STATEMENT
OF
CAMILLE A. OLSON

ON: **FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION**

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES**
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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TESTIMONY OF CAMILLE A. OLSON

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

FIGHTING FOR FAIRNESS: EXAMINING LEGISLATION TO CONFRONT WORKPLACE DISCRIMINATION

MARCH 18, 2021

Good morning, U.S. House of Representatives Education & Labor Committee; Workforce Protections Subcommittee Chair Alma S. Adams and Ranking Member Fred Keller; Civil Rights and Human Services Subcommittee Chair Suzanne Bonamici and Ranking Member Russ Fulcher; and members of the Subcommittees.

Thank you for inviting me to testify at this Joint Subcommittee Hearing entitled "Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination." [1] My testimony will focus principally on the Joint Subcommittee's consideration of H.R. 7, the "Paycheck Fairness Act" ("PFA" or "H.R. 7"). I will also provide some additional limited testimony with respect to H.R. 1230, the "Protecting Older Workers Against Discrimination Act" ("POWADA" or "H.R. 1230) (previously introduced in the 116th Congress (2019-2020), H.R. 1065, the "Pregnant Workers Fairness Act" ("PWFA" or "H.R. 1065"), and H.R. 5592, the "PUMP for Nursing Mothers Act" ("PUMP Act" or "H.R. 5592) (previously introduced in the 116th Congress (2019-2020)).

I am a partner with the law firm Seyfarth Shaw LLP 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.[2] I am a woman, working mother, and over the age of 40. I testify today as an attorney committed to ensuring equal employment opportunities for all applicants and employees, including women and working mothers and, specifically, that with respect to pay, ensuring that any pay differences between employees performing equal work under similar working conditions are based on bona fide, business or 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 employment policies and compensation practices. I provide counsel to employers designing, reviewing, evaluating, and, as appropriate, taking remedial steps with respect to their employment pay practices, to ensure compliance with federal and local equal employment opportunity laws. I have also regularly provided employers counsel to ensure that they meet their obligations to workers under the Americans with Disabilities Act of 1990, PL 101-336, 104 Stat. 327, as amended by the Americans with Disabilities Act Amendments Act of 2008, (see 42 U.S.C. Sections 12101, et seq) ("ADA"), and

[1] I would like to acknowledge Seyfarth Shaw LLP attorneys, Richard B. Lapp, Lawrence Z. Lorber, Annette Tyman, and Ryan L. Young, as well as Bill Varade, Cameron Van, Korin T. Isotalo, and Abigail Hodonicky, for their invaluable assistance in the preparation of this testimony.

[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.

the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, et seq, as amended by the Older Workers Benefit Protection Act, PL 101-433, 104 Stat. 978, ("ADEA"). 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* 42 U.S.C. Sections 2000e-5(e), (g), (k), 1981a(1)), 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 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Rizo v. Yovino*, 950 F.3d 1217, 1224 (9th Cir. 2020), cert. denied, *Yovino v. Rizo*, 141 S. Ct. 189 (2020), and have also testified before the Equal Employment Opportunity Commission ("EEOC") on issues involving non-discrimination in compensation and other compliance and enforcement matters. I also frequently speak and write on equal employment opportunity law topics.[3]

I begin with an analysis of The Paycheck Fairness Act, and then briefly discuss the remaining three bills - POWADA, PWFA, and the PUMP Act.

H.R. 7 -- The Paycheck Fairness Act

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, AND WOULD DISADVANTAGE ALL EMPLOYEES

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, business or 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 where appropriate, correcting unexplained pay differentials that are not a function of business or 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 business or job-related factors is not surprising. Key objectives of sound compensation systems include: (1) attracting qualified

[3] I am a member of the Board of Directors of America's Newspapers, Inland Press Foundation, and the University Club of Chicago Foundation. I am a member of the Executive Committee of the Coalition for Workforce Innovation ("CWI"). I am a Trustee of the Committee for Economic Development ("CED") of The Conference Board, and a Member of CED's Women in Corporate Leadership Committee and Fixing America's Infrastructure Committee. Since 2013, I have Chaired 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.

talent through competitive wages that recognize an applicant's potential based on past experiences, education and other business or 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 bona fide business or 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 job and compensation analyses would be effective for encouraging self-evaluation and the implementation of concrete steps to eliminate unexplained pay differentials without the need for litigation.

However, H.R. 7 seeks to provide a rigid, one-size-fits-all solution 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 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 discourage 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 Subcommittees, I thank you for the opportunity to share some of those concerns with you today.

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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).

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]

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 provide 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

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[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.

[7] *See*, Title VII, 42 U.S.C. at Sections 12117(a), 1981a(2).

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 backpay 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]

For these reasons, and all of the reasons set forth below, I urge the Subcommittee members 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 now 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

[8] 42 U.S.C. Sections 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 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).

or quality of production; or "any factor other than sex."[10] To meet their 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 business or 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 not apply where a litigant later 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 find the employer to have violated the EPA if years later an attorney suggests an alternative practice could have been chosen 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

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[10] 29 U.S.C. Section 206(d).

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

[12] 29 U.S.C. Section 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).

[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").

if the reason for the wage differential is a business or 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, business or 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, including the pay an applicant is leaving to accept a new job when an employer sets 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, business or 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 framed by the first three specifically enumerated defenses (seniority, merit pay, and productivity).

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 business or job-related differentiators used by employers in compensation decisions. Under the doctrine of *ejusdem generis*, the general words are construed to include business or 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:

[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).

The Second Circuit explains that, an employer proffering a "factor other than sex" defense must demonstrate that any "other differentials" causing "wage disparities" were "implemented for a **legitimate business reason**."[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]

Similarly, the Fourth Circuit found that the "factor other than sex" test is not satisfied by a gender-neutral pay system unless the employer demonstrates reliance on "**job-related distinctions underlying**" the wage differentials.[18]

The Sixth Circuit explained that "[t]he Equal Pay Act's catch-all provision 'does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a **legitimate business reason**.'"[19]

Similarly, the Ninth Circuit defines the EPA's "factor other than sex" as "compris[ing] only **job-related factors**."[20]

The Tenth Circuit Court of Appeals explained that the "factor other than sex" test is satisfied only if "any resulting difference in pay is '**rooted in legitimate business-related differences in work responsibilities and qualifications for the particular position**.'"[21]

The Eleventh Circuit Court of Appeals defines the "factor other than sex" in the EPA as including business or job-related factors such as the "unique characteristics of the same job; . . ., an individual's experience, training or ability; [and] . . . **circumstances connected with the business**."[22]

Given the above, to expressly provide that the factor other than sex in the EPA be business or 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 "business or job-related" into the "factor 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.[23]

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[16] *Forden v. Bristol Myers Squibb*, 63 Fed. Appx. 14, *15 (2d Cir. 2003) (citation omitted).

