of H.R. 7 on the Equal Pay Act. If enacted, H.R. 7 would alter the Equal Pay Act significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise – namely, that throughout the United States of America, all wage disparities existing between men and women are necessarily the result of discrimination by employers and that employer and employee discussions regarding their wage expectations will perpetuate and lead to inherently discriminatory pay practices.[6]

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[4] CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 4, "LABOR QUALITY: INVESTING IN HUMAN CAPITAL" (11th edition).

[5] CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 7, "ALTERNATIVE PAY SCHEMES AND LABOR EFFICIENCY" AND CHAPTER 8, "THE WAGE STRUCTURE" (11th edition).

[6] Over the years, labor economists and scholars have observed that wage differences between men and women are attributable to a number of factors, including the identification of numerous business-related factors that are unrelated to any alleged employer discrimination. *See, e.g.*, BUREAU OF LABOR STATISTICS REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS (2013); JOINT ECON. COMM., INVEST IN WOMEN, INVEST IN AMERICA (2010); and AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN Commissioned by the U.S. Dep't of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp. (2009) (when accounting for factors such as: occupation, human capital development, the quality and quantity of relevant work experience, industry, health insurance, fringe benefits, and overtime work, the 2009 Report found that the unexplained hourly wage differences were between 4.8 and 7.1 percent). Complex factors that have been identified in social science research to explain the differences in wage rates between men and women include the following, many of which are the function of employee choice: the availability of other non-economic benefits provided by the employer; an employees' pay history; the number of hours worked; an employee's willingness to work during certain shifts and in certain locations; certifications and training obtained by the employee; the amount and type of education achieved; the quality and quantity of prior experience; length of time in the workforce; length of service with the employer; time in a particular job; the frequency and duration of time spent outside the workforce; job performance; personal choices regarding other family or social obligations; occupational choice, self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors. Indeed, the EPA already recognizes that there may be lawful pay differences between jobs which are caused by compensation systems that govern seniority, merit pay, and productivity and quality.

On the unsupported assertion that many pay disparities "can only be due to continued intentional discrimination or the lingering effects of past discrimination," H.R. 7 would impose harsh penalties upon all employers, essentially eliminate the "factor other than sex" defense, restrict employer speech and make available a more attorney-friendly class action device. For example, revisions to the "factor other than sex" defense contained within H.R. 7 would render the defense a nullity, allowing judges and juries to second guess employers and the marketplace as to the relative worth of job qualifications in individual pay decisions. H.R. 7, in effect, will require employers to implement a civil service philosophy with respect to all pay decisions, eliminating individual pay advancements unless an employer can prove its pay raise was a business necessity. H.R. 7 contends that these changes are necessary to ensure equal pay for women.

While, as noted above, certain clarifications and incentives may be useful in enhancing compliance with the Equal Pay Act, in its current enforcement structure, the Equal Pay Act, along with Title VII, already provides robust protections and significant remedies to protect applicants and employees against gender-based pay discrimination.[7] Plaintiffs are taking advantage of the multiple forms of redress available to remedy pay discrimination through both the filing of discrimination charges as well as federal and state court individual lawsuits and class actions.

The proposed changes to the EPA are also contrary to its most fundamental underpinnings: the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of a worker's qualifications, the work performed, and more specifically, the setting of compensation. The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other anti-discrimination legislation. Perhaps the most notable difference is the lack of any requirement that a prevailing EPA plaintiff prove intentional employer discrimination. This feature separates the EPA from Title VII, as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[8] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. In contrast, the EPA currently imposes liability on employers for unlimited compensatory damages without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency of proof in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for substantially equal work, which is not the result of: a seniority system; a merit system; a system measuring quality or quantity of work; or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by H.R. 7 are debated. By effectively eliminating the "factor other than sex" defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference is: (1) job-related and required by "business necessity" and (2) not "derived from a sex-based differential in compensation," H.R. 7 imports a business necessity "plus" standard for an employer to defend every individual pay decision even where no evidence of intentional discrimination is required to be shown.[9]

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[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) ("Title VII").

[8] 42 U.S.C. §§ 1981 and 1983, respectively.

[9] Under H.R. 7, market forces would effectively be excluded from consideration when an employer sets an individual's pay rates unless an employer is able to prove a negative – that the market rate used was not derived or

For these reasons, and all of the reasons set forth below, I urge the Committee to carefully reconsider certain concepts proposed by H.R. 7.

II. CERTAIN CONCEPTS IN H.R. 7 CREATE BURDENS ON EMPLOYERS THAT ARE UNTENABLE

The Equal Pay Act imposes strict liability on employers found to have violated the law. In other words, employees are not required to show that the employer intended to discriminate based on gender, only that the employer engaged in an impermissible disparate pay practice. Employees who prove a violation of the EPA are entitled to double damages, attorneys' fees and costs.

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work, unless the difference in pay is the result of: a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or "any factor other than sex."[10] To meet her burden of proof under the EPA, an employee must demonstrate that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[11] If the employee makes that showing, the burden of persuasion then shifts to the employer, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[12] Critically, there is no requirement under the EPA for a plaintiff to identify a specific employment policy that is being challenged, or to prove any discriminatory intent or animus on the part of the employer.[13]

H.R. 7 does not change the EPA's first three affirmative defenses. Pay differences based on seniority and merit pay systems or compensation based on productivity or quality of work are job-related and appropriate factors upon which to base differences in pay for employees performing equal work. However, it changes the "factor other than sex" defense by narrowly limiting its application to only those situations where an employer proves that the factor (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related and consistent with business necessity; and (3) accounts for the entire differential in compensation at issue." Finally, the proposed change would alter the burden-shifting mechanism of the EPA by requiring that "[s]uch defense shall

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influenced by a sex-based differential in pay. Under H.R. 7, an employee's request for higher pay to match a competitor's offer could not be "matched" unless, first, the employer proved the competitor's offer was not influenced by a sex-based differential (practically, a very difficult burden) and second, the employee's increase was a business necessity (how does an employer prove that one employee's retention is a business necessity?). Imposing this significant additional burden on employers is also unnecessary. Under the EPA the catch all defense must be a factor *other than* sex. If the employer's asserted explanation for a pay disparity was actually sex-based, the defense would fail. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (employer failed to carry its burden of proof on the factor other than sex defense where the evidence showed the employer paid males who worked the night shift more than females who worked the day shift, when the differential arose simply because men would not work at the low rates paid women inspectors, and reflected a job market in which Corning could pay women less than men for the same work).

[10] 29 U.S.C. § 206(d).

[11] *Id.*; *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

[12] 29 U.S.C. § 206(d)(1).

[13] *See id.* (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).

not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."

