

# ValpoScholar

## Valparaiso University Law Review

Volume 47  
Number 2 Winter 2013

pp.185-225

Winter 2013

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### Recommended Citation

Keiko Lynn Yoshino, *Reevaluating the Equal Pay Act for the Modern Professional Woman*, 47 Val. U. L. Rev. 185 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol47/iss2/26>

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## REEVALUATING THE EQUAL PAY ACT FOR THE MODERN PROFESSIONAL WOMAN

*"It's the Fred Astaire-Ginger Rogers thing . . . Women do the same steps as men, but they do them backwards and in high heels."<sup>1</sup>*

### I. INTRODUCTION

Mika Brzezinski, co-host of MSNBC's *Morning Joe*, was underpaid, overworked, and undervalued.<sup>2</sup> Despite her professional experience, long hours, and success at creating a hit show, MSNBC refused to pay her what she was worth.<sup>3</sup> In Brzezinski's recent bestseller *Knowing Your Value*, she explains her inability to be properly compensated was a result of not knowing her value and not knowing how to ask for what she deserved.<sup>4</sup> In her book, she explores the problem of wage disparity at the professional level and the lack of women in leadership positions.<sup>5</sup>

Currently, three percent of Forbes 500 chief executive officers are women.<sup>6</sup> Of the one hundred U.S. Senators, only seventeen are women.<sup>7</sup>

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<sup>1</sup> See MIKA BRZEZINKSI, *KNOWING YOUR VALUE: WOMEN, MONEY, AND GETTING WHAT YOU'RE WORTH* 64 (2010) (quoting Ilene H. Lang, president and CEO of Catalyst) ("That's what women have to go through to show they're as good as men. They have to work harder, they take much longer to be promoted, and they have to prove themselves over and over again."); see also Bob Thaves & Tom Thames, *Comic Strip, Frank and Ernest*, *THECOMICSTRIPS.COM* (May 3, 1982), [http://thecomicstrips.com/store/add\\_strip.php?iid=69155](http://thecomicstrips.com/store/add_strip.php?iid=69155) ("Sure he was great, but don't forget that Ginger Rogers did everything he did, backwards and in high heels.").

<sup>2</sup> See BRZEZINKSI, *supra* note 1, at 2 (explaining her twenty-year career as a professional journalist, fifteen-hour work days, only to be paid 1/14 of what her co-host was making).

<sup>3</sup> *Id.* Brzezinski acknowledges that her co-host Joe Scarborough, a former congressman, was worth more to the show's success, and "his salary was on par with other prime time hosts," but she questioned whether he was fourteen times more valuable than her. *Id.* at 2-3. Scarborough was just as upset with MSNBC for not paying Brzezinski more and went so far as to transfer his rating bonuses into her account. *Id.* at 140-41. She credits her co-host for knowing her value better than she did. *Id.* at 144. Brzezinski was eventually compensated for her worth with a book deal, radio show, and other business opportunities. *Id.*

<sup>4</sup> *Id.* at 186.

<sup>5</sup> *Id.* at 51-52.

<sup>6</sup> See THE WHITE HOUSE PROJECT, *THE WHITE HOUSE PROJECT REPORT: BENCHMARKING WOMEN'S LEADERSHIP* 10 (Nov. 2009), available at [http://thewhitehouseproject.org/wp-content/uploads/2012/03/benchmark\\_wom\\_leadership.pdf](http://thewhitehouseproject.org/wp-content/uploads/2012/03/benchmark_wom_leadership.pdf) (explaining the breakdown of women in business leadership positions). Companies with greater female participation in management do better financially than those with fewer women in leadership. *Id.* at 27. Dina Dublon, member of the boards of directors for Microsoft, Accenture, and PepsiCo. states, "Diversity in leadership and openness to new perspectives is crucial for charting the course in business. Without more than symbolic representation, we risk going backward instead of forward." *Id.* See also SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE*

Women, on average, hold only eighteen percent of top leadership positions in industries like academia, law, film, and journalism.<sup>8</sup> Although the Bureau of Labor Statistics (“BLS”) reported women’s participation in the labor force has grown substantially over the past century, the glass ceiling remains.<sup>9</sup> Women are making progress in

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WILL TO LEAD 8 (2013) (asserting that while societal barriers continue, women have put up barriers within themselves).

We hold ourselves back in ways both big and small, by lacking self-confidence, by not raising our hands, and by pulling back when we should be leaning in. We internalize the negative messages we get throughout our lives—the messages that say it’s wrong to be outspoken, aggressive, more powerful than men. We lower our own expectations of what we can achieve. We continue to do the majority of the housework and childcare. We compromise our career goals to make room for partners and children who may not even exist yet. Compared to our male colleagues, fewer of us aspire to senior positions. . . . My argument is that getting rid of these internal barriers is critical to gaining power.

*Id.* Sandberg is a wife, mother of two, and currently serves as the chief operating officer of Facebook.

<sup>7</sup> See *Women in the Senate*, UNITED STATES SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/women\\_senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm) (last visited Aug. 13, 2012) (discussing women’s involvement in the Senate). Only thirty-nine women have served in the U.S. Senate. *Id.*

<sup>8</sup> See THE WHITE HOUSE PROJECT, *supra* note 6, at 9 (exploring the percentage of female leadership in ten sectors). The report concludes that in order to make lasting change, women need to reach “critical mass” in various industries. *Id.* at 14. Critical mass, originating from nuclear physics, refers to the “quantity needed to start a chain reaction, an irreversible propulsion into a new situation or process.” *Id.* By reaching critical mass women would not be seen as women, but as equals. *Id.* at 13. Critical mass is achieved with one-third representation. *Id.* at 5. Referencing the Supreme Court, “[O]ne woman is newsworthy—she’s a first. Two is better—but still an exception, not the rule. Three out of nine—one in three—stops being unusual.” *Id.* at 14. See also Sandberg, *supra* note 6, at 15–16 (arguing that while women possess the skills to lead in the workplace, they lack the ambition to achieve senior positions). Sandberg notes female accomplishments come at a cost, “Professional ambition is expected of men. . . . Aggressive and hard-charging women violate unwritten rules about acceptable social conduct. Men are continually applauded for being ambitious and powerful and successful, but women who display these same traits often pay the social penalty.” *Id.* at 17. Many disagree with Sandberg claiming, “Women are not less ambitious than men. . . [just] more enlightened with different and more meaningful goals.” *Id.* at 18. Sandberg recognizes not all women want careers, children, or both and appreciates there is more to life than climbing the career ladder. *Id.* at 10, 18.

<sup>9</sup> U.S. BUREAU OF LABOR STATISTICS, BLS SPOTLIGHT ON STATISTICS: WOMEN AT WORK 1 (Mar. 2011), available at [http://www.bls.gov/spotlight/2011/women/pdf/women\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf); see C. KERRY FIELDS & HENRY R. CHEESEMAN, CONTEMPORARY EMPLOYMENT LAW 245 (2011) (explaining that a glass-ceiling is a perceived barrier preventing certain classes of individuals from climbing the “highest rungs of corporate leadership”).

white-collar professions, such as medical, legal, and executive positions; however, they are paid less than their male counterparts.<sup>10</sup>

On average, women are paid eighty-one percent of men's salaries for similar work.<sup>11</sup> Although this is a substantial increase from the fifty-nine percent women received in 1963, women are still paid less in every profession.<sup>12</sup> Careful examinations of industry pay practices reveal that the wage gap exists in lower-wage occupational jobs, but the women who are better educated and have achieved the highest levels of professional status experience a more substantial pay gap.<sup>13</sup> These professional women stand to lose the most over a forty-year career.<sup>14</sup> For example, it has been estimated that female health care practitioners will

<sup>10</sup> See JESSICA ARONS, CENTER FOR AMERICAN PROGRESS ACTION FUND, LIFETIME LOSSES: THE CAREER WAGE GAP 5 (Dec. 2008), available at [http://www.americanprogressaction.org/wp-content/uploads/issues/2008/pdf/equal\\_pay.pdf](http://www.americanprogressaction.org/wp-content/uploads/issues/2008/pdf/equal_pay.pdf) (explaining the history of gender wage disparity).

<sup>11</sup> See U.S. BUREAU OF LABOR STATISTICS, *supra* note 9, at 7 (reporting that as of 2010 women now earn eighty-one percent of what men earn).

<sup>12</sup> See ARONS, *supra* note 10, at 2-5 (explaining the history of the wage disparity and current pay differentials); see also Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 29 (2010) (illustrating the double standard pay scales in the 1960s).

<sup>13</sup> See ARONS, *supra* note 10, at 5 (examining the wage disparity in different professions); AM. ASS'N FOR UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 15 (2011), available at <http://www.aauw.org/learn/research/upload/simpletruthaboutpaygap1.pdf> (showing occupation segregation and subsequent pay inequity within those fields). The pay gap is greater with higher levels of education. *Id.* at 13. See also Eisenberg, *supra* note 12, at 24, 26 (asserting that professional and executive women "are not earning compensation levels comparable to their male peers"); see also JOAN C. WILLIAMS & VETA T. RICHARDSON, NEW MILLENNIUM, SAME GLASS CEILING? THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 9 (July 2010), available at <http://www.attorneyretention.org/Publications/SameGlassCeiling.pdf> ("Professional women have the largest gender wage gap in the entire economy: they earn proportionately less, as compared with professional men than do women in non-professional jobs.") (footnote omitted); JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUC. FOUND., BEHIND THE PAY GAP 11 (2007), available at <http://www.aauw.org/learn/research/upload/behindpaygap.pdf> (studying the pay gap after college). The study reported that full time female workers that are one year out of college earned eighty percent of what their fellow male classmates earned. *Id.* at 10. Women earned less than men in nearly every collegiate major, but the extent of the discrepancy is dependent on the major. *Id.* at 11. After taking into account segregation by major and then subsequent occupation choices, five percent of that pay differential cannot be explained and may be attributed to sex discrimination. *Id.* at 8. Ten years out of college that unexplained five percent grows to twelve percent. *Id.* at 20.

<sup>14</sup> See ARONS, *supra* note 10, at 5 (analyzing the wage disparity in different types of employment). Women may average a loss of \$434,000 over forty years. *Id.* at 1. According to the Center for American Progress, the reason for the drastic difference in professional pay is that skilled labor tends to be more unionized with set salary ranges, and these union contracts do not provide opportunities for salary negotiation. *Id.* at 6. Women with college degrees fared far worse than those without—\$713,000 versus \$270,000 for women who did not finish high school. *Id.* at 1.

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lose \$891,000 in their career, while females in the legal profession will lose \$1,481,000.<sup>15</sup>

Brzezinski interviewed prominent women in various industries about knowing their value in the workplace, including Valarie Jarrett, senior advisor to President Obama; Sheryl Sandberg, Chief Operating Officer (“COO”) of Facebook; and Arianna Huffington, media entrepreneur.<sup>16</sup> Brzezinski found many of the women she interviewed shared the similar struggle of getting paid their value.<sup>17</sup> She suggests women learn from her own experiences and those of her interviewees and take matters into their own hands by realizing their value and asking for what they are worth.<sup>18</sup> However, if asking does not work and the wage difference for similar work continues, women should seek legal remedies.<sup>19</sup>

Current legal solutions for a professional woman are to either file a claim in court pursuant to the Equal Pay Act (“EPA”) or Title VII of the Civil Rights Act of 1964 (“Title VII”); file a complaint with the Equal Employment Opportunity Commission (“EEOC”); or all of the above.<sup>20</sup> The current U.S. approach to wage disparity is considered a complaint-based model because it relies solely on the *individual* to file a claim.<sup>21</sup> The

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<sup>15</sup> *Id.* at 5. The top five occupations where women stand to lose out are legal, health care practitioners, sales, management, and business operations. *Id.* at 6. See NAT’L ASS’N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE THIRD ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3 (Nov. 2008), available at [http://nawl.timberlakepublishing.com/files/2008\\_Survey\\_Report\\_FINAL\\_as%20of%2011-10-08.pdf](http://nawl.timberlakepublishing.com/files/2008_Survey_Report_FINAL_as%20of%2011-10-08.pdf) (“At every stage of practice, men out-earn women lawyers . . .”). In the 2008 survey, the National Association of Women Lawyers (“NAWL”) found that “at each level of seniority, women in large firms do less well than men,” and the difference increases as women advance in their career. *Id.* at 14. Associate women earn ninety-seven percent of their male counterparts and if/when women make equity partner that percentage drops to eighty-seven percent. *Id.* Furthermore, women make up less than sixteen percent of equity partners. *Id.* at 2.

<sup>16</sup> BRZEZINSKI, *supra* note 1, at 6–8. Brzezinski found that women did not *ask* for a higher salary because either they were unaware they should be paid more; afraid of raising their hand and being rejected; interested in being liked; or under the belief that if they work hard enough and long enough, they will be given what they deserve. *Id.* at 37, 40, 42, 85, 132.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 8, 184. Brzezinski explains value is not just about money but understanding how you should be valued anywhere. *Id.* at 8. But she encourages the reader to know the fair-market-value of their contributions so they can be paid what they deserve. *Id.* at 186.

<sup>19</sup> See *infra* text accompanying note 20 (explaining EPA, Title VII, and EEOC as viable legal options to remedy unequal wages based on sex).

<sup>20</sup> See *Equal Pay/Compensation Discrimination*, EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/equalcompensation.cfm> (last visited Sept. 28, 2011) (discussing how individuals may seek a remedy under the EPA).

<sup>21</sup> See PAY EQUITY TASK FORCE FINAL REPORT, PAY EQUITY: A NEW APPROACH TO A FUNDAMENTAL RIGHT 111 (2004) (noting complaint-based models require complaints to initiate a pay equity review).

individual's prima facie standard is difficult to meet, and the affirmative defenses are so broadly construed that most claims are dismissed at summary judgment.<sup>22</sup> District courts, from 1999–2009, granted summary judgment motions in favor of employers seventy-two percent of the time and these judgments were affirmed by an appellate court ninety-two percent of the time.<sup>23</sup> Complaint-based models are recognized as inadequate because employers are unlikely to change their practices until faced with a complaint or individual claim.<sup>24</sup>

Discriminatory pay practices are not limited to the United States, and, consequently, other countries have adopted diverse approaches to addressing this endemic problem.<sup>25</sup> According to the International Labor Organization (“ILO”), Sweden and Canada have adopted the best approach—the proactive model.<sup>26</sup> This model is the most effective approach because it places responsibility on the employers to review their pay practices, adopt a pay equity action plan to remedy pay discrepancies, and comply within a certain timeframe.<sup>27</sup> This Note proposes an amendment to the EPA that incorporates similar proactive model responsibilities on U.S. employers.

In an effort to amend the EPA to follow a proactive model, Part II of this Note discusses the remedies for addressing the wage disparity, acknowledges contemporary congressional legislation to ameliorate the deficiencies of the EPA, and introduces the proactive model.<sup>28</sup> Part III of this Note addresses the problems associated with relying solely on the EPA's complaint-based model and analyzes Canada and Sweden's

<sup>22</sup> See Eisenberg, *supra* note 12, at 33 (noting that an increasing number of claims are dismissed at summary judgment).

<sup>23</sup> *Id.* at 34.