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

[18] *United States E.E.O.C. v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018) (citation omitted).

[19] *Balmer v. HCA, Inc.* 423 F.3d 606, 612 (6th Cir. 2005) (citation omitted) *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826 (2011).

[20] *Rizo v. Yovino*, 950 F.3d at 1224.

[21] *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (citation omitted) (analyzing "[a] bona-fide, gender-neutral pay classification system.").

[22] *Lima v. Fla. Dep't of Children & Families, 627 Fed. Appx. 782, 786 (11th Cir. 2015) (alteration in original) (citation omitted).*

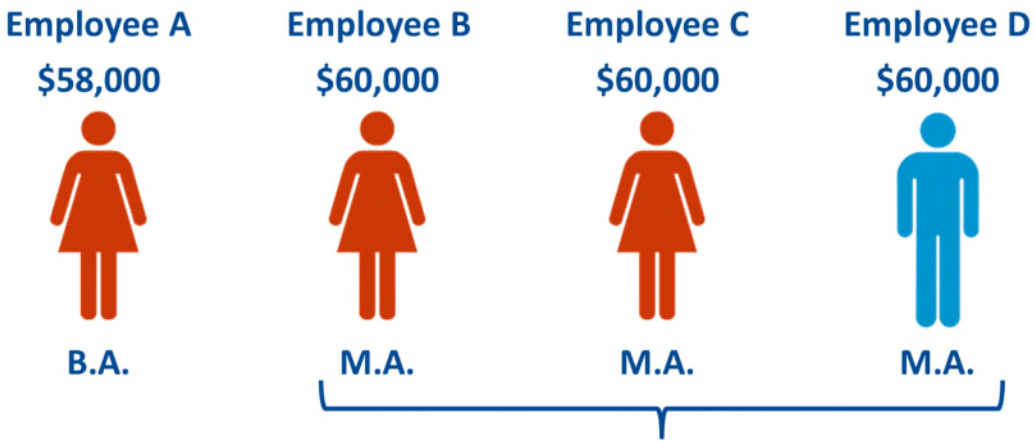
[23] *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (court noted its function is not to sit as a "super personnel department" and that inquiring into the reasonableness of an employer's decision would narrow the exception

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." Business or job-related is fundamentally different from business necessity. Business or job-related requires that a nexus is shown between a compensation decision and 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. The following 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. These examples also show that H.R.'s business necessity requirement will discourage employers from making and rewarding these differences between applicants and employees, regardless of their sex, to their detriment.

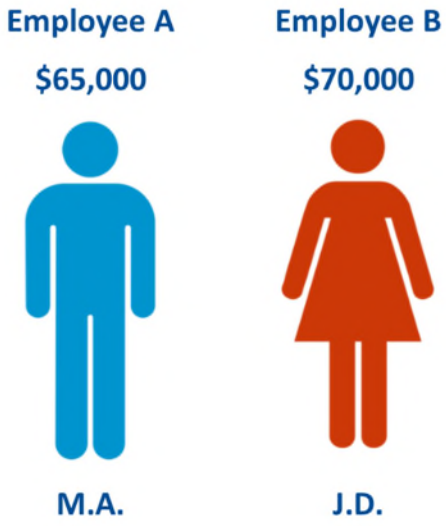
Example 1: Paying A Higher Salary to All Employees Whose Educational Qualifications Exceed Minimum Educational Requirements Benefits Everyone, But May Not Qualify as a Business Necessity, and thus, Relying on Higher Educational Qualifications To Pay Women More May Violate the PFA.



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.").

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 than the minimum qualifications; 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 some courts have found that an employee need only identify a single comparator of the opposite sex who is paid more for the same position.

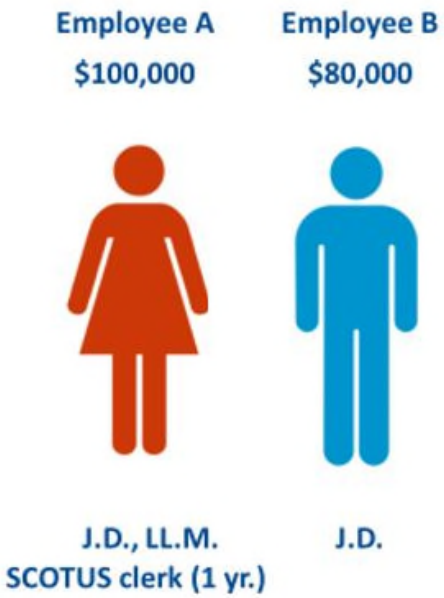
Example 2: The Factor Other Than Sex Defense of Additional Qualifications Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Woman More, May Violate the PFA.



In this example, an employer has chosen to offer a higher starting salary to a female Law Firm Office Administrator applicant who has a J.D. degree based on the employer's belief that her J.D. will provide her with unique insights in performing her management responsibilities of a law firm, and because her qualifications provide her with other employment opportunities at higher salaries, than a male office administrator received in another office. So, while the job duties for that position do not include legal work, in the employer's judgment, the performance of the administrator duties will be enhanced by the additional qualifications of a J.D., justifying the higher salary. But under a "business necessity" framework, this 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: The Factor Other Than Sex Defense of Additional Experience Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Woman More, May Violate the PFA.



In this third example, two second-year associates are paid differently based on their different levels of experience. A female associate who holds an LL.M. degree and was a Supreme Court clerk, is paid $20,000 more than a male 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 business or job-related reasons for the difference in compensation between these two associates.

Example 4: The Factor Other Than Sex Defense of An Applicant's Negotiating Skills Based on Prior Salary and Other Factors Benefits All Employees Regardless of their Sex, But May Not Qualify as a Business Necessity, and thus, Reliance on it To Pay A Women More, May Violate the PFA.

In summary form (without illustrations), I have also described below six real-life examples of female applicants and a current employee who used their prior salary or overall compensation package with a prospective employer, or a competitive bid from another potential employer to increase their pay. Under the PFA, these employers who increased the female applicants' pay and also increased the pay of an existing female employee with a more lucrative job offer risk non-compliance with its requirement that the reason it did so was a business necessity and/or that in doing so it was obligated to raise the pay of all other employees as "an alternative measure" to eliminate differences between the pay of men and women performing the same job.