In so doing, H.R. 7 pushes the EPA to heights that would essentially obliterate the "factor other than sex" affirmative defense out of the statute. That is because employers would have to demonstrate that a pay difference is not only based on a job-related reason, but is also consistent with business necessity, not based on or derived on a "sex-based differential" and accounts for the entire wage differential. And these showings are required for a factor that is – by definition – *not* gender-based. Even if the employer is able to meet such a heightened standard, H.R. 7 would still permit an employee to prevail by pointing to an alternative practice that the employer did not adopt. The practical result is that employer burdens are so high, that any plaintiff bringing an EPA claim will prevail by simply showing a wage differential for employees doing the same work, unless the employer can demonstrate the differential was based on (1) a seniority system, (2) a merit system, or (3) a system which measures earnings by quantity or quality of production.

The "factor other than sex" affirmative defense forms the crux of the EPA.[14] It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a job-related factor other than sex.[15] This affirmative defense properly enables employers to consider a wide range of permissible, i.e., non-discriminatory, bona fide, job-related factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as competitive bids and marketplace conditions, in setting salaries.

If enacted, H.R. 7's proposed restrictions would upset the delicate balance that the drafters of the EPA sought to maintain between the goals of the EPA – requiring differences in pay amongst employees performing equal work be limited to bona fide, job-related factors – and the need to allow managers to exercise their own business judgment and discretion without undue and unnecessary interference by the courts.

A. The EPA's "Factor Other Than Sex" Is a Business or Job-Related Factor, as Expressly Defined by Courts and Rules of Statutory Construction

While the text of the EPA does not use the words "business-related" or "job-related" it is already part of the EPA as construed by a majority of courts of appeal across the United States and the general rules of statutory construction. The so-called "catch-all" defense is not without existing limiting principles. Indeed, under ordinary rules of statutory interpretation the "factor other than sex" defense should be consistent with the first three specifically enumerated defenses (seniority, merit pay, and productivity).

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[14] 109 CONG. REC. 9198 (1963) (statement of Rep. Goodell, principal exponent of the EPA) ("We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction").

[15] *See, e.g.*, *Fallon*, 882 F.2d at 1211-12 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

As a rule of statutory construction, or interpretation, where a class of things is followed by general wording, the general wording is usually restricted to things of the same type as the listed items. This rule of statutory construction is sometimes referred to in Latin as *ejusdem generis* or "of the same kind." As the Supreme Court stated in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), *ejusdem generis* is a situation in which "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Here, the Equal Pay Act requires that any differential in pay between individuals performing the same work must be proven by the employer to be the result of a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any factor other than sex. The language "or any factor other than sex" follows three job-related differentiators used by employers in compensation decisions. Under the doctrine of *ejusdem generis*, the general words are construed to include job-related differentiators in pay.

The majority of circuit courts of appeals have held that the "factor other than sex" defense must be business or job-related. The business or job-related factor other than sex test used by circuit courts includes the following:

The Second Circuit explains that, " . . . to successfully establish the 'factor other than sex' defense, an employer must also demonstrate that it had a **legitimate business reason** for implementing the gender-neutral factor that brought about the wage differential." [16]

Applying the current EPA's "factor other than sex" test, the Third Circuit explained: "the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential"; because the differential was based on a **legitimate business reason**.[17]

The Sixth Circuit requires a "**legitimate business reason**" against which to measure the "factor other than sex" defense.[18] Similarly, the Ninth Circuit defines the "factor other than sex" as follows: "An employer thus cannot use a factor which causes a wage differential between male and female employees absent an **acceptable business reason**." [19]

The Eleventh Circuit Court of Appeals defines the "factor other than sex" in the EPA as including job-related factors such as the "unique characteristics of the same job; . . . an individual's *experience*, training or ability; or . . . **circumstances connected with the business**."[20]

Given the above, to expressly provide that the factor other than sex in the EPA be job-related, would provide employers with specific guidance as to the application of the EPA's legal standards to their employment policies and practices. Most importantly, inserting "job-related" into the "factor

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[16] *Belfi v. Prendergast*, 191 F.3d 129, 136 (2nd Cir. 1999).

[17] *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 596 (3rd Cir. 1973).

[18] *E.E.O.C. v. J.C. Penney Co., Inc.* 843 F.2d 249, 253 (6th Cir. 1988) (citations omitted).

[19] *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982) ("The Equal Pay Act entrusts employers, not judges, with making the often uncertain decisions of how to accomplish business objectives.")

[20] *Steger v. General Electric Company*, 318 F.3d 1066, 1078 (11th Cir. 2003) (citations omitted).

other than sex" defense does not force the federal court system to function as a "super personnel department," inquiring into the reasonableness of employers' day-to-day compensation decisions.[21]

B. Requiring That the "Factor Other Than Sex" Defense Satisfy the Concept of Business Necessity Is Unworkable

Requiring that employers demonstrate a "factor other than sex" is also "consistent with business necessity" is an impossibly high standard.

If a "business necessity" requirement is imported into the EPA "factor other than sex" defense, then even if an employer proved an applicant's job experience or education was the factor considered when paying a male applicant more than a female applicant, the employer would still face liability if it cannot prove that the reason for the pay differential (i.e., greater job experience or education) was a matter of "business necessity." Job or business-related is fundamentally different from business necessity. Business or job-related requires that a nexus should be shown between a compensation decision and the job the employee is performing and its relationship to the business enterprise. Business necessity suggests that the very viability of the business is dependent upon the compensation decision. Requiring an employer to prove that a *wage differential* between two individuals is a business necessity is unworkable. It would require an employer to meet an impossible threshold – to prove that it is a *business necessity* for the employer to pay one person more than another based on innumerable intangible criteria such as relative levels of education, experience, or job performance. A few examples may be instructive for demonstrating the unworkable nature of H.R. 7's business necessity requirement with respect to all factors employers use to differentiate pay amongst employees performing the same work. They are contained in Appendix 1.

Both practically and analytically, this "business necessity" showing cannot be done with respect to an individualized employee pay decision every time a pay decision is made (i.e., engage an expert to perform a study or otherwise prove it is a business necessity to pay Employee A X dollars more than Employee B because of Employee A's greater experience or education, for example).

Put differently, applying H.R. 7's "consistent with business necessity" test to the EPA would require employers to prove – as to each wage differential – the ultimate business goal achieved by the higher pay is significantly correlated with the job's requirements and bears a demonstrable relationship to the successful performance of the job. This highly onerous standard would place an unrealistic burden on employers that would be virtually impossible to achieve.

C. Requiring That the "Factor Other than Sex" Defense Be the Least Impactful in Terms of Pay Disparities Is Unworkable

Under the proposed amendments to the EPA, even if an employer could demonstrate that the "factor other than sex" was bona fide, *and* job related, *and* consistent with business necessity, it

[21] *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (court noted its function is not to sit as a "super personnel department" and that inquiring into the reasonableness of an employer's decision would narrow the exception beyond the plain language of the statute). *Smith v. Leggett Wire Co*., 220 F.3d 752, 763 (6th Cir. 2000) ("[I]t is inappropriate for the judiciary to substitute its judgment for that of management."). *See also Ptasznik v. St. Joseph Hosp*., 464 F.3d 691, 697 (7th Cir. 2006) (holding that courts do not "sit as super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.").

could still be held liable if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing a wage differential. In other words, liability would still be imposed because the employer paid a male applicant a higher wage rate that was job-related, consistent with business necessity, and not the result of sex discrimination, because in retrospect, years later, a judge or jury determined it could have chosen an alternative employment practice. This just encourages after-the-fact second-guessing and creates uncertainty for employers.

