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Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act

Catherine Lerum

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Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act

“I believe we have a moral obligation to ensure that one half of the American workforce is treated fairly and equitably as the other half.”¹ – Rosa L. DeLauro

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1. *A Fair Share for All: Pay Equity in the New American Workplace: Hearing on S. 182 and S. 984 Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. 10 (2010) (statement of Rep. Rosa DeLauro on the Paycheck Fairness Act), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg75805/html/CHRG-111shrg75805.htm>.

I. INTRODUCTION

Efforts to eradicate wage disparity between men and women began as early as 1898 during the era of industrialization.² The goal of equal pay for equal work became more apparent during World War I.³ The National War Labor Board of World War I established principles that recognized that it was “necessary to employ women in work ordinarily performed by men, [and] they must be allowed equal pay for equal work.”⁴ Another major occurrence that encouraged equal pay for women transpired during World War II.⁵ The National War Labor Board of World War II created an equal pay order.⁶ The war ended before the rule was enforced, but it led to the next major impetus for equal pay for women: the Women’s Equal Pay Act of 1945.⁷ This was the first bill that prohibited pay discrimination against women.⁸ The bill did not succeed, but efforts to pass legislation that promoted equal pay continued in Congress.⁹ Between 1948 and 1962, seventy-two bills concerning equal pay were introduced to Congress.¹⁰ Not one bill was exposed to a congressional hearing, and, furthermore, “no bill was reported.”¹¹

Finally, in 1963, the Equal Pay Act (EPA) was enacted amending the Fair Labor Standards Act.¹² The EPA established that wage discrimination based on sex is a violation of the Fair Labor Standards Act.¹³ In 1963, women were paid 58.9% of what men made.¹⁴ In contrast, in 2011, women were paid 77% of what men made.¹⁵ While the wage gap between men and

2. EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963 at 3 (Bureau of Nat’l Affairs, Inc. et al. eds., 1963), available at http://heinonline.org/HOL/Page?handle=hein.beal/eqpwol0001&id=1&collection=leghis&index=alpha/E_leghis.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. History of the Struggle for Fair Pay, NAT’L COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org/info-history.html> (last updated Sept. 2012).

8. EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, *supra* note 2, at 4.

9. *Id.*

10. *Id.*

11. *Id.*

12. H.R. REP. NO. 88-309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 687-88, 1963 WL 4623.

13. *Id.*

14. The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap, NAT’L COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org/info-time.html> (last updated Sept. 2012).

15. *Id.*

women has narrowed, it is still present.¹⁶ Over one hundred years have passed since the quest for equal pay for women began.¹⁷ The pursuit to completely eliminate the pay gap continues today in Congress, but despite these efforts, the wage gap may exist for many years due to the continued opposition confronting legislative remedial efforts.

In 1997, the Paycheck Fairness Act (PFA) was introduced in Congress.¹⁸ According to Rosa DeLauro, who introduced the PFA to the United States House of Representatives,¹⁹ the PFA is a “common-sense solution to the lingering problem of pay inequity.”²⁰ Moreover, the purpose of the PFA is to strengthen the EPA.²¹ Despite the fact that the PFA is a “common sense solution” and would ultimately strengthen the EPA, a hearing for the PFA did not occur until January 2009.²² The bill passed in the United States House of Representatives (House) in January 2009,²³ but the United States Senate (Senate) failed to ratify the bill in November 2010.²⁴ In June 2012, history repeated itself when the PFA again was unsuccessful in the Senate.²⁵ Despite the persistent wage gap, Congress has failed to acknowledge that the EPA is ineffective for women to prevail on wage discrimination claims, and Congress will not take the affirmative action to resolve the current wage inequity between men and women.²⁶

In order for a plaintiff to prevail on a wage discrimination claim under the EPA, she must plead and prove that: (1) “the employer pays different wages to employees of opposite sex”; (2) “the employees perform equal work on jobs requiring equal skill, effort, and responsibility”; and (3) they “are performed under similar working conditions.”²⁷ If the plaintiff is able

16. *Id.*

17. See EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, *supra* note 2, at 3.

18. *History of the Struggle for Fair Pay*, *supra* note 7.

19. *Id.*

20. Testimony of Rosa DeLauro, *supra* note 1, at 14.

21. See *id.* at 13-14 (explaining that the EPA is not producing the results Congress intended and that the PFA would provide “real progress” in the workforce).

22. See 155 CONG. REC. H124 (daily ed. Jan. 9, 2009).

23. Help Close the Wage Gap: Support the Paycheck Fairness Act, AM. CIV. LIBERTIES UNION (Jan. 2013), https://www.aclu.org/files/assets/pfa_-_factsheet_1_2013.pdf.

24. Amanda Terkel, Republicans Block an Up-or-Down Vote on the Paycheck Fairness Act, HUFFINGTON POST (Nov. 17, 2010), http://www.huffingtonpost.com/2010/11/17/republicans-block-paycheck-fairness-act_n_784849.html.

25. Jennifer Bendery, Paycheck Fairness Act Fails the Senate Vote, HUFFINGTON POST (June 5, 2012, 3:59 PM), http://www.huffingtonpost.com/2012/06/05/paycheck-fairness-act-senate-vote_n_1571413.html.

26. *See id.*

27. Peter Avery, Note, The Diluted Equal Pay Act: How Was it Broken? How Can it Be Fixed?, 56 RUTGERS L. REV. 849, 851 (2004). See 29 U.S.C. § 206(d)(1) (2006) (internal quotation marks omitted).

to prove her case, then the burden of proof shifts to the defendant.²⁸ The employer defendant can raise four affirmative defenses.²⁹ The employer can prove that the wage differentials are based on: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”³⁰

In addition to the plaintiff’s prima facie case, there is also an establishment provision in the EPA.³¹ Specifically, the EPA provides that no employer can discriminate “within any establishment in which such employees are employed.”³² The establishment requirement is known as the “same establishment” provision.³³ To prove a wage discrimination case under the EPA, a plaintiff has to compare her wages to another employee within the same establishment.³⁴ If a court determines that the plaintiff is trying to compare her wages to an employee of a separate establishment, then the plaintiff cannot satisfy the elements of a prima facie case.³⁵

Last, “[u]nlike normal class actions, plaintiffs in an Equal Pay Act suit must affirmatively join the litigation.”³⁶ Class actions under the EPA follow the Fair Labor Standards Act.³⁷ Plaintiffs must “opt-in” to the class action in order to join the litigation.³⁸ Most class actions are governed by Federal Rule of Civil Procedure 23, which provides for an “opt-out” procedure.³⁹

Almost fifty years after the EPA’s enactment, the wage gap continues to affect women on a national basis.⁴⁰ The purpose of this Legislative Note is to show that the EPA is not effective legislation for plaintiffs who fall victim to wage discrimination. It demonstrates that the amendments of the PFA would significantly change how courts handle wage discrimination cases brought under the EPA. This Legislative Note examines three amendments from the PFA. The first amendment analyzed alters the EPA’s

28. See EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, *supra* note 2, at 29.

29. 29 U.S.C. § 206(d)(1) (2006).

30. *Id.*

31. *Id.*

32. *Id.*

33. See Deborah L. Brake, *Testimony Before the Senate Committee on Health, Education, Labor, and Pensions, United States Senate: The Failure of Existing Employment Laws to Close the Gender Wage Gap* (Mar. 11, 2010), available at <http://www.help.senate.gov/imo/media/doc/brake.pdf>.

34. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586 (11th Cir. 1994).

35. See *Jacobson v. Pitman-Moore, Inc.*, 573 F. Supp. 565 (D. Minn. 1983).

36. *Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 801 (11th Cir. 1992).

37. See 29 U.S.C. § 216(b) (2006).

38. *Thompson v. Sawyer*, 678 F.2d 257, 269 (D.C. Cir. 1982).

39. FED. R. CIV. P. 23(c). See *Beavers*, 975 F.2d at 801; *Shushan v. Univ. Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990).

40. *The Wage Gap Over Time*, *supra* note 14.

“any other factor other than sex” defense. The amendment dramatically modifies the EPA’s “other factor” defense by specifying that an employer meets his burden of proof if the justification for the wage disparity “(i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity.”⁴¹ Next, this Legislative Note examines the PFA’s amendment to the EPA’s “establishment” provision. Specifically, the PFA amends the EPA by clarifying and defining the term “establishment.”⁴² Last, this Legislative Note analyzes the PFA’s class action amendment. The PFA class action amendment would permit plaintiffs to bring their claims as a class under a Federal Rule of Civil Procedure 23 class action rather than a collective action required under the EPA.⁴³

This Legislative Note begins its analysis in Part II by examining the legislative histories of the Equal Pay Act and the Paycheck Fairness Act. It demonstrates that both congressional bodies intended to eliminate the wage gap.⁴⁴ Part II of this Legislative Note also illustrates current statistics concerning the wage gap. It shows what women currently earn compared to men and how the wage gap dramatically affects a woman’s earnings over a working lifetime.⁴⁵

Part III of this Legislative Note focuses on the amendment to the EPA’s fourth affirmative defense—the “any other factor other than sex” defense. It argues that the language of the PFA would not only resolve a split circuit issue concerning how a defendant fulfills his burden of proof,⁴⁶ but it also protects future EPA plaintiffs from unfounded defenses employers use to mask discrimination.⁴⁷ The unambiguous language of the PFA amendment would place a higher burden of proof on the defendant.⁴⁸ However, the most significant aspect of this amendment is that it compels courts and defendants to justify wage disparity between employees of the opposite

41. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

42. *Id.*

43. *Id.* See *Kuhn v. Phila. Elec. Co.*, 475 F. Supp. 324, 326 (E.D. Pa. 1979) (explaining that a plaintiff must bring an EPA collective action under the Fair Labor Standards Act).

44. See *infra* text accompanying notes 55-105.

45. See *infra* text accompanying notes 106-116.

46. See *infra* text accompanying notes 132-159. See also *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (explaining the different standards courts utilize to interpret the fourth affirmative defense).

47. See *infra* text accompanying notes 174-177. See also *Kouba v. Allstate, Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982).

48. See *infra* text accompanying notes 160-183; Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

sex based on factors like training, education, and skill, rather than a factor concerning one's sex.⁴⁹

Part IV of this Legislative Note focuses on the "establishment" portion of the EPA and the amendment proposed by the PFA. It argues that the language of the PFA supports a broad interpretation of the term "establishment," and, by doing so, allows a plaintiff to successfully plead her case.⁵⁰ This Legislative Note argues that the "establishment" amendment would eliminate the result that a plaintiff's case is dismissed solely because she works at another location, and it illustrates that the amendment promotes the basic purposes of the EPA.⁵¹

Last, Part V of this Legislative Note discusses the PFA "class action" amendment to the Fair Labor Standards Act. It shows that the PFA amendment better serves plaintiffs if they are permitted to bring a class action under Federal Rule of Civil Procedure 23 (Rule 23), as opposed to a collective action under 29 U.S.C. § 216(b) (section 216(b)).⁵² Specifically, Rule 23 permits and encourages a higher participation class rate and grants procedural protections that section 216(b) fails to provide.⁵³ Overall, by analyzing certain amendments from the PFA, this Legislative Note demonstrates that the PFA would have a significant impact on wage discrimination claims: it would create uniformity among courts, better protect EPA plaintiffs, serve the true remedial purposes of the EPA, and close the wage gap between men and women.

II. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT AND THE PAYCHECK FAIRNESS ACT

A. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT

"[E]qual pay for equal work."⁵⁴ This was the theme of Congress when the EPA was passed.⁵⁵ Interestingly, Congress recognized that the legisla-

49. See *infra* text accompanying notes 174-183. See also *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992).

50. See *infra* text accompanying notes 232-267.

51. See *infra* text accompanying notes 253-287. See also *Grumbine v. United States*, 586 F. Supp. 1144, 1151 (D.D.C. 1984).

52. See *infra* text accompanying notes 304-357.

53. See *infra* text accompanying notes 304-345; *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-cv-00579, 2010 WL 3743642, at *4 (W.D. Va. Sept. 23, 2010). See also *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990).

54. See LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963 (AMENDING SECTION 6 OF THE FAIR LABOR STANDARDS OF 1938, AS AMENDED): PUBLIC LAW 88-38, 88TH CONGRESS, H.R. 6060 AND S. 1409, at 56 (1963), available at http://heinonline.org/HOL/Page?handle=hein.leghis/equalpay0001&id=1&collection=leghis&index=alpha/L_leghis.

tion was long overdue and there had to be economic justice for women.⁵⁶ Congress intended to combat the old-fashioned belief that a man could be paid more than a woman due to his standing in society.⁵⁷ By doing so, Congress wanted to eliminate the wage gap between men and women.⁵⁸ There were three significant reasons why the EPA was enacted.⁵⁹ First, discriminatory pay rates negatively affected the general “purchasing power and living standard” of employees.⁶⁰ Second, employers who engaged in discriminatory pay had an unfair benefit over those who did pay men and women equally.⁶¹ Last, Congress was concerned that low levels of production could result from a lack of morale due to low wages.⁶²

Examining the defenses for employers, Congress recognized that it was not possible for the EPA to provide every exception in order to defeat a plaintiff’s case.⁶³ Because of this, Congress granted employers three definitive exceptions and one broad exception.⁶⁴ As introduced above, the broad exception is the fourth affirmative defense: the “any other factor other than sex” defense.⁶⁵ Even though this defense was intended to be broad, Congress recognized the defense was to be business related.⁶⁶ The fourth affirmative defense would permit employers to raise issues such as: “shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, [or] differences based on experience, training, or ability.”⁶⁷ Clearly, the intent of Congress concerning the fourth affirmative defense was to be business-related.⁶⁸ Anything similar to the valid, business-related reasons illustrated above permitted an employer to pay employees differently without violating the Act.⁶⁹

55. See H.R. REP. NO. 88-309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 688, 1963 WL 4623.

56. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, *supra* note 54, at 57.

57. *Id.* at 36.

58. *Id.* at 39.

59. *Id.* at 36.

60. *Id.*

61. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, *supra* note 54, at 37.

62. *Id.*

63. H.R. REP. NO. 88-309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 689, 1963 WL 4623.

64. *Id.*

65. 29 U.S.C. § 206(d)(1) (2006).

66. See H.R. REP. NO. 88-309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 1963 WL 4623.

67. *Id.* at 689.

68. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992).

69. See *id.* (examining the legislative history of the fourth affirmative defense, and based on that analysis, the court concluded that an employer’s defense of a job classification system needed to be “rooted” in a business-related reason in order for the court to find that the employer did not violate the EPA).

Concerning the opponents of the EPA, there is no direct evidence that congressional members opposed the proposition “equal pay for equal work.”⁷⁰ Those who did in fact oppose the Act concentrated on how costly it was to hire women employees.⁷¹ Others argued that the EPA would permit the federal government to become too involved in local affairs and businesses.⁷² Specifically, opposing congressional members believed the EPA encouraged the federal government to explore employers’ files, an unnecessary act that did not concern the salary of women employees.⁷³ Some congressional members argued that discriminatory pay in the workplace was an issue that should be addressed by state governments, not the federal government.⁷⁴ Whatever opposition the EPA encountered, it is significant that members of Congress who objected to the Act did not oppose the EPA because it sought to establish equal pay for equal work and an elimination of the wage gap.⁷⁵

The overall intent of Congress was to abolish the economic injustice in society.⁷⁶ Congress not only focused on how the EPA would impact women, but also how the Act affected society as a whole.⁷⁷ Specifically, Congress recognized that the Act would have a momentous effect on almost 25 million women.⁷⁸

B. LEGISLATIVE HISTORY OF THE PAYCHECK FAIRNESS ACT

“Equal pay for equal work must not just be a saying, it must be the law.”⁷⁹ The primary intent of Congress concerning the PFA was to lessen the wage gap, and fill the “loopholes” that had developed in case law due to the EPA.⁸⁰ Congressional proponents wanted to repair and strengthen the EPA.⁸¹ Those in support of the PFA truly believed the proposed legislation

70. EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, *supra* note 2, at 7.

71. *Id.*

72. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, *supra* note 54, at 71-72.

73. EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963, *supra* note 2, at 7.

74. *Id.*

75. *See id.*

76. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963, *supra* note 54, at 53-55, 57-58.

77. *See id.*

78. *Id.* at 53.

79. 155 CONG. REC. H129 (daily ed. Jan. 9, 2009) (statement of Rep. Holt).

80. Testimony of Rosa DeLauro, *supra* note 1, at 1. See also 155 CONG. REC. H127 (daily ed. Jan. 9, 2009) (statement of Rep. Miller).

81. Testimony of Rosa DeLauro, *supra* note 1, at 1. See generally 155 CONG. REC. H127-H133 (daily ed. Jan. 9, 2009) (demonstrating statements made by congressional members that the EPA is not an effective legal tool for women, given the current wage gap and

was a real solution to a current societal dilemma.⁸² “We have a chance to finally provide equal pay for equal work and make opportunity real for millions of American women.”⁸³

When the House of Representatives considered the PFA in debate, members were not just focusing on what women made in comparison to men, but how the pay differential affected women’s economic lives.⁸⁴ For example, Congressman Hare of Illinois stated “[t]his wage disparity will end up costing women anywhere from \$400,000 to \$2 million over a lifetime in lost wages.”⁸⁵ In addition, Congress focused on how wage discrimination affects the family unit.⁸⁶ Many American households depend on two wage earners, and when one wage earner does not receive the full benefit of her paycheck, the entire family is affected.⁸⁷ In addition, some members of Congress promoted the passage of the PFA by analyzing the progress of the wage gap since the enactment of the EPA.⁸⁸ After more than forty years since passage of the EPA, the “progress” is that women earn 77 cents for every dollar earned by men, compared to the 59 cents women made for every dollar earned by men when the EPA was enacted.⁸⁹

Supporters of the PFA believed that the proposed legislation would improve the wage gap.⁹⁰ For example, the PFA would deter wage discrimination because it would impose consequential penalties.⁹¹ In addition, a no retaliation clause in the legislation protects the employee in the event she shares wage and salary information with other employees.⁹² Lastly, those in favor of the PFA believed the bill would discourage employers from using numerous reasons to justify a difference in pay between a male and female employee.⁹³ Thus, members of Congress stressed that an employer’s defense should not be connected in any way to one’s sex.⁹⁴ When congressional members addressed the fourth affirmative defense, paralleling the

certain “loopholes” that have developed in the law, and that the PFA would actually repair the current state of the law).

82. See 155 CONG. REC. H129 (daily ed. Jan. 9, 2009) (statement of Rep. DeLauro).

83. *Id.*

84. *Id.*

85. 155 CONG. REC. H129 (daily ed. Jan. 9, 2009) (statement of Rep. Hare).

86. 155 CONG. REC. H130 (daily ed. Jan. 9, 2009) (statement of Rep. Holt).

87. See *Id.*; 155 CONG. REC. H130 (daily ed. Jan. 9, 2009) (statement of Rep. Slaughter).

88. 155 CONG. REC. H130 (daily ed. Jan. 9, 2009) (statement of Rep. Slaughter).

89. *Id.*

90. See generally 155 CONG. REC. H131-H133 (daily ed. Jan. 9, 2009) (demonstrating statements made by congressional members in support of the PFA because of the likelihood the legislation will improve the wage gap).

91. 155 CONG. REC. H131 (daily ed. Jan. 9, 2009) (statement of Rep. Jackson Lee).

92. *Id.*

93. *Id.*

94. *Id.*

congressional intent concerning the EPA, they too intended for the fourth affirmative defense to be “job-related” and “necessary for the business.”⁹⁵

In contrast to those who supported the PFA, members of Congress who were against the PFA claimed it made the system “fundamentally unfair.”⁹⁶ These members of Congress concentrated on how the legislation would affect independent businesses and employers.⁹⁷ Congressional members opposing the legislation argued that if the PFA were enacted, it would hamper the nation’s businesses.⁹⁸ They explained that this legislation would limit the control of business owners when hiring employees.⁹⁹ More specifically, they believed the PFA would permit Congress to actually manage the employment matters of independent businesses.¹⁰⁰ In addition, if the legislation was enacted, they assumed employers would be unprotected from an indefinite amount of claims.¹⁰¹ Last, those against the passage of the PFA believed that it would eliminate “key employer defenses.”¹⁰²

Those who opposed the PFA indicated that the proposed legislation would increase the costs of lawsuits and benefit trial lawyers.¹⁰³ One member of Congress went as far to say that “[t]he Democrats’ meager efforts to blunt the potential harm do not change the fact that trial lawyers stand to receive a big payday”¹⁰⁴ Despite the opposition to the bill, these members of Congress acknowledged that any wage disparity between men and women due to sexual discrimination is a wrongdoing.¹⁰⁵

Overall, the legislative history of the Paycheck Fairness Act illustrates that the congressional members today have the same goal as the congressional members in 1962: to eliminate the wage gap between men and women. Despite the fact that these two congressional bodies had the same intent, the wage gap persists.