First, a software development company is filling two positions in a new role involving highly specialized software engineering. No salary surveys are on point. The employer offers both successful candidates—one man and one woman—a starting rate of $150,000, in line with what the company pays its incumbent software engineers. The man accepts the offer but the woman, having a better understanding of the highly specialized arcane knowledge that her specialized role requires, demands $185,000. The company meets her demand because no other candidate is available and because the need for her specialized talent is urgent. In doing so has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Second, an engineering firm is recruiting two engineers, with an onboarding date of July 1. The recruiting process identifies the two most qualified applicants: one man and one woman. Each is offered a starting salary of $87,000. The man accepts the offer. The woman thinks the $87,000 offer is fair, but asks for a sign-on bonus, explaining that the $10,000 annual retention bonus she expects at her current employer will not come due until October 1. The man, too, had a $10,000 annual retention bonus at his company, but that bonus was already paid, on April 1. Animated by a sense of equity and fairness, and wanting to hire the woman quickly, the firm pays her (but not the man) a $10,000 sign-on bonus. In increasing the female employee's offer to entice her to accept it and because the employer believes it's the fair thing to do, has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't provide the male applicant the $10,000 as well?

Third, a professional services company, in recruiting for a vice president to lead a region, identifies a highly qualified woman working as an executive at another firm. The company's standard executive contract includes base pay, bonus, and stock options. During contract negotiations, the female executive outlines the three-year vesting schedule for her stock options at her current firm, which she expects to yield her a value of $200,000. The employer raises its salary offer to make the woman whole (for the predicted value of her loss in stock options) over the next three years. Meanwhile, the salary for an incumbent male vice president leading a different region, while performing a job requiring equal skill, experience, and responsibility, would be $200,000 less over the three years in question. In raising its salary offer for the female applicant has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Fourth, an manufacturer is recruiting two sales managers, one a man and one a woman. Each is offered a starting salary of $75,000. The man accepts the offer. The woman points out that her salary at her current employer is $85,000, and though she wants to accept the offer, because she is the sole financial support for her family of four, she cannot tolerate a $10,000 pay cut. The company responds with an offer of $80,000, which she accepts. In raising its salary offer for the female applicant has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it doesn't raise the male applicant's pay as well?

Fifth, a private high school, filling two teaching positions, considers two prime candidates—a man making $60,000 at his current school and a woman making $59,000 at her current school. During the interview process, the woman reveals she is considering an offer from a competing private school at $66,000. The man has no other prospects. The school hires both candidates, the man at $63,000 and the woman at $66,000 (matching her competing offer). When the employer matches the female applicant's competing offer has the employer met the business necessity requirement of the PFA? If so, has it also adopted the least impactful practice, where it offers and the male applicant

accepts an offer that is $3,000 less than the female applicant's starting pay, but later files suit against the high school alleging an equal pay violation?

Sixth, a photojournalist is enticed to leave her position at a major metropolitan daily in Ohio when she receives an unsolicited offer to join another daily in Michigan that pays $10,000 more in annual salary. She informs her employer of her dilemma; her family could really use the additional $10,000. Concerned about losing this prize-winning journalist, the Ohio daily matches her competitive offer, and she decides to stay put. In doing so, she now makes $10,000 annually more than any other photojournalist at the Ohio newspaper, including male photojournalists. When the employer matches the female photojournalist's competing offer has the employer met the business necessity defense in the PFA? If so, has it also adopted the least impactful practice where it doesn't raise the pay of other male photojournalists who now make $10,000 less than the female photojournalist?

As these examples show, both practically and analytically, this "business necessity" showing cannot be made 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. And, the losers under H.R. 7 would be workers, both women and men.

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 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 the employer could have chosen an alternative employment practice. This just encourages after-the-fact second-guessing and creates uncertainty for employers in the examples provided above, and every day in workplaces across America. Examples of that specific second-guessing have been included alongside the examples described under Example 4 immediately above.

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 with other employees. 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, and should not be imparted into the EPA.

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 business or 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 often 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.[24]

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 caveat 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

[24] *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").

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 clear 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. For example, 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 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, AS WRITTEN

A. There are Circumstances Where Consideration of An Applicant's Prior Pay are Not Inconsistent with the Equal Pay Act, and An Employer's Consideration of Same In Setting Initial Pay Should Not Be Banned As Directed by H.R. 7

Throughout the more than 50 years after the EPA's enactment in 1963, courts have held that employers could, in appropriate circumstances, treat prior salary as a factor other than sex, while forbidding employers to pay women less simply because market forces would permit the employers

to get away with it.[25] To do otherwise adopts an extreme rule that offends common sense and business realities, while undermining employers' reliance on 50 years of EPA jurisprudence.

Salary history information, in combination with other information provided by applicants, provides employers with a holistic view of the relative qualifications, experience levels, and immediate prior performance of candidates. An applicant's past salary is also useful for assessing real time information about the competitive market wage for a given job. It is 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. Information about an applicant's salary history has long been used by employers to make informed decisions about candidates during the hiring process, not for the purpose of perpetuating historical inequality, but because consideration of prior pay, alongside other business-related factors such as experience, education, past performance, and training advantages all job applicants. To be sure, it is possible that an applicant's past salary may reflect historical sex discrimination in pay. Today, under the EPA as written, and interpreted by courts of appeals, employers who consider prior salary among other factors when setting initial wages do not automatically violate the EPA. However, employers, as always, have the burden of showing that any resulting pay differential is based on a valid factor other than sex.

Without any stated reason or justification, H.R. 7 would prohibit employers from seeking or using information about an applicant's prior salary in connection with the hiring process, including formulating an initial pay offer. Specifically, it would 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 its ability to compete for talent in a competitive labor market.

1. Employers Use Prior Salary History for Legitimate Reasons That Often Benefit Women

H.R. 7 proposes to amend the EPA by severely limiting an employer's right to utilize wage history information from a prospective employee. However, employers frequently make business decisions where the consideration of an applicant's prior salary, among other factors, does not involve any pay discrimination because of sex, but instead benefits employees, regardless of their sex.

