Tuesday, October 20
2:30 pm–4:00 pm

207 New Employment Legislation and Regulations Under the Obama Administration

Ellen Dunkin
Senior Vice President and Associate General Counsel
Crump Group, Inc.

Edwin Farren
Assistant General Counsel
Capital One

Curtis Schehr
Senior Vice President, Chief Compliance Officer and Executive Counsel
DynCorp International, Inc.

Faculty Biographies

Ellen Dunkin

Ellen R. Dunkin is senior vice president and associate general counsel for Crump Group, Inc., the largest wholesale insurance broker in the United States, and a leading U.S. provider of recordkeeping and support services to company-sponsored retirement plans. At Crump, she provides advice on a wide range of corporate, finance, human resources, compliance and risk management related issues.

Ms. Dunkin was previously general counsel and director of government affairs of the Risk and Insurance Management Society, Inc. ("RIMS") in New York, a non-profit professional association dedicated to advancing the practice of risk management. Prior to joining RIMS, she served as senior attorney at Marsh & McLennan Companies, where she provided counsel in the areas of securities regulation, mergers and acquisitions, executive compensation and employee benefits. Prior to those roles, Ms. Dunkin was a corporate associate at Willkie Farr & Gallagher in New York.

She is a former Chair of ACC's non-profit Organizations Committee, and a member of the Employment & Labor and Small Law Departments Committees. She served on the New York City Bar Association's Hurricane Katrina Working Group and is a former member of its Non-Profit Committee. Ms. Dunkin is a member of the Town of Mamaroneck (NY) Planning Board and previously served as president and director of the Mamaroneck Schools Foundation.

Ms. Dunkin graduated from St. John's University School of Law, where she was an editor of the Law Review, and received her BA from the University at Albany-SUNY.

Edwin Farren

Edwin F. Farren is an assistant general counsel for Capital One in Richmond, VA. He is a member of the Capital One employment, securities and governance group in the legal department. Mr. Farren provides strategic legal counsel and compliance advice across a broad range of U.S. employment law issues. His work includes legal support for complex human resources programs and initiatives. Previously, he also managed U.S. employment litigation for Capital One.

Before joining Capital One, Mr. Farren practiced law with Hunton & Williams in Richmond, Virginia. There, he specialized in employment law litigation, advice and training. His practice included significant experience in federal and state courts, as well as expertise in affirmative action planning and managing audits by the OFCCP.

He is a member of ACC, the Virginia State Bar, and the Richmond Bar Association. He serves as a co-chair of the membership subcommittee of the ACC's Employment & Labor Law Committee and is a member of the ACC's WMACCA chapter.

Mr. Farren earned his BA, with distinction, from the University of Virginia and his JD from Washington & Lee University, graduating magna cum laude.

Curtis Schehr

Curtis L. Schehr serves as senior vice president, chief compliance officer and executive counsel of DynCorp International Inc. in Falls Church, VA. Mr. Schehr is responsible for developing and implementing an integrated governance, risk and compliance framework that captures ethics, compliance and regulatory areas, and effectively supports an accountable and transparent business environment. Mr. Schehr reports to the president and chief executive officer and to the audit committee of the board of directors. Mr. Schehr has management oversight for the company’s ethics and business conduct program, related internal investigations, internal audit, and trade compliance, which includes all export and import activities. Mr. Schehr is also responsible for other related regulatory and compliance matters including the Foreign Corrupt Practices Act.

Prior to being appointed as chief compliance officer, Mr. Schehr served as senior vice president, general counsel and secretary of DynCorp International. Before joining DynCorp International, Mr. Schehr was senior vice president, general counsel and secretary of Anteon International Corporation. At Anteon, Mr. Schehr was part of the corporate leadership team that spearheaded the company's growth and acquisition strategy, including an initial public offering.

Mr. Schehr currently serves as president-elect of ACC’s WMACCA Chapter.

Mr. Schehr holds two BAs from Lehigh University, where he was elected to Phi Beta Kappa. He earned his JD degree, with honors, from the George Washington University Law School.

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Family and Caregiver Rights

Family Caregivers Trivia Quiz*

1. How many people are currently caring for an elderly or disabled loved one?

a. 8 million b. 22 million c. 50 million

2. Who said "There are only four kinds of people in the world: those who have been caregivers; those who are currently caregivers; those who will be caregivers; those who will need caregivers"?

a. Rosalynn Carter b. Mother Theresa c. Ralph Nader

*2008 IlluminAge Communication Partners

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Family Caregivers Trivia Quiz cont'd

4. Adults who are raising children under 18 while providing care for an elderly parent are often called...

a. "The Sandwich Generation"
b. "Society's Squeezed Stratum"
c. "The Double Duty Group"

5. Respite care, which provides a temporary break for caregivers…

a. Isn't a good idea because it upsets the routine
b. Can be provided in the home
c. May be a short-term onsite program at a nursing home
d. Both B & C

6. What percentage of family caregivers are women?

a. 40 b. 60 c. 80 d. 95

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Family Caregivers Trivia Quiz cont'd

7. The Family and Medical Leave Act of 1993 allows employees of larger companies to take a 12 week leave if they….

a. Experience an illness
b. Have a baby
c. Provide care for an ill spouse or parent
d. All of the above

8. The annual dollar value of the services provided by family caregivers is…

a. $400 million b. $25 billion c. $306 billion

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Family Caregivers Trivia Quiz cont'd

9. The best way to be a good caregiver is….

a. To sacrifice everything for the loved one's needs
b. To take care of the caregiver, too
c. To graciously turn down offers of help

10. Help for family caregivers is available through….

a. State and Area Agencies on Aging
b. Federal programs
c. Volunteer groups
d. All of the above

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The Healthy Families Act

- H.R. 2460 introduced by Rep. Rosa DeLauro (CT-3)
- S. 1152 introduced by Sen. Edward M. Kennedy (MA)
- Title: To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families.

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Family-Friendly Workplace Act

- H.R. 933 introduced by Rep. Cathy McMorris Rodgers (WA-5)
- Title: Amends the Fair Labor Standards Act of 1938 to provide for compensatory time for employees in the private sector.

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Working Families Flexibility Act

- H.R. 1274 introduced by Rep. Carolyn B. Maloney (NY-14)
- Title: To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

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Paid Vacation Act

- H.R. 2564 introduced by Rep. Alan Grayson (FL-8)
- Title: To amend the Fair Labor Standards Act to require that employers provide a minimum of one (1) week of paid annual leave to employees.

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Other Legislation

- Employment Non-Discrimination Act
  - H.R. 3017 and H.R. 2981 both introduced by Rep. Barney Frank (MA-4)
  - Title: To prohibit employment discrimination on the basis of sexual orientation or gender identity.

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Other Possible Legislation

- The Independent Contractor Proper Classification Act
  - S.2044 in 110th Congress. Introduced by Sen. Barack Obama
- Expansion/Repeal of FMLA Regulations
  - Some buzz that FMLA regulations adopted in Fall 2008 may be repealed or revised.

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Pay Discrimination Legislation in 2009

Lilly Ledbetter Fair Pay Act

- First law signed by President Obama
- Reverses Supreme Court's ruling in *Ledbetter*
- Changes time limitations for EEOC pay discrimination charges

Paycheck Fairness Act

- Passed House in January 2009
- Proposes significant changes to Equal Pay Act
- Changes claim standards, imposes new litigation rules, and dictates agency efforts

Fair Pay Act

- Introduced in House and Senate in April 2009
- Proposes new protections beyond Equal Pay Act
- Addresses occupational segregation using equivalent value approach

Increased Possibility for Class Action Pay Challenges

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Lilly Ledbetter Fair Pay Act – Codifying the "Paycheck Rule"

An unlawful employment practice occurs:

- when a discriminatory compensation decision or other practice is adopted;
- when an individual becomes subject to a discriminatory compensation decision or other practice; or
- when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice

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Lilly Ledbetter Fair Pay Act – Other Key Aspects

- Applies to pay claims under Title VII, ADEA, ADA & Rehabilitation Act
- Retroactive to May 28, 2007
- Back pay continues to be limited to two year period
- Questions Remain
  - How far will courts take the scope of "other practice"?
  - Equitable defenses such as laches or waiver?

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Paycheck Fairness Act Proposals

Alters Claim Standards

- Tougher burden for employer defense
  - "Bona fide factor other than sex"
  - Factor must be job related & consistent with business necessity
- Broader definition of "establishment"
- Expands retaliation provision to protect discussions of wages

New Litigation Rules

- Move to Rule 23 "opt out" class action vehicle
- Enhanced penalties
  - Uncapped compensatory and punitive damages
  - Punitive damages without proof of discriminatory intent

Dictates Agency Action

- EEOC to develop new methods to collect pay data from employers
- Changes to OFCCP practices
  - Return of pay grade methodology
  - Multiple regression not required
  - No limits on types of evidence or methods of evaluation
  - Reinstates EO Survey

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Fair Pay Act Proposals

- Far Broader than the Equal Pay Act
  - Equal pay for "equivalent work"
  - Covers sex, race, and national origin
- Allows different wages based on seniority, merit or production systems, or based on bona fide factor if job related and furthers business purpose
- Gives workers option to file with EEOC or court
  - Uncapped compensatory and punitive damages
- Requires annual employer report filed with EEOC
  - Disclose wage rates paid to employees in each classification/job with breakout by sex, race, national origin (no individual names)
  - EEOC may publish any data submitted, and must make reports and data available to public

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Proactive Employer Strategies to Respond to New Pay Legislation

- Ensure proper documentation of pay decisions
  - Consider the broader categories of records impacting pay
- Pay Mix – base salary v. variable pay
- Review and revise record retention practices, as appropriate
- Avoid excessive manger discretion in pay decisions
  - Use objective decision criteria and guardrails for mangers
  - Ensure consistent processes and adequate governance
  - Train managers on process and EEO
- Conduct periodic privileged equity studies and remediate, as appropriate

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Practical Considerations in Pay Equity Studies

- Maintain the attorney-client privilege
- Similarly situated employee groups remain critical
  - Review job structures, job analyses and job descriptions
- Set realistic expectations – Diagnosis and Remediation
- Multiple regression & non-statistical cohort analyses
  - Confirm factors that drive & explain pay
  - Identify material unexplained differences
  - Peeling back the layers of the onion
- Common hurdles - data availability and integrations
- Roll up analyses – Multiple lenses add value

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Forewarn Act Proposals

- Expands employer coverage
- Lowers triggers for "plant closing" and "mass layoff"
- Increases notice period to 90 days
- Adds required recipients and content to notices

- Creates new DOL enforcement scheme
- Increases penalties (double back pay)
- New restrictions on waiver of rights
- New posters & obligation to distribute DOL guide

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Immigration Reform Issues

- Revised I-9 form
- New I-9 audits
- FAR E-Verify Rules
- ARRA – H-1B limitations

Bottom Line – Audit your I-9 processes

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Equal Remedies Act Proposal

Removes caps on compensatory and punitive damages under Title VII and ADA

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Age Discrimination in Employment Act

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ADEA Amendments – Gross v. FBL Decision

- U.S. Supreme Court decided in Gross v. FBL Financial Services (6/18/09) that "mixed-motive" analysis sometimes used in Title VII cases does not apply to age discrimination cases under the ADEA
- Court ruled (5-4 decision) that a plaintiff in a disparate treatment age discrimination case always bears the burden of proving that age was the "but-for" cause of the challenged adverse employment action
- Burden of persuasion does not shift to employer to show that it would have taken same action regardless of age – even if plaintiff produces some evidence that age was a motivating factor in decision-making process
- Unlike Title VII, Court ruled that the ADEA does not permit a plaintiff to establish liability merely by proving that discrimination was one of the motivating factors in the employment decision
- Court's ruling was relatively surprising since the formal issue before it was the proper type of evidence a plaintiff must introduce in order to be entitled to "mixed-motive" instruction to the jury

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ADEA Amendments – Gross Decision

- Observations
  - Effect of more difficult causation standard will make age cases more difficult for plaintiffs
  - Expect legislative activity seeking to reverse the effect of Gross decision and apply Title VII mixed-motive standards to ADEA cases
    - Sen. Patrick Leahy (D – VT) issued a public statement expressing displeasure with Gross decision. "The decision… reminds me of the court's wrong-headed ruling in Ledbetter. In fact, it was these same five justices who misconstrued an employment discrimination statute in that case," Leahy said.
      - » Justices supporting FBL decision: Thomas, Roberts, Scalia, Kennedy and Alito

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ADEA Disparate Impact – Smith and Meacham

- Supreme Court decided in Smith v. City of Jackson (2005) that a defense to a disparate impact claim under the ADEA does not require showing a business necessity, but rather, a reasonable factor other than age (RFOA)
- Court did not determine which party bore the burden of proving RFOA
- EEOC issued NPRM in March 2008 (73 FR 16807) to conform EEOC regs to Smith decision and took position that employer had the burden of proving RFOA
- March 2008 NPRM proposed revisions provide for the RFOA defense and Court requirement that employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities

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ADEA Disparate Impact – Smith and Meacham

- Supreme Court decided Meacham v. Atomic Knolls Lab on June 19, 2008 holding that employer exemption from liability for ADEA disparate impact claim based on reasonable factors other than age (RFOA) creates an affirmative defense on which employer bears the burden of production and persuasion.
- Following decisions in Smith and Meacham, EEOC believes it is appropriate to issue a separate Notice of Proposed Rulemaking (NPRM) to address the scope of the RFOA defense.
- New NPRM will be titled "Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act."

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Employee Free Choice Act

- Unionized workforce has decreased substantially over last 30 years and union bargaining power has significantly declined
- Union and its proponents argue that employers (i) use election process to delay and argue against unions; and (ii) drag out negotiation of first contract
- EFCA's primary elements
  - Substitute card check for secret ballot election
  - Binding arbitration decides first contract if negotiations are unsuccessful after 120 days
  - Increased financial penalties (treble pay) and $20K per violation against employers for unfair labor practices

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Employee Free Choice Act -- Observations

- Potential Effects if EFCA is adopted
  - More successful union organizing campaigns (stealthy and little management reaction time)
  - Loss of leverage in negotiating first contract. Little union incentive to accept management's offer, but incentive to hold out for mandatory arbitration and a better deal
  - First contract binding for two years
- Planning for EFCA
  - Develop a pre-emptive strategy (no time to react)
  - Focus on educating employees why no third party is needed in workplace and consequences of signing authorization card
  - Focus on factors that tend to cause employees to sign authorization cards and address those issues
  - Revise management training to ensure each supervisor is able to explain why workforce is better off union free
  - Communicate directly with all employees

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Secret Ballot Protection Act (SBPA)

- Republican and business lobby response to EFCA
- H.R. 874 and S. 1173 would amend NLRA to require that union recognition be based on a secret ballot election conducted by the NLRB
- Existing law permits (but does not require) an employer to recognize a union if it obtains signed authorization cards from a majority of the proposed unit
- Proposed legislation would make it an unfair labor practice for an employer to recognize or bargain with a union unless it was selected through a secret ballot election
- Proponents argue that secret ballot elections protect employee privacy and limit the opportunity for union coercion

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RESPECT ACT

- Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers ("RESPECT") Act introduced in House and Senate on 3/22/07
- RESPECT would substantially revise definition of "supervisor" in the NLRA
- NLRA excludes "supervisors" from its protections; conversely, employers are liable for supervisory conduct that constitutes an unfair labor practice
- Prior to 2006, the NLRB inconsistently applied statutory definition of supervisor leading to appellate court and U.S. Supreme Court review of NLRB interpretations of the definition of supervisor
- NLRB decisions concerning supervisory status in the Oakwood Healthcare cases (2006) involved the meaning of the terms "assign," "responsibly to direct," and "independent judgment" used in NLRA Section 2(11)
- Although Oakwood decisions were rather favorable to labor's viewpoint (only 12 of 172 individuals at issue deemed to be supervisors), the RESPECT Act was nonetheless introduced

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RESPECT ACT

- Proposed legislation (introduced in the 110th Congress) would make three changes to the NLRA definition of supervisor
  - delete "assign"
  - delete "responsibly to direct;" and
  - require the individual to spend the majority of his or her time performing the remaining supervisory functions in the statutory definition
- Impact would make many "working supervisors" and front-line managers no longer qualified as supervisors under the NLRA
- Narrowing of definition would make those individuals eligible to join the collective bargaining units of the employees such individuals are responsible to supervise
- Anticipate re-introduction of RESPECT legislation with continued face-off between business and organized labor
- Recommend pro-active planning for company revisions of current supervisory functions in order to meet a modified definition of supervisor

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Three Labor-Friendly Executive Orders Issued by Obama Administration

1. Non-Displacement of Qualified Workers Under Service Contracts

- E.O. 13495 (Jan. 30, 2009) requires a successor services contractor (and its subcontractors) to offer employment to certain of the predecessor contractor's employees
- Applies to non-managerial and supervisory employees who would otherwise be terminated as a result of the new contract
- Successor contractor must provide covered employees a right of first refusal "in positions for which they are qualified"
  - No requirement to offer job to employees who have failed to perform
  - DOL responsible for enforcement and may debar a contractor for up to three years for violating the E.O.
- Regulations implementing E.O. required to be issued by 7/31/09

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Three Labor-Friendly Executive Orders Issued by Obama Administration

2. Notification of Employee Rights Under Federal Law

- E.O. 13496 (Jan. 30, 2009) rescinds E.O. 12301 issued by President G.W. Bush requiring government contractors and subcontractors to post notices informing employees of certain rights (*Beck* rights) such as the ability to refuse to join a union and to object to use of non-union member dues for certain purposes
- E.O. 13496 requires government contractors and subcontractors to post notices informing employees of their affirmative right to organize under the NLRA
- Notice of Proposed Rulemaking issued in Fed. Register 8/3/09. Comments due 9/2/09
- DOL may cancel, terminate or suspend contract in whole or in part for noncompliance and may declare contractor ineligible for further Government contracts. Enforcement by OFCCP.

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Three Labor-Friendly Executive Orders Issued by Obama Administration

3. Economy in Government Contracting

- E.O. 13494 (Feb. 4, 2009) prevents federal contractors from being reimbursed for expenses incurred in efforts to influence employees' decision to form unions or engage in collective bargaining
  - Examples of costs that are unallowable if incurred to dissuade employees from forming unions or undertaking collective bargaining
    - Preparing and distributing materials
    - Hiring or consulting legal counsel or consultants
    - Holding meetings (including paying salaries of employees who attend such meetings)
- Does not affect allowability of costs incurred in maintaining satisfactory relations with employees (e.g., labor/management committees, employee publications)

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Three Labor-Friendly Executive Orders Issued by Obama Administration

- Observations:
  - Obama administration focused on finding ways to advance cause of organized labor
  - E.O. orders and implementing regulations may give rise to preemptive litigation and lobbying efforts
  - Review policies and procedures to ensure company is in a position to comply

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Arbitration Fairness Act ("AFA") of 2009

- AFA would limit applicability of the Federal Arbitration Act of 1925
- Bill would exclude the following types of disputes from the scope of the Federal Arbitration Act:
  - Employment disputes between an employer and employee arising out of their employment relationship as defined by the Fair Labor Standards Act
  - Consumer disputes
  - Franchise disputes between a franchisor and franchisee

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Arbitration Fairness Act ("AFA") of 2009

- Proposed legislation would void pre-dispute arbitration provisions and reverse case law that had delegated to arbitrators the responsibility for deciding whether a dispute is subject to an arbitration agreement, and requires that such issues be determined by the applicable court
- Proposed legislation also provides that the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator
- Arbitration provisions in collective bargaining agreements are excluded

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Arbitration Fairness Act ("AFA") of 2009

- Findings Cited In Proposed Legislation: (H.R. 1020 and S. 931):
  - FAA was intended to apply to commercial entities of similar sophistication and bargaining power.
  - Various U.S. Supreme Court decisions have since broadened the applicability of the FAA to extend to parties of very disparate economic power, so that millions of consumers and employees must submit disputes to binding arbitration.
  - Many of these consumers and employees may not have understood the arbitration clauses in agreements they accepted, or had little choice in accepting the agreements.
  - Mandatory arbitration does not adequately protect civil rights and consumer rights because it is not transparent (non-public decisions)

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Arbitration Fairness Act ("AFA") of 2009

- Status of pending legislation:
  - H.R. 1020 referred to Subcommittee on Commercial and Administrative Law (3/16/09)
  - S. 931 referred to Committee on the Judiciary (4/29/09)

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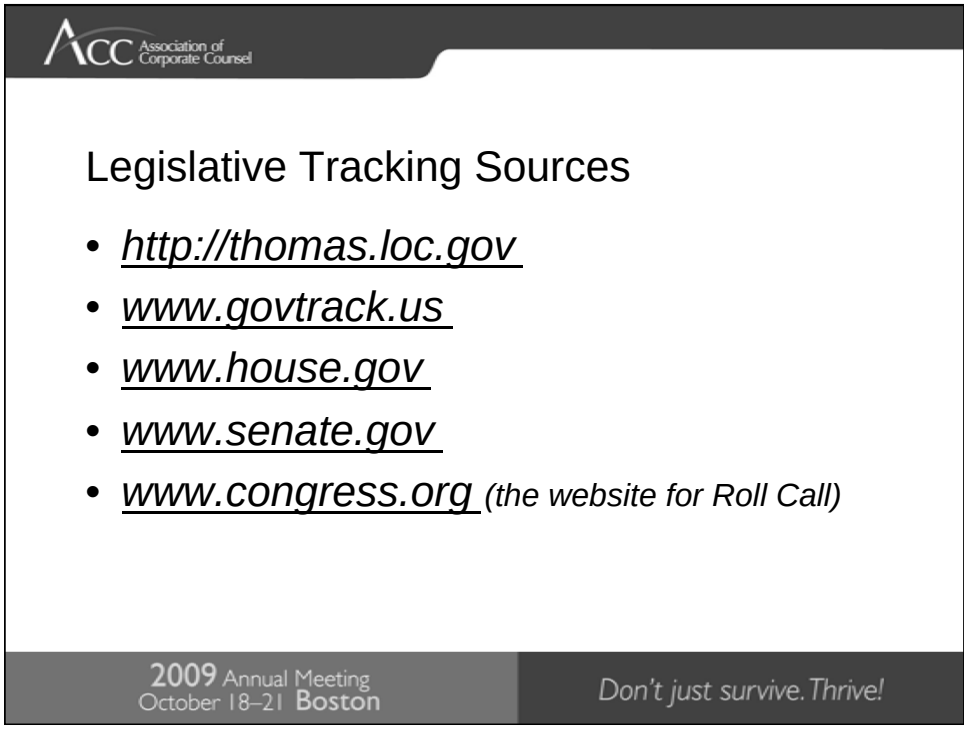

Ellen R. Dunkin
Senior Vice President & Associate General Counsel
Crump Group, Inc.

Bill Summaries as of July 29, 2009

Family and Caregiver Rights:

1. The Healthy Families Act
2. Working Families Flexibility Act
3. Family-Friendly Workplace Act
4. Paid Vacation Act

Other Legislation or Possible Legislation:

1. Employment Nondiscrimination Act
2. The Independent Contractor Proper Classification Act
    a. Obama bill in 110th Congress. No current bill
3. Expansion/Repeal of FMLA Regulations
    a. No official activity to date

The Healthy Families Act
H.R. 2460/S. 1152

H.R. 2460 introduced by Rep. Rosa DeLauro (CT-3)

S. 1152 introduced by Sen. Edward M. Kennedy (MA)

Title: To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families.

Summary: The Act requires certain employers who employ 15 or more employees for each working day during 20 or more workweeks a year to permit each employee to earn at least one (1) hour of paid sick time for every 30 hours worked. Maximum hours in one year permitted, but not required is 56 hours. Employees may use such time to (1) meet their own medical needs; (2) care for medical needs of certain family members; or (3) seek medical attention, assist a related person, take legal action, or engage in other specified activities relating to domestic violence, sexual assault, or stalking.

Actions: Introduced in 111th Congress on May 18, 2009. (Previously introduced in 109th and 110th Congresses) In House, referred to Committees on Education and Labor, Oversight and Government Reform, and House Administration. Introduced in Senate on May 21, 2009. Referred to Senate Committee on Health, Education, Labor and Pensions.

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111TH CONGRESS
1ST SESSION

H. R. 2460

To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 2009

Ms. DELAURO (for herself, Mr. GEORGE MILLER of California, Mr. HARE, Mr. HINCHEY, Mr. SERRANO, Ms. SCHAKOWSKY, Mrs. CAPPS, Mr. NADLER of New York, Mr. MCGOVERN, Mr. FRANK of Massachusetts, Mrs. MALONEY, Mr. GUTIERREZ, Mrs. MCCARTHY of New York, Mr. WALZ, Mr. RUSH, Ms. BALDWIN, Mr. HOLT, Ms. LINDA T. SÁNCHEZ of California, Ms. NORTON, Mr. FILNER, Ms. JACKSON-LEE of Texas, Mr. STARK, Ms. SCHWARTZ, Mr. JOHNSON of Georgia, Mr. WAXMAN, Ms. CASTOR of Florida, Ms. ZOE LOFGREN of California, Ms. MOORE of Wisconsin, Mr. CONNOLLY of Virginia, Mrs. LOWEY, Mr. KILDEE, Mr. BISHOP of New York, Mr. OLVER, Mr. BLUMENAUER, Mr. RYAN of Ohio, Ms. WASSERMAN SCHULTZ, Mr. CLEAVER, Mr. ELLISON, Mr. KUCINICH, Ms. SUTTON, Mr. ORTIZ, Mr. ISRAEL, Mr. BRADY of Pennsylvania, Mr. MARKEY of Massachusetts, Ms. WOOLSEY, Mr. AL GREEN of Texas, Mr. GENE GREEN of Texas, Mr. CUMMINGS, Mrs. DAVIS of California, Mr. LEWIS of Georgia, Mr. MCDERMOTT, Mr. RODRIGUEZ, Mr. LYNCH, Mr. MICHAUD, Ms. BERKLEY, Mr. VAN HOLLEN, Mr. JACKSON of Illinois, Mr. SARBANES, Mr. ROTHMAN of New Jersey, Mr. OBERSTAR, Ms. HIRONO, Mr. GRAYSON, Mr. GRIJALVA, Ms. PINGREE of Maine, Mr. CARSON of Indiana, Mr. CAPUANO, Mr. COHEN, Mr. CONYERS, Mr. COSTELLO, Ms. ESHOO, Mr. HONDA, Ms. KILPATRICK of Michigan, Mr. LARSON of Connecticut, Ms. LEE of California, Ms. MCCOLLUM, Mr. MORAN of Virginia, Mr. MURPHY of Connecticut, Mr. PASCRELL, Mr. PRICE of North Carolina, Mr. SHERMAN, Mr. KENNEDY, Ms. VELÁZQUEZ, Mr. WEINER, Mr. DOYLE, Mr. FATTAH, Mr. SIRES, Mr. DAVIS of Illinois, Mr. CLAY, Ms. CORRINE BROWN of Florida, Mr. PALLONE, Mr. MEEKS of New York, Mr. BERMAN, Mr. COURTNEY, Mr. MEEK of Florida, Mrs. CHRISTENSEN, Mr. PAYNE, Ms. CLARKE, Ms. SHEA-PORTER, Mr. ABERCROMBIE, Ms. EDWARDS of Maryland, Mr. SABLAN, and Ms. FUDGE) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committees on Oversight and Government Reform and House Administration, for a period to be subsequently determined by the Speaker, in

each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Healthy Families Act".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Working Americans need time to meet their own health care needs and to care for family members, including their children, spouse, parents, and parents-in-law, and other children and adults for whom they are caretakers.

(2) Health care needs include preventive health care, diagnostic procedures, medical treatment, and recovery in response to short- and long-term illnesses and injuries.

(3) Providing employees time off to meet health care needs ensures that they will be healthier in the long run. Preventive care helps avoid illnesses and

injuries and routine medical care helps detect illnesses early and shorten their duration.

(4) When parents are available to care for their children who become sick, children recover faster, more serious illnesses are prevented, and children's overall mental and physical health improve. In a 2009 study published in the American Journal of Public Health, 81 percent of parents of a child with special health care needs reported that taking leave from work to be with their child had a "good" or "very good" effect on their child's physical health. Similarly, 85 percent of parents of such a child found that taking such leave had a "good" or "very good" effect on their child's emotional health.

(5) When parents cannot afford to miss work and must send children with contagious illnesses to child care centers or schools, infection can spread rapidly through child care centers and schools.

(6) Providing paid sick time improves public health by reducing infectious disease. Policies that make it easier for sick adults and children to be isolated at home reduce the spread of infectious disease.

(7) Routine medical care reduces medical costs by detecting and treating illness and injury early,

decreasing the need for emergency care. These savings benefit public and private payers of health insurance, including private businesses.

(8) The provision of individual and family sick time by large and small businesses, both here in the United States and elsewhere, demonstrates that policy solutions are both feasible and affordable in a competitive economy. A 2009 study by the Center for Economic and Policy Research found that, of 22 countries with comparable economies, the United States was 1 of only 3 countries that did not provide any paid time off for workers with short-term illnesses.

(9) Measures that ensure that employees are in good health and do not need to worry about unmet family health problems help businesses by promoting productivity and reducing employee turnover.

(10) The American Productivity Audit found that presenteeism—the practice of employees coming to work despite illness—costs $180,000,000,000 annually in lost productivity. Studies in the Journal of Occupational and Environmental Medicine, the Employee Benefit News, and the Harvard Business Review show that presenteeism is a larger productivity

drain than either absenteeism or short-term disability.

(11) The absence of paid sick time has forced Americans to make untenable choices between needed income and jobs on the one hand and caring for their own and their family's health on the other.

(12) Nearly half of Americans lack paid sick time for self-care or to care for a family member. For families in the lowest quartile of earners, 79 percent lack paid sick time. For families in the next 2 quartiles, 46 and 38 percent, respectively, lack paid sick time. Even for families in the highest income quartile, 28 percent lack paid sick time. In addition, millions of workers cannot use paid sick time to care for ill family members.

(13) Due to the roles of men and women in society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.

(14) An increasing number of men are also taking on caretaking obligations, and men who request paid time for caretaking purposes are often denied accommodation or penalized because of stereotypes that caretaking is only "women's work".

(15) Employers' reliance on persistent stereotypes about the "proper" roles of both men and women in the workplace and in the home continues a cycle of discrimination and fosters stereotypical views about women's commitment to work and their value as employees.

(16) Employment standards that apply to only one gender have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(17) It is in the national interest to ensure that all Americans can care for their own health and the health of their families while prospering at work.

(18) Nearly 1 in 3 American women report physical or sexual abuse by a husband or boyfriend at some point in their lives. Domestic violence also affects men. Women account for about 85 percent of the victims of domestic violence and men account for approximately 15 percent of the victims. Therefore, women disproportionately need time off to care for their health or to find solutions, such as obtaining a restraining order or finding housing, to avoid or prevent physical or sexual abuse.

(19) Up to 85 percent of domestic violence victims miss work because of abuse. The mean number

of days of paid work lost by a rape victim is 8.1 days, by a victim of physical assault is 7.2 days, and by a victim of stalking is 10.1 days. Nationwide, domestic violence victims lose almost 8,000,000 days of paid work per year.

(20) Without paid sick days that can be used to address the effects of domestic violence, these victims are in grave danger of losing their jobs. Surveys have found that 96 to 98 percent of employed domestic violence victims experience problems at work related to the violence. The Government Accountability Office similarly found that 24 to 52 percent of victims report losing a job due, at least in part, to domestic violence. The loss of employment can be particularly devastating for victims of domestic violence, who often need economic security to ensure safety.

(21) The Centers for Disease Control and Prevention has estimated that domestic violence costs over $700,000,000 annually due to the victims' lost productivity in employment.

(22) Efforts to assist abused employees result in positive outcomes for employers as well as employees because employers can retain workers who might otherwise be compelled to leave. In a 2002

survey, 68 percent of corporate leaders surveyed said that a company's financial performance would benefit from addressing domestic violence among its employees.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to ensure that all working Americans can address their own health needs and the health needs of their families by requiring employers to permit employees to earn up to 56 hours of paid sick time including paid time for family care;

(2) to diminish public and private health care costs by enabling workers to seek early and routine medical care for themselves and their family members;

(3) to assist employees who are, or whose family members are, victims of domestic violence, sexual assault, or stalking, by providing the employees with paid time away from work to allow the victims to receive treatment and to take the necessary steps to ensure their protection;

(4) to accomplish the purposes described in paragraphs (1) through (3) in a manner that is feasible for employers; and

(5) consistent with the provision of the 14th amendment to the Constitution relating to equal protection of the laws, and pursuant to Congress' power to enforce that provision under section 5 of that amendment—

(A) to accomplish the purposes described in paragraphs (1) through (3) in a manner that minimizes the potential for employment discrimination on the basis of sex by ensuring generally that paid sick time is available for eligible medical reasons on a gender-neutral basis; and

(B) to promote the goal of equal employment opportunity for women and men.

SEC. 4. DEFINITIONS.

In this Act:

(1) CHILD.—The term "child" means a biological, foster, or adopted child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(2) DOMESTIC VIOLENCE.—The term "domestic violence" has the meaning given the term in section

40002(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)), except that the reference in such section to the term "jurisdiction receiving grant monies" shall be deemed to mean the jurisdiction in which the victim lives or the jurisdiction in which the employer involved is located.

(3) EMPLOYEE.—The term "employee" means an individual who is—

(A)(i) an employee, as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under subparagraph (E), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a reference to an employer described in clauses (i)(I) and (ii) of paragraph (4)(A); or

(ii) an employee of the Government Accountability Office;

(B) a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a));

(C) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995

(2 U.S.C. 1301), other than an applicant for employment;

(D) a covered employee, as defined in section 411(c) of title 3, United States Code; or

(E) a Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(4) EMPLOYER.—

(A) IN GENERAL.—The term "employer" means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under subclause (V);

(II) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(III) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an employing agency covered under subchapter V of chapter 63 of title 5, United States Code; and

(ii) is engaged in commerce (including government), or an industry or activity affecting commerce (including government), as defined in subparagraph (B)(iii).

(B) COVERED EMPLOYER.—

(i) IN GENERAL.—In subparagraph (A)(i)(I), the term "covered employer"—

(I) means any person engaged in commerce or in any industry or activity affecting commerce who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(II) includes—

(aa) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(bb) any successor in interest of an employer;

(III) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(IV) includes the Government Accountability Office and the Library of Congress.

(ii) PUBLIC AGENCY.—For purposes of clause (i)(III), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(iii) DEFINITIONS.—For purposes of this subparagraph:

(I) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(II) EMPLOYEE.—The term "employee" has the same meaning given such term in section 3(e) of the Fair

Labor Standards Act of 1938 (29 U.S.C. 203(e)).

(III) PERSON.—The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(C) PREDECESSORS.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(5) EMPLOYMENT BENEFITS.—The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) HEALTH CARE PROVIDER.—The term "health care provider" means a provider who—

(A)(i) is a doctor of medicine or osteopathy who is authorized to practice medicine or sur-

gery (as appropriate) by the State in which the doctor practices; or

(ii) is any other person determined by the Secretary to be capable of providing health care services; and

(B) is not employed by an employer for whom the provider issues certification under this Act.

(7) PAID SICK TIME.—The term "paid sick time" means an increment of compensated leave that can be earned by an employee for use during an absence from employment for any of the reasons described in paragraphs (1) through (4) of section 5(b).

(8) PARENT.—The term "parent" means a biological, foster, or adoptive parent of an employee, a stepparent of an employee, or a legal guardian or other person who stood in loco parentis to an employee when the employee was a child.

(9) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(10) SEXUAL ASSAULT.—The term "sexual assault" has the meaning given the term in section 40002(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)).

(11) SPOUSE.—The term "spouse", with respect to an employee, has the meaning given such term by the marriage laws of the State in which the employee resides.

(12) STALKING.—The term "stalking" has the meaning given the term in section 40002(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)).

(13) VICTIM SERVICES ORGANIZATION.—The term "victim services organization" means a nonprofit, nongovernmental organization that provides assistance to victims of domestic violence, sexual assault, or stalking or advocates for such victims, including a rape crisis center, an organization carrying out a domestic violence, sexual assault, or stalking prevention or treatment program, an organization operating a shelter or providing counseling services, or a legal services organization or other organization providing assistance through the legal process.

SEC. 5. PROVISION OF PAID SICK TIME.

(a) ACCRUAL OF PAID SICK TIME.—

(1) IN GENERAL.—An employer shall permit each employee employed by the employer to earn not less than 1 hour of paid sick time for every 30 hours worked, to be used as described in subsection (b).

An employer shall not be required to permit an employee to earn, under this section, more than 56 hours of paid sick time in a calendar year, unless the employer chooses to set a higher limit.

(2) EXEMPT EMPLOYEES.—

(A) IN GENERAL.—Except as provided in paragraph (3), for purposes of this section, an employee who is exempt from overtime requirements under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) shall be assumed to work 40 hours in each workweek.

(B) SHORTER NORMAL WORKWEEK.—If the normal workweek of such an employee is less than 40 hours, the employee shall earn paid sick time based upon that normal work week.

(3) DATES OF ACCRUAL AND USE.—Employees shall begin to earn paid sick time under this section at the commencement of their employment. An employee shall be entitled to use the earned paid sick time beginning on the 60th calendar day following commencement of the employee's employment. After that 60th calendar day, the employee may use the paid sick time as the time is earned. An employer

may, at the discretion of the employer, loan paid sick time to an employee in advance of the earning of such time under this section by such employee.

(4) CARRYOVER.—

(A) IN GENERAL.—Except as provided in subparagraph (B), paid sick time earned under this section shall carry over from 1 calendar year to the next.

(B) CONSTRUCTION.—This Act shall not be construed to require an employer to permit an employee to accrue more than 56 hours of earned paid sick time at a given time.

(5) EMPLOYERS WITH EXISTING POLICIES.—Any employer with a paid leave policy who makes available an amount of paid leave that is sufficient to meet the requirements of this section and that may be used for the same purposes and under the same conditions as the purposes and conditions outlined in subsection (b) shall not be required to permit an employee to earn additional paid sick time under this section.

(6) CONSTRUCTION.—Nothing in this section shall be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement,

or other separation from employment for earned paid sick time that has not been used.

(7) REINSTATEMENT.—If an employee is separated from employment with an employer and is rehired, within 12 months after that separation, by the same employer, the employer shall reinstate the employee's previously earned paid sick time. The employee shall be entitled to use the earned paid sick time and earn additional paid sick time at the recommencement of employment with the employer.

(8) PROHIBITION.—An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement worker to cover the hours during which the employee is using paid sick time.

(b) USES.—Paid sick time earned under this section may be used by an employee for any of the following:

(1) An absence resulting from a physical or mental illness, injury, or medical condition of the employee.

(2) An absence resulting from obtaining professional medical diagnosis or care, or preventive medical care, for the employee.

(3) An absence for the purpose of caring for a child, a parent, a spouse, or any other individual re-

lated by blood or affinity whose close association with the employee is the equivalent of a family relationship, who—

(A) has any of the conditions or needs for diagnosis or care described in paragraph (1) or (2); and

(B) in the case of someone who is not a child, is otherwise in need of care.

(4) An absence resulting from domestic violence, sexual assault, or stalking, if the time is to—

(A) seek medical attention for the employee or the employee's child, parent, or spouse, or an individual related to the employee as described in paragraph (3), to recover from physical or psychological injury or disability caused by domestic violence, sexual assault, or stalking;

(B) obtain or assist a related person described in paragraph (3) in obtaining services from a victim services organization;

(C) obtain or assist a related person described in paragraph (3) in obtaining psychological or other counseling;

(D) seek relocation; or

(E) take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic violence, sexual assault, or stalking.

(c) SCHEDULING.—An employee shall make a reasonable effort to schedule a period of paid sick time under this Act in a manner that does not unduly disrupt the operations of the employer.

(d) PROCEDURES.—

(1) IN GENERAL.—Paid sick time shall be provided upon the oral or written request of an employee. Such request shall—

(A) include the expected duration of the period of such time;

(B) in a case in which the need for such period of time is foreseeable at least 7 days in advance of such period, be provided at least 7 days in advance of such period; and

(C) otherwise, be provided as soon as practicable after the employee is aware of the need for such period.

(2) CERTIFICATION IN GENERAL.—

(A) PROVISION.—

(i) IN GENERAL.—Subject to subparagraph (C), an employer may require that a

request for paid sick time under this section for a purpose described in paragraph (1), (2), or (3) of subsection (b) be supported by a certification issued by the health care provider of the eligible employee or of an individual described in subsection (b)(3), as appropriate, if the period of such time covers more than 3 consecutive workdays.