<sup>24</sup> See EQUAL PAY TASK FORCE, JUST PAY: A REPORT TO THE EQUAL OPPORTUNITIES COMMISSION, xi (2001), available at <http://www4.btwebworld.com/equalpaytaskforce/howto/JustPayS.pdf> (stating there will be no progress unless employers are forced to examine whether they have a pay gap, which will not likely occur voluntarily).

<sup>25</sup> See CATALYST, WOMEN'S EARNINGS AND INCOME 7 (2011), available at <http://analyseconomique.files.wordpress.com/2012/08/earnings-and-income-of-u-s-women-and-men.pdf> (showing the earnings of men and women in the United States and other countries); Jill Andrews, Comment, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 NW. J. INT'L L. & BUS. 413, 413 (1994) (“[Countries have] facially similar laws prohibiting discrimination . . . the difference between equality in law and equality in fact lies in their implementation.”) (footnote omitted).

<sup>26</sup> See generally Marie-Thérèse Chicha, *A Comparative Analysis of Promoting Pay Equity: Models and Impacts*, 8–27 (Int'l Labor Office, Geneva, Working Paper 49, 2006) (examining three approaches used to implement pay equity).

<sup>27</sup> *Id.*; see also *infra* Part II.C (discussing Sweden's and Québec's proactive model).

<sup>28</sup> See *infra* Part II (exploring current remedies to the wage disparity and international proactive model).

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proactive model approach.<sup>29</sup> Next, Part IV of this Note proposes an EPA amendment that adopts parts of Sweden's and Québec's proactive models, effectively making employers share in the responsibility of closing the wage gap at the professional level.<sup>30</sup>

## II. BACKGROUND

## A. EPA: The Current Legislative Answer to U.S. Wage Disparity

The purpose for enacting the EPA was to remedy "a serious and endemic problem of employment discrimination in private industry . . ." <sup>31</sup> The EPA prohibits employers from paying the opposite sex less money for equal work.<sup>32</sup> When the EPA was passed in 1963, women earned an average of fifty-nine cents for every dollar a man earned.<sup>33</sup> Forty-eight years later, women still only average eighty-one cents on the dollar.<sup>34</sup> At the current rate, the wage gap has been projected to disappear by the year 2056.<sup>35</sup> To address this injustice, a

<sup>29</sup> See *infra* Part III (discussing the problems with current remedies).

<sup>30</sup> See *infra* Part IV (proposing a proactive amendment as an alternative remedy).

<sup>31</sup> See *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (addressing the wage disparity in the United States). The cretinous wage structure of the mid-twentieth century was based on an outdated belief that a man, "because of his role in society, should be paid more than a woman even though his duties are the same." *Id.* See also Eisenberg, *supra* note 12, at 30 ("Many legislators lamented that the final [version of the] EPA was not as strong as it needed to be to combat wage discrimination. Representative St. George noted, 'It is a little bit too little and, of course, it is too late.'") (footnote omitted). See generally Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859 (2005) (providing an extensive history of the struggles that women have endured to break into the legal profession and the modern glass ceiling before the Equal Pay Act).

<sup>32</sup> See Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (codified and amended at 29 U.S.C. § 206(d)(1) (2006)) ("[P]aying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . ." violates the EPA); see also *Equal Pay and Compensation Discrimination: Fact Sheet*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2010) [hereinafter EQUAL EMP'T OPPORTUNITY COMM'N] <http://www.eeoc.gov/eeoc/publications/upload/fs-epa.pdf> (last updated Apr. 1, 2010) (explaining that employers cannot pay employees less for jobs that are substantially equal).

<sup>33</sup> ARONS, *supra* note 10, at 2.

<sup>34</sup> U.S. BUREAU OF LABOR STATISTICS, *supra* note 9, at 7.

<sup>35</sup> *Women's Median Earnings as a Percent of Men's Median Earnings, 1969-2009 (Full-Time, Year-Round Workers) with Projection for Pay Equity in 2056*, INST. FOR WOMEN'S POL'Y RES., fig. IWPR # Q004 (Mar. 2011); see WILLIAMS & RICHARDSON, *supra* note 13, at 9 (discussing the existing wage disparities between female and male attorneys); see also DEY & HILL, *supra* note 13, at 11 (examining the pay gap among college graduates); NAT'L ASS'N OF WOMEN LAWYERS & NAWL FOUND., *supra* note 15, at 3 (discussing problems women face in law firms).

discriminated-against professional woman must turn to the EPA or Title VII.<sup>36</sup> This Note focuses on obstacles within the EPA, even though similar problems exist in Title VII.<sup>37</sup>

Under the EPA, a professional woman may file an individual claim in court, make a complaint with the EEOC, or both.<sup>38</sup> The EPA, a predecessor to Title VII, was the first federal sex discrimination law.<sup>39</sup> The EPA was an amendment to the Fair Labor Standards Act of 1938 (“FLSA”), designed to remedy pay discrimination against women.<sup>40</sup> The

<sup>36</sup> See FIELDS & CHEESEMAN, *supra* note 9, at 166 (showing available remedies depending on the statutory basis for the plaintiff’s claim); see also EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 20 (“[S]omeone who has an Equal Pay Act claim may also have a claim under Title VII.”). See generally *Reconciliation with Title VII of the Civil Rights Act of 1964*, in I CIVIL RIGHTS ACTIONS TREATISE ¶ 20.06 (Lexis 2011) (stating that sex-based wage discrimination violates both the EPA and Title VII of the Civil Rights Act of 1964, but the statutes are not coextensive). For example, some employers will only be liable under one statute but not the other. *Id.* ¶ 20.06A. To bring a Title VII claim the employer must have fifteen or more employees. *Id.* However, Title VII is broader because it is not limited to sex but rather applies to discrimination based on race, color, religion, and national origin. *Id.* ¶ 20.06B.

<sup>37</sup> Title VII has a different prima facie standard and has a broader mandate than the EPA. See GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 117–18 (2001) (noting the differences between the EPA and Title VII). The EPA is limited to sex discrimination, and, therefore, Title VII will not be discussed in-depth. *Id.* at 118. However, Title VII is mentioned because the affirmative defenses and reliance on an individual complaint are the same as the EPA. See *id.* (discussing the Bennett Amendment and incorporation of EPA’s affirmative defenses into Title VII). As a result, this Note will cite Title VII cases that involve the affirmative defense “any factor other than sex.”

<sup>38</sup> See EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 20 (explaining how the EEOC handles allegations of an EPA violation); see also MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 123 (1988) (noting there are no administrative prerequisites, no pre-suit charges, no administrative investigations or conciliation required before bringing a suit); RUTHERGLEN, *supra* note 37, at 158 (noting EEOC requirements for filing Title VII claims); REBECCA HANNER WHITE, *EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION* 167–68 (1998) (noting that, unlike Title VII, FLSA governs EPA claims and does not require the plaintiff to exhaust administrative remedies before bringing an EPA claim); Eisenberg, *supra* note 12, at 30 (stating plaintiffs do not have to file a charge with the EEOC before bringing a private action).

<sup>39</sup> See Eisenberg, *supra* note 12, at 29 (discussing the beginning of the concept of equal pay for equal work).

<sup>40</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (codified and amended at 29 U.S.C. § 206(d)(1) (2006)); see 4 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 7:1 (2010) (discussing the history of the EPA). The Act applies to both men and women, but women have traditionally been the beneficiaries. *Id.* See generally *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (stating the reason for enactment of the EPA was “to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it”) (footnote omitted). The EPA, as originally enacted, did not even apply to the white-collar professional. See Juliene James, Note, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873, 1881–82 (2004) (explaining that the addition of the EPA to the FLSA originally limited the type of



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EPA and FLSA were enforced by the U.S. Department of Labor's Wage and Hour Administrator until President Carter reassigned the enforcement of the EPA to the EEOC in an effort to consolidate all anti-discrimination laws under one agency.<sup>41</sup> The EPA is considered a complaint-based model, because it is enforced through complaints made either by individuals or through the EEOC.<sup>42</sup>

1. EPA: Complaint-Based Model

Individuals who are paid less because of their sex may file suit against their employer pursuant to the EPA.<sup>43</sup> In order to prevail on an EPA claim, the plaintiff must establish a prima facie case and rebut several affirmative defenses provided by the employer.<sup>44</sup> To establish a prima facie case under the EPA, the plaintiff has the initial burden of proving: (1) the employer pays the worker of one sex more than the opposite sex; (2) the employees perform equal work, which is determined by equal skill, effort, and responsibility; and (3) the jobs are

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professions protected by the legislation). Since the EPA was an amendment to FLSA, it was therefore subject to the same white-collar exemptions. *Id.* The FLSA contained a "white collar" clause that exempted those "employed in a bona fide executive, administrative, or professional capacity" from bringing claims under the Act. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (codified and amended 29 U.S.C. § 213(a)(1) (2006)). These "white collar" exemptions were justified on the basis of administrative difficulty, autonomy concerns, and symbolic value of certain jobs. James, *supra*, at 1892-94. "[Administrative difficulty] assumes that the type of work done by executives, professionals, and administrative workers is qualitatively different from that done by wage earners, such that the work done by one white-collar employee cannot be divided among many and therefore is not 'spreadable.'" *Id.* at 1892. "Autonomy" is the idea that executives are sufficiently compensated and are in a better position to control their income and therefore do not need protection. *Id.* at 1893. Adherents to the "symbolic value" position argue that though exempted workers are not sufficiently compensated, they receive a benefit from the identification with a class that has the freedom to advance in careers and are not in need of protection. *Id.* at 1894. Since the EPA's passage, Congress has eliminated the white collar exemptions. 29 C.F.R. § 1620.1(a)(1) (2011).

<sup>41</sup> See Reorganization Plan No. 1 of 1978, 45 Fed. Reg. 19,807 (May 9, 1978) (authorizing the transition of the EPA's enforcement power from the Department of Labor to the EEOC); see also FIELDS & CHEESEMAN, *supra* note 9, at 158 (noting that the EEOC enforces Title VII). See generally EEOC v. Home of Econ., Inc., 712 F.2d 356, 357 (8th Cir. 1983) (explaining the Reorganization Plan did not create a conciliation requirement before filing an EPA claim).

<sup>42</sup> See PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 111 (explaining that the complaint-based model relies on the employee to initiate the pay equity review).

<sup>43</sup> See Equal Pay Act of 1963 § 206(d)(1) (prohibiting employers from discriminating on the basis of sex by paying lower wages). The prima facie standard for Title VII is outside the scope of this Note.

<sup>44</sup> See generally *id.* (discussing the affirmative defenses available to an employer); Corning Glass Works v. Brennan, 417 U.S. 188, 195-96 (1974) (discussing the prima facie burden of an EPA claim).

performed under similar working conditions.<sup>45</sup> Whether the plaintiff has established a prima facie case typically turns on whether the work engaged in is “substantially equal” to her male peers.<sup>46</sup> The substantially equal standard has been interpreted to lie somewhere between “comparable” and “identical.”<sup>47</sup>

Courts have developed two interpretations of substantially equal: (1) the strict approach and (2) the pragmatic approach.<sup>48</sup> Courts applying the strict approach often decline to find professional jobs as substantially equal, specifically in instances where executives manage different departments.<sup>49</sup> In *Wheatley v. Wicomico County*, the Fourth Circuit, applying the strict approach, determined that, since the directors

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<sup>45</sup> *Corning Glass Works*, 417 U.S. at 195 (discussing the requirements to establish an EPA claim); see also 29 C.F.R. § 1620.13(a) (2011) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”); 29 C.F.R. § 1620.15(a) (“[Equal skill] includes consideration of such factors as experience, training, education, and ability.”); 29 C.F.R. § 1620.16(a) (“[Equal effort] is concerned with the measurement of the physical or mental exertion needed for the performance of a job.”); 29 C.F.R. § 1620.17(a) (“[Equal] responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.”); 29 C.F.R. § 1620.18(a) (stating the working condition requirement of the EPA adopts a flexible standard that enlists practical judgment to determine the difference).

<sup>46</sup> See BODENSTEINER & LEVINSON, *supra* note 40, § 7:7 (discussing how courts have interpreted the substantially equal standard); see also *Equal Work—General Principles*, in I CIVIL RIGHTS ACTIONS TREATISE, *supra* note 36, ¶ 20.14(A) (stating the most intricate element of the EPA is proving the equal work requirement).

<sup>47</sup> See *Thompson v. Sawyer*, 678 F.2d 257, 271–72 (D.C. Cir. 1982) (illustrating that the widely adopted “substantially equal” test is a middle course between “exactly alike” and “merely comparable”). “[T]he phrase ‘equal work’ does not mean that jobs must be identical, but merely that they must be ‘substantially equal.’” *Id.* at 272. The court examined the legislative history of the EPA and found that it contained “ammunition both for those who would insist on a very narrow reading of ‘equality,’ and for those who would urge a more expansive understanding of the term.” *Id.* at 271 (footnote omitted). See also 29 C.F.R. § 1620.14(a) (“[E]qual’ does not mean ‘identical.’”).

<sup>48</sup> See Eisenberg, *supra* note 12, at 39 (discussing courts’ approaches to handling substantially equal).

<sup>49</sup> See generally *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007) (holding that the managers of two parks were not comparable because the parks were so different from one another); *Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 332 (4th Cir. 2004) (holding that the work of managers was not comparable because they worked in different departments); *Berg v. Norand Corp.*, 169 F.3d 1140, 1146 (8th Cir. 1999) (holding that thirty-three male managers could be paid \$6,000–\$8,000 more than seven female managers because their tasks were substantially different); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1364 (10th Cir. 1997) (holding that assistant managers of different departments were not comparable); *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002) (explaining that courts should not be in the business of second guessing decisions involving hiring and compensating executives); *Ratts v. Bus. Sys., Inc.*, 686 F. Supp. 546, 550 (D.S.C. 1987) (“Allegations of Equal Pay Act violations have routinely been rejected by courts applying the equal work standard to jobs involving executive and management positions.”).

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worked in different departments, they could not be substantially equal.<sup>50</sup> In *Ratts v. Business Systems, Inc.*, the District Court of South Carolina also applied the strict approach, finding directors who performed a core group of tasks were not comparable because there were additional duties in each department that were not the same.<sup>51</sup>

Courts that utilize the pragmatic approach focus on whether the core functions or general purpose of the job are substantially similar and then determine if the additional tasks are significant enough to establish the jobs as unequal.<sup>52</sup> The Northern District Court of Alabama held in *Crabtree v. Baptist Hospital of Gadsden Inc.* that vice presidents in different departments were substantially equal.<sup>53</sup> In *Simpson v. Merchant*, the

<sup>50</sup> 390 F.3d at 333. The female heads of departments had the same management responsibilities as their male counterparts in other departments but were paid \$25,000 less a year. *Id.* at 331. The plaintiffs asserted that managers, regardless of department subject-matter, were comparable because they performed the same supervisory duties. *Id.* The court declined to consider department managers with general similar responsibilities as equal. *Id.* at 333. The court interpreted the legislative intent behind the word “equal” as meaning “virtually identical.” *Id.* The court said, “We decline to hold that having a *similar* title plus *similar* generalized responsibilities is equivalent to having *equal* skills and *equal* responsibilities.” *Id.* at 334.