C. STATISTICS CONCERNING THE WAGE GAP

The statistics are clear: the wage gap between women and men has not been eliminated.¹⁰⁶ The following statistics provide an accurate picture of earnings between men and women. The statistics are based on the earnings

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- 95. 155 CONG. REC. H133 (daily ed. Jan. 9, 2009) (statement of Rep. Conyers).
 - 96. 155 CONG. REC. H132 (daily ed. Jan. 9, 2009) (statement of Rep. McKeon).
 - 97. *Id.*
 - 98. 155 CONG. REC. H128 (daily ed. Jan. 9, 2009) (statement of Rep. Kline).
 - 99. *Id.*
 - 100. *Id.*
 - 101. *Id.*
 - 102. 155 CONG. REC. H128 (daily ed. Jan. 9, 2009) (statement of Rep. Andrews).
 - 103. 155 CONG. REC. H128 (daily ed. Jan. 9, 2009) (statement of Rep. Kline).
 - 104. 155 CONG. REC. H132 (daily ed. Jan. 9, 2009) (statement of Rep. McKeon).
 - 105. 155 CONG. REC. H128 (daily ed. Jan. 9, 2009) (statement of Rep. Kline).
 - 106. See *The Wage Gap Over Time*, *supra* note 14.

of a full-time, year-round worker.¹⁰⁷ A “full-time” worker is someone who worked “[thirty-five] or more hours per week in the weeks they worked in the past [twelve] months.”¹⁰⁸ A “year-round” worker is an individual who worked “[fifty] or more weeks in the past [twelve] months.”¹⁰⁹ According to the American Community Survey, in 2009, for full-time, year-round workers, the “median earnings for women were 78.2% of men’s earnings;”¹¹⁰ thus, in 2009, a woman’s average salary was \$35,549, and a man’s average salary was \$45,485.¹¹¹ Moreover, in all fifty states and the District of Columbia, women earned less than men.¹¹²

As indicated above, in 1963, the wage disparity between men and women was that a woman was paid 59 cents for every dollar a man earned, and, currently, a woman is paid approximately 77 to 78 cents for every dollar a man earns.¹¹³ This increase illustrates that the “wage gap has narrowed by less than half a cent per year.”¹¹⁴ Overall, it is estimated that if a woman worked full-time for forty-seven years, she lost a substantial amount of earnings due to the wage gap.¹¹⁵ The following illustrates the dramatic loss of earnings a woman can sustain over a working lifetime due to the wage gap: a high school graduate can lose \$700,000; a college graduate can lose \$1.2 million; and a professional school graduate can lose \$2 million.¹¹⁶

There are sources that address and demonstrate that there are additional reasons for the wage disparity between men and women.¹¹⁷ These additional reasons are categorized as “women’s choices.”¹¹⁸ Among these

107. David M. Getz, *Men’s and Women’s Earnings for States and Metropolitan Statistical Areas: 2009*, U.S. CENSUS BUREAU, Sept. 2010, available at <https://www.census.gov/prod/2010pubs/acsbr09-3.pdf>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Getz, *supra* note 107.

113. The Wage Gap Over Time, *supra* note 14; See Getz, *supra* note 107.

114. The Wage Gap Over Time, *supra* note 14

115. *Id.*

116. *Id.*

117. See CONSAD RESEARCH CORP., AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN (2009), available at <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>; Ramesh Ponnuru, Don’t Blame Discrimination for Gender Wage Gap, BLOOMBERG (Aug. 13, 2012, 5:30 PM CT), <http://www.bloomberg.com/news/2012-08-13/don-t-blame-discrimination-for-gender-wage-gap.html>. A detailed explanation concerning the causes of the wage disparity between men and women is beyond the scope of this Legislative Note. The purpose of this paragraph is to bring light to the differing explanations concerning the wage disparity, yet establish that the pay gap between men and women cannot be “explained away.” AM. ASS’N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE PAY GAP 8 (2012), available at <http://www.aauw.org/files/2013/02/The-Simple-Truth-2013.pdf>.

118. THE SIMPLE TRUTH ABOUT THE PAY GAP, *supra* note 117, at 8.

“choices” that cause wage disparity between women and men is the fact that women, on average, work fewer hours than men.¹¹⁹ Another possible reason for the wage disparity might be due to the fact that women and men choose different occupational fields.¹²⁰ In addition, the obvious “women’s choice” that affects women’s pay is motherhood.¹²¹ Studies indicate that when women become mothers, this typically results in these women leaving the work force or working part-time.¹²² Despite these “women’s choices,” sources indicate that after taking into consideration the “choices” that may affect the wage disparity between men and women, there is still an unexplained wage gap between men and women.¹²³

III. THE “ANY OTHER FACTOR OTHER THAN SEX” DEFENSE

A. PROPOSED LANGUAGE OF THE PAYCHECK FAIRNESS ACT

As previously described, once the plaintiff makes a prima facie case alleging that her employer pays employees of one sex more than employees of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified by one of the EPA’s four exceptions.¹²⁴ The payment is justified if it is made pursuant to: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”¹²⁵ The exceptions are affirmative defenses, which the employer must plead and prove.¹²⁶ The fourth affirmative defense has the attention of current members of Congress due to the ambiguous language and the varying interpretations of this exception.¹²⁷

The proposed language of the PFA would have a substantial impact on how courts interpret the fourth affirmative defense. The language of the PFA is specific and instructive concerning when the employer’s “any factor other than sex” defense satisfies the burden of proof.¹²⁸ Specifically, the

119. Ponnuru, *supra* note 117.

120. CONSAD RESEARCH CORP., *supra* note 117, at 6; THE SIMPLE TRUTH ABOUT THE PAY GAP, *supra* note 117, at 8. The American Association of University of Women recognizes that while the gender wage gap may be “explained” by the fact that women enter occupational fields that tend to pay less, this does not mean the wages in those fields are actually fair. THE SIMPLE TRUTH ABOUT THE PAY GAP, *supra* note 117, at 8.

121. THE SIMPLE TRUTH ABOUT THE PAY GAP, *supra* note 117, at 9.

122. *Id.*

123. *Id.* at 8.

124. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

125. 29 U.S.C. § 206(d)(1) (2006).

126. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982).

127. See *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992).

128. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

drafters of the PFA struck out “any other factor other than sex” and inserted “a bona fide factor other than sex, such as education, training, or experience.”¹²⁹ Not only do the drafters emphasize that the defendant’s “factor” be a “bona fide factor” and provide examples of such a factor, but the drafters also explain that the employer’s exception applies when the employer demonstrates that it is truly not a sex-based justification and that it is business related.¹³⁰ Specifically, the drafters proposed this language to be inserted at the end of 29 U.S.C. § 206(d)(1): “The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity.”¹³¹ This Legislative Note demonstrates that if Congress adopted, or in the future adopts, the PFA language, the interpretation of the fourth affirmative defense by the courts would be consistent, it would create a higher burden of proof for the defendant, and it would promote the original intent of Congress.

B. SOLUTION FOR THE SPLIT CIRCUITS

The proposed language of the PFA would create and encourage uniformity among the circuits interpreting the “any other factor other than sex” language of the EPA. Justices White, O’Connor, and Chief Justice Rehnquist of the United States Supreme Court recognized that the circuit courts relied on different standards to establish whether the employer meets his burden of proof concerning the fourth affirmative defense.¹³² Specifically, the two main standards used by the courts to determine if the employer has met his burden of proof are the gender-neutral test and the legitimate business reason test.¹³³

The Seventh and Eighth Circuits apply a gender neutrality standard to determine if an employer can prevail on the “any other factor other than sex” defense.¹³⁴ These courts recognize and emphasize that the fourth af-

129. *Id.*

130. *Id.*

131. *Id.*

132. *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992).

133. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (asserting that the defendant must provide a “legitimate business-related” reason to support the wage disparity between a male and female employee); *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (demonstrating that the gender-neutral test is a broad standard that does not have to be related to the employee’s position); Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 864-66 (2004).

134. See *Fallon*, 882 F.2d at 1206. See also *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987); *Strecker v. Grand Forks Cnty. Soc. Serv. Bd.*, 640 F.2d 96 (8th Cir. 1980), *overruled on other grounds by Robert v. Norton*, 682 F.2d 192 (8th Cir. 1982).

firmative defense was intended to be broad.¹³⁵ The court in *Fallon v. State of Illinois* stated that “[t]he fourth affirmative defense . . . (any other factor other than sex) is a broad ‘catch-all’ exception and embraces an almost limitless number of factors, so long as they do not involve sex.”¹³⁶ While these circuits maintain that the exception must be broad, they require that the factor may not be “discriminatorily applied.”¹³⁷ In *Covington v. Southern Illinois University*, the court stated that an employer could consider the prior salary of another employee as a “factor other than sex” if the payment policy was not discriminatorily implemented or if there was no other evidence that illustrated the employer discriminated because of an individual’s sex.¹³⁸ Courts that apply this approach ignore that the employer’s “other factor” defense relates to the requirements of the particular position being litigated or even the company’s business.¹³⁹

The proposed language of the PFA clearly disposes of the gender neutrality defense. While the gender-neutral circuits explicitly reject that the other factor has to be related to business,¹⁴⁰ the language of the PFA clearly supports that an employer must prove that the “other factor” is both necessary for the business- and job-related.¹⁴¹ In essence, even if an employer utilizes a gender-neutral standard, the proposed language of the PFA requires the employer to support his defense with something more.¹⁴² If the PFA were enacted, the minority’s gender neutrality standard would violate the statute. Courts of the minority view warn that imposing a business-related standard permits other courts to re-examine and possibly supervise a company or business.¹⁴³ In addition, the minority circuits recognize the split, and are “not even slightly tempted to change sides.”¹⁴⁴ These courts argue that the gender-neutral standard directly supports the language of section 206(d)(1) of the EPA.¹⁴⁵ However, the Seventh and Eighth Circuits fail to consider the intent of Congress at the time the EPA was adopted.¹⁴⁶

135. See *Fallon*, 882 F.2d at 1211.

136. *Id.*

137. *Covington*, 816 F.2d at 323.

138. *Id.*

139. See *Wernsing v. Dep’t of Human Servs., Ill.*, 427 F.3d 466, 468 (7th Cir. 2005).

140. *Id.*

141. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

142. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (explaining that without a business- or job-related reason, the defense could not prove its case with “a gender-neutral classification system”).

143. *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003).

144. *Wernsing*, 427 F.3d at 470.

145. *Id.*

146. *Id.*

The Second, Sixth, Ninth, and Eleventh Circuits (the majority view) apply the “acceptable business reason” standard in order to determine whether the employer prevails on the fourth affirmative defense.¹⁴⁷ Under this standard, the employer must give an acceptable business reason to justify the wage disparity.¹⁴⁸ According to the court in *Kouba v. Allstate Insurance Co.*, the EPA “concerns business practices.”¹⁴⁹ Therefore, it is “non-sensical to sanction the use of a factor that rests on some consideration unrelated to business.”¹⁵⁰ In addition, the court in *Equal Employment Opportunity Commission v. J.C. Penney Co.*, concluded that an employer could prevail if he showed that the “factor other than sex” was “at a minimum” an acceptable business reason.¹⁵¹ Furthermore, these circuits relied on legislative history in order to elaborate on the acceptable business reason standard.¹⁵² The court in *Glenn v. General Motors Corp.* specified that the fourth affirmative defense of the EPA applied when the pay disparity is the product of “unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.”¹⁵³

The proposed language of the PFA is unambiguous and clearly aligns with the “acceptable business reason” standard.¹⁵⁴ To reiterate, the language requires that the “factor other than sex” be related to the job in question or necessary for the business.¹⁵⁵ If the PFA were enacted, it would set forth a precedent that is already widespread among the circuits.¹⁵⁶ In addition, the courts applying the “acceptable business reason” standard were guided by

147. See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988); *Equal Emp’t Opportunity Comm’n v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

148. *Kouba*, 691 F.2d at 876.