For example, when an employer considers an applicant's salary history, coupled with other data like education or experience, it provides a holistic measure of an applicant's relative skill, responsibility, and job performance. Salary history information also helps assess an applicant's interest because it avoids the awkward scenario of an applicant seeking a salary higher than an employer can pay.[26] Finally, salary history allows an employer to make a competitive offer to an

[25] The Ninth Circuit Court of Appeals is the only outlier, disagreeing with the EEOC, all other courts of appeals and previous panels of the Ninth Circuit Court of Appeals when it held in a confusing 2020 opinion that prior salary can be considered for setting salary, but not as an affirmative defense to the EPA (described in the opinion's concurrence as an "indefensible contradiction" by Judges McKeown, Tallman and Murguia). *Rizo v. Yovino*, 950 F.3d at 1236.

[26] Yuki Noguchi, Nat. Pub. Radio, Proposals Aim to Combat Discrimination Based on Salary History (May 30, 2017), https://tinyurl.com/ya67hrua.

applicant because it allows the employer to meet, or exceed raises or offers the applicant received from competing employers.[27]

In an April 2020 survey, the Society for Human Resource Management ("SHRM") asked its members how they use information regarding an applicant's prior salary history.[28] SHRM respondents reported using prior salary history for one or more legitimate business purposes, including: framing an attractive offer; screening out applicants they could not afford; and increasing an offer to attract an applicant away from his or her current job. The survey found that this market data also helped employers assess their own pay structures to ensure they maintained competitive wages for current and prospective employees.

Landing candidates:

- 65.3% of respondents report screening out candidates whose salary demands are too high.
- 64.6% of respondents report framing an offer that would be attractive to the applicant.
- 51.9% of respondents report inducing a candidate to leave a current job.
- 37.8 % of respondents report gauging candidate's likely interest in an open position.
- 32.6% of respondents report obtaining important negotiation information.
- 24.2% of respondents report negotiating a higher rate of pay with an applicant who has opportunities for higher-paid jobs with other employers.

Evaluating candidates:

- 14.1% of respondents report ensuring the candidate has the desired experience, ability, etc.
- 13.6% of respondents report learning about a candidate's prior performance, education, skill or experience.

Improving internal pay structures:

- 58.4% of respondents report gathering market data to compare against employer's own pay structure.

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[27] See, e.g., Amy Gallo, Harv. Bus. Rev. Online, Setting the Record Straight: Using an Outside Offer to Get a Raise (July 5, 2016) (outside offers "a legitimate way to get … higher compensation"), https://tinyurl.com/jhm2eub; see also *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (citation omitted) ("[A]n employer may consider the market place value of the skills of a particular individual when determining his or her salary").

[28] These results are from a poll taken April 16–20, 2020, with 616 SHRM member respondents. See https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/data-snapshot-how-employers-use-prior-pay-in-decision-making.aspx (accessed March 14, 2021).

- 25.3% of respondents report inducing an existing employee to reject a competitive offer from another employer.[29]

Stifling an employer from utilizing information provided by an applicant about their prior salary will hurt all applicants, regardless of their sex. Some specific examples illustrate how employers consider prior salary without blindly accepting any socially biased market forces creating endemic pay discrimination.

Considering prior or current salary information benefits all employees. The following are but a few real life examples:

In example one, a real estate brokerage is recruiting new residential sales agents. In deciding how much to offer new hires, the brokerage relies on a mix of factors, including information provided by applicants regarding their years of experience, written recommendations, prior sales revenue, and current salary. It turns out that female agents in the relevant market generally earn higher salaries and among the brokerage's new hires the women are paid more because they had been earning higher salaries at their former employers. Without the ability to use this critical information, the employer and female applicant are disadvantaged.

In example two, a grocery store must quickly replace two junior managers just as a global pandemic erupts. Store management generally knows that competing stores have a pandemic premium pay program for store managers, but does not know the amounts being paid. Store management identifies two candidates of equal skill and experience—one a man, one a woman, and both working at different competing stores. During the hiring process both individuals ask whether their current pandemic premium pay will be matched at the store, noting the amount of their current premium pay. The store responds positively to each applicant, offering each the store's base annual pay for a junior manager plus a guarantee to pay each applicant the premium pay the applicant was earning elsewhere. The male candidate is thus hired at $60,000 and the woman at $65,000. Without using the information provided by each applicant regarding the applicant's pandemic pay premium and agreeing to pay it, the grocery store would not be extending a competitive offer to the female or male candidate. Here, the female candidate would miss an opportunity to increase her salary (by her higher premium pay) and the store would be disadvantaged in its recruitment efforts.

In the final example,[30] a smaller law firm merges into a bigger law firm. The bigger firm has a lock-step salary system for associates. The smaller firm had been paying associates smaller base salaries, while awarding widely varying performance bonuses, with the larger bonuses generally going to female associates because of their generally higher performance. The female associates share this information during the hiring process with the bigger law firm, concerned that their pay will not recognize their performance. Upon the merger, the larger firm integrates the smaller-firm associates into its lock-step payment system on the basis of their total pay earned during the prior year (as a result of the information provided by the associates), with the result that women integrated into the bigger firm now have a higher salary than their male counterparts who have been integrated into the bigger firm. If the acquiring firm is prohibited from relying on prior salary information for

[29] *Id.*

[30] *See also, supra*, at pages 10 - 14 for additional examples of an employer's use of prior salary that may be unlawful under H.R. 7.

the merged employees in setting their compensation offer, the women would be disadvantaged in their compensation.

In these examples, considering prior salary in setting pay is neither a pretext for unlawful discrimination, nor a disadvantage to women, but a sound and important factor appropriately considered in setting starting salary in many circumstances to attract and to retain employees. The EPA allows employers, exercising their discretion, to decide when the use of prior salary is appropriate, and the EPA allows courts, exercising their judgment, to determine where employers have crossed the line from permissible use to impermissible use.

The above examples show various ways in which employers making real-world pay-setting decisions sometimes utilize an employee's or applicant's prior (or current) salary (or competitive future salary offer), as one factor among others, in setting pay. One might object that the examples show how *women* can benefit from consideration of prior salary. But that is the point. Considering prior salary (and in the example of a competitive offer, a market salary proposal) can benefit women as well as men. And employers could not decide to consider prior salary *only* when the practice would benefit women, because any such practice would be unlawful. H.R. 7's categorical ban on considering prior salary as a factor other than sex under the EPA in setting initial salary offers may, in fact, have the perverse effect of hurting women, as well as men, in their pay aspirations.