Under H.R. 7, plaintiffs' lawyers will no doubt argue that employer liability attaches every time they second-guess an employer's employment practice by identifying another employment practice that doesn't produce the differential in pay between a male and female employee. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience. H.R. 7 does not describe any examples of alternative employment practices that would suffice to defeat the employer's burden. If a plaintiff countered an employer's justification of education, training, or experience by suggesting that the employer had the financial ability to raise everyone's pay in the same job – is financial ability to raise another employee's wage rate an alternative employment practice that would defeat the employer's defense (in every case, so that the Equal Pay Act's "factor other than sex" defense is in fact a complete illusion)? In effect, H.R. 7 suggests that the universal alternative would be to "round up" any wage distinction. No answer is found in H.R. 7; yet, this one issue would lead to considerable uncertainty and litigation.

The proposed changes to the EPA would invite such disputes into courtrooms, forcing the judiciary to weigh the merits of countless economic judgments of employers. In this sense, the proposed changes represent an unprecedented intrusion of government into the independent business decisions of private enterprises.

D. Requiring Employers to Explain 100% of Any Differential Is Undefined and Unworkable

H.R. 7 requires employers to explain the "entire" pay differential between male and female employees. Such an exacting standard is unworkable. Advancing the obligation to employers to explain the "entire pay differential" assumes that compensation decisions are modeled after a civil service system whereby all jobs are compressed into distinct pay grades and each pay grade is compensated at the same wage rate.

Compensation decisions in the private sector are made based on a variety of factors that are not capable of an exact dollar-for-dollar comparison. Differences in experience, education and performance, among other job-related factors, matter significantly for purposes of setting compensation. How would an employer ever be able to explain that it credited an employee with X dollars for their 6.3 years of prior experience, and Y dollars because the candidate went to a top tier school verses Z dollars for a mid-tier school? It will be virtually impossible for employers to meet such a standard.

In analyzing compensation across organizations, employers with large workforces rely on statistical analyses to test whether pay is correlated with gender. A finding of 1.96 standard deviations (assuming a "normal distribution" manifested by the familiar bell curve graphic) indicates that a given pay difference would be expected to occur by chance 5% of the time if pay was set in a sex-neutral environment and if the regression model correctly incorporates all of the job-related

determinants of pay. Courts have approved this statistical standard in employment discrimination cases.[22]

When statistical analyses show a pay difference of fewer than 1.96 standard deviations, then labor economists, statisticians and courts generally conclude that the statistical evidence do not give rise to an inference that a gender pay difference exists, even though the same analyses do not explain 100% of all pay differences between male and female employees.

Relying on statistical significance when measuring pay differences is critically important. That is, because a statistical analysis can never capture or precisely account for all of the factors that influence pay, the effect of a factor like gender on pay is necessarily measured by using a margin of error. For example, in political polling, a voter survey reveals 60% of voters are likely to vote for a candidate in the next election, usually accompanied by a phrase such as "plus or minus 3%." What that means is that there is a 3% margin of error surrounding the estimate of 60% of voters choosing to vote for your re-election. More precisely, it is expected that somewhere between 57% and 63% of the voters will end up voting for the candidate—the 60% reported estimate is simply the middle of that range.

A statistical analysis of pay differences between male and females also includes a margin of error. For example, a statistical analysis could find that female employees at Company XYZ are paid 1% less than comparable male employees, but this difference is not statistically significant (e.g., -1.00 standard deviations). This means that the margin of error surrounding this pay discrepancy includes the possibility that female employees are actually paid more than comparable males: a 3% margin of error surrounding a pay difference of negative 1% means that the likely gender pay difference is somewhere between -4% and +2%.

To the extent the "entire differential" is interpreted to mean that 100% of the wage differences must be explained – i.e., that all employees performing equal work must be paid *exactly the same* regardless of the statistical significance of any differences across the group – that standard is untested and unworkable. State laws that have recently adopted similar "entire differential" language do not provide any guidance and will result in considerable litigation. For example, the California, Massachusetts, New Jersey and Oregon laws similarly require employers to explain the entire differential, but courts in those states have not yet interpreted those laws. While the Massachusetts Attorney General's office has taken the position that "eliminating unlawful pay disparities means adjusting employees' salaries or wages so that employees performing comparable work are paid equally," the Guidance does not address whether statistical significance may be considered.

Requiring employers to explain *every cent* of difference among a group of employees performing the same work is unworkable because such differences could have occurred by legitimate factors. Indeed, multivariate regression models are specifically designed to determine if there is a pattern that suggests a discriminatory motive, (i.e., gender discrimination) is at play. The absence of

[22] *Adams v. Ameritech Servs.*, Inc., 231 F.3d 414, 424 (7th Cir. 2000) (noting that in employment discrimination cases, "[t]wo standard deviations is normally enough to show that it is extremely unlikely ... that [a] disparity is due to chance."); *Cullen v. Indiana Univ. Bd. of Trustees*, 338 F.3d 693, 702 (7th Cir. 2003) (explaining in an Equal Pay case that "generally accepted principles of statistical modeling suggest that a figure less than two standard deviations is considered an acceptable deviation").

a statistical finding suggests that differences are likely occurring by random chance and not as a pattern that is based on gender.

If enacted as proposed, employers would be forced to concoct a precise equation to determine pay, by assigning a base pay to each level in each job family and assigning a precise dollar amount to each year of experience, educational degree, and performance rating, along with every other factor used to determine pay. This would require a radical overhaul in approach and general compensation philosophies for most private employers across the country. For this reason, H.R. 7's requirement that employers explain 100% of any differential should be rejected.

III. OTHER PARTS OF H.R. 7 ARE UNWORKABLE

A. H.R. 7 Restricts Employers from Legitimate Speech That Is Essential to the Hiring Process

Information about an applicant's salary history has long been used by employers to make informed decisions about candidates during the hiring process. For instance, salary history information, in combination with other information provided by applicants, provides employers with a holistic view of the relative qualifications, experience levels, and performance of candidates. It is also useful for assessing real time information about the competitive market wage for a given job. It is also often a critical factor in an applicant's decision as to whether to apply for, interview for, and accept a new job. Few applicants voluntarily change employers for lower-paying positions.

Without any stated reason or justification, H.R. 7 would prohibit employers from seeking this vital information during the hiring process. It would also prohibit employers from relying on prior salary information, unless (1) it is provided voluntarily after an offer of employment that includes compensation is extended, and (2) it may be used for the sole purpose of supporting a wage that is higher than the wage offered by the employer. Such prohibitions raise serious concerns for the employer community and will hamper their ability to compete for talent in a competitive labor market.