149. *Id.*

150. *Id.*

151. *J.C. Penney*, 843 F.2d at 253.

152. *Aldrich*, 963 F.2d at 525-26; *Glenn*, 841 F.2d at 1571.

153. *Glenn*, 841 F.2d at 1571.

154. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw). See also Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 267 (2012) (maintaining that the majority view concerning the “other factor other than sex” is codified by the PFA).

155. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

156. See generally *Aldrich*, 963 F.2d 520 (2d Cir. 1992); *Glenn*, 841 F.2d 1567 (11th Cir. 1988); *J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988); *Kouba v. Allstate, Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (demonstrating that the Second, Sixth, Ninth, and Eleventh Circuits already implement the “acceptable business reason” standard when discerning whether the employer has met his burden of proof concerning the fourth affirmative defense).

the congressional intent of the EPA.¹⁵⁷ The majority circuits relied on the congressional records of the Senate and House to determine whether the courts should consider the business-related standard when analyzing the employer's affirmative defense.¹⁵⁸ These courts determined that Congress intended that a business- or job-related standard apply to this defense because it is unjust to prevent a plaintiff from prevailing on a prima facie case without investigating the specific characteristics of a certain job or business.¹⁵⁹ Therefore, the PFA's legislation would not only promote the view of the majority circuits, but also reinforce the original intent of Congress.

C. HIGHER BURDEN ON THE DEFENDANT

Again, the proposed language of the PFA alters the "any other factor other than sex" language of the EPA.¹⁶⁰ The PFA states that the employer's other factor would only prevail if it "(i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity."¹⁶¹ The precise language set forth in the PFA concerning the "factor other than sex" defense places a higher burden of proof on the defendant. Contrary to the PFA, the ambiguous language set forth in the EPA concerning the fourth affirmative defense has led courts to relax the defendant's burden of proof.¹⁶²

In *Strecker v. Grand Forks County Social Service Board*, the court found that Betty Strecker "performed substantially equal work under similar working conditions" to her male successor yet received considerably less pay.¹⁶³ Even though Strecker successfully pleaded and proved her prima facie case, the court concluded that the pay differential was justified by the state's "classification system."¹⁶⁴ A classification system that calculates a person's experience and education with an occupation's obligations in order to establish an employee's salary does not violate the EPA.¹⁶⁵ However, when the court concluded that the classification itself is an acceptable

157. See, e.g., Glenn, 841 F.2d at 1571.

158. Id. See also Aldrich, 963 F.2d at 526.

159. See, e.g., Aldrich, 963 F.2d at 525-26.

160. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

161. Id.

162. Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 865 (2004).

163. *Strecker v. Grand Forks Cnty. Soc. Serv. Bd.*, 640 F.2d 96, 99 (8th Cir. 1980), overruled on other grounds by *Robert v. Norton*, 682 F.2d 192 (8th Cir. 1982).

164. *Strecker*, 640 F.2d at 104.

165. Id. at 100.

factor other than sex, it diminished the burden of proof on the defendant.¹⁶⁶ The dissent recognized “that the defendants did nothing more than establish the existence of that system.”¹⁶⁷ By relying on the ambiguous language of the EPA and permitting the defendant to prevail on any factor as long as it did not involve sex, the defendants did not have to show if the classification system requirements were related to the job, if Strecker was not qualified for a higher classification, or if she was receiving the highest possible salary she could earn.¹⁶⁸

The PFA resolves the risk of diminishing the burden of proof on the defendant by eliminating ambiguous language of the EPA. The proposed language of the PFA places a higher burden on the defendant by eliminating a common belief that the fourth affirmative defense truly includes any other factor than sex.¹⁶⁹ Courts that apply the gender neutrality standard interpret the language of the fourth affirmative defense as embracing “an almost limitless number of factors, so long as they do not involve sex.”¹⁷⁰ The PFA drafters purposely excluded “any” from section 206(d)(1), and replaced it with “a bona fide factor other than sex, such as education, training, or experience.”¹⁷¹ The court in *EEOC v. J.C. Penney Co.*, ruled that the fourth affirmative defense “does not include literally *any* other factor.”¹⁷² Eliminating the idea that defendants are free to choose any defense, as long as it does not involve sex, allows a plaintiff to have a stronger case.¹⁷³

The PFA favors the business-related standard because it separates defenses that truly are justifiable reasons for a difference in pay from those that actually discriminate.¹⁷⁴ Courts rely on the business-related standard in order to circumvent the facially neutral defenses offered by employers that, in reality, discriminate based on sex.¹⁷⁵ By enforcing a legitimate business

166. See *id.* at 104 (Heaney, J., dissenting).

167. *Id.*

168. *Id.*

169. See *Kouba v. Allstate, Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (noting that if a defendant uses “any factor that either does not refer on its face to an employee’s gender or does not result in all women having lower salaries than all men . . . an employer [can] easily manipulate factors having a close correlation to gender as a guise to pay female employees discriminatorily low salaries . . .”).

170. *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989).

171. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw).

172. *Equal Emp’t Opportunity Comm’n v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

173. Cf. *J.C. Penney*, 843 F.2d at 253; *Kouba*, 691 F.2d at 876; *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (demonstrating that if courts permitted employers to utilize any factor to satisfy the fourth affirmative defense, employers can then easily mask sexual discrimination).

174. See *Kouba*, 691 F.2d at 876.

175. See, e.g., *id.*

standard, the employer has to show that his excuse is legitimate or necessary for the business.¹⁷⁶ “Without a job-relatedness requirement, the factor–other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.”¹⁷⁷ By requiring courts to analyze if the employer’s other factor relates to the job or is necessary for the business, the PFA ensures that an employer cannot use a facially neutral defense and thus places a higher burden on the defendant.

The PFA is also significant because it sets a precedent for the business standard and ultimately gives more guidance to courts. Even a business-related defense could serve as a pretext for discrimination.¹⁷⁸ For example, an employer might argue that an employee’s prior salary is a legitimate “factor other than sex” to determine her current salary.¹⁷⁹ While this reason has been accepted as a “factor other than sex,”¹⁸⁰ courts that rely on the business-related standard realize that the prior salary of one’s employment may have been the result of discrimination as well.¹⁸¹ The courts are limited when confronted with this type of defense, because there is no standard precedent when applying the “acceptable business reason” standard,¹⁸² and courts disagree on what constitutes a legitimate business reason.¹⁸³ The proposed language of the PFA would effectively guide courts when applying the business-related standard.

D. MARKET FORCE THEORY ELIMINATED

As previously established, the PFA specifies that the employer’s fourth affirmative defense should be “job-related with respect to the position in question,” and “consistent with business necessity.”¹⁸⁴ In addition to these two factors, the PFA also mandates that the employer’s fourth affirmative defense “is not based upon or derived from a sex-based [difference] in

176. See Aldrich, 963 F.2d at 525. See also *Maxwell v. City of Tucson*, 803 F.2d 444, 447-48 (9th Cir. 1986).

177. Aldrich, 963 F.2d at 525.

178. See Kouba, 691 F.2d at 876.

179. *Id.*

180. *Wernsing v. Dep’t of Human Servs., Ill.*, 427 F.3d 466, 468 (7th Cir. 2005).

181. See Kouba, 691 F.2d at 876.

182. See generally *Equal Emp’t Opportunity Comm’n v. J.C. Penney Co.*, 843 F.2d 249, 255 (6th Cir. 1988) (Hillman, J., dissenting) (illustrating that the majority does not provide any guidance when the “legitimate business reason . . . becomes a pretext for discrimination”); Kouba, 691 F.2d at 876 (asserting that there is no guidance concerning the “proper judicial inquiry” when applying the business-related standard, and the court had to manufacture its own test).

183. See *J.C. Penney*, 843 F.2d at 255 (Hillman, J., dissenting).

184. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a)(3) (2012), 2011 CONG US S 3220 (Westlaw).

compensation.”¹⁸⁵ This clause is significant because it might bar employers and courts from justifying the “factor other than sex” defense with the market force theory.¹⁸⁶

The market force theory is the argument “that supply and demand dictates that women *qua* women may be paid less than their male counterparts” for similar work.¹⁸⁷ This theory supports employers paying male employees more because the idea is that “male employees are in higher demand than female employees.”¹⁸⁸ Contrary to this theory is the comparable worth theory.¹⁸⁹ The comparable worth theory is that wages should be the same when occupations predominantly made up of women are “comparable” to the occupations that are predominantly made up of men.¹⁹⁰ The goal of the comparable worth theory is to provide equal wages to employees in comparable occupations.¹⁹¹ By doing so, wages are based on an employee’s training, skill, work environment, and so on.¹⁹² The PFA’s language should, and hopefully will, ban the use of a market force theory.¹⁹³ In addition, the language of the PFA supports the holdings of the Supreme Court and the majority circuits: that the market force theory should not be the foundation of an employer’s fourth affirmative defense because it supports wage discrimination based on sex.¹⁹⁴

The PFA’s proposed language codifies and enforces the Supreme Court’s rejection of the market force theory concerning the fourth affirma-

185. *Id.*

186. See generally Daniel N. Kuperstein, Note, Finding Worth in the New Workplace: The Implications of Comparable Worth’s Reemergence in the Global Economy, 24 HOFSTRA LAB. & EMP. L.J. 363, 389 (2007) (stating that the PFA as a whole promotes the comparable worth theory).

187. *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) (internal quotation marks omitted); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988), *quoted in* Ruben Bolivar Pagan, Note, Defending the “Acceptable Business Reason” Requirement of the Equal Pay Act: A Response to the Challenges of *Wernsing v. Department of Human Services*, 33 J. CORP. L. 1007, 1020 (2007).

188. Thomas H. McCarthy, Jr., Note, “Market Value” as a Factor “Other Than Sex” in *Sex-Based Wage Discrimination Claims*, U. ILL. L. REV. 1027, 1037 (1985), *cited in* Pagan, *supra* note 187, at 1020.

189. Pagan, *supra* note 187, at 1019.

190. Claire Andre & Manuel Velasquez, Comparable Worth, ISSUES IN ETHICS, Spring 1990, available at <http://www.scu.edu/ethics/publications/iie/v3n2/comparable.html>.