<sup>51</sup> 686 F. Supp. at 550. The female vice president earned \$60,000–\$70,000 less than her peer male vice presidents, although they performed a core of similar tasks. *Id.* at 549. The plaintiff attempted to show her duties were equal to those of other male vice presidents. *Id.* at 548. The court conceded that, although all vice presidents performed similar tasks, including “supervision of employees, corporate decision making, participation in trade shows and the general goal of selling a product,” the jobs were not substantially equal because they performed different additional duties. *Id.* at 550.

<sup>52</sup> See Eisenberg, *supra* note 12, at 39; see also EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1245 (8th Cir. 1981) (“Whether two jobs entail equal skill, equal effort, or equal responsibility requires a practical judgment on the basis of all the facts and circumstances of a particular case.”); see, e.g., Brown v. Fred’s, Inc., 494 F.3d 736, 740–41 (8th Cir. 2007) (holding that a jury could have concluded that the difference of working at a larger store was not a justification for paying a female manager \$100 less than the male managers); Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 578 (8th Cir. 2006) (holding that vice presidents were substantially equal); Brewster v. Barnes, 788 F.2d 985, 991 (4th Cir. 1986) (holding that male and female correctional officers were substantially equal); Denman v. Youngstown State Univ., 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (holding that male and female cabinet officers were substantially equal because they were within the same job grade and job family); Rinaldi v. World Book, Inc., No. 00 C 3573, 2001 WL 477145, at \*9 (N.D. Ill. May 3, 2001) (holding that the vice presidents’ work, although in different departments, were considered to be comparable); Crabtree v. Baptist Hosp. of Gadsden, Inc., No. 82-AR-1849-M, 1983 WL 30400, at \*4 (N.D. Ala. Sept. 21, 1983) (finding that the vice presidents’ jobs were comparable, even though they had different responsibilities and a different number of employees under their control). *But see* Merillat v. Metal Spinners, Inc., 470 F.3d 685, 695–96 (7th Cir. 2006) (holding that a senior buyer and male managerial employee had a common core of tasks, but they were unequal because some of the tasks required different responsibilities).

<sup>53</sup> *Crabtree*, 1983 WL 30400, at \*4–5. The defendants asserted that, since none of the assistant vice presidents had the same area of responsibility or had the same number of

Eighth Circuit compared the assistant vice president to an untitled bank officer because, although they carried out different tasks, they possessed similar skills.<sup>54</sup> After the employee establishes a prima facie case, the employer may invoke affirmative defenses.<sup>55</sup>

There are four affirmative defenses listed in the statute: (1) pay based on a seniority system, (2) a merit pay system, (3) a system that measures earnings by quantity or quality of production, or (4) payment based on any factor other than sex.<sup>56</sup> If the plaintiff can establish a prima facie case, the burden of persuasion then shifts to the employer to show that the difference in pay is justified under one of the Act's four exceptions.<sup>57</sup> The most commonly invoked affirmative defense is "any factor other than sex."<sup>58</sup> To establish this defense, employers can point to any job-related or business reason other than sex to justify the difference in pay.<sup>59</sup> For example, the Third Circuit has held that a department store

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employees under their supervision, the jobs were not equivalent, and the plaintiff failed to meet her burden of proof. *Id.* at \*4. The court found that pay was so disparate between the single female officer and male officers that it could not be attributed to anything other than sexual discrimination. *Id.* at \*5.

<sup>54</sup> *Simpson*, 441 F.3d at 578. Although Simpson had the title of assistant vice president and Henry had the title of bank officer, the court found a jury could have concluded that they possessed the same experience, training, education, and ability to perform their jobs. *Id.* at 576–78. The court held that difference of college degree was irrelevant because all the skills required for the job were learned on-the-job. *Id.* at 578. The jury awarded Simpson damages in the amount of \$35,664.37. *Id.* at 577.

<sup>55</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (codified and amended at 29 U.S.C. § 206(d)(1) (2006)).

<sup>56</sup> *Id.* Note that these affirmative defenses have been incorporated into Title VII. *Id.*

<sup>57</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). The court summarized the four exceptions:

The Act establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes "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 than sex."

*Id.* (footnote omitted).

<sup>58</sup> See BODENSTEINER & LEVINSON, *supra* note 40, § 7:14 ("The most litigated defense under the Equal Pay Act is that the wage disparity is based on a 'factor other than sex.'") (footnote omitted); Eisenberg, *supra* note 12, at 57–60 (describing "any factor other than sex" as the most controversial affirmative defense); see also *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (explaining how broadly the court is to construe the any factor other than sex affirmative defense).

<sup>59</sup> See Eisenberg, *supra* note 12, at 60 (explaining the majority of circuits and the EEOC's view on the fourth affirmative defense); see also *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (explaining the court was not concerned with "the wisdom or reasonableness" of the fourth affirmative defense); *Dey*, 28 F.3d at 1462 ("[T]he EPA's fourth affirmative defense is a broad 'catch-all' exception [that] embraces an almost limitless number of factors, so long as they do not involve sex. . . . The factor need not be 'related to the requirements of the particular position in question,' nor must it even be business-related.").

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could pay men more than women because the men's department was more profitable than the women's department.<sup>60</sup> Profitability of a department was considered to be a factor other than sex.<sup>61</sup>

Many courts follow the "legitimate business reason" approach, which requires that the factor be job-related and a reasonable business practice.<sup>62</sup> Other courts, including the Seventh Circuit, have broadly interpreted the defense as meaning any reason, regardless of whether it is legitimate, provided it is not based on sex.<sup>63</sup> In addition to or instead of filing an EPA claim individually, plaintiffs may elect to allege a

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<sup>60</sup> See *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 597 (3d Cir. 1973) (explaining the wage differential was not based on sex but supported by a reasonable business decision). The department store's policy would not permit men or women to work in the department of the opposite sex. *Id.* at 591. Although statistics revealed full-time male employees made more dollar sales per hour than females, the women could not sell the high-priced items sold in the men's department. *Id.* at 593-94.

<sup>61</sup> See *id.* at 594 (agreeing with the district court that economic benefits could justify the wage differential).

<sup>62</sup> See *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) ("[T]he 'factor other than sex' defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."). The Sixth Circuit further explains that it adopts the Ninth Circuit's interpretation set out in *Kouba v. Allstate Insurance Co.* to avoid the extreme application of "any factor other than sex." *Id.* See also *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) ("The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason."). In *Kouba*, the court held that prior salary was an acceptable business reason. *Id.* at 876.

<sup>63</sup> See *Wernsing v. Dep't of Human Servs., Ill.*, 427 F.3d 466, 468 (7th Cir. 2005) (asserting that courts should not determine what is an acceptable or good reason); see also *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 702-03 (7th Cir. 2003) (holding that education, marketplace value of skills, and prior salary constitute adequate factors other than sex); *Markel v. Bd. of Regents of the Univ. of Wisc. Sys.*, 276 F.3d 906, 913 (7th Cir. 2002) (finding that one employee was "justifiably paid more" because that employee had worked for the university longer and had held the position of program director, thus the discrepancy was not based on sex); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (asserting that Congress did not want the affirmative defense to be construed so broadly); *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (acknowledging that a woman's willingness to be paid less is an insufficient justification but that an employer may employ a market value assessment of a particular employee's skills to determine his or her salary). *But see* *Ende v. Bd. of Regents of Regency Univs.*, 757 F.2d 176, 183 (7th Cir. 1985) (finding that an adjustment formula eliminating pay differential from past discrimination as valid); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970) (stating that an employer's bargaining power that is greater over women than over men "is not the kind of factor Congress had in mind"). After an employee of Northern Illinois University ("NIU") filed a complaint in the Regional Office of Civil Rights ("OAR") alleging salary and job discrimination, the OAR and NIU conducted investigations. *Id.* at 178. NIU found an average of \$150,000 discrepancy between male and female faculty and instituted a salary formula that would pay female faculty an additional \$150,000 on a yearly basis. *Id.*

complaint with the EEOC. After an investigation, the EEOC has the discretion on whether to file a complaint.<sup>64</sup>

## 2. EEOC: Enforcement of the EPA

The EEOC originally was formed to enforce Title VII but has subsequently become responsible for enforcing all federal anti-discrimination laws, including the EPA.<sup>65</sup> As a result of the agency's additional enforcement responsibilities, the EEOC has become understaffed and underfunded.<sup>66</sup> The EEOC receives, investigates, and resolves charges of discrimination filed against private employers, employment agencies, labor unions, and the government.<sup>67</sup> In addition to investigating allegations of discrimination, the EEOC collects workforce data from employers with more than one hundred employees.<sup>68</sup> Employers are required to file reports disclosing their employees' gender, race, and job categories.<sup>69</sup> The data is collected for

<sup>64</sup> See *infra* Part II.A.2 (discussing the role of the EEOC and the EPA).

<sup>65</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 32; see FIELDS & CHEESEMAN, *supra* note 9, at 158 (discussing the purpose of the EEOC and the procedure of filing a claim with the EEOC); *Overview*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Sept. 28, 2011) (describing the responsibility of the EEOC).

<sup>66</sup> See Kathryn Moss, Scott Burris, Michael Ullman, Matthew Johnsen & Jeffrey Swanson, *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 6 (2001) (pointing out problems with the EEOC). The EEOC was formed in 1964 under the Civil Rights Act, but the agency has continued to take on additional statutory obligations without receiving additional funding. *Id.*

<sup>67</sup> See *Administrative Enforcement and Litigation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/eeoc/enforcement\\_litigation.cfm](http://www.eeoc.gov/eeoc/enforcement_litigation.cfm) (last visited Sept. 28, 2011) (discussing EEOC methods for handling complaints). In 2009, the EEOC received 93,277 private sector charges of discrimination and 7,277 requests for hearings in the federal sector. *Enforcement*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/enforcement/index.cfm> (last visited Dec. 20, 2012) (discussing EEOC enforcement practices). The EEOC also has a mediation program for both the private and federal sectors that has resolved claims more efficiently over the past few years. *Id.*

<sup>68</sup> See *EEO Reports/Surveys*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/reporting.cfm> (last visited Sept. 28, 2011) (explaining EEOC reporting duties). The data collected is shared with other federal agencies in order to avoid duplicate collection. *Id.* See also *EEO-1: Who Must File*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N [hereinafter *EEO-1: Who Must File*], <http://www.eeoc.gov/employers/eo1survey/whomustfile.cfm> (last visited Sept. 28, 2011) (stating that all private employers subject to Title VII with over one hundred employees must fill out a Standard Form-100, also known as an EEO-1). State and local government, schools, and other groups file different forms. *Id.*

<sup>69</sup> See *EEO-1: Who Must File*, *supra* note 68 (stating who must file surveys with the EEOC). See generally EQUAL EMP'T OPPORTUNITY COMM'N, INSTRUCTION BOOKLET (Jan. 5, 2006) [hereinafter INSTRUCTION BOOKLET], <http://www.eeoc.gov/employers/eo1survey/>

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numerous reasons, including enforcement, employer self-assessment, and research.<sup>70</sup>

The FLSA does not provide the EEOC with enforcement powers to adjudicate EPA claims.<sup>71</sup> The EPA can be enforced by an employee, which is known as private action, or by the EEOC, which is known as public action.<sup>72</sup> In a public action, the EEOC can seek an injunction, or it can recover unpaid wages on behalf of the employee, plus liquidated damages.<sup>73</sup> Private individuals can sue only if they have not previously accepted relief from a public action and if a public action has not been filed on their behalf.<sup>74</sup> The EPA was considered revolutionary for its time, but the “equal work” standard has been considered by many to be an ineffective remedy for women in upper-level professions.<sup>75</sup> As a result, Congress has made two legislative proposals targeting these EPA flaws.<sup>76</sup>

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upload/instructions\_form.pdf (listing general job categories that are listed on the EEO-1 with corresponding skills and training requirements). Job categories include executive/senior level officials and managers, first/mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers (skilled), operatives (semi-skilled), laborers and helpers (unskilled), and service workers.  
*Id.*

<sup>70</sup> See *EEO-1: Who Must File*, *supra* note 68 (stating what data is collected); see also INSTRUCTION BOOKLET, *supra* note 69, at 1 (stating that the EEO-1 is not voluntary and the EEOC may compel an employer to file this form by obtaining an order from a U.S. district court).

<sup>71</sup> See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (codified as amended at 29 U.S.C. §§ 213(a)(1), 216-17 (2006)) (addressing the penalties and right of action for those who violate the EPA—but note there is no adjudication procedure within the agency); RUTHERGLEN, *supra* note 37, at 116 (“The FLSA authorizes the Secretary of Labor to bring civil enforcement actions, but an executive reorganization plan transferred this authority to the EEOC.”) (footnote omitted). “[T]he EEOC can sue for back pay” and liquidated damages under 29 U.S.C. § 216(b) and for injunctive relief, including back pay but not liquidated damages, under 29 U.S.C. § 216(c). *Id.*

<sup>72</sup> See Fair Labor Standards Amendments of 1961, 29 U.S.C. §§ 216(b)–(c) (explaining who can sue and what can be recovered in an action against an employer); PLAYER, *supra* note 38, at 123 (stating how the EPA is enforced and the remedies available to employees).

<sup>73</sup> 29 U.S.C. §§ 216(b)–(c).

<sup>74</sup> 29 U.S.C. § 216(b); see RUTHERGLEN, *supra* note 37, at 116 (noting what damages plaintiffs can recover).

<sup>75</sup> See Eisenberg, *supra* note 12, at 46 (asserting that the equal work standard has imposed a glass ceiling for professional women). During the passage of the bill, Congressmen voiced concerns. *Id.* at 30. Representative Dwyer stated, “There are a number of weaknesses in this bill which I believe unwisely limit the scope of its application and unnecessarily encumber its enforcement.” *Id.*

<sup>76</sup> See *infra* Part II.B (examining the FPA and PFA).