2. Courts Have Long Recognized That Under Certain Circumstances Prior Salary History Is A Legitimate Factor Other Than Sex

Under certain circumstances, courts have found that prior salary history can constitute a "factor other than sex" if considered for legitimate business reasons.[31] This often includes looking at prior salary history alongside additional factors, other than sex.[32]

The Eighth Circuit Court of Appeals explained that prior salary can constitute a "factor other than sex" because it may also demonstrate a candidate's superior "education, experience, or other qualifications."[33] The Second Circuit similarly found that prior salary history could justify wage differentials, where a higher starting salary was required to attract qualified candidates.[34] Affirming the district court, the Sixth Circuit Court of Appeals explained "a higher salary history" was a legitimate "factor other than sex," when coupled with "a higher salary" demand and "greater relevant industry experience."[35] The Federal Court of Claims has also found that "qualifications and existing

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[31] As noted above, the Ninth Circuit Court of Appeals is the only outlier, determining that prior salary history can never play a role in an initial pay decision. *Rizo v. Yovino*, 950 F.3d at 1232.

[32] *See Drum v. Leeson Elc. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

[33] *Id*. *See, also, Taylor v. White*, 321 F.3d 710, 714–15, 717 (8th Cir. 2003).

[34] *Belfi v. Prendergast*, 191 F.3d 129, 137 (2d Cir. 1999) (The LIRR had legitimate business reasons for considering prior salary history "to attract union employees to management by including overtime pay in calculating the 10 percent promotion increase given under the Salary Plan."); *see also*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525, 527 (2d Cir. 1992) (employers may rely on prior pay if it "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue" and "has some grounding in legitimate business considerations");.

[35] *Balmer v. HCA, Inc.*, 423 F.3d 606, 613 (6th Cir. 2005) abrogated on other grounds by *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011). *See id.* at 612 (citation omitted) ("Consideration of a new employee's prior salary is allowed as long as the employer does not rely solely on prior salary to justify a pay disparity."). *See*

income" may justify wage differentials when "equitably applied to each candidate."[36] Furthermore, the Fourth, Tenth and Eleventh Circuits have all found that employers may rely on prior pay as one such "factor other than sex."[37] Similarly, the Seventh Circuit Court of Appeals has issued numerous decisions holding that prior salary information can be a legitimate factor other than sex when considered with other information.[38]

The Ninth Circuit itself once recognized the wisdom of a "pragmatic standard, which protects against abuse yet accommodates employer discretion," by requiring that an employer use prior salary as a "factor reasonably in light of the employer's stated purpose as well as its other practices." *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982). This "pragmatic standard" necessarily recognized that the EPA "does not impose a strict prohibition against the use of prior salary." *Id.* at 878.

The EEOC, the federal agency empowered to enforce the EPA as of 1978, has, since at least 1997, agreed with these court decisions, that prior salary can be a legitimate factor other than sex. *See, e.g.*, EEOC Notice Number 915.002 (Oct. 29, 1997), Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (advising further inquiries in cases where a defendant employer has asserted prior salary as a 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."[39]

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

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.

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also, Beck-Wilson v. Principi, 441 F.3d 353, 365, 366 (6th Cir. 2006) ("any other factor" exception includes factors "adopted for a legitimate business reason"; employers can rely on a sex-neutral system such as prior pay if there are "business-related" reasons to do so).

[36] *North v. United States*, 123 Fed. Cl. 457 , 467 (2015).

[37] *See United States EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018) (citations omitted) ("[Q]ualifications, certifications, and employment history fall within the scope of . . . 'a differential based on any factor other than sex.'"); *see also Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (citation omitted) (employers may rely on prior salary history if it is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *Lima v. Fla. Dep't of Children & Families*, 627 Fed. Appx. 782, 786 (11th Cir. 2015) (citation omitted) (prior salary history related to "an individual's experience, training, or ability" can be one such "[other] factor than sex.").

[38] *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)).

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

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 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 relying upon salary information that is voluntarily provided by applicants that fosters competition under our free market system and benefits applicants and employees.

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 recognizes the importance of ensuring non-retaliation for requesting or discussing certain wage data, 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,[40] the Age Discrimination in Employment Act,[41] Title V of the Americans

[40] 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. Section 2000e 3(a).

[41] The Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 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,

with Disabilities Act,[42] Section 501 of the Rehabilitation Act,[43] the Equal Pay Act,[44] and Title II of the Genetic Information Nondiscrimination Act[45] **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[46] 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 employment practice, including unequal pay for equal work.[47] Opposition is protected even if it is informal or does not include the words unequal pay or

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testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. Section 623(d).

[42] 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. Section 12203(a).

[43] Section 501 of the Rehabilitation Act states, "[t]he standards used to determine whether this section has been violated in a complaint alleging non-affirmative 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. Section 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)

[44] 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 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. Section 215(a)(3).

[45] 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. Section 2000ff-6(f).

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

[47] *Id*.

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
- 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").[48] 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.[49]

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

[48] 29 U.S.C. Section 158(a)(4).

[49] *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.").

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 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.[50]

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

[50] 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.

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 provides a level of damages far exceeding those available under Title VII of the 1964 Civil Rights Act, as amended in 1991 by 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 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 selective 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 workers 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.[51]

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. [52] 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.[53]

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.[54] 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 or collective action alleging sex discrimination in pay.[55] The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim

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

[52] *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).

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

[54] *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).

[55] *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 Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

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.

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.[56] 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 begins with a comparison of pay between equal jobs. The requirements of Section 8 ignore this basic focus. For instance, H.R. 7 refers to collecting compensation data by "job categories, including the job categories" set forth in the EEOC's Information Report ("EEO-1). Such job categories are exceedingly broad and share no relationship to the basic tenants of "equal work" required under the EPA. Likewise, requiring collection of hiring, promotions and terminations data are also data points that have no relevance to EPA claims. Thus, 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.

[56] 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.

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 Are 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.[57] Enforcement policies and 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.[58] 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. More importantly, H.R. 7 imposes EPA requirement son federal contractors where there is currently no authority for doing so.

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.[59] 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

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[57] 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, 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.

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

[59] *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.").

or a neutral administrative plan to select contractors for audit.[60] To this end, the OFCCP already has in place a robust mechanism for selecting contractors for audit that comports with applicable Fourth Amendment Standards.[61]

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 System for Award Management (SAM).[62] 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 the last four years, the OFCCP scheduled, on average, only 1,025 service and supply contractor audit annually (2020 - 1,538; 2019 - 1,042; 2018 - 785; and 2017- 735).[63] 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."[64] Courts presume that multiple offices are not a "single *establishment*" unless unusual circumstances are demonstrated.[65] H.R. 7 assumes the

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

[61] "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

[62] 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.

[63] 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.