191. Kuperstein, *supra* note 186, at 376.

192. *Id.*

193. See generally *id.* at 389, 392 (explaining the PFA as a whole promotes the comparable worth theory).

194. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988). See generally Pagan, *supra* note 187, at 1020-21 (indicating that the Supreme Court did not adhere to the market force theory as a justification for wage disparity and that the market force theory does not accurately establish the value of an employee).

tive defense.¹⁹⁵ In *Corning Glass Works v. Brennan*, Corning Glass Works paid higher wages to night shift employees, but men predominantly filled the night shift positions.¹⁹⁶ The Court stated Corning would prevail on its claim if it could prove that the difference in pay was compensation for working night shifts, as opposed to higher pay due to the fact that men dominated the night shift.¹⁹⁷ The Court found that Corning did not prevail on the fourth affirmative defense because when the difference of pay was in place at Corning Glass Works, the remainder of night employees in that specific industry did not receive higher wages than day employees.¹⁹⁸ The Court recognized that the difference in pay transpired because men did not want to work for the lower wages women earned.¹⁹⁹ The wage differential “reflected a job market in which Corning could pay women less than men for the same work.”²⁰⁰

The PFA’s language banning the use of the market force theory is significant because, despite the Supreme Court’s position that the market force theory does not justify a difference in pay,²⁰¹ courts still adhere to the theory to justify the “factor other than sex” defense.²⁰² Circuits that apply the acceptable business reason standard criticize the minority circuits that permit an employer’s defense to qualify as a factor other than sex based on the market force theory.²⁰³ The court in *Covington* permitted a university to justify a wage disparity between a male and female employee because of a “salary retention policy.”²⁰⁴ The salary retention policy is a sex-neutral policy that sustained an employee’s salary when that employee’s occupational position changed within the university.²⁰⁵ This sex-neutral university policy did not relate to the business or the job requirements of an employee’s performance.²⁰⁶ The court “implicitly used the market force theory to justify the pay disparity.”²⁰⁷ Recently, the court in *Wernsing v. Department of Hu-*

195. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a) (2012), 2011 CONG US S 3220 (Westlaw); *Corning Glass Works*, 417 U.S. at 204-05 (1974); Pagan, *supra* note 187, at 1020 (maintaining that the Supreme Court refused to permit the market force theory to justify wage disparity between male and female employees).

196. *Corning Glass Works*, 417 U.S. at 192.

197. *Id.* at 204.

198. *Id.* at 204-05.

199. *Id.* at 205.

200. *Id.*

201. See *Corning Glass Works*, 417 U.S. at 205; Pagan, *supra* note 187, at 1020.

202. See *Wernsing v. Dep’t of Human Servs., Ill.*, 427 F.3d 466, 469-70 (7th Cir. 2005); *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987); Pagan, *supra* note 187, at 1021.

203. See *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

man Services also disregarded the Supreme Court's position concerning the market force theory.²⁰⁸ The court stated "[t]he Equal Pay Act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent."²⁰⁹ Not only did the court dismiss the concerns rooted in the market force theory, but it also refused to recognize the value of the comparable worth theory.²¹⁰ The court in *Wernsing* acknowledged that the comparable worth doctrine sets "wages based on 'merit' rather than forces of supply and demand," yet the court refused to apply the comparable worth doctrine.²¹¹

The reasoning set forth in *Covington* and *Wernsing* is what the PFA clearly would eradicate. The application of the market force theory inherently discriminates on the basis of sex.²¹² The PFA's language makes it clear that any difference in compensation based on sex would not be tolerated as a justification for the wage disparity.²¹³ The supporters of the PFA seek to reinforce the Supreme Court's stance on the market force theory,²¹⁴ and, more importantly, legislate that women's wages should be determined by their training, skill, education, and so on, or as the court in *Wernsing* called it: their "merit."²¹⁵

IV. THE ESTABLISHMENT PROVISION

A. THE "ESTABLISHMENT" PROVISION AND THE PAYCHECK FAIRNESS ACT AMENDMENT

A plaintiff's prima facie equal pay case requires her to prove that an employer pays employees of the opposite sex different wages.²¹⁶ In addition to this initial requirement, the plaintiff must also comply with a "geographic limitation" provided by the statute.²¹⁷ The "employees against whom plaintiff compares herself [a comparator] must work in the same 'establishment' as the claimant."²¹⁸ Thus, a plaintiff completely pleads and proves her "prima facie case by satisfying both the geographic and descriptive compo-

208. Pagan, supra note 187, at 1021.

209. *Wernsing*, 427 F.3d at 469.

210. *Id.* at 469-70.

211. *Id.*

212. See generally Pagan, supra note 187, at 1020 (demonstrating that the market force theory is an unpersuasive defense to wage disparity because the market analysis does not accurately establish wages).

213. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

214. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).

215. *Wernsing*, 427 F.3d at 469.

216. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994).

217. *Id.*

218. *Id.*

nents of the test as applied to even one comparator.”²¹⁹ The establishment provision of the EPA is significant, because the determination of whether there is a single establishment or separate establishments affects the outcome of the plaintiff’s case.²²⁰ Unfortunately, the language of the EPA is silent concerning how courts should interpret “establishment.”²²¹ “Establishment” is mentioned three times in the language of the statute.²²² The EPA states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions²²³

While the EPA is silent concerning the term “establishment,” the Equal Employment Opportunity Commission (EEOC) defines the term.²²⁴ The term “establishment . . . refers to a distinct physical place of business rather than to an entire business or ‘enterprise’ which may include several separate places of business.”²²⁵ Therefore, the general rule states that each physically separate place of business is usually a separate establishment.²²⁶ Despite the general rule, the EEOC acknowledges that under “unusual circumstances” a business can be regarded as a single establishment even when segments of a business are physically separated.²²⁷ The EEOC provides examples to demonstrate when these “unusual circumstances” give rise to a single establishment, such as: a central administrative entity that establishes wages, hires employees, and assigns where employees work; employees that transfer frequently between the different locations of a busi-

219. *Id.*

220. *See id.* at 591 (explaining that the plaintiff’s prima facie case was “eviscerat[ed]” when the district court found that the comparators and plaintiff worked at separate establishments).

221. *See* 29 U.S.C. § 206(d)(1) (2006).

222. *Id.*

223. *Id.* (emphasis added).

224. 29 C.F.R. § 1620.9(a) (2012).

225. *Id.*

226. *Id.*

227. 29 C.F.R. § 1620.9(b) (2012).

ness; and employment responsibilities that are almost identical at the separate locations.²²⁸ If these unusual circumstances are not present, then courts should apply the general rule that an establishment is a distinct physical place of business.²²⁹

The drafters of the PFA addressed the “establishment” issue and proposed the following language:

[E]mployees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State. The preceding sentence shall not be construed as limiting broader applications of the term “establishment” consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission.²³⁰

This portion of this Legislative Note illustrates that the PFA “establishment” amendment could have a substantial impact on how courts interpret the term “establishment.” In addition, this Legislative Note further recognizes the significance this amendment could have on a plaintiff’s EPA case.

B. A BROAD INTERPRETATION OF THE TERM “ESTABLISHMENT”

Despite the general rule, determining when a business qualifies as a single establishment or separate establishments varies among federal district and appellate courts.²³¹ There are several cases that implement a narrow interpretation of “establishment” and strictly apply the geographical limitation.²³² For example, in *Shultz v. Corning Glass Works*, defendant Corning Glass Works operated three different factories.²³³ The court found that two of those factories constituted one establishment because the two factories utilized the same office building and, in addition, were joined by

228. Id.

229. Id.

230. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a)(3)(C) (2012), 2011 CONG US S 3220 (Westlaw).

231. See *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347, 351 (D. Kan. 1986) (identifying one line of cases recognizing that “establishment” “is defined as a distinct physical place of business,” and a second line of cases recognizing that an “establishment” can consist of a business’s different operations in multiple locations).

232. See *Shultz v. Corning Glass Works*, 319 F. Supp. 1161 (D.N.Y. 1970). See also *Mitchell v. Birkett*, 286 F.2d 474 (8th Cir. 1961); *Jacobson v. Pitman-Moore, Inc.* 573 F. Supp. 565 (D. Minn. 1983).

233. *Shultz*, 319 F. Supp. at 1164.

passageways.²³⁴ However, the court determined that the third factory was a separate establishment because it was located one-half mile away, “separated from the other two plants,” and employees did not transfer between the first two factories and the third one.²³⁵ Clearly, the PFA language is in direct conflict with the narrow interpretation of “establishment.”²³⁶ The drafters intended to eradicate the narrow interpretation used among courts.²³⁷

A number of cases favor a broad interpretation of the term “establishment” and stray from the traditional geographic rule.²³⁸ *Brennan v. Goose Creek Consolidated School District* is an influential case courts look to for guidance concerning this broad interpretation.²³⁹ The court in *Brennan* found that thirteen different elementary schools in one school district created a single establishment.²⁴⁰ The court found that a single “establishment” could apply to a business that has workplaces at different physical locations.²⁴¹ The court relied on certain factors, which are consistent with the examples listed by the EEOC,²⁴² to determine whether or not the school district qualified as a single establishment.²⁴³ Specifically, the controlling factors are centralized “control of job descriptions, salary administration, and job assignments or functions.”²⁴⁴

The court in *Mulhall v. Advance Security, Inc.* also deviated from the traditional rule established by the EEOC.²⁴⁵ Specifically, the court in *Mulhall* found that the plaintiff could compare her salary to different comparators in Nevada and California because a single establishment existed.²⁴⁶ The court stated, “[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.”²⁴⁷ Cases like *Mulhall* and *Brennan* illustrate that the “establishment” should

234. *Id.*

235. *Id.*

236. Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a)(3)(C) (2012), 2011 CONG US S 3220 (Westlaw).

237. See *id.*

238. See *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586 (11th Cir. 1994); *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975); *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347 (D. Kan.1986); *Grumbine v. United States*, 586 F. Supp. 1144 (D.D.C. 1984).

239. See *Renstrom v. Nash Finch Co.*, 787 F. Supp. 2d 961, 964 (D. Minn. 2011).

240. See *Brennan*, 519 F.2d at 54, 58.

241. *Id.* at 56.

242. *Id.* at 58. See 29 C.F.R. § 1620.9(b) (2012).

243. *Brennan*, 519 F.2d at 58.

244. *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan.1986).

245. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591-92 (11th Cir. 1994).

246. *Id.* at 588-92.

247. *Id.* at 592.

not be determined solely based on the operation's location.²⁴⁸ Clearly, this broad interpretation of "establishment" is exactly what the PFA drafters intend to promote.²⁴⁹ Not only does the PFA language solidify what initially constitutes a single establishment, but the PFA language also encourages broader interpretations that are illustrated in cases like *Mulhall* and *Brennan*.²⁵⁰

To reiterate, the plaintiff's prima facie case almost rests on how a court defines the term "establishment." The court may either find the term should be interpreted broadly or narrowly.²⁵¹ A court's choice of a definition is crucial because the characterization of the word can strengthen, weaken, or, in fact, as one court stated "eviscerat[e]" the plaintiff's case.²⁵² The analysis below illustrates that the PFA intends to eliminate the negative consequences that stem from the narrow interpretation of "establishment."