1. H.R. 7's Ban on Seeking Prior Salary History Information Is Unconstitutional

H.R. 7 proposes to amend the EPA by severely limiting an employer's right to seek wage history information from a prospective employee. The proposal violates an employer's First Amendment right to engage in free speech without appropriate justification. A similar restriction on an employer's right to seek salary history information from applicants was recently deemed an unconstitutional restraint on free speech.[23] The Court's decision was based, in part, on the lack of evidence to conclude that a ban on seeking salary history information would do anything to "directly advance" the government's interest in reducing discriminatory wage disparities and promoting wage equity.[24]

In reaching its conclusion, the Court analyzed the expert testimony produced in support of the salary history ban but found that it was "riddled with conclusory statements, amounting to

[23] *Chamber of Commerce For Greater Philadelphia v. City of Philadelphia et al.*, 319 F. Supp. 3d 773, 800 (E.D. Penn. April 30, 2018), *appealed*¸ 18-2175 (3d Cir. May 30, 2018).

[24] *Id*. at 798.

various tidbits and educated guesses" that were insufficient to support a restraint on speech. [25] Moreover, most of the evidence failed to address the possibility that alleged disparate wages "could also be based on factors having nothing to do with discrimination, such as qualifications, experience, or any number of other factors.[26]

The same principles apply here. While the government has a compelling interest in eliminating gender-based pay discrepancies that are in fact caused by discrimination, the prohibition on seeking wage history does not serve this interest.[27] H.R. 7 is devoid of any rationale to support a restriction on an employer's constitutional right of free speech.

2. Employers Should Not Be Prohibited from Considering Prior Salary for Legitimate Job-Related Reasons

As the EEOC and courts have noted, prior salary information can be a legitimate factor other than sex. However, while the EEOC has noted that prior salary information "can" reflect sex-based compensation disparities, it has also noted that an employer could be justified in relying on prior salary information if it "accurately reflected the employee's ability based on his or her job-related qualifications" or that it "considered the prior salary, but did not rely solely on it in setting the employee's current salary."[28] Other courts have reached similar conclusions.[29]

Employers routinely rely on prior salary information for competitive purposes as a way to gather real time market data. It is also used to benchmark against the pay of current employees or to target offers to top performing employees at competitor firms. It can also be used as an indicator of a candidate's experience, performance or level of expertise in an area.

Prohibiting employers from relying on prior salary information, even if it's voluntarily provided, until after an offer that includes compensation information has been extended will invoke an unnatural cadence that does not reflect the realities of the workforce. Indeed, human resources representatives will be forced to issue "Miranda-type" warnings to applicants advising them that they cannot provide information regarding prior salary. And that even if they do, the employer must make a salary offer unrelated to their prior salary.

The only effect that the current proposal is guaranteed to have are steeper recruiting costs which will be borne by both employers and applicants. Employers, particularly small businesses that lack access to expensive third-party market data, and applicants will be forced to proceed through the hiring process without an understanding of whether an applicant's pay is in line with what the employer is willing to pay. This disconnect would normally be addressed early on in the hiring

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[25] *Id*.

[26] *Id*.

[27] *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 802-04 (2011)(finding that a statute which was "wildly underinclusive" and "vastly overinclusive" does not meet the First Amendment's requirement that statutes restricting speech be narrowly tailored).

[28] EEOC, Compliance Manual, No. 915.003 §10-IV.F.2.g (Dec. 2000).

[29] *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Dey v. Colt Constr. & Dev't Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987); *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)).

process and would allow both the employer and the candidate to proceed if there is at least some mutual understanding of the salary range for the position.

In the United States, prices of goods and services are based on the fundamental economic principles of supply and demand. Highly competent, qualified and talented employees – whether male or female – are in greater demand, yet in smaller supply, which creates competition for their services. Employers should not be restricted from seeking and relying upon critical information that fosters competition under our free market system.

B. Prohibiting Retaliation Against Employees Who Request or Discuss Wage Data to Enforce the Non-Discrimination Provisions of the Equal Pay Act Is Important but Must Be Balanced Against Legitimate Privacy Interests

Section 3 of H.R. 7 creates new non-retaliation provisions which, while seemingly benign, are in fact overly broad and can have adverse consequences when one considers their application to common workplace situations. While everyone supports the concept of non-retaliation, certain unintended consequences need to be discussed. Moreover, this new language may not be necessary given the breadth and matrix of existing laws providing protections against retaliation, as discussed below.

Existing equal employment opportunity laws on the federal and state level prohibit employees from being retaliated against for asserting their rights to be free from discrimination in compensation. These protections include protection for discussions relating to compensation, including discussions and gathering information regarding compensation with management or coworkers for the purpose of determining whether an unlawful wage disparity exists. Title VII of the Civil Rights Act of 1964[30], the Age Discrimination in Employment Act[31], Title V of the Americans with Disabilities Act[32], Section 501 of the Rehabilitation Act[33], the Equal Pay Act[34], and Title II of

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[30] Title VII states, "[n]o person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting." 42 U.S.C. § 1997d

[31] The Age Discrimination in Employment Act states, "[i]t shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d).

[32] The Americans with Disabilities Act states, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

[33] §501 of the Rehabilitation Act states, "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, 1 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment." 29 U.S.C. § 791(f); *Coons v. Sec'y of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004). (liability standards the same as those under the ADA)

[34] The Equal Pay Act states, "it shall be unlawful to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding

the Genetic Information Nondiscrimination Act[35] **all** currently prohibit retaliation and related conduct against an employee for engaging in protected activity by engaging in an equal employment opportunity process or reasonably opposing conduct made unlawful by an equal employment opportunity law.

Applicants and employees who assert these rights are engaged in what is called "protected activity" which can take many forms. Examples of protected activity described on the Equal Employment Opportunity Commission's website[36] include protections against an applicant or employee being retaliated against for:

- Reasonably opposing conduct made unlawful by any EEO law (including the EPA);
- Raising an internal complaint of wage discrimination;
- Filing an EEOC charge or lawsuit (or serving as a witness, or participating in any other way in an equal employment opportunity matter) even if the underlying pay discrimination allegation is unsuccessful or untimely; and
- Filing a lawsuit alleging wage discrimination.

The EEOC has provided guidance that employers must not retaliate against an individual for "opposing" an employer's perceived unlawful EEO practice, including unequal pay for equal work[37]. Opposition is protected even if it is informal or does not include the words unequal pay or discrimination. Instead, the communication or activity is protected under federal equal employment opportunity laws as long as the circumstances show that the activity is in relation to perceived unlawful wage discrimination. For example, it is currently unlawful for an employer to retaliate against an applicant or employee for:

- Talking to coworkers to gather information or evidence in support of an employee's claim of an unlawful compensation disparity;
- Threatening to complain about alleged wage discrimination against oneself or others;
- Providing information in an employer's internal investigation of an alleged unlawful wage disparity; or

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under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]" 29 U.S.C. § 215(a)(3).

[35] The Genetic Information Nondiscrimination Act states, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection." 42 U.S.C. § 2000ff-6(f).