[64] 29 C.F.R. Section 1620.9(a).

[65] *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).

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 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."[66] 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.

[66] 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).

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 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 an affirmative defense) 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 reasonable action to eliminate pay discrepancies that are not explained by job or business-related factors.[67]

The Massachusetts Equal Pay Act, as amended, effective July 1, 2018, M.G.L. Ch. 149, Section 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."[68] I urge Subcommittee members to consider including a similar

[67] 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.

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

safe haven for employers who engage in good faith self-evaluations of their pay practices under the Equal Pay Act and Title VII.[69]

H. R. 1230 -- Protecting Older Workers Against Discrimination Act

In the 116th Congress, the Protecting Older Workers Against Discrimination Act ("POWADA") was introduced as H.R. 1230 on February 14, 2019. This Committee held an omnibus hearing on May 21, 2019, addressing POWADA and other legislation, marked up the bill on June 11, 2019 and the House passed it on January 15, 2020. There had been no action on the bill in the Senate. This testimony is addressing the version passed by the House in 2020.

H.R. 1230 was introduced to address an asserted lapse in the reach of the Age Discrimination in Employment Act caused by the Supreme Court decision in *Gross v FBL Financial Services*, 557 U.S. 167 (2009). *Gross* held that the specific language in the 1991 Civil Rights Act which recognized a mixed motive theory in Title VII did not extend to other anti-discrimination statutes, such as the ADEA. In order to understand the implications of H.R. 1230, it would be helpful to understand what a mixed-motive theory of discrimination entails. Under standard and long accepted jurisprudence, anti-discrimination statutes require that plaintiffs prove either that the employer intended the practice or act which discriminated against a protected class member or class or that a practice otherwise neutral had an overwhelming negative numerical impact on the protected class. The 1991 CRA contained two provisions which were somewhat at odds. The first, 42 USC Section 2000e-2(k)(1)(A)(i), states that in disparate impact cases, " a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." (emph. added). The act goes on to require in section (1)(B)(i) "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact…" (emph. added). Thus the core provision defining disparate impact discrimination clearly requires singular proof of intent. However, the 1991 CRA went on to add another provision, 42 USC sect. 2000e-2(m) which provided that in addition to other provisions of the subchapter, discrimination can be established under the Title VII covered classes when the complaining party demonstrated that membership in one of the protected categories was a motivating factor for any employment practice, even though other factors also motivated the practice. Subsection (m) was an added alternative to the core requirement of required proof and was intended to clarify a concurring opinion in another Title VII Supreme Court decision, *Price Waterhouse v Hopkins* 490 U.S. 228 (1989), concurring opinion at 261 which suggested under the facts of the case that the court might consider alternative reasons advanced for the employment decision. It should be further noted that the plaintiff in the *Price Waterhouse* case prevailed by a 6-3 vote. It should be noted that Congress recognized that the mixed-

[69] 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.

motive theory was subordinate to the core definition of discrimination by limiting remedies if a mixed motive was found to favor the complaining party to include only attorney's fees, and an order directing the employer to cease the offending practice.

While the question of defining mixed-motive proof of discrimination was raised by the 1991 CRA, it is clear beyond question that the Congress only considered its application to Title VII cases and that is what the Supreme Court held in the *Gross* decision. Notwithstanding this clear result, the proponents of POWADA suggest that every statute which addresses discrimination should be interpreted in the same manner notwithstanding differences in coverage, statutory structure and purpose. So the basic argument advanced for POWADA is that decisions addressing age discrimination under the Age Discrimination in Employment Act ("ADEA") should be governed by statutory construction established in a related but different statute, Title VII. This proposition was expressly disavowed by the Supreme Court in *Meachem et. al. v Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008). There the Supreme Court citing to *Smith v City of Jackson* 544 U.S. 228 at 233(2005) held that "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the "reasonable factors other than age" ("RFOA") clause into the ADEA "significantly narrowing its coverage'" Congress did not denigrate the problem of age discrimination in the ADEA but rather recognized, as it should, that in dealing with the complexities of discrimination, and the unique circumstances of each protected category covered by the plethora of anti-discrimination statutes that not every form of discrimination is the same nor does it require the same definition and remedial response.

The basis for this decision lies not only in the express language of the ADEA and Title VII but in the legislative history of the treatment of age discrimination. Congress considered including age in the protected categories when it debated and passed Title VII as part of the 1964 Civil Rights Act. During the debate held on February 8, 1964, the House voted down an amendment which would have added age to the protected categories by a vote of 123 to 94. In the debate, the lead sponsor, Chairman Cellar (D-NY) stated that the reach of age discrimination, although inherently pernicious was not widely understood and differed from the focus of the Civil Rights Act. Similarly in the Senate debate on June 11, 1964, Democrat Senators Humphrey and Morse and Minority Leader Dirksen as prime sponsors of the Civil Rights Act argued that the problems of age discrimination were distinct from those of race discrimination and should be addressed separately. The amendment to include age in the Civil Rights Act was defeated 63 to 28. When age discrimination was finally addressed in the 1967 Age Discrimination in Employment Act, which was made part of the Fair Labor Standards Act and not Title VII, Congress determined in 29 U.S. 623 (f)(1) that it would not be unlawful for an employer to rely on RFOA.

It is thus antithetical to the structure and basis of the ADEA to drop into that statute a clause from another statute which has its own structure and long history of judicial interpretation and statutory amendment which neither comports with the clear intent of Congress and which cannot coherently exist with the RFOA provision in ADEA. A mixed motive as defined in Title VII would simply negate the RFOA section in ADEA. As drafted, the Title VII mixed-motive theory posits that there could be a good motive and a bad motive for an employment decision and the decider, either Judge or jury would weigh both to determine guilt. But under the RFOA theory, the issue is not to weigh different motivations but to determine if the defending theory was reasonable. If so, the issue is decided. If the mixed-motive theory of discrimination were dropped into the ADEA, it would revise in its entirety the long standing structure and interpretation of the ADEA.