C. CONSEQUENCES ELIMINATED FROM A NARROW INTERPRETATION OF "ESTABLISHMENT"

The PFA "establishment" amendment completely eliminates a narrow, geographic interpretation of the term "establishment," and diminishes the chances of EPA cases being dismissed solely because the court finds the plaintiff works at a different location and thus may have no comparator in that location.²⁵³ For example, in *Jacobson v. Pitman-Moore, Inc.*, the plaintiff's EPA claim was quickly dismissed once the court found that the defendant's geographically separated offices did not constitute a single establishment.²⁵⁴ The court heavily relied on the fact that "establishment" is defined as a separate place of business.²⁵⁵ Moreover, the court found it was irrelevant that the operation of plaintiff's branch was dependent on the other offices.²⁵⁶ In *Mitchell v. Birkett*, the court found that two photography shops owned by the same employer were separate establishments simply

248. See *Mulhall*, 19 F.3d at 592; *Brennan*, 519 F.2d at 56, 58; *Brownlee*, 642 F. Supp. at 353.

249. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a)(3)(C) (2012), 2011 CONG US S 3220 (Westlaw).

250. See *id.*; *Mulhall*, 19 F.3d at 586; *Brennan*, 519 F.2d at 53.

251. See *Brennan*, 519 F.2d at 56-58 (illustrating a broad interpretation of the term "establishment"); *Shultz v. Corning Glass Works*, 319 F. Supp. 1161, 1164 (D.N.Y. 1970) (illustrating a narrow interpretation of the term "establishment"), *modified sub nom.* *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973), *aff'd sub nom.* *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

252. *Mulhall*, 19 F.3d at 590-91.

253. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3(a)(3)(C) (2012), 2011 CONG US S 3220 (Westlaw).

254. *Jacobson v. Pitman-Moore, Inc.* 573 F. Supp. 565, 568 (D. Minn. 1983).

255. *Id.*

256. *Id.*

because the two enterprises were located nine miles from each other.²⁵⁷ The court stated that factors like “[c]ommon ownership” and a “close functional and economic relationship” between the two entities were not satisfactory reasons to find that the two shops created a single establishment.²⁵⁸ A very narrow interpretation of the term “establishment” prevents contemplation of factors that other courts have considered to determine whether a single establishment exists.²⁵⁹

A defendant can easily eliminate a plaintiff’s EPA claim by raising the “establishment” defense if a court applies a narrow interpretation of “establishment.”²⁶⁰ If the defendant can prove that the “establishment” where the employee works is a “distinct physical place of business,” the plaintiff’s EPA case will be dismissed if she has no comparator within that establishment.²⁶¹ On the contrary, courts that apply the broad interpretation of the term “establishment” recognize that, when a woman works at a physically separate location, that is not an indication she should be paid less than a man.²⁶² In addition, the court in *Grumbine v. United States* noted it is not practical for an employer to claim an “establishment” defense (arguing that an operation is a “distinct physical place of business”) to the EPA when that employer implements “a uniform, non-geographic pay policy.”²⁶³ By eliminating the narrow interpretation of the term “establishment,” a plaintiff’s case will not be dismissed purely because the defendant limits the plaintiff’s comparators to one location.

Contrary to promoting a broad interpretation of “establishment,” some courts have noted that Congress did not intend for the “establishment” provision to have a broad interpretation.²⁶⁴ The court in *Renstrom v. Nash Finch Co.* maintained that, by the time the EPA was enacted, Congress acquired the term “establishment” from the Fair Labor Standards Act (FLSA), and the term had an established definition—“a distinct physical place of business.”²⁶⁵ Thus, courts have argued that Congress did not intend for the EPA and the FLSA to provide different interpretations of the term “estab-

257. Mitchell v. Birkett, 286 F.2d 474, 477-78 (8th Cir. 1961).

258. Id.

259. See Mulhall v. Advance Sec., Inc., 19 F.3d 586 (11th Cir. 1994); Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53 (5th Cir. 1975); Brownlee v. Gay and Taylor, Inc., 642 F. Supp. 347 (D. Kan.1986).

260. See Jacobson, 573 F. Supp. at 568.

261. See Mulhall, 19 F.3d at 591 (explaining that the district court dismissed the plaintiff’s EPA case because the two male employees the plaintiff intended to compare her salary to did not work at the same establishment as the plaintiff).

262. See Grumbine v. United States, 586 F. Supp. 1144, 1150-51 (D.D.C. 1984).

263. Id. at 1148.

264. Renstrom v. Nash Finch Co., 787 F. Supp. 2d 961, 964 (D. Minn. 2011).

265. Id. (citing A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945)). See 29 C.F.R. § 1620.9(b) (2012).

lishment.”²⁶⁶ However, if Congress truly intended for the “establishment” provision to have a narrow meaning, then many employees would be denied the remedial value of the EPA.²⁶⁷

D. PROMOTION AND ENFORCEMENT OF THE REMEDIAL GOALS OF THE EQUAL PAY ACT

By eliminating the narrow interpretation of “establishment,” the PFA drafters promote the “basic purposes” of the EPA.²⁶⁸ Courts that apply a broad interpretation to the term “establishment” and do not limit it to one geographic location tend to consider the “basic purposes” of the EPA.²⁶⁹ A broad interpretation of “establishment” aligns with the EPA because the EPA is a remedial statute that should be interpreted “liberally.”²⁷⁰ A narrow interpretation of “establishment” hinders the objectives of the EPA because a narrow interpretation makes it more difficult to prove that the wage disparity is due to discrimination.²⁷¹ For example, if a court determines there is a separate establishment based on geographic location, then it eliminates an opportunity for the plaintiff to compare her salary to someone who does substantially the same work at another location.²⁷² By limiting the “establishment” provision to a narrow interpretation, certain employees are completely unprotected by the EPA.²⁷³ For example, managerial or professional employees might have no other employees to compare their salaries with if the managerial or professional employees are limited to one location.²⁷⁴ In *Vickers v. International Baking Co.*, the court recognized that limiting the “establishment” provision to one location “would effectively permit a large employer with national operations to exempt its managerial staff from . . . the reach of the EPA.”²⁷⁵ Therefore, the “establishment” amendment actual-

266. Renstrom, 787 F. Supp. 2d at 964.

267. See Grumbine v. United States, 586 F. Supp. 1144, 1150 (D.D.C. 1984).

268. The basic purposes of the EPA were to promote women’s rights and place women in an equal economic setting as men. Ultimately, the goal of the EPA was to eliminate any sex discrimination that affected women’s wages in the work place. Grumbine, 586 F. Supp. at 1146.

269. See *id.* at 1146. See also Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53, 57 (5th Cir. 1975).

270. See Grumbine, 586 F. Supp. at 1150.

271. See Brennan, 519 F.2d at 57.

272. See *id.* (asserting the consequences from the court’s narrow interpretation of “establishment” in Shultz v. Corning Glass Works).

273. See Grumbine, 586 F. Supp. at 1150.

274. *Id.*

275. *Vickers v. Int’l Baking Co.*, No. Civ.A. 398CV1864D, 2000 WL 1804612, at *5 (N.D. Tex. Dec. 7, 2000).

ly promotes and serves the true purposes of the EPA: to promote the economic standing of women in society.²⁷⁶

The PFA “establishment” amendment is significant because, in general, courts shy away from a meaningful application of the broad interpretation of the term “establishment.”²⁷⁷ These courts tend to give significant weight to the fact that a defendant’s operations are geographically distinct.²⁷⁸ For example, in *Wetzel v. Liberty Mutual Insurance Co.*, the court found that defendant’s company, which was made up of 130 branch offices, was an operation that consisted of separate establishments.²⁷⁹ The court recognized the importance of the test established by *Brennan* but also placed significance on “physical proximity as a determinative factor” in order to conclude that the offices were separate establishments.²⁸⁰ Also, in *Alexander v. University of Michigan-Flint*, the court found that the University of Michigan was a separate establishment from University of Michigan-Flint.²⁸¹ While the two locations were geographically separated, the plaintiff established that the University itself had “one salary plan and evaluation program,” “one set of job descriptions,” and the like.²⁸² The court, however, still found the two locations to be separate establishments.²⁸³ While the court found the cooperation and communications between the two locations significant, it also placed emphasis on the fact that the two locations were physically separated.²⁸⁴ This reasoning differs from courts that implement the broad interpretation of “establishment” and the PFA because these sources emphasize that geographic location should not be considered to determine whether an operation is a single establishment or separate establishments.²⁸⁵

Contrary to promoting a broad interpretation of “establishment,” if “establishment” is applied too broadly and courts relax the interpretation of

276. See generally *Grumbine*, 586 F. Supp. at 1146 (maintaining that when considering the proper application of “establishment,” the court should acknowledge the “basic purposes” of the EPA, and, as a result, found that the comparators (located at physically separated offices) of the plaintiff were all within the same establishment).

277. See *Jacobson v. Pitman-Moore, Inc.*, 573 F. Supp. 565, 568 (D. Minn. 1983); *Alexander v. Univ. of Michigan-Flint*, 509 F. Supp. 627, 628 (E.D. Mich. 1980); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 405 (D. Pa. 1978).

278. See *Jacobson*, 573 F. Supp. at 568. See also *Alexander*, 509 F. Supp. at 629; *Wetzel*, 449 F. Supp. at 407.

279. *Wetzel*, 449 F. Supp. at 407.

280. *Id.*

281. *Alexander*, 509 F. Supp. at 629.

282. *Id.*

283. *Id.*

284. *Id.*

285. See *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan.1986); Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

“unusual circumstances,” then “any corporation with a hierarchical management structure and a functioning human-resources department would find itself defined as a single ‘establishment.’”²⁸⁶ However, as the court in *Brownlee v. Gay and Taylor, Inc.* stated, “where central supervision exists and where pay standards apply for an entire business entity regardless of where the employee is located, individuals should be compared on the basis of their employment function and not geographic location.”²⁸⁷

V. A CHANGE FROM COLLECTIVE ACTION TO CLASS ACTION

A. SECTION 216(B) OF THE FAIR LABOR STANDARDS ACT VERSUS FEDERAL RULE OF CIVIL PROCEDURE 23

If a plaintiff wishes to pursue a collective action under the EPA, she is subject to the standards of the Fair Labor Standards Act (FLSA), specifically section 216(b).²⁸⁸ Under a section 216(b) action, the plaintiff essentially has two requirements to fulfill. First, an action “may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”²⁸⁹ Second, the statute states “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”²⁹⁰ Essentially, under a section 216(b) collective action, a party plaintiff must affirmatively “opt-in” to the class, and, in order to do so, she must file a written consent with the court.²⁹¹ Thus, if a party plaintiff does not affirmatively join the class, then she does not benefit from the judgment.²⁹²

The PFA amends section 216(b) of the FLSA.²⁹³ The amendment states: “Notwithstanding any other provision of Federal law, any action brought to enforce the section 6(b) may be maintained as a class action as provided by the Federal Rules of Civil Procedure.”²⁹⁴ Essentially, the drafters intended to transform the EPA section 216(b) collective action into a bona fide Rule 23 class action.²⁹⁵

286. *Renstrom v. Nash Finch Co.*, 787 F. Supp. 2d 961, 965 (D. Minn. 2011).