[36] EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#A._Protected.

[37] *Id*.

- Complaining to management about sex-based compensation disparities.

Additional protections against retaliation for asserting rights to discuss wages with other employees can also be found in the National Labor Relations Act ("NLRA").[38] The NLRA protects non-supervisory employees and applicants from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved.[39]

Under existing federal law, protections against retaliation apply to conduct that is conducted in a reasonable manner (for example, without threats of violence, or badgering a subordinate employee to give a witness statement) by those with a reasonable good faith belief that an unlawful wage disparity may exist (for example, that a woman is being paid less than a man who is performing equal work).

However, Section 3(b) of H.R. 7 would extend unprecedented anti-retaliation protections to employees who inquire about, discuss, or disclose the wages of themselves or others. This Section of H.R. 7 is written so broadly that employees would have the right to inquire about, discuss, or disclose wage information **without limitation**. Under Section 3(b)(1)(A) an employee who has served or is planning to serve on an "industry committee" also specifically enjoys this right to disclose the wages of other employees without limitation.

There is no consideration of the reasonableness of the employee's actions with respect to their inquiries, discussions, or disclosures, nor is the permissibility of such action tethered to the alleged underlying pay disparity. Further, the proposed bill does not take into account or protect the privacy rights of other employees with respect to publicly disseminating information about their pay, nor does it contain a mechanism for balancing and protecting employers' legitimate business concerns in maintaining confidentiality of certain compensation information.

Under H.R. 7, an employee who chooses to post on social media the wages of all other employees, by name, would be deemed to be engaging in protected activity, against which other employees and the employer would have no recourse. An employee whose compensation information is made public in this manner who felt their right to privacy had been violated would have no ability to stop this co-worker's protected activity. The employer would also have no ability to object to such a broad disclosure of data, notwithstanding the potential proprietary nature of such information and the potential disadvantage that could result from a competitor's possession of the identity and current compensation of its employees. H.R. 7 expands an employee's right to inquire, discuss and disclose wages of other employees such that it trumps legitimate privacy and confidentiality rights of other employees and the employer.

H.R. 7 further extends employees' rights to discuss their pay and that of others' by failing to connect the protected activity of discussing pay information with a permissible purpose. The broadness of the proposal protects employees from retaliation for inquiring about, discussing, or sharing pay information regardless of whether they do so with the intent to identify or remedy an unlawful pay disparity that is attributable to sex. For example, as currently written, the bill would

[38] 29 U.S.C. § 158(a)(4).

[39] *N.L.R.B. v. Lloyd A. Fry Roofing Co. of Delaware*, 651 F.2d 442, 445 (6th Cir. 1981) ("Employees may engage in concerted activities protected by section 7 regardless of whether the employees are members of a union.").

allow an employee who is angry at their manager to survey co-workers to obtain compensation information and publish it in a public forum – without any connection to a desire to remedy a discriminatory pay practice or other unlawful employment practice.

Finally, unlike existing federal law, H.R. 7 does not attach any standard of "reasonableness" to an employee's activity to be deemed protected activity. An employer would have no remedy against an employee who undertook a mass mailing of pay information, or took out an ad in the local paper, for example, even though most would not consider such activity a reasonable disclosure of employer information – again, even if such activity were not in connection with a good faith concern of an unlawful pay disparity.

This language goes far beyond any rights enjoyed by non-unionized and unionized employees under other federal employment laws.[40]

In contrast, here, H.R. 7 provides an open door for an employee's inquiries and disclosures of the wages of all employees, both within and outside the company, without any balancing of the privacy rights of other employees, an employer's need for confidentiality, and other legitimate concerns. As noted, current law establishes a broad protection to employees or applicants who inquire about general compensation practices or compensation for similar employees, but H.R. 7 stretches these protections unnecessarily to the potential detriment of employees and employers.

C. The PFA Inappropriately Expands EPA Remedies for Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

The EPA provides a mechanism under which aggrieved employees can seek damages and employers will be deterred from engaging in practices that perpetuate unequal pay for equal work. An employee adversely affected by a violation of the EPA is entitled to backpay for the wages not properly paid as well as an amount equal to such backpay as liquidated damages. An employer may avoid liability for liquidated damages under certain conditions where it shows its actions, or its failures to act, were in good faith, believing it was never in violation of the EPA. Reasonable attorney's fees and costs may also be awarded. The EEOC can enforce the EPA on behalf of an employee or an employee can bring a private lawsuit in court with jury trials. The EEOC may request injunctive relief and an employer that willfully violates the EPA is subject to criminal prosecution and fines up to $10,000. H.R. 7 would layer upon these provisions an award of unlimited compensatory and punitive damages. H.R. 7 would not require a showing of intent to support an award of unlimited compensatory damages. This expansion would be inappropriate and provide a level of damages far exceeding those available under Title VII of the 1964 Civil Rights Act as recently amended in 1991 by the Congress.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages, capped at certain levels (depending on the size of the employer). Importantly, one of the key compromises which led to the 1991 CRA's passage was to limit these damages to intentional cases of discrimination. (In disparate impact cases, where intent need not be shown, damages are limited to lost backpay.) And yet the Bill before you would provide

[40] For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but this right is not without boundaries and not without safeguards.

for unlimited compensatory damages without proof of intent. The required showing for proof of an EPA violation is lower than under Title VII, but the available damages are higher. What is more, H.R. 7 would also allow for uncapped punitive damages in addition to the EPA's existing double recovery of economic damages.

The current damage mechanisms under the EPA serve their intended purpose of eliminating wage disparities, making employees whole, compensating employees with an equal amount of special liquidated damages, and paying all attorneys' fees and costs. These remedies are appropriately proportional as a remedy for an employer's actions that produce unintentional, unlawful wage disparities. To upend this design through a contortionist's attempt to carry over parts of Title VII's remedial scheme in a selected manner, and expand damages under lower proof requirements is not appropriate.

D. The EPA's Collective Action Mechanism in Section 216(b) Should Not Be Amended to Incorporate Fed. R. Civ. P. 23

Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by individuals on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action. This is a mechanism that gives these individuals the choice of whether to become affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. The other benefit to Section 216(b) collective action plaintiffs in cases brought under the FLSA, ADEA, and EPA is that courts generally impose a more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees in order for their claim to survive the early phases of litigation. This standard is more stringent under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and under H.R. 7, would also apply to multi-plaintiff cases under the EPA. The proponents of H.R. 7 have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a), a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit; that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole; or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis

under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of these enumerated requirements.[41]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees.[42] The similarly situated requirement is met through sufficiently pleading and offering evidence obtained in early phases of discovery that discrimination occurred to a group of employees. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively "opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[43]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex as a form of sex discrimination under Title VII, as well as Rule 216(b) collective actions under the EPA.[44] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.[45] The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For these reasons, this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by H.R. 7, as the current mechanism sufficiently balances the interests of employers and aggrieved employees, and the proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul.

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[41] *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[42] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.*, No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001), citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).