B. *Proposed Legislation to Amend the EPA's Complaint-Based Model*

Over the years, Congress has reintroduced the Fair Pay Act ("FPA") and the Paycheck Fairness Act ("PFA") in an effort to ameliorate the EPA's inability to close the wage gap.<sup>77</sup> Both pieces of legislation target different flaws of the EPA. The FPA changes the substantially equal standard to "equivalent jobs." "[E]quivalent jobs' means jobs that *may be dissimilar*, but whose requirements are equivalent, when viewed as a *composite* of skills, effort, responsibility, and working conditions."<sup>78</sup> For example, Senator Harkin explained that in social work, a primarily female-dominated job, employees are paid less than probation officers, a primarily male-dominated job, even though both jobs require equal skill,

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<sup>77</sup> Fair Pay Act of 2011, H.R. 1493, 112th Cong. (2011) (introducing the bill on April 12, 2011, and referring it to the House subcommittee on Workforce Protections on May 20, 2011); Paycheck Fairness Act, H.R. 1519, 112th Cong. (2011); Fair Pay Act of 2011, S. 788, 112th Cong. (2011) (introducing a related bill that was referred to the Senate Committee on Health, Education, Labor, and Pensions on April 12, 2011); *see also* Editorial, *Progress on Fair Pay*, N.Y. TIMES, Jan. 28, 2009, <http://www.nytimes.com/2009/01/28/opinion/28wed3.html?scp=1&sq=progress%20on%20fair%20pay&st=cse> (passing the PFA in the House in 2009, which was originally paired with the Lilly Ledbetter Fair Pay Act ("LLFPA") for a chamber vote; however, congressional leadership was concerned the LLFPA would not pass, so they decided to pass the PFA). The Fair Pay Act was introduced in the 103rd Congress and has been reintroduced in every subsequent session. *See* H.R. 1493 & S. 788; Fair Pay Act of 2009, H.R. 2151 & S. 904, 111th Cong. (2009); Fair Pay Act of 2007, H.R. 2019 & S. 1087, 110th Cong. (2007); Fair Pay Act of 2005, H.R. 1697 & S. 840, 109th Cong. (2005); Fair Pay Act of 2003, H.R. 1695 & S. 841, 108th Cong. (2003); Fair Pay Act of 2001, H.R. 1362 & S. 684, 107th Cong. (2001); Fair Pay Act of 1999, H.R. 1271 & S. 702, 106th Cong. (1999); Fair Pay Act of 1997, H.R. 1302 & S. 232, 105th Cong. (1997); Fair Pay Act of 1995, S. 1650, 104th Cong. (1996); Fair Pay Act of 1995, H.R. 1507, 104th Cong. (1995); Fair Pay Act of 1994, H.R. 4803, 103d Cong. (1994). The Paycheck Fairness Act has been introduced in the 111th, 110th, 109th, and 108th Congress. *See* Paycheck Fairness Act, H.R. 12 & S. 182, 111th Cong. (2009); Paycheck Fairness Act, H.R. 1338 & S. 766, 110th Cong. (2007); Paycheck Fairness Act, H.R. 1687 & S. 841, 109th Cong. (2005); Paycheck Fairness Act, H.R. 1688 & S. 76, 108th Cong. (2003). The PFA has passed the House in previous sessions, but it consistently failed in the Senate committee. Ashely Portero, *What You Need to Know About the Paycheck Fairness Act*, INT'L BUS. TIMES (June 1, 2012, 4:48 PM), <http://www.ibtimes.com/what-you-need-know-about-paycheck-fairness-act-701179>.

<sup>78</sup> H.R. 1493 § 3(a)(4)(B) (emphasis added); *see* 151 CONG. REC. S840 (daily ed. Apr. 19, 2005) (referencing floor statements made by Senator Harkin that female dominated jobs, such as social work, childcare, nurses, and teachers, are historically undervalued and underpaid). By allowing courts to compare jobs that are dissimilar, the FPA effectively targets the EPA's occupational segregation, which perpetuates the devaluation of women's work. *See* 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, 391 (2007) ("[The FPA] was introduced as a means of correcting the pay between jobs that 'should' be paid the same—even if the jobs are in dissimilar occupations that nonetheless are deemed to have equivalent skills, effort, responsibility, and working conditions.") (footnote omitted).



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effort, and responsibility.<sup>79</sup> The FPA would allow these seemingly *dissimilar* jobs to be comparable.<sup>80</sup>

The PFA, championed as the “common-sense bill” by President Obama, revises the “any factor other than sex” affirmative defense to a heightened standard that will require “a bona fide factor other than sex, such as education, training, or experience.”<sup>81</sup> A bona fide factor is specifically one not based on sex, but job-related and consistent with business necessity.<sup>82</sup> As discussed in Part III, neither factor provides a comprehensive solution to prevent litigation.<sup>83</sup> However, the ILO recognizes an alternative approach to closing the wage gap—the proactive model—which places responsibility on the employer to maintain fair pay practices, thus preempting the need for litigation.<sup>84</sup>

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<sup>79</sup> See Press Release, U.S. Sen. Tom Harkin of Iowa, Equal Pay for Equal Work (Apr. 9, 2004), available at <http://harkin.senate.gov/press/column.cfm?i=222096> (commemorating Equal Pay Day).

<sup>80</sup> See *supra* note 75 and accompanying text (illustrating the ineffectiveness of the remedies provided by the EPA, and hence the FPA was needed).

<sup>81</sup> See H.R. 1519 § 3(a)(2) (enhancing enforcement of equal pay requirements by using the bona fide factor other than sex); Jesse Lee, *President Obama Speaks out for Paycheck Fairness*, THE WHITE HOUSE BLOG (July 20, 2010, 11:56 AM), <http://www.whitehouse.gov/blog/2010/07/20/president-obama-speaks-out-paycheck-fairness> (addressing the importance of the Paycheck Fairness Act). The Act also forbids retaliation against employees for exploring fair pay claims. H.R. 1519 § 3(b). The Act enhances penalties against employers for unlawful practices, including punitive damages. *Id.* § 3(c). The PFA authorizes grants for negotiation and skill training programs for girls and women. *Id.* § 5(b). See Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. LAW. 155, 173–74 (1999) (explaining specifically what the FPA amends); Vicky Lovell, *Evaluating Policy Solutions to Sex-Based Pay Discrimination: Women Workers, Lawmakers, and Cultural Change*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 58–59 (2009) (discussing how the FPA addresses the occupation segregation of the EPA); see also H.R. 1519 § 3(a) (striking the “any factor other than sex” and inserting the bona fide factor defense). The PFA also enhances penalties against employers for violation of the act by adding punitive damages. *Id.* § 3(c). The PFA authorizes grants for negotiation and skill training programs for girls and women. *Id.* § 5(b).

<sup>82</sup> See H.R. 1519 § 3(a)(B) (“The bona fide factor defense . . . shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from sex-based differential compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity.”). Note, however, the business necessity defense will not apply “where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.” *Id.*

<sup>83</sup> See *infra* Part III (discussing how the proposed amendments do not address the major flaws of the EPA).

<sup>84</sup> See *infra* Part II.C (introducing Sweden’s and Canada’s proactive model).

C. *Introducing the International Proactive Models: Sweden & Canada*

Wage disparity is an international epidemic.<sup>85</sup> Although the right to equal pay has been enshrined in international charters and conventions, pay inequality continues.<sup>86</sup> The ILO, after examining alternative models, determined the Swedish and Canadian proactive models to be the most

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<sup>85</sup> See CATALYST, *supra* note 25, at 7 (showing pay discrepancies in foreign countries); see also Howard LaFranchi, *Hillary Clinton at UN: 'Women's Progress Is Human Progress'*, THE CHRISTIAN SCI. MONITOR (Mar. 12, 2010), <http://www.csmonitor.com/USA/Foreign-Policy/2010/0312/Hillary-Clinton-at-UN-Women-s-progress-is-human-progress> (highlighting the United Nations' attention to women's issues). Secretary Clinton, addressing the United Nations, stated, "[W]omen's progress is human progress, and human progress is women's progress," echoing the sentiment she conveyed fifteen years earlier at the World Conference on Women in Beijing when she said, "[W]omen's rights are human rights, and human rights are women's rights." *Id.* See, e.g., Stephen Kurczy, *International Women's Day: Which Nation Has the Smallest Pay Gap for Women?*, THE CHRISTIAN SCI. MONITOR, (Mar. 8, 2010), <http://www.csmonitor.com/Business/2010/0308/International-women-s-day-Which-nation-has-smallest-pay-gap-for-women> (reporting which countries have the largest and smallest wage disparities). Sweden is ranked second internationally among countries where women's pay is closest to men's. *Id.*

<sup>86</sup> See Convention on the Elimination of All Forms of Discrimination Against Women, art. 11(1), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (requiring parties to take "all appropriate measures to eliminate discrimination against women in the field of employment" and mandating the right to equal remuneration); International Covenant on Economic, Social and Cultural Rights, art. 7(a)(i), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (requiring equal pay for equal work, specifically citing women); International Covenant on Civil and Political Rights, art. 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, art. 2.1, 3.1, June 6, 1951, ILO C100 (requiring member states to ensure application of equal remuneration for work of equal value by instituting measures such as objective job appraisal). Both Canada and Sweden have ratified all four of these conventions, but the United States has only ratified ICCPR and signed ICESCR and CEDAW. See *Ratifications of C100-Equal Remuneration Convention, 1951 (No. 100)*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312245](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245) (last visited Nov. 1, 2012) (providing a list of nations which have ratified the remuneration convention); see also United Nations Treaty Collections, Database of United Nations Treaty Collections, Ratifications of International Covenant on Economic, Social and Cultural Rights by Country (copy on file with Valparaiso University Law School Library) (providing the ratification, accession, and succession dates of all nations); United Nations Treaty Collections, Database of United Nations Treaty Collections, Ratifications of International Covenant on Civil and Political Rights by Country (copy on file with Valparaiso University Law School Library) (providing the ratification, accession, and succession dates of all nations); United Nations Treaty Collections, Database of United Nations Treaty Collections, Ratifications of Convention on the Elimination of All Forms of Discrimination Against Women by Country (copy on file with Valparaiso University Law School Library) (providing the ratification, accession, and succession dates of all nations).

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effective approaches to eliminating the wage gap.<sup>87</sup> Experts believe the proactive model is the most effective because it imposes a responsibility on the employer to review pay practices and correct wage discrimination.<sup>88</sup> Both Canada and Sweden have passed legislation that puts an obligation on the employer to ensure jobs of equal value receive equal pay and establishes a government commission to provide oversight and accountability.<sup>89</sup>

## 1. Canada's Proactive Model

Canadian provinces, including Ontario and Québec, have passed equal pay legislation.<sup>90</sup> Ontario passed its Pay Equity Act in 1990, and Québec passed a similar act in 1996.<sup>91</sup> Both acts require employers to

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<sup>87</sup> See Mary Cornish, *Securing Pay Equity for Women's Work – Everyone Benefits – The International Experience*, ILO Equal Pay for Work of Equal Value 7-8 (Aug. 25, 2008), [http://www.cavalluzzo.com/publications/newsletters/securingpayequityforwomenswork\\_cornish\\_september7\\_08.pdf](http://www.cavalluzzo.com/publications/newsletters/securingpayequityforwomenswork_cornish_september7_08.pdf) (asserting that the proactive model is the most effective approach to achieve pay equity); *About the ILO*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Aug. 13, 2012) (explaining the ILO is an agency of the United Nations responsible for overseeing international labor standards); see also Chicha, *supra* note 26, at 8 (examining the international models used to achieve pay equity). Since the ILO has determined that the model used by Sweden and Canada is the most effective, this Note will focus on this model's approach. The United Kingdom's and Netherlands's methods use an "equal opportunity" approach that requires employers to conduct a thorough assessment of job dimensions as a diagnosis for unfair wages, but subsequently requires the employer to eliminate the disparity within a set time frame. *Id.* at 15. Alternatively, France and Switzerland attempt to fulfill equal work for equal pay requirements by using broad, federally-designated characteristics to compare "equal" work; it then requires employers to submit an overview of progress. *Id.* at 19-25.

<sup>88</sup> See Chicha, *supra* note 26, at 10 (examining the effectiveness of the proactive model); see also PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 111 (stating that, unlike the complaint-based models, which only remedy that particular complaint, proactive models provide broader application because they put a burden on the employer to eliminate wage disparity from the beginning). Proactive legislation requires employers to demonstrate that they have taken steps to analyze wages and eliminate discriminatory pay practices. *Id.* at 66.

<sup>89</sup> See DISKRIMINERINGSLAG (Svensk författningssamling [SFS] 2008:567) (Swed.), [www.do.se/Documents/pdf/new\\_discrimination\\_law.pdf](http://www.do.se/Documents/pdf/new_discrimination_law.pdf) (demonstrating that Sweden has passed equal pay legislation); Pay Equity Act, R.S.Q. 2010, c. E-12.001 (Can.), [www.ces.gouv.qc.ca/documents/publications/anglais.pdf](http://www.ces.gouv.qc.ca/documents/publications/anglais.pdf) (providing Québec's equal pay legislation); Pay Equity Act, R.S.O. 1990, c. P.7 (Can.) (providing Ontario's passed equal pay legislation); see also Chicha, *supra* note 26, at 10-15 (examining Sweden and Québec's approach to equal pay in companies and organizations); Cornish, *supra* note 87, at 7 (examining the three international models). Note that both Sweden and Canada have ratified international conventions that hold them accountable for equal pay for equal work.

<sup>90</sup> R.S.Q. 2010, c. E-12.001 (Can.); R.S.O. 1990, c. P.7 (Can.).

<sup>91</sup> See Chicha, *supra* note 26, at 12 (discussing two of Canada's provinces that have proactive legislation); see also PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 65

first develop pay equity plans and, second, to establish a government commission tasked with enforcement of the act.<sup>92</sup> This Note examines Québec's pay equity plan and Ontario's government commission.

*a. Québec's Pay Equity Act*

Québec's Pay Equity Act was enacted with the purpose of addressing systematic gender discrimination subsequent to pay inequity.<sup>93</sup> The Act mandates employers with fifty or more employees to develop pay equity plans.<sup>94</sup> However, only employers with one hundred or more employees must establish a pay equity plan and a pay equity committee within their enterprise.<sup>95</sup> Pay equity committees represent both employers and employees and are responsible for establishing a pay equity plan.<sup>96</sup>

The pay equity plan is a four-step process.<sup>97</sup> Step one identifies those job classes that are predominately female and predominately male.<sup>98</sup>

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(stating that the federal government passed the Canadian Human Rights Act in 1977, which provides recourse through a complaint). The report explains that jurisdictions which have not adopted pay equity legislation can seek relief through this general statute. *Id.* at 66. But the report found that the federal complaint-based model had been subject to considerable criticism, thus, leading to provinces adopting proactive legislation. *Id.*

<sup>92</sup> See generally R.S.Q. 2010, c. E-12.001 (Can.); R.S.O. 1990, c. P.7 (Can.) (discussing pay equity action plans and government enforcement).

<sup>93</sup> R.S.Q. 2010, c. E-12.001 § 1 (Can.). The Pay Equity Act was enacted in 1996 but was subsequently amended and updated in August 2010. See Chicha, *supra* note 26, at 12 (discussing two Canadian proactive approaches to redressing pay inequity).

<sup>94</sup> R.S.Q. 2010, c. E-12.001 § 31 (Can.). If the enterprise has less than fifty employees, the employer *may* elect, but is not obligated, to establish a pay equity plan. *Id.* § 34.

<sup>95</sup> *Id.* § 10. However, if the enterprise has fifty to ninety-nine employees, the employer *may* elect, but is not obligated, to set up a pay equity committee. *Id.* § 31.

<sup>96</sup> *Id.* §§ 16, 21.1. The committee must have at least three members, two-thirds of the committee must represent employees, and half of the members representing employees must be women. *Id.* § 17. The employer will provide the required training to every employee on the committee. *Id.* § 26. See Chicha, *supra* note 26, at 13 (stating that employers are required by law to provide pay equity committee employees with necessary training to enable them to carry out their responsibilities). Companies with fifty to ninety-nine employees are not required to form committees, but rather employees and trade unions must formulate a pay equity plan. *Id.* See generally R.S.Q. 2010, c. E-12.001 §§ 16-30.1 (Can.) (discussing additional procedural roles of the pay equity committee).

<sup>97</sup> R.S.Q. 2010, c. E-12.001 § 50 (Can.); see PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 112 (identifying characteristics of the proactive model). The pay equity laws aim for equality in results, not just in opportunity. *Id.*

<sup>98</sup> R.S.Q. 2010, c. E-12.001 § 53 (Can.). Predominately male and female classes of jobs are identified as those which have similar duties or responsibilities, similar required qualifications, and the same remuneration or rate of compensation. *Id.* § 54. Jobs are considered to be predominately female or male if held by sixty percent of the same sex. *Id.* § 55. See Chicha, *supra* note 26, at 12 (stating that the Act provides criteria for determining job categories and alternative criteria for determining the gender predominance).