Another significant concern about POWADA which should be addressed is that including a mixed-motive theory into the ADEA and the other statutes at issue will simply encourage needless litigation in which the only successful participant will be the plaintiff's attorney if the plaintiff prevails. If the employer demonstrates that it would have taken the same employment action in the absence of the impermissible motivating factor, by statute the "successful" plaintiff gains nothing from the proceeding and indeed may well be left with a tax liability , when his or her attorney's fee is paid. Too, because the theory of mixed-motive is so elusive, and under the RFOA theory in the ADEA so confusing, it will undoubtedly make it nearly impossible for an employer to prevail on summary judgment even if it has a persuasive explanation for its action. Such a result does not prevent discrimination. Rather, it furthers unnecessary litigation. Indeed, under the mixed-motive theory a persuasive explanation for an employer's action is not persuasive at all. While there could have been a justification to amend Title VII in view of the multiple opinions in the *Price-Waterhouse* decision, inclusion in the ADEA or the other statutes would only serve to upset the statutory structure of those statutes and change the theories under which the those theories of discrimination have been addressed.[70]

In addition to the attempt to include mixed-motive into three different statutes, H.R. 1230 also included language which would have inserted the mixed-motive theory of discrimination into the retaliation sections of Title VII, 42 USC 2000e-3(a), into the Rehabilitation Act and into the Americans with Disabilities Act. The Findings and Purposes section of H.R. 1230 provided no reason or purpose for the inclusion of this statutory addition. In the testimony provided by the advocates for POWADA it was stated that the effort was to reverse the decision of the Supreme Court in *University of Texas SW. Medical Center v. Nassar* 133 S. Ct. In *Nassar*, relying in part on the *Gross* decision, the Supreme Court held that " [t]he text, structure, and history of Title VII demonstrates that a plaintiff making a retaliation claim … must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Nassar* at 2534. In addition, and perhaps even more persuasive, the Court noted that the Congress choose not to amend section 2000e-2(a) when it included the "lessened causation test stated in 2000e-2(m)" *Nassar* at 2533. There was an obvious reason for Congress' decision and the Supreme Court's interpretation of "the text, structure and history of Title VII."

Retaliation is inherently a case of differing explanations. The plaintiff claims that the employer is taking an adverse action because the plaintiff complained of an employer's action. The employer then has to show that its action was otherwise justified because of an employment policy or some other independent reason. The plaintiff will then attempt to show that the employer's explanation is without substance. If the plaintiff is successful. Then all of the operative remedial provisions of the statute are available. The plaintiff will receive actual relief.

However, if the case is a mixed-motive case, which will involve the same set of facts, the plaintiff receives nothing. And since a retaliation case always involves mixed motives or dual motives, an employer's adverse action and the plaintiff's claim that the action was motivated in part at least in part by an improper motive, there will always be a "mixed-motive". However, even if a

[70] In considering age discrimination and the reach of the ADEA, it should be noted that unlike other protected characteristics, age is not an immutable characteristic and the ADEA treats age differently even as compared to individuals within the protected age level but with different ages. See e.g. *O'Connor v Consolidated Coin Caterers,* 517 U.S. 308 (1996). So in attempting to rationalize the RFOA affirmative defense, with mixed motive treatment, it becomes even more difficult to reach a fair conclusion and the burden on employers is even greater 29 U.S.C. Section 623 (f) (1).

decider weighs the two motivations and determines in some way that the improper motivation was controlling, the plaintiff still receives nothing. This gives the plaintiff's attorney two bites at the apple but the plaintiff herself doesn't even get the core.

While Congress decided to incorporate the mixed-motive theory into Title VII it recognized that mixed-motive was a "lessened causation test" *Nassar* at 2533. It is clear that neither the ADEA nor the ADA are appropriate statutes to include this lessened or ancillary cause of action with limited remedies. To further amend the statutes as well as Title VII to include this theory into the retaliation provisions makes even less sense. It will upset the established methods of adjudicating retaliation and insert meaningless litigation into an already overburdened employment law system.

H.R. 1065 - The Pregnant Workers Fairness Act

H.R. 1065 - The Pregnant Workers Fairness Act ("PWFA") was introduced in this Congress on February 15, 2021. It was considered in the previous Congress as H.R. 2694, and the issues raised by H.R. 1065 have been introduced and considered before the House in almost every legislative session beginning in 2012. Pregnant workers should be afforded accommodations to permit them to perform the essential functions of their job when limited by pregnancy-related conditions or conditions resulting from pregnancy. But, while H.R. 1065 supports that right, it misses the opportunity to provide employers, employees, courts and regulators much needed clarity on the scope of the affected rights and obligations in accommodating pregnant employees. The Subcommittees should consider incorporating H.R. 1065's protections into a uniform scheme within Title VII which acknowledges and harmonizes the interplay and overlap between and among the multiple laws and regulations in this important area of civil rights while preserving the intent of H.R. 1065.

The Pregnancy Discrimination Act of 1978 ("PDA") 42 U.S.C. Section 2000e(k) amended Title VII by making it illegal if an employer discriminates against a pregnant employee due to her pregnancy or maintains policies which adversely affect pregnant employees. The PDA requires an employer to treat pregnant employees as it treats any other temporarily disabled employee.

Pregnancy was also previously partially addressed in the Americans with Disabilities Act as amended by the Americans With Disabilities Act Amendments Act of 2008 ("ADAAA"). The ADAAA provided that limitations experienced by pregnant workers that were not of short term duration were covered by the ADA which triggered the obligation to engage in an interactive process in order to determine whether there was an accommodation which could be offered to the worker to enable her to continue her employment. While the ADAAA generally excluded disabilities of short term duration, if the pregnancy-related disabilities were "sufficiently severe," the condition was deemed to be covered by the ADA and the requirements of the ADA, including consideration of reasonable accommodations had to be examined.

The Family and Medical Leave Act of 1993 established a complex regulatory process whereby covered employees who experienced a serious medical condition could take leave, including intermittent leave in order to deal with the condition. Pregnancy and the various conditions emanating from pregnancy are generally considered to be serious medical conditions and the employee can take leave, including intermittent leave of up to twelve weeks. While FMLA leave is not compensated, the employees job is generally protected and the employee remains under employer provided health care coverage and other benefits during the leave. Each of these laws is accompanied by complex regulatory requirements.

In addition to the federal statutory coverage for pregnancy, thirty states and numerous local governments have enacted workplace protections for pregnant workers. These local laws all differ as to their definitions, procedures, duration and requirements including the requirement to provide accommodations.