[43] Portal-to-Portal Pay Act, 29 U.S.C. §256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[44] *See, e.g., Jarvaise v. Rand Corp*., No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

[45] *See, e.g., Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but § 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

E. Requiring the EEOC to Collect Disaggregated Pay Data from Employers Raises Significant Concerns

The unquenched interest of the government in collecting reams of data from the regulated community is an ongoing issue. Data collection is often viewed as a mere ministerial act by which employers can access an HR information system and automatically prepare reports containing the most intimate details of their employees. Such a mindset is reflected in Section 8 of H.R. 7 which would establish a significant new data collection obligation to be administered by the EEOC. This new requirement does not provide adequate protection for the privacy and confidentiality of employee personnel and compensation information.

H.R. 7's Section 8 proposes that the EEOC "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 employees." This sweeping, new authority is based on an amendment to Title VII.[46] H.R. 7 has been premised on alleged weaknesses of the Equal Pay Act. The data to be collected under Section 8, however, has very little to do with the Equal Pay Act. Rather, it is a new provision designed to greatly enhance the data collection of the EEOC in support of its Title VII authority. The implications are substantial.

The core element of the Equal Pay Act is that where substantially similar jobs are compensated differently between sexes, the reason must be job-related. The requirements of Section 8 ignore this basic focus. Rather, by compelling employers to create new personnel data collection systems for information generally not relevant to the Equal Pay Act, H.R. 7 will impose new vastly expensive and intrusive obligations on employers unrelated to the Equal Pay Act's purposes.

The Equal Pay Act does not address race or national origin discrimination, nor does H.R. 7 as a whole. There are no findings supporting a broad new assertion of data collection authority relating to the race or national origin of employees. What's more, employers under Title VII have never been required to collect, let alone maintain or submit, data on the national origin of employees. H.R. 7 does not contain any reference to an empirical study to support the collection of such data or any official estimates of its costs. And, perhaps most importantly, there are no outer boundaries limiting the reach of this data collection requirement.

For these reasons Section 8 of H.R. 7 should not be inserted into the Equal Pay Act.

F. H.R. 7's Mandates Regarding OFCCP's Investigative Techniques and Methods Is Inappropriate

Statutes provide relatively broad policy goals and enforcement schemes in which the agencies with subject matter expertise are delegated the power to fill in the details, monitor compliance, investigate potential violations, and enforce H.R. 7.[47] Enforcement policies and

[46] The current survey tool used by the EEOC under Title VII, the EEO-1 report which collects only demographic employee workforce counts is limited to employers with 100 or more employees or government contractors with 50 or more employees. In contrast, the Equal Pay Act covers employers with 2 or more employees and business volume of $500,000 or more. While this new data collection is technically authorized under Title VII, as part of the Paycheck Protection Act, it is not hard to envision an expansion to these smaller employers at some time in the future.

[47] Enforcement of the Equal Pay Act's mandate that any differences in pay between men and women performing equal work under similar working conditions, must be explained by job-related reasons such as a seniority system,

procedures are left to the responsible agencies who engage in rulemaking pursuant to the Administrative Procedures Act. Those requirements ensure the public has an opportunity to participate in a meaningful way in the rulemaking process.[48] In contrast, H.R. 7 rejects these fundamental principles and micromanages how the OFCCP should conduct its investigations and the procedures it and the regulated contractor community must follow.

Section 9(b)(2) of H.R. 7 mandates that the OFCCP follow the EEOC Compliance Manual with respect to defining "similarly situated employees," even though the EEOC's current Compliance Manual definition is not otherwise included in any statute, and it therefore seems inappropriate to be codified into law and prescribed for the OFCCP to follow. The EEOC Compliance Manual is not law, nor regulation, and can be changed at any time by the EEOC. The Supreme Court has repeatedly declined to give *Chevron* deference to EEOC Guidance.[49] H.R. 7 would effectively codify EEOC guidance that could be changed at any time at the EEOC's discretion, without legislative, court, or public comment. This is inappropriate.

Also, in a change that would upend the OFCCP's neutral selection system, H.R. 7 would also mandate a compensation data collection survey to be collected annually from at least half of all non-constructor *establishments* each year for purposes of developing a target list of companies to audit. Such a change implicates Fourth Amendment concerns that require either "evidence" of a violation or a neutral administrative plan to select contractors for audit.[50] To this end, the OFCCP already has in place a robust mechanism for selecting contractors for audit that comports with applicable Fourth Amendment Standards.[51]

Indeed, the collection of data on this scale would be a monumental burden on federal contractors with minimal benefit. In 2015, the OFCCP estimated that a proposed rule would impact over 500,000 federal contractors based on the number of contractor companies registered in the

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merit system or a system which measures earnings by quantity or quality of work, was allocated to the Secretary of Labor and then - by Reorganization Plan 1 of 1978, to the EEOC. Similarly, Reorganization Plan 1 consolidated enforcement of the executive orders requiring affirmative action to the Department of Labor, but did not change any of the enforcement procedures of the OFCCP.

[48] United States Attorney General's Manual on the Administrative Procedure Act, p. 1 (1947).

[49] See e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 133 S. Ct. 2517, Slip. Op. at 21 (2013) ("Respondent and the Government also argue that applying the motivating-factor provision's lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court's decision in Skidmore v. Swift & Co., 323 U. S. 134 (1944) . . . . The weight of deference afforded to agency interpretations under Skidmore depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U. S., at 140; see Vance, post, at 9, n. 4. . . . [The explanations provided] lack the persuasive force that is a necessary precondition to deference under Skidmore."); Ledbetter v. Goodyear Tire & Rubber Co. , 550 U.S. 618, 127 S.Ct. 2162, 2177 n. 11 (2007), dissenting position adopted by legislative action on other grounds ("Ledbetter argues that the EEOC's endorsement of her approach in its Compliance Manual and in administrative adjudications merits deference. But we have previously declined to extend Chevron deference to the Compliance Manual, Morgan, supra, at 111, n. 6, and similarly decline to defer to the EEOC's adjudicatory positions.").

[50] *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

[51] "Contractors can expect OFCCP to use a neutral selection system to identify contractors for compliance evaluations that meets applicable Fourth Amendment standards. OFCCP's neutral process for selecting contractors for compliance evaluations relies on multiple information sources and analytical procedures." https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf

System for Award Management (SAM).[52] While H.R. 7 is limited to non-construction contractors (i.e., service and supply contractors), the report would be required from at least half of service and supply *establishments*, not just contractors. As a result, this number would apply to an exponentially greater number of federal contractors. However, in 2018, the OFCCP audited only 785 service and supply contractors and in 2017, they only audited 735 contractors.[53] Thus, to mandate a survey system that would create unduly burdensome requirements applicable to hundreds of thousands of employers, and to expect the agency to then scour the survey data as a method for identifying contractors for evaluation is simply nonsensical and a waste of government resources.