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Step two develops a method, tools, and an evaluation process to determine the value of job classes.<sup>99</sup> Step three involves the evaluation of predominately male and female jobs using the method selected in step two and the calculation of subsequent wage disparities.<sup>100</sup> Step four determines the terms and conditions of payment and adjustments in compensation.<sup>101</sup> The Act requires the pay equity plan be completed in four years and the results be posted in a prominent place easily accessible to employees for sixty days.<sup>102</sup> If an employee is not satisfied with the pay equity plan or is of the opinion that the employer has not made adjustments in compensation, then she may file a complaint with the governmental oversight commission.<sup>103</sup>

*b. The Pay Equity Commission of Ontario*

Ontario passed the Pay Equity Act in 1990.<sup>104</sup> The Act established the Pay Equity Commission of Ontario (“PEC”), which has two distinct bodies: the Pay Equity Office (“PEO”) and the Pay Equity Hearings Tribunal (“PEHT”).<sup>105</sup> The PEO is responsible for enforcement of the Pay

<sup>99</sup> R.S.Q. 2010, c. E-12.001 § 56 (Can.). To determine the value of each job class, the following must be considered: qualifications, responsibilities, effort, and work conditions. *Id.* § 57. See Chicha, *supra* note 26, at 12 (stating the criteria for determining job class value).

<sup>100</sup> R.S.Q. 2010, c. E-12.001 §§ 59, 60 (Can.). The pay equity committee—or employer if there is no committee—will identify differences in compensation between the predominately male and female classes and make adjustments accordingly. *Id.* §§ 60, 68. See Chicha, *supra* note 26, at 13 (“Specific methods of comparing pay—on an individual and on a global basis—are presented, leaving the choice up to those in charge of the programme.”).

<sup>101</sup> R.S.Q. 2010, c. E-12.001 § 69 (Can.). “Adjustments in compensation may be spread over a maximum period of four years.” *Id.* § 70. The employer cannot reduce the pay of another employee to achieve pay equity. *Id.* § 73. See Chicha, *supra* note 26, at 13 (discussing the four year compliance time frame).

<sup>102</sup> R.S.Q. 2010, c. E-12.001 §§ 37, 75 (Can.). After the pay equity plan has been implemented, the employer will conduct a pay equity audit every five years. *Id.* § 76.1. These audits were not part of the original Act in 1996. *Id.* See Pay Equity Act, Q. Gaz. 1996, c. 43 § 40 (Can.) (providing the repealed text from the 2010 revised statute). The original text stated that an employer must maintain pay equity in his enterprise after adjustments to compensation have been made or plan action equity adopted. *Id.*

<sup>103</sup> R.S.Q. 2010, c. E-12.001 §§ 96–99 (Can.).

<sup>104</sup> See *The Pay Equity Act*, PAY EQUITY COMM’N, [http://www.payequity.gov.on.ca/en/about/the\\_act.php](http://www.payequity.gov.on.ca/en/about/the_act.php) (last visited Aug. 13, 2012) (discussing the Pay Equity Act).

<sup>105</sup> See Pay Equity Act, R.S.O. 1990, c. P.7 § 27(1)–(2) (Can.) (explaining the administration of the Act); see also *About the Pay Equity Commission*, PAY EQUITY COMM’N [hereinafter PAY EQUITY COMM’N], <http://www.payequity.gov.on.ca/en/about/index.php> (last visited Aug. 13, 2012) (last visited Aug. 13, 2012) (discussing the role of the Pay Equity Commission). See generally R.S.Q. 2010, c. E-12.001 §§ 77–78, 93, 132 (Can.) (establishing Québec’s Commission de l’équité salariale, or Pay Equity Commission, consisting of three members that oversee the implementation of the Act, including pay equity plans). The

Equity Act by investigating and resolving complaints and objections to pay equity plans through its Review Services division.<sup>106</sup> The PEHT adjudicates disputes that arise under the Pay Equity Act.<sup>107</sup>

The PEO has Review Officers monitor the preparation and implementation of the pay equity plans and investigates complaints filed with the PEC.<sup>108</sup> If the Review Officer does not believe the pay equity plan is being implemented according to the terms of the Act, he or she may order the employer to comply.<sup>109</sup> If the employer fails to comply with the direct order, the Review Officer may refer the matter to the PEHT for adjudication and sanctions.<sup>110</sup> The PEHT can impose financial penalties ranging from \$5,000–\$50,000 for non-compliance with the Act.<sup>111</sup> A survey conducted by the Institute de la Statistique du Québec in 2005 revealed that 80.2% of organizations with over two hundred employees completed pay equity plans.<sup>112</sup> Canada is not the only country that has adopted a proactive model; Sweden enacted pay equity laws over twenty years ago.<sup>113</sup>

## 2. Sweden's Proactive Model

Sweden has one of the highest levels of gender equality in the world.<sup>114</sup> In 2008, the legislature passed The Discrimination Act, which

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Commission may conduct pay equity audits, make investigations on its own initiative, or follow up on a reported dispute or complaint. *Id.* § 93(1), (6), (7).

<sup>106</sup> See PAY EQUITY COMM'N, *supra* note 105 (discussing the role of the Pay Equity Commission); see also *The Pay Equity Office*, PAY EQUITY COMM'N, <http://www.payequity.gov.on.ca/en/about/office.php> (last visited Aug. 13, 2012) (explaining PEO's two operation units, Review Services and Educational and Communication Services). The Review Services Unit is responsible for enforcing the Act, whereas the Educational and Communication Services Unit is tasked with developing resources to assist workplaces with Act compliance. *Id.*

<sup>107</sup> PAY EQUITY COMM'N, *supra* note 105. The PEHT "has exclusive jurisdiction to determine all questions of fact or law" under the Pay Equity Act. *Id.* All PEHT's decisions are final. *Id.*

<sup>108</sup> R.S.O. 1990, c. P.7 § 34(2) (Can.). See *The Pay Equity Office*, *supra* note 106 (discussing the role of Review Officers).

<sup>109</sup> R.S.O. 1990, c. P.7 § 24(2) (Can.).

<sup>110</sup> *Id.* § 24(5). If the employer fails to comply, the matter may be referred to the Hearings Tribunal. *Id.* In the hearing, the employer carries "the burden of proving that he, she or it has complied with the order." *Id.* § 24(5.3).

<sup>111</sup> *Id.* § 26(1).

<sup>112</sup> Chicha, *supra* note 26, at 14.

<sup>113</sup> See *infra* Part II.C.2 (introducing Sweden's pay equity laws).

<sup>114</sup> *Gender Equality: The Swedish Approach to Fairness*, SWED. INST., 1 (Aug. 2011) [hereinafter SWED. INST.], <http://www.sweden.se/eng/Home/Society/Equality/Facts/Gender-equality-in-Sweden/>. Gender equality is a cornerstone in Sweden. *Id.* Starting in pre-school, students are taught about equal opportunities in life, regardless of gender. *Id.*

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adopted and consolidated the majority of Sweden's anti-discrimination acts, including The Equal Opportunities Act.<sup>115</sup> The Act endeavors to equalize wages and prevent future pay inequity for those who perform work of equal value.<sup>116</sup> Equal work is determined by an overall assessment of job requirements, including, but not limited to, knowledge and skills, responsibility, and effort.<sup>117</sup> The Act requires employers to take affirmative steps to balance the distribution of males and females in different employment categories and enables both males and females to combine employment with parenthood.<sup>118</sup>

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Swedish women on average earn 94 percent of men's salaries. *Id.* at 3. There has been an increase in women leading private companies and sitting on boards of companies. *Id.* at 3.

<sup>115</sup> See 1 ch. 1 § DISKRIMINERINGSLAG (Svensk författningssamling [SFS] 2008:567) (Swed.) ("The purpose of this Act is to combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age."); JÄMSTÄLLDHETSLAG (Svensk författningssamling [SFS] 1991:433) (Swed.) (amended by [SFS] 2000:773) ("The purpose of the Act is to promote equal rights for women and men in matters relating to work, the terms and conditions of employment and other working conditions, and opportunities for development in work (*equality in working life*)."); see also *Fact Sheet: New Anti-Discrimination Legislation and a New Agency, the Equality Ombudsman*, MINISTRY OF INTEGRATION AND GENDER EQUALITY, GOV'T OFF. OF SWED. (Jan. 2009), <http://www.sweden.se/eng/Home/Work/Labor-market/Employee-rights/Anti-discrimination-laws/Facts/New-anti-discrimination-legislation/> (discussing what is in the new anti-discrimination legislation). The Discrimination Act replaces the Equal Opportunities Act; the Act on Measures against Discrimination in Working Life on Grounds of Ethnic Origin, Religion or Other Religious Faith; the Prohibition of Discrimination in Working Life on Grounds of Sexual Orientation Act; the Equal Treatment of Students at Universities Act; the Prohibition of Discrimination Act; and the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and School Students. *Id.*

<sup>116</sup> 3 ch. 2 § DISKRIMINERINGSLAG.

<sup>117</sup> See *id.* (explaining how equal work is determined). The Act uses "such as," implying that the criteria are not limited to knowledge and skills, responsibility and effort. *Id.* See also Chicha, *supra* note 26, at 11 (discussing Sweden's former Equal Opportunity Act). Under the Equal Opportunities Act of 1991:

The employer is required to formulate a pay equity action plan in order to ensure that remuneration is fixed on the basis of objective criteria that are common to all jobs. The Act is intended to counter both pay disparities between women and men doing the same job and those existing between predominately female or male jobs that have equal value. The Act details the factors that must be taken into account in the evaluation and include qualifications, responsibilities, efforts and working conditions.

*Id.*

<sup>118</sup> See 3 ch. 5, 8 §§ DISKRIMINERINGSLAG (discussing an employer's obligation to maintain the work environment and recruitment of employees). Employers are to promote equal distribution of work by means of education and training. *Id.* 8 §. When the distribution is unequal, employers are supposed to make a special effort when recruiting employees of the underrepresented sex when vacancies arise. *Id.* 9 §. See also SWED. INST., *supra* note 114 (stating that Swedish parents are "entitled to 480 days of [paid] parental leave when a child

The Act mandates that every three years an employer survey and analyze its provisions and practices regarding pay and examine pay differences between men and women conducting work of equal value.<sup>119</sup> An employer is also required to assess whether the existing pay differences are directly or indirectly related to sex.<sup>120</sup> Additionally, employers are obligated to draw up an action plan for equal pay in which they report the results of their survey, indicate what adjustments need to be made, and estimate the costs and time necessary for executing those adjustments, not exceeding three years.<sup>121</sup> Employers with less than twenty-five employees do not need to draw up plans for equal pay.<sup>122</sup>

Sweden's Discrimination Act created a new agency—the Equality Ombudsman and Board against Discrimination—to oversee compliance with the Act.<sup>123</sup> The Ombudsman may bring an action on behalf of individuals who file complaints and may compel information from employers pertaining to those complaints.<sup>124</sup> Employers that do not comply with the Act or the requests of the Equality Ombudsman are subject to monetary fines.<sup>125</sup> The Board against Discrimination, at the recommendation of the Equality Ombudsman, may issue financial

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is born or adopted"). *See generally* *Employment-based Benefits*, SWEDEN.SE, [http://www.sweden.se/eng/Home/Work/The-Swedish-system/Employment\\_based\\_benefits/Parental-leave/](http://www.sweden.se/eng/Home/Work/The-Swedish-system/Employment_based_benefits/Parental-leave/) (last visited Aug. 15, 2012) (asserting parental leave is a central part of Swedish life, and therefore parents share 480 days of paid leave).

<sup>119</sup> 3 ch. 10 § DISKRIMINERINGSLAG. *Contra* 10 § Jämställdhetslagen (Svensk författningssamling [SFS] 1991:433) (Swed.) (indicating that, under the former Act, employers were required to conduct annual surveys). *See* Chicha, *supra* note 18, at 11 (discussing employers' responsibility to conduct surveys).

<sup>120</sup> 3 ch. 10 § DISKRIMINERINGSLAG.

<sup>121</sup> *Id.* 11 §. *Contra* 11 § Jämställdhetslagen (indicating that, under the former Act, employers were required to conduct annual pay equity plans).

<sup>122</sup> 3 ch. 11 § DISKRIMINERINGSLAG. *Contra* 11 § Jämställdhetslagen (indicating that, under the former Act, employers with less than ten employees did not need make plans for equal pay).

<sup>123</sup> *See* 4 ch. 1 § DISKRIMINERINGSLAG (stating the responsibility of the Ombudsman is to get employers to voluntarily comply). *See generally* MINISTRY OF INTEGRATION AND GENDER EQUALITY, GOV'T OFF. OF SWED., *supra* note 115 (discussing the Equality Ombudsman's and Board against Discrimination's new agency roles).

<sup>124</sup> *See* 4 ch. 2-3 §§ DISKRIMINERINGSLAG (discussing the breadth of the Ombudsman's authority to inquire about an employer's pay practices).

<sup>125</sup> 4 ch. 4, 5 §§ DISKRIMINERINGSLAG. The Equality Ombudsman then makes recommendations to the Board against Discrimination to issue fines for failure to comply with the Act. *Id.* 5 §. The Equality Ombudsman can issue financial penalties to employers without approval of the Board against Discrimination for failure to comply with their investigation. *See id.* 4 § (noting that the Board against Discrimination reviews decisions to order financial penalties that the Equality Ombudsman orders on an individual failing to comply). The Board against Discrimination hears appeals for those monetary fines issued by the Equality Ombudsman. *Id.* 7 §.



penalties.<sup>126</sup> Although Canada's and Sweden's proactive pay equity laws have been recognized as the best approach to remedying wage disparity, the United States has not adopted or proposed any similar laws.<sup>127</sup>

### III. ANALYSIS

The EPA's complaint-based model is an ineffective approach to addressing wage disparity at the white-collar level, primarily for two reasons. First, the EPA's current framework is disadvantageous because professional plaintiffs are required to carry a difficult burden of proof in establishing that their job is substantially equal to their peers in terms of skill, effort, responsibility, and working conditions.<sup>128</sup> Additionally, the EPA provides employers with four affirmative defenses, including the broad "any factor other than sex" defense to shield them from liability.<sup>129</sup> Second, the more substantial problem with the EPA is that employees alone, not employers, are burdened with responsibility for curtailing the systemic wage disparity by filing arduous and often ineffective complaints.<sup>130</sup>

Part III.A of this Note examines the EPA's disadvantageous framework. Specifically, Part III.A.1 discusses the substantially equal standard; Part III.A.2 examines the any factor other than sex affirmative defense; and Part III.A.3 explores Congress's legislative endeavors to address these EPA deficiencies.<sup>131</sup> Then, Part III.B advocates for Congress to adopt an approach similar to Canada's and Sweden's proactive models in an effort to combat systemic wage disparity.<sup>132</sup> In particular, Part III.B.1 identifies the benefits to the pay equity action plan,

<sup>126</sup> See 4 ch. 5, 7, 9 §§ DISKRIMINERINGSLAG (permitting the Board against Discrimination to ensure that applications for financial penalties from the Equality Ombudsman are adequately investigated and ordered). See Chicha, *supra* note 26, at 11-12 (discussing the results of Sweden's equal pay laws). A small survey conducted by the Equality Ombudsman between 2004 and 2005 revealed that twenty-four organizations needed to amend their pay practices, and, in all of these cases, the organizations complied with wage adjustment. *Id.* Thus, the survey demonstrates the need for both enforcement and follow-up by government commissions. *Id.* at 12.