287. *Brownlee*, 642 F. Supp. at 352.

288. *Kuhn v. Phila. Elec. Co.*, 475 F. Supp. 324, 326 (E.D. Pa. 1979).

289. 29 U.S.C. § 216(b) (2006).

290. *Id.*

291. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975).

292. *See id.*

293. Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

294. *Id.*

295. *Id.*

A party who seeks certification under Rule 23 must first meet 23(a)'s four prerequisites:

(1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.²⁹⁶

Then, the party must meet one of the three requirements described in Rule 23(b).²⁹⁷ The "opt-in" requirement of section 216(b) is inconsistent with Rule 23.²⁹⁸ In a Rule 23(b)(3) class action, the court must provide notice to every individual in the class.²⁹⁹ The notice informs every member of the class that even if the final judgment is not satisfactory, the judgment "will include all members of the class who do not request exclusion."³⁰⁰ In addition, in class actions maintained under Rule 23(b)(1) or (b)(2), the judgment is irrevocable for every member of the class, and there is no option to request exclusion.³⁰¹ Thus, Rule 23 class actions are known as "opt-out" or "no option" class actions.³⁰² Persons in a class must affirmatively exclude themselves from the class, or persons in a class do not have a choice as to whether they can exclude themselves.³⁰³

B. IMPACT OF THE CLASS ACTION AMENDMENT

The PFA amendment will create a higher participation rate of plaintiffs in future EPA class actions. Plaintiffs who wish to pursue a collective action under the EPA and subject themselves to the prerequisites of the FLSA are faced with the "more restrictive 'opt-in' procedure."³⁰⁴ When potential plaintiffs must actively join a collective action, there is a lower

296. FED. R. CIV. P. 23(a), *quoted in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).

297. *Id.*

298. Shushan v. Univ. at Colo. at Boulder, 132 F.R.D. 263, 266 (D. Colo. 1990).

299. *Id.* at 265-66.

300. *Id.* at 266.

301. *Id.*

302. *Id.*

303. Shushan, 132 F.R.D. at 266.

304. Ameritech Ben. Plan Comm. v. Comm'n Workers of Am., 220 F.3d 814, 820 (7th Cir. 2000).

participation rate.³⁰⁵ The “opt-in” procedure is not favorable to employees because they fear that if they choose to “opt-in,” they may encounter retaliation from their current employer.³⁰⁶ For example, in *Kennedy v. Virginia Polytechnic Institute & State University*, a plaintiff in an EPA collective action could not affectively pursue a Title VII class action because the number of plaintiffs did not fulfill the numerosity requirement mandated by Rule 23.³⁰⁷ The plaintiff contended that current employees feared to join the collective action.³⁰⁸ Moreover, a court can and will take into consideration that in employment discrimination cases, the class will be smaller because employees fear retaliation by their current employer.³⁰⁹ Thus, it is likely that more plaintiffs will participate in an EPA class action if the “opt-in” procedure is eliminated.³¹⁰ In addition, the “opt-in” procedure does not seem to truly cater to the remedial purposes that the EPA supposedly serves.³¹¹ The “opt-in” requirement limits the employer’s liability to only those employees who choose to “opt-in.”³¹² Rather, an employer should be held liable for all of his wrongful acts towards all of his employees; the “opt-out” procedure aids in accomplishing this goal.³¹³

Except for the increase in the number of members in an EPA class action, the implementation of the PFA class action amendment would not otherwise create significant consequences in court proceedings. In order to certify a class in a section 216(b) case, the court must decide if the plaintiffs are “similarly situated.”³¹⁴ Certification of a class under section 216(b) varies among courts³¹⁵ because section 216(b) is silent concerning the requirements needed to establish when a class is “similarly situated.”³¹⁶ The

305. See, e.g., Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 734 (2010).

306. See *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-cv-00579, 2010 WL 3743642, at *4 (W.D. Va. Sept. 23, 2010).

307. *Id.*

308. *Id.*

309. See *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999).

310. See Ruan, *supra* note 305, at 734. See also James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be “Similarly Situated”?*, 38 SUFFOLK U. L. REV. 95, 98 (2004) (demonstrating that plaintiffs are actually discouraged to join a collective action if they must affirmatively “opt-in”); *cf.* *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-cv-00579, 2010 WL 3743642, at *4 (W.D. Va. Sept. 23, 2010).

311. See Fraser, *supra* note 310, at 121.

312. *See id.*

313. *Id.*

314. *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001).

315. *Rochlin v. Cincinnati Ins. Co.*, No. IPoo-1898-CH/K, 2003 WL 21852341, at *15 (S.D. Ind. Jul. 8, 2003).

316. See *Thiessen*, 267 F.3d at 1102; *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266 (D. Colo. 1990).

first method used by the courts is known as the ad hoc approach.³¹⁷ The ad hoc approach consists of two stages.³¹⁸ The first stage is known as the “notice stage.”³¹⁹ If the plaintiffs are “similarly situated,” the court will “conditionally certify” the class and send notice to potential plaintiffs who wish to “opt-in” to the lawsuit.³²⁰ The plaintiffs have a minimal burden and only have to show that the “class members were together the victims of a single decision, policy, or plan.”³²¹ At the second stage of the ad hoc method, the defendant usually files for a motion to decertify the class, and the court implements a heightened standard to again determine if the plaintiffs are “similarly situated.”³²² The court usually considers the following factors to determine if a class should survive certification: “(1) disparate factual employment settings of the individual plaintiffs; (2) the various defenses available to the defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations.”³²³

The second approach to determine if a section 216(b) class is “similarly situated” is to integrate the requirements of the Rule 23 class action into the section 216(b) collective action.³²⁴ Courts that apply this approach acknowledge that Rule 23 is not completely incompatible with section 216(b).³²⁵ Under this method, the court applies “Rule 23(a)’s four requirement[s] (numerosity, commonality, typicality, and adequacy of representation) and [Rule] 23(b)(3)’s requirement that common questions of fact predominate . . . to determine whether plaintiffs are similarly situated.”³²⁶

While these seem like opposite methods in order to determine certification of a class, the two approaches are actually comparable because both of these approaches “allow for consideration of the same or similar factors.”³²⁷ Therefore, the class action amendment does not cause substantial change to court proceedings because some courts already implement Rule

317. Thiessen, 267 F.3d at 1102.

318. See *id.* at 1102-03 (describing that the ad hoc approach has an initial “notice stage” and then the court returns to the issue for a second determination to decide whether the class is certified).

319. *Id.* at 1102.

320. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995).

321. Thiessen, 267 F.3d at 1102 (quoting *Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1058 (D. Colo. 1996)) (internal quotations omitted).

322. *Id.* at 1103; *Mooney*, 54 F.3d at 1214.

323. *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328, 1344 (N.D. Ala. 2011) (alteration in original) (quoting *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008)).

324. Thiessen, 267 F.3d at 1103.

325. *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266 (D. Colo. 1990).

326. Thiessen, 267 F.3d at 1103 (quoting *Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1061 (D. Colo. 1996)).

327. *Id.* at 1105.

23 requirements in order to certify section 216(b) classes, and the two procedures are actually quite similar.³²⁸

It is recognized that the Rule 23 prerequisites that plaintiffs have to fulfill for class certification require a “rigorous analysis.”³²⁹ One might argue the ad hoc approach is more favorable to plaintiffs because the standard at the initial stage for conditional certification is quite complaisant.³³⁰ However, decertification of a class occurs quite often at the second stage of the ad hoc approach.³³¹ In the end, both analyses are quite stringent, and, because of this similarity, it is likely that there would not be a significant change for plaintiffs.³³²

The procedural standards of Rule 23 better serve the remedial purposes of the EPA than a section 216(b) collective action.³³³ First, the language of section 216(b) is vague concerning the requirements needed to establish a collective action.³³⁴ The one established prerequisite is that the class must be similarly situated,³³⁵ and, as demonstrated above, the procedural requirements are established by case law.³³⁶ Another significant procedural difference between Rule 23 and section 216(b) concerns the statute of limitations. Under Rule 23, the statute of limitations is tolled (meaning “to stop the running of” the statutory period)³³⁷ for all class members’ claims once the class action is filed.³³⁸ Thus, once the claim is filed and the statute of limitations is tolled, the statute of limitations continues to be tolled for every class member “until the motion for class certification is denied.”³³⁹ This differs from a collective action governed by section 216(b). Under section 216(b), the statute of limitations is only tolled for the individual class members who have filed a written consent and “opted in” to the class.³⁴⁰ Plaintiffs who delay to “opt-in” to a collection action are at risk of running out of

328. *See id.*

329. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

330. *See Thiessen*, 267 F.3d at 1102; *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (explaining that courts often base their decisions to conditionally certify a class based on pleadings and affidavits submitted to the court).

331. *See Mooney*, 54 F.3d at 1214; *Fraser*, *supra* note 310, at 120.

332. *See Mooney*, 54 F.3d at 1214; *Walmart*, 131 S. Ct. at 2551.

333. *See generally Fraser*, *supra* note 310, at 120-21 (addressing major procedural differences between Rule 23 and section 216(b) and how these differences can affect substantive rights).

334. *See Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266 (D. Colo. 1990).

335. *Id.*

336. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001); *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328 (N.D. Ala. 2011); *Rochlin v. Cincinnati Ins. Co.*, No. IPoo-1898-CH/K, 2003 WL 21852341 (S.D. Ind. Jul. 8, 2003).

337. BLACK’S LAW DICTIONARY 1625 (9th ed. 2009).

338. *See Crown, Cork, & Seal Co., v. Parker*, 462 U.S. 345, 353-54 (1983).