Moreover, there are no identified protections or standards for determining whether the burden of collecting and producing the requested data is appropriate in light of the utility of the data, and that employee privacy and employer confidentiality and trade secret considerations with respect to an employer's compensation data have been addressed before the data is collected. H.R. 7's recordkeeping obligations should not be considered without a thorough analysis of the Fourth Amendment implications, along with the benefit, burden and privacy considerations with respect to compilation and production of sensitive wage data.

G. H.R. 7's Definition of Establishment Is Overly Broad

Currently, the EPA requires that an employee compare their wages against other employees within the same physical place of business in which they work. According to the regulations issued by the EEOC interpreting the EPA, the term *establishment* "refers to a distinct physical place of business" within a company. "[E]ach physically separate place of business is ordinarily considered a separate establishment" under the EPA. The regulations contrast this with the entire business which "may include several separate places of business."[54] Courts presume that multiple offices are not a "single *establishment*" unless unusual circumstances are demonstrated.[55] H.R. 7 assumes the opposite, and the expansion of the definition of *establishment* will lead to inappropriate comparisons of employee pay.

H.R. 7 broadens the definition of *establishment* to include "workplaces located in the same county or similar political subdivision of a State." H.R. 7's proposed expansion of the definition of *establishment* within which to consider compensation decisions redefines and expands "equal work performed under similar working conditions" in a way that is inconsistent with rational business decisions. Shouldn't employees who experience a higher cost of living as well as higher commuting costs and longer commuting distances be paid more than other employees performing the same job? Under H.R. 7 an employee bringing an EPA claim could compare their pay to that earned by an employee who performs work outside their physical place of business, but at a completely separate place of business within the same county (or similar political subdivision). For example, H.R. 7 would allow a male employee working in an employer's office in Sauk Village, Illinois, a small

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[52] 80 Fed. Reg. 54933, at 54951 (September 11, 2015). While the OFCCP suggested the number could be overstated because of the monetary threshold of $10,000 for OFCCP covered, they conceded the number might be understated because it may not capture all of the subcontractors over which the OFCCP also has jurisdiction.

[53] OFCCP By the Numbers, Supply and Service Compliance Evaluations Conducted, available at https://www.dol.gov/ofccp/BTN/index.html, last viewed Feb. 9, 2019.

[54] 29 C.F.R. §1620.9(a).

[55] *Chapman v. Fred's Stores of Tennessee*, No. 08-cv-01247, at 2013 W.L. 1767791, at *11 (finding relevant establishment was all stores in the nation because there was centralized control applicable to the one job at issue).

suburban village on the outskirts of Cook County, Illinois (with low commuting costs) to that of a female employee who performs the same work in a downtown Chicago, Illinois high rise office building (in a dense urban environment with high commuting costs). It would come as no surprise that an employer might pay the male employee working in Sauk Village with lower commuting costs less compensation for equal work performed by a female employee who experiences higher commuting costs to travel to her worksite each day in downtown Chicago, Illinois. Yet, H.R. 7 would compare their compensation without regard to this geographic difference that explains a difference in pay between the two employees.

H.R. 7's new definition of *establishment* is contrary to the EEOC's regulations that treat the definition of *establishment* as the specific circumstances of the work environment would dictate, including defining *establishment* as beyond one physical location in the presence of "unusual circumstances."[56] H.R. 7's expanded definition to include all physical locations within a county (or similar political subdivision) as one *establishment* should be rejected because it operates on a faulty assumption that all physical locations within a county or political subdivision present similar working conditions for purposes of setting employee compensation. H.R. 7's assumption that all locations within a county should be aggregated as one *establishment* ignores the many geographically-based reasons locations within a county do not present similar working conditions as a result of different costs of living, average commuting distances, and commuting costs. The EEOC's regulations are consistent with the EPA's purpose of ensuring equal pay for equal work, under similar working conditions. Those regulations acknowledge that "unusual circumstances" may exist that require the application of *establishment* across more than one physical location.

IV. CONSIDER PROVIDING EMPLOYERS INCENTIVES TO PROACTIVELY EVALUATE THEIR PAY PRACTICES TO ENSURE COMPLIANCE WITH THE EQUAL PAY ACT

The most efficient and long lasting improvements in employment practices emanate from voluntary efforts by employers to critically review and implement improvements to those practices. Today, many employers improve their compensation practices through intense voluntary reviews of employee pay to ensure that differences amongst employees who perform the same work are accounted for by explanatory, job-related variables. And, if the differences cannot be explained by those variables, by revising their pay practices.

These compensation reviews are voluntarily undertaken by employers to ensure compliance with law and to ensure a sound compensation system. Proactive voluntary employer self-evaluations and related pay adjustments can ensure an employer's compliance with the EPA's mandate that differences in pay between employees performing equal work under similar working conditions are explained by job-related reasons, even though an undertaking of that analysis may require significant resources and third party expertise. Today, across the country, employers are motivated to undertake

[56] Courts interpreting this provision have held that such circumstances may be present when pay and promotion decisions across different locations are controlled from a centralized location. *See, e.g., Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 591-92 (11th Cir. 1994) ("A reasonable trier of fact could infer that because of centralized control and the functional interrelationship between plaintiff and the comparators . . . a single establishment exists for purposes of the EPA."); *Brennan v. Goose Creek Consol. Ind. Sch. Dist.*, 519 F.2d 53, 57-58 (5th Cir. 1975) (treating schools within the same school district as one establishment).

these reviews to ensure sound compensation systems that reward employees based on legitimate job-related reasons.

However, some employers hesitate to perform those reviews for fear that those self-critical analyses may increase their legal risk and exposure if they are subject to disclosure to plaintiffs' attorneys (who may use the information gathered in these self-audits out of context or in other misleading ways to support litigation against the employer), and are not treated as confidential privileged analyses. This disincentive to employer voluntary compensation reviews could be solved through enactment of a safe harbor encouraging employers to perform compensation audits, and protecting those employers who engage in voluntary audits that meet certain specific requirements from having those audits used against them in any future litigation.

Subcommittee members may wish to consider the positive impact of incentivizing employers to voluntarily perform self-evaluations of compensation practices by including safe harbors and limitations on their disclosure, admissibility, or use in future litigation and other proceedings. For example, employers would be even more likely to perform periodic compensation audits if the performance of such a self-evaluation provided the employer: (1) a safe harbor against disclosure of the results of the audit, and (2) other possible affirmative relief (such as the elimination of liquidated damages) where the employer conducts the self-evaluation in good faith to assess pay practices and discrepancies in pay between employees performing equal work, and takes prompt appropriate action to eliminate pay discrepancies that are not explained by job-related factors.[57]

The Massachusetts Equal Pay Act, as amended, effective July 1, 2018, M.G.L. Ch. 149, § 105A**,** provides similar incentives to employers who perform self-evaluations; and it has, in fact, encouraged self-evaluations. The Massachusetts Attorney General has explained that self-evaluations should not be used to second guess employers, noting that whether an employer is eligible for either a safe haven or affirmative defense does not "turn on whether a court ultimately agrees with the employer's analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on whether the self-evaluation was conducted in good faith and reasonable in detail and scope."[58] I urge Subcommittee members to consider including a similar safe haven for employers who engage in good faith self-evaluations of their pay practices under the Equal Pay Act and Title VII.[59]

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[57] Similarly, an employer's decision to implement only part of the recommendations of a voluntary audit should not be able to be used to demonstrate willful unlawful action.