(ii) TIMELINESS.—The employee shall provide a copy of such certification to the employer in a timely manner, not later than 30 days after the first day of the period of time. The employer shall not delay the commencement of the period of time on the basis that the employer has not yet received the certification.

(B) SUFFICIENT CERTIFICATION.—

(i) IN GENERAL.—A certification provided under subparagraph (A) shall be sufficient if it states—

(I) the date on which the period of time will be needed;

(II) the probable duration of the period of time;

(III) the appropriate medical facts within the knowledge of the health care provider regarding the condition involved, subject to clause (ii); and

(IV)(aa) for purposes of paid sick time under subsection (b)(1), a statement that absence from work is medically necessary;

(bb) for purposes of such time under subsection (b)(2), the dates on which testing for a medical diagnosis or care is expected to be given and the duration of such testing or care; and

(cc) for purposes of such time under subsection (b)(3), in the case of time to care for someone who is not a child, a statement that care is needed for an individual described in such subsection, and an estimate of the amount of time that such care is needed for such individual.

(ii) LIMITATION.—In issuing a certification under subparagraph (A), a health care provider shall make reasonable efforts

to limit the medical facts described in clause (i)(III) that are disclosed in the certification to the minimum necessary to establish a need for the employee to utilize paid sick time.

(C) REGULATIONS.—Regulations prescribed under section 13 shall specify the manner in which an employee who does not have health insurance shall provide a certification for purposes of this paragraph.

(D) CONFIDENTIALITY AND NONDISCLOSURE.—

(i) PROTECTED HEALTH INFORMATION.—Nothing in this Act shall be construed to require a health care provider to disclose information in violation of section 1177 of the Social Security Act (42 U.S.C. 1320d–6) or the regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note).

(ii) HEALTH INFORMATION RECORDS.—If an employer possesses health information about an employee or an employee's child, parent, spouse or

other individual described in subsection (b)(3), such information shall—

(I) be maintained on a separate form and in a separate file from other personnel information;

(II) be treated as a confidential medical record; and

(III) not be disclosed except to the affected employee or with the permission of the affected employee.

(3) CERTIFICATION IN THE CASE OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING.—

(A) IN GENERAL.—An employer may require that a request for paid sick time under this section for a purpose described in subsection (b)(4) be supported by 1 of the following forms of documentation:

(i) A police report indicating that the employee, or a member of the employee's family described in subsection (b)(4), was a victim of domestic violence, sexual assault, or stalking.

(ii) A court order protecting or separating the employee or a member of the employee's family described in subsection

(b)(4) from the perpetrator of an act of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney that the employee or a member of the employee's family described in subsection (b)(4) has appeared in court or is scheduled to appear in court in a proceeding related to domestic violence, sexual assault, or stalking.

(iii) Other documentation signed by an employee or volunteer working for a victim services organization, an attorney, a police officer, a medical professional, a social worker, an antiviolence counselor, or a member of the clergy, affirming that the employee or a member of the employee's family described in subsection (b)(4) is a victim of domestic violence, sexual assault, or stalking.

(B) REQUIREMENTS.—The requirements of paragraph (2) shall apply to certifications under this paragraph, except that—

(i) subclauses (III) and (IV) of subparagraph (B)(i) and subparagraph (B)(ii) of such paragraph shall not apply;

(ii) the certification shall state the reason that the leave is required with the facts to be disclosed limited to the minimum necessary to establish a need for the employee to be absent from work, and the employee shall not be required to explain the details of the domestic violence, sexual assault, or stalking involved; and

(iii) with respect to confidentiality under subparagraph (D) of such paragraph, any information provided to the employer under this paragraph shall be confidential, except to the extent that any disclosure of such information is—

(I) requested or consented to in writing by the employee; or

(II) otherwise required by applicable Federal or State law.

SEC. 6. POSTING REQUIREMENT.

(a) IN GENERAL.—Each employer shall post and keep posted a notice, to be prepared or approved in accordance with procedures specified in regulations prescribed under section 13, setting forth excerpts from, or summaries of, the pertinent provisions of this Act including—

(1) information describing paid sick time available to employees under this Act;

(2) information pertaining to the filing of an action under this Act;

(3) the details of the notice requirement for a foreseeable period of time under section 5(d)(1)(B); and

(4) information that describes—

(A) the protections that an employee has in exercising rights under this Act; and

(B) how the employee can contact the Secretary (or other appropriate authority as described in section 8) if any of the rights are violated.

(b) LOCATION.—The notice described under subsection (a) shall be posted—

(1) in conspicuous places on the premises of the employer, where notices to employees (including applicants) are customarily posted; or

(2) in employee handbooks.

(c) VIOLATION; PENALTY.—Any employer who willfully violates the posting requirements of this section shall be subject to a civil fine in an amount not to exceed $100 for each separate offense.

SEC. 7. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—

(1) EXERCISE OF RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this Act, including—

(A) discharging or discriminating against (including retaliating against) any individual, including a job applicant, for exercising, or attempting to exercise, any right provided under this Act;

(B) using the taking of paid sick time under this Act as a negative factor in an employment action, such as hiring, promotion, or a disciplinary action; or

(C) counting the paid sick time under a no-fault attendance policy or any other absence control policy.

(2) DISCRIMINATION.—It shall be unlawful for any employer to discharge or in any other manner discriminate against (including retaliating against) any individual, including a job applicant, for opposing any practice made unlawful by this Act.

(b) INTERFERENCE WITH PROCEEDINGS OR INQUIRIES.—It shall be unlawful for any person to discharge or in any other manner discriminate against (including retali-

ating against) any individual, including a job applicant, because such individual—

(1) has filed an action, or has instituted or caused to be instituted any proceeding, under or related to this Act;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this Act; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this Act.

(c) CONSTRUCTION.—Nothing in this section shall be construed to state or imply that the scope of the activities prohibited by section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2615) is less than the scope of the activities prohibited by this section.

SEC. 8. ENFORCEMENT AUTHORITY.

(a) IN GENERAL.—

(1) DEFINITION.—In this subsection:

(A) the term "employee" means an employee described in subparagraph (A) or (B) of section 4(3); and

(B) the term "employer" means an employer described in subclause (I) or (II) of section 4(4)(A)(i).

(2) INVESTIGATIVE AUTHORITY.—

(A) IN GENERAL.—To ensure compliance with the provisions of this Act, or any regulation or order issued under this Act, the Secretary shall have, subject to subparagraph (C), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)), with respect to employers, employees, and other individuals affected.

(B) OBLIGATION TO KEEP AND PRESERVE RECORDS.—An employer shall make, keep, and preserve records pertaining to compliance with this Act in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations prescribed by the Secretary.

(C) REQUIRED SUBMISSIONS GENERALLY LIMITED TO AN ANNUAL BASIS.—The Secretary shall not require, under the authority of this paragraph, an employer to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this Act or any regula-

tion or order issued pursuant to this Act, or is investigating a charge pursuant to paragraph (4).

(D) SUBPOENA AUTHORITY.—For the purposes of any investigation provided for in this paragraph, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

(3) CIVIL ACTION BY EMPLOYEES OR INDIVIDUALS.—

(A) RIGHT OF ACTION.—An action to recover the damages or equitable relief prescribed in subparagraph (B) may be maintained against any employer in any Federal or State court of competent jurisdiction by one or more employees or individuals or their representative for and on behalf of—

(i) the employees or individuals; or

(ii) the employees or individuals and others similarly situated.

(B) LIABILITY.—Any employer who violates section 7 (including a violation relating to rights provided under section 5) shall be liable to any employee or individual affected—

(i) for damages equal to—

(I) the amount of—

(aa) any wages, salary, employment benefits, or other compensation denied or lost by reason of the violation; or

(bb) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost, any actual monetary losses sustained as a direct result of the violation up to a sum equal to 56 hours of wages or salary for the employee or individual;

(II) the interest on the amount described in subclause (I) calculated at the prevailing rate; and

(III) an additional amount as liquidated damages; and

(ii) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(C) FEES AND COSTS.—The court in an action under this paragraph shall, in addition to

any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) ACTION BY THE SECRETARY.—

(A) ADMINISTRATIVE ACTION.—The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 7 (including a violation relating to rights provided under section 5) in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(B) CIVIL ACTION.—The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in paragraph (3)(B)(i).

(C) SUMS RECOVERED.—Any sums recovered by the Secretary pursuant to subparagraph (B) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee or individual affected. Any such sums not paid to an employee or individual affected because of inability to do so

within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(5) LIMITATION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), an action may be brought under paragraph (3), (4), or (6) not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(B) WILLFUL VIOLATION.—In the case of an action brought for a willful violation of section 7 (including a willful violation relating to rights provided under section 5), such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(C) COMMENCEMENT.—In determining when an action is commenced under paragraph (3), (4), or (6) for the purposes of this paragraph, it shall be considered to be commenced on the date when the complaint is filed.

(6) ACTION FOR INJUNCTION BY SECRETARY.—The district courts of the United States shall have

jurisdiction, for cause shown, in an action brought by the Secretary—

(A) to restrain violations of section 7 (including a violation relating to rights provided under section 5), including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to employees or individuals eligible under this Act; or

(B) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(7) SOLICITOR OF LABOR.—The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under paragraph (4) or (6).

(8) GOVERNMENT ACCOUNTABILITY OFFICE AND LIBRARY OF CONGRESS.—Notwithstanding any other provision of this subsection, in the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subsection shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

(b) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, alleging a violation of section 202(a)(1) of that Act (2 U.S.C. 1312(a)(1)) shall be the powers, remedies, and procedures this Act provides to that Board, or any person, alleging an unlawful employment practice in violation of this Act against an employee described in section 4(3)(C).

(c) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Merit Systems Protection Board, or any person, alleging a violation of section 412(a)(1) of that title, shall be the powers, remedies, and procedures this Act provides to the President, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 4(3)(D).

(d) EMPLOYEES COVERED BY CHAPTER 63 OF TITLE 5, UNITED STATES CODE.—The powers, remedies, and procedures provided in title 5, United States Code, to an employing agency, provided in chapter 12 of that title to

the Merit Systems Protection Board, or provided in that title to any person, alleging a violation of chapter 63 of that title, shall be the powers, remedies, and procedures this Act provides to that agency, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 4(3)(E).

(e) REMEDIES FOR STATE EMPLOYEES.—

(1) WAIVER OF SOVEREIGN IMMUNITY.—A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this Act for equitable, legal, or other relief authorized under this Act.

(2) OFFICIAL CAPACITY.—An official of a State may be sued in the official capacity of the official by any employee who has complied with the procedures under subsection (a)(3), for injunctive relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes (42 U.S.C. 1988).

(3) APPLICABILITY.—With respect to a particular program or activity, paragraph (1) applies to conduct occurring on or after the day, after the date of enactment of this Act, on which a State first receives or uses Federal financial assistance for that program or activity.

(4) DEFINITION OF PROGRAM OR ACTIVITY.—In this subsection, the term "program or activity" has the meaning given the term in section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4a).

SEC. 9. COLLECTION OF DATA ON PAID SICK TIME AND FURTHER STUDY.

(a) COMPILATION OF INFORMATION.—Effective 90 days after the date of enactment of this Act, the Commissioner of Labor Statistics shall annually compile information on the following:

(1) The number of employees who used paid sick time.

(2) The number of hours of paid sick time used.

(3) The number of employees who used paid sick time for absences necessary due to domestic violence, sexual assault, or stalking.

(4) The demographic characteristics of employees who were eligible for and who used paid sick time.

(b) GAO STUDY.—

(1) IN GENERAL.—The Comptroller General of the United States shall annually conduct a study to determine the following:

(A)(i) The number of days employees used paid sick time and the reasons for the use.

(ii) The number of employees who used the paid sick time for periods of time covering more than 3 consecutive workdays.

(B) The cost and benefits to employers of implementing the paid sick time policies.

(C) The cost to employees of providing certification to obtain the paid sick time.

(D) The benefits of the paid sick time to employees and their family members, including effects on employees' ability to care for their family members or to provide for their own health needs.

(E) Whether the paid sick time affected employees' ability to sustain an adequate income while meeting needs of the employees and their family members.

(F) Whether employers who administered paid sick time policies prior to the date of enactment of this Act were affected by the provisions of this Act.

(G) Whether other types of leave were affected by this Act.

(H) Whether paid sick time affected retention and turnover and costs of presenteeism.

(I) Whether the paid sick time increased the use of less costly preventive medical care and lowered the use of emergency room care.

(J) Whether the paid sick time reduced the number of children sent to school when the children were sick.

(2) AGGREGATING DATA.—The data collected under subparagraphs (A) and (D) of paragraph (1) shall be aggregated by gender, race, disability, earnings level, age, marital status, family type, including parental status, and industry.

(3) REPORTS.—

(A) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall prepare and submit a report to the appropriate committees of Congress concerning the

results of the study conducted pursuant to paragraph (1) and the data aggregated under paragraph (2).

(B) FOLLOWUP REPORT.—Not later than 5 years after the date of enactment of this Act, the Comptroller General of the United States shall prepare and submit a followup report to the appropriate committees of Congress concerning the results of the study conducted pursuant to paragraph (1) and the data aggregated under paragraph (2).

SEC. 10. EFFECT ON OTHER LAWS.

(a) FEDERAL AND STATE ANTIDISCRIMINATION LAWS.—Nothing in this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) STATE AND LOCAL LAWS.—Nothing in this Act shall be construed to supersede (including preempting) any provision of any State or local law that provides greater paid sick time or leave rights (including greater paid sick time or leave, or greater coverage of those eligible for paid sick time or leave) than the rights established under this Act.

SEC. 11. EFFECT ON EXISTING EMPLOYMENT BENEFITS.

(a) MORE PROTECTIVE.—Nothing in this Act shall be construed to diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid sick leave or other leave rights to employees or individuals than the rights established under this Act.

(b) LESS PROTECTIVE.—The rights established for employees under this Act shall not be diminished by any contract, collective bargaining agreement, or any employment benefit program or plan.

SEC. 12. ENCOURAGEMENT OF MORE GENEROUS LEAVE POLICIES.

Nothing in this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than policies that comply with the requirements of this Act.

SEC. 13. REGULATIONS.

(a) IN GENERAL.—

(1) AUTHORITY.—Except as provided in paragraph (2), not later than 180 days after the date of enactment of this Act, the Secretary shall prescribe such regulations as are necessary to carry out this Act with respect to employees described in subparagraph (A) or (B) of section 4(3) and other individ-

uals affected by employers described in subclause (I) or (II) of section 4(4)(A)(i).

(2) GOVERNMENT ACCOUNTABILITY OFFICE; LIBRARY OF CONGRESS.—The Comptroller General of the United States and the Librarian of Congress shall prescribe the regulations with respect to employees of the Government Accountability Office and the Library of Congress, respectively and other individuals affected by the Comptroller General of the United States and the Librarian of Congress, respectively.

(b) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—

(1) AUTHORITY.—Not later than 120 days after the date of enactment of this Act, the Board of Directors of the Office of Compliance shall prescribe (in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384)) such regulations as are necessary to carry out this Act with respect to employees described in section 4(3)(C) and other individuals affected by employers described in section 4(4)(A)(i)(III).

(2) AGENCY REGULATIONS.—The regulations prescribed under paragraph (1) shall be the same as substantive regulations promulgated by the Sec-

retary to carry out this Act except insofar as the Board may determine, for good cause shown and stated together with the regulations prescribed under paragraph (1), that a modification of such regulations would be more effective for the implementation of the rights and protections involved under this section.

(c) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—

(1) AUTHORITY.—Not later than 120 days after the date of enactment of this Act, the President (or the designee of the President) shall prescribe such regulations as are necessary to carry out this Act with respect to employees described in section 4(3)(D) and other individuals affected by employers described in section 4(4)(A)(i)(IV).

(2) AGENCY REGULATIONS.—The regulations prescribed under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary to carry out this Act except insofar as the President (or designee) may determine, for good cause shown and stated together with the regulations prescribed under paragraph (1), that a modification of such regulations would be more effective

for the implementation of the rights and protections involved under this section.

(d) EMPLOYEES COVERED BY CHAPTER 63 OF TITLE 5, UNITED STATES CODE.—

(1) AUTHORITY.—Not later than 120 days after the date of enactment of this Act, the Director of the Office of Personnel Management shall prescribe such regulations as are necessary to carry out this Act with respect to employees described in section 4(3)(E) and other individuals affected by employers described in section 4(4)(A)(i)(V).

(2) AGENCY REGULATIONS.—The regulations prescribed under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary to carry out this Act except insofar as the Director may determine, for good cause shown and stated together with the regulations prescribed under paragraph (1), that a modification of such regulations would be more effective for the implementation of the rights and protections involved under this section.

SEC. 14. EFFECTIVE DATES.

(a) EFFECTIVE DATE.—This Act shall take effect 6 months after the date of issuance of regulations under section 13(a)(1).

(b) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date prescribed by subsection (a), this Act shall take effect on the earlier of—

(1) the date of the termination of such agreement; or

(2) the date that occurs 18 months after the date of issuance of regulations under section 13(a)(1).

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The Working Families Flexibility Act
H.R. 1274

H.R. 1274 introduced by Rep. Carolyn B. Maloney (NY-14)

Title: To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

Summary: The Act authorizes an employee to request from an employer a change in terms or conditions of employment if the request relates to: (i) the number of hours the employee is required to work; (ii) the times when the employee is required to work; or (iii) where the employee is required to work. Sets forth certain requirements on the part of the employer with respect to such requests.

Actions: Introduced in 111th Congress on March 3, 2009. In House, referred to Committees on Education and Labor, Oversight and Government Reform, House Administration, and Judiciary. No Senate bill.

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111TH CONGRESS
1ST SESSION

H. R. 1274

To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 2009

Mrs. MALONEY (for herself, Mr. GEORGE MILLER of California, Mr. LEWIS of Georgia, and Mr. CUMMINGS) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committees on Oversight and Government Reform, House Administration, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To permit employees to request, and to ensure employers consider requests for, flexible work terms and conditions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Working Families Flexibility Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) EMPLOYEE.—The term "employee" means an individual—

(A) who is—

(i)(I) an employee (including an applicant), as defined in section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)), who is not covered under any of clauses (ii) through (v), including such an employee of the Library of Congress, except that a reference in such section to an employer shall be considered to be a reference to an employer described in clauses (i)(I) and (ii) of paragraph (2)(A); or

(II) an employee (including an applicant) of the Government Accountability Office;

(ii) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a));

(iii) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(iv) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code; or

(v) a Federal officer or employee (including an applicant) covered under subchapter V of chapter 63 of title 5, United States Code; and

(B) who works an average of at least 20 hours per week or, in the alternative, at least 1,000 hours per year.

(2) EMPLOYER.—

(A) IN GENERAL.—The term "employer" means a person who is—

(i)(I) a covered employer, as defined in subparagraph (B), who is not covered under any of subclauses (II) through (V);

(II) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(III) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(IV) an employing office, as defined in section 411(c) of title 3, United States Code; or

(V) an employing agency covered under subchapter V of chapter 63 of title 5, United States Code; and

(ii) is engaged in commerce (including government), in the production of goods for commerce, or in an enterprise engaged in commerce (including government) or in the production of goods for commerce.

(B) COVERED EMPLOYER.—

(i) IN GENERAL.—In subparagraph (A)(i)(I), the term "covered employer"—

(I) means any person engaged in commerce or in any industry or activity affecting commerce who employs 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(II) includes—

(aa) any person who acts, directly or indirectly, in the interest of such an employer to any of the employees of such employer; and

(bb) any successor in interest of such an employer; and

(III) includes an agency described in clause (iii) or (iv) of subparagraph (A) of section 101(4) of the Family and Medical Leave Act of 1993 (29 U.S.C. 2611(4)), to which subparagraph (B) of such section shall apply.

(ii) DEFINITIONS.—For purposes of this subparagraph:

(I) COMMERCE.—The terms "commerce" and "industry or activity affecting commerce" have the meanings given the terms in section 101 of such Act (29 U.S.C. 2611).

(II) EMPLOYEE; PERSON.—The terms "employee" and "person" have the meanings given such terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203).

(C) PREDECESSORS.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) SECRETARY.—The term "Secretary" means the Secretary of Labor.

SEC. 3. STATUTORY RIGHT TO REQUEST FLEXIBLE WORK TERMS AND CONDITIONS.

(a) IN GENERAL.—An employee may apply to the employee's employer for a change in the employee's terms or conditions of employment if the change relates to—

(1) the number of hours the employee is required to work;

(2) the times when the employee is required to work; or

(3) where the employee is required to work.

(b) CONTENTS.—An application submitted under this section shall—

(1) state that the application is an application described in subsection (a);

(2) specify the change applied for and the date on which the employee requests that the change become effective; and

(3) explain what effect, if any, the employee thinks the change applied for would have on the employer and how, in the employee's opinion, any such effect might be dealt with.

(c) SUBMISSIONS.—

(1) PERIOD BETWEEN SUBMISSIONS.—If an employee, who has submitted an application under this section to an employer, submits a further application under this section to the same employer before the end of the period of 12 months beginning with the date on which the previous application was submitted, that further application shall not be covered by section 4.

(2) FORM AND TIMING.—The Secretary shall by regulation specify—

(A) the form of applications submitted under this section; and

(B) when such an application shall be considered to be submitted.

SEC. 4. EMPLOYER'S DUTIES IN RELATION TO APPLICATIONS.

(a) IN GENERAL.—An employer to whom an employee submits an application under section 3 shall consider the application in accordance with regulations issued by the Secretary.

(b) REGULATIONS.—Regulations issued under subsection (a)—

(1) shall include provisions that provide—

(A) that the employer and the employee shall hold a meeting to discuss an application

submitted under section 3 within 14 days after the date of submission;

(B) that the employer shall give the employee a written decision regarding the application within 14 days after the date of the meeting described in subparagraph (A);

(C) that a decision under subparagraph (B) to reject the application shall state the grounds for the decision, including whether those grounds included—

(i) the identifiable cost of the change in a term or condition of employment requested in the application, including the costs of loss of productivity, of retraining or hiring employees, or of transferring employees from 1 facility to another facility;

(ii) the overall financial resources involved;

(iii) for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities;

(iv) the effect of the change on the employer's ability to meet customer demand; or

(v) other factors specified by the Secretary in regulation;

(D) that if the employer rejects the employee's application, the employer may propose in writing an alternative change to the employee's hours, times, and place of work;

(E) that if the employee is dissatisfied with the employer's decision under subparagraph (B) and the alternative described in subparagraph (D), the employee has the right to request reconsideration of the decision within 14 days after the later of—

(i) the date on which the employer gives the employee the decision under subparagraph (B); and

(ii) if applicable, the date on which the employer proposes the alternative described in subparagraph (D);

(F) for procedures for exercising the right to request reconsideration described in subparagraph (E), including procedures requiring the employee to set out the grounds for reconsideration, including any inaccuracies or misstatements that the employee contends were in the employer's decision;

(G) that the decision under subparagraph (B) shall include such information as the regulations shall specify relating to the right to request reconsideration under subparagraph (E);

(H) that the employer and the employee shall hold a meeting to discuss the request for reconsideration described in subparagraph (E) within 14 days after the date on which the employee gives notice of the request for reconsideration to the employer;

(I) that the employer shall give the employee a written decision regarding the request for reconsideration within 14 days after the date of the meeting described in subparagraph (H);

(J) that a decision under subparagraph (I) to deny the request for reconsideration shall state the grounds for the decision, including whether those grounds included the factors described in clauses (i) through (v) of subparagraph (C);

(K) that a statement made under subparagraph (C) or (J) shall contain a sufficient explanation of the grounds for the decision involved;

(L) that the employee shall have a right to be accompanied at meetings described in subparagraph (A) or (H) by a representative of the employee's choosing with such qualifications as the regulations shall specify; and

(M) that if such a representative of the employee's choosing is not available to attend a meeting described in subparagraph (A) or (H), the meeting shall be postponed;

(2) may include provisions that provide—

(A) that any requirement of the regulations shall not apply in a case in which such an application is disposed of by agreement or withdrawn;

(B) for extension of a time limit in a case in which the employer and employee agree, or in such other circumstances as the regulations may specify; and

(C) for applications to be treated as withdrawn in specified circumstances; and

(3) may include different provisions for different cases or circumstances.

SEC. 5. PROHIBITED ACTS.

(a) INTERFERENCE WITH RIGHTS.—It shall be unlawful for any employer to interfere with, restrain, or deny

the exercise of, or the attempt to exercise, any right provided under this Act.

(b) INTERFERENCE WITH APPLICATION, PROCEEDINGS, OR INQUIRIES.—It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual because such individual—

(1) has submitted (or attempted to submit) an application under section 3;

(2) has filed an action, or has instituted or caused to be instituted any proceeding, under or related to this Act;

(3) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this Act;

(4) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this Act;

(5) has opposed any practice made unlawful by this Act; or

(6) has in any other way exercised or attempted to exercise any right provided under this Act.

SEC. 6. ENFORCEMENT.

(a) DEFINITIONS.—Except as provided in subsection (d), in this section:

(1) EMPLOYEE.—The term "employee" means an employee described in clause (i) or (ii) of section 2(1)(A).

(2) EMPLOYER.—The term "employer" means an employer described in subclause (I) or (II) of section 2(2)(A)(i).

(b) GENERAL AUTHORITY.—The provisions of this Act may be enforced pursuant to the following provisions:

(1) INVESTIGATION AND ASSESSMENT.—An employee who is affected by a violation of a right in section 5 (including a violation relating to a right provided under section 3 or 4) may make a complaint to the Administrator of the Wage and Hour Division of the Employment Standards Administration of the Department of Labor, alleging that the employer involved has violated section 5. The Administrator shall investigate, and may issue an order making determinations, and assessing a civil penalty described in section 7(a)(1) or awarding relief described in section 7(a)(2), as appropriate, with respect to the alleged violation.

(2) ADMINISTRATIVE HEARING.—An affected person who takes exception to an order issued under paragraph (1) may request an administrative hearing concerning the order under procedures estab-

lished by the Secretary that comply with the requirements of sections 554, 556, and 557 of title 5, United States Code, and regulations promulgated by the Secretary. Such hearing shall be conducted expeditiously. If no affected person requests the hearing within 60 days after the order is issued under paragraph (1), the order shall be deemed to be a final order that is not subject to judicial review.

(3) ENFORCEMENT.—The amount of any penalty assessed against an employer under this subsection, when finally determined, may be—

(A) deducted from any sums owed by the United States to the employer; or

(B) recovered in a civil action brought against the employer by the Secretary in any court of competent jurisdiction.

(4) CIVIL ACTION.—An affected person desiring review of an order issued under paragraph (2) (other than a nonreviewable order) may file a petition for review in an appropriate Federal court of appeals.

(5) CIVIL ACTION BY THE SECRETARY FOR INJUNCTIVE RELIEF.—The Secretary may bring an action for a violation described in paragraph (1) in a district court of the United States to obtain the injunctive relief described in section 7(b).

(c) GOVERNMENT ACCOUNTABILITY OFFICE AND LIBRARY OF CONGRESS.—Notwithstanding any other provision of this section, the Secretary is authorized to enter into agreements with the Librarian of Congress and the Comptroller General of the United States with respect to individuals employed in the Library of Congress and the Government Accountability Office, respectively, to provide for the carrying out of functions of the Secretary under subsection (b) with respect to such individuals.

(d) OTHER EMPLOYEES.—

(1) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—Notwithstanding any other provision of this section or section 7, the powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, alleging a violation of section 202(a)(1) of that Act (2 U.S.C. 1312(a)(1)) shall be the powers, remedies, and procedures this Act provides to that Board, or any person, alleging an unlawful employment practice in violation of this Act against an employee described in section 2(1)(A)(iii).

(2) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—Notwithstanding

any other provision of this section or section 7, the powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Merit Systems Protection Board, or any person, alleging a violation of section 412(a)(1) of that title, shall be the powers, remedies, and procedures this Act provides to the President, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 2(1)(A)(iv).

(3) EMPLOYEES COVERED BY CHAPTER 63 OF TITLE 5, UNITED STATES CODE.—Notwithstanding any other provision of this section or section 7, the powers, remedies, and procedures provided in title 5, United States Code, to an employing agency, provided in chapter 12 of that title to the Merit Systems Protection Board, or provided in that title to any person, alleging a violation of chapter 63 of that title, shall be the powers, remedies, and procedures this Act provides to that agency, that Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 2(1)(A)(v).

SEC. 7. REMEDIES.

(a) ADMINISTRATIVE PROCEEDINGS AND ACTIONS FOR REVIEW.—

(1) INTERFERENCE WITH EXERCISE OF RIGHTS.—In an action brought under paragraph (1), (2), or (4) of section 6(b), an employer who violates the provisions of section 5(a) (including a violation relating to a right provided under section 3 or 4) shall be subject to a civil penalty of not less than $1000 and not more than $5,000 for each employee who was the subject of such a violation.

(2) RETALIATION.—In an action brought under paragraph (1), (2), or (4) of section 6(b), if an employer violates section 5(b), the employee who is affected by the violation or the Secretary, as appropriate, may obtain an order awarding such equitable relief as may be appropriate, including employment, reinstatement, promotion, back pay, and a change in the terms or conditions of employment.

(b) CIVIL ACTION BY THE SECRETARY FOR INJUNCTIVE RELIEF.—In an action brought under section 6(b)(5), the Secretary may obtain an order—

(1) restraining violations of section 5 (including a violation relating to a right provided under section 3 or 4); or

(2) awarding such other equitable relief as may be appropriate, including employment, reinstatement, promotion, back pay, and a change in the terms or conditions of employment.

SEC. 8. NOTICE.

(a) IN GENERAL.—Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary (or the appropriate officer specified in section 12(a), as applicable), setting forth excerpts from, or summaries of, the pertinent provisions of this Act and information pertaining to the filing of a complaint under section 6(b).

(b) PENALTY.—Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $500 for each separate offense.

SEC. 9. RECORDKEEPING.

Any employer shall make, keep, and preserve records pertaining to compliance with this Act in accordance with regulations issued under section 12.

SEC. 10. RESEARCH, EDUCATION, AND TECHNICAL ASSISTANCE PROGRAM.

(a) IN GENERAL.—The Secretary (and each officer specified in section 12(a), as applicable) shall provide in-

formation and technical assistance to employers, labor organizations, and the general public concerning compliance with this Act.

(b) PROGRAM.—In order to achieve the objectives of this Act, the Secretary (and each officer specified in section 12(a), as applicable) shall carry on a continuing program of research, education, and technical assistance, including—

(1) conducting and promoting research with the intent of encouraging flexibility in work terms and conditions;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the various communication media, and the general public the findings of studies and other materials for promoting compliance with this Act;

(3) sponsoring and assisting State and community informational and educational programs; and

(4) providing technical assistance to employers, labor organizations, professional associations, and other interested persons on means of achieving and maintaining compliance with the provisions of this Act.

SEC. 11. RIGHTS RETAINED BY EMPLOYEES.

Nothing in this Act shall be considered to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under a collective bargaining agreement.

SEC. 12. APPLICATION OF PROVISIONS.

(a) APPLICATION TO CLASSES OF EMPLOYEES.—Not later than 120 days after the date of enactment of this Act—

(1)(A) except as provided in subparagraph (B), the Secretary shall issue such regulations as are necessary to carry out this Act with respect to employees described in clause (i) or (ii) of section 2(1)(A); and

(B) the Comptroller General of the United States and the Librarian of Congress shall issue such regulations as are necessary to carry out this Act with respect to employees of the Government Accountability Office and the Library of Congress, respectively;

(2) the Board of Directors of the Office of Compliance shall issue (in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384)) such regulations as are necessary to carry out this Act with respect to employees described in section 2(1)(A)(iii);

(3) the President (or the designee of the President) shall issue such regulations as are necessary to carry out this Act with respect to employees described in section 2(1)(A)(iv); and

(4) the Director of the Office of Personnel Management shall issue such regulations as are necessary to carry out this Act with respect to employees described in section 2(1)(A)(v).

(b) TRANSITIONAL PROVISIONS.—A regulation issued under subsection (a) may contain such transitional provisions as the Secretary determines to be appropriate in connection with the application of any of the provisions of this Act.

SEC. 13. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to carry out this Act such sums as may be necessary for fiscal year 2010 and each subsequent fiscal year.

SEC. 14. EFFECTIVE DATE.

(a) IN GENERAL.—This Act takes effect 6 months after the date of enactment of this Act, except as provided in subsection (b).

(b) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date prescribed by subsection (a), this Act shall apply on the earlier of—

(1) the date of the termination of such agreement; or

(2) the date that occurs 12 months after the date of enactment of this Act.

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The Family-Friendly Workplace Act
H.R. 933

H.R. 933 introduced by Rep. Cathy McMorris Rodgers (WA-5)

Title: Amends the Fair Labor Standards Act of 1938 to provide for compensatory time for employees in the private sector.

Summary: Amends the FLSA to authorize private employers to provide compensatory time off at a rate of 1 ½ hours per hour of employment for which overtime compensation is required. Applicable only if in accordance with collective bargaining agreement, or if none, then in accordance with agreement between employer and employee. Prohibits accrual of more than 160 hours on compensatory time. Requires employer to pay employee for any unused time accrued during prior year. Requires employer to give 30 days notice before discontinuing compensatory time off. Prohibits retaliation and provides for damages to employees where employer violates agreement.

Actions: Introduced in 111th Congress on February 10, 2009. In House, referred to Committee on Education and Labor. No Senate bill.

I

111TH CONGRESS
1ST SESSION

H. R. 933

To amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 10, 2009

Mrs. MCMORRIS RODGERS (for herself, Mr. MCKEON, Mr. WILSON of South Carolina, Mr. PAUL, Ms. GRANGER, Mr. BURTON of Indiana, Mr. EHLERS, Mr. MCHENRY, Mr. CONAWAY, Mr. KIRK, Mr. JORDAN of Ohio, Mr. LATTA, Mr. KLINE of Minnesota, and Mr. SOUDER) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the Fair Labor Standards Act of 1938 to provide compensatory time for employees in the private sector.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Family-Friendly Workplace Act".

SEC. 2. COMPENSATORY TIME.

Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

"(r) COMPENSATORY TIME OFF FOR PRIVATE EMPLOYEES.—

"(1) GENERAL RULE.—

"(A) COMPENSATORY TIME OFF.—An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(B) DEFINITION.—For purposes of this subsection, the term 'employee' does not include an employee of a public agency.

"(2) CONDITIONS.—An employer may provide compensatory time to employees under paragraph (1)(A) only if such time is provided in accordance with—

"(A) applicable provisions of a collective bargaining agreement between the employer and the labor organization which has been certified or recognized as the representative of the employees under applicable law; or

"(B) in the case of employees who are not represented by a labor organization which has been certified or recognized as the representative of such employees under applicable law, an agreement arrived at between the employer and employee before the performance of the work and affirmed by a written or otherwise verifiable record maintained in accordance with section 11(c)—

"(i) in which the employer has offered and the employee has chosen to receive compensatory time in lieu of monetary overtime compensation; and

"(ii) entered into knowingly and voluntarily by such employees and not as a condition of employment.

No employee may receive or agree to receive compensatory time off under this subsection unless the employee has worked at least 1000 hours for the employee's employer during a period of continuous employment with the employer in the 12-month period before the date of agreement or receipt of compensatory time off.

"(3) HOUR LIMIT.—

"(A) MAXIMUM HOURS.—An employee may accrue not more than 160 hours of compensatory time.

"(B) COMPENSATION DATE.—Not later than January 31 of each calendar year, the employee's employer shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year which was not used prior to December 31 of the preceding year at the rate prescribed by paragraph (6). An employer may designate and communicate to the employer's employees a 12-month period other than the calendar year, in which case such compensation shall be provided not later than 31 days after the end of such 12-month period.

"(C) EXCESS OF 80 HOURS.—The employer may provide monetary compensation for an employee's unused compensatory time in excess of 80 hours at any time after giving the employee at least 30 days notice. Such compensation shall be provided at the rate prescribed by paragraph (6).

"(D) POLICY.—Except where a collective bargaining agreement provides otherwise, an

employer which has adopted a policy offering compensatory time to employees may discontinue such policy upon giving employees 30 days notice.

"(E) WRITTEN REQUEST.—An employee may withdraw an agreement described in paragraph (2)(B) at any time. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time accrued which has not yet been used. Within 30 days of receiving the written request, the employer shall provide the employee the monetary compensation due in accordance with paragraph (6).

"(4) PRIVATE EMPLOYER ACTIONS.—An employer which provides compensatory time under paragraph (1) to employees shall not directly or indirectly intimidate, threaten, or coerce or attempt to intimidate, threaten, or coerce any employee for the purpose of—

"(A) interfering with such employee's rights under this subsection to request or not request compensatory time off in lieu of payment of monetary overtime compensation for overtime hours; or

"(B) requiring any employee to use such compensatory time.

"(5) TERMINATION OF EMPLOYMENT.—An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time in accordance with paragraph (6).

"(6) RATE OF COMPENSATION.—

"(A) GENERAL RULE.—If compensation is to be paid to an employee for accrued compensatory time off, such compensation shall be paid at a rate of compensation not less than—

"(i) the regular rate received by such employee when the compensatory time was earned; or

"(ii) the final regular rate received by such employee,

whichever is higher.

"(B) CONSIDERATION OF PAYMENT.—Any payment owed to an employee under this subsection for unused compensatory time shall be considered unpaid overtime compensation.

"(7) USE OF TIME.—An employee—

"(A) who has accrued compensatory time off authorized to be provided under paragraph (1); and

"(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the employer.

"(8) DEFINITIONS.—The terms 'overtime compensation' and 'compensatory time' shall have the meanings given such terms by subsection (o)(7).".

SEC. 3. REMEDIES.

Section 16 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216) is amended—

(1) in subsection (b), by striking "(b) Any employer" and inserting "(b) Except as provided in subsection (f), any employer"; and

(2) by adding at the end the following:

"(f) An employer which violates section 7(r)(4) shall be liable to the employee affected in the amount of the rate of compensation (determined in accordance with section 7(r)(6)(A)) for each hour of compensatory time accrued by the employee and in an additional equal amount as liquidated damages reduced by the amount of such rate

of compensation for each hour of compensatory time used by such employee.".

SEC. 4. NOTICE TO EMPLOYEES.

Not later than 30 days after the date of the enactment of this Act, the Secretary of Labor shall revise the materials the Secretary provides, under regulations published in section 516.4 of title 29, Code of Federal Regulations, to employers for purposes of a notice explaining the Fair Labor Standards Act of 1938 to employees so that such notice reflects the amendments made to such Act by this Act.

SEC. 5. SUNSET.

This Act and the amendments made by this Act shall expire 5 years after the date of the enactment of this Act.

○

The Paid Vacation Act
H.R. 2564

H.R. 2564 introduced by Rep. Alan Grayson (FL-8)

Title: To amend the Fair Labor Standards Act to require that employers provide a minimum of one (1) week of paid annual leave to employees.

Summary: The Act requires employers who, (i) upon enactment, employ 100 or more employees to provide each employee with one (1) week of paid vacation during each 12-month period; and (ii) beginning three (3) years after enactment, employ 50 or more employees to provide one (1) week of paid vacation during each 12-month period, AND who employ 100 or more employees to provide two (2) weeks paid vacation during each 12-month period, beginning on the employee's first anniversary of employment. Requires an employee to provide 30 days prior notice of intent to take vacation, including the date the paid vacation will begin.

Actions: Introduced in 111th Congress on May 21, 2009. In House, referred to Committee on Education and Labor. No Senate bill.

I

111TH CONGRESS
1ST SESSION

H. R. 2564

To amend the Fair Labor Standards Act to require that employers provide a minimum of 1 week of paid annual leave to employees.

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 2009

Mr. GRAYSON (for himself, Mr. LEWIS of Georgia, and Mr. HINCHEY) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the Fair Labor Standards Act to require that employers provide a minimum of 1 week of paid annual leave to employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Paid Vacation Act of 2009".

SEC. 2. FINDINGS.

Congress finds that—

(1) according to the Bureau of Labor Statistics, each year the average American works one month (160 hours) more today than in 1976;

(2) job-related stress costs business $344 billion a year in absenteeism, lost productivity, and health costs;

(3) some 75 percent of visits to primary care physicians come from stress-induced problems;

(4) 147 countries require paid vacation leave, and the United States is the only industrialized Nation without a minimum annual leave law;

(5) one of the fastest growing economies in the world, China, requires 3 weeks off for employees, which they call "Golden Weeks";

(6) Canada requires 2 weeks off for all employees, and 3 weeks off for employees with 5 years or more with one employer;

(7) the Pew Research Center says more free time is the number one priority for middle-class Americans—with 68 percent of those surveyed listed this as a high priority for them;

(8) in 2008, about half (52 percent) of American workers took a vacation of a week or longer, and only 14 percent of American workers took 2 weeks or more for vacation;

(9) men who don't take regular vacations are 32 percent more likely to die of heart attacks, and 21 percent more likely to die early of all causes;

(10) women who don't take regular vacations have a 50 percent greater risk of heart attack, and are twice as likely to be depressed as those who do;

(11) the travel industry adds $740 billion a year to the Nation's economy, while stress and burn-out at work cost the economy over $300 billion a year; and

(12) vacations allow workers and businesses to increase productivity, decrease stress-related health costs, and provide time for family strengthening and bonding.

SEC. 3. ENTITLEMENT TO VACATION.

Section 7 of the Fair Labor Standards Act (29 U.S.C. 207) is amended by inserting after subsection (b) the following:

"(c)(1) Beginning on the date of enactment of the Paid Vacation Act of 2009, an eligible employee of an employer that employs 100 or more employees at any time during a calendar year shall be entitled to a total of 1 workweek of paid vacation during each 12-month period.

"(2) Beginning on the date that is 3 years after the date of enactment of the Paid Vacation Act of 2009, an

eligible employee of an employer that employs 50 or more employees at any time during a calendar year shall be entitled to a total of 1 workweek of paid vacation during each 12-month period, and an eligible employee of an employer that employs 100 or more employees shall be entitled to a total of 2 workweeks of paid vacation during each 12-month period, beginning on that eligible employee's first anniversary of employment.

"(3) An eligible employee shall provide the employer with not less than 30 days' notice, before the date the paid vacation under paragraph (1) or (2) is to begin, of the employee's intention to take paid vacation under such paragraph, and identify the date such paid vacation shall begin.

"(4) For purposes of this subsection—

"(A) the term 'eligible employee' means an employee who has been employed for at least 12 months by the employer with respect to whom leave is requested under paragraph (1) or (2) and for at least 1,250 hours of service with such employer during such 12-month period; and

"(B) the term 1 workweek of 'paid vacation' means vacation time, in addition to and apart from sick leave and any leave otherwise required by law, to be taken in a continuous series or block of work

days comprising 7 calendar days that cannot be rolled over, but must be used within the 12-month period.

"(5) The exemptions to this section provided in section 13 shall not apply to this subsection.".

SEC. 4. PUBLIC AWARENESS CAMPAIGN BY DEPARTMENT OF LABOR.

The Secretary of Labor is authorized to conduct a public awareness campaign, through the Internet and other media, to inform the public of the entitlement to leave afforded by this Act. There is authorized to be appropriated such sums as may be necessary for the public awareness campaign.

SEC. 5. STUDY ON PRODUCTIVITY.

The Secretary of Labor shall conduct a study on workplace productivity and the effect on productivity of the leave requirement in this Act. The study shall also address any benefits to public health and psychological well-being as a result of such leave. Not later than 3 years after the date of enactment of this Act, the Secretary shall transmit to Congress a report containing the findings of the study, and shall publish such findings on the website of the Department of Labor.

○

The Employment Non-Discrimination Act
H.R. 3017/H.R. 2981

H.R. 3017 and H.R. 2981 both introduced by Rep. Barney Frank (MA-4)

Title: To prohibit employment discrimination on the basis of sexual orientation or gender identity.

Summary: The Act will afford federal protection against employment discrimination by certain public and private employers based on sexual orientation or gender identity. The Act explicitly prohibits preferential treatment and quotas, and does not permit disparate impact suits. It exempts employers with fewer than 15 employees and the military. But it does apply to religious organizations. It does not require that domestic partner benefits be provided to same-sex partners of employees.

Actions: H.R. 2981 introduced in 111th Congress on June 19, 2009. H.R. 3017 introduced on June 24, 2009. (Previously introduced in 110th Congress.) In House, referred to Committees on Education and Labor, Oversight and Government Reform, House Administration and Judiciary. On July 23, 2009 Judiciary Committee referred H.R. 2981 to Subcommittee on the Constitution, Civil Rights and Civil Liberties. No Senate bill, although one is expected shortly.

I

111TH CONGRESS
1ST SESSION

H. R. 3017

To prohibit employment discrimination on the basis of sexual orientation or gender identity.

IN THE HOUSE OF REPRESENTATIVES

JUNE 24, 2009

Mr. FRANK of Massachusetts (for himself, Mr. GEORGE MILLER of California, Mr. CONYERS, Ms. BALDWIN, Mr. POLIS of Colorado, Mr. ANDREWS, Mr. SESTAK, Mr. BLUMENAUER, Mr. DOGGETT, Mr. NADLER of New York, Mr. CLYBURN, Mr. CARSON of Indiana, Mr. MORAN of Virginia, Ms. ROS-LEHTINEN, Mr. CASTLE, Mr. KIRK, Mr. LANCE, Mr. PLATTS, Mrs. BIGGERT, Ms. HARMAN, Mr. HASTINGS of Florida, Mrs. DAVIS of California, Mr. CAPUANO, Mr. SERRANO, Mr. MEEK of Florida, Ms. SCHAKOWSKY, Ms. DEGETTE, Ms. TSONGAS, Mr. STARK, Mr. JACKSON of Illinois, Mr. QUIGLEY, Ms. RICHARDSON, Mr. INSLEE, Mr. DOYLE, Mrs. LOWEY, Mr. VAN HOLLEN, Mr. MCDERMOTT, Mr. WU, Mr. GRIJALVA, Mr. TIERNEY, Ms. NORTON, Mr. BERMAN, Mr. HONDA, Mr. SCHIFF, Ms. SHEA-PORTER, Mr. ROTHMAN of New Jersey, Mr. GONZALEZ, Mr. JOHNSON of Georgia, Mr. LEWIS of Georgia, Mr. DEFAZIO, Mr. LANGEVIN, Mr. FOSTER, Ms. WASSERMAN SCHULTZ, Mr. PATRICK J. MURPHY of Pennsylvania, Ms. ROYBAL-ALLARD, Mr. WEINER, Mr. PALLONE, Mr. HOLT, Mr. FILNER, Mr. SIRES, Mr. HARE, Mr. WEXLER, Mr. MASSA, Ms. DELAURO, Mr. CLAY, Mr. BRADY of Pennsylvania, Mrs. NAPOLITANO, Mr. MURPHY of Connecticut, Mr. CLEAVER, Mrs. CAPPS, Ms. SLAUGHTER, Mr. MITCHELL, Ms. ESHOO, Mr. CARNAHAN, Mr. SCHRADER, Mr. SMITH of Washington, Ms. LINDA T. SÁNCHEZ of California, Ms. MCCOLLUM, Mr. WELCH, Mr. DINGELL, Mr. LEVIN, Mr. GUTIERREZ, Mr. ELLISON, Mr. MCGOVERN, Mr. WAXMAN, Mr. COOPER, Mr. CUMMINGS, Mr. OLVER, Mr. HIGGINS, Mr. FATTAH, Mr. ISRAEL, Ms. MATSUI, Ms. BEAN, Mr. KILDEE, Ms. SCHWARTZ, Mr. ABERCROMBIE, Ms. BERKLEY, Mr. SHERMAN, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. DELAHUNT, Ms. CASTOR of Florida, Mr. CROWLEY, Mr. ENGEL, Mr. PETERS, Ms. KILROY, Mrs. MCCARTHY of New York, Mrs. MALONEY, Mr. KUCINICH, Ms. LEE of California, Mr. HIMES, Ms. SPEIER, Ms. EDWARDS of Maryland, Mr. HODES, Ms. CLARKE, Mr. MOORE of Kansas, Mr. PAYNE, Mr. HEINRICH, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committees on House Administration, Oversight and Government Reform, and the

Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To prohibit employment discrimination on the basis of sexual orientation or gender identity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employment Non-Discrimination Act of 2009".

SEC. 2. PURPOSES.

The purposes of this Act are—

(1) to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers;

(2) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including meaningful and effective remedies for any such discrimination; and

(3) to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution, and to regulate interstate commerce

and provide for the general welfare pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.

SEC. 3. DEFINITIONS.

(a) IN GENERAL.—In this Act:

(1) COMMISSION.—The term "Commission" means the Equal Employment Opportunity Commission.

(2) COVERED ENTITY.—The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) EMPLOYEE.—

(A) IN GENERAL.—the term "employee" means—

(i) an employee as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(ii) a Presidential appointee or State employee to which section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16(a)(1)) applies;

(iii) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) or sec-

tion 411(c) of title 3, United States Code; or

(iv) an employee or applicant to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies.

(B) EXCEPTION.—The provisions of this Act that apply to an employee or individual shall not apply to a volunteer who receives no compensation.

(4) EMPLOYER.—The term "employer" means—

(A) a person engaged in an industry affecting commerce (as defined in section (701)(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h)) who has 15 or more employees (as defined in subparagraphs (A)(i) and (B) of paragraph (3)) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986;

(B) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 applies;

(C) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 or section 411(c) of title 3, United States Code; or

(D) an entity to which section 717(a) of the Civil Rights Act of 1964 applies.

(5) EMPLOYMENT AGENCY.—The term "employment agency" has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(6) GENDER IDENTITY.—The term "gender identity" means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

(7) LABOR ORGANIZATION.—The term "labor organization" has the meaning given the term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d)).

(8) PERSON.—The term "person" has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(9) SEXUAL ORIENTATION.—The term "sexual orientation" means homosexuality, heterosexuality, or bisexuality.

(10) STATE.—The term "State" has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

(b) APPLICATION OF DEFINITIONS.—For purposes of this section, a reference in section 701 of the Civil Rights Act of 1964—

(1) to an employee or an employer shall be considered to refer to an employee (as defined in paragraph (3)) or an employer (as defined in paragraph (4)), respectively, except as provided in paragraph (2) below; and

(2) to an employer in subsection (f) of that section shall be considered to refer to an employer (as defined in paragraph (4)(A)).

SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.

(a) EMPLOYER PRACTICES.—It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the indi-

vidual, because of such individual's actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.

(b) EMPLOYMENT AGENCY PRACTICES.—It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual or to classify or refer for employment any individual on the basis of the actual or perceived sexual orientation or gender identity of the individual.

(c) LABOR ORGANIZATION PRACTICES.—It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment, or would limit such employment or otherwise adversely affect the status of the individual as an employee or as an applicant for employment because of such individual's actual or perceived sexual orientation or gender identity; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) TRAINING PROGRAMS.—It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the actual or perceived sexual orientation or gender identity of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) ASSOCIATION.—An unlawful employment practice described in any of subsections (a) through (d) shall be considered to include an action described in that subsection, taken against an individual based on the actual

or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.

(f) NO PREFERENTIAL TREATMENT OR QUOTAS.—Nothing in this Act shall be construed or interpreted to require or permit—

(1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such actual or perceived sexual orientation or gender identity in any community, State, section, or other area, or in the available work force in any community, State, section, or other area; or

(2) the adoption or implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation or gender identity.

(g) DISPARATE IMPACT.—Only disparate treatment claims may be brought under this Act.

SEC. 5. RETALIATION PROHIBITED.

It shall be an unlawful employment practice for a covered entity to discriminate against an individual because such individual (1) opposed any practice made an unlawful employment practice by this Act; or (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.

This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a); 2000e–2(e)(2)).

SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED FORCES; VETERANS' PREFERENCES.

(a) ARMED FORCES.—

(1) EMPLOYMENT.—In this Act, the term "employment" does not apply to the relationship between the United States and members of the Armed Forces.

(2) ARMED FORCES.—In paragraph (1) the term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) VETERANS' PREFERENCES.—This title does not repeal or modify any Federal, State, territorial, or local law creating a special right or preference concerning employment for a veteran.

SEC. 8. CONSTRUCTION.

(a) EMPLOYER RULES AND POLICIES.—

(1) IN GENERAL.—Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.

(2) SEXUAL HARASSMENT.—Nothing in this Act shall be construed to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.

(3) CERTAIN SHARED FACILITIES.—Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

(4) ADDITIONAL FACILITIES NOT REQUIRED.—Nothing in this Act shall be construed to require the construction of new or additional facilities.

(5) DRESS AND GROOMING STANDARDS.—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender tran-

sition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

(b) EMPLOYEE BENEFITS.—Nothing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits.

(c) DEFINITION OF MARRIAGE.—As used in this Act, the term "married" refers to marriage as such term is defined in section 7 of title I, United States Code (referred to as the Defense of Marriage Act).

SEC. 9. COLLECTION OF STATISTICS PROHIBITED.

The Commission shall not collect statistics on actual or perceived sexual orientation or gender identity from covered entities, or compel the collection of such statistics by covered entities.

SEC. 10. ENFORCEMENT.

(a) ENFORCEMENT POWERS.—With respect to the administration and enforcement of this Act in the case of a claim alleged by an individual for a violation of this Act—

(1) the Commission shall have the same powers as the Commission has to administer and enforce—

(A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b and 2000e–16c),

in the case of a claim alleged by such individual for a violation of such title, or of section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b(a)(1)), respectively;

(2) the Librarian of Congress shall have the same powers as the Librarian of Congress has to administer and enforce title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title;

(3) the Board (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) shall have the same powers as the Board has to administer and enforce the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by such individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1));

(4) the Attorney General shall have the same powers as the Attorney General has to administer and enforce—

(A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b and 2000e–16c);

in the case of a claim alleged by such individual for a violation of such title, or of section 302(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b(a)(1)), respectively;

(5) the President, the Commission, and the Merit Systems Protection Board shall have the same powers as the President, the Commission, and the Board, respectively, have to administer and enforce chapter 5 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of section 411 of such title; and

(6) a court of the United States shall have the same jurisdiction and powers as the court has to enforce—

(A) title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of

a claim alleged by such individual for a violation of such title;

(B) sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b and 2000e–16c) in the case of a claim alleged by such individual for a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1));

(C) the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) in the case of a claim alleged by such individual for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)); and

(D) chapter 5 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of section 411 of such title.

(b) PROCEDURES AND REMEDIES.—The procedures and remedies applicable to a claim alleged by an individual for a violation of this Act are—

(1) the procedures and remedies applicable for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) in the case of a claim alleged by such individual for a violation of such title;

(2) the procedures and remedies applicable for a violation of section 302(a)(1) of the Government Employee Rights Act of 1991 (2 U.S.C. 1202(a)(1)) in the case of a claim alleged by such individual for a violation of such section;

(3) the procedures and remedies applicable for a violation of section 201(a)(1) of the Congressional Accountability Act of 1995 (2 U.S.C. 1311(a)(1)) in the case of a claim alleged by such individual for a violation of such section; and

(4) the procedures and remedies applicable for a violation of section 411 of title 3, United States Code, in the case of a claim alleged by such individual for a violation of such section.

(c) OTHER APPLICABLE PROVISIONS.—With respect to a claim alleged by a covered employee (as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301)) for a violation of this Act, title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleged by such a covered employee for a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

SEC. 11. STATE AND FEDERAL IMMUNITY.

(a) ABROGATION OF STATE IMMUNITY.—A State shall not be immune under the 11th amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act.

(b) WAIVER OF STATE IMMUNITY.—

(1) IN GENERAL.—

(A) WAIVER.—A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act for a remedy authorized under subsection (d).

(B) DEFINITION.—In this paragraph, the term "program or activity" has the meaning given the term in section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d–4a).

(2) EFFECTIVE DATE.—With respect to a particular program or activity, paragraph (1) applies to conduct occurring on or after the day, after the date of enactment of this Act, on which a State first receives or uses Federal financial assistance for that program or activity.

(c) REMEDIES AGAINST STATE OFFICIALS.—An official of a State may be sued in the official capacity of the official by any employee or applicant for employment who has complied with the applicable procedures of section 10, for equitable relief that is authorized under this Act. In such a suit the court may award to the prevailing party those costs authorized by section 722 of the Revised Statutes of the United States (42 U.S.C. 1988).

(d) REMEDIES AGAINST THE UNITED STATES AND THE STATES.—Notwithstanding any other provision of this Act, in an action or administrative proceeding against the United States or a State for a violation of this Act, remedies (including remedies at law and in equity, and interest) are available for the violation to the same extent as the remedies are available for a violation of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) by a private entity, except that—

(1) punitive damages are not available; and

(2) compensatory damages are available to the extent specified in section 1977A(b) of the Revised Statutes (42 U.S.C. 1981a(b)).

SEC. 12. ATTORNEYS' FEES.

Notwithstanding any other provision of this Act, in an action or administrative proceeding for a violation of this Act, an entity described in section 10(a) (other than

paragraph (4) of such section), in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. The Commission and the United States shall be liable for the costs to the same extent as a private person.

SEC. 13. POSTING NOTICES.

A covered entity who is required to post notices described in section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10) shall post notices for employees, applicants for employment, and members, to whom the provisions specified in section 10(b) apply, that describe the applicable provisions of this Act in the manner prescribed by, and subject to the penalty provided under, section 711 of the Civil Rights Act of 1964.

SEC. 14. REGULATIONS.

(a) IN GENERAL.—Except as provided in subsections (b), (c), and (d), the Commission shall have authority to issue regulations to carry out this Act.

(b) LIBRARIAN OF CONGRESS.—The Librarian of Congress shall have authority to issue regulations to carry out this Act with respect to employees and applicants for employment of the Library of Congress.

(c) BOARD.—The Board referred to in section 10(a)(3) shall have authority to issue regulations to carry

out this Act, in accordance with section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), with respect to covered employees, as defined in section 101 of such Act (2 U.S.C. 1301).

(d) PRESIDENT.—The President shall have authority to issue regulations to carry out this Act with respect to covered employees, as defined in section 411(c) of title 3, United States Code.

SEC. 15. RELATIONSHIP TO OTHER LAWS.

This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State.

SEC. 16. SEVERABILITY.

If any provision of this Act, or the application of the provision to any person or circumstance, is held to be invalid, the remainder of this Act and the application of the provision to any other person or circumstances shall not be affected by the invalidity.

SEC. 17. EFFECTIVE DATE.

This Act shall take effect on the date that is 6 months after the date of enactment of this Act and shall not apply to conduct occurring before the effective date.

○

Lilly Ledbetter Fair Pay Act of 2009

111TH CONGRESS
1ST SESSION

S. 181

AN ACT

To amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lilly Ledbetter Fair Pay Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to

preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(e)) is amended by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

"(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability

may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) in the first sentence—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking "(d)" and inserting "(d)(1)";

(2) in the third sentence, by striking "Upon" and inserting the following:

"(2) Upon"; and

(3) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensa-

tion decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5).

(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans

with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) CONFORMING AMENDMENTS.—

(1) REHABILITATION ACT OF 1973.—Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended—

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e–5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e–5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964.—Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

Passed the Senate January 22, 2009.

Attest:

Secretary.

111TH CONGRESS
1ST SESSION

S. 181

AN ACT

To amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Paycheck Fairness Act
House Bill as of August 14, 2009

HR 12 IH

111th CONGRESS

1st Session

H. R. 12

To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

January 6, 2009

Ms. DELAURO (for herself, Mr. DOYLE, Mr. HOYER, Mr. GEORGE MILLER of California, Ms. HIRONO, Mr. RUPPERSBERGER, Ms. SCHAKOWSKY, Mr. STARK, Mr. ACKERMAN, Ms. CLARKE, Mr. HOLT, Mr. LEVIN, Mr. KILDEE, Mrs. MCCARTHY of New York, Ms. SUTTON, Mr. VAN HOLLEN, Mr. ELLISON, Ms. EDWARDS of Maryland, Mr. GRIJALVA, Mr. NADLER of New York, Ms. NORTON, Mr. OBERSTAR, Ms. MATSUI, Mrs. TAUSCHER, Mr. PAYNE, Mr. HODES, Mr. JACKSON of Illinois, Ms. LEE of California, Mr. ROTHMAN of New Jersey, Mr. SERRANO, Mr. WEINER, Mr. WU, Mr. COHEN, Mr. CONYERS, Mr. HARE, Mr. ISRAEL, Mr. LARSON of Connecticut, Mr. SESTAK, Mr. ABERCROMBIE, Mr. ANDREWS, Mr. ARCURI, Mr. BACA, Mr. BECERRA, Ms. BERKLEY, Mr. BISHOP of New York, Mr. BLUMENAUER, Mr. BOSWELL, Mr. BOUCHER, Mr. BRADY of Pennsylvania, Mrs. CAPPS, Mr. CARNAHAN, Mr. CARSON of Indiana, Mr. CLAY, Mr. CLEAVER, Mr. CLYBURN, Mr. COURTNEY, Mr. CUMMINGS, Mr. DAVIS of Alabama, Mrs. DAVIS of California, Mr. DEFAZIO, Ms. DEGETTE, Mr. DICKS, Mr. ENGEL, Mr. FARR, Mr. FATTAH, Mr. FILNER, Ms. GIFFORDS, Mrs. GILLIBRAND, Mr. HALL of New York, Mr. HASTINGS of Florida, Mr. HINCHEY, Mr. HINOJOSA, Mr. HONDA, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. JOHNSON of Georgia, Mr. KAGEN, Mr. KIND, Mr. LANGEVIN, Mr. LEWIS of Georgia, Mr. LIPINSKI, Mr. LOEBSACK, Ms. ZOE LOFGREN of California, Mrs. LOWEY, Mr. LYNCH, Mr. MAFFEI, Mrs. MALONEY, Mr. MARKEY of Massachusetts, Ms. MCCOLLUM, Mr. MCDERMOTT, Mr. MICHAUD, Mr. MILLER of North Carolina, Mr. MOORE of Kansas, Ms. MOORE of Wisconsin, Mr. MORAN of Virginia, Mr. PATRICK MURPHY of Pennsylvania, Mr. OBEY, Mr. OLVER, Mr. PALLONE, Mr. PASCRELL, Mr. PETERS, Mr. REYES, Mr. RODRIGUEZ, Ms. LINDA T. SANCHEZ of California, Ms. LORETTA SANCHEZ of California, Mr. SARBANES, Mr. SCHIFF, Ms. SCHWARTZ, Mr. SCOTT of Georgia, Mr. SCOTT of Virginia, Ms. SHEA-PORTER, Mr. SHERMAN, Mr. SIRES, Mr. SKELTON, Ms. SLAUGHTER, Ms. SPEIER, Mr. TIERNEY, Mr. TOWNS, Ms. TSONGAS, Mr. VISCLOSKY, Mr. WALZ, Ms. WASSERMAN SCHULTZ, Ms. WATERS, Ms. WATSON, Mr. WAXMAN, Mr. WELCH, Mr. WEXLER, Ms. WOOLSEY, Mr. YARMUTH, Ms. HARMAN, Ms. KAPTUR, Mr.

KUCINICH, Mr. MCMAHON, Mr. MURPHY of Connecticut, Mr. PERRIELLO, Ms. PINGREE of Maine, Mr. POMEROY, Mr. RYAN of Ohio, Mr. THOMPSON of Mississippi, Ms. VELAZQUEZ, Mr. HEINRICH, Mr. BAIRD, Ms. BALDWIN, Mr. BERMAN, Mr. BERRY, Ms. BORDALLO, Mr. BRALEY of Iowa, Ms. CORRINE BROWN of Florida, Mr. BUTTERFIELD, Mr. CAPUANO, Mr. DAVIS of Illinois, Mr. DINGELL, Mrs. CHRISTENSEN, Mr. DOGGETT, Mr. LARSEN of Washington, Mr. WATT, Mr. STUPAK, Ms. CASTOR of Florida, Mr. BISHOP of Georgia, Mr. MURTHA, Mr. CARDOZA, Mr. RUSH, Mr. ORTIZ, Mr. EDWARDS of Texas, Mr. SHULER, Mr. AL GREEN of Texas, Mr. GONZALEZ, Mr. COOPER, Mr. MITCHELL, Mr. PETERSON, Mr. GENE GREEN of Texas, Ms. RICHARDSON, Mr. HIGGINS, Ms. JACKSON-LEE of Texas, Mr. THOMPSON of California, Mr. COSTELLO, and Mr. KENNEDY) introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Paycheck Fairness Act'.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Women have entered the workforce in record numbers over the past 50 years.

(2) Despite the enactment of the Equal Pay Act in 1963, many women continue to earn significantly lower pay than men for equal work. These pay disparities exist in both the private and governmental sectors. In many instances, the pay disparities can only be due to continued intentional discrimination or the lingering effects of past discrimination.

(3) The existence of such pay disparities--

(A) depresses the wages of working families who rely on the wages of all members of the family to make ends meet;

(B) undermines women's retirement security, which is often based on earnings while in the workforce;

(C) prevents the optimum utilization of available labor resources;

(D) has been spread and perpetuated, through commerce and the channels and instrumentalities of commerce, among the workers of the several States;

(E) burdens commerce and the free flow of goods in commerce;

(F) constitutes an unfair method of competition in commerce;

(G) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;

(H) interferes with the orderly and fair marketing of goods in commerce; and

(I) in many instances, may deprive workers of equal protection on the basis of sex in violation of the 5th and 14th amendments.

(4)(A) Artificial barriers to the elimination of discrimination in the payment of wages on the basis of sex continue to exist decades after the enactment of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) and the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.).

(B) These barriers have resulted, in significant part, because the Equal Pay Act has not worked as Congress originally intended. Improvements and modifications to the law are necessary to ensure that the Act provides effective protection to those subject to pay discrimination on the basis of their sex.

(C) Elimination of such barriers would have positive effects, including--

(i) providing a solution to problems in the economy created by unfair pay disparities;

(ii) substantially reducing the number of working women earning unfairly low wages, thereby reducing the dependence on public assistance;

(iii) promoting stable families by enabling all family members to earn a fair rate of pay;

(iv) remedying the effects of past discrimination on the basis of sex and ensuring that in the future workers are afforded equal protection on the basis of sex; and

(v) ensuring equal protection pursuant to Congress' power to

enforce the 5th and 14th amendments.

(5) The Department of Labor and the Equal Employment Opportunity Commission have important and unique responsibilities to help ensure that women receive equal pay for equal work.

(6) The Department of Labor is responsible for--

(A) collecting and making publicly available information about women's pay;

(B) ensuring that companies receiving Federal contracts comply with anti-discrimination affirmative action requirements of Executive Order 11246 (relating to equal employment opportunity);

(C) disseminating information about women's rights in the workplace;

(D) helping women who have been victims of pay discrimination obtain a remedy; and

(E) being proactive in investigating and prosecuting equal pay violations, especially systemic violations, and in enforcing all of its mandates.

(7) The Equal Employment Opportunity Commission is the primary enforcement agency for claims made under the Equal Pay Act, and issues regulations and guidance on appropriate interpretations of the law.

(8) With a stronger commitment by the Department of Labor and the Equal Employment Opportunity Commission to their responsibilities, increased information as a result of the amendments made by this Act to the Equal Pay Act of 1963, wage data, and more effective remedies, women will be better able to recognize and enforce their rights.

(9) Certain employers have already made great strides in eradicating unfair pay disparities in the workplace and their achievements should be recognized.

SEC. 3. ENHANCED ENFORCEMENT OF EQUAL PAY REQUIREMENTS.

(a) Bona-Fide Factor Defense and Modification of Same Establishment Requirement- Section 6(d)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(1)) is amended--

(1) by striking `No employer having' and inserting `(A) No employer having';

(2) by striking `any other factor other than sex' and inserting `a bona fide factor other than sex, such as education, training, or experience'; and

(3) by inserting at the end the following:

`(B) The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall 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.

`(C) For purposes of subparagraph (A), employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same county or similar political subdivision of a State. The preceding sentence shall not be construed as limiting broader applications of the term `establishment' consistent with rules prescribed or guidance issued by the Equal Opportunity Employment Commission.'.

(b) Nonretaliation Provision- Section 15 of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)) is amended--

(1) in subsection (a)(3), by striking `employee has filed' and all that follows and inserting `employee--

`(A) has made a charge or filed any complaint or instituted or caused to be instituted any investigation, proceeding, hearing, or action under or related to this Act, including an investigation conducted by the employer, or has testified or is planning to testify or has assisted or participated in any manner in any such investigation, proceeding, hearing or action, or has served or is planning to serve on an industry Committee; or

`(B) has inquired about, discussed or disclosed the wages of the employee or another employee.'; and

(2) by adding at the end the following:

`(c) Subsection (a)(3)(B) shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job functions discloses the wages of such other

employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under section 6(d), including an investigation conducted by the employer. Nothing in this subsection shall be construed to limit the rights of an employee provided under any other provision of law.'.

(c) Enhanced Penalties- Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is amended--

(1) by inserting after the first sentence the following: `Any employer who violates section 6(d) shall additionally be liable for such compensatory damages, or, where the employee demonstrates that the employer acted with malice or reckless indifference, punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.';

(2) in the sentence beginning `An action to', by striking `either of the preceding sentences' and inserting `any of the preceding sentences of this subsection';

(3) in the sentence beginning `No employees shall', by striking `No employees' and inserting `Except with respect to class actions brought to enforce section 6(d), no employee';

(4) by inserting after the sentence referred to in paragraph (3), the following: `Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained as a class action as provided by the Federal Rules of Civil Procedure.'; and

(5) in the sentence beginning `The court in'--

(A) by striking `in such action' and inserting `in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection'; and

(B) by inserting before the period the following: `, including expert fees'.

(d) Action by Secretary- Section 16(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(c)) is amended--

(1) in the first sentence--

(A) by inserting `or, in the case of a violation of section 6(d), additional compensatory or punitive damages, as described in subsection (b),' before `and the agreement'; and

(B) by inserting before the period the following: `, or such compensatory or punitive damages, as appropriate';

(2) in the second sentence, by inserting before the period the following: `and, in the case of a violation of section 6(d), additional compensatory or punitive damages, as described in subsection (b)';

(3) in the third sentence, by striking `the first sentence' and inserting `the first or second sentence'; and

(4) in the last sentence--

(A) by striking `commenced in the case' and inserting `commenced--

`(1) in the case';

(B) by striking the period and inserting `; or'; and

(C) by adding at the end the following:

`(2) in the case of a class action brought to enforce section 6(d), on the date on which the individual becomes a party plaintiff to the class action.'.

SEC. 4. TRAINING.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, subject to the availability of funds appropriated under section 10, shall provide training to Commission employees and affected individuals and entities on matters involving discrimination in the payment of wages.

SEC. 5. NEGOTIATION SKILLS TRAINING FOR GIRLS AND WOMEN.

(a) Program Authorized-

(1) IN GENERAL- The Secretary of Labor, after consultation with the Secretary of Education, is authorized to establish and carry out a grant program.

(2) GRANTS- In carrying out the program, the Secretary of Labor may make grants on a competitive basis to eligible entities, to carry out negotiation skills training programs for girls and women.

(3) ELIGIBLE ENTITIES- To be eligible to receive a grant under this subsection, an entity shall be a public agency, such as a State, a local government in a metropolitan statistical area (as defined by the Office of Management and Budget), a State educational agency, or a local educational agency, a private nonprofit organization, or a community-based organization.

(4) APPLICATION- To be eligible to receive a grant under this subsection, an entity shall submit an application to the Secretary of Labor at such time, in such manner, and containing such information as the Secretary of Labor may require.

(5) USE OF FUNDS- An entity that receives a grant under this subsection shall use the funds made available through the grant to carry out an effective negotiation skills training program that empowers girls and women. The training provided through the program shall help girls and women strengthen their negotiation skills to allow the girls and women to obtain higher salaries and rates of compensation that are equal to those paid to similarly-situated male employees.

(b) Incorporating Training Into Existing Programs- The Secretary of Labor and the Secretary of Education shall issue regulations or policy guidance that provides for integrating the negotiation skills training, to the extent practicable, into programs authorized under--

(1) in the case of the Secretary of Education, the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.), the Carl D. Perkins Vocational and Technical Education Act of 1998 (20 U.S.C. 2301 et seq.), the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), and other programs carried out by the Department of Education that the Secretary of Education determines to be appropriate; and

(2) in the case of the Secretary of Labor, the Workforce Investment Act of 1998 (29 U.S.C. 2801 et seq.), and other programs carried out by the Department of Labor that the Secretary of Labor determines to be appropriate.

(c) Report- Not later than 1 year after the date of enactment of this Act, and annually thereafter, the Secretary of Labor and the Secretary of Education shall prepare and submit to Congress a report describing the activities conducted under this section and evaluating the effectiveness of such activities in achieving the purposes of this Act.

SEC. 6. RESEARCH, EDUCATION, AND OUTREACH.

The Secretary of Labor shall conduct studies and provide information to

employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women, including--

(1) conducting and promoting research to develop the means to correct expeditiously the conditions leading to the pay disparities;

(2) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the media, and the general public the findings resulting from studies and other materials, relating to eliminating the pay disparities;

(3) sponsoring and assisting State and community informational and educational programs;

(4) providing information to employers, labor organizations, professional associations, and other interested persons on the means of eliminating the pay disparities;

(5) recognizing and promoting the achievements of employers, labor organizations, and professional associations that have worked to eliminate the pay disparities; and

(6) convening a national summit to discuss, and consider approaches for rectifying, the pay disparities.

SEC. 7. ESTABLISHMENT OF THE NATIONAL AWARD FOR PAY EQUITY IN THE WORKPLACE.

(a) In General- There is established the Secretary of Labor's National Award for Pay Equity in the Workplace, which shall be awarded, as appropriate, to encourage proactive efforts to comply with section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

(b) Criteria for Qualification- The Secretary of Labor shall set criteria for receipt of the award, including a requirement that an employer has made substantial effort to eliminate pay disparities between men and women, and deserves special recognition as a consequence of such effort. The Secretary shall establish procedures for the application and presentation of the award.

(c) Business- In this section, the term `employer' includes--

(1)(A) a corporation, including a nonprofit corporation;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in any of subparagraphs (A) through (D);

(2) an entity carrying out an education referral program, a training program, such as an apprenticeship or management training program, or a similar program; and

(3) an entity carrying out a joint program, formed by a combination of any entities described in paragraph (1) or (2).

SEC. 8. COLLECTION OF PAY INFORMATION BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

Section 709 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-8) is amended by adding at the end the following:

`(f)(1) Not later than 18 months after the date of enactment of this subsection, the Commission shall--

`(A) complete a survey of the data that is currently available to the Federal Government relating to employee pay information for use in the enforcement of Federal laws prohibiting pay discrimination and, in consultation with other relevant Federal agencies, identify additional data collections that will enhance the enforcement of such laws; and

`(B) based on the results of the survey and consultations under subparagraph (A), issue regulations to provide for the collection of pay information data from employers as described by the sex, race, and national origin of employees.

`(2) In implementing paragraph (1), the Commission shall have as its primary consideration the most effective and efficient means for enhancing the enforcement of Federal laws prohibiting pay discrimination. For this purpose, the Commission shall consider factors including the imposition of burdens on employers, the frequency of required reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports.'.

SEC. 9. REINSTATEMENT OF PAY EQUITY PROGRAMS AND PAY EQUITY DATA COLLECTION.

(a) Bureau of Labor Statistics Data Collection- The Commissioner of Labor Statistics shall continue to collect data on women workers in the Current

Employment Statistics survey.

(b) Office of Federal Contract Compliance Programs Initiatives- The Director of the Office of Federal Contract Compliance Programs shall ensure that employees of the Office--

(1)(A) shall use the full range of investigatory tools at the Office's disposal, including pay grade methodology;

(B) in considering evidence of possible compensation discrimination--

(i) shall not limit its consideration to a small number of types of evidence; and

(ii) shall not limit its evaluation of the evidence to a small number of methods of evaluating the evidence; and

(C) shall not require a multiple regression analysis or anecdotal evidence for a compensation discrimination case;

(2) for purposes of its investigative, compliance, and enforcement activities, shall define `similarly situated employees' in a way that is consistent with and not more stringent than the definition provided in item 1 of subsection A of section 10-III of the Equal Employment Opportunity Commission Compliance Manual (2000), and shall consider only factors that the Office's investigation reveals were used in making compensation decisions; and

(3) shall reinstate the Equal Opportunity Survey, as required by section 60-2.18 of title 41, Code of Federal Regulations (as in effect on September 7, 2006), designating not less than half of all nonconstruction contractor establishments each year to prepare and file such survey, and shall review and utilize the responses to such survey to identify contractor establishments for further evaluation and for other enforcement purposes as appropriate.

(c) Department of Labor Distribution of Wage Discrimination Information- The Secretary of Labor shall make readily available (in print, on the Department of Labor website, and through any other forum that the Department may use to distribute compensation discrimination information), accurate information on compensation discrimination, including statistics, explanations of employee rights, historical analyses of such discrimination, instructions for employers on compliance, and any other information that will assist the public in understanding and addressing such discrimination.

SEC. 10. AUTHORIZATION OF APPROPRIATIONS.

(a) Authorization of Appropriations- There are authorized to be appropriated $15,000,000 to carry out this Act.

(b) Prohibition on Earmarks- None of the funds appropriated pursuant to subsection (a) for purposes of the grant program in section 5 of this Act may be used for a Congressional earmark as defined in clause 9(d) of rule XXI of the Rules of the House of Representatives.

SEC. 11. SMALL BUSINESS ASSISTANCE.

(a) Effective Date- This Act and the amendments made by this Act shall take effect on the date that is 6 months after the date of enactment of this Act.

(b) Technical Assistance Materials- The Secretary of Labor and the Commissioner of the Equal Employment Opportunity Commission shall jointly develop technical assistance material to assist small businesses in complying with the requirements of this Act and the amendments made by this Act.

(c) Small Businesses- A small business shall be exempt from the provisions of this Act to the same extent that such business is exempt from the requirements of the Fair Labor Standards Act pursuant to section 3(s)(1)(A)(i) and (ii) of such Act.

SEC. 12. RULE OF CONSTRUCTION.

Nothing in this Act, or in any amendments made by this Act, shall affect the obligation of employers and employees to fully comply with all applicable immigration laws, including any penalties, fines, or other sanctions.

END

Fair Pay Act of 2009
House Bill as of August 14, 2009

HR 2151 IH

111th CONGRESS

1st Session

H. R. 2151

To amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

April 28, 2009

Ms. NORTON introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) Short Title- This Act may be cited as the `Fair Pay Act of 2009'.

(b) Reference- Except as provided in section 8, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

SEC. 2. FINDINGS.

Congress finds the following:

(1) Wage rate differentials exist between equivalent jobs segregated by sex, race, and national origin in Government employment and in industries engaged in commerce or in the production of goods for

commerce.

(2) The existence of such wage rate differentials--

(A) depresses wages and living standards for employees necessary for their health and efficiency;

(B) prevents the maximum utilization of the available labor resources;

(C) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(D) burdens commerce and the free flow of goods in commerce; and

(E) constitutes an unfair method of competition.

(3) Discrimination in hiring and promotion has played a role in maintaining a segregated work force.

(4) Many women and people of color work in occupations dominated by individuals of their same sex, race, and national origin.

(5)(A) United States Census Bureau data shows that in 2007, women in the United States working full-time, year-round earned roughly 78 cents for every dollar earned by a man working full-time, year-round.

(B) A 2003 study by the General Accountability Office found that even when accounting for key factors generally known to influence earnings such as race, marital status, age and number of children as well as hours worked and time out of the workforce, a 20 percent gap in pay remains which cannot be accounted for but may be partially explained by women make less who work in traditionally female dominated careers as well as other discrimination in the workplace.

(6) Section 6(d) of the Fair Labor Standards Act of 1938 prohibits discrimination in compensation for `equal work' on the basis of sex.

(7) Artificial barriers to the elimination of discrimination in compensation based upon sex, race, and national origin continue to exist more than 4 decades after the passage of section 6(d) of the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, and the Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.). Elimination of such barriers would have positive effects, including--

(A) providing a solution to problems in the economy created by

discrimination through wage rate differentials;

(B) substantially reducing the number of working women and people of color earning low wages, thereby reducing the dependence on public assistance; and

(C) promoting stable families by enabling working family members to earn a fair rate of pay.

SEC. 3. EQUAL PAY FOR EQUIVALENT JOBS.

(a) Amendment- Section 6 (29 U.S.C. 206) is amended by adding at the end the following:

`(h)(1)(A) Except as provided in subparagraph (B), no employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex, race, or national origin by paying wages to employees in such establishment in a job that is dominated by employees of a particular sex, race, or national origin at a rate less than the rate at which the employer pays wages to employees in such establishment in another job that is dominated by employees of the opposite sex or of a different race or national origin, respectively, for work on equivalent jobs.

`(B) Nothing in subparagraph (A) shall prohibit the payment of different wage rates to employees where such payment is made pursuant to--

`(i) a seniority system;

`(ii) a merit system;

`(iii) a system that measures earnings by quantity or quality of production; or

`(iv) a differential based on a bona fide factor other than sex, race, or national origin, such as education, training, or experience, except that this clause shall apply only if--

`(I) the employer demonstrates that--

`(aa) such factor--

`(AA) is job-related with respect to the position in question; or

`(BB) furthers a legitimate business purpose, except that this item shall not apply if 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; and

`(bb) such factor was actually applied and used reasonably in light of the asserted justification; and

`(II) upon the employer succeeding under subclause (I), the employee fails to demonstrate that the differential produced by the reliance of the employer on such factor is itself the result of discrimination on the basis of sex, race, or national origin by the employer.

`(C) The Equal Employment Opportunity Commission shall issue guidelines specifying criteria for determining whether a job is dominated by employees of a particular sex, race, or national origin for purposes of subparagraph (B)(iv). Such guidelines shall not include a list of such jobs.

`(D) An employer who is paying a wage rate differential in violation of subparagraph (A) shall not, in order to comply with the provisions of such subparagraph, reduce the wage rate of any employee.

`(2) No labor organization or its agents representing employees of an employer having employees subject to any provision of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1)(A).

`(3) For purposes of administration and enforcement of this subsection, any amounts owing to any employee that have been withheld in violation of paragraph (1)(A) shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this section or section 7.

`(4) In this subsection:

`(A) The term `labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

`(B) The term `equivalent jobs' means jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.'.

(b) Conforming Amendment- Section 13(a) (29 U.S.C. 213(a)) is amended in the matter before paragraph (1) by striking `section 6(d)' and inserting

`sections 6 (d) and (h)'.

SEC. 4. PROHIBITED ACTS.

Section 15(a) (29 U.S.C. 215(a)) is amended--

(1) by striking the period at the end of paragraph (5) and inserting a semicolon; and

(2) by adding after paragraph (5) the following:

`(6) to discriminate against any individual because such individual has opposed any act or practice made unlawful by section 6(h) or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce section 6 (h); or

`(7) to discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere with any employee or any other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages or the wages of any other employee, or because the employee exercised, enjoyed, aided, or encouraged any other person to exercise or enjoy any right granted or protected by section 6(h).'.

SEC. 5. REMEDIES.

(a) Enhanced Penalties- Section 16(b) (29 U.S.C. 216(b)) is amended--

(1) by inserting after the first sentence the following: `Any employer who violates subsection (d) or (h) of section 6 shall additionally be liable for such compensatory or punitive damages as may be appropriate, except that the United States shall not be liable for punitive damages.';

(2) in the sentence beginning `An action to', by striking `either of the preceding sentences' and inserting `any of the preceding sentences of this subsection';

(3) in the sentence beginning `No employees', by striking `No employees' and inserting `Except with respect to class actions brought under subsection (f), no employee';

(4) in the sentence beginning `The court in', by striking `in such action' and inserting `in any action brought to recover the liability prescribed in any of the preceding sentences of this subsection'; and

(5) by striking `section 15(a)(3)' each place it occurs and inserting `paragraphs (3), (6), and (7) of section 15(a)'.

(b) Action by Secretary- Section 16(c) (29 U.S.C. 216(c)) is amended--

(1) in the first sentence--

(A) by inserting `or, in the case of a violation of subsection (d) or (h) of section 6, additional compensatory or punitive damages,' before `and the agreement'; and

(B) by inserting before the period the following: `, or such compensatory or punitive damages, as appropriate';

(2) in the second sentence, by inserting before the period the following: `and, in the case of a violation of subsection (d) or (h) of section 6, additional compensatory or punitive damages'; and

(3) in the third sentence, by striking `the first sentence' and inserting `the first or second sentence'.

(c) Fees- Section 16 (29 U.S.C. 216) is amended by adding at the end the following:

`(f) In any action brought under this section for a violation of section 6(h), the court shall, in addition to any other remedies awarded to the prevailing plaintiff or plaintiffs, allow expert fees as part of the costs. Any such action may be maintained as a class action as provided by the Federal Rules of Civil Procedure.'.

SEC. 6. RECORDS.

(a) Records- Section 11(c) (29 U.S.C. 211(c)) is amended--

(1) by inserting `(1)' after `(c)'; and

(2) by adding at the end the following:

`(2) Every employer subject to section 6(h) shall preserve records that document and support the method, system, calculations, and other bases used by the employer in establishing, adjusting, and determining the wage rates paid to the employees of the employer. Every employer subject to section 6(h) shall preserve such records for such periods of time, and shall make such reports from the records to the Equal Employment Opportunity Commission, as shall be prescribed by the Equal Employment Opportunity Commission by regulation or order as necessary or appropriate for the enforcement of the provisions of section 6(h) or any regulation promulgated

pursuant to section 6(h).'.

(b) Small Business Exemptions- Section 11(c) (as amended by subsection (a)) is further amended by adding at the end the following:

`(3) Every employer subject to section 6(h) that has 25 or more employees on any date during the first or second year after the effective date of this paragraph, or 15 or more employees on any date during any subsequent year after such second year, shall, in accordance with regulations promulgated by the Equal Employment Opportunity Commission under paragraph (8), prepare and submit to the Equal Employment Opportunity Commission for the year involved a report signed by the president, treasurer, or corresponding principal officer, of the employer that includes information that discloses the wage rates paid to employees of the employer in each classification, position, or job title, or to employees in other wage groups employed by the employer, including information with respect to the sex, race, and national origin of employees at each wage rate in each classification, position, job title, or other wage group.'.

(c) Protection of Confidentiality- Section 11(c) (as amended by subsections (a) and (b)) is further amended by adding at the end the following:

`(4) The rules and regulations promulgated by the Equal Employment Opportunity Commission under paragraph (8), relating to the form of such a report, shall include requirements to protect the confidentiality of employees, including a requirement that the report shall not contain the name of any individual employee.'.

(d) Use; Inspections; Examination; Regulations- Section 11(c) (as amended by subsections (a) through (c)) is further amended by adding at the end the following:

`(5) The Equal Employment Opportunity Commission may publish any information and data that the Equal Employment Opportunity Commission obtains pursuant to the provisions of paragraph (3). The Equal Employment Opportunity Commission may use the information and data for statistical and research purposes, and compile and publish such studies, analyses, reports, and surveys based on the information and data as the Equal Employment Opportunity Commission may consider appropriate.

`(6) In order to carry out the purposes of this Act, the Equal Employment Opportunity Commission shall by regulation make reasonable provision for the inspection and examination by any person of the information and data contained in any report submitted to the Equal Employment Opportunity Commission pursuant to paragraph (3).

`(7) The Equal Employment Opportunity Commission shall by regulation

provide for the furnishing of copies of reports submitted to the Equal Employment Opportunity Commission pursuant to paragraph (3) to any person upon payment of a charge based upon the cost of the service.

`(8) The Equal Employment Opportunity Commission shall issue rules and regulations prescribing the form and content of reports required to be submitted under paragraph (3) and such other reasonable rules and regulations as the Equal Employment Opportunity Commission may find necessary to prevent the circumvention or evasion of such reporting requirements. In exercising the authority of the Equal Employment Opportunity Commission under paragraph (3), the Equal Employment Opportunity Commission may prescribe by general rule simplified reports for employers for whom the Equal Employment Opportunity Commission finds that because of the size of the employers a detailed report would be unduly burdensome.'.

SEC. 7. RESEARCH, EDUCATION, AND TECHNICAL ASSISTANCE PROGRAM; REPORT TO CONGRESS.

Section 4(d) (29 U.S.C. 204(d)) is amended by adding at the end the following:

`(4) The Equal Employment Opportunity Commission shall conduct studies and provide information and technical assistance to employers, labor organizations, and the general public concerning effective means available to implement the provisions of section 6(h) prohibiting wage rate discrimination between employees performing work in equivalent jobs on the basis of sex, race, or national origin. Such studies, information, and technical assistance shall be based on and include reference to the objectives of such section to eliminate such discrimination. In order to achieve the objectives of such section, the Equal Employment Opportunity Commission shall carry on a continuing program of research, education, and technical assistance including--

`(A) conducting and promoting research with the intent of developing means to expeditiously correct the wage rate differentials described in section 6(h);

`(B) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the various media of communication, and the general public the findings of studies and other materials for promoting compliance with section 6(h);

`(C) sponsoring and assisting State and community informational and educational programs; and

`(D) providing technical assistance to employers, labor organizations, professional associations and other interested persons on means of achieving and maintaining compliance with the provisions of section 6 (h).

`(5) The report submitted biennially by the Secretary to Congress under paragraph (1) shall include a separate evaluation and appraisal regarding the implementation of section 6(h).'.

SEC. 8. CONFORMING AMENDMENTS.

(a) Congressional Employees-

(1) APPLICATION- Section 203(a)(1) of the Congressional Accountability Act of 1995 (2 U.S.C. 1313(a)(1)) is amended--

(A) by striking `subsections (a)(1) and (d) of section 6' and inserting `subsections (a)(1), (d), and (h) of section 6'; and

(B) by striking `206 (a)(1) and (d)' and inserting `206 (a)(1), (d), and (h)'.

(2) REMEDIES- Section 203(b) of such Act (2 U.S.C. 1313(b)) is amended by inserting before the period the following: `or, in an appropriate case, under section 16(f) of such Act (29 U.S.C. 216(f))'.

(b) Executive Branch Employees-

(1) APPLICATION- Section 413(a)(1) of title 3, United States Code, as added by section 2(a) of the Presidential and Executive Office Accountability Act (Public Law 104-331; 110 Stat. 4053), is amended by striking `subsections (a)(1) and (d) of section 6' and inserting `subsections (a)(1), (d), and (h) of section 6'.

(2) REMEDIES- Section 413(b) of such title is amended by inserting before the period the following: `or, in an appropriate case, under section 16(f) of such Act'.

SEC. 9. EFFECTIVE DATE.

The amendments made by this Act shall take effect 1 year after the date of enactment of this Act.

END

Forewarn Act
House Bill as of August 14, 2009

HR 3042 IH

111th CONGRESS

1st Session

H. R. 3042

To amend the Worker Adjustment and Retraining Notification Act to minimize the adverse effects of employment dislocation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

June 25, 2009

Mr. GEORGE MILLER of California (for himself, Mr. MCHUGH, Ms. WOOLSEY, and Ms. KAPTUR) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Worker Adjustment and Retraining Notification Act to minimize the adverse effects of employment dislocation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Forewarn Act'.

SEC. 2. AMENDMENTS TO THE WARN ACT.

(a) Definitions-

(1) EMPLOYER, PLANT CLOSING, AND MASS LAYOFF- Paragraphs (1) through (3) of section 2(a) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101(a)(1)-(3)) are amended to read as follows:

`(1) the term `employer' means any business enterprise that employs 75 or more employees and includes any parent corporation of which such business enterprise is a subsidiary;

`(2) the term `plant closing' means the permanent or temporary

shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment, which results in an employment loss at such site, during any 30-day period, for 25 or more employees;

`(3) the term `mass layoff' means a reduction in force at a single site of employment which results in an employment loss at such site, during any 30-day period, for 25 or more employees.'.

(2) SECRETARY OF LABOR-

(A) DEFINITION- Paragraph (8) of such section is amended to read as follows:

`(8) the term `Secretary' means the Secretary of Labor or a representative of the Secretary of Labor.'.

(B) REGULATIONS- Section 8(a) of such Act (29 U.S.C. 2107(a)) is amended by striking `of Labor'.

(3) CONFORMING AMENDMENTS-

(A) NOTICE- Section 3(d) of such Act (29 U.S.C. 2102(d)) is amended by striking out `, each of which is less than the minimum number of employees specified in section 2(a)(2) or (3) but which in the aggregate exceed that minimum number,' and inserting `which in the aggregate exceed the minimum number of employees specified in section 2(a)(2) or (3)'.

(B) DEFINITIONS- Section 2(b)(1) of such Act (29 U.S.C. 2101(b)(1)) is amended by striking `(other than a part-time employee)'.

(b) Notice-

(1) NOTICE PERIOD-

(A) IN GENERAL- Section 3 of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102) is amended by striking `60-day period' and inserting `90-day period' each place it appears.

(B) CONFORMING AMENDMENT- Section 5(a)(1) of such Act (29 U.S.C. 2104(a)(1)) is amended in the matter following subparagraph (B), by striking `60 days' and inserting `90 days'.

(2) RECIPIENTS- Section 3(a) of such Act (29 U.S.C. 2102(a)) is amended--

(A) in paragraph (1), by striking `or, if there is no such representative at that time, to each affected employee; and' and inserting `and to each affected employee;'; and

(B) by redesignating paragraph (2) as paragraph (3) and inserting after paragraph (1) the following:

`(2) to the Secretary and the Governor of the State where the plant closing or mass layoff is to occur; and'.

(3) NOTICE EXCUSED WHERE CAUSED BY TERRORIST ATTACK- Section 3(b)(2) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102(b)(2)) is amended by adding at the end the following:

`(C) No notice under this Act shall be required if the plant closing or mass layoff is due directly to a terrorist attack on the United States.'.

(4) CONTENT OF NOTICE- Section 3 of such Act (29 U.S.C. 2102) is further amended by adding at the end the following:

`(e) Content of Notices- An employer who is required to provide notice as required under subsection (a) shall include--

`(1) in each notice required under such subsection--

`(A) a statement of the number of affected employees;

`(B) the reason for the plant closing or mass layoff;

`(C) the availability of employment at other establishments owned by the employer;

`(D) a statement of each employee's rights with respect to wages, severance and employee benefits; and

`(E) a statement of the available employment and training services provided by the Department of Labor; and

`(2) in each notice required under such subsection except for the notice provided to individual employees, the names, addresses, and occupations of the affected employees.'.

(5) INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO WORKERS AND DOL NOTICE TO CONGRESS- Section 3 of such Act (29 U.S.C. 2102) is further amended by adding at the end the following:

`(f) Information Regarding Benefits and Services Available to Employees- Concurrent with or immediately after providing the notice required under subsection (a)(1), an employer shall provide affected employees with information regarding the benefits and services available to such employees, as described in the guide compiled by the Secretary under section 13.

`(g) Access of Rapid Response Teams- An employer who is required to provide notice shall permit, during work hours, reasonable on-site access to any Federal, State, or local rapid response team responsible for providing reemployment, training, and related services to affected employees.

`(h) DOL Notice to Congress- As soon as practicable and not later than 15 days after receiving notification under subsection (a)(2), the Secretary of Labor shall notify the appropriate Senators and Members of the House of Representatives who represent the area or areas where the plant closing or mass layoff is to occur.'.

(c) Enforcement-

(1) AMOUNT- Section 5(a)(1) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2104(a)(1)) is amended--

(A) in subparagraph (A)--

(i) by striking `back pay for each day of violation' and inserting `two days' pay multiplied by the number of calendar days for which the employer was required but failed to provide notice before such closing or layoff'; and

(ii) in clause (ii), by striking `and' at the end thereof;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

`(B) interest on the amount described in subparagraph (A) calculated at the prevailing rate; and'; and

(D) by striking the matter following subparagraph (C) (as so redesignated).

(2) CONFORMING AMENDMENT- Section 5(a)(3) of such Act (29 U.S.C. 2104(a)(3)) is amended by inserting `, the Secretary of Labor, or the Governor' after `unit of local government'.

(3) EXEMPTION- Section 5(a)(4) of such Act (29 U.S.C. 2104(a)(4)) is amended by striking `reduce the amount of the liability or penalty

provided for in this section' and inserting `reduce the amount of the liability under paragraph (1) and reduce the amount of the penalty provided for in paragraph (3)'.

(4) ADMINISTRATIVE COMPLAINT- Section 5(a)(5) of such Act (29 U.S.C. 2104(a)(5)) is amended--

(A) by striking `may sue' and inserting `may,';

(B) by inserting after `both,' the following: `(A) file a complaint with the Secretary alleging a violation of section 3, or (B) bring suit'; and

(C) by adding at the end thereof the following new sentence: `A person seeking to enforce such liability may use one or both of the enforcement mechanisms described in subparagraphs (A) and (B).'.

(5) ACTION BY THE SECRETARY- Section 5 of such Act (29 U.S.C. 2104) is amended--

(A) by redesignating subsection (b) as subsection (d); and

(B) by inserting after subsection (a) the following new subsections:

`(b) Action by the Secretary-

`(1) ADMINISTRATIVE ACTION- The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 3 by an employer in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

`(2) SUBPOENA POWERS- For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

`(3) CIVIL ACTION- The Secretary may bring an action in any court of competent jurisdiction to recover on behalf of an employee the backpay, interest, benefits, and liquidated damages described in subsection (a).

`(4) SUMS RECOVERED- Any sums recovered by the Secretary on behalf of an employee under subparagraphs (A), (B), and (D) of section 5(a)(1) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years, and any sums recovered by the Secretary under subparagraph

(C) of section 5(a)(1), shall be credited as an offsetting collection to the appropriations account of the Secretary of Labor for expenses for the administration of this Act and shall remain available to the Secretary until expended.

`(5) ACTION TO COMPEL RELIEF BY SECRETARY- The district courts of the United States shall have jurisdiction, for cause shown, over an action brought by the Secretary to restrain the withholding of payment of back pay, interest, benefits, or other compensation, plus interest, found by the court to be due to employees under this Act.

`(c) Limitations-

`(1) LIMITATIONS PERIOD- An action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

`(2) COMMENCEMENT- In determining when an action is commenced under this section for the purposes of paragraph (1), it shall be considered to be commenced on the date on which the complaint is filed.

`(3) LIMITATION ON PRIVATE ACTION WHILE ACTION OF SECRETARY IS PENDING- If the Secretary has instituted an enforcement action or proceeding under subsection (b), an individual employee may not bring an action under subsection (a) during the pendency of the proceeding against any person with respect to whom the Secretary has instituted the proceeding.'.

(d) Posting of Notices; Penalties- Section 11 of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 note) is amended to read as follows:

`SEC. 11. POSTING OF NOTICES; PENALTIES.

`(a) Posting of Notices- Each employer shall post and keep posted in conspicuous places upon its premises where notices to employees are customarily posted a notice to be prepared or approved by the Secretary setting forth excerpts from, or summaries of, the pertinent provisions of this chapter and information pertinent to the filing of a complaint.

`(b) Penalties- A willful violation of this section shall be punishable by a fine of not more than $500 for each separate offense.'.

(e) Non-waiver of Rights and Remedies; Information Regarding Benefits and Services Available to Employees- Such Act is further amended by adding at the end the following:

`SEC. 12. RIGHTS AND REMEDIES NOT SUBJECT TO WAIVER.

`(a) In General- The rights and remedies provided under this Act (including the right to maintain a civil action) may not be waived, deferred, or lost pursuant to any agreement or settlement other than an agreement or settlement described in subsection (b).

`(b) Agreement or Settlement- An agreement or settlement referred to in subsection (a) is an agreement or settlement negotiated by the Secretary, an attorney general of any State, or a private attorney on behalf of affected employees.

`SEC. 13. INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO WORKERS.

`The Secretary of Labor shall maintain a guide of benefits and services which may be available to affected employees, including unemployment compensation, trade adjustment assistance, COBRA benefits, and early access to training and other services, including counseling services, available under the Workforce Investment Act of 1998. Such guide shall be available on the Internet website of the Department of Labor and shall include a description of the benefits and services, the eligibility requirements, and the means of obtaining such benefits and services. Upon receiving notice from an employer under section 3(a)(2), the Secretary shall immediately transmit such guide to such employer.'.

SEC. 3. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act.

SEC. 4. AUTHORIZATION OF APPROPRIATIONS.

In addition to funds authorized to be appropriated for the general enforcement of the Worker Adjustment and Retraining Notification Act, there is authorized to be appropriated to the Secretary of Labor such additional sums as may be necessary for the additional enforcement authority authorized by the amendments made by this Act.

END

H

Supreme Court of the United States
Jack **GROSS**, Petitioner,
v.
FBL FINANCIAL SERVICES, INC.
No. 08-441.

Argued March 31, 2009.
Decided June 18, 2009.

Background: Employee brought action against employer under Age Discrimination in Employment Act (ADEA), alleging he was demoted because of his age. The United States District Court for the Southern District of Iowa, Thomas J. Shields, J., rendered judgment on jury verdict for employee. Employer appealed. The United States Court of Appeals for the Eighth Circuit, Colloton, Circuit Judge, 526 F.3d 356, reversed. Certiorari was granted.

Holding: The Supreme Court, Justice Thomas, held that mixed-motives jury instruction is never proper in ADEA case.

Vacated and remanded.

Justice Stevens filed dissenting opinion, in which Justices Souter, Ginsburg and Breyer joined.

Justice Breyer filed dissenting opinion, in which Justices Souter and Ginsburg joined.

West Headnotes

[1] Federal Courts 170B 460.1

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk460 Review on Certiorari
170Bk460.1 k. In General. Most Cited Cases

Although petition for certiorari, asking Supreme Court to decide whether a plaintiff had to present direct evidence of discrimination in order to obtain mixed-motive instruction in a non-Title VII discrimination case, did not specifically frame the question to include threshold inquiry of whether burden of persuasion ever shifted to party defending alleged mixed-motives discrimination claim brought under ADEA, statement of question presented was deemed to comprise every subsidiary question fairly included therein. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[2] Statutes 361 223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
When conducting statutory interpretation, Supreme Court must be careful not to apply rules applicable under one statute to different statute without careful and critical examination.

[3] Statutes 361 230

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k230 k. Amendatory and Amended Acts. Most Cited Cases
When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.

[4] Statutes 361 185

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k185 k. Implications and Infer-

ences. Most Cited Cases
Negative implications raised by disparate statutory provisions are strongest when provisions were considered simultaneously when language raising the implication was inserted.

[5] Civil Rights 78 1209

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1209 k. Motive or Intent; Pretext. Most Cited Cases

Civil Rights 78 1210

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1210 k. Disparate Treatment. Most Cited Cases

Civil Rights 78 1539

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1539 k. Age Discrimination. Most Cited Cases
ADEA does not authorize mixed-motives age discrimination claim, since ordinary meaning of ADEA's requirement that employer took adverse action "because of" age is that age was the "reason" that employer decided to act; therefore, to establish disparate-treatment claim, plaintiff must prove that age was "but-for" cause of employer's adverse decision, and burden of persuasion does not shift to employer to show that it would have taken the action regardless of age, even when plaintiff has produced some evidence that age was one motivating factor in that decision. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

[6] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Statutory construction must begin with language employed by Congress and assumption that ordinary meaning of that language accurately expresses legislative purpose.

[7] Evidence 157 91

157 Evidence
157III Burden of Proof
157k91 k. Party Asserting or Denying Existence of Facts. Most Cited Cases
Where statutory text is silent on allocation of burden of persuasion, ordinary default rule is that plaintiffs bear risk of failing to prove their claims.

***2344** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner Gross filed suit, alleging that respondent (FBL) demoted him in violation of the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age," 29 U.S.C. § 623(a). At the close of trial, and over FBL's objections, the District Court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it ***2345** proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, for cases under Title VII of

the Civil Rights Act of 1964 when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations-*i.e.,* a "mixed-motives" case.

Held: A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Pp. 2348 - 2352.

(a) Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94-95, 123 S.Ct. 2148, 156 L.Ed.2d 84. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now. When conducting statutory interpretation, the Court "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki,* 552 U.S. ----, ----, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10. Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse action, see 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it added §§ 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII, even though it contemporaneously amended the ADEA in several ways. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally, see *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274, and "negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted," *Lindh v. Murphy,* 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481. Pp. 2348 - 2349.

(b) The ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338. To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge v. Phoenix Bond & Indemnity Co.,* 553 U.S. ----, ----, 128 S.Ct. 2131, 170 L.Ed.2d 1012. It follows that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that "but-for" cause. This Court has previously held this to be the burden's proper allocation in ADEA cases, see, *e.g.*, *Kentucky Retirement Systems v. EEOC,* 554 U.S. ----, ---- - ----, ---- - ----, 128 S.Ct. 2361, 171 L.Ed.2d 322, and nothing in the statute's text indicates that Congress has carved out an exception for a subset of ADEA cases. Where a statute is ***2346** "silent on the allocation of the burden of persuasion," "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast,* 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387. Hence, the burden of persuasion is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. Pp. 2350 - 2351.

(c) This Court rejects petitioner's contention that the proper interpretation of the ADEA is nonetheless controlled by *Price Waterhouse,* which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. It is far from clear that the Court would have the same approach were it to consider the question today in the first instance. Whatever *Price Waterhouse* 's deficiencies in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. The problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47, 97 S.Ct. 2549, 53 L.Ed.2d 568. Pp. 2351 - 2352.

526 F.3d 356, vacated and remanded.

Thomas, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined.
Eric Schnapper, Seattle, WA, for petitioner.

Lisa S. Blatt, Washington, DC, for United States as amicus curiae, by special leave of Court, supporting the petitioner.

Carter G. Phillips, for respondent.

Beth A. Townsend, Townsend Law Office, West Des Moines, IA, Michael J. Carroll, Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, IA, Eric Schnapper, Counsel of Record, School of Law, University of Washington, Seattle, WA, for petitioner.

Carter G. Phillips, Counsel of Record, Sidley Austin LLP, Washington, D.C., Frank Harty, Debra L. Hulett, Jordan B. Hansell, Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, Iowa, for Respondent.

For U.S. Supreme Court briefs, see:2009 WL 208116 (Pet.Brief)2009 WL 507026 (Resp.Brief)2009 WL 740767 (Reply.Brief)

Justice THOMAS delivered the opinion of the Court.

The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* Because we hold that such a jury instruction is never proper in an ADEA case, we vacate the decision below.

I

Petitioner Jack Gross began working for respondent FBL Financial Group, Inc. (FBL), in 1971. As of 2001, Gross held the position of claims administration director. But in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator. At that same time, FBL transferred many of Gross' job responsibilities to a newly created position-claims administration manager. That position was given to Lisa Kneeskern,***2347** who had previously been supervised by Gross and who was then in her early forties. App. to Pet. for Cert. 23a (District Court opinion). Although Gross (in his new position) and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities to Kneeskern.

In April 2004, Gross filed suit in District Court, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. § 623(a). The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. See App. to Pet. for Cert. 23a (District Court opinion).

At the close of trial, and over FBL's objections, the District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and that his "age was a motivating factor" in FBL's decision to demote him. App. 9-10. The jury was further instructed that Gross' age would qualify as a " 'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [him]." *Id.,* at 10. The jury was also instructed regarding FBL's burden of proof. According to the District Court, the "verdict must be for [FBL] ... if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Ibid.* The jury returned a verdict for Gross, awarding him $46,945 in lost compensation. *Id.,* at 8.

FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the

standard established in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). See 526 F.3d 356, 358 (2008). In *Price Waterhouse,* this Court addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations-*i.e.,* a "mixed-motives" case. 490 U.S., at 232, 244-247, 109 S.Ct. 1775 (plurality opinion). The *Price Waterhouse* decision was splintered. Four Justices joined a plurality opinion, see *id.,* at 231-258, 109 S.Ct. 1775, Justices White and O'Connor separately concurred in the judgment, see *id.,* at 258-261, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 261-279, 109 S.Ct. 1775 (opinion of O'Connor, J.), and three Justices dissented, see *id.,* at 279-295, 109 S.Ct. 1775 (opinion of KENNEDY, J.). Six Justices ultimately agreed that if a Title VII plaintiff shows that discrimination was a "motivating" or a " 'substantial' " factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration. See *id.,* at 258, 109 S.Ct. 1775 (plurality opinion); *id.,* at 259-260, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 276, 109 S.Ct. 1775 (opinion of O'Connor, J.). Justice O'Connor further found that to shift the burden of persuasion to the employer, the employee must present "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." *Id.,* at 276, 109 S.Ct. 1775.

***2348** In accordance with Circuit precedent, the Court of Appeals identified Justice O'Connor's opinion as controlling. See 526 F.3d, at 359 (citing *Erickson v. Farmland Industries, Inc.,* 271 F.3d 718, 724 (C.A.8 2001)). Applying that standard, the Court of Appeals found that Gross needed to present "[d]irect evidence ... sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." 526 F.3d, at 359 (internal quotation marks omitted). In the Court of Appeals' view, "direct evidence" is only that evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision." *Ibid.* (internal quotation marks omitted). Only upon a presentation of such evidence, the Court of Appeals held, should the burden shift to the employer " 'to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.' " *Ibid.* (quoting *Price Waterhouse, supra,* at 276, 109 S.Ct. 1775 (opinion of O'Connor, J.)).

The Court of Appeals thus concluded that the District Court's jury instructions were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of *any* category of evidence showing that age was a motivating factor-not just "direct evidence" related to FBL's alleged consideration of age. See 526 F.3d, at 360. Because Gross conceded that he had not presented direct evidence of discrimination, the Court of Appeals held that the District Court should not have given the mixed-motives instruction. *Ibid.* Rather, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; the jury thus should have been instructed only to determine whether Gross had carried his burden of "prov [ing] that age was the determining factor in FBL's employment action." See *ibid.*

We granted certiorari, 555 U.S. ----, 129 S.Ct. 680, 172 L.Ed.2d 649 (2008), and now vacate the decision of the Court of Appeals.

II

[1] The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." Pet. for Cert. i. Before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.[FN1] We hold that it does not.

> FN1. Although the parties did not specifically frame the question to include this threshold inquiry, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." This Court's Rule 14.1; see also *City of Sherrill v. Oneida Indian Nation of N. Y.,* 544 U.S. 197, 214, n. 8, 125 S.Ct.

1478, 161 L.Ed.2d 386 (2005) (" 'Questions not explicitly mentioned but essential to the analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented' " (quoting R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed.2002))); *Ballard v. Commissioner,* 544 U.S. 40, 46-47, and n. 2, 125 S.Ct. 1270, 161 L.Ed.2d 227 (2005) (evaluating "a question anterior" to the "questions the parties raised").

A

Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

***2349** In *Price Waterhouse,* a plurality of the Court and two Justices concurring in the judgment determined that once a "plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." 490 U.S., at 258, 109 S.Ct. 1775; see also *id.,* at 259-260, 109 S.Ct. 1775 (opinion of White, J.); *id.,* at 276, 109 S.Ct. 1775 (opinion of O'Connor, J.). But as we explained in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 94-95, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. See 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added)); § 2000e-5(g)(2)(B) (restricting the remedies available to plaintiffs proving violations of § 2000e-2(m)).

[2] This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki,* 552 U.S. ----, ----, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10 (2008). Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways, see Civil Rights Act of 1991, § 115, 105 Stat. 1079; *id.,* § 302, at 1088.

[3][4] We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. See *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Furthermore, as the Court has explained, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy,* 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.[FN2]

FN2. Justice STEVENS argues that the Court must incorporate its past interpretations of Title VII into the ADEA because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII," *post,* at 2354 (dissenting opinion) (internal quotation marks omitted), and because the Court has frequently applied its interpretations of Title VII to the ADEA, see *post,* at 2354 - 2356. But the Court's approach to interpreting the ADEA in light of Title VII has not been uniform. In *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004), for example, the Court declined to interpret

the phrase "because of ... age" in 29 U.S.C. § 623(a) to bar discrimination against people of all ages, even though the Court had previously interpreted "because of ... race [or] sex" in Title VII to bar discrimination against people of all races and both sexes, see 540 U.S., at 584, 592, n. 5, 124 S.Ct. 1236. And the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), utilized in Title VII cases is appropriate in the ADEA context. See *Reevesv. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). In this instance, it is the textual differences between Title VII and the ADEA that prevent us from applying *Price Waterhouse* and *Desert Palace* to federal age discrimination claims.

***2350** B

[5][6] Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (internal quotation marks omitted). The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added).

The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason *of,* on account *of* " (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome* " (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision. See *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ----, ----, 128 S.Ct. 2131, 2141-2142, 170 L.Ed.2d 1012 (2008) (recognizing that the phrase, "by reason of," requires at least a showing of "but for" causation (internal quotation marks omitted)); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63-64, and n. 14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of" (internal quotation marks omitted)); cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it").[FN3]

FN3. Justice BREYER contends that there is "nothing unfair or impractical" about hinging liability on whether "forbidden motive ... play [ed] a role in the employer's decision." *Post,* at 2359 (dissenting opinion). But that is a decision for Congress to make. See *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. ----, ----, 128 S.Ct. 2326, 2338-2339, 171 L.Ed.2d 203 (2008). Congress amended Title VII to allow for employer liability when discrimination "was *a motivating factor* for any employment practice, even though other factors also motivated the practice," 42 U.S.C. § 2000e-2(m) (emphasis added), but did not similarly amend the ADEA, see *supra,* at 2348 - 2349. We must give effect to Congress'

choice. See *14 Penn Plaza LLC v. Pyett,* 556 U.S. ----, ----, 129 S.Ct. 1456, 1472, 173 L.Ed.2d 398 (2009).

***2351** [7] It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. See *Kentucky Retirement Systems v. EEOC,* 554 U.S. ----, ---- - ----, ---- - 128, 128 S.Ct. 2361, 2363-2366, 2369-2371, 171 L.Ed.2d 322 (2008); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 141, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast,* 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); see also *Meacham v. Knolls Atomic Power Laboratory,* 554 U.S. ----, ----, 128 S.Ct. 2395, 2400-2401, 171 L.Ed.2d 283 (2008) ("Absent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief" (internal quotation marks omitted)). We have no warrant to depart from the general rule in this setting.

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision. See *Reeves, supra,* at 141-143, 147, 120 S.Ct. 2097.[FN4]

FN4. Because we hold that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, we do not need to address whether plaintiffs must present direct, rather than circumstantial, evidence to obtain a burden-shifting instruction. There is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the "but-for" cause of their employer's adverse action, see 29 U.S.C. § 623(a), and we will imply none. "Congress has been unequivocal when imposing heightened proof requirements" in other statutory contexts, including in other subsections within Title 29, when it has seen fit. See *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); see also, *e.g.,* 25 U.S.C. § 2504(b)(2)(B) (imposing "clear and convincing evidence" standard); 29 U.S.C. § 722(a)(2)(A) (same).

III

Finally, we reject petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse,* which initially established that the burden of persuasion shifted in alleged mixed-motives Title VII claims. [FN5] In any event, it is far ***2352** from clear that the Court would have the same approach were it to consider the question today in the first instance. Cf. *14 Penn Plaza LLC v. Pyett,* 556 U.S. ----, ----, 129 S.Ct. 1456, 1472, 173 L.Ed.2d 398 (2009) (declining to "introduc[e] a qualification into the ADEA that is not found in its text"); *Meacham, supra,* at ----, 128 S.Ct., at 2406 (explaining that the ADEA must be "read ... the way Congress wrote it").

FN5. Justice STEVENS also contends that we must apply *Price Waterhouse* under the reasoning of *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). See *post,* at 2356. In *Smith,* the Court applied to the ADEA its pre-1991 interpretation of Title VII with respect to disparate-impact claims despite Congress' 1991 amendment adding disparate-impact claims to Title VII but not the ADEA. 544 U.S., at 240, 125 S.Ct. 1536. But the amendments made by Congress in this same legislation, which added the "motivating factor" language to Title VII, undermine Justice STEVENS' argument. Congress not only explicitly added "motivating factor" liability to Title VII, see *supra,* at 2348 - 2349, but it also partially abrogated *Price Waterhouse* 's holding by eliminating an employer's complete affirmative defense to "motivating fac-

tor" claims, see 42 U.S.C. § 2000e-5(g)(2)(B). If such "motivating factor" claims were already part of Title VII, the addition of § 2000e-5(g)(2)(B) alone would have been sufficient. Congress' careful tailoring of the "motivating factor" claim in Title VII, as well as the absence of a provision parallel to § 2000e-2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.

Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework. See, *e.g.*, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (C.A.2 1992) (referring to "the murky water of shifting burdens in discrimination cases"); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 661 (C.A.7 1991) (en banc) (Flaum, J., dissenting) ("The difficulty judges have in formulating [burden-shifting] instructions and jurors have in applying them can be seen in the fact that jury verdicts in ADEA cases are supplanted by judgments notwithstanding the verdict or reversed on appeal more frequently than jury verdicts generally"). Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (reevaluating precedent that was subject to criticism and "continuing controversy and confusion"); *Payne v. Tennessee*, 501 U.S. 808, 839-844, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (SOUTER, J., concurring).[FN6]

FN6. Gross points out that the Court has also applied a burden-shifting framework to certain claims brought in contexts other than pursuant to Title VII. See Brief for Petitioner 54-55 (citing, *inter alia*, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-403, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (claims brought under the National Labor Relations Act (NLRA)); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (constitutional claims)). These cases, however, do not require the Court to adopt his contra statutory position. The case involving the NLRA did not require the Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to the National Labor Relation Board's determination that such a framework was appropriate. See *NLRB, supra*, at 400-403, 103 S.Ct. 2469. And the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text.

IV

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

The Age Discrimination in Employment Act of 1967 (ADEA), ***2353**29 U.S.C. § 621 *et seq.*, *makes it unlawful for an employer to discriminate against any employee "because of" that individual's age, § 623(a). The most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee. The "but-for" causation standard endorsed by the Court today was advanced in Justice KENNEDY's dissenting opinion in* Price Waterhouse v. Hopkins, *490 U.S. 228, 279, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a case construing identical language in Title VII of the*

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court's interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

I

The Court asks whether a mixed-motives instruction is ever appropriate in an ADEA case. As it acknowledges, this was not the question we granted certiorari to decide.[FN1] Instead, the question arose for the first time in respondent's brief, which asked us to "overrule *Price Waterhouse* with respect to its application to the ADEA." Brief for Respondent 26 (boldface type deleted). In the usual course, this Court would not entertain such a request raised only in a merits brief: " 'We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.' " *Alabama v. Shelton,* 535 U.S. 654, 660, n. 3, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) (quoting *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 171, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999)). Yet the Court is unconcerned that the question it chooses to answer has not been briefed by the parties or interested *amici curiae*. Its failure to consider the views of the United States, which represents the agency charged with administering the ADEA, is especially irresponsible.[FN2]

FN1. "The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]." *Ante,* at 2346.

FN2. The United States filed an *amicus curiae* brief supporting petitioner on the question presented. At oral argument, the Government urged that the Court should not reach the issue it takes up today. See Tr. of Oral Arg. 20-21, 28-29.

Unfortunately, the majority's inattention to prudential Court practices is matched by its utter disregard of our precedent and Congress' intent. The ADEA provides that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). As we recognized in *Price Waterhouse* when we construed the identical "because of" language of Title VII, see 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual ... with respect to his compensation, terms, ***2354** conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin" (emphasis added)), the most natural reading of the text proscribes adverse employment actions motivated in whole or in part by the age of the employee.

In *Price Waterhouse,* we concluded that the words " 'because of' such individual's ... sex ... mean that gender must be irrelevant to employment decisions." 490 U.S., at 240, 109 S.Ct. 1775 (plurality opinion); see also *id.,* at 260, 109 S.Ct. 1775 (White, J., concurring in judgment). To establish a violation of Title VII, we therefore held, a plaintiff had to prove that her sex was a motivating factor in an adverse employment decision. [FN3] We recognized that the employer had an affirmative defense: It could avoid a finding of liability by proving that it would have made the same decision even if it had not taken the plaintiff's sex into account. *Id.,* at 244-245, 109 S.Ct. 1775 (plurality opinion). But this affirmative defense did not alter the meaning of "because of." As we made clear, when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.,* at 241, 109 S.Ct. 1775; see also *id.,* at 260, 109 S.Ct. 1775 (White, J., concurring in judgment). We readily rejected the dissent's contrary assertion. "To construe

the words 'because of' as colloquial shorthand for 'but-for' causation," we said, "is to misunderstand them." *Id.*, at 240, 109 S.Ct. 1775 (plurality opinion). [FN4]

> FN3. Although Justice White stated that the plaintiff had to show that her sex was a "substantial" factor, while the plurality used the term "motivating" factor, these standards are interchangeable, as evidenced by Justice White's quotation of *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977): " '[T]he burden was properly placed upon [the plaintiff to show that the illegitimate criterion] was a "substantial factor"-or, *to put it in other words,* that it was a "motivating factor" ' " in the adverse decision. *Price Waterhouse*, 490 U.S., at 259, 109 S.Ct. 1775 (emphasis added); see also *id.*, at 249, 109 S.Ct. 1775 (plurality opinion) (using "substantial" and "motivating" interchangeably).
>
> FN4. We were no doubt aware that dictionaries define "because of" as "by reason of" or "on account of." *Ante,* at 2350. Contrary to the majority's bald assertion, however, this does not establish that the term denotes but-for causation. The dictionaries the Court cites do not, for instance, define "because of" as "*solely* by reason of" or "*exclusively* on account of." In *Price Waterhouse*, we recognized that the words "because of" do not mean "*solely* because of," and we held that the inquiry "commanded by the words" of the statute was whether gender was a motivating factor in the employment decision. 490 U.S., at 241, 109 S.Ct. 1775 (plurality opinion).

Today, however, the Court interprets the words "because of" in the ADEA "as colloquial shorthand for 'but-for' causation." *Ibid.* That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)). See generally *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) *(per curiam)*. For this reason, Justice KENNEDY's dissent in *Price Waterhouse* assumed the plurality's mixed-motives framework extended to the ADEA, see 490 U.S., at 292, 109 S.Ct. 1775, and the Courts of Appeals to have ***2355** considered the issue unanimously have applied *Price Waterhouse* to ADEA claims.[FN5]

> FN5. See *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (C.A.1 2000); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171 (C.A.2 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (C.A.3 1995); *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160 (C.A.4 2004); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (C.A.5 2004); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (C.A.6 2003); *Visser v. Packer Eng. Assocs., Inc.*, 924 F.2d 655 (C.A.7 1991) (en banc); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (C.A.8 1995); *Lewis v. YMCA*, 208 F.3d 1303 (C.A.11 2000) *(per curiam);* see also *Gonzagowski v. Widnall*, 115 F.3d 744, 749 (C.A.10 1997).

The Court nonetheless suggests that applying *Price Waterhouse* would be inconsistent with our ADEA precedents. In particular, the Court relies on our statement in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), that "[a disparate-treatment] claim 'cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*.' " *Ante,* at 2350. The italicized phrase is at best inconclusive as to the meaning of the ADEA's "because of" language, however, as other passages in *Hazen Paper Co.* demonstrate. We also stated, for instance, that the ADEA "requires the employer to *ignore* an employee's age," *id.*, at 612, 113 S.Ct. 1701 (emphasis added), and noted that "[w]hen the employer's decision is *wholly motivated* by factors other than

age," there is no violation, *id.*, at 611 (emphasis altered). So too, we indicated the "possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status," *id.*, at 613, 113 S.Ct. 1701-a classic mixed-motives scenario.

Moreover, both *Hazen Paper Co.* and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), on which the majority also relies, support the conclusion that the ADEA should be interpreted consistently with Title VII. In those non-mixed-motives ADEA cases, the Court followed the standards set forth in non-mixed-motives Title VII cases including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See, *e.g.*, *Reeves*, 530 U.S., at 141-143, 120 S.Ct. 2097; *Hazen Paper Co.*, 507 U.S., at 610, 113 S.Ct. 1701. This by no means indicates, as the majority reasons, that *mixed-motives* ADEA cases should follow those standards. Rather, it underscores that ADEA standards are generally understood to conform to Title VII standards.

II

The conclusion that "because of" an individual's age means that age was a motivating factor in an employment decision is bolstered by Congress' reaction to *Price Waterhouse* in the 1991 Civil Rights Act. As part of its response to "a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws," H.R.Rep. No. 102-40, pt. 2, p. 2 (1991), U.S.Code Cong. & Admin.News 1991, p. 694 (hereinafter H.R. Rep.), Congress eliminated the affirmative defense to liability that *Price Waterhouse* had furnished employers and provided instead that an employer's same-decision showing would limit only a plaintiff's remedies. See § 2000e-5(g)(2)(B). Importantly, however, Congress ratified *Price Waterhouse* 's interpretation of the plaintiff's burden of proof, rejecting the dissent's suggestion in that case that but-for causation was the proper standard. See ***2356** § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ADEA.[FN6] But it proceeds to ignore the conclusion compelled by this interpretation of the Act: *Price Waterhouse* 's construction of "because of" remains the governing law for ADEA claims.

> FN6. There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. See H.R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including ... the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a manner consistent with Title VII as amended by this Act," including the mixed-motives provisions).

Our recent decision in *Smith v. City of Jackson*, 544 U.S. 228, 240, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005), is precisely on point, as we considered in that case the effect of Congress' failure to amend the disparate-impact provisions of the ADEA when it amended the corresponding Title VII provisions in the 1991 Act. Noting that "the relevant 1991 amendments expanded the coverage of Title VII[but] did not amend the ADEA or speak to the subject of age discrimination," we held that " *Wards Cove* 's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA." 544 U.S., at 240, 125 S.Ct. 1536 (discussing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)); see also *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. ----, ----, 128 S.Ct. 2395, 2405-2406, 171 L.Ed.2d 283 (2008). If the *Wards Cove* disparate-impact framework that Congress flatly repudiated in the Title VII context continues to apply to ADEA claims, the mixed-motives framework that Congress substantially endorsed surely applies.

Curiously, the Court reaches the opposite conclusion, relying on Congress' partial ratification of *Price Waterhouse* to argue against that case's precedential value. It reasons that if the 1991 amendments do not apply to the ADEA, *Price Waterhouse* likewise must not apply because Congress effectively codified *Price Waterhouse* 's holding in the amendments. *Ante,* at 2348 - 2349. This does not follow. To the contrary, the fact that Congress endorsed this Court's interpretation of the "because of" language in *Price Waterhouse* (even as it rejected the employer's affirmative defense to liability) provides all the more reason to adhere to that decision's motivating-factor test. Indeed, Congress emphasized in passing the 1991 Act that the motivating-factor test was consistent with its original intent in enacting Title VII. See, *e.g.,* H.R. Rep., pt. 2, at 17 ("When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions"); *id.,* at 2 (stating that the Act "reaffirm[ed] that any reliance on prejudice in making employment decisions is illegal"); see also H.R. Rep., pt. 1, at 45; S.Rep. No. 101-315, pp. 6, 22 (1990).

The 1991 amendments to Title VII also provide the answer to the majority's argument that the mixed-motives approach has proved unworkable. *Ante,* at 2351 - 2352. Because Congress has codified a mixed-***2357** motives framework for Title VII cases-the vast majority of antidiscrimination lawsuits-the Court's concerns about that framework are of no moment. Were the Court truly worried about difficulties faced by trial courts and juries, moreover, it would not reach today's decision, which will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.

The Court's resurrection of the but-for causation standard is unwarranted. *Price Waterhouse* repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up-whether a mixed-motives jury instruction is ever proper in an ADEA case-is plainly yes.

III

Although the Court declines to address the question we granted certiorari to decide, I would answer that question by following our unanimous opinion in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). I would accordingly hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

The source of the direct-evidence debate is Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse.* Writing only for herself, Justice O'Connor argued that a plaintiff should be required to introduce "direct evidence" that her sex motivated the decision before the plurality's mixed-motives framework would apply. 490 U.S., at 276, 109 S.Ct. 1775. [FN7] Many courts have treated Justice O'Connor's opinion in *Price Waterhouse* as controlling for both Title VII and ADEA mixed-motives cases in light of our statement in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " Unlike the cases *Marks* addressed, however, *Price Waterhouse* garnered five votes for a single rationale: Justice White agreed with the plurality as to the motivating-factor test, see *supra,* at 2354, n. 3; he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer's credible testimony could suffice. 490 U.S., at 261, 109 S.Ct. 1775. Because Justice White provided a fifth vote for the "rationale explaining the result" of the *Price Waterhouse* decision, *Marks,* 430 U.S., at 193, 97 S.Ct. 990, his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.

FN7. While Justice O'Connor did not define precisely what she meant by "direct evidence," we contrasted such evidence with circumstantial evidence in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148,

156 L.Ed.2d 84 (2003). That Justice O'Connor might have intended a different definition does not affect my conclusion, as I do not believe a plaintiff is required to introduce any special type of evidence to obtain a mixed-motives instruction.

Any questions raised by *Price Waterhouse* as to a direct evidence requirement were settled by this Court's unanimous decision in *Desert Palace,* in which we held that a plaintiff need not introduce direct evidence to meet her burden in a mixed-motives case under Title VII, as amended by the Civil Rights Act of 1991. In construing***2358** the language of § 2000e-2(m), we reasoned that the statute did not mention, much less require, a heightened showing through direct evidence and that "Congress has been unequivocal when imposing heightened proof requirements." 539 U.S., at 99, 123 S.Ct. 2148. The statute's silence with respect to direct evidence, we held, meant that "we should not depart from the '[c]onventional rul[e] of civil litigation ... [that] requires a plaintiff to prove his case by a preponderance of the evidence', ... using 'direct or circumstantial evidence.' " *Ibid.* (quoting *Price Waterhouse,* 490 U.S., at 253, 109 S.Ct. 1775 (plurality opinion), and *Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)). We also recognized the Court's consistent acknowledgment of the utility of circumstantial evidence in discrimination cases.

Our analysis in *Desert Palace* applies with equal force to the ADEA. Cf. *ante,* at 2351 - 2352, n. 4. As with the 1991 amendments to Title VII, no language in the ADEA imposes a heightened direct evidence requirement, and we have specifically recognized the utility of circumstantial evidence in ADEA cases. See *Reeves,* 530 U.S., at 147, 120 S.Ct. 2097 (cited by *Desert Palace,* 539 U.S., at 99-100, 123 S.Ct. 2148). Moreover, in *Hazen Paper Co.,* we held that an award of liquidated damages for a "willful" violation of the ADEA did not require proof of the employer's motivation through direct evidence, 507 U.S., at 615, 113 S.Ct. 1701, and we have similarly rejected the imposition of special evidentiary rules in other ADEA cases. See, *e.g., Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). *Desert Palace* thus confirms the answer provided by the plurality and Justice White in *Price Waterhouse:* An ADEA plaintiff need not present direct evidence of discrimination to obtain a mixed-motives instruction.

IV

The Court's endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in *Price Waterhouse* and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking. I respectfully dissent.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.
I agree with Justice STEVENS that mixed-motive instructions are appropriate in the Age Discrimination in Employment Act context. And I join his opinion. The Court rejects this conclusion on the ground that the words "because of" require a plaintiff to prove that age was the "but-for" cause of his employer's adverse employment action. *Ante,* at 2350. But the majority does not explain why this is so. The words "because of" do not inherently require a showing of "but-for" causation, and I see no reason to read them to require such a showing.

It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we ***2359** *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision. In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is

to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer's decision. And the fact that a jury has found that age did play a role in the decision justifies the use of the word "because," *i.e.*, the employer dismissed the employee because of his age (and other things). See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). I therefore would see nothing wrong in concluding that the plaintiff has established a violation of the statute.

But the law need not automatically assess liability in these circumstances. In *Price Waterhouse*, the plurality recognized an affirmative defense where the defendant could show that the employee would have been dismissed regardless. The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. See *id.*, at 242, 109 S.Ct. 1775; cf. *ante,* at 2356 (STEVENS, J., dissenting) (describing the Title VII framework). I can see nothing unfair or impractical about allocating the burdens of proof in this way.

The instruction that the District Court gave seems appropriate and lawful. It says, in pertinent part:

> "Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:
>
> .....
>
> "[The] plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.
>
> "However, your verdict must be for defendant ... if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age.
>
> .....
>
> "As used in these instructions, plaintiff's age was 'a motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." App. 9-10.

For these reasons as well as for those set forth by Justice STEVENS, I respectfully dissent.

U.S.,2009.
Gross v. FBL Financial Services, Inc.
129 S.Ct. 2343, 106 Fair Empl.Prac.Cas. (BNA) 833, 92 Empl. Prac. Dec. P 43,584, 174 L.Ed.2d 119, 77 USLW 4531, 09 Cal. Daily Op. Serv. 7539, 2009 Daily Journal D.A.R. 8888, 21 Fla. L. Weekly Fed. S 958

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Supreme Court of the United States
Azel P. **SMITH**, et al., Petitioners,
v.
CITY OF **JACKSON**, **MISSISSIPPI**, et al.
No. 03-1160.

Argued Nov. 3, 2004.
Decided March 30, 2005.

Background: Police and public safety officers brought suit against city, under Age Discrimination in Employment Act (ADEA), alleging that salary increases they received were less generous than increases received by younger officers. The United States District Court for the Southern District of Mississippi, William H. Barbour, Jr., J., granted summary judgment for city. Officers appealed. The United States Court of Appeals for the Fifth Circuit, 351 F.3d 183, affirmed dismissal of disparate-impact claim. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:
(1) ADEA authorizes recovery in disparate-impact cases, but
(2) complaint did not set forth valid disparate-impact claim.

Affirmed.

Justice Scalia concurred in part and concurred in the judgment, and filed opinion.

Justice O'Connor concurred in the judgment, and filed opinion in which Justices Kennedy and Thomas joined.

Chief Justice Rehnquist took no part in the decision.

West Headnotes

[1] Civil Rights 78 1211

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1211 k. Disparate Impact. Most Cited Cases
Age Discrimination in Employment Act (ADEA) authorizes disparate-impact claims. (per Justice Stevens, with three Justices joining and one Justice concurring in judgment). Age Discrimination in Employment Act of 1967, § 4(a)(1, 2), 29 U.S.C.A. § 623(a)(1, 2).

[2] Civil Rights 78 1532

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1532 k. Pleading. Most Cited Cases
Officers alleging that salary increases they received were less generous than increases received by younger officers did not state disparate-impact claim under ADEA; complaint did not identify any specific test, requirement, or practice within pay plan that had adverse impact on older workers. Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C.A. § 623(a).

[3] Civil Rights 78 1532

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1532 k. Pleading. Most Cited Cases
It is not enough for employee asserting disparate-impact employment discrimination claim to simply allege that there is disparate impact on workers, or point to generalized policy that leads to such impact; rather, employee must isolate and identify specific employment practices that are allegedly responsible for any observed statistical disparities.

[4] Civil Rights 78 1207

78 Civil Rights

78II Employment Practices
78k1199 Age Discrimination
78k1207 k. Public Employment. Most Cited Cases

Civil Rights 78 1211

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1211 k. Disparate Impact. Most Cited Cases
City's revision of employee pay plan, granting raises to police and public safety officers in order to bring their salaries up to regional average, did not violate ADEA, even though older, higher ranking officers received raises representing lower percentage of their salaries; decision to grant larger raise to lower echelon employees for purpose of bringing salaries in line with that of surrounding police forces was decision based on "reasonable factor other than age" that responded to city's legitimate goal of retaining police officers. Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C.A. § 623(a).

***1537 *228** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In revising its employee pay plan, respondent City granted raises to all police officers and police dispatchers in an attempt to bring their starting salaries up to the regional average. Officers with less than five years' service received proportionately greater raises than those with more seniority, and most officers over 40 had more than five years of service. Petitioners, a group of older officers, filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), claiming, *inter alia,* that they were adversely affected by the plan because of their age. The District Court granted the City summary judgment. Affirming, the Fifth Circuit ruled that disparate-impact claims are categorically unavailable under the ADEA, but it assumed that the facts alleged by petitioners would entitle them to relief under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, which announced a disparate-impact theory of recovery for cases brought under Title VII of the Civil Rights Act of 1964 (Title VII).

Held: The judgment is affirmed.

351 F.3d 183, affirmed.

Justice STEVENS delivered the opinion of the Court with respect to Parts I, II, and IV, concluding:

1. The ADEA authorizes recovery in disparate-impact cases comparable to *Griggs.* Except for the substitution of "age" for "race, color, religion, sex, or national origin," the language of ADEA § 4(a)(2) and Title VII § 703(a)(2) is identical. Unlike Title VII, however, ADEA § 4(f)(1) significantly narrows its coverage by permitting any "otherwise prohibited" ***1538** action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision). Pp. 1540-1541.

2. Petitioners have not set forth a valid disparate-impact claim. Two textual differences between the ADEA and Title VII make clear that the disparate-impact theory's scope is narrower under the ADEA than under Title VII. One is the RFOA provision. The other is the amendment to Title VII in the Civil Rights Act of 1991, which modified this Court's *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733, holding that narrowly construed the scope of liability on a disparate-impact theory. Because the relevant 1991 amendments expanded Title VII's coverage ***229** but did not amend the ADEA or speak to age discrimination, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. Congress' decision to limit the ADEA's coverage by including the RFOA provision is consistent with the fact that age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. Here, petitioners have done little more than point out that the pay plan is relatively less generous to older workers than to younger ones. They have not, as required by *Wards Cove,* identified any specific test, requirement, or practice within the pay plan

that has an adverse impact on older workers. Further, the record makes clear that the City's plan was based on reasonable factors other than age. The City's explanation for the differential between older and younger workers was its perceived need to make junior officers' salaries competitive with comparable positions in the market. Thus, the disparate impact was attributable to the City's decision to give raises based on seniority and position. Reliance on these factors is unquestionably reasonable given the City's goal. Pp. 1544-1546.

Justice STEVENS, joined by Justice SOUTER, Justice GINSBURG, and Justice BREYER, concluded in Part III that the ADEA's text, the RFOA provision, and Equal Employment Opportunity Commission (EEOC) regulations all support the conclusion that a disparate-impact theory is cognizable under the ADEA. Pp. 1541-1544.

Justice SCALIA concluded that the reasoning in Part III of Justice STEVENS' opinion is a basis for deferring, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, to the EEOC's reasonable view that the ADEA authorizes disparate-impact claims. Pp. 1546-1549.

Justice O'CONNOR, joined by Justice KENNEDY and Justice THOMAS, concluded that the judgment should be affirmed on the ground that disparate impact claims are not cognizable under the ADEA. Pp. 1549-1560.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Part III, in which SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 1546. O'CONNOR, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post,* p. 1549. REHNQUIST, C. J., took no part in the decision of the case.
Counsel for petitioners were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate and C. Lee Reeves, Clinic members; Eric J. Feigin, Daniel S. Goldman, David B. Sapp, Mara Silver, and Sean Tonolli also participated.

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For U.S. Supreme Court briefs, see:2004 WL 1369172 (Pet.Brief)2004 WL 1881768 (Resp.Brief)2004 WL 2190435 (Reply.Brief)

Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with

respect to Part III, in which Justice SOUTER, Justice GINSBURG, and Justice BREYER join.

230** Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the "disparate-impact" theory of recovery announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. See ***231Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *Markham v. Geller*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari).

I

On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." [FN1] On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

FN1. App. 15.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate-impact" claim). The District Court granted summary judgment to the City on both ****1540** claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. 351 F.3d 183 (C.A.5 2003). Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of *Griggs*.

***232** We granted the officers' petition for certiorari, 541 U.S. 958, 124 S.Ct. 1724, 158 L.Ed.2d 398 (2004), and now hold that the ADEA does authorize recovery in "disparate-impact" cases comparable to *Griggs*. Because, however, we conclude that petitioners have not set forth a valid disparate-impact claim, we affirm.

II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination.[FN2] *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 587, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004). Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." § 715, 78 Stat. 265. The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 5 (June 1965), reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981), Doc. No. 5 (hereinafter Wirtz Report). Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Id.*, at 15.

FN2. See 110 Cong. Rec. 2596-2599 (1964) (amendment offered by Rep. Dowdy, voted down 123 to 94); *id.,* at 9911-9913, 13490-13492 (amendment offered by Sen. Smathers, voted down 63 to 28).

In response to that report Congress directed the Secretary to propose remedial legislation, see Fair Labor Standards Amendments of 1966, Pub.L. 89-601, § 606, 80 Stat. 845, and ***233** then acted favorably on his proposal. As enacted in 1967, § 4(a)(2) of the ADEA, now codified as 29 U.S.C. § 623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age ...." 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.[FN3] Unlike Title VII, however, § 4(f)(1) ****1541** of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

FN3. Like Title VII with respect to all protected classes except race, the ADEA provides an affirmative defense to liability where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business ...." § 4(f)(1), 81 Stat. 603. Cf. Civil Rights Act of 1964, § 703(e), 78 Stat. 256 ("Notwithstanding any other provision of this title, ... it shall not be [unlawful to perform any of the prohibited activities in §§ 703(a)-(d)] on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ... ").

III

[1] In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) *(per curiam).* We have consistently applied ***234** that presumption to language in the ADEA that was "derived *in haec verba* from Title VII." *Lorillard v. Pons,* 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).[FN4] Our unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance.

FN4. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 756, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979) (interpreting § 14(b) of the ADEA in light of § 706(c) of Title VII); *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 416, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985) (interpreting ADEA's bona fide occupational qualification exception in light of Title VII's BFOQ exception); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (interpreting the ADEA to apply to denial of privileges cases in a similar manner as under Title VII).

In *Griggs,* a case decided four years after the enactment of the ADEA, we considered whether § 703 of Title VII prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." 401 U.S., at 425-426, 91 S.Ct. 849. Accepting the Court of Appeals' conclusion that the employer had adopted the diploma and test requirements

without any intent to discriminate, we held that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*, at 432, 91 S.Ct. 849.

We explained that Congress had "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Ibid.* We relied on the fact that history is "filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but ***235** Congress has mandated the commonsense proposition that they are not to become masters of reality." *Id.*, at 433, 91 S.Ct. 849. And we noted that the Equal Employment Opportunity Commission (EEOC), which had enforcement responsibility, had issued guidelines that accorded with our view. *Id.*, at 433-434, 91 S.Ct. 849. We thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent.[FN5]

> FN5. The congressional purposes on which we relied in *Griggs* have a striking parallel to two important points made in the Wirtz Report. Just as the *Griggs* opinion ruled out discrimination based on racial animus as a problem in that case, the Wirtz Report concluded that there was no significant discrimination of that kind so far as older workers are concerned. Wirtz Report 6. And just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools, 401 U.S., at 430, 91 S.Ct. 849, the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers-unfairly if, despite his limited schooling, an older worker's years of experience have given him therelevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

****1542** While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Neither § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Ibid.* (explaining that in disparate-impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee' " (alteration in original) (quoting ***236**42 U.S.C. § 2000e-2(a)(2))). Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.[FN6]

> FN6. In reaching a contrary conclusion, Justice O'CONNOR ignores key textual differences between § 4(a)(1), which does not encompass disparate-impact liability, and § 4(a)(2). Paragraph (a)(1) makes it unlawful for an employer "to fail or refuse to hire ... *any individual* ... because of *such individual's* age." (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer "to limit ... his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* age." (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions-which are focused on his employees generally-and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect

to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age-the very definition of disparate impact. Justice O'CONNOR is therefore quite wrong to suggest that the textual differences between the two paragraphs are unimportant.

Griggs, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA. [FN7] Indeed, for ****1543** over two decades***237** after our decision in *Griggs,* the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a "disparate-impact" theory in appropriate cases.[FN8] It was only after our decision in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.[FN9] Our opinion in *Hazen Paper,* however, did not address or comment on the issue we decide today. In that case, we held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a *disparate-treatment* theory. The motivating factor was not, we held, the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating***238** an employee. *Id.,* at 612, 113 S.Ct. 1701.[FN10] While we noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA," *id.,* at 610, 113 S.Ct. 1701, we were careful to explain that we were not deciding "whether a disparate impact theory of liability is available under the ADEA ...," *ibid.* In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs.*

FN7. Justice O'CONNOR reaches a contrary conclusion based on the text of the statute, the legislative history, and the structure of the statute. As we explain above, n. 6, *supra,* her textual reasoning is not persuasive. Further, while Congress may have intended to remedy disparate-impact-type situations through "noncoercive measures" in part, there is nothing to suggest that it intended such measures to be the sole method of achieving the desired result of remedying practices that had an adverse effect on older workers. Finally, we agree that the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently. See *post,* at 1552 (O'CONNOR, J., concurring in judgment). However, Congress obviously considered those classes of individuals to be sufficiently similar to warrant enacting identical legislation, at least with respect to employment practices it sought to prohibit. While those differences, *coupled with a difference in the text of the statute* such as the RFOA provision, may warrant addressing disparate-impact claims in the two statutes differently, see *infra,* at 1544-1545, it does not justify departing from the plain text and our settled interpretation of that text.

FN8. B. Lindemann & D. Kadue, Age Discrimination in Employment Law 416, and n. 16 (2003) (citing *Holt v. Gamewell Corp.,* 797 F.2d 36, 37 (C.A.1 1986); *Maresco v. Evans Chemetics,* 964 F.2d 106, 115 (C.A.2 1992); *Blum v. Witco Chemical Corp.,* 829 F.2d 367, 372 (C.A.3 1987); *Wooden v. Board of Ed. of Jefferson Cty., Ky.,* 931 F.2d 376, 379 (C.A.6 1991); *Monroe v. United Air Lines,* 736 F.2d 394, 404, n. 3 (C.A.7 1984); *Dace v. ACF Industries,* 722 F.2d 374, 378 (C.A.8 1983), modified, 728 F.2d 976 (1984) *(per curiam); Palmer v. United States,* 794 F.2d 534, 536 (C.A.9 1986); *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419 (C.A.10 1993) (assuming disparate-impact theory); *MacPherson v. University of Montevallo,* 922 F.2d 766, 771 (C.A.11 1991); *Arnold v. United States Postal Serv.,* 863 F.2d 994, 998 (C.A.D.C.1988) (assuming disparate-impact theory)).

FN9. See, *e.g., Mullin v. Raytheon Co.,* 164 F.3d 696, 700 (C.A.1 1999) ("[T]ectonic plates shifted when the Court decided *[Hazen Paper]*"); *Gantt v. Wilson Sporting Goods Co.,* 143 F.3d 1042, 1048 (C.A.6

1998) ("[T]here is now considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory" (internal quotation marks omitted)). See also Lindemann & Kadue, Age Discrimination in Employment Law, at 417-418, n. 23 (collecting cases). In contrast to the First, Seventh, Tenth, and Eleventh Circuits, which have held that there is no disparate-impact theory, the Second, Eighth, and Ninth Circuits continue to recognize such a theory. *Id.,* at 417, and n. 22.

FN10. We did note, however, that the challenged conduct was actionable under § 510 of the Employee Retirement Income Security Act of 1974. 507 U.S., at 612, 113 S.Ct. 1701.

The Court of Appeals' categorical rejection of disparate-impact liability, like Justice O'CONNOR's, rested primarily on the RFOA provision and the majority's analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre- *Hazen Paper* consensus concerning disparate-impact liability. And *Hazen Paper* itself contains the response to the concern over the RFOA provision.

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) ... where the differentiation is based on reasonable factors other than age [discrimination] ...." 81 Stat. ****1544** 603. In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See *Hazen Paper,* 507 U.S., at 609, 113 S.Ct. 1701 ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age"). In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as Justice O'CONNOR suggests, a "safe harbor from liability," *post,* at 1551 (emphasis deleted), since there would ***239** be no liability under § 4(a). See *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (noting, in a Title VII case, that an employer can defeat liability by showing that the employee was rejected for "a legitimate, nondiscriminatory reason" without reference to an RFOA provision).

In disparate-impact cases, however, the allegedly "otherwise prohibited" activity is not based on age. *Ibid.* ("[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another ... " (quoting *Teamsters v. United States,* 431 U.S. 324, 335-336, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.[FN11]

FN11. We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based "on any other factor"-reasonable or unreasonable-"other than sex." The fact that Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive.

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U.S.C. § 628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory. The initial regulations, while not mentioning disparate impact by name, nevertheless permitted such claims if the employer relied on a factor that was not related to age. 29 CFR § 860.103(f)(1)(i) (1970) (barring physical fitness requirements that were not "reasonably necessary for the specific***240** work to be performed"). See also § 1625.7 (2004) (setting forth the

standards for a disparate-impact claim).

The text of the statute, as interpreted in *Griggs,* the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.

IV

Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the ****1545** Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court's holding in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), a case in which we narrowly construed the employer's exposure to liability on a disparate-impact theory. See Civil Rights Act of 1991, § 2, 105 Stat. 1071. While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.

Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, "certain circumstances ... unquestionably affect older workers more strongly, as a ***241** group, than they do younger workers." Wirtz Report 11. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

[2][3][4] Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in *Wards Cove,* it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is " 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.' " 490 U.S., at 656, 109 S.Ct. 2115 (quoting *Watson,* 487 U.S., at 994, 108 S.Ct. 2777; emphasis added). Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could "result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances ....' " 490 U.S., at 657, 109 S.Ct. 2115. In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City's plan was based on reasonable factors other than age.

The plan divided each of five basic positions-police officer, master police officer, police sergeant, police lieutenant, and deputy police chief-into a series of steps and half-steps. The wage for each range was based on a survey of comparable communities in the Southeast. Employees were then assigned a step (or half-step) within their position that corresponded***242** to the lowest step that would still give the individual a 2% raise. Most of the officers were in the three lowest ranks; in each of those ranks there were officers under age 40 and officers over 40. In none did their age affect their compensation. The few officers in the two highest ranks are all over 40. Their raises, though higher in dollar amount than the raises given to ****1546** junior officers, represented a smaller percentage of their salaries, which of course are higher than the salaries paid to their juniors. They are mem-

bers of the class complaining of the "disparate impact" of the award.

Petitioners' evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did.[FN12] Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority.[FN13] Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

FN12. Exh. C, Record 1192.

FN13. App. to Pet. for Cert. 41a.

Thus, the disparate impact is attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable facto[r] other than age" that responded to the City's legitimate goal of retaining police officers. Cf. *MacPherson v. University of Montevallo*, 922 F.2d 766, 772 (C.A.11 1991).

***243** While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Accordingly, while we do not agree with the Court of Appeals' holding that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

Justice SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join all except Part III of its opinion. As to that Part, I agree with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 601-602, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (SCALIA, J., dissenting).

This is an absolutely classic case for deference to agency interpretation. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, confers upon the EEOC authority to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the ADEA. § 628. Pursuant to this authority, the EEOC promulgated, after notice-and-comment rulemaking, see ****1547**46 Fed.Reg. 47724, 47727 (1981), a regulation that reads as follows:

> ***244** "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 CFR § 1625.7(d) (2004).

The statement of the EEOC which accompanied publication of the agency's final interpretation of the ADEA said the following regarding this regulation: "Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See*

Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir.1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)." 46 Fed.Reg., at 47725. The regulation affirmed, moreover, what had been the longstanding position of the Department of Labor, the agency that previously administered the ADEA, see *ante,* at 1544; 29 CFR § 860.103(f)(1)(i) (1970). And finally, the Commission has appeared in numerous cases in the lower courts, both as a party and as *amicus curiae,* to defend the position that the ADEA authorizes disparate-impact claims.[FN1] Even under the unduly constrained standards of agency deference recited in ***245***United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), the EEOC's reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference. *Id.*, at 229-231, and n. 12, 121 S.Ct. 2164. *A fortiori,* it is entitled to deference under the pre- *Mead* formulation of *Chevron,* to which I continue to adhere. See 533 U.S., at 256-257, 121 S.Ct. 2164 (SCALIA, J., dissenting).

> FN1. See, *e.g.,* Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellees in *Meacham v. Knolls Atomic Power Lab.,* No. 02-4083(L) etc. (CA2), p. 12, available at http:// www. eeoc. gov/ briefs/ meacha. txt (all Internet materials as visited Mar. 24, 2005, and available in Clerk of Court's case file) ("The Commission has consistently defended [the interpretation announced in 29 CFR § 1625.7(d) (2004)], arguing that a claim of discrimination under a disparate impact theory is cognizable"); Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellants Seeking Reversal in *Sitko v. Goodyear Tire & Rubber Co.,* No. 02-4083(CA6), p. 8, available at http:// www. eeoc. gov/ briefs/ sitkov. txt (pending); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950-951 (C.A.8 1999).

Justice O'CONNOR both denies that the EEOC has taken a position on the existence of disparate-impact claims and asserts that, even if it has, its position does not deserve deference. See *post,* at 1558-1560 opinion concurring in judgment). The first claim cannot be squared with the text of the EEOC's regulation, quoted above. This cannot possibly be read as agnostic on the question whether the ADEA prohibits employer practices that have a disparate impact on the aged. It provides that such practices "can *only* be justified as a business necessity," compelling the conclusion that, absent a "business necessity," such practices are prohibited.[FN2]

> FN2. Perhaps Justice O'CONNOR adopts the narrower position that, while the EEOC has taken the view that the ADEA prohibits actions that have a disparate impact, it has stopped short of recognizing "disparate impact *claims*." *Post,* at 1559 (opinion concurring in judgment) (emphasis added). If so, this position is equally misguided. The EEOC need not take the extra step of recognizing that individuals harmed by prohibited actions have a right to sue; the ADEA itself makes that automatic. 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter ... ").

****1548*** Justice O'CONNOR would not defer to the EEOC regulation, even if it read as it does, because, she says, the regulation "does not purport to interpret the language of § 4(a) at all," but is rather limited to an interpretation of the "reasonable factors other than age" (RFOA) clause of § 4(f)(1) of the ADEA, which she says is not at issue. *Post,* at 1559. This argument assumes, however, that the RFOA clause operates independently of the remainder of the ADEA. It does not. Section 4(f)(1) provides, in relevant part:

> ***246*** "It shall not be unlawful for an employer, employment agency, or labor organization ... to take any action *otherwise prohibited* under subsections (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age ...." 29 U.S.C. § 623(f)(1) (emphasis added).

As this text makes clear, the RFOA defense is relevant *only* as a response to employer actions "otherwise prohibited" by the ADEA. Hence, the unavoidable meaning of the regulation at issue is that the ADEA prohibits employer actions that have an "adverse impact on individuals within the protected age

group." 29 CFR § 1625.7(d) (2004). And, of course, the only provision of the ADEA that could conceivably be interpreted to effect such a prohibition is § 4(a)(2)-the provision that Justice O'CONNOR maintains the EEOC "does not purport to interpret ... at all." *Post,* at 1559.[FN3]

> FN3. Justice O'CONNOR argues that the regulation does not necessarily construe § 4(a)(2) to prohibit disparate impact, because disparate treatment *also* can have the effect which the regulation addresses-viz., "an adverse impact on individuals within the protected age group," 29 CFR § 1625.7(d) (2004). See *post,* at 1559. That is true enough. But the question here is not whether disparate-treatment claims (when they have a disparate impact) are *also* covered by the regulation; it is whether disparate-impact claims of *all* sorts *are* covered; and there is no way to avoid the conclusion (consistently reaffirmed by the agency's actions over the years) that they are. That is also a complete response to Justice O'CONNOR's point that the regulation could not refer to § 4(a)(2) because it includes "applicants for employment," who are protected only under § 4(a)(1). Perhaps applicants for employment are covered only when (as Justice O'CONNOR posits) disparate treatment results in disparate impact; or perhaps the agency's attempt to sweep employment applications into the disparate-impact prohibition is mistaken. But whatever *in addition* it may cover, or may erroneously seek to cover, it is impossible to contend that the regulation does *not* cover actions that "limit, segregate, or classify" employees in a way that produces a disparate impact on those within the protected age group; and the only basis for its interpretation that those actions are prohibited is § 4(a)(2).

***247** Lastly, Justice O'CONNOR argues that the EEOC's interpretation of what is "otherwise prohibited" by the ADEA is not entitled to deference because the Court concludes that the same regulation's interpretation of *another term*-the term "reasonable factors other than age," which the regulation takes to include only "business necessity"-is unreasonable. *Post,* at 1560. Her logic seems to be that, because the two interpretations appear in the same paragraph, they should stand or fall together. She cites no case for this proposition, and it makes little sense. If the two simultaneously adopted interpretations were contained in *distinct* paragraphs, the invalidation of one would not, of course, render the other infirm. (Justice O'CONNOR does not mean to imply, I assume, that our rejection of the EEOC's application of the phrase " 'reasonable factors other than age' " to disparate-impact claims in paragraph (d) of § 1625.7 relieves the lower courts of the obligation to ****1549** defer to the EEOC's other applications of the same phrase in paragraph (c) or (e).) I can conceive no basis for a different rule simply because the two simultaneously adopted interpretations appear in the same paragraph.

The EEOC has express authority to promulgate rules and regulations interpreting the ADEA. It has exercised that authority to recognize disparate-impact claims. And, for the reasons given by the plurality opinion, its position is eminently reasonable. In my view, that is sufficient to resolve this case.

Justice O'CONNOR, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment.

"Disparate treatment ... captures the essence of what Congress sought to prohibit in the [Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*] It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." ***248***Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). In the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent. See *ibid.; Markham v. Geller,* 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981) (REHNQUIST, J., dissenting from denial of certiorari). I decline to join the Court in doing so today.

I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA. The ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such

claims. Moreover, the significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 counsel against transposing to the former our construction of the latter in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Finally, the agencies charged with administering the ADEA have never authoritatively construed the statute's prohibitory language to impose disparate impact liability. Thus, on the precise question of statutory interpretation now before us, there is no reasoned agency reading of the text to which we might defer.

I

A

Our starting point is the statute's text. Section 4(a) of the ADEA makes it unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age ...." 29 U.S.C. § 623(a).

***249** Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961); see also *Teamsters v. United States,* 431 U.S. 324, 335-336, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (" 'Disparate treatment' ... is the most easily understood ****1550** type of discrimination. The employer simply treats some people less favorably than others *because of* their [protected characteristic]. Proof of discriminatory motive is critical" (emphasis added)).

Petitioners look instead to the second paragraph, § 4(a)(2), as the basis for their disparate impact claim. But petitioners' argument founders on the plain language of the statute, the natural reading of which requires proof of discriminatory intent. Section 4(a)(2) uses the phrase "because of ... age" in precisely the same manner as does the preceding paragraph-to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's age.

Paragraphs (a)(1) and (a)(2) do differ in one informative respect. The employer actions targeted by paragraph (a)(1)-*i.e.,* refusing to hire, discharging, or discriminating against-are *inherently harmful* to the targeted individual. The actions referred to in paragraph (a)(2), on the other hand-*i.e.,* limiting, segregating, or classifying-are *facially neutral.* Accordingly, paragraph (a)(2) includes additional language which clarifies that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must "deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee." That distinction aside, the structures of paragraphs (a)(1) and (a)(2) are otherwise identical. Each paragraph prohibits an ***250** employer from taking specified adverse actions against an individual "because of such individual's age."

The plurality instead reads paragraph (a)(2) to prohibit employer actions that "adversely affect [an individual's] status as an employe[e] because of such individual's age." Under this reading, "because of ... age" refers to the *cause of the adverse effect* rather than the *motive for the employer's action.* See *ante,* at 1542. This reading is unpersuasive for two reasons. First, it ignores the obvious parallel between paragraphs (a)(1) and (a)(2) by giving the phrase "because of such individual's age" a different meaning in each of the two paragraphs. And second, it ignores the drafters' use of a comma separating the "because of ... age" clause from the preceding language. That comma makes plain that the "because of ... age" clause should not be read, as the plurality would have it, to modify only the "adversely affect" phrase. See, *e.g., United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290

(1989) (interpreting statute in light of the drafters' use of a comma to set aside a particular phrase from the following language); see also B. Garner, A Dictionary of Modern Legal Usage 101 (2d ed. 1995) ("Generally, the word *because* should not follow a comma"). Rather, the "because of ... age" clause is set aside to make clear that it modifies the *entirety* of the preceding paragraph: An employer may not, because of an individual's age, limit, segregate, or classify his employees in a way that harms that individual.

The plurality also argues that its reading is supported by the supposed "incongruity" between paragraph (a)(2)'s use of the plural in referring to the employer's actions ("limit, segregate, or classify his *employees* ") and its use of the singular in the "because of such *individual's* age" clause. (Emphases added.) *Ante,* at 1542, n. 6. Not so. For the reasons just stated, the "because of ... age" clause modifies *all* of the preceding language of paragraph (a)(2). That preceding language is phrased in *both* the plural (insofar as it ***251** refers to the employer's actions relating to *employees*) *and* the singular (insofar as it requires that such action actually harm ****1551** *an individual*). The use of the singular in the "because of ... age" clause simply makes clear that paragraph (a)(2) forbids an employer to limit, segregate, or classify his employees if that decision is taken because of *even one* employee's age and *that individual* (alone or together with others) is harmed.

B

While § 4(a)(2) of the ADEA makes it unlawful to intentionally discriminate because of age, § 4(f)(1) clarifies that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section ... where the differentiation is based on reasonable factors other than age ...." 29 U.S.C. § 623(f)(1). This "reasonable factors other than age" (RFOA) provision "insure[s] that employers [are] permitted to use neutral criteria" other than age, *EEOC v. Wyoming,* 460 U.S. 226, 232-233, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), even if this results in a disparate adverse impact on older workers. The provision therefore expresses Congress' clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination. That policy, in my view, cannot easily be reconciled with the plurality's expansive reading of § 4(a)(2).

The plurality, however, reasons that the RFOA provision's language instead confirms that § 4(a) authorizes disparate impact claims. If § 4(a) prohibited only intentional discrimination, the argument goes, then the RFOA provision would have no effect because any action based on a factor other than age would not be " 'otherwise prohibited' " under § 4(a). See *ante,* at 1543-1544. Moreover, the plurality says, the RFOA provision applies only to employer actions based on *reasonable* factors other than age-so employers may still be held liable for actions based on *un* reasonable nonage factors. See *ante,* at 1544.

***252** This argument misconstrues the purpose and effect of the RFOA provision. Discriminatory intent *is* required under § 4(a), for the reasons discussed above. The role of the RFOA provision is to afford employers an independent *safe harbor* from liability. It provides that, where a plaintiff has made out a prima facie case of intentional age discrimination under § 4(a)-thus "creat[ing] a presumption that the employer unlawfully discriminated against the employee," *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)-the employer can rebut this case by producing evidence that its action was based on a reasonable nonage factor. Thus, the RFOA provision codifies a safe harbor analogous to the "legitimate, nondiscriminatory reason" (LNR) justification later recognized in Title VII suits. *Ibid.; McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Assuming the *McDonnell Douglas* framework applies to ADEA suits, see *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), this "rebuttal" function of the RFOA provision is arguably redundant with the judicially established LNR justification. See *ante,* at 1543-1544. But, at most, that merely demonstrates Congress' abundance of caution in codifying an *express statutory exemption* from liability in the absence of discriminatory intent. See *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 646, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990) (provisions that, although

"technically unnecessary," are sometimes "inserted out of an abundance of caution-a drafting imprecision venerable enough to have left its mark **1552 on legal Latin *(ex abundanti cautela)* "). It is noteworthy that even after *McDonnell Douglas* was decided, lower courts continued to rely on the RFOA exemption, in lieu of the LNR justification, as the basis for rebutting a prima facie case of age discrimination. See, *e.g.*, *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (C.A.11 1983) *(per curiam)*; *Schwager v. Sun Oil Co. of Pa.*, 591 F.2d 58, 61 (C.A.10 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-583 (C.A.5 1975) *(per curiam)*.

**253 In any event, the RFOA provision also plays a distinct (and clearly nonredundant) role in "mixed-motive" cases. In such cases, an adverse action taken in substantial part because of an employee's age may be "otherwise prohibited" by § 4(a). See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262-266, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'CONNOR, J., concurring in judgment). The RFOA exemption makes clear that such conduct is nevertheless lawful so long as it is "based on" a reasonable factor other than age.

Finally, the RFOA provision's reference to "reasonable" factors serves only to prevent the employer from gaining the benefit of the statutory safe harbor by offering an irrational justification. Reliance on an unreasonable nonage factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); see also *Hazen Paper*, 507 U.S., at 613-614, 113 S.Ct. 1701.

II

The legislative history of the ADEA confirms what its text plainly indicates-that Congress never intended the statute to authorize disparate impact claims. The drafters of the ADEA and the Congress that enacted it understood that age discrimination was qualitatively different from the kinds of discrimination addressed by Title VII, and that many legitimate employment practices would have a disparate impact on older workers. Accordingly, Congress determined that the disparate impact problem would best be addressed through noncoercive measures, and that the ADEA's prohibitory provisions should be reserved for combating intentional age-based discrimination.

A

Although Congress rejected proposals to address age discrimination in the Civil Rights Act of 1964, § 715 of that Act directed the Secretary of Labor to undertake a study of age **254 discrimination in employment and to submit to Congress a report containing "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable," 78 Stat. 265. See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586-587, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004); *EEOC v. Wyoming*, 460 U.S., at 229, 103 S.Ct. 1054. In response, Secretary Willard Wirtz submitted the report that provided the blueprint for the ADEA. See Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (June 1965), reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981), Doc. No. 5 (hereinafter Wirtz Report or Report). Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning. See generally Blumrosen, Interpreting the ADEA: Intent or Impact 14-20, in Age **1553 Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 83-89 (M. Lake ed.1982); see also *General Dynamics, supra*, at 587-590, 124 S.Ct. 1236 (relying on the Wirtz Report to interpret the ADEA); *EEOC v. Wyoming, supra*, at 230-231, 103 S.Ct. 1054 (discussing the Report's role in the drafting of the ADEA).

The Wirtz Report reached two conclusions of central relevance to the question presented by this case. First, the Report emphasized that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII of the Civil Rights Act of 1964 (*i.e.*, race, color, religion, sex, and national origin discrimination). Most importantly-in stark contrast to the types of discrimination addressed by Title VII-the Report found no evidence that age discrimi-

nation resulted from intolerance or animus toward older workers. Rather, age discrimination was based primarily upon unfounded assumptions about the relationship between an individual's age and her ability to perform a job. Wirtz Report 2. In addition, whereas ability is nearly always***255** completely unrelated to the characteristics protected by Title VII, the Report found that, in some cases, "there is in fact a relationship between [an individual's] age and his ability to perform the job." *Ibid.* (emphasis deleted).

Second, the Wirtz Report drew a sharp distinction between " 'arbitrary discrimination' " (which the Report clearly equates with disparate treatment) and circumstances or practices having a disparate impact on older workers. See *id.,* at 2, 21-22. The Report defined "arbitrary" discrimination as adverse treatment of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.,* at 2 (emphasis in original). While the "most obvious kind" of arbitrary discrimination is the setting of unjustified maximum age limits for employment, *id.,* at 6, naturally the Report's definition encompasses a broad range of disparate treatment.

The Report distinguished such "arbitrary" (*i.e.,* intentional and unfounded) discrimination from two other phenomena. One involves differentiation of employees based on a genuine relationship between age and ability to perform a job. See *id.,* at 2. In this connection, the Report examined "circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers," including questions of health, educational attainment, and technological change. *Id.,* at 11-14.[FN1] In addition, the Report***256** assessed****1554** "institutional arrangements"-such as seniority rules, workers' compensation laws, and pension plans-which, though intended to benefit older workers, might actually make employers less likely to hire or retain them. *Id.,* at 2, 15-17.

> FN1. It is in this connection that the Report refers to formal employment standards requiring a high school diploma. See Wirtz Report 3. The Wirtz Report did say that such a requirement would be "unfair" if an older worker's years of experience had given him an equivalent education. *Ibid.* But the plurality is mistaken to find in this statement a congressional "goal" of eliminating job requirements with a disparate impact on older workers. See *ante,* at 1541-1542, n. 5. Rather, the Wirtz Report discussed the diploma requirement in the context of a broader discussion of the effects of "wholly impersonal forces-most of them part of what is properly, if sometimes too casually, called 'progress.' " Wirtz Report 3. These forces included "the pace of changing technology, changing jobs, *changing educational* requirements, and changing personnel practices," which "increase[d] the need for special efforts if older workers' employment prospects are to improve significantly." *Ibid.* (emphasis added); see also *id.,* at 11-15 (discussing the educational attainments of older workers, together with health and technological change, in a section entitled "The Necessary Recognition of Forces of Circumstance"). The Report recommended that such forces be addressed through noncoercive instead of prohibitory measures, and it specifically focused on the need for educational opportunities for older workers. See *id.,* at 23-25.

The Report specifically recommended legislative action to prohibit "arbitrary discrimination," *i.e.,* disparate treatment. *Id.,* at 21-22. In sharp contrast, it recommended that the other two types of "discrimination"-both involving factors or practices having a disparate impact on older workers-be addressed through noncoercive measures: programs to increase the availability of employment; continuing education; and adjustment of pension systems, workers' compensation, and other institutional arrangements. *Id.,* at 22-25. These recommendations found direct expression in the ADEA, which was drafted at Congress' command that the Secretary of Labor make "specific legislative recommendations for implementing the [Wirtz Report's] conclusions," Fair Labor Standards Amendments of 1966, § 606, 80 Stat. 845. See also *General Dynamics, supra,* at 589, 124 S.Ct. 1236 ("[T]he ADEA ... begins with statements of purpose and findings that mirror the Wirtz Report").

B

The ADEA's structure confirms Congress' determination to prohibit only "arbitrary" discrimination (*i.e.,* disparate treatment based on unfounded assumptions), while addressing practices with a disparate adverse impact on older workers***257** through noncoercive measures. Section 2-which sets forth the findings and purposes of the statute-draws a clear distinction between "the setting of arbitrary age limits regardless of potential for job performance" and "certain otherwise desirable practices [that] may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). In response to these problems, § 2 identifies three purposes of the ADEA: "[1] to promote employment of older persons based on their ability rather than age; [2] to prohibit arbitrary age discrimination in employment; [and 3] to help employers and workers find ways of meeting problems arising from the impact of age on employment." § 621(b).

Each of these three purposes corresponds to one of the three substantive statutory sections that follow. Section 3 seeks to "promote employment of older persons" by directing the Secretary of Labor to undertake a program of research and education related to "the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy." § 622(a). Section 4, which contains the ADEA's core prohibitions, corresponds to the second purpose: to "prohibit arbitrary age discrimination in employment." Finally, § 5 addresses the third statutory purpose by requiring the Secretary of Labor to undertake a study of "institutional and other arrangements giving rise to involuntary retirement" and to submit any resulting findings and legislative recommendations to Congress. § 624(a)(1).

Section 4-including § 4(a)(2)-must be read in light of the express statutory purpose the provision was intended to effect: the prohibition of "arbitrary age discrimination in employment." § 621(b). As the legislative history makes plain, "arbitrary" age discrimination had a very specific meaning for the ADEA's drafters. It meant disparate *treatment* of older workers, predominantly because of unfounded assumptions about the relationship between age and ability. See *supra,* at 1553-1554. Again, such intentional discrimination****1555** was clearly distinguished from circumstances and practices***258** merely having a disparate impact on older workers, which-as ADEA §§ 2, 3, and 5 make clear-Congress intended to address through research, education, and possible future legislative action.

C

In addition to this affirmative evidence of congressional intent, I find it telling that the legislative history is devoid of any discussion of disparate impact claims or of the complicated issues such claims raise in the ADEA context. See Gold, Disparate Impact Under the Age Discrimination in Employment Act of 1967, 25 Berkeley J. Emp. & Lab. L. 1, 40 (2004). At the time the ADEA was enacted, the predominant focus of antidiscrimination law was on intentional discrimination; the concept of disparate impact liability, by contrast, was quite novel. See, *e.g.,* Gold, *Griggs'* Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Indus. Rel. L.J. 429, 518-520 (1985); Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L.Rev. 59, 69-71 (1972-1973). Had Congress intended to inaugurate disparate impact liability in the ADEA, one would expect to find some indication of that intent in the text and the legislative history. There is none.

D

Congress' decision not to authorize disparate impact claims is understandable in light of the questionable utility of such claims in the age-discrimination context. No one would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination, like racial minorities have. See *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313-314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) *(per curiam);* see also Wirtz Report 5-6. Accordingly, disparate impact liability under the ADEA cannot be justified, and is not necessary, as a means of redressing the cumulative results***259** of past discrimination. Cf. *Griggs,* 401 U.S., at 430, 91 S.Ct. 849 (reasoning that disparate impact liability is necessary under Title VII to prevent perpetuation of the results of past racial dis-

crimination).

Moreover, the Wirtz Report correctly concluded that-unlike the classifications protected by Title VII-there often *is* a correlation between an individual's age and her ability to perform a job. Wirtz Report 2, 11-15. That is to be expected, for "physical ability generally declines with age," *Murgia, supra,* at 315, 96 S.Ct. 2562, and in some cases, so does mental capacity, see *Gregory v. Ashcroft,* 501 U.S. 452, 472, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Perhaps more importantly, advances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-á-vis younger workers. Wirtz Report 11-15. Beyond these performance-affecting factors, there is also the fact that many employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority. See, *e.g., Finnegan v. Trans World Airlines, Inc.,* 967 F.2d 1161, 1164 (C.A.7 1992) ("[V]irtually all elements of a standard compensation package are positively correlated with age"). Accordingly, many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers. Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.

****1556** III

The plurality and Justice SCALIA offer two principal arguments in favor of their reading of the statute: that the relevant provision of the ADEA should be read *in pari materia* with the parallel provision of Title VII, and that we should give interpretive weight or deference to agency statements relating to disparate impact liability. I find neither argument persuasive.

***260** A

The language of the ADEA's prohibitory provisions was modeled on, and is nearly identical to, parallel provisions in Title VII. See *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 357, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995); *Lorillard v. Pons,* 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). Because *Griggs, supra,* held that Title VII's § 703(a)(2) permits disparate impact claims, the plurality concludes that we should read § 4(a)(2) of the ADEA similarly. *Ante,* at 1541-1543.

Obviously, this argument would be a great deal more convincing had *Griggs* been decided *before* the ADEA was enacted. In that case, we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims. See, *e.g., Department of Energy v. Ohio,* 503 U.S. 607, 626, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992); *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). But *Griggs* was decided four years *after* the ADEA's enactment, and there is no reason to suppose that Congress in 1967 could have foreseen the interpretation of Title VII that was to come. See *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 523, n. 9, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994); see also *supra,* at 1555 (discussing novelty of disparate impact theory at the time of the ADEA's enactment).

To be sure, where two statutes use similar language we generally take this as "a strong indication that [they] should be interpreted *pari passu.*" *Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) *(per curiam).* But this is not a rigid or absolute rule, and it " 'readily yields' " to other indicia of congressional intent. *General Dynamics,* 540 U.S., at 595, 124 S.Ct. 1236 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932)). Indeed, " 'the meaning [of the same words] well may vary to meet the purposes of the law.' " *United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (quoting *Atlantic Cleaners & Dyers, supra,* at 433, 52 S.Ct. 607; alteration in original). Accordingly, we have not hesitated to give ***261** a different reading to the same language-whether appearing in separate statutes or in separate provisions of the same statute-if there is strong evidence that Congress did not intend the language to be used uniformly. See, *e.g., General Dynamics, supra,* at 595-597, 124 S.Ct. 1236 ("age" has different meaning where used in different parts of the ADEA); *Cleveland Indians, supra,* at 213, 121 S.Ct. 1433

("wages paid" has different meanings in different provisions of Title 26 U.S.C.); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-344, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("employee" has different meanings in different parts of Title VII); *Fogerty, supra,* at 522-525, 114 S.Ct. 1023 (Copyright Act's attorney's fees provision has different meaning than the analogous provision in Title VII, despite their "virtually identical language"). Such is the case here.

**1557 First, there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent. Most importantly, whereas the ADEA's RFOA provision protects employers from liability for any actions not motivated by age, see *supra,* at 1551-1552, Title VII lacks any similar provision. In addition, the ADEA's structure demonstrates Congress' intent to combat intentional discrimination through § 4's prohibitions while addressing employment practices having a disparate impact on older workers through independent noncoercive mechanisms. See *supra,* at 1554-1555. There is no analogy in the structure of Title VII. Furthermore, as the Congresses that adopted *both* Title VII *and* the ADEA clearly recognized, the two statutes were intended to address qualitatively different kinds of discrimination. See *supra,* at 1552-1553. Disparate impact liability may have a legitimate role in combating the types of discrimination addressed by Title VII, but the nature of aging and of age discrimination makes such liability inappropriate for the ADEA. See *supra,* at 1555.

Finally, nothing in the Court's decision in *Griggs* itself provides any reason to extend its holding to the ADEA. As the plurality tacitly acknowledges, *ante,* at 1542, the decision *262 in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose, i.e.,*

> "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S., at 429-430, 91 S.Ct. 849.

In other words, the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, see *Murgia,* 427 U.S., at 313-314, 96 S.Ct. 2562, and it therefore should not control our decision here.

Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent. In my judgment, the significant differences between Title VII and the ADEA are more than sufficient to overcome the default presumption that similar language is to be read similarly. See *Fogerty, supra,* at 523-524, 114 S.Ct. 1023 (concluding that the "normal indication" that similar language should be read similarly is "overborne" by differences between the legislative history and purposes of two statutes).

B

The plurality asserts that the agencies charged with the ADEA's administration "have consistently interpreted the [statute] to authorize relief on a disparate-impact theory." *Ante,* at 1544. In support of this claim, the plurality describes a 1968 interpretive bulletin issued by the Department of Labor as "permitt[ing]" disparate impact claims. *Ibid.* (citing 29 CFR § 860.103(f)(1)(i) (1970)). And the plurality*263 cites, without comment, an Equal Employment Opportunity Commission (EEOC) policy statement construing the RFOA provision. *Ante,* at 1544 (citing 29 CFR § 1625.7 (2004)). It is unclear what interpretive value the plurality means to assign to these agency statements. But Justice SCALIA, at least, thinks that the EEOC statement is entitled to deference under **1558*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and that "that is sufficient to resolve this case." *Ante,* at 1549 (opinion concurring in part and concurring in judgment). I disagree and, for the reasons that follow, would give no weight to the statements in question.

The 1968 Labor Department bulletin to which the

plurality alludes was intended to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.' " 29 CFR § 860.1 (1970) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). In discussing the RFOA provision, the bulletin states that "physical fitness requirements" and "[e]valuation factors such as quantity or quality of production, or educational level" can qualify as reasonable nonage factors, so long as they have a valid relationship to job qualifications and are uniformly applied. §§ 860.103(f)(1), (2). But the bulletin does not construe the ADEA's *prohibitory* provisions, nor does it state or imply that § 4(a) authorizes disparate impact claims. Rather, it establishes "a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the" RFOA exemption. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 172, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) (discussing 1968 bulletin's interpretation of the § 4(f)(2) exemption). Moreover, the very same bulletin states unequivocally that "[t]he clear purpose [of the ADEA] is to insure that age, within the limits prescribed by the Act, is not *a determining factor in making any decision* regarding the hiring, dismissal, promotion or any other term, condition or privilege of employment of an ***264** individual." § 860.103(c) (emphasis added). That language is all about discriminatory intent.

The EEOC statement cited by the plurality and relied upon by Justice SCALIA is equally unhelpful. This "interpretative rule or policy statement," promulgated in 1981, superseded the 1968 Labor Department bulletin after responsibility for enforcing the ADEA was transferred from Labor to the EEOC. See 46 Fed.Reg. 47724 (1981). It states, in relevant part:

> "[W]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 CFR § 1625.7(d) (2004).

Like the 1968 bulletin it replaces, this statement merely spells out the agency's view, for purposes of its enforcement policy, of what an employer must do to be certain of gaining the safety of the RFOA haven. It says nothing about whether disparate impact claims are authorized by the ADEA.

For Justice SCALIA, "[t]his is an absolutely classic case for deference to agency interpretation." *Ante,* at 1546 (opinion concurring in part and concurring in judgment). I disagree. Under *Chevron,* we will defer to a reasonable agency interpretation of ambiguous statutory language, see 467 U.S., at 843-844, 104 S.Ct. 2778, provided that the interpretation has the requisite "force of law," *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). The rationale for such deference is that Congress has explicitly or implicitly delegated to the agency responsible for administering a statute the authority to choose among permissible constructions of ambiguous statutory text. See ****1559***Chevron, supra,* at 844, 104 S.Ct. 2778. The question now before us is not what it takes to qualify for the RFOA exemption, ***265** but rather whether § 4(a)(2) of the ADEA authorizes disparate impact claims. But the EEOC statement does not purport to interpret the language of § 4(a) at all. Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner. As to the specific question presented, therefore, the regulation is not entitled to any deference. See *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 106-109, and n. 17, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993); see also *SEC v. Sloan*, 436 U.S. 103, 117-118, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287-289, and n. 5, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978).[FN2]

> FN2. Because the EEOC regulation does not actually interpret the text at issue, we need not address the degree of deference to which the regulation would otherwise be entitled. Cf. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (declining to address whether EEOC's regulations interpreting the ADEA are entitled to *Chevron* deference).

Justice SCALIA's attempt to link the EEOC's RFOA regulation to § 4(a)(2) is premised on a dubious chain of inferences that, in my view, highlights the hazards of his approach. Because the RFOA provision is "relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA," he reasons, the "unavoidable meaning" of the EEOC statement is that the agency interprets the ADEA to prohibit "employer actions that have an 'adverse impact on individuals within the protected age group.' " *Ante,* at 1548 (opinion concurring in part and concurring in judgment) (quoting 29 CFR § 1625.7(d) (2004)). But, of course, *disparate treatment* clearly has an "adverse impact on individuals within the protected age group," *ibid.,* and Justice SCALIA's reading of the EEOC's rule is hardly "unavoidable." The regulation says only that if an employer wants to rely on a practice-say, a physical fitness test-as the basis for an exemption from liability, and that test adversely affects older workers, the employer can be sure of qualifying for the exemption only if the test is sufficiently job related. Such a ***266** limitation makes sense in disparate treatment cases. A test that harms older workers and is unrelated to the job may be a pretext for-or even a means of effectuating-intentional discrimination. See *supra,* at 1552. Justice SCALIA completes his analytical chain by inferring that the EEOC regulation *must* be read to interpret *§ 4(a)(2)* to allow disparate impact claims because that is the only provision of the ADEA that could "conceivably" be so interpreted. *Ante,* at 1548. But the support for that inference is doubtful, to say the least. The regulation specifically refers to employment practices claimed as a basis for "different treatment of employees *or applicants for employment,*" 29 CFR § 1625.7(d) (2004) (emphasis added). Section 4(a)(2), of course, does not apply to "applicants for employment" at all-it is only § 4(a)(1) that protects this group. See 29 U.S.C. § 623(a). That suggests that the EEOC must have read the RFOA to provide a defense against claims under § 4(a)(1)-which unquestionably permits only disparate treatment claims, see *supra,* at 1549-1550.

This discussion serves to illustrate why it makes little sense to attribute to the agency a construction of the relevant statutory text that the agency itself has not ****1560** actually articulated so that we can then "defer" to that reading. Such an approach is particularly troubling where applied to a question as weighty as whether a statute does or does not subject employers to liability absent discriminatory intent. This is not, in my view, what *Chevron* contemplated.

As an interpretation of the *RFOA provision,* moreover, the EEOC regulation is both unreasonable on its face and directly at odds with the Court's holding in today's case. It says that the RFOA exemption is available only if the employer's practice is justified by a "business necessity." But the Court has rejected that reading of the RFOA provision, and rightly so: There may be many "reasonable" means by which an employer can advance its goals, and a given nonage factor can certainly be "reasonable" without being necessary. ***267** *Ante,* at 1546; see also *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 419, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985) (distinguishing " 'reasonable necessity' " standard from "reasonableness"). Of course, it is elementary that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Betts,* 492 U.S., at 171, 109 S.Ct. 2854. The agency clearly misread the RFOA provision it was attempting to construe. That error is not necessarily dispositive of the disparate impact question. But I think it highlights the improvidence of giving weight (let alone deferring) to the regulation's *purported assumption* that an *entirely different provision* of the statute, which is not even the subject of the regulation, authorizes disparate impact claims. In my view, we should simply acknowledge that this regulation is of no help in answering the question presented.

IV

Although I would not read the ADEA to authorize disparate impact claims, I agree with the Court that, if such claims are allowed, they are strictly circumscribed by the RFOA exemption. See *ante,* at 1545-1546. That exemption requires only that the challenged employment practice be based on a "reasonable" nonage factor-that is, one that is rationally related to some legitimate business objective. I also agree with the Court, *ante,* at 1544-1545, that, if disparate impact claims are to be permitted under the ADEA, they are governed by the standards set forth in our decision in *Wards Cove Packing Co. v. Atonio,*

490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). That means, as the Court holds, *ante,* at 1545, that "a plaintiff must demonstrate that it is the application of a *specific or particular employment practice* that has *created* the disparate impact under attack," *Wards Cove, supra,* at 657, 109 S.Ct. 2115 (emphasis added); see also *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (opinion of O'CONNOR, J.). It also means that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion. See ***268***Wards Cove, supra,* at 659-660, 109 S.Ct. 2115; see also *Watson, supra,* at 997, 108 S.Ct. 2777 (opinion of O'CONNOR, J.). Even if petitioners' disparate impact claim were cognizable under the ADEA, that claim clearly would fail in light of these requirements.

U.S.,2005.
Smith v. City of Jackson, Miss.
544 U.S. 228, 125 S.Ct. 1536, 95 Fair Empl.Prac.Cas. (BNA) 641, 86 Empl. Prac. Dec. P 41,882, 161 L.Ed.2d 410, 73 USLW 4251, 05 Cal. Daily Op. Serv. 2716, 2005 Daily Journal D.A.R. 3713, 18 Fla. L. Weekly Fed. S 211

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Supreme Court of the United States
Clifford B. **MEACHAM** et al., Petitioners,
v.
KNOLLS ATOMIC POWER LABORATORY, aka KAPL, Inc., et al.
No. 06-1505.

Argued April 23, 2008.
Decided June 19, 2008.

Background: Twenty-eight former employees of government contractor laid off as result of involuntary reduction in force brought suit alleging violations of Age Discrimination in Employment Act (ADEA) and New York Human Rights Law. Following judgment on jury verdicts in employees' favor, employers filed post-trial motions, including motion for judgment as matter of law (JMOL). The United States District Court for the Northern District of New York, David Homer, United States Magistrate Judge, 185 F.Supp.2d 193, denied employers' motions. Appeal was taken. The United States Court of Appeals for the Second Circuit, 381 F.3d 56, affirmed. On petition for writ of certiorari, the Supreme Court, 544 U.S. 957, 125 S.Ct. 1731, 161 L.Ed.2d 596, vacated and remanded. On remand, the Court of Appeals, 461 F.3d 134, vacated and remanded with instructions to enter judgment as a matter of law for employer. Certiorari was granted.

Holding: The Supreme Court, Justice Souter, held that exemption from liability for disparate impact claim under ADEA for employer actions based on reasonable factors other than age (RFOA) creates an affirmative defense, on which employer bears both the burden of production and burden of persuasion.

Vacated and remanded.

Justice Scalia filed an opinion concurring in the judgment.

Justice Thomas filed an opinion concurring in part and dissenting in part.

Justice Breyer took no part in the consideration or decision of the case.

West Headnotes

[1] Civil Rights 78 1529

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1529 k. Defenses in General. Most Cited Cases

Civil Rights 78 1539

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1539 k. Age Discrimination. Most Cited Cases
Exemption from liability for disparate impact claim under ADEA for employer actions based on reasonable factors other than age (RFOA) creates an affirmative defense, on which employer bears both the burden of production and burden of persuasion. Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C.A. § 623(f)(1).

[2] Civil Rights 78 1211

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1211 k. Disparate Impact. Most Cited Cases
Plaintiff alleging disparate impact claim under ADEA cannot merely allege a disparate impact, or point to a generalized policy that leads to such an impact; rather, plaintiff is obliged to isolate and identify the specific employment practices that are alleg-

edly responsible for any observed statistical disparities. Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C.A. § 623(a).

West Codenotes
Validity Called into Doubt29 CFR § 1625.7(d) (2007)

***2395** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

When the National Government ordered its contractor, respondent Knolls, to reduce its work force, Knolls had its managers score their subordinates on "performance," "flexibility," and "critical ***2396** skills"; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old. Petitioners (Meacham, for short) were among those laid off, and they filed this suit asserting, *inter alia,* a disparate-impact claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* To show such an impact, Meacham relied on a statistical expert's testimony that results so skewed according to age could rarely occur by chance; and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. The jury found for Meacham on the disparate-impact claim, and the Second Circuit initially affirmed. This Court vacated the judgment and remanded in light of its intervening decision in *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410. The Second Circuit then held for Knolls, finding its prior ruling untenable because it had applied a "business necessity" standard rather than a "reasonableness" test in assessing the employer's reliance on factors other than age in the layoff decisions, and because Meacham had not carried the burden of persuasion as to the reasonableness of Knolls's non-age factors.

Held: An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" (RFOA) affirmative defense under § 623(f)(1). Pp. 2400 - 2407.

(a) The ADEA's text and structure indicate that the RFOA exemption creates an affirmative defense, for which the burden of persuasion falls on the employer. The RFOA exemption is listed alongside one for bona fide occupational qualifications (BFOQ), which the Court has recognized to be an affirmative defense: "It shall not be unlawful for an employer ... to take any action otherwise prohibited under subsections (a), (b), (c), or (e) ... where age is a [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on [RFOA] ... ." § 623(f)(1). Given that the statute lays out its exemptions in a provision separate from the general prohibitions in §§ 623(a)-(c), (e), and expressly refers to the prohibited conduct as such, it is no surprise that this Court has spoken of both the BFOQ and RFOA as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122, 105 S.Ct. 613, 83 L.Ed.2d 523. This reading follows the familiar principle that "[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it," *Javierre v. Central Altagracia*, 217 U.S. 502, 508, 30 S.Ct. 598, 54 L.Ed. 859. As this longstanding convention is part of the backdrop against which the Congress writes laws, the Court respects it unless there is compelling reason to think that Congress put the burden of persuasion on the other side. See *Schaffer v. Weast*, 546 U.S. 49, 57-58, 126 S.Ct. 528, 163 L.Ed.2d 387. The Court has given this principle particular weight in enforcing the Fair Labor Standards Act of 1968, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 41 L.Ed.2d 1; and it has also recognized that "the ADEA [is] enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40. Nothing in § 623(f)(1) suggests that Congress meant it to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it. Any further doubt would be dispelled by the natural ***2397** implication of the "otherwise prohibited" language prefacing the BFOQ and RFOA defenses. Pp. 2400 -

2402.

(b) Knolls argues that because the RFOA clause bars liability where action is taken for reasons "other than age," it should be read as mere elaboration on an element of liability. But *City of Jackson* confirmed that § 623(a)(2)'s prohibition extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision. 544 U.S., at 239, 243, 125 S.Ct. 1536. And *City of Jackson* made it clear that action based on a "factor other than age" is the very premise for disparate-impact liability, not a negation of it or a defense to it. Thus, it is assumed that a non-age factor was at work in such a case, and the focus of the RFOA defense is on whether the factor relied on was "reasonable." Pp. 2402 - 2403.

(c) The business necessity test has no place in ADEA disparate-impact cases; applying both that test and the RFOA defense would entail a wasteful and confusing structure of proof. The absence of a business necessity enquiry does not diminish, however, the reasons already given for reading the RFOA as an affirmative defense. *City of Jackson* cannot be read as implying that the burden of proving any business-related defense falls on the plaintiff, for it confirmed that the BFOQ is an affirmative defense, see 544 U.S., at 233, n. 3, 125 S.Ct. 1536. Moreover, in referring to " *Wards Cove*'s interpretation of identical language [in Title VII]," *City of Jackson* could not have had the RFOA clause in mind, for Title VII has no like-worded defense. And as *Wards Cove* did not purport to construe any Title VII defenses, only an over-reading of *City of Jackson* would find in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA. Pp. 2404 - 2406.

(d) *City of Jackson* confirmed that an ADEA disparate-impact plaintiff must " ' "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." ' " 544 U.S., at 241, 125 S.Ct. 1536. This is not a trivial burden, and it ought to allay some of the concern that recognizing an employer's burden of persuasion on an RFOA defense will encourage strike suits or nudge plaintiffs with marginal cases into court; but in the end, such concerns have to be directed at Congress, which set the balance by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. Pp. 2405 - 2407.

461 F.3d 134, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined, and in which THOMAS, J., joined as to Parts I and II-A. SCALIA, J., filed an opinion concurring in the judgment. THOMAS, J., filed an opinion concurring in part and dissenting in part. BREYER, J., took no part in the consideration or decision of the case.
John B. DuCharme, Joseph C. Berger, Berger, DuCharme, Harp & Clark, L.L.P., Clifton Park, NY, Kevin K. Russell, Counsel of Record, Amy Howe, Howe & Russell, P.C., Bethesda, MD, Pamela S. Karlan, Stanford Law School Supreme Court Litigation Clinic, Stanford, CA, for Petitioners.

Margaret A. Clemens, John E. Higgins, Nixon Peabody LLP, Rochester, N.Y., Seth P. Waxman, Counsel of Record, Paul R.Q. Wolfson, Heather M. Zachary, Anthony M. Deardurff, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., Janet R. Carter, Daniel C. Richenthal, Wilmer Cutler Pickering Hale and Dorr LLP, New York, N.Y., for Respondents.

***2398** For U.S. Supreme Court briefs, see:2008 WL 618088 (Pet.Brief)2008 WL 954279 (Resp.Brief)2008 WL 1757580 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court.

A provision of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*, creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age" (RFOA). § 623(f)(1). The question is whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit. We hold that the employer must do both.

I

The National Government pays private companies to do some of the work maintaining the Nation's fleet of nuclear-powered warships. One such contractor is respondent KAPL, Inc. (Knolls), the operator of the Government's Knolls Atomic Power Laboratory, which has a history dating back to the first nuclear-powered submarines in the 1940s and 1950s. The United States Navy and the Department of Energy jointly fund Knolls's operations, decide what projects it should pursue, and set its annual staffing limits. In recent years, Knolls has been charged with designing prototype naval nuclear reactors and with training Navy personnel to run them.

The demands for naval nuclear reactors changed with the end of the Cold War, and for fiscal year 1996 Knolls was ordered to reduce its work force. Even after a hundred or so employees chose to take the company's ensuing buyout offer, Knolls was left with thirty-some jobs to cut.[FN1] Petitioners (Meacham, for short) are among those laid off in the resulting "involuntary reduction in force." In order to select those for layoff, Knolls told its managers to score their subordinates on three scales, "performance," "flexibility," and "critical skills." [FN2] The scores were summed, along with points for years of service, and the totals determined who should be let go.

FN1. The Naval Reactors program had lowered Knolls's staffing limit by 108 people; as Knolls also had to hire 35 new employees for work existing personnel could not do, a total of 143 jobs would have to go.

FN2. The "performance" score was based on the worker's two most recent appraisals. The "flexibility" instruction read: "Rate the employee's flexibility within the Laboratory. Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?" The "critical skills" instruction read: "How critical are the employee's skills to continuing work in the Lab? Is the individual's skill a *key* technical resource for the [Naval Reactors] program? Is the skill readily accessible within the Lab or generally available from the external market?" App. 94-95 (emphasis in original).

Of the 31 salaried employees laid off, 30 were at least 40 years old. [FN3] Twenty-eight of them sued, raising both disparate-treatment (discriminatory intent) and disparate-impact (discriminatory result) claims under the ADEA and state law, alleging that Knolls "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory ***2399** impact on ADEA-protected employees." *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 61 (C.A.2 2004) *(Meacham I)*. To show a disparate impact, the workers relied on a statistical expert's testimony to the effect that results so skewed according to age could rarely occur by chance; [FN4] and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcomes. *Id.*, at 65.

FN3. For comparison: after the voluntary buyouts, 1,203 out of 2,063 salaried workers (or 58%) were at least 40 years old; and of the 245 who were at risk of involuntary layoff, and therefore included in the rankings scheme, 179 (or 73%) were 40 or over. *Meacham v. Knolls Atomic Power Laboratory*, 185 F.Supp.2d 193, 203 (N.D.N.Y.2002).

FN4. The expert cut the data in different ways, showing the chances to be 1 in 348,000 (based on a population of all 2,063 salaried workers); 1 in 1,260 (based on a population of the 245 workers at risk of layoff); or 1 in 6,639 (when the analysis was broken down by sections of the company). *Meacham I*, 381 F.3d, at 64-65.

The jury found for Meacham on the disparate-impact claim (but not on the disparate-treatment claim). The Court of Appeals affirmed, after examining the verdict through the lens of the so-called "burden shifting" scheme of inference spelled out in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). See *Meacham I, supra*, at

74-76.[FN5] After Knolls sought certiorari, we vacated the judgment and remanded for further proceedings in light of *Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005), decided while Knolls's petition was pending. See 544 U.S. 957, 125 S.Ct. 1731, 161 L.Ed.2d 596 (2005).

> FN5. Taking the *Wards Cove* steps in turn, the Court of Appeals concluded that the "jury could have found that the degree of subjective decision making allowed in the [layoff procedure] created the disparity," 381 F.3d, at 74; that the employer had answered with evidence of a "facially legitimate business justification," a need "to reduce its workforce while still retaining employees with skills critical to the performance of [Knolls's] functions," *ibid.* (internal quotation marks omitted); and that petitioners would prevail nonetheless because "[a]t least one suitable alternative is clear from the record," that Knolls "could have designed [a procedure] with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias," *id.*, at 75.

On remand, the same Court of Appeals panel ruled in favor of Knolls, over a dissent. 461 F.3d 134 (C.A.2 2006) (case below) *(Meacham II)*. The majority found its prior ruling "untenable" because it had applied the *Wards Cove* "business necessity" standard rather than a "reasonableness" test, contrary to *City of Jackson*; and on the latter standard, Meacham, the employee, had not carried the burden of persuasion. 461 F.3d, at 140-141, 144.[FN6] In dissent, Judge Pooler took issue with the majority for confusing business justifications under *Wards Cove* with the statutory RFOA exemption, which she read to be an affirmative defense with the burden of persuasion falling on defendants. 461 F.3d, at 147, 149-152.[FN7]

> FN6. Distinguishing the two tests mattered, the Court of Appeals explained, because even though "[t]here may have been other reasonable ways for [Knolls] to achieve its goals (as we held in *[Meacham I]*), ... the one selected was not unreasonable." *Meacham II*, 461 F.3d, at 146 (citation and internal quotation marks omitted). The burden of persuasion for either test was said to fall on the plaintiff, however, because "the employer is not to bear the ultimate burden of persuasion with respect to the legitimacy of its business justification." *Id.*, at 142 (citing *Wards Cove*, 490 U.S., at 659-660, 109 S.Ct. 2115; internal quotation marks omitted). The majority took note of the textual signs that the RFOA was an affirmative defense, but set them aside because " *City of Jackson* ... emphasized that there are reasonable and permissible employment criteria that correlate with age," thereby leaving it to plaintiffs to prove that a criterion is not reasonable. 461 F.3d, at 142-143.

> FN7. In Judge Pooler's view, a jury "could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of [Knolls's] plan as implemented." *Id.*, at 153 (dissenting opinion).

***2400** Meacham sought certiorari, noting conflicting decisions assigning the burden of persuasion on the reasonableness of the factor other than age; the Court of Appeals in this case placed it on the employee (to show the non-age factor unreasonable), but the Ninth Circuit in *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552 (1983), had assigned it to the employer (to show the factor was a reasonable one). In fact it was in *Criswell* that we first took up this question, only to find it not well posed in that case. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408, n. 10, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985). We granted certiorari, 552 U.S. ----, 128 S.Ct. 1118, 169 L.Ed.2d 846 (2007), and now vacate the judgment of the Second Circuit and remand.[FN8]

> FN8. Petitioners also sought certiorari as to "[w]hether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a 'reasonable factor other than age' as a matter of law." Pet. for Cert. i. We denied certiorari on this question and express no views on it here.

II

A

The ADEA's general prohibitions against age discrimination, 29 U.S.C. §§ 623(a)-(c), (e), are subject to a separate provision, § 623(f), creating exemptions for employer practices "otherwise prohibited under subsections (a), (b), (c), or (e)." The RFOA exemption is listed in § 623(f) alongside one for bona fide occupational qualifications (BFOQ): "It shall not be unlawful for an employer ... to take any action otherwise prohibited under subsections (a), (b), (c), or (e) ... where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age ... ." § 623(f)(1).

Given how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's "five affirmative defenses," *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 122, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). After looking at the statutory text, most lawyers would accept that characterization as a matter of course, thanks to the familiar principle that "[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Javierre v. Central Altagracia,* 217 U.S. 502, 508, 30 S.Ct. 598, 54 L.Ed. 859 (1910) (opinion for the Court by Holmes, J.); see also *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits ..."); *United States v. First City Nat. Bank of Houston,* 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967) (citing *Morton Salt, supra,* at 44-45, 68 S.Ct. 822). That longstanding convention is part of the backdrop against which the Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side. See *Schaffer v. Weast,* 546 U.S. 49, 57-58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief").

We have never been given any reason for a heterodox take on the RFOA clause's ***2401** nearest neighbor, and our prior cases recognize that the BFOQ clause establishes an affirmative defense against claims of disparate treatment. See, *e.g., City of Jackson, supra,* at 233, n. 3, 125 S.Ct. 1536; *Western Air Lines, Inc., supra,* at 414-419, and nn. 24, 29, 105 S.Ct. 2743. We have likewise given the affirmative defense construction to the exemption in the Equal Pay Act of 1963 for pay differentials based on "any other factor other than sex," *Corning Glass Works v. Brennan,* 417 U.S. 188, 196, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (internal quotation marks omitted); and there, we took account of the particular weight given to the interpretive convention already noted, when enforcing the Fair Labor Standards Act of 1938 (FLSA), *id.,* at 196-197, 94 S.Ct. 2223 ("[T]he general rule [is] that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof"). This focus makes the principle of construction the more instructive in ADEA cases: "[i]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *Lorillard v. Pons,* 434 U.S. 575, 581, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). And we have remarked and relied on the "significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA." *Id.,* at 580, 98 S.Ct. 866 (quoting 29 U.S.C. § 626(b); emphasis deleted); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 528, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (applying reasoning of *Lorillard*); *Thurston, supra,* at 126, 105 S.Ct. 613 (same). As against this interpretive background, there is no hint in the text that Congress meant § 623(f)(1) to march out of step with either the general or specifically FLSA default rules placing the burden of proving an exemption on the party claiming it.

[1] With these principles and prior cases in mind, we find it impossible to look at the text and structure of

the ADEA and imagine that the RFOA clause works differently from the BFOQ clause next to it. Both exempt otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the "one who claims its benefits," *Morton Salt Co., supra,* at 44-45, 68 S.Ct. 822, the "party seeking relief," *Schaffer, supra,* at 57-58, 126 S.Ct. 528, and here, "the employer," *Corning Glass Works, supra,* at 196, 94 S.Ct. 2223.

If there were any doubt, the stress of the idiom "otherwise prohibited," prefacing the BFOQ and RFOA conditions, would dispel it.[FN9] The implication of affirmative defense is underscored by contrasting ***2402** § 623(f)(1) with the section of the ADEA at issue in *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), and by the way Congress responded to our decision there. In *Betts,* we said the issue was whether a provision in a former version of § 623(f)(2), one about employee benefit plans, merely "redefine[d] the elements of a plaintiff's prima facie case," or instead "establish[ed] a defense" to what "otherwise would be a violation of the Act." *Id.,* at 181, 109 S.Ct. 2854.[FN10] Although the provision contained no "otherwise prohibited" kind of language, we said that it "appears on first reading to describe an affirmative defense." *Ibid.* We nonetheless thought that this more natural view (which we had taken in *Thurston*) was overridden by evidence of legislative history, by the peculiarity of a pretext-revealing condition in the phrasing of the provision (that a benefit plan "not [be] a subterfuge to evade the purposes" of the ADEA), and by the parallel with a prior case construing an "analogous provision of Title VII" (analogous because it also contained a pretext-revealing condition). 492 U.S., at 181, 109 S.Ct. 2854. A year later, however, Congress responded to *Betts* by enacting the Older Workers Benefit Protection Act, Pub.L. 101-433, 104 Stat. 978, avowedly to "restore the original congressional intent" that the ADEA's benefits provision be read as an affirmative defense, *id.,* § 101. What is instructive on the question at hand is that, in clarifying that § 623(f)(2) specifies affirmative defenses, Congress not only set the burden in so many words but also added the phrase "otherwise prohibited" as a part of the preface (just as in the text of § 623(f)(1)).[FN11] Congress thus confirmed the natural implication that we find in the "otherwise prohibited" language in § 623(f)(1): it refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition. The amendment in the aftermath of *Betts* shows that Congress understands the phrase the same way we naturally read it, as a clear signal that a defense to what is "otherwise prohibited" is an affirmative defense, entirely the responsibility of the party raising it.

FN9. We do not need to seek further relief from doubt by looking to the Equal Employment Opportunity Commission (EEOC) regulations on burdens of proof in ADEA cases. The parties focus on two of them, but we think neither clearly answers the question here. One of them the Government has disavowed as overtaken by our decision in *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005), Brief for United States as *Amicus Curiae* 16, n. 1 (noting that 29 CFR § 1625.7(d) (2007) "takes a position that does not survive" *City of Jackson*), for the regulation seems to require a showing of business necessity as a part of the RFOA defense. Compare 29 CFR § 1625.7(d) ("When an employment practice, including a test, is claimed as a basis for different treatment ... on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity"), with *City of Jackson, supra,* at 243, 125 S.Ct. 1536 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement"). And the second regulation would take a bit of stretching to cover disparate-impact cases, for its text speaks in terms of disparate treatment. See 29 CFR § 1625.7(e) (concerning use of the RFOA defense against an "individual claim of discriminatory treatment"). The EEOC has lately proposed rulemaking that would revise both of these regulations, eliminating any reference to

"business necessity" and placing the burden of proof on the employer "[w]henever the exception of 'a reasonable factor other than age' is raised." 73 Fed.Reg. 16807-16809 (Mar. 31, 2008) (proposed 29 CFR § 1625.7(e)).

FN10. The provision read: "It shall not be unlawful for an employer ... to observe the terms of ... any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter ... because of the age of such individual." 29 U.S.C. § 623(f)(2) (1982 ed.).

FN11. Congress surely could not have meant this phrase to contradict its express allocation of the burden, in the same amendment. But that would be the upshot of Knolls's suggestion that the only way to read the word "otherwise" as not redundant in the phrase "otherwise prohibited under subsection (a), (b), (c), or (e)" is to say that the word must refer only to § 623(f)(1) itself, implying that § 623(f)(1) must be a liability-creating provision for which the burden falls on the plaintiff. Brief for Respondents 33, and n. 7. Besides, this argument proves too much, for it implies that even the BFOQ exemption is not an affirmative defense.

B

Knolls ventures that, regardless, the RFOA provision should be read as mere ***2403** elaboration on an element of liability. Because it bars liability where action is taken for reasons "other than age," the argument goes, the provision must be directed not at justifying age discrimination by proof of some extenuating fact but at negating the premise of liability under § 623(a)(2), "because of age."

The answer to this argument, however, is *City of Jackson,* where we confirmed that the prohibition in § 623(a)(2) extends to practices with a disparate impact, inferring this result in part from the presence of the RFOA provision at issue here.[FN12] We drew on the recognized distinction between disparate-treatment and disparate-impact forms of liability, and explained that "the very definition of disparate impact" was that "an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age." 544 U.S., at 236, n. 6, 125 S.Ct. 1536 (plurality opinion); *id.,* at 243, 125 S.Ct. 1536 (SCALIA, J., concurring in part and concurring in judgment) (expressing agreement with "all of the Court's reasoning" in the plurality opinion, but finding it a basis for deference to the EEOC rather than for independent judicial decision). We emphasized that these were the kinds of employer activities, "otherwise prohibited" by § 623(a)(2), that were mainly what the statute meant to test against the RFOA condition: because "[i]n disparate-impact cases ... the allegedly 'otherwise prohibited' activity is not based on age," it is "in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' " *Id.,* at 239, 125 S.Ct. 1536 (plurality opinion).

FN12. In doing so, we expressly rejected the so-called "safe harbor" view of the RFOA provision. See *City of Jackson,* 544 U.S., at 238-239, 125 S.Ct. 1536 (plurality opinion); *id.,* at 252-253, 125 S.Ct. 1536 (O'Connor, J., concurring in judgment) (describing "safe harbor" view).

Thus, in *City of Jackson,* we made it clear that in the typical disparate-impact case, the employer's practice is "without respect to age" and its adverse impact (though "because of age") is "attributable to a nonage factor"; so action based on a "factor other than age" is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it. The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a "reasonable" one for the employer to be using. Reasonableness is a justification categorically distinct from the factual condition "because of age" and not necessarily correlated with it in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor

might do just the opposite.[FN13]

FN13. The factual causation that § 623(a)(2) describes as practices that "deprive or tend to deprive ... or otherwise adversely affect [employees] ... because of ... age" is typically shown by looking to data revealing the impact of a given practice on actual employees. See, *e.g.*, *City of Jackson*, 544 U.S., at 241, 125 S.Ct. 1536 (opinion of the Court); cf. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 658-659, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (under Title VII, "specific causation" is shown, and a "prima facie case" is "establish[ed]," when plaintiff identifies a specific employment practice linked to a statistical disparity); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) (plurality opinion) (in Title VII cases, "statistical disparities must be sufficiently substantial that they raise ... an inference of causation").

> This enquiry would be muddled if the value, "reasonableness," were to become a factor artificially boosting or discounting the factual strength of the causal link, or the extent of the measured impact. It would open the door to incoherent undershooting, for example, if defendants were heard to say that an impact is "somewhat less correlated with age, seeing as the factor is a reasonable one"; and it would be overshooting to make them show that the impact is "not correlated with age, and the factor is reasonable, besides."

***2404** III

The Court of Appeals majority rejected the affirmative defense reading and arrived at its position on the burden of proof question by a different route: because it read our decision in *City of Jackson* as ruling out the so-called "business necessity" enquiry in ADEA cases, the court concluded that the RFOA defense "replaces" it and therefore must conform to its burden of persuasion resting on the complaining party. But the court's premise (that *City of Jackson* modified the "business necessity" enquiry) is mistaken; this alone would be reason enough to reject its approach. And although we are now satisfied that the business necessity test should have no place in ADEA disparate-impact cases, we agree with the Government that this conclusion does not stand in the way of our holding that the RFOA exemption is an affirmative defense. See Brief for United States as *Amicus Curiae* 25-27.

To begin with, when the Court of Appeals further inferred from the *City of Jackson* reference to *Wards Cove* that the *Wards Cove* burden of persuasion (on the employee, for the business necessity enquiry) also applied to the RFOA defense, it gave short shrift to the reasons set out in Part II-A, *supra,* for reading RFOA as an affirmative defense (with the burden on the employer). But we think that even on its own terms, *City of Jackson* falls short of supporting the Court of Appeals's conclusion.

Although *City of Jackson* contains the statement that " *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA," 544 U.S., at 240, 125 S.Ct. 1536, *City of Jackson* made only two specific references to aspects of the *Wards Cove* interpretation of Title VII that might have "remain[ed] applicable" in ADEA cases. One was to the existence of disparate-impact liability, which *City of Jackson* explained was narrower in ADEA cases than under Title VII. The other was to a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact, which is the employee's burden under both the ADEA and the pre-1991 Title VII. See 544 U.S., at 241, 125 S.Ct. 1536. Neither of these references, of course, is at odds with the view of RFOA as an affirmative defense.

If, indeed, *City of Jackson*'s reference to *Wards Cove* could be read literally to include other aspects of the latter case, beyond what mattered in *City of Jackson* itself, the untoward consequences of the broader reading would rule it out. One such consequence is embraced by Meacham, who argues both that the Court of Appeals was wrong to place the burden of persuasion for the RFOA defense on the employee, and that the court was right in thinking that *City of Jackson* adopted the *Wards Cove* burden of persuasion on what Meacham views as one element of an

ADEA impact claim. For Meacham takes the position that an impact plaintiff like himself has to negate business necessity in order to show that the employer's actions were "otherwise prohibited"; only then does the RFOA (with the burden of persuasion on the employer) have a role to play. To apply both tests, however, would force the parties to develop (and the court or jury to follow) two overlapping enquiries: first, whether the employment practice at issue (based on a factor other than ***2405** age) is supported by a business justification; and second, whether that factor is a reasonable one. Depending on how the first enquiry proceeds, a plaintiff might directly contest the force of the employer's rationale, or else try to show that the employer invoked it as a pretext by pointing (for example) to alternative practices with less of a disparate impact. See *Wards Cove*, 490 U.S., at 658, 109 S.Ct. 2115 ("first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact"); see also *id.*, at 658-661, 109 S.Ct. 2115. But even if the plaintiff succeeded at one or the other, in Meacham's scheme the employer could still avoid liability by proving reasonableness.

Here is what is so strange: as the Government says, "[i]f disparate-impact plaintiffs have already established that a challenged practice is a pretext for intentional age discrimination, it makes little sense then to ask whether the discriminatory practice is based on reasonable factors *other than age*." Brief for United States as *Amicus Curiae* 26 (emphasis in original). Conversely, proving the reasonableness defense would eliminate much of the point a plaintiff would have had for showing alternatives in the first place: why make the effort to show alternative practices with a less discriminatory effect (and besides, how would that prove pretext?), when everyone knows that the choice of a practice relying on a "reasonable" non-age factor is good enough to avoid liability? FN14 At the very least, developing the reasonableness defense would be substantially redundant with the direct contest over the force of the business justification, especially when both enquiries deal with the same, narrowly specified practice. It is not very fair to take the remark about *Wards Cove* in *City of Jackson* as requiring such a wasteful and confusing structure of proof.

> FN14. See *City of Jackson*, 544 U.S., at 243, 125 S.Ct. 1536 ("While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement").

Nor is there any good way to read the same line from *City of Jackson* as implying that the burden of proving any business-related defense falls on the plaintiff; most obviously, this would entail no longer taking the BFOQ clause to be an affirmative defense, which *City of Jackson* confirmed that it is, see 544 U.S., at 233, n. 3, 125 S.Ct. 1536. What is more, *City of Jackson* could not have had the RFOA clause in mind as "identical" to anything in Title VII (for which a *Wards Cove*'s reading might be adopted), for that statute has no like-worded defense. And as *Wards Cove* did not purport to construe any statutory defenses under Title VII, only an over-reading of *City of Jackson* would find lurking in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA (never mind one that Title VII does not have).

IV

[2] As mentioned, where *City of Jackson* did get help from our prior reading of Title VII was in relying on *Wards Cove* to repeat that a plaintiff falls short by merely alleging a disparate impact, or "point[ing] to a generalized policy that leads to such an impact." *City of Jackson*, 544 U.S., at 241, 125 S.Ct. 1536. The plaintiff is obliged to do more: to "isolat [e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Ibid.* (quoting***2406** *Wards Cove*, *supra*, at 656, 109 S.Ct. 2115; emphasis in original; internal quotation marks omitted). The aim of this requirement, as *City of Jackson* said, is to avoid the "result [of] employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.' " 544 U.S., at 241, 125 S.Ct. 1536 (quot-

ing *Wards Cove, supra,* at 657, 109 S.Ct. 2115; some internal quotation marks omitted). And as the outcome in that case shows, the requirement has bite: one sufficient reason for rejecting the employees' challenge was that they "ha [d] done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers," and "ha[d] not identified any specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers." *City of Jackson, supra,* at 241, 125 S.Ct. 1536.

Identifying a specific practice is not a trivial burden, and it ought to allay some of the concern raised by Knolls's *amici,* who fear that recognizing an employer's burden of persuasion on an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued. See, *e.g.,* Brief for General Electric Co. as *Amicus Curiae* 18-31. It is also to the point that the only thing at stake in this case is the gap between production and persuasion; nobody is saying that even the burden of production should be placed on the plaintiff. Cf. *Schaffer,* 546 U.S., at 56, 126 S.Ct. 528 (burden of persuasion answers "which party loses if the evidence is closely balanced"); *id.,* at 58, 126 S.Ct. 528 ("In truth, however, very few cases will be in evidentiary equipoise"). And the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.

That said, there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, *amici*'s concerns have to be directed at Congress, which set the balance where it is, by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. We have to read it the way Congress wrote it.

* * *

As we have said before, Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, "significantly narrow[ing] its coverage." *City of Jackson,* 544 U.S., at 233, 125 S.Ct. 1536. And as the outcome for the employer in *City of Jackson* shows, "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.,* at 241, 125 S.Ct. 1536. In this case, we realize that the Court of Appeals showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion. Whether the outcome should be any different when the burden is properly ***2407** placed on the employer is best left to that court in the first instance. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER took no part in the consideration or decision of this case.
Justice SCALIA, concurring in the judgment.
I do not join the majority opinion because the Court answers for itself two questions that Congress has left to the sound judgment of the Equal Employment Opportunity Commission. As represented by the Solicitor General of the United States in a brief signed by the Commission's General Counsel, the Commission takes the position that the reasonable-factor-other-than-age provision is an affirmative defense on which the employer bears the burden of proof, and that, in disparate-impact suits brought under the Age Discrimination in Employment Act of 1967 (ADEA), that provision replaces the business-necessity test of *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

Neither position was contrived just for this case. In-

deed, the Commission has arguably held its view on the burden-of-proof point for nearly 30 years. See 44 Fed.Reg. 68858, 68861 (1979). Although its regulation applied only to cases involving "discriminatory treatment," 29 CFR § 1625.7(e) (2007), even if that covers only disparate treatment, see *ante,* at 2401 - 2402, n. 9, the logic of its extension to disparate-impact claims is obvious and unavoidable. See Brief for United States as *Amicus Curiae* 16, n. 1. At the very least, the regulation does not contradict the Commission's current position: It does not say that the employer bears the burden of proof *only* in discriminatory-treatment cases.

The Commission's view on the business-necessity test is newly minted, but that does not undermine it. The Commission has never expressed the contrary view that the factfinder must consider both business necessity *and* reasonableness when an employer applies a factor that has a disparate impact on older workers. In fact, before *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005), the Commission had not even considered the relationship between the two standards, because it used to treat the two as *identical*. See 29 CFR § 1625.7(d). After *City of Jackson* rejected that equation, see 544 U.S., at 243, 125 S.Ct. 1536, the Commission decided that the business-necessity standard plays no role in ADEA disparate-impact claims, see Brief for United States as *Amicus Curiae* 25-27, and has even proposed new rules setting forth that position, see 73 Fed.Reg. 16807-16809 (2008).

Because administration of the ADEA has been placed in the hands of the Commission, and because the agency's positions on the questions before us are unquestionably reasonable (as the Court's opinion ably shows), I defer to the agency's views. See *Raymond B. Yates, M. D., P.C. Profit Sharing Plan v. Hendon,* 541 U.S. 1, 24-25, 124 S.Ct. 1330, 158 L.Ed.2d 40 (2004) (SCALIA, J., concurring in judgment). I therefore concur in the Court's judgment to vacate the judgment of the Court of Appeals.

Justice THOMAS, concurring in part and dissenting in part.

I write separately to note that I continue to believe that disparate-impact claims are not cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* See ***2408***Smith v. City of Jackson,* 544 U.S. 228, 247-268, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Moreover, I disagree with the Court's statement that the "reasonable factors other than age" (RFOA) exception, § 623(f)(1), is principally relevant in disparate-impact cases. Compare *City of Jackson, supra,* at 251-253, 125 S.Ct. 1536 (opinion concurring in judgment), with *ante,* at 2402 - 2403 (citing *City of Jackson, supra,* at 239, 125 S.Ct. 1536 (plurality opinion)). I therefore join only Parts I and II-A of the Court's opinion because I agree that the RFOA exception is an affirmative defense-when it arises in disparate-treatment cases. Here, although the Court of Appeals erred in placing the burden of proof on petitioners, I would nonetheless affirm because the only claims at issue are disparate-impact claims.

U.S.,2008.
Meacham v. Knolls Atomic Power Laboratory
128 S.Ct. 2395, 103 Fair Empl.Prac.Cas. (BNA) 908, 91 Empl. Prac. Dec. P 43,231, 171 L.Ed.2d 283, 76 USLW 4488, 08 Cal. Daily Op. Serv. 7526, 2008 Daily Journal D.A.R. 9116, 21 Fla. L. Weekly Fed. S 400

END OF DOCUMENT

I

111TH CONGRESS
1ST SESSION

H. R. 1409

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 2009

Mr. GEORGE MILLER of California (for himself, Mr. SCOTT of Georgia, Mr. BRADY of Pennsylvania, Mr. DOYLE, Mr. KILDEE, Mrs. CAPPS, Mr. WALZ, Ms. LEE of California, Ms. SCHAKOWSKY, Mrs. NAPOLITANO, Ms. LINDA T. SÁNCHEZ of California, Ms. DELAURO, Mr. KENNEDY, Mr. DOGGETT, Mr. FILNER, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. GRIJALVA, Ms. MCCOLLUM, Ms. WOOLSEY, Mr. LYNCH, Mr. GUTIERREZ, Mr. YARMUTH, Ms. SUTTON, Mr. MARKEY of Massachusetts, Mr. HARE, Mr. LEVIN, Mr. SARBANES, Mr. BRALEY of Iowa, Ms. HIRONO, Mr. TIERNEY, Mr. MCGOVERN, Ms. EDWARDS of Maryland, Mr. ABERCROMBIE, Mr. JOHNSON of Georgia, Mr. HOLT, Mrs. MALONEY, Mr. NADLER of New York, Mr. CAPUANO, Mr. HIGGINS, Mr. BLUMENAUER, Mr. SMITH of Washington, Mr. ELLISON, Mr. MCDERMOTT, Ms. RICHARDSON, Mr. MCNERNEY, Mr. SCHIFF, Mrs. LOWEY, Mr. OLVER, Ms. ZOE LOFGREN of California, Mr. ACKERMAN, Mr. ENGEL, Mr. LEWIS of Georgia, Mr. WILSON of Ohio, Mr. KUCINICH, Mr. WELCH, Mr. AL GREEN of Texas, Mr. HINOJOSA, Mrs. MCCARTHY of New York, Mr. PAYNE, Mr. DAVIS of Illinois, Ms. CLARKE, Mr. ISRAEL, Mr. CUMMINGS, Mr. COSTELLO, Mr. LANGEVIN, Mr. FARR, Ms. PINGREE of Maine, Ms. CORRINE BROWN of Florida, Mr. BERMAN, Mr. PETERS, Mr. ANDREWS, Ms. SHEA-PORTER, Mr. CARNAHAN, Mr. WU, Mrs. DAVIS of California, Mr. SCOTT of Virginia, Ms. CASTOR of Florida, Mr. SERRANO, Mrs. HALVORSON, Mr. MURPHY of Connecticut, Mr. SHERMAN, Mr. MOORE of Kansas, Mr. CONYERS, Mr. WEINER, Ms. TSONGAS, Mr. BISHOP of New York, Mr. KIND, Mr. PETERSON, Mr. LIPINSKI, Mr. MAFFEI, Mr. DEFAZIO, Mr. WEXLER, Ms. ESHOO, Mr. DINGELL, Mr. MCMAHON, Mr. SCHRADER, Mr. STUPAK, Mr. GENE GREEN of Texas, Mr. LOEBSACK, Mr. CARDOZA, Mr. HALL of New York, Ms. SLAUGHTER, Mr. RAHALL, Mr. FRANK of Massachusetts, Ms. MATSUI, Mr. RUPPERSBERGER, Mr. CLEAVER, Mr. HINCHEY, Mr. ROTHMAN of New Jersey, Mr. GRAYSON, Ms. BALDWIN, Mr. JACKSON of Illinois, Ms. BEAN, Mr. NEAL of Massachusetts, Mrs. TAUSCHER, Mr. WAXMAN, Ms. KILPATRICK of Michigan,

Mr. HASTINGS of Florida, Ms. KAPTUR, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. CARSON of Indiana, Mr. ADLER of New Jersey, Mr. MEEK of Florida, Ms. KILROY, Mr. RYAN of Ohio, Mr. MASSA, Mr. FOSTER, Mr. TOWNS, Mr. ORTIZ, Ms. ROYBAL-ALLARD, Ms. VELÁZQUEZ, Mr. RUSH, Mr. HODES, Mr. CLYBURN, Mr. BOSWELL, Mr. MOLLOHAN, Mr. MICHAUD, Mr. KISSELL, Mr. PASCRELL, Mr. MELANCON, Mr. BECERRA, Mr. DELAHUNT, Ms. WASSERMAN SCHULTZ, Mr. INSLEE, Mr. PALLONE, Mr. BOCCIERI, Mr. MCHUGH, Mr. DRIEHAUS, Mr. HONDA, Mr. CLAY, Mr. OBERSTAR, Mr. TONKO, Ms. WATERS, Mr. SCHAUER, Mr. VISCLOSKY, Mr. MILLER of North Carolina, Mr. RANGEL, Mr. SPACE, Mr. LUJÁN, Mr. CROWLEY, Ms. MOORE of Wisconsin, Mr. STARK, Ms. JACKSON-LEE of Texas, Ms. SCHWARTZ, Mr. BACA, Mr. PASTOR of Arizona, Mr. FATTAH, Mr. HOYER, Mr. LARSON of Connecticut, Ms. WATSON, Ms. LORETTA SANCHEZ of California, Mr. PRICE of North Carolina, Mr. SIRES, Mr. SMITH of New Jersey, Mr. LARSEN of Washington, Ms. FUDGE, Mr. MEEKS of New York, Ms. NORTON, Mr. THOMPSON of Mississippi, Mr. BAIRD, Ms. KOSMAS, Mr. DICKS, Mr. BISHOP of Georgia, Mr. HEINRICH, Mr. COURTNEY, Mr. TEAGUE, Mr. MURTHA, Ms. HARMAN, Mr. VAN HOLLEN, Mr. LOBIONDO, Mr. REYES, Mr. HIMES, Mr. OBEY, Mr. BOUCHER, Mr. KANJORSKI, Mr. HOLDEN, Mr. SALAZAR, Mr. ARCURI, Mrs. DAHLKEMPER, Mr. SKELTON, Mr. ALTMIRE, Mr. CONNOLLY of Virginia, Mr. GONZALEZ, Mr. RODRIGUEZ, Mr. MORAN of Virginia, Mr. KAGEN, Ms. MARKEY of Colorado, Ms. DEGETTE, Mr. PIERLUISI, Ms. HERSETH SANDLIN, Ms. SPEIER, Mr. THOMPSON of California, Mr. DONNELLY of Indiana, Mr. WATT, Mr. SABLAN, Mr. SESTAK, Ms. BERKLEY, Mr. DAVIS of Alabama, Mr. FALEOMAVAEGA, Mr. POLIS of Colorado, Mr. PERLMUTTER, Mr. COSTA, and Ms. TITUS) introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Free Choice Act of 2009".

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) IN GENERAL.—Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

"(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

"(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining

representative in the manner described in paragraph (6). Such guidelines and procedures shall include—

"(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

"(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.".

(b) CONFORMING AMENDMENTS.—

(1) NATIONAL LABOR RELATIONS BOARD.—Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence—

(A) by striking "and to" and inserting "to"; and

(B) by striking "and certify the results thereof," and inserting ", and to issue certifications as provided for in that section,".

(2) UNFAIR LABOR PRACTICES.—Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended—

(A) in paragraph (7)(B) by striking ", or" and inserting "or a petition has been filed under section 9(c)(6), or"; and

(B) in paragraph (7)(C) by striking "when such a petition has been filed" and inserting

"when such a petition other than a petition under section 9(c)(6) has been filed".

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

"(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

"(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

"(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Me-

diation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

"(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.".

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) INJUNCTIONS AGAINST UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES.—

(1) IN GENERAL.—Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended—

(A) in the second sentence, by striking "If, after such" and inserting the following:

"(2) If, after such"; and

(B) by striking the first sentence and inserting the following:

"(1) Whenever it is charged—

"(A) that any employer—

"(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

"(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

"(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

"(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B), or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.".

(2) CONFORMING AMENDMENT.—Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting "under circumstances not subject to section 10(l)" after "section 8".

(b) REMEDIES FOR VIOLATIONS.—

(1) BACKPAY.—Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking "*And provided further,*" and inserting "*Provided further,* That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into

between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further,*".

(2) CIVIL PENALTIES.—Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended—

(A) by striking "Any" and inserting "(a) Any"; and

(B) by adding at the end the following:

"(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other

persons seeking to exercise rights guaranteed by this Act, or on the public interest.".

○

II

Calendar No. 24

111TH CONGRESS
1ST SESSION

S. 478

To amend the National Labor Relations Act to ensure the right of employees to a secret-ballot election conducted by the National Labor Relations Board.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 25, 2009

Mr. DEMINT (for himself, Mr. ALEXANDER, Mr. BURR, Mr. CORNYN, Mr. ENZI, Mr. INHOFE, Mr. ROBERTS, Mr. WICKER, Mr. VITTER, Mr. COBURN, Mr. CORKER, Mr. MCCONNELL, Mr. BUNNING, Mr. THUNE, Mr. MCCAIN, Mr. BARRASSO, Mr. BROWNBACK, Mr. KYL, and Mr. SHELBY) introduced the following bill; which was read the first time

FEBRUARY 26, 2009

Read the second time and placed on the calendar

A BILL

To amend the National Labor Relations Act to ensure the right of employees to a secret-ballot election conducted by the National Labor Relations Board.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Secret Ballot Protection Act of 2009".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) The right of employees under the National Labor Relations Act (29 U.S.C. 151 et seq.) to choose whether to be represented by a labor organization by way of secret ballot election conducted by the National Labor Relations Board is among the most important protections afforded under Federal labor law.

(2) The right of employees to choose by secret ballot is the only method that ensures a choice free of coercion, intimidation, irregularity, or illegality.

(3) The recognition of a labor organization by using a private agreement, rather than a secret ballot election overseen by the National Labor Relations Board, threatens the freedom of employees to choose whether to be represented by a labor organization, and severely limits the ability of the National Labor Relations Board to ensure the protection of workers.

SEC. 3. NATIONAL LABOR RELATIONS ACT.

(a) RECOGNITION OF REPRESENTATIVE.—

(1) IN GENERAL.—Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. 158(a)(2)) is amended by inserting before the colon the following: "or to recognize or bargain collectively with a labor organization that has not been selected by a major-

ity of such employees in a secret ballot election conducted by the National Labor Relations Board in accordance with section 9".

(2) APPLICATION.—The amendment made by paragraph (1) shall not apply to collective bargaining relationships in which a labor organization with majority support was lawfully recognized prior to the date of enactment of this Act.

(b) ELECTION REQUIRED.—

(1) IN GENERAL.—Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended—

(A) in paragraph (6), by striking "and" at the end;

(B) in paragraph (7), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(8) to cause or attempt to cause an employer to recognize or bargain collectively with a representative of a labor organization that has not been selected by a majority of such employees in a secret ballot election conducted by the National Labor Relations Board in accordance with section 9.".

(2) APPLICATION.—The amendment made by paragraph (1) shall not apply to collective bar-

gaining relationships that were recognized prior to the date of enactment of this Act.

(c) SECRET BALLOT ELECTION.—Section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)), is amended—

(1) by striking "Representatives" and inserting "(1) Representatives";

(2) by inserting after "designated or selected" the following: "by a secret ballot election conducted by the National Labor Relations Board in accordance with this section"; and

(3) by adding at the end the following:

"(2) The secret ballot election requirement under paragraph (1) shall not apply to collective bargaining relationships that were recognized before the date of the enactment of the Secret Ballot Protection Act of 2009.".

SEC. 4. REGULATIONS AND AUTHORITY.

(a) REGULATIONS.—Not later than 6 months after the date of the enactment of this Act, the National Labor Relations Board shall review and revise all regulations promulgated prior to such date of enactment to implement the amendments made by this Act.

(b) AUTHORITY.—Nothing in this Act (or the amendments made by this Act) shall be construed to limit or

otherwise diminish the remedial authority of the National Labor Relations Board.

Calendar No. 24

111TH CONGRESS
1ST SESSION

S. 478

A BILL

To amend the National Labor Relations Act to ensure the right of employees to a secret-ballot election conducted by the National Labor Relations Board.

FEBRUARY 26, 2009

Read the second time and placed on the calendar

I

111TH CONGRESS
1ST SESSION

H. R. 1644

To amend the Internal Revenue Code of 1986 to provide for a tax credit for qualified donations of employee services.

IN THE HOUSE OF REPRESENTATIVES

MARCH 19, 2009

Mr. LEWIS of Georgia introduced the following bill; which was referred to the Committee on Ways and Means, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Internal Revenue Code of 1986 to provide for a tax credit for qualified donations of employee services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Incentive to Serve Tax Act".

SEC. 2. TAX CREDIT FOR QUALIFIED DONATIONS OF EMPLOYEE SERVICES.

(a) IN GENERAL.—Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of

1986 is amended by adding at the end the following new section:

"SEC. 45R. QUALIFIED EMPLOYEE SERVICE DONATIONS.

"(a) IN GENERAL.—For purposes of section 38, the qualified employee service donation credit under this section is an amount equal to 25 percent of the qualified wages paid or incurred by the taxpayer.

"(b) QUALIFIED WAGES.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified wages' means the wages paid or incurred by an employer during the taxable year to an eligible employee during periods in which the eligible employee is performing qualified services.

"(2) WAGES.—The term 'wages' has the meaning given to such term by subsection (b) of section 3306 (determined without regard to the dollar limitation contained in such section).

"(3) LIMITATION ON WAGES TAKEN INTO ACCOUNT.—The amount of qualified wages which may be taken into account with respect to any individual shall not exceed $100,000 per year.

"(4) COORDINATION WITH OTHER CREDITS.—

"(A) WORK OPPORTUNITY CREDIT.—The term 'qualified wages' shall not include wages

attributable to service rendered during the 1-year period beginning with the day the individual begins work for the employer if any portion of such wages is taken into account in determining the credit under section 51.

"(B) INDIAN EMPLOYMENT CREDIT.—The term 'qualified wages' shall not include wages with respect to any employee if a credit is allowed for wages paid to such employee under section 45A.

"(c) ELIGIBLE EMPLOYEE.—For purposes of this section, the term 'eligible employee' means any employee of the employer who performs qualified services at the direction of the employer and with the employee's consent for a period of not less than 160 hours for which such employee was fully compensated during the taxable year of the employer.

"(d) QUALIFIED SERVICES.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified services' means—

"(A) eligible direct services to recipients or beneficiaries of charitable organizations and community agencies,

"(B) the recruitment and coordination of activities of volunteers providing such eligible direct services, or

"(C) the building of the capacity of such organizations and agencies to provide such eligible direct services.

"(2) ELIGIBLE DIRECT SERVICES.—The term 'eligible direct services' means direct services which advance 1 or more of the following:

"(A) Improving the quality of education in public schools for economically disadvantaged students.

"(B) Expanding and improving access to health care.

"(C) Improving and conserving energy and natural resources.

"(D) Improving economic opportunities for economically disadvantaged individuals.

"(E) Improving disaster preparedness and response.

"(e) VERIFICATION.—No amount shall be allowed as a credit under subsection (a) for qualified wages for qualified services with respect to which the taxpayer has not submitted such information or certification as the Sec-

retary determines necessary to ensure the performance of such qualified services.

"(f) SPECIAL RULES.—For purposes of this section, rules similar to the rules of section 52 shall apply.".

(b) CREDIT TREATED AS BUSINESS CREDIT.—Section 38(b) of the Internal Revenue Code of 1986 (relating to current year business credit) is amended by striking "plus" at the end of paragraph (34), by striking the period at the end of paragraph (35) and inserting ", plus", and by adding at the end the following new paragraph:

"(36) the credit determined under section 45R(a).".

(c) CONFORMING AMENDMENTS.—

(1) Section 196(c) of the Internal Revenue Code of 1986 is amended by striking "and" at the end of paragraph (12), by striking the period at the end of paragraph (13) and inserting ", and", and by adding at the end the following new paragraph:

"(14) the qualified employee service credit under section 45R(a).".

(2) Section 280C(a) of such Code is amended by inserting "45R(a)," after "45P(a),".

(d) CLERICAL AMENDMENT.—The table of sections for subpart D of part IV of subchapter A of chapter 1

of the Internal Revenue Code of 1986 is amended by adding at the end the following new item:

"Sec. 45R. Qualified employee service donations.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to wages paid or incurred after the date of the enactment of this Act.

SEC. 3. EXCLUSION.

Section 148 of the National and Community Service Act of 1990 (42 U.S.C. 12604) is amended—

(1) by redesignating subsection (g) as subsection (h); and

(2) by inserting after subsection (f) the following:

"(g) EXCLUSION FROM INCOME.—The amount of an educational award provided to an individual under this section shall not be included in the gross income of the individual for purposes of the Internal Revenue Code of 1986.".

○

Friday, January 30th, 2009 at 12:00 am
Nondisplacement of Qualified Workers Under Service Contracts

For Immediate Release January 30, 2009

EXECUTIVE ORDER

NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

Sec. 2. Definitions.

(a) "Service contract" or "contract" means any contract or subcontract for services entered into by the Federal Governmentor its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq., and its implementing regulations.

(b) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

Sec. 3. Exclusions. This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts ith sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

Sec. 4. Authority to Exempt Contracts. If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

Sec. 5. Contract Clause. The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

"NONDISPLACEMENT OF QUALIFIED WORKERS

"(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of thecontract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

"(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C.

357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

"(c) In accordance with Federal Acquisition Regulation 52.222–41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

"(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) _____, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

"(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about th employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States."

Sec. 6. Enforcement. (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this

order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

Sec. 7. Revocation. Executive Order 13204 of February 17, 2001, is revoked.

Sec. 8. Severability. If any provision of this order, or the application of such provision or amendment to any person or

circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 9. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

Sec. 10. Effective Date. This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

Friday, January 30th, 2009 at 12:00 am

Executive Order -- Notificiation of Employee Rights Under Federal Labor Laws

For Immediate Release January 30, 2009

EXECUTIVE ORDER

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NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

Section 1. Policy. This order is designed to promote economy and efficiency in Government procurement. When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 et seq. As the Act recognizes, "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" will "eliminate the causes of certain substantial obstructions to the free flow of commerce" and "mitigate and eliminate these obstructions when they have occurred." 29 U.S.C. 151. Relying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.

Sec. 2. Contract Clause. Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403.

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

"2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order [number as provided by the Federal Register] of [insert new date]. Such other sanctions or remedies may be imposed as are provided in Executive Order [number as provided by the Federal Register] of [insert new date], or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order [number as provided by the Federal Register] of [insert new date]) so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non compliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 3. Administration.

(a) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.

(b) Within 120 days of the effective date of this order, the Secretary shall initiate a rulemaking to prescribe the size, form, and content of the notice to be posted by a contractor under paragraph 1 of the contract clause described in section 2 of this order. Such notice shall describe the rights of employees under Federal labor laws, consistent with the policy set forth in section 1 of this order.

(c) Whenever the Secretary finds that an act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions set out in subsection (a) of this section necessary to achieve the purposes of this order, the Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

Sec. 4. Exemptions. (a) If the Secretary finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Government to procure goods or services on an economical and efficient basis, the Secretary may exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of this order with respect to a particular contract or subcontract or any class of contracts or subcontracts.

(b) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract or subcontract or class of contracts or subcontracts.

Sec. 5. Investigation.

(a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated. Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor or subcontractor, where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

Sec. 6. Compliance.

(a) The Secretary, or any agency or officer in the executive branch lawfully designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section, prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under section 7(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 7(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

Sec. 7. Remedies. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency, or his or her designee, continues to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be

issued by the Secretary under this subsection so long as the head of a contracting department or agency, or his or her designee, continues to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

Sec. 8. Reports. Whenever the Secretary invokes section 7(a) or 7(b) of this order, the contracting department or agency shall report to the Secretary the results of the action it has taken within such time as the Secretary shall specify.

Sec. 9. Cooperation. Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 10. Sufficiency of Remedies. If the Secretary finds that the authority vested in the Secretary by sections 5 through 9 of this order is not sufficient to effectuate the purposes of this order, the Secretary shall develop recommendations on how better to effectuate those purposes.

Sec. 11. Delegation. The Secretary may, in accordance with law, delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 12. Implementation. To the extent permitted by law, the Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and any related rules, regulations, or orders issued by the Secretary under this order and shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

Sec. 13. Revocation of Prior Order and Actions. Executive Order 13201 of February 17, 2001, is revoked. The heads of executive departments and agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13201.

Sec. 14. Severability. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 15. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 16. Effective Date. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the rule promulgated by the Secretary pursuant to section 3(b) of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 30, 2009

EXECUTIVE ORDER

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ECONOMY IN GOVERNMENT CONTRACTING

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

Section 1. To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors' provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

Sec. 2. It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees -- whether employees of the recipient of the Federal disbursements or of any other entity -- to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

Sec. 3. Notwithstanding section 2 of this order, contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees, employee publications (other than those undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), and other related activities. See 48 C.F.R. 31.205-21.

Sec. 4. Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not

more

(OVER)

to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

(a) preparing and distributing materials;

(b) hiring or consulting legal counsel or consultants;

(c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

(d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

Sec. 5. Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

Sec. 6. Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

Sec. 7. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 8. This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.

BARACK OBAMA

THE WHITE HOUSE,
January 30, 2009.

# # #

Federal Register

Monday,
August 3, 2009

Part II

Department of Labor

Office of Labor-Management Standards

29 CFR Part 471

Notification of Employee Rights Under Federal Labor Laws; Proposed Rule

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 471

RIN 1215–AB70

Notification of Employee Rights Under Federal Labor Laws

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes a regulation to implement Executive Order 13496, which was signed by President Barack Obama on January 30, 2009. Executive Order 13496 (''the Executive Order,'' ''the Order,'' or ''EO 13496'') requires nonexempt Federal departments and agencies to include within their Government contracts specific provisions requiring that contractors and subcontractors with whom they do business post notices informing their employees of their rights as employees under Federal labor laws. The Executive Order requires the Secretary (''Secretary'') of the Department of Labor (''Department'') to initiate a rulemaking to prescribe the size, form, and content of the notice that must be posted by a contractor under paragraph 1 of the contract clause described in section 2 of the Order. Under the Executive Order, Federal Government contracting departments and agencies must include the required contract provisions in every Government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold, and except in those cases in which the Secretary exempts a contracting department or agency with respect to particular contracts or subcontracts or class of contracts or subcontracts pursuant to section 4 of the Order. As required by the Executive Order, this proposed rule establishes the content of the notice required by the Executive Order's contract clause, and implements other provisions of the Executive Order, including provisions regarding sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order and the implementing regulations.

DATES: Comments regarding this proposed rule must be received by the Department of Labor on or before September 2, 2009.

ADDRESSES: You may submit comments, identified by 1215–AB70, only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.* To locate the proposed rule, use key words such as ''Department of Labor'' or ''Notification of Employee Rights Under Federal Labor Laws'' to search documents accepting comments. Follow the instructions for submitting comments.

Delivery: Comments should be sent to: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210. Because of security precautions the Department continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments.

The Office of Labor-Management Standards (OLMS) recommends that you confirm receipt of your delivered comments by contacting (202) 693–0123 (this is not a toll-free number). Individuals with hearing impairments may call (800) 877–8339 (TTY/TDD). Only those comments submitted through *http://www.regulations.gov,* hand-delivered, or mailed will be accepted. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours at the above address.

The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, (202) 693–1185 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: *The Proposed Rule is organized as follows*:

I. Background—provides a brief description of the development of the Proposed Rule
II. Authority—cites the legal authority supporting the Proposed Rule, Departmental re-delegation authority, and interagency coordination authority
III. Overview of the Rule—outlines the proposed regulatory text
IV. Regulatory Procedures—sets forth the applicable regulatory requirements and requests comments on specific issues

I. Background

On January 30, 2009, President Barack Obama signed Executive Order 13496, entitled ''Notification of Employee Rights Under Federal Labor Laws.'' 74 FR 6107 (February 4, 2009). The purpose of the Order is ''to promote economy and efficiency in Government procurement'' by ensuring that employees of certain Government contractors are informed of their rights under Federal labor laws. *Id.,* Sec. 1. As the Order states, ''When the Federal Government contracts for goods or services, it has a proprietary interest in ensuring that those contracts will be performed by contractors whose work will not be interrupted by labor unrest. The attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws, including the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*'' The Order reiterates the declaration of national labor policy contained in the National Labor Relations Act (''NLRA''), 29 U.S.C. 151, that ''encouraging the practice and procedure of collective bargaining and * * * protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection'' will ''eliminate the causes of certain substantial obstructions to the free flow of commerce'' and ''mitigate and eliminate these obstructions when they have occurred.'' *Id.,* Section 1, quoting 29 U.S.C. 151. As the Order concludes, ''[r]elying on contractors whose employees are informed of such rights under Federal labor laws facilitates the efficient and economical completion of the Federal Government's contracts.'' *Id.*

The Order achieves the goal of notification to employees of federal contractors of their legal rights through two related mechanisms. First, Section 2 of the Order provides the complete text of a contract clause that Government contracting departments and agencies must include in all covered Government contracts and subcontracts. 74 FR at 6107–6108, Sec. 2. Second, through incorporation of the specified clause in its contracts with the Federal government, contractors thereby agree to post a notice in conspicuous places in their plants and offices informing employees of their rights under Federal labor laws. *Id.,* Sec. 2, Para. 1.

The Order states that the Secretary of Labor (''Secretary'') ''shall be responsible for [its] administration and enforcement.'' 74 FR at 6108, Sec. 3. To that end, the Order delegates to the Secretary the authority to ''adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.'' *Id.,* Sec. 3(a). In particular, the Order requires the Secretary to prescribe the content, size, and form of the employee notice. *Id.,* Sec. 3(b). In addition, the Order permits the Secretary, among other things, to make modifications to the contractual provisions required to be included in Government contracts (Sec. 3(c)); to provide exemptions for contracting departments or agencies with respect to particular contracts or subcontracts or class of contracts or subcontracts for certain specified reasons (Sec. 4); to establish procedures for investigations of Government contractors and subcontractors to determine whether the required contract provisions have been violated (Sec. 5); to conduct hearings regarding compliance (Sec. 6); and to provide for certain remedies in the event that violations are found (Sec. 7). *Id.,* 74 FR at 6108–6109. Accordingly, the Secretary proposes the following regulations to implement the policies and procedures set forth in the Executive Order. The specific standards and procedures proposed to implement the Executive Order will be discussed in detail in Section III., Overview of the Rule, below.

II. Authority

A. Legal Authority

The President issued Executive Order 13496 pursuant to his authority under ''the Constitution and laws of the United States,'' expressly including the Federal Property and Administrative Services Act ''Procurement Act,'' 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to ''prescribe policies and directives that [he] considers necessary to carry out'' the statutory purposes of ensuring ''economical and efficient'' government procurement and supply. 40 U.S.C. 101, 121(a). Executive Order 13496 delegates to the Secretary of Labor the authority to ''adopt such rules and regulations and issue such orders as are necessary and appropriate to achieve the purposes of this order.'' 74 FR at 6108, Sec. 3. The Secretary has delegated her authority to promulgate these regulations to the Assistant Secretary for Employment Standards. Secretary's Order 01–2008 (May 30, 2008), 73 FR 32424 (published June 6, 2008).

B. Interagency Coordination

Section 12 of the Executive Order requires the Federal Acquisition Regulatory Council (FAR Council) to take action to implement provisions of the Order in the Federal Acquisition Regulation (FAR). 74 FR at 6110. Accordingly, the Department has coordinated with the FAR Council in inserting language implementing the Executive Order into the FAR.

III. Overview of the Rule

The Department's proposed rule, which establishes standards and procedures for implementing and enforcing Executive Order 13496, is set forth in subchapter D, Part 471 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the proposed rule sets out definitions, the prescribed requirements for the size, form and content of the employee notice, exceptions for certain types of contracts, and exemptions that may be applicable to contracting departments and agencies with respect to a particular contract or subcontract or class of contracts or subcontracts. Subpart B of the proposed rule sets out standards and procedures related to complaint procedures, compliance evaluations, and enforcement of the rule. Subpart C sets out other standards and procedures related to certain ancillary matters. The discussion below is organized in the same manner, and explains the Department's adoption of the standards and procedures set out in the regulatory text, which follows. The Department invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Subpart A contains definitions of terms used in the rule, requirements for the content, size and form of the notice that a contractor must post to its employees, the types of contracts that are excepted from the rule and applicable exemptions available to a contracting department or agency with respect to a particular contract or subcontract or class of contracts or subcontracts.

Definitions

The definitions proposed in this rule are derived largely from the definitions of the same terms in the Department's Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60–1.3 and the former regulations implementing Executive Order 13201, 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). Slight variations between the definitions proposed here and those upon which they were modeled were made in order to accommodate the terms to Executive Order 13946. The Department invites comments regarding the definitions proposed in Section 471.1 below.

Requirements for Employee Notice

As noted above, Executive Order 13496 requires the Secretary to ''prescribe the size, form and content of the notice'' that contractors must post to notify employees of their rights. Sec. 3(b), E.O. 13496, 74 FR at 6108. The proposed rule fulfills the Secretary's obligation to establish standards and procedures regarding each of these issues, which are discussed in turn below.

Section 471.2(a) of the proposed rule sets out in full the four paragraphs that the Executive Order requires to be included in all non-excepted Government contracts. The first paragraph of the proposed contract clause specifies the content of the notice that must be provided to employees of Federal contractors. The proposed notice contains those employee rights established under the National Labor Relations Act (''NLRA''), 29 U.S.C. 151, *et seq.* The Secretary believes providing notice of the rights under the NLRA bests effectuates the purpose of the Executive Order. Section 1 of the Executive Order clearly states that the Order's policy is to attain industrial peace and enhance worker productivity through the notification of workers of ''their rights under Federal labor laws, including the National Labor Relations Act.'' 74 FR at 6107, Sec. 1. The policy of the Executive Order goes on to emphasize the foundation underlying the NLRA, which is to encourage collective bargaining and to protect workers' rights to freedom of association and self-organization, and notes that

efficiency and economy in government contracting is promoted when contractors inform their employees of ''such rights.'' Further, the contract clause prescribed by the Order requires Federal contractors to post the notice ''in conspicuous places in and about plants and offices *where employees covered by the National Labor Relations Act* engage in activities related to performance of the contract * * *.'' 74 FR at 6107, Sec. 2, Para. 1 (emphasis added). As a result, the Executive Order's terms provide that the employee notice it requires must be posted only by employers in the private sector, with some statutory exceptions, and need not be posted by employers in the public sector.[1]

In establishing a description of rights under the NLRA in the proposed notice, the Department believes that such rights are best presented to employees following a concise preamble that provides context to such rights. Therefore, section 471.2 of the proposed rule sets out the following text for inclusion in the notice to employees prior to the description of employee rights under the NLRA:

> It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

The content of the above notice derives from section 1 of the NLRA, 29 U.S.C. 151, and E.O. 13496, Section 1. The Department seeks comments on this description of policy in the proposed section 471.2.

In proposing to include the statutory rights under the NLRA in the required notice, the Secretary considered the level of detail the notice should contain regarding those statutory rights. A broad statement of employee rights under the NLRA appears in section 7 of the Act, which states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

29 U.S.C. 157. The Department considered requiring a verbatim replication of the statute's enumeration of employee rights in Section 7 of the NLRA. Alternatively, the Department considered including a simplified list of rights based upon the statutory provision, which would include the right of employees to: Organize; form, join, or assist any union; bargain collectively through representatives of their own choice; act together for other mutual aid or protection; or choose not to engage in any of these protected concerted activities.

However, the Department does not believe that posting the statutory language itself or a simplified list of rights in a notice will be likely to convey the information necessary to best inform employees of their rights under the Act. Instead, the Department proposes that the statement of employee rights contained in Appendix A to Subpart A of Part 471 be required for inclusion in the notice. This statement contains greater detail of NLRA rights, derived from Board or court decisions implementing such rights—which will more effectively convey such rights to employees. A more complete and readable text will also better enable employees to apply the rights to actual workplace situations. Additionally, employees will be better apprised of their rights under the NLRA if the notice also contains examples of general circumstances, also derived from Board or court decisions further implementing section 7 and other provisions of the NLRA, that constitute violations of their rights under the Act. With the above principles in mind, the Department devised a notice that provides employees with a more than rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice.

The Department invites comment on this statement of employee rights proposed for inclusion on the required notice to employees. In particular, the Department requests comment on whether the notice contains sufficient information of employee rights under the Act; whether the notice effectively conveys the information necessary to best inform employees of their rights under the Act; and whether the notice achieves the desired balance between providing an overview of employee rights under the Act and limiting unnecessary and distracting information.

Moreover, proposed § 471.2 also requires that the notice of employee rights contain NLRB contact information and basic enforcement procedures to enable employees to find out more about their rights under the Act and to proceed with enforcement if necessary. Accordingly, the required notice confirms that illegal conduct will not be permitted, provides information regarding the NLRB and filing a charge with that agency, and indicates that the Board will prosecute violators of the Act. Furthermore, the notice indicates that there is a 6-month statute of limitations applicable to making allegations of violations and provides NLRB contact information for use by employees. The Department invites suggested additions or deletions to these procedural provisions that would improve the content of the notice of employee rights.

Paragraph 4 of the contract clause in the Executive Order requires the contractor to incorporate only paragraphs 1 through 3 of the clause in its subcontracts. *See* 74 FR at 6108, Sec. 2, para. 4. A narrow reading of the operation of this provision outside the full context of the Executive Order might suggest that the obligation to include the contract clause is limited to contracts between the government agency and the prime contractor. Under this reading, subcontractors would be required only to post the notice of employee rights, and their subcontractors (sometimes called second tier contractors) would have no responsibilities under the Executive Order. However, the provisions of the Executive Order establishing exemptions and exceptions for the application of the Executive Order's obligations do not expressly specify that its obligations do not flow past the first tier subcontractor, a significant limitation that one would expect to be made explicitly in the text of the Executive Order rather than by operation of the contract clause's incorporation provision. In addition, in the Department's past regulatory treatment of a similar issue, it has adapted through regulation the application of an Executive Order's contract inclusion provisions so that the obligation to abide by the mandates of the orders flows to subcontractors below the first tier. *See, e.g.,* 69 FR 16376, 16378 (Mar. 29, 2004) (final rule implementing E.O. 13201) (based on identical contract incorporation provision, ''the intent of the Order was clearly that the clause be passed to

[1] Under the NLRA, the term ''employer'' excludes the United States government, any wholly owned government corporation, or any State or political subdivision. 29 U.S.C. 152(2). As a result, employees of these public-sector employers are not ''employees'' covered by the NLRA. The NLRA's definition of ''employee'' also excludes those employed as agricultural laborers, in the domestic service of any person or family in a home, by a parent or spouse, as an independent contractor, as a supervisor, or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

subcontractors below the first tier''); 57 FR 49588, 49591 (Nov. 2, 1992) (final rule implementing E.O. 12800) (''It is clear, however, that the intent of Executive Order 12800 was that the clause flow down below the first tier level''). The Department's experience with regulatory implementation of all these Executive Orders is that requiring the obligations of the Executive Order to flow past the first tier subcontractor best achieves the purposes of the Executive Orders. For these reasons, the Department has concluded that in order to fully implement the intent of E.O. 13496, Sec. 471.2(a) has been adapted to require the inclusion of paragraphs 1 through 4 of the contract clause. The Department seeks comments on this proposal.

Proposed § 471.2(b) provides that the employee notice clause is to be set out verbatim in a contract, subcontract or purchase order, rather than being incorporated by reference in those documents. Proposed § 471.2(c) implements Section 3(c) of the Executive Order, 74 FR 6108, permitting the Secretary to modify the contract clause under certain specified circumstances as needed from time to time. The Department requests comment regarding the utility of setting out the employee notice clause verbatim, as opposed to incorporation by reference, to ensure that contractors will be aware of their contractual obligation to post the required notice.

The contract clause in the Executive Order requires a contractor to post the employee notice conspicuously ''in and about its plants and offices * * * including in all places where notices to employees are customarily posted both physically and electronically.'' 74 FR 6107, Sec. 2, para. 2. As a result, a contractor is required to post the notice physically at its place of operation where employees are likely to see it. Proposed § 471.2(d) provides that the Department will print the required employee notice poster and supply it to Federal contractors through the Federal contracting agency. In addition, the poster may be obtained from OLMS, whose contact information is provided in this subsection of the proposed rule, or can be downloaded from OLMS's Web site, *http://www.olms.dol.gov.* The Secretary has concluded that the Department's printing of the poster and provision of it to Federal contractors will reduce the burden on those contractors to comply with the Executive Order and this regulation, and will ensure conformity and consistency with the Secretary's specifications for the notice. Proposed § 471.2(d) also permits contractors to reproduce in exact duplicate the poster supplied by the Department to satisfy their obligations under the Executive Order and this rule. The Department invites comment on its proposal to make available print and electronic format posters containing the employee notice.

Those contractors that customarily post notices to employees electronically must also post the required notice electronically. In § 471.2(e), the Department proposes that such contractors may satisfy the electronic posting requirement on any web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal. A contractor must display prominently on its Web page or electronic site where other employee notices are customarily placed a link to the DOL's web page that contains the full text of the employee notice. The contractor must also place the link in the prescribed text contained in § 471.2(e). The prescribed text is the introductory language of the notice. The Department seeks comments on this proposal for electronic compliance. In addition, the Department seeks comment on whether it should prescribe standards regarding the size, clarity, location, and brightness with regard to the link, including how to prescribe electronic postings that are at least as large, clear and conspicuous as the contractor's other posters.

Exceptions for Specific Types of Contracts and Exemptions Available to Contracting Departments or Agencies With Respect to Particular Contractors or Subcontracts

The Executive Order expressly excepts from its application two types of Government contracts: Collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and contracts involving purchases below the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403; 74 FR at 6107, Sec. 2. The simplified acquisition threshold is currently set at $100,000. 41 U.S.C. 403. Section 471.3(a)(1) and (2) of the proposed rule implement these exceptions. In addition, the Executive Order's provision regarding its effective date excepts contracts resulting from solicitations issued prior to the effective date of the final rule promulgated pursuant to this rulemaking. 74 FR 6111, Sec. 16. Proposed § 471.3(a)(3) implements this provision of the Executive Order.

As proposed in § 471.2(a), all nonexempt prime contractors and subcontractors are required to include the employee notice contract clause in each of their nonexempt subcontracts so that the obligation to notify employees of their rights flows to subcontractors of a government contract as well. The Executive Order does not except from its coverage subcontracts involving purchases below the simplified acquisition threshold. The Department has defined ''subcontract'' in the definitional section of the rule to include only those subcontracts that are necessary to the performance of the government contract. *See* § 471.1(r); *see also OFCCP* v. *Monongahela R.R.,* 85–OFC–2, 1986 WL 802025 (Recommended Decision and Order, April 2, 1986), aff'd, (Deputy Under Secretary's Final Decision and Order, Mar. 11, 1987) (railroad transporting coal to power generation plant of energy company contracting with GSA was subcontractor because delivery of coal is necessary to for the power company to perform under its contract with GSA). Although this rule may result in coverage of subcontracts with relatively *de minimis* value in the overall scheme of government contracts, covered subcontractors include only those who are performing subcontracts that are necessary to the performance of the prime contract. The Department invites comment on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract.

In addition to the exceptions for certain contracts, the Executive Order establishes two exemptions that the Secretary, in her discretion, may provide to contracting departments or agencies that the Secretary finds appropriate for exemption. 74 FR 6108, Sec. 4. These provisions permit the Secretary to exempt a contracting department or agency or group of departments or agencies from the requirements of any or all of the provisions of the Order with respect to a particular contract or subcontract or any class of contracts or subcontracts if she finds either that the application of any of the requirements of the Order would not serve its purposes or would impair the ability of the government to procure goods or services on an economical and efficient basis, or that special circumstances require an exemption in order to serve the national interest. *Id.* Proposed § 471.3(b) implements these exemptions. Proposed § 471.3(b) provides for the submission of written requests for exemptions to the

Deputy Assistant Secretary for Labor-Management Programs, and further provides that the Deputy Assistant Secretary may withdraw an exemption if a determination is made that such action is necessary or appropriate to achieve the purposes of the rule. The Department invites comments on the standards and procedures for requesting an exemption and the Department's withdrawal of a granted exemption.

Finally, proposed § 471.4 implements the policy noted above that the Executive Order requires notice-posting in those workplaces in which employees covered by the NLRA perform their work under the Federal contract. Thus, this rule does not apply to employers excluded from the definition of ''employer'' in the NLRA, 29 U.S.C. 152(2), and employers of employees excluded from the definition of ''employee'' under the NLRA, 29 U.S.C. 152(3). As a result, Federal, State and local public-sector employers are not covered by this rule. 29 U.S.C. 152(2). Also excluded are employers of workers employed: as agricultural laborers; in the domestic service of any person or family in a home; by a parent or spouse; as an independent contractor; as a supervisor; or by an employer subject to the Railway Labor Act, such as railroads and airlines. 29 U.S.C. 152(3).

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

Subpart B of the proposed rule establishes standards and procedures the Department will use to determine compliance with obligations of the rule, take complaints regarding noncompliance, address findings of violations, provide hearings for certain matters, impose sanctions, including debarment, and provide for reinstatement in the case of debarment. The standards and procedures proposed in this subpart are taken largely from the Department's prior rule administering and enforcing Executive Order 13201, 66 FR 11221 (February 22, 2001). *See* 29 CFR Part 470 (2008), rescinded under authority of E.O. 13496, 74 FR 14045 (March 30, 2009). The Department invites comment on the administrative and enforcement procedures proposed in Subpart B.

The Department's Office of Federal Contract Compliance Programs (''OFCCP'') administers and enforces several laws that ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment. Therefore, OFCCP already has responsibility for monitoring, evaluating and ensuring that contractors doing business with the Federal government conduct themselves in a manner that complies with certain Federal laws. Proposed § 471.10 builds on this practice and expertise, and establishes authority in the Deputy Assistant Secretary for Federal Contract Compliance to conduct evaluations to determine whether a contractor is in compliance with the requirements of this rule. Under proposed § 471.10(a), such evaluations may be done solely for the purpose of assessing compliance with this rule, or may be undertaken in conjunction with an assessment of a Federal contractors' compliance with other laws under OFCCP's jurisdiction. This proposed section also establishes standards regarding location of the posted notice that will be used by OFCCP to assess compliance and indicates that an evaluation record will reflect efforts made toward conciliation, corrective action and/or recommendations regarding enforcement actions.

Proposed § 471.11 provides for the Department's acceptance of written complaints alleging that a contractor doing business with the Federal government has failed to post the notice required by this rule. The proposed section establishes that no special complaint form is required, but that complaints must be in writing. In addition, as proposed in § 471.11, written complaints must contain certain information, including the name, address and telephone number of the person submitting the complaint, and the name and address of the Federal contractor alleged to have violated this rule. This proposed section establishes that written complaints may be submitted either to OFCCP or OLMS, and the contact information for each agency is contained in this subsection. Finally, proposed § 471.11 establishes that OFCCP will conduct investigations of complaints submitted under this section, make compliance findings based on such investigations, and include in the investigation record any efforts made toward conciliation, corrective action, and recommended enforcement action,

Proposed § 471.12 sets out the initial steps that the Department will take in the event that a contractor is found to be in violation of this rule, including making reasonable efforts to secure compliance through conciliation. Under this proposed section, a noncompliant contractor must take action to correct the violation and commit in writing to maintain compliance in the future. If the contractor fails to come into compliance, OLMS may proceed with enforcement efforts proposed in § 471.13.

Proposed § 471.13 implements Section 6 of the Executive Order, 74 FR 6108–6109, and establishes steps that the Department will take in the event that conciliation efforts fail to bring a contractor into compliance with this rule. Under this proposed section, enforcement proceedings may be initiated if violations are found as a result of either a compliance evaluation or a complaint investigation, or in those cases in which a contractor refuses to allow a compliance evaluation or complaint investigation or refuses to cooperate with the compliance evaluation or complaint investigation, including failing to provide information sought during those procedures. The enforcement procedures proposed in § 471.13 rely primarily on the Department's regulations at 29 CFR part 18, which govern administrative hearings before Administrative Law Judges (ALJ), and, in particular, on the provisions for expedited hearings at 29 CFR 18.42. The procedures in this proposed section establish that an ALJ will make recommended findings and conclusions regarding any alleged violation to the Assistant Secretary for Employment Standards (''Assistant Secretary''), who will issue a final administrative order. The final administrative order may include a cease-and-desist order or other appropriate remedies in the event that a violation is found. The procedures in this proposed section also establish timetables for submitting exceptions to the ALJ's recommended order to the Assistant Secretary, and also provide for the use of expedited proceedings.

Proposed § 471.14 addresses the imposition of sanctions and penalties in cases in which violations are found, and establishes post-hearing procedures related to such sanctions or penalties. Section 7 of the Executive Order provides the framework for the scope and nature of remedies the Department may order in the event of a violation. 74 FR 6109. Section 7(a) of the Executive Order provides that the Secretary may issue a directive that the contracting department or agency cancel, terminate, suspend, or cause to be cancelled, terminated or suspended any contract or portion of a contract for noncompliance. *Id.* In addition, the Executive Order indicates that contracts may be cancelled, terminated or suspended absolutely, or their continuance may be conditioned on a requirement for future compliance. *Id.* Prior to issuing such a directive, the Secretary must offer the head of the contracting department or

agency an opportunity to object in writing to the remedy contemplated, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7 of the Executive Order prevents the imposition of such a remedy if the head of the contracting department or agency, or his or her designee, continues to object to the issuance of the directive. *Id.* Proposed § 471.14(a), (b), (c), and (d)(1) fully implement the standards and procedures established in Section 7(a) of the Executive Order.

Section 7(b) of the Executive Order provides that the Secretary may issue an order debarring noncompliant contractors ''until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of the order.'' 74 FR 6109. As with the remedies discussed above, prior to the imposition of debarment, the Secretary must offer the head of the contracting department or agency an opportunity to object in writing to debarment, and the objections must contain reasons why the contract is essential to the agency's mission. *Id.* Finally, Section 7(b) of the Executive Order prevents the imposition of debarment if the head of the contracting department or agency, or his or her designee, continues to object to it. *Id.* Proposed § 471.14(d)(3) of the rule establishes the availability of the debarment remedy. Section 471.14(f) of the proposed rule indicates that the Assistant Secretary will periodically publish and distribute the names of contractors or subcontractors that have been debarred for noncompliance.

Proposed § 471.15 permits a contractor or subcontractor to seek a hearing before the Assistant Secretary before the imposition of any of the remedies outlined above. Finally, proposed § 471.16 provides contractors or subcontractors that have been debarred under this rule an opportunity to seek reinstatement by requesting such in a letter to the Assistant Secretary. Under this proposed provision, the Assistant Secretary may reinstate the debarred contractor or subcontractor if he or she finds that the contractor or subcontractor has come into compliance with this rule and has shown that it will fully comply in the future.

As noted above, § 471.2(a) requires all nonexempt prime contractors and subcontractors to include the employee notice contract clause in each of its nonexempt subcontracts so that the obligation to notify employees of their rights is binding upon each successive subcontractor. Regarding enforcement of the requirements of the rule as to subcontractors, the Executive Order requires the contractor to ''take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance.'' 74 FR 6108, Sec. 2, para. 4. Accordingly, in the event that the Department determines that a subcontractor is out of compliance with the requirements of this rule regarding employee notice or inclusion of the contract clause in the subcontractor's own subcontracts, the Secretary may direct the contractor to require the noncompliant subcontractor to come into compliance. As indicated in the Executive Order, if such a directive causes the contractor to become involved in litigation with the subcontractor, the contractor may request the United States to enter the litigation in order to protect the interests of the United States. 74 FR 6108, Sec. 2, para. 4. If the contractor is unable to compel subcontractor compliance on its own accord, the compliance review, complaint, investigation, conciliation, hearing and decision procedures established in Sections 471.10 through 471.16 to assess and resolve contractor compliance with the requirements of this rule are also applicable to subcontractors. In those instances in which a contractor fails to take the action directed by the Secretary regarding a subcontractor's noncompliance, the contractor may be subject to the same enforcement and remedial procedures that apply when it is determined to be out of compliance regarding the requirements to provide employee notice or include the contract clause in its contracts. *See* § 471.13(a)(1).

Subpart C—Ancillary Matters

A number of discrete issues unconnected to the issues addressed in the two previous subparts merit attention in this proposed rule, and they are set out in this subpart. Consequently, this Subpart addresses delegations of authority within and outside the Department to administer and enforce this proposed rule, rulings under or interpretations of the Executive Order, standards prohibiting intimidation, threats, coercion or other interference with rights protected under this rule, and other provisions of the Executive Order that are included in this proposed rule. The Department invites comment on any issues addressed in this subpart.

Proposed § 471.20 implements Section 11 of the Executive Order, 74 FR 6110, which permits the delegation of the Secretary's authority under the Order to Federal agencies within or outside the Department. Section 471.21 of the proposed rule indicates that the Assistant Secretary has authority to make rulings under or interpretations of this rule. Proposed § 471.22 seeks to prevent intimidation or interference with rights protected under this rule, so it proposes that the sanctions and penalties available for noncompliance set out in § 471.14 be available should a contractor or subcontractor fail to take all steps necessary to prevent such intimidation or interference. Activities protected by this proposed section include filing a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, a complaint investigation, hearing or any other activity related to the administration and enforcement of this rule. Finally, proposed § 471.23 implements Section 9 of the Executive Order, 74 FR 6109, which requires that contracting departments and agencies cooperate with the Secretary in carrying out her functions under the Order, and implements Section 15 of the Executive Order, 74 FR 6110, which establishes general guidelines for the Order's implementation.

IV. Regulatory Procedures

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. 58 FR 51735, 51735–51736. The Department has determined that this rule is not an ''economically significant'' regulatory action under section 3(f)(1) of Executive Order 12866. 58 FR 51738. Based on the Department's analysis, including a cost impact analysis set forth more fully below with regard to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* this rule is not likely to: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or (4) raise novel legal or policy issues. 58 FR 51738. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the rule under section 6(a)(3)(B) of the Executive Order. 58 FR 51741. However, because of its importance to the public,

the rule was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' Executive Order 13272, Sec. 1, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking''). However, an agency is relieved of the obligation to prepare an initial regulatory flexibility for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C 605. Based on the analysis below, in which the Department has estimated the financial burdens to covered small contractors and subcontractors associated with complying with the requirements contained in this proposed rule, the Department has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of the Executive Order and these implementing regulations is the notification to employees of their rights with respect to collective bargaining and other protected, concerted activity. This goal is achieved through the incorporation of a contract clause in all covered Government contracts. The Executive Order and this rule impose the obligation to ensure that the contract clause is included in all Government contracts not on private contractors, but on Government contracting departments and agencies, which are not ''small entities'' that come within the focus of the RFA. Therefore, the costs attendant to learning of the obligation to include the contract clause in Government contracts and modifying those contracts in order to comply with that obligation is a cost borne by the Federal government, and is not incorporated into this analysis.

Once the required contract clause is included in the Government contract, contractors then begin to assume the burdens associated with compliance. Those obligations include posting the required notice and incorporating the contract clause into all covered subcontracts, thus making the same obligations binding on covered subcontractors. For the purposes of this analysis, the Department estimates that, on average, each prime contractor will subcontract some portion of its prime contract three times, and the prime contractor therefore will expend time ensuring that the contract clause is included in its subcontracts and notifying those subcontractors of their attendant obligations. To the extent that subcontractors subcontract any part of their contract with the prime contractor, they, in turn, will be required to expend time ensuring that the contract clause is included in the next tier of subcontracts and notifying the next-tier subcontractors of their attendant obligations. Therefore, for the purpose of determining time spent on compliance, the Department will not differentiate between the obligations of prime contractors and subsequent tiers of subcontractors in assessing time spent on compliance; the Department assumes that all contractors, whether prime contractor or subcontractor, will spend equivalent amounts of time engaging in compliance activity.

The Department estimates that each contractor will spend a total of 3.5 hours per year in order to comply with this rule, which includes 90 minutes for the contractor to learn about the contract and notice requirements, train staff, and maintain records; 30 minutes for contractors to incorporate the contract clause into each subcontract and explain its contents to subcontractors; 30 minutes acquiring the notice from a government agency or Web site; and 60 minutes posting them physically and electronically, depending on where and how the contractor customarily posts notices to employees. The Department assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor statistics data, earned a total hourly wage of $31.02 in January, 2009, including accounting for fringe benefits. The Department then multiplied this figure by 3.5 hours to estimate the average annual costs for contractors and subcontractors to comply with this rule. Accordingly, this proposed rule is estimated to impose average annual costs of $108.57 per contractor (3.5 hours × $31.02). These costs will decrease in subsequent years based on a contractor's increasing familiarity with the rule's requirements and having already satisfied its posting requirements in earlier years.

Based upon figures obtained from USASpending.gov, which compiles information on federal spending and contractors across government agencies, the Department concludes that there were 186,536 unique Federal contractors holding Federal contracts in FY 2008.[2] Although this rule does not apply to Federal contracts below the simplified acquisition threshold, the Department does not have a means by which to calculate what portion of all Federal contractors hold *only* contracts with the government below the simplified acquisition threshold to which the rule would not apply in any respect. Therefore, in order to determine the number of entities affected by this rule, the Department used all Federal contractors as a basis, regardless of the size of the government contract held. Based on data analyzed in the Federal Procurement Data System (fpds.gov), which compiles data about types of contractors, of all 186,536 unique Federal prime contractors, approximately 35% are ''small entities'' as defined by the Small Business Administration (SBA) size standards.[3]

[2] The Federal Funding Accountability and Transparency Act of 2006, Pub.L. 109–282, (Sept. 26, 2006), requires that the Office of Management and Budget establish a single searchable Web site, accessible by the public for free, that includes for each Federal award, among other things: (1) The name of the entity receiving the award; (2) the amount of the award; (3) information on the award including transaction type, funding agency, etc.; (4) the location of the entity receiving the award; and (5) a unique identifier of the entity receiving the award. *See* 31 U.S.C.A. § 6101 note. In compliance with this requirement, USASpending.gov was established.

[3] The Federal Procurement Data System compiles data regarding small business ''actions'' and small business ''dollars'' using the criteria employed by SBA to define ''small entities.'' In FY 2008, small business actions accounted for 50% of all Federal procurement action. However, deriving a percentage of contractors that are small using the ''action'' data would overstate the number of small contractors because contract actions reflect more than just contracts; they include modifications, blanket purchase agreement calls, task orders, and federal supply schedule orders. As a result, there are many more contract actions than there are contracts or contractors. Accordingly, a single small contractor might have hundreds of actions, *e.g.,* delivery or task orders, placed against its contract. These contract actions would be counted individually in the FPDS, but represent only one small business.

Also reflected in FPDS, in FY 2008, small business ''dollars'' accounted for 19% of all Federal dollars spent. However, deriving a percentage of contractors that are small using the ''dollars'' data would understate the number of small contractors. Major acquisitions account for a disproportionate share of the dollar amounts and are almost exclusively awarded to large businesses. For instance, Lockheed Martin was awarded $34 billion in contracts in FY 2008, which accounted for 6% of all Federal spending in that year. The top five federal contractors, all large businesses, accounted for over 20% of contract dollars in FY 2008. As a result, because the largest Federal contractors disproportionately represent ''dollars'' spent by the

Therefore, for the purposes of the RFA analysis, the Department estimates that this rule will affect 65,288 small Federal prime contractors.

As noted above, for the purposes of this analysis, the Department estimates that each prime contractor subcontracts a portion of the prime contract three times, on average. However, the community of prime contractors does not utilize a unique subcontractor for each subcontract; the Department assumes that subcontractors may be working under several prime contracts for either a single prime contractor or multiple prime contractors, or both. In addition, some subcontractors may also be holding prime contracts with the government, so they may already be counted as affected entities. Therefore, in order to determine the unique number of subcontractors affected by this rule, the Department estimates there are the same number of unique subcontractors as prime contractors, resulting in the estimate that 186,536 subcontractors are affected by this rule. Further, for the purposes of this analysis, the Department assumes that all subcontractors are ''small entities'' as defined by SBA size standards. Therefore, in order to estimate the total number of ''small'' contractors affected by this rule, the Department has added together the estimates for the number of small prime contractors calculated above (65,288) with the estimate of all subcontractors (186,536), all of which we assume are small. Accordingly, the Department estimates that 251,824 small prime and subcontractors are affected by this rule.

Based on this analysis, the Department concludes that this proposed rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either ''significant economic impact'' or ''substantial'' as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact.'' *See A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* Office of Advocacy, U.S. Small Business Administration at 17, available at *http://www.sba.gov.* As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* In this case, the Department has determined that the average cost of compliance with this rule in the first year for all Federal contractors and subcontractors will be $108.57. The Department concludes that this economic impact is not significant. Furthermore, the Department has determined that of the entire regulated community of all 186,536 prime contractors and all 186,536 subcontractors, 67% percent of that regulated community constitute small entities (251,824 small contractors divided by all 373,072 contractors). Although this figure represents a substantial number of federal contractors and subcontractors, because Federal contractors are derived from virtually all segments of the economy and across industries, this figure is a small portion of the national economy overall. *Id.* at 20 (''the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall''). Accordingly, the Department concludes that the rule does not impact a substantial number of small entities in a particular industry or segment of the economy. Therefore, under 5 U.S.C. 605, the Department concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, this proposed rule would not include any Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than $100 million in any one year.

Paperwork Reduction Act

Certain sections of this proposed rule, including § 471.11(a) and (b), contain information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA). As required by the PRA, the Department has submitted a copy of these sections to OMB for its review.

The proposed rule requires contractors to post notices and cooperate with any investigation into a failure to comply with the requirements of part 471 as the result of a complaint or a compliance evaluation. It also permits employees to file complaints with the Department alleging that a contractor has failed to comply with those requirements. The application of the PRA to those requirements is discussed below.

The proposed rule imposes certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and § 471.2(a). As noted in § 471.2(e), the Department will supply the notice, and contractors will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, ''[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public'' is not considered a ''collection of information'' under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The proposed rule would also impose certain burdens on the contractor associated with cooperating with an investigation into failure to comply with the requirements of part 471 as the result of a complaint or in connection with a compliance evaluation. The regulations implementing the PRA exempt any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. *See* 5 CFR 1320.4. Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. *Id.* Therefore, this exemption would apply to the Department's investigation of complaints alleging violations of the Order or this proposed rule as well as compliance evaluations.

As for the burden hour estimate for employees filing complaints, we estimate, based on the experience of the Office of Federal Contract Compliance Programs (OFCCP) administering other laws applicable to Federal contractors, that it will take an average of 1.28 hours for such a complainant to compose a complaint containing the necessary information and to send that complaint to the Department. This number is also consistent with the burden estimate for filing a complaint under E.O. 13201 and the now-revoked part 470 regulations.

The Department has estimated it would receive a total of 50 employee complaints in any given year, which is significantly larger than the estimate contained its most recent PRA submission for E.O. 13201. In that

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Federal government, the FPDB's data on small ''dollars'' spent understates the number of small entities with which the Federal government does business.

The Department concludes that the percentage of all Federal contractors that are ''small'' is probably somewhere between 19% and 50%, the two percentages derived from the FPDS figures on small ''actions'' and small ''dollars.'' The mean of these two percentages is approximately 35%, and the Department will use this figure above to estimate how many of all Federal contractors are ''small entities'' in SBA's terms.

submission, the Department estimated it would receive 20 employee complaints. This number itself had been revised downwards because the Department never received any employee complaints pursuant to the now-revoked 29 CFR part 470 regulations. Because the applicability of the proposed rule and E.O. 13496 is greater in scope than the now-revoked part 470 and E.O. 13201 in terms of geography (the now-revoked part 470 regulations only applied to states without right-to-work laws, whereas the proposed rule applies nationwide), the Department has revised upwards its estimate of employee complaints under the proposed rule from 20 to 50. In addition, E.O. 13201 required the posting of a notice containing information of interest to only a few—employees who may have objected to paying union dues or fees for non-representational activities—while the information in the poster required by this regulation should be of interest to all employees.

The Department calculated the estimates of annualized cost to respondents for the hour burdens associated with this collection of information. Specifically, it used the data from the Bureau of Labor Statistics (BLS) National Compensation Survey: Occupation Wages in the United States (NCS), 2007 (Bulletin 2704), to calculate the cost of the burden hours associated with employee complaints. The NCS Bulletin indicates that the average hourly wage for all workers during 2007, the most recent year available, was $19.88 per hour. Therefore, we estimate that the cost to a complainant of filing a complaint under E.O. 13496 will be $25.92, or $25.45 ($19.88 × 1.28) + $0.47 for postage and envelope ($0.44 postage and $0.03 for the envelope). We further estimate, as stated above, that 50 individual complaints will be filed each year. Therefore, we project that this collection of information will impose on employees who file complaints a total annual cost burden of $1,296.00 ($25.92 per complaint × 50 complaints).

Proposed § 471.3(b) permits contracting departments to submit written requests for an exemption from the obligations of the Executive Order (waiver request) as to particular contracts or classes of contracts under specified circumstance. The PRA does not cover the costs to the Federal government for the submission of waiver requests by contracting agencies or departments or for the processing of waiver requests by the Department of Labor. The regulations implementing the PRA define the term ''burden,'' in pertinent part, as ''the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.'' 5 CFR 1320.3(b)(1). The definition of the term ''person'' in the same regulations includes ''an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision.'' 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government for the submission of waiver requests by contracting agencies and departments need not be taken into consideration.

The Department invites the public to comment on whether each of the proposed collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). Comments must be submitted by September 2, 2009 to: Desk Officer for the Department of Labor, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.

Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that the proposed rule does not have ''federalism implications.'' The employee notice required by the Executive Order and part 471 must be posted only by employers covered under the NLRA. Therefore, the proposed rule does not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this Proposed Rule does not impose substantial direct compliance costs on Indian tribal governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Request for Comments

This proposed rule would implement Executive Order 13496. The Department invites comments about the NPRM from interested parties, including current and potential Government contractors, subcontractors, and vendors, and current and potential employees of such entities; labor organizations; public interest groups; Federal contracting agencies; and the public.

List of Subjects in 29 CFR Part 471

Administrative practice and procedure, Government contracts, employee rights, Labor unions.

Text of Proposed Rule

Accordingly, a new Subchapter D, consisting of Part 471, is proposed to be added to 29 CFR Chapter IV to read as follows:

Subchapter D. Notification of Employee Rights Under Federal Labor Laws

PART 471—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

Authority: 40 U.S.C. 101 *et seq.*; Executive Order 13496, 74 FR 6107 (February 4, 2009); Secretary's Order 01–2008, 73 FR 32424 (June 6, 2008).

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 471.1 What definitions apply to this part?

Assistant Secretary means the Assistant Secretary for Employment Standards, United States Department of Labor, or his or her designee.

Collective bargaining agreement means an