<sup>127</sup> See Part III (examining the problems of the EPA and the benefits of the proactive model).

<sup>128</sup> See *infra* Part III.A.1 (discussing the difficulty of proving the EPA's substantially equal prima facie burden).

<sup>129</sup> See *infra* Part III.A.2 (discussing the problems associated with the EPA's any factor other than sex affirmative defense).

<sup>130</sup> See *infra* Part III.A (noting that the EPA is a complaint-based model and employers do not share a similar responsibility).

<sup>131</sup> See *infra* Part III.A.1 (discussing the difficult substantially equal standard plaintiffs must prove); *infra* Part III.A.2 (discussing the any factor other than sex affirmative defense that employers can utilize); *infra* Part III.A.3 (discussing current legislative proposals).

<sup>132</sup> See *infra* Part III.B (analyzing the proactive model).

and Part III.B.2 stresses the importance of a government commission to enforcement.<sup>133</sup>

A. *The EPA's Disadvantageous Framework*

Although some would argue the EPA is advantageous to addressing wage disparity because of the strides made since its enactment in 1963, in reality, the EPA's framework is disadvantageous because it discourages plaintiffs from bringing a claim.<sup>134</sup> Under the EPA, a plaintiff must prove that she was paid less than her male peers for substantially equal work.<sup>135</sup> Then, if she manages to carry her burden of proof, the Act provides the employer with affirmative defenses, including the any factor other than sex defense to avoid liability.<sup>136</sup> Although the Supreme Court has announced that the EPA should be construed and applied broadly so as to actually be an effective remedy against wage discrimination, the current framework creates too many obstacles for plaintiffs to overcome.<sup>137</sup> In practice, requiring plaintiffs to satisfy the prima facie burden and navigate through affirmative defenses results in few EPA claims surviving summary judgment.<sup>138</sup> This high summary judgment rate places substantial risk on the plaintiffs, which discourages them from filing a suit.<sup>139</sup> The obstacles facing plaintiffs are further

<sup>133</sup> See *infra* Part III.B.1 (explaining the flexibility of the pay equity action plans); *infra* Part III.A.2 (explaining how government commissions act as enforcement mechanisms).

<sup>134</sup> See Part III.A (addressing the difficulties that plaintiffs face while pursuing an EPA claim).

<sup>135</sup> See *supra* Part II.A.1 (discussing the EPA's prima facie burden).

<sup>136</sup> See *supra* Part II.B (analyzing the EPA's affirmative defenses).

<sup>137</sup> See *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.").

<sup>138</sup> See Eisenberg, *supra* note 12, at 32-34 (analyzing the effectiveness of the EPA by examining all published federal appellate and Supreme Court decisions that considered an EPA claim). In the 1970s, ninety-seven percent of EPA claims were decided at the district court level by a bench or jury trial. *Id.* at 33. "From 2000 to 2009, only 31% of reported appellate cases had been decided at trial in the district court." *Id.* In the early years of the EPA, appellate courts were more likely to reverse a jury or bench trial verdict than in recent decades. *Id.* at 34. During the first decade of EPA litigation, appellate courts reversed forty-five percent of jury verdicts for employers. *Id.* The appellate courts, in the most recent decade, have "affirmed all verdicts that resulted from trials in the district court." *Id.* "From 2000 to 2009, the courts of appeal affirmed grants of summary judgment for the employer by the district courts 92% percent of the time." *Id.* See also Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 86 (2011) (explaining that courts are relying on existing typologies and that those claims which do not fit within these archaic frameworks will be rejected). The author asserts that the discrimination claim frameworks are unable to keep up with changes in the workplace, and the sheer number of them makes them procedurally and theoretically inconsistent. *Id.*

<sup>139</sup> See Eisenberg, *supra* note 12, at 32-34 (examining trends in summary judgment).

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exacerbated by the EPA's inconsistent substantially equal standard and the EPA and Title VII's broadly interpreted affirmative defense—any factor other than sex.<sup>140</sup>

## 1. The Difficulty of Proving “Substantially Equal”

To establish a prima facie case under the EPA, a plaintiff bears the burden to prove her job is “substantially equal” to that of her male peer.<sup>141</sup> The substantially equal standard is a difficult burden for white-collar employees to carry because often the jobs are not *exactly* the same.<sup>142</sup> Some courts follow the strict approach, which requires jobs to be identical, while other courts follow the pragmatic approach, which provides more deference to the employee by allowing jobs to be comparable, so long as the core set of tasks are similar.<sup>143</sup> Unfortunately, the strict approach serves to facilitate the dismissal of EPA claims at summary judgment and, in effect, perpetuates the glass ceiling.<sup>144</sup>

To the detriment of the plaintiff, courts that follow the strict approach have declined to compare professional jobs unless the jobs are fungible or mirror images of each other.<sup>145</sup> Even though the Supreme Court has held that the EPA is broadly remedial, courts continue to

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<sup>140</sup> See *infra* Part III.A.1 (exploring the various interpretations of substantially equal).

<sup>141</sup> See *supra* text accompanying note 46 (discussing the determination of equal skill, effort, and responsibility as “substantially equal”); see also *Corning Glass Works*, 417 U.S. at 195–96 (discussing the plaintiff's burden). In *Corning Glass Works*, the Court noted that the plaintiff must show the following: (1) the employer pays the worker of one sex more than the opposite sex; (2) the employees perform equal work, which is determined by equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions. *Id.* at 195. Although the white-collar exemptions were lifted, courts have difficulty comparing substantially equal work in bona fide executive, administrative, or professional positions. See generally Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (codified and amended 29 U.S.C. § 213(a)(1) (2006)) (providing an exemption for white-collar workers); 29 C.F.R. § 1620.1(a) (2011) (demonstrating that the white-collar exceptions were eliminated from the EPA).

<sup>142</sup> See *supra* note 40 (explaining reservations made about comparing white-collar jobs).

<sup>143</sup> See *supra* text accompanying notes 46–54 (examining the various court interpretations of substantially equal).

<sup>144</sup> See *infra* text accompanying notes 149–50 (discussing the trend among appellate courts in affirming summary judgment).

<sup>145</sup> Eisenberg, *supra* note 12, at 39; see *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1365 (10th Cir. 1997) (refusing to apply the EPA broadly, the court found the assistant manager's work was merely comparable and not substantially equal); *Ratts v. Bus. Sys., Inc.*, 686 F. Supp. 546, 550 (D.S.C. 1987) (“Allegations of Equal Pay Act violations have routinely been rejected by courts applying the equal work standard to jobs involving executive and management positions.”). See generally BODENSTEINER & LEVINSON, *supra* note 40, § 7:6 (noting that in the professional setting there are many factors that explain why wage differential may not implicate sex discrimination).

apply the strict approach at the detriment of professional women.<sup>146</sup> For example, some courts have rejected the invitation to compare male and female managerial jobs in different departments as equal, even though they essentially performed the same tasks of supervising, coordinating, and organizing.<sup>147</sup> The mentality of the strict approach stems from the incorrect belief that professional jobs are either too difficult to compare because they do not perform commodity-like work or, alternatively, that “no judge or jury should be allowed to second guess the complex remuneration decisions of businesses . . . .”<sup>148</sup>

The strict approach has an adverse effect on plaintiffs who bring EPA claims.<sup>149</sup> Plaintiffs who bring EPA claims in the Seventh Circuit have an abysmal success rate of twenty-four percent.<sup>150</sup> Judge Posner of the Seventh Circuit has remarked, “The proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman . . . and there are *no* skill differences.”<sup>151</sup> Thus, in effect, the strict approach prevents the courts from comparing

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<sup>146</sup> See *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007) (holding that the managers of two parks were not comparable “because the parks [were] so different from one another”); *Berg v. Norand Corp.*, 169 F.3d 1140, 1146 (8th Cir. 1999) (holding that thirty-three male managers could be paid \$6,000–\$8,000 more than seven female managers because their tasks were substantially different).

<sup>147</sup> *Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 333 (4th Cir. 2004); *Ratts*, 686 F. Supp. at 550.

<sup>148</sup> *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. 2002) (“Requiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale.”); see *Ratts*, 686 F. Supp. at 550 (acknowledging that the task of comparing executive/management positions is a difficult one).

<sup>149</sup> See *Eisenberg*, *supra* note 12, at 34 (acknowledging that the Seventh and Eighth Circuit are the most hostile to EPA claims).

<sup>150</sup> *Id.* Plaintiffs have a success rate of thirty-nine percent in the Eighth Circuit. *Id.* The author correlates these low percentages with the court’s strict interpretation of “equal work” and broad interpretation of “factor-other-than-sex.” *Id.* The courts most receptive to EPA claims are the Sixth Circuit, with a success rate of eighty-five percent, and the D.C. Circuit, with a success rate of seventy-five percent. *Id.* at 35.

<sup>151</sup> *Sims-Fingers*, 493 F.3d at 771–72 (emphasis added); see *Wernsing v. Dep’t. of Human Servs., Ill.*, 427 F.3d 466, 468 (7th Cir. 2005) (asserting that the EPA should not be a mechanism to authorize judges to investigate practices of employers). The court drew an analogous comparison to a Title VII case:

As we say frequently when dealing with equivalent questions under other federal statutes, such as Title VII of the Civil Rights Act of 1964: “A district judge does not sit in a court of industrial relations. No matter how medieval a firm’s practices, no matter how high-handed its decisional process, no matter how mistaken the firm’s managers, Title VII and § 1981 do not interfere.”

*Id.* (quoting *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560–61 (7th Cir. 1987)).

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professional jobs unless there are *no* differences between them.<sup>152</sup> The strict approach is effective at providing remedies to lower-wage workers who work in standardized, hourly wage jobs where the tasks are clearly comparable to that of their male counterparts.<sup>153</sup> But for the women who have advanced to executive level positions, the strict approach does not allow for a comparison of those jobs and, thus, effectively closes off the EPA as an avenue for remedying wage inequality.<sup>154</sup>

Fortunately, not all courts follow the strict approach—other courts have adopted the more forgiving pragmatic approach.<sup>155</sup> The pragmatic approach, which allows courts to use “practical judgment,” is beneficial, because it takes into account the regulatory definitions of equal skill, effort, and responsibility to establish whether the overall job function is the same.<sup>156</sup> The pragmatic approach is better than the strict approach, because it allows for flexibility in determining what is substantially equal and permits differences in various degrees.<sup>157</sup> This is evidenced when courts, adopting the pragmatic approach, have held that vice presidents are substantially equal, even though they did not perform the exact same job.<sup>158</sup>

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<sup>152</sup> *Sims-Fingers*, 493 F.3d at 771–72.

<sup>153</sup> Eisenberg, *supra* note 12, at 41.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 42, 46.

<sup>156</sup> *Id.* at 41–42; see *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981) (“[A] court must compare the jobs in question in light of the full factual situation and the broad remedial purpose of the statute.”).

<sup>157</sup> See Eisenberg, *supra* note 12, at 42 (explaining definitions for skill, effort, and responsibility). The author explains that defining “skill” is about the amount of skill or degree of skill rather than a specific set of skills and, at the professional level, is based on education and the professional abilities needed for the job. *Id.* at 42–43. Similarly, the author explains the “effort” requirement is easier to apply to white-collar jobs because it is not based on physical or mental exertion, but on whether the knowledge applied to the job was the same. *Id.* at 43. Finally, the author defines “responsibility” as the “degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.” *Id.* at 42.

<sup>158</sup> See *Crabtree v. Baptist Hosp. of Gadsden, Inc.*, No. 82-AR-1849-M, 1983 WL 30400, at \*4 (N.D. Ala. Sept. 21, 1983) (finding that different responsibilities did not make the jobs unequal). The court recognized female vice presidents earned thousands of dollars less and stated that the difference in pay between male officers and the sole female officer was so disparate that it could not be attributed to anything but sexual discrimination. *Id.* at \*5. See also *Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 578–79 (8th Cir. 2006) (holding that, when comparing the vice president positions, a jury could determine that both employees possessed similar skills and that the jobs required the same effort and responsibility). Examining the first factor of skill, the court concluded that both vice presidents possessed the same experience, training, education, and ability to perform their jobs. *Id.* at 578. The second factor, effort, was determined to be equal because both employees were required to apply the same base of banking knowledge to their jobs. *Id.*

Unlike the strict approach, another advantage of the pragmatic approach is that it provides courts discretion when comparing executives, managers, and professionals in different departments.<sup>159</sup> The courts operate under the broad remedial purpose of the statute by first looking at a common core of tasks to determine whether jobs are equal and then whether there are a significant number of tasks to establish that the jobs are unequal.<sup>160</sup> But, even if the court applies the pragmatic approach when reviewing a plaintiff's claim, employers can still shield themselves from liability by citing any of the four affirmative defenses, including any factor other than sex.<sup>161</sup>

## 2. The Difficulty of Getting Around the "Any Factor Other than Sex" Affirmative Defense

The EPA and Title VII both have the affirmative defense of any factor other than sex, which has been applied in various ways.<sup>162</sup> Courts that require a legitimate business reason, as opposed to courts employing a broader interpretation of *any* factor, are more in line with the EPA's remedial intent.<sup>163</sup> Without a legitimate business-related consideration, the factor other than sex defense puts a "gaping loophole

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The third factor, responsibility, was also determined to be equal because both vice presidents did work that required a high degree of accountability. *Id.*

<sup>159</sup> See *Rinaldi v. World Book, Inc.*, No. 00 C 3573, 2001 WL 477145, at \*9 (N.D. Ill. May 3, 2001) (holding that the work of vice presidents is still comparable even if they work in different departments). The core of common tasks requirement was established because both vice presidents had administrative responsibilities, and summary judgment was not appropriate because there was a material question of fact on whether additional tasks made the jobs substantially different. *Id.* See also *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671, 677 (N.D. Ohio 2008) (holding that male and female cabinet officers were substantially equal because they were within the same job grade and job family).

<sup>160</sup> *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986) (quoting *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 156 (3rd Cir. 1985)). In *Brewster*, the court compared male and female correctional officers and found a core of common tasks, because both officers "supervised inmates, transported prisoners, searched visitors, and served as chief jailor when necessary." *Id.* See *Brown v. Fred's Inc.*, 494 F.3d 736, 740-41 (8th Cir. 2007) (holding that the difference of working at a larger store was an insubstantial difference, and therefore there was no justification for paying a female manager \$100 less than the male managers). See generally *supra* text accompanying note 137 (explaining that the EPA is broadly remedial and should be applied that way).

<sup>161</sup> See *supra* Part II.A.2 (discussing the inconsistent interpretations of the any factor other than sex defense).

<sup>162</sup> See *supra* note 37 (explaining the similarities between the Equal Pay Act and Title VII); see also *supra* notes 62-63 and accompanying text (illustrating cases where employers used the any factor other than sex defense).

<sup>163</sup> See *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.").

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in the statute” and provides employers with an unprecedented opportunity to circumvent the EPA.<sup>164</sup> However, the other side would argue that the any factor other than sex defense “does not authorize federal courts to set their own standards of ‘acceptable’ business practices . . . [but bases their determination on] whether the employer has a reason other than sex—not whether it was a ‘good’ reason.”<sup>165</sup> This broad interpretation undoubtedly contributes to the low success rate of EPA claims throughout the appellate courts.<sup>166</sup>

Further impairing a plaintiff’s EPA claim is the interpretation of some appellate courts; they have interpreted “any factor other than sex” to mean literally *any* factor, thus allowing employers to defeat an EPA claim by pointing to any reason not related to sex.<sup>167</sup> But most courts require an acceptable or legitimate business reason.<sup>168</sup> However, those courts that examine legitimate business reasons have only applied them to non-supervisory jobs, like clerks and sale agents, and not to professional occupations.<sup>169</sup> Congress, in an attempt to ameliorate the EPA’s inconsistent substantially equal standard and the EPA and Title VII’s broad affirmative defense—any factor other than sex—has proposed the FPA and the PFA.<sup>170</sup>

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<sup>164</sup> See *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (stating the legitimate business reason defense aligns with Congress’s general policy goals under the EPA). However, the court pointed out that Congress did not intend for employers to make menial distinctions based on the title of the position. *Id.* The court wrote, “Surely Congress did not intend that an employee would lose an EPA claim after making out a prima facie case of wage discrimination simply because, for example, the employer chooses to call one employee a cleaner and another employee a custodian.” *Id.*

<sup>165</sup> *Wernsing v. Dept. of Human Servs., Ill.*, 427 F.3d 466, 468 (7th Cir. 2005); see *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (explaining the court was not concerned with “the wisdom or reasonableness” of the fourth affirmative defense); *supra* note 63 and accompanying text (discussing the Seventh Circuit’s broad interpretation of the affirmative defense).

<sup>166</sup> See *Eisenberg*, *supra* note 12, at 35 tbl.4 (illustrating plaintiffs’ EPA claim success rates in different circuits). Plaintiffs are more likely to prevail in the Sixth Circuit, where the success rate is eighty-five percent, versus the Seventh Circuit, where the success rate is twenty-four percent. *Id.*

<sup>167</sup> *Id.* at 60 (noting the Seventh and Eighth Circuit will take any “acceptable” reason).

<sup>168</sup> See *supra* note 62 (illustrating instances where the courts have required legitimate business reasons).

<sup>169</sup> *Eisenberg*, *supra* note 12, at 59.

<sup>170</sup> See *infra* Part III.A.3 (examining the FPA and PFA as possible remedies to the wage disparity).

## 3. Analyzing Current Legislative Proposals to Fix “Substantially Equal” and “Any Factor Other than Sex”

Congress has made legislative attempts to remedy the substantially equal and any factor other than sex defenses but has not sought to put in place any preventative measures to curtail the systemic wage inequity. These legislative attempts – the FPA and PFA – make gains in amending the EPA’s disadvantageous framework but are far from complete.<sup>171</sup>

The FPA is a positive change because it alters the language from the substantially equal standard to “equivalent jobs.”<sup>172</sup> The equivalent job standard would make it all but impossible for courts to utilize the strict approach.<sup>173</sup> Under the FPA, courts would be mandated to follow the more pragmatic approach, providing deference to employees by broadly interpreting the job requirements and leading to higher success rates in court.<sup>174</sup> The PFA, Congress’s other legislative proposal, targets the broad application of any factor other than sex.<sup>175</sup>

The PFA weakens the fourth affirmative defense because it modifies the any factor other than sex defense to “a bona fide factor other than sex, such as education, training, or experience . . .”<sup>176</sup> By specifying certain bona fide factors, Congress significantly narrowed the fourth affirmative defense and removed the confusion as to what type of permissible factors courts should evaluate.<sup>177</sup> The beneficial change from “any” to “bona fide” effectively eliminates the broad, minority interpretation of *any* factor other than sex, thereby increasing a plaintiff’s chances of surviving summary judgment.<sup>178</sup>

While both acts will have a positive impact because they reduce the obstacles plaintiffs face in bringing EPA claims and create more consistency among courts, the acts do not reach the major problem of the EPA – the lack of affirmative responsibility on the employer to remedy

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<sup>171</sup> The Fair Pay Act of 2011, H.R. 1493, 112th Cong. (2011); Paycheck Fairness Act, H.R. 1519, 112th Cong. (2011).

<sup>172</sup> H.R. 1493 § 3(a).

<sup>173</sup> *Id.* § 3(a)(4)(B). The amendment, if passed, would have a positive impact on the EPA because it will constructively require courts to compare *dissimilar* jobs. *Id.*

<sup>174</sup> *See supra* Part III.A.1 (examining the pragmatic and strict approach to substantially equal).

<sup>175</sup> H.R. 1519 § 3(a).

<sup>176</sup> *Id.*

<sup>177</sup> *See id.* (striking any factor other than sex and requiring instead a bona fide factor, including education, training, or experience).

<sup>178</sup> *See supra* Part III.A.2 (examining the different interpretations of the any factor other than sex defense).



pay inequality.<sup>179</sup> Canada and Sweden have developed proactive laws that target this particular flaw by requiring employers to routinely review pay practices, amend unfair wages, and submit pay equity plans to a governmental oversight commission.<sup>180</sup>

B. *The Benefits of the Proactive Model*

The proactive model is the most effective approach in addressing pay inequality, because it corrects current wage disparity in the workplace and serves as a preventative measure against future wage disparity.<sup>181</sup> The proactive model accomplishes these claims by placing an affirmative responsibility on the employer to ensure equal pay practices within his or her establishment through the development of pay equity plans.<sup>182</sup> Additionally, the model is effective because of the government commission, which is tasked with both the enforcement of the pay equity plans and the adjudication of violations of the equal pay acts.<sup>183</sup>

1. Flexibility and Feasibility of Pay Equity Plans

The proactive approach is advantageous because it preempts the need for employees to bring arduous claims by placing an affirmative responsibility on employers to correct and maintain equal pay practices within their establishments.<sup>184</sup> Unlike the current model, which places no concrete obligations on the employer, the proactive model mandates that the employer create a pay equity plan that produces tangible results in wage practices within a certain time frame.<sup>185</sup> The four-step process of the proactive model provides a systematic remedy to address the

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<sup>179</sup> See The Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56-57 (1963) (codified and amended at 29 U.S.C. § 206(d)(1) (2006)) (noting in the EPA text no affirmative responsibility on the employer to actively protect employees from being paid less).

<sup>180</sup> See *infra* Part III.B (explaining how the proactive model would be an improvement over the complaint-based approach).

<sup>181</sup> See *infra* Part III.B.1 (discussing the benefit of the pay equity plan). *Contra* § 3, 77 Stat. at 56-57 (noting there are no affirmative obligations on the employer to maintain equal pay practices).

<sup>182</sup> See *infra* Part III.B.1 (addressing the pay equity plan's flexibility and likelihood of implementation).

<sup>183</sup> See *infra* Part III.B.2 (noting the importance of governmental oversight).

<sup>184</sup> PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 111 (stating that, unlike the complaint-based models which only remedy that particular complaint, proactive models provide broader application because they place a burden on the employer to eliminate wage disparity from the beginning).

<sup>185</sup> *Id.* at 112. Proactive legislation aims for "equality of results, not just equality of opportunity." *Id.*

systematic problem of wage disparity because it acts as a preventative mechanism within each establishment.<sup>186</sup>

The Québec and Swedish pay equity action plans share four distinct steps, including the surveillance of pay practices, the development of unique evaluation systems to compare the value of job classes within that establishment, the evaluation of job classes using the prescribed system, and the implementation of pay changes over a set period of time.<sup>187</sup> A major benefit of the pay equity plan is that companies are more likely to implement the plan because of the flexibility it affords.<sup>188</sup> For example, in both the Québec and Swedish acts, employers are provided flexibility or latitude to determine what work is of “equal value” within their own establishment, rather than risking a negative interpretation by a judge.<sup>189</sup> Québec’s Act is more restrictive than Sweden’s because Québec states certain criteria that “must” be included in the determination value of job classes.<sup>190</sup> Sweden’s pay equity

<sup>186</sup> See *id.* (examining characteristics of proactive models). Sweden and Québec have both passed equal pay legislation. See generally Pay Equity Act, R.S.Q. 2010, c. E-12.001 (Can.); DISKRIMINERINGSLAG (Svensk författningssamling [SFS] 2008:567) (Swed.).

<sup>187</sup> R.S.Q. 2010, c. E-12.001, § 50 (Can.) (requiring employers to make pay equity plans); 3 ch. 11 § DISKRIMINERINGSLAG (requiring employers to make action plans). Sweden and Québec’s equal pay acts have four similar steps. First, both must identify job classes as primarily male or female and determine if the differences are sex related. R.S.Q. 2010, c. E-12.001, § 53 (Can.) (requiring identification of predominately male and female jobs); 3 ch. 10 § DISKRIMINERINGSLAG (requiring the assessment of male and female jobs). Second, both must develop a method to determine the value of different job classes, including, but not limited to, the examination of knowledge, skills, responsibility, effort, and work environment. R.S.Q. 2010, c. E-12.001, § 57 (Can.) (listing the factors that must be taken into consideration for value determination); 3 ch. 10 § DISKRIMINERINGSLAG (explaining how equal value is to be determined). Third, both set forth the designated method to evaluate job classes, determine equal work among those job classes, and calculate any subsequent wage disparities. R.S.Q. 2010, c. E-12.001, § 59 (Can.) (evaluating similar jobs using pre-determined methods of equal value); 3 ch. 10 § DISKRIMINERINGSLAG (evaluating male and female jobs using the employer’s criteria of equal value). Fourth, both mandate that employers make a plan that estimates the cost and time necessary to make the appropriate compensation adjustments. R.S.Q. 2010, c. E-12.001, § 69 (Can.) (determining payment adjustment conditions); 3 ch. 11 § DISKRIMINERINGSLAG (discussing the time frame and costs for making wage adjustments).

<sup>188</sup> See PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 116–18 (discussing the advantages of flexible provisions in pay equity legislation).

<sup>189</sup> See R.S.Q. 2010, c. E-12.001, § 57 (Can.) (listing factors that an employer may take into account when making a value determination); 3 ch. 2 § DISKRIMINERINGSLAG (allowing employers to determine what constitutes equal value); PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 118 (noting that evaluation method requirements are fairly limited).

<sup>190</sup> See R.S.Q. 2010, c. E-12.001, § 57 (Can.) (“The value determination method *must* take the following factors into account in respect of each job class: (1) required qualifications; (2) responsibilities; (3) effort required; (4) the conditions under which the work is performed.”) (emphasis added).

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legislation merely suggests standards “such as” knowledge and skills, responsibility, effort, and working conditions to determine the value of job classes.<sup>191</sup> Regardless, using the language “such as” instead of “must” in pay equity legislation provides employers with the deference to determine what is considered equal value within the workplace.<sup>192</sup>

Québec’s and Sweden’s implementation requirements are feasible because the onus on the employer is dependent on the number of employees.<sup>193</sup> Undoubtedly, there are economic costs associated with the implementation of pay equity laws that are passed onto the employer, but Sweden eases the economic burden by requiring a minimum threshold of twenty-five employees to trigger the need for a pay equity action plan.<sup>194</sup> Likewise, Québec does not require a formal pay equity action plan unless the employer has fifty employees; however, employers with less than fifty employees are still required to independently make appropriate adjustments in compensation.<sup>195</sup> The higher the number of employees equates to a higher risk of wage inequality; thus, Québec requires a pay equity committee, representing both the employees and the employer, to establish a pay equity plan if there are over one hundred employees.<sup>196</sup>

A minor difference between the Canadian and Swedish pay equity plans is the time frame in which employers must assess and alter their

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<sup>191</sup> See 3 ch. 2 § DISKRIMINERINGSLAG (“The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.”); see also R.S.Q. 2010, c. E-12.001, § 57 (Can.) (“The value determination method *must* take the following factors into account in respect of each job class: (1) required qualifications; (2) responsibilities; (3) effort required; (4) the conditions under which the work is performed.”) (emphasis added).

<sup>192</sup> 3 ch. 2 § DISKRIMINERINGSLAG.

<sup>193</sup> R.S.Q. 2010, c. E-12.001, §§ 4, 10, 16 (Can.) (discussing how the number of employees impacts employers’ pay equity plans); see PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 116 (discussing Ontario’s legislation as the first to apply to the private sector). Ontario’s equal pay laws allow for implementation flexibility dependent on the size of the public organization. *Id.* The report notes that overly flexible criteria, while advantageous, may also create implementation confusion. *Id.*

<sup>194</sup> 3 ch. 11 § DISKRIMINERINGSLAG.

<sup>195</sup> R.S.Q. 2010, c. E-12.001, § 34 (Can.). The employer must still provide the same remuneration to employees in predominately female and male job classes, and that process cannot discriminate on the basis of gender. *Id.* An employer with fifty to one hundred employees must develop pay equity plans, but are not required to have committees. *Id.* § 31.

<sup>196</sup> *Id.* §§ 10, 16. The pay equity committee is responsible for the development of the establishment’s pay equity plan. *Id.* § 21.1. See Chicha, *supra* note 26, at 13 (analyzing company size requirements to determine how much compliance deference the employer should receive).

pay practices.<sup>197</sup> Under the Swedish system, a pay action plan must be implemented within three years, which allows employers sufficient time to make authentic changes.<sup>198</sup> Québec, however, has a four year window for implementation, which allows for an elongated noncompliance period.<sup>199</sup> Canada's and Sweden's equal pay acts, in addition to mandating pay equity plans, establish government commissions to enforce compliance with their legislation.<sup>200</sup>

## 2. Comparing Governmental Oversight

Although a plaintiff may bring an EPA private suit without involving the EEOC, the EEOC can serve as a mechanism for enforcement like Sweden's Discrimination Board and Ontario's PEC.<sup>201</sup> The EEOC is comparable to the Ontario PEC, in that it collects employment data from employers and investigates claims.<sup>202</sup> The EEOC also has the authority to investigate allegations of sex discrimination and, upon finding a violation, has the power to file a lawsuit on behalf of an individual.<sup>203</sup> The difference between the EEOC, the PEC, and the Discrimination Board is the adjudication procedures.<sup>204</sup> Sweden's and Canada's adjudication is handled as part of their governmental oversight commissions, whereas the EEOC must seek enforcement through the federal court system.<sup>205</sup>

Similar to Sweden's Discrimination Board, the EEOC is tasked with the enforcement of many anti-discrimination laws.<sup>206</sup> However, even with the additional enforcement responsibilities, the EEOC has not

<sup>197</sup> R.S.Q. 2010, c. E-12.001, § 37 (Can.); 3 ch. 11 § DISKRIMINERINGSLAG.

<sup>198</sup> 3 ch. 11 § DISKRIMINERINGSLAG. The action plan is based on the goal of implementing the necessary adjustment as soon as possible. *Id.*

<sup>199</sup> R.S.Q. 2010, c. E-12.001, § 37 (Can.).

<sup>200</sup> See *infra* Part III.B.2 (discussing the benefits of active governmental oversight).

<sup>201</sup> See *supra* text accompanying note 38 (explaining the administrative procedures for an EPA claim).

<sup>202</sup> See *supra* text accompanying note 69 (noting employers must submit gender, race, and job categories to the EEOC).

<sup>203</sup> See *Overview, supra* note 65 (describing the EEOC's process for handling claims). The EEOC is not required to file lawsuits in every case it finds discrimination. *Id.*

<sup>204</sup> See *supra* Part II.A.2 (examining the EEOC's enforcement provisions); *supra* Part II.C.1 (examining Ontario's enforcement provisions); *supra* Part II.C.2 (analyzing Sweden's enforcement practices).

<sup>205</sup> See *supra* text accompany notes 71-74 (exploring public action taken by the EEOC and the relief available to the employee).

<sup>206</sup> See *supra* text accompanying note 65 (discussing the EEOC's enforcement of all federal antidiscrimination legislation); *supra* text accompanying note 115 (noting the consolidation of Sweden's anti-discrimination laws into the Discrimination Act).

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received additional funding.<sup>207</sup> Consequently, there has been a decreasing trend in the number of EPA lawsuits filed by the EEOC.<sup>208</sup> In 2001, the EEOC filed fourteen EPA cases and, in 2008, the agency filed zero.<sup>209</sup> Facing these odds, plaintiffs still opt to bring their grievances to the attention of the EEOC, because, even with limited resources, the EEOC has a larger litigation department than a private law firm and a better rate of success.<sup>210</sup>

Canada's and Sweden's proactive equal pay laws move away from the confrontational complaint-based approach to a model that fosters cooperation within the organization.<sup>211</sup> The proactive model has been championed as the most advanced approach to remedying wage disparity because of its comprehensive pay equity action plan, and the United States should strive to adopt similar provisions.<sup>212</sup>

#### IV. CONTRIBUTION

Congress's legislative attempts to remedy wage disparity with the PFA and FPA only target the EPA's substantially equal standard and the any factor other than sex affirmative defense.<sup>213</sup> These Acts may improve the litigation process by codifying the pragmatic approach and bona fide factor requirement, but they do not take substantial preventive measures to address the wage gap.<sup>214</sup> The proactive model curtails the systemic problem by placing an affirmative responsibility on the employer to ensure fair pay practices, thereby preventing wage disparity and litigation.<sup>215</sup> Additionally, this approach invests the employer in the pay practices and relieves the employee of the responsibility of

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<sup>207</sup> See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 32 (stating the EEOC is responsible for enforcement of the EPA, Title VII, the Age Discrimination Act of 1967 ("ADA"), and Title I of the Americans with Disabilities Act of 1990); Kathryn Moss et al., *supra* note 66, at 6 (explaining how the EEOC, since 1964, has continued to take on statutory obligations without obtaining additional funds).

<sup>208</sup> See Eisenberg, *supra* note 12, at 36 (illustrating the number of EPA cases filed by the EEOC in recent years).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* The author explains that appellate plaintiffs represented by the EEOC won seventy-three percent of the time compared to private plaintiffs who won only forty-four percent of the time. *Id.*

<sup>211</sup> See PAY EQUITY TASK FORCE FINAL REPORT, *supra* note 21, at 111 (explaining that the proactive model supports cooperation over confrontation).

<sup>212</sup> See *infra* Part IV (discussing an amendment to the EPA incorporating provisions from Canada's and Sweden's pay equity legislation).

<sup>213</sup> See *supra* Part III.A.3 (examining Congress's legislative proposals).

<sup>214</sup> *Id.*

<sup>215</sup> See *supra* Part III.B (examining the benefits of the proactive model).

addressing pay equity.<sup>216</sup> Amendments must be made to 29 U.S.C. § 206—the EPA—under a new subsection (h), in order to remedy the wage disparity.<sup>217</sup>

First, § 206 must be amended to indicate the mission of the proactive changes.<sup>218</sup> Second, § 206 must require the employer to conduct a survey every three years that analyzes pay discrepancies.<sup>219</sup> Third, as a result of that survey, § 206 must require employers to develop pay equity action plans.<sup>220</sup> Last, § 206 must mandate that employers submit their surveys and pay equity action plans to the EEOC.<sup>221</sup>

Proposed Amendment to 29 USC § 206(h)<sup>222</sup>

1. *Employers and employees shall endeavor to equalize and prevent differences in wages between women and men who perform work which is regarded as equal or of equal value.*<sup>223</sup>
2. *To prevent unwarranted pay differentials and to remedy current pay differentials, the employer with over one hundred employees shall, within the framework of its operations, conduct a survey every three years that includes an analysis of its pay practices and determine whether differences can be attributed to sex.*<sup>224</sup>
3. *As a result of the survey, those employers are to develop a pay equity action plan, which includes the following obligations:*<sup>225</sup>

<sup>216</sup> See *id.* (discussing an employer's mandated responsibility to maintain equal pay practices). *Contra supra* note 179 and accompanying text (noting the EPA's absence of any employer obligation to maintain equal pay practices).

<sup>217</sup> See *infra* text accompanying notes 222–31 (creating a new amendment to the EPA).

<sup>218</sup> See *infra* text accompanying note 223 (addressing joint cooperation between employers and employees to address wage inequality).

<sup>219</sup> See *infra* text accompanying note 224 (noting the requirement of a pay survey).

<sup>220</sup> See *infra* text accompanying notes 225–29 (listing the requirement of the pay equity action plan).

<sup>221</sup> See *infra* text accompanying note 230 (providing the enforcement provision of the Act).

<sup>222</sup> The Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (1963) (codified and amended at 29 U.S.C. § 206(d)(1) (2006)). Note that 29 U.S.C. § 206 (2006) currently only goes up to (g). This proposal is the contribution of the author.

<sup>223</sup> This section of the proposed amendment was modeled after Sweden's Discrimination Act. See 1 ch. 1 § DISKRIMINERINGSLAG (Svensk författningssamling [SFS] 2008:567) (Swed.) (stating the purpose to equalize wages and prevent future pay inequality).

<sup>224</sup> This section of the proposed amendment was modeled after Sweden's Discrimination Act. See 3 ch. 10 § DISKRIMINERINGSLAG (discussing the requirement of a survey).

<sup>225</sup> This section of the proposed amendment was modeled after Sweden's Discrimination Act. See *id.* at 3 ch. 11 § DISKRIMINERINGSLAG (stating that a pay equity plan is to be developed after the survey).

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a) Identify predominately male and female jobs. Predominately held jobs are those occupations where sixty percent or more is maintained by one sex.<sup>226</sup>

b) Develop a method to determine equal value within the establishment, including, but not limited to, equal effort, responsibility, skills, and working conditions.<sup>227</sup>

c) Apply the method to predominately male and female classes to evaluate the differences in compensation and assess whether existing pay differences are directly related to sex. Calculate any differences in wage discrimination.<sup>228</sup>

d) Implementation of the action plan will not take more than three years. The EEOC, provided with additional funding, will be tasked with oversight and enforcement of the action plans following rulemaking procedures already in place.<sup>229</sup>

4. Employers then shall submit a report including their survey and action plan to remedy pay inequality to the EEOC.<sup>230</sup> Failure to submit a report will result in financial penalties ranging from \$50,000-\$100,000 and doubled for repeat offenders.<sup>231</sup>

Commentary

The four-part amendments to § 206 will effectively allocate responsibility to the employer to ensure equal pay for those jobs of equal value. Adopting a mission statement makes clear to both employees and employers that they are responsible for pay equity practices and it

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<sup>226</sup> This section of the proposed amendment was modeled after Québec's Pay Equity Act. See R.S.Q. 2010, c. E-12.001, §§ 53-55 (Can.) (discussing the identification of predominately male and female jobs).

<sup>227</sup> This section of the proposed amendment was modeled after Québec's Pay Equity Act. See *id.* §§ 56-58 (determining the value of job classes).

<sup>228</sup> This section of the proposed amendment was modeled after Québec's Pay Equity Act. See *id.* § 59 (requiring a committee or employer to determine the new value of jobs to assess equal value among the predominately male and female jobs).

<sup>229</sup> This section of the proposed amendment was modeled after Québec's Pay Equity Act. See *id.* § 70 (discussing the implementation of higher wages).

<sup>230</sup> The specifics as to how the EEOC handles and enforces these new requirements is beyond the scope of this Note.

<sup>231</sup> This specifies the amount the EEOC can fine an establishment for a violation modeled after Québec's and Ontario's Pay Equity Act. See R.S.Q. 2010, c. E-12.001, § 115 (Can.) (providing financial penalties for failure to act); Pay Equity Act, R.S.O. 1990, c. P.7, § 26 (Can.) (stating the financial penalty for failure to comply).

fosters bilateral cooperation.<sup>232</sup> This statement will set the tone as one of cooperation instead of confrontation. Requiring an employer of over one hundred employees to conduct a survey every three years will ensure a serious examination of pay practices to determine if pay differentials can be attributed to sex.<sup>233</sup> One hundred employees is a large enough sample to make both meaningful comparisons between job classes and implementation worth the economic costs.

Currently, the EPA does not require employers to take any reviewable initiatives for addressing wage disparity within their establishments.<sup>234</sup> Thus, the most extensive and crucial part of the amendment is the creation of the pay equity action plan that identifies pay disparities, develops a method to determine equal value, applies that method to predominately male and female jobs, and implements the change in wages over the course of three years.<sup>235</sup> The adoption of the pay equity action plan creates a comprehensive framework while simultaneously providing employers with flexibility to develop equal value methods tailored to meet their establishment's needs. Recognizing that the EEOC has been underfunded, additional funding must be allocated to ensure adequate resources are available for administering pay equity plan oversight. Finally, requiring employers to submit surveys and pay equity action plans to the EEOC holds them accountable and effectively creates a database for the EEOC to track changes in employer pay practices.<sup>236</sup> Additionally, the EEOC would have the power to issue monetary sanctions for noncompliance.<sup>237</sup>

While the proposed amendment does not address the inherent flaws of the complaint-based model, it does seek to preempt wage discrimination altogether by requiring employers to take an active role in evaluating pay practices.<sup>238</sup> The EPA's complaint-based approach

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<sup>232</sup> See *supra* text accompanying note 223 (addressing joint cooperation between employers and employees).

<sup>233</sup> See *supra* text accompanying note 224 (explaining the employer's responsibility to conduct surveys).

<sup>234</sup> See *supra* text accompanying note 179 (noting the EPA does not mandate any affirmative responsibility on the employer to maintain equal pay within their establishment).

<sup>235</sup> See *supra* text accompanying notes 225–29 (explaining the requirements of the pay equity action plan).

<sup>236</sup> See *supra* text accompanying note 230 (requiring employers to submit their surveys and action plans to the EEOC).

<sup>237</sup> See *supra* text accompanying note 231 (explaining the monetary fines the EEOC may impose on employers for noncompliance).

<sup>238</sup> See *supra* text accompany notes 224–29 (stating employers must conduct surveys and develop pay equity action plans in an effort to maintain equal pay within their establishments).



provides relief only after there have been instances of pay inequality, and the FPA and PFA only seek to make that process more effective.<sup>239</sup> Although the FPA and PFA would be an authentic change on the EPA's disadvantageous framework, 29 U.S.C. § 206(h) needs to be considered as an additional approach when combating the systematic wage disparity. This amendment strives to adjust the unequal balance in responsibility of narrowing the wage gap in conjunction with the EPA's existing framework. By allocating some responsibility to the employers, the proactive model seeks to balance the burden of ameliorating the wage disparity that currently is shouldered solely by the employee.

#### V. CONCLUSION

The World Economic Forum reports a correlation between the growth of a society and the empowerment of its women.<sup>240</sup> Equal pay for equal work is arguably the foundation of women's empowerment.<sup>241</sup> While the EPA was novel when enacted in 1963, in the twenty-first century it currently serves as merely a provincial remedy for the professional woman. Although Congress has made attempts to address major obstacles in current law, these legislative proposals neglect to address the overarching dilemma of the complaint-based model. The prosaic complaint-based model fails to mandate preventative measures to be taken by the employer to close the wage gap. Although Mika Brzezinski is right that women need to know their value and learn to ask for it, there also needs to be an introduction of a legal framework that allocates some of that responsibility on the employers. The systematic problem—the pay gap—requires a systematic solution.

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<sup>239</sup> See *supra* Part III.A.3 (explaining how the FPA and PFA address the disadvantageous framework of the EPA).

<sup>240</sup> See AUGUSTO LOPEZ-CLAROS & SAADIA ZAHIDI, WOMEN'S EMPOWERMENT: MEASURING THE GLOBAL GENDER GAP, WORLD ECONOMIC FORUM 11 (2005) (explaining the two points of correlation—the Gender Gap Index ranks and Growth Competitiveness and the Gender Gap Index and the log of GDP per capita). See also SANDBERG, *supra* note 6, at 25 (providing the commencement address at Barnard College, an all-women's liberal arts school).

You are the promise for a more equal world. . . . And I hope that you . . . have the ambition to lean in to your career and run the world. Because the world needs you to change it. Women all around the world are counting on you. So please ask yourself: What would I do if I weren't afraid? And then go do it.

*Id.* at 25–26.

<sup>241</sup> LOPEZ-CLAROS, *supra* note 240, at 2. The World Economic Forum identified economic participation, economic opportunity, political empowerment, educational attainment, and health and well being as the five important dimensions to women's empowerment. *Id.* Economic participation concerns the number of women working *and* whether they are being compensated on an equal basis. *Id.* at 3.

Requiring employers of a hundred or more employees to conduct a survey that analyzes their pay practices every three years ensures employers are aware of pay differentials.<sup>242</sup> In addition, employers would be tasked with creating pay equity action plans that identify pay disparity among jobs, develop an internal method to determine what is equal work, apply the method to jobs predominately held by men and women, and then implement necessary changes within two years.<sup>243</sup> After all, “[n]o one should have to dance backward all of their lives.”<sup>244</sup>

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<sup>242</sup> See *supra* text accompanying note 224 (proposing a survey requirement).

<sup>243</sup> See *supra* text accompanying notes 225-29 (proposing a four-step pay equity action plan).

<sup>244</sup> Jill Ruckelshaus, former commissioner on the U.S. Commission on Civil Rights 1980-1983 and current director of Costco Wholesale Corp., *THE GALLOPING BEAVER* (Feb. 5, 2006), available at <http://thegallopinglebeaver.blogspot.com/2006/02/no-one-should-have-to-dance-backward.html>.

\* J.D. Candidate, Valparaiso University Law School (2013); B.A., Politics, Mount Holyoke College (2009). I had a tremendous amount of guidance throughout the Note-writing process and would like to give recognition to those individuals that were instrumental to my success. I first would like to thank my parents Jun and Mary Yoshino for their unwavering support. A special thanks to my mentors Travis Stegmoller and Jessica Levitt who helped me navigate the Note-writing process, without which I would have been lost. I also want to thank my advisor, Professor Rosalie Berger Levinson, whose invaluable expertise and counsel coupled with her infectious confidence in me attributed to my achievement. I want to thank Dean Mark Adams who helped cultivate my Note topic and provided sage advice throughout the year. Lastly, I want to thank my fellow Mount Holyoke alum, Jo Jenson, who gave me renewed inspiration and dedication to my endeavor without even realizing it.