[58] Office of the Attorney General, Overview and Frequently Asked Questions, at 17 (March 1, 2018).

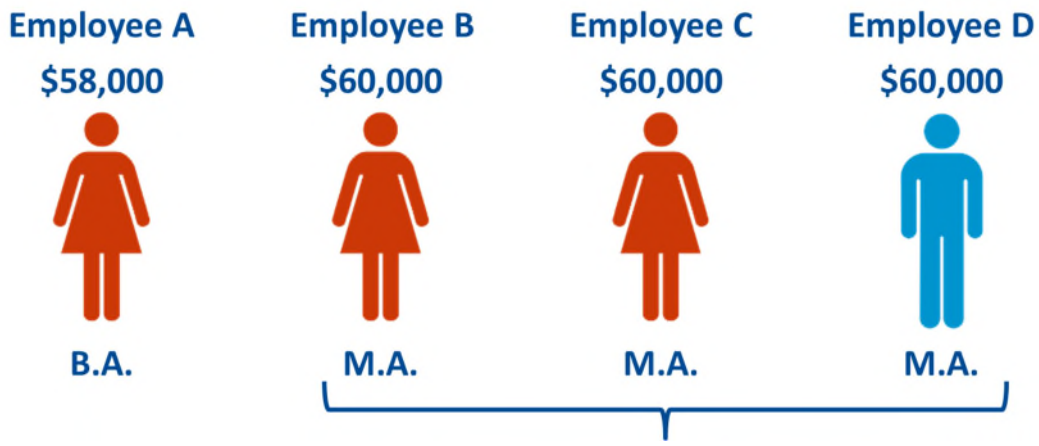
[59] Existing incentives to employers under Title VII have spurred the formulation of enhanced employer non-harassment and non-discrimination policies and practices. Under Title VII, an employer may avoid liability for harassment that does not involve an adverse employment action if the employer can demonstrate: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and (2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. *See, Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742 (1998). *See, also, Kolstad v. American Dental Association*, 527 U.S. 526 (1999) (employer may avoid liability for punitive damages if a discriminatory decision by a manager was made contrary to the employer's good faith efforts to comply with Title VII). After these cases were decided employers focused on the development and enhancement of policies and enhanced procedures to protect employees against workplace harassment and discrimination.

Conclusion

In conclusion, I have concerns with certain components of the Paycheck Fairness Act. Education & Labor Committee Chair Scott and Ranking Member Fox, members of the Civil Rights and Human Services Subcommittee and Subcommittee on Workforce Protections Subcommittee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me if I can be of further assistance in this matter.

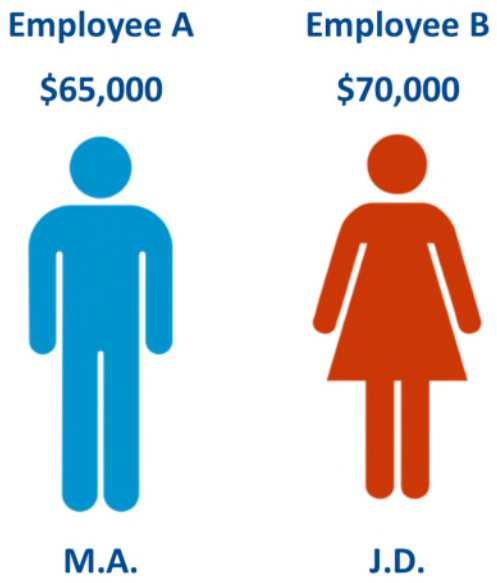
APPENDIX 1

Example 1: Minimum Requirements



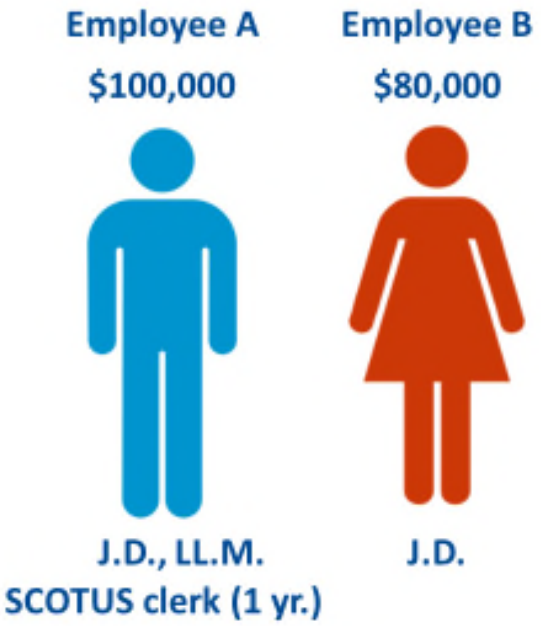
In this first example, an employer has chosen to pay higher salaries to all employees (men and women) who have higher educational qualifications for a marketing manager position; here a Master's degree as opposed to a Bachelor's degree. In this example, that job-related decision has an overall positive effect on female employees' salaries. If a Bachelor's degree is the minimum requirement for this position, then an employer may have a difficult time establishing that its decision to pay higher salaries for a more advanced degree is "consistent with business necessity." And yet, individuals with higher level degrees will command higher compensation in the market and thus a higher salary may be necessary to employ the applicant (and their higher education qualification may provide enhanced contributions to the business). In this example, Employee A may have a claim under the PFA when she compares her salary to Employee D. This is true, even though Employees B and C, who are also females with Master's degrees, are being paid the same salary as Employee D because a Master's degree that is not a job requisite may not be viewed by some courts as a "business necessity". Such a finding is a realistic outcome given that courts have found that an employee need only identify a single comparator of the opposite sex who is paid more for the same position.

Example 2: Additional Qualifications



In this example, an employer has chosen to pay a higher salary to a female Law Firm Office Administrator who has a J.D. degree. The job duties for that position do not include legal work. Nevertheless, in the employer's judgment, the performance of those job duties will be enhanced by the additional qualifications of a J.D., justifying the higher salary. But under a "business necessity" framework, that job-related reason may not qualify as a business necessity, as the job could be done without it. The employee may have a claim even if the advanced degree does actually improve performance or serve another legitimate business goal, where it was not absolutely "required" for the job.

Example 3: Additional Experience



In this third example, two second-year associates are paid differently based on their different levels of experience. A male associate who holds an LL.M. degree and was a Supreme Court clerk, is paid $20,000 more than a female associate who holds only a J.D. degree. As with the other examples, the employer's judgment that Employee A's additional experience (and qualifications) improves job performance or serves another legitimate business goal (e.g., impressing prospective clients) may not qualify as a "business necessity" since, technically, both employees are performing equal work as second-year associates, but present job-related reasons for the difference in compensation between these two associates.