339. *Id.*

340. 29 U.S.C. § 256 (2006). *See Fraser*, *supra* note 310, at 107-08.

time to file their consents.³⁴¹ Last, the procedural requirements of Rule 23 are designed to protect the rights of parties who are not present before the court.³⁴² Some courts argue that the procedural protections of Rule 23 are only allocated to these individuals because, even though they are not before the court, they are still “bound by a judgment.”³⁴³ Because of this, these courts argue that “opt-in” plaintiffs do not need the extra protection granted by Rule 23 because “opt-in” plaintiffs choose to be bound by the judgment.³⁴⁴ However, the court’s duty to protect an individual’s rights should not be diminished only because it is an individual’s responsibility to file a written consent so that she may be bound by the judgment.³⁴⁵ Despite the conflicting views on this subject, the PFA amendment would clearly grant EPA plaintiffs favorable procedural protections.³⁴⁶

The amendment would create uniformity for plaintiffs who bring both Title VII and EPA class action claims. “Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate with respect to ‘compensation, terms, conditions, or privileges of employment’ on the grounds of sex.”³⁴⁷ Claims of “large-scale sexual discrimination” are frequently brought under both Title VII and the EPA.³⁴⁸ “The same employment situation may give rise to a claim for relief under either statute.”³⁴⁹ It is recognized that the two causes of actions should be interpreted in accordance with each other.³⁵⁰ Despite this fact, Title VII and the EPA cannot be analyzed under the same class action procedures.³⁵¹ In *Kuhn v. Philadelphia Electric Co.*, the court quickly dismissed the plaintiffs’ contentions to bring an EPA collective action under Rule 23.³⁵² The court noted that “[m]any courts have held that a suit authorized by §216(b) may not be conducted as a Rule 23 class action.”³⁵³ This is quite different from a Title

341. See Sari M. Alamuddin et al., *Differences Between Rule 23 Class Actions and FLSA § 216(b) Collective Actions; Tips for Achieving Class and Collective Action Certification Post-Dukes*, 890 PRAC. L. INST. 293, 298, 314 (2012).

342. *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990).

343. See *Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984), *abrogated by Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

344. *Shushan*, 132 F.R.D. at 267.

345. *Id.*

346. See *id.*

347. *Thompson v. Sawyer*, 678 F.2d 257, 263 (D.C. Cir. 1982) (quoting 42 U.S.C. § 2000e-2(a)(1)).

348. *Thompson*, 678 F.2d at 263.

349. *Id.*

350. See *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir. 1975).

351. *Ameritech Ben. Plan Comm. v. Comm’n Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000) (“There is no such thing as a Rule 23 class action in an Equal Pay Act case.”); *Kuhn v. Phila. Elec. Co.*, 475 F. Supp. 324, 326 (E.D. Penn. 1979).

352. *Kuhn*, 475 F. Supp. at 326.

353. *Id.*

VII class action claim that is conducted under Rule 23.³⁵⁴ However, the court recognized that carrying out two different procedural class actions could create “administrative difficulties” for purposes of the litigation.³⁵⁵ Since one cause of action can give rise to the other,³⁵⁶ it is sensible to create an amendment that would create uniformity and clarity for future EPA plaintiffs who wish to pursue a class action.³⁵⁷

One might argue that Rule 23 class actions are actually not a sufficient procedural tool for EPA plaintiffs, given the recent outcome in *Wal-Mart Stores, Inc. v. Dukes*.³⁵⁸ In *Dukes*, approximately one and a half million women who were current or former employees of Wal-Mart were certified as a class.³⁵⁹ However, the United States Supreme Court decertified the class because the plaintiffs could not demonstrate that there was a question of law or fact common to the class—the commonality requirement mandated by Rule 23(a).³⁶⁰ The Court concluded that the commonality requirement was not fulfilled because plaintiffs did not sufficiently prove there was a “companywide discriminatory pay and promotion policy.”³⁶¹ In fact, plaintiffs’ contention that Wal-Mart’s policy of allowing discretion by local supervisors over employment matters was actually opposite of a uniform policy that would establish commonality.³⁶² However, Justice Ginsburg, dissenting from the majority opinion, found the evidence reviewed by the district court was sufficient to find a common question and fulfilled Rule 23(a)(2)’s requirement.³⁶³ Moreover, Justice Ginsburg found that the majority actually combined the criteria of Rule 23(a)(2) with the precedent of Rule 23(b)(3), a more challenging precedent to satisfy.³⁶⁴ While a critical analysis of Rule 23 is beyond the scope of this Legislative Note, a close decision and the apparent controversy concerning the certification of a class

354. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), for a current interpretation of certifying a class under Title VII pursuant to Rule 23.

355. Kuhn, 475 F. Supp. at 327.

356. See *Thompson v. Sawyer*, 678 F.2d 257, 263 (D.C. Cir. 1982).

357. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

358. See Eisenberg, *supra* note 154, at 270 (cautioning against the use of Rule 23 class actions for EPA plaintiffs given the recent result of *Dukes*, but arguing only for a modification to section 216(b) and not a change to Rule 23 class actions).

359. *Dukes*, 131 S. Ct. at 2547.

360. *Id.* at 2550, 2551, 2556, 2557.

361. *Id.* at 2556.

362. *Id.* at 2554.

363. *Id.* at 2562-64 (Ginsburg, J., dissenting).

364. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting) (stating that in addition to the four prerequisites mandated by Rule 23(a), a Rule 23(b)(3) certification requires that questions of law or fact common to class members predominate over any questions affecting only individual members).

of such massive proportion does not rule out the obvious benefits of a Rule 23 class action in the proposed statute.³⁶⁵

VI. CONCLUSION

Despite the fact that the Equal Pay Act was enacted into law almost fifty years ago, it is clear that the goal for equal wages for women continues to be only that—a goal. As the statistics clearly indicate, the reality of pay discrimination continues to permeate throughout society.³⁶⁶ In 1963, a woman earned fifty-nine cents to a man's dollar.³⁶⁷ Currently, a woman earns approximately seventy-seven cents to a man's dollar.³⁶⁸ If the intent of Congress was that the EPA would actually eliminate the wage gap between men and women,³⁶⁹ an increase of women's wages that amounts to approximately eighteen cents is not a success. Considering that equal pay for equal work is not actually a reality and still a goal, there needs to be a solution.

Congress has a solution: the Paycheck Fairness Act. Congressional members who have fashioned this legislation had similar intent to those who created the EPA.³⁷⁰ The purpose of the PFA is to actually solve the wage disparity problem, thus eliminating the wage gap.³⁷¹ A woman loses thousands of dollars over a working lifetime because of the wage disparity.³⁷² This financial loss not only affects the economic lives of women, but those whom they support.³⁷³ It is necessary to implement a legislative solution to remedy this wrongdoing.

By analyzing three amendments of the PFA, this Legislative Note demonstrates the profound legal impact the PFA can have for women who were or will be victims of unequal pay. The amendment to the "other factor other than sex" defense will have a significant impact on a plaintiff's EPA case.³⁷⁴ First, the PFA amendment would create uniformity among the courts.³⁷⁵ The circuits are currently split between applying the "gender neutral test" and the "acceptable business reason" standard in order to deter-

365. See *id.* See also *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990); *Fraser*, *supra* note 310, at 117-22.

366. See *The Wage Gap Over Time*, *supra* note 14; *Getz*, *supra* note 107.

367. See *Getz*, *supra* note 107.

368. See *id.*

369. LEGISLATIVE HISTORY OF THE EQUAL PAY ACT, *supra* note 54, at 39.

370. See 155 CONG. REC. H129 (daily ed. Jan. 9, 2009).

371. *Id.*

372. *Id.*

373. *Id.*

374. See *supra* text accompanying notes 132-215.

375. See *supra* text accompanying notes 132-159.

mine if the defendant has met his burden of proof.³⁷⁶ The PFA language clearly supports the “business related” standard.³⁷⁷ Next, because the PFA adopts the “business related” standard, the amendment would eliminate the consequences that arise from applying the “gender neutral” standard.³⁷⁸ The PFA would eradicate a defendant’s ability to avoid liability, because the amendment does not support a limitless number of factors as long as that factor does not involve sex.³⁷⁹ Rather, the PFA would create a standard for the “other factor,” stating that it must be a bona fide factor that is job related and necessary for the business.³⁸⁰ Last, the PFA once and for all would prevent courts and defendants from utilizing a market force theory to justify a difference in pay.³⁸¹ The PFA amendment would eliminate the premise that women should be paid based on the forces of supply and demand. The PFA reinforces that women’s wages should be based on their training, education, and skill.³⁸²

The PFA amendment to the “establishment” provision would permit an EPA plaintiff to have a stronger case.³⁸³ First, the provision supports a broad interpretation of the term “establishment.”³⁸⁴ The purpose of a broad interpretation of “establishment” is to prevent the plaintiff’s prima facie case from being dismissed solely because the location in which she works does not have a proper comparator.³⁸⁵ That is, the PFA amendment prevents dismissal of a plaintiff’s case merely because she is being paid a lower wage at a different location.³⁸⁶ More importantly, by eliminating a narrow interpretation of “establishment,” the PFA is furthering the basic purposes of the EPA.³⁸⁷ A narrow interpretation makes it difficult for the plaintiff to prove discrimination, and it leaves certain employees unprotected by the EPA.³⁸⁸ Lastly, the PFA’s amendment compels courts that have been re-

376. See *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992).

377. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

378. See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982).

379. See supra text accompanying notes 160-183.

380. Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw).

381. See supra text accompanying notes 184-215.

382. See *id.*

383. See supra text accompanying notes 231-287.

384. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012), 2011 CONG US S 3220 (Westlaw); *Brennan v. Goose Creek Consol. Indep. School Dist.*, 519 F.2d 53, 58 (5th Cir. 1975).

385. See *Brennan*, 519 F.2d at 58; *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 588-92 (11th Cir. 1984).

386. See supra text accompanying notes 253-267.

387. See supra text accompanying notes 268-287.

388. See *Brennan*, 519 F.2d at 57; *Grumbine v. United States*, 586 F. Supp. 1144, 1151 (D.D.C. 1984).

sistant to apply a meaningful application of the broad interpretation of “establishment” to actually do so.³⁸⁹

The last amendment analyzed, the “class actions” amendment, would also have a significant impact for potential EPA plaintiffs.³⁹⁰ The PFA amendment would allow more employees an opportunity to be part of a class action.³⁹¹ In addition, the PFA reinforces the true purposes of the EPA because Rule 23 grants plaintiffs procedural protections that section 216(b) does not extend to “opt-in” plaintiffs.³⁹² Last, the amendment would create uniformity and clarity for plaintiffs who wish to bring both Title VII and EPA class actions.³⁹³ Usually, one cause of action gives rise to the other, but, unfortunately, plaintiffs must follow two different procedural standards in one case if they wish to pursue both claims.³⁹⁴ Thus, the PFA would eliminate the nonsensical procedural hoops plaintiffs have to jump through.

It is obvious that the Paycheck Fairness Act would make significant changes that female employees deserve. It is also clear that Congress has a tool that can be used to provide these significant changes that can truly impact women’s lives. It is time for the goal of “equal pay for equal work” to become a reality.

CATHERINE LERUM*

389. See *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397 (D. Pa. 1978).

390. See *supra* text accompanying notes 304-365.

391. See *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-cv-00579, 2010 WL 3743642, at *4 (W.D. Va. Sept. 23, 2010). See also Ruan, *supra* note 305, at 734.

392. See *Dolan v. Project Const. Corp.*, 725 F.2d 1263, 1266 (10th Cir. 1984); *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 267 (D. Colo. 1990).

393. See *supra* text accompanying notes 347-357.

394. See *Kuhn v. Phila. Elec. Co.*, 475 F. Supp. 324, 326 (E.D. Pa. 1979).

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