H.R. 1065 further addresses and clarifies for employers and employees how to properly accommodate pregnancy in the workplace. And in addition to these federal and state laws and regulatory requirements, pregnancy has been the subject of various judicial interpretations to further define the obligations employers must comply with. In particular, in the case styled *Young v UPS* 575 U.S. 206 (2015) 135 S. Ct 1338 (2015), the Supreme Court undertook to define the obligations an employer owed to a pregnant employee under the PDA. In that decision, the court attempted to define the obligations of the PDA which provided that the accommodations owed to a pregnant employee had to mirror on some respects the accommodations offered to other employees who had disabilities which affected their ability to perform their job functions. Insofar as that case arose under the PDA, requirements which might have applied under the ADAAA or even the FMLA were not discussed.[71] And because of this narrow treatment of the issues in *Young* there has been confusion as to what the *Young* decision actually directs with respect to the accommodations to be offered to pregnant workers. This then is the nub of the issue with H.R. 1065.

I believe that pregnant workers should be afforded accommodations to permit them to perform the essential functions of their job when limited by pregnancy-related conditions or conditions resulting from pregnancy. The current patchwork of inconsistent and confusing laws have left employers and employees wondering what are their obligations and rights. As Marc Freedman, Vice President of Employment Policy at the U.S. Chamber of Commerce stated recently, "I defy anyone to read that decision and tell me with certainty what an employer is obligated to do or what an employee's rights are." *See There's a New Pregnancy Discrimination Bill in the House. This Time it Might Pass.* https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html (last visited on 3/12/2021).

Indeed, H.R. 2694 represented a unique situation whereby the impacted stakeholders, employer associations and women's advocacy groups in particular worked hard to reach consensus.[72] And this Committee similarly worked in a bi-partisan manner in order to reach agreement. However, the efforts of last Congress that have been carried forward in H.R. 1065 ignore one salient fact, the area of workplace pregnancy regulation is somewhat overwhelmed with statutory and regulatory requirements which overlap, and require different responses and involve their own complex statutory structure. To this point, section 7 of H.R. 1065 provides:

[71] As Justice Breyer held : " We note that statutory changes made after the time of Young's pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of "disability" under the ADA to make clear that "physical or mental impairment[s] that substantially limi[t]" an individual's ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. Sections 12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., Section 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes." *Young* at 10.

[72] *Id.* ("'The folks that we [the U.S. Chamber of Commerce] worked with on this bill are not folks that we are usually in agreement with,' said Mr. Freedman, but 'giving pregnant women the ability to stay in a workplace is a good thing, and we wanted to find a way to get to that endpoint.'").

> Nothing in this Act shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth or related medical condition."

To ensure the benefits of H.R. 1065 are universally and consistently implemented, I ask the Subcommittees to consider incorporating its protections into a uniform scheme rationalizing the interplay between these multiple requirements so that employers may be able to fashion policies consistent with the intent of the law and preserve the intent of HR 1065. Whether this should be a separate statute or, perhaps, replace the PDA and be included as an amendment to Title VII and include all of the provisions of Title VII, including the exemption for employees of religious entities,[73] which govern employment should be strongly considered. And while the historic policy of employment laws is that State and local laws be enforced in parallel with federal law, in this one instance, it seems that uniformity in the treatment of pregnancy would be in the public interest. It does not seem to be a rational public policy to have at least four federal laws dealing with pregnancy, thirty state laws, and additional local laws covering other jurisdictions all accompanied by different regulatory requirements and interpretations and all thereby subject to different judicial interpretations. Pregnant workers deserve a coherent policy structure whereby their rights are clearly set forth and employers need similar consistency. Often, additional statutes covering similar areas are placed upon each other so that the complexity of the area addressed is enhanced rather than limited. Perhaps in the area covered by H.R. 1065, in which their appears to be little difference in the desired outcome, the statute can be constructed to remove uncertainty and confusion rather than add to it.

H. R. 5592 -- The Providing Urgent Maternal Protections for Nursing Mothers Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP" Act) looks to expand the breastfeeding accommodation requirements and enforcement mechanisms originally provided in the Patient Protection and Affordable Care Act (often referred to as the Break Time for Nursing Mothers law). In particular, the Act extends the breastfeeding accommodation requirements found in Section 7(r) of the Fair Labor Standards Act (FLSA) to exempt employees, most notably expanding the requirements to cover salaried employees. The Act also expressly clarifies that employers are not obligated under the FLSA to compensate hourly employees for time spent during a pumping break if the employee is entirely relieved from performing any work during the break (unless otherwise required by Federal, State, or local law), and expands the private right of action to every technical violation of Section 7(r), regardless of whether the employee has sustained a monetary damage.

The health benefits of feeding infants with breastmilk are numerous and well documented. In addition to the current federal law -- thirty-two states, the District of Columbia, and Puerto Rico have laws concerning breastfeeding in the workplace.[74] For that reason I offer the following two comments for consideration:

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[73] *See*, 42 U.S.C. Section 2000e-1(a)

[74] Breastfeeding State Laws; https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx. (Retrieved March 13, 2021.)

Providing clear guidance to employers in situations where employees are not working at a fixed location, as to how to comply with the Act's obligations. Employees who work in these work environments include commercial airline pilots, patrolling police officers, and delivery drivers (to name a few). How should employers meet their obligations to provide private space for their employees to express milk while they are on duty in these environments?[75]

It is important to consider whether it is appropriate to expand the private right of action under the PUMP Act to every possible violation of Section 7(r), including technical violations that do not result in monetary damages (e.g. a claim that the provided space did not properly shield the employee from view). Employees currently may bring a private right of action (including the right to bring a collective action on behalf of themselves and others similarly situated) when their employer's violation of Section 7(r) results in unpaid wages or when they suffer retaliation for complaining of a violation of Section 7(r)'s requirements. Extending the private right of action to its utmost limit will expose already overburdened courts with a flood of individual and collective actions for technical violations of Section 7(r) -- actions with limited, delayed recovery that will serve as little more than vehicles for attorney fees and will add additional costs and burdens to employers with no benefit to workers. The Department of Labor, which has the power to investigate alleged violations and impose penalties for repeated or willful violations of Section 7(r),[76] is better suited to quickly and sufficiently enforce such technical violations of Section 7(r).

V. CONCLUSION

In conclusion, I have certain concerns and suggestions with respect to components of the Paycheck Fairness Act and the other bills discussed above. Workforce Protections Subcommittee Chair Alma S. Adams and Ranking Member Fred Keller; Civil Rights and Human Services Subcommittee Chair Suzanne Bonamici and Ranking Member Russ Fulcher; and members of the Subcommittees, 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.

[75] Fact Sheet #73: Break Time for Nursing Mothers under the FLSA; https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers. (Retrieved March 13, 2021.)

[76] The Department can impose a penalty of up to $2,074 per violation against any employer who repeatedly or willfully violates Section 7(r). 29 C.F.R. 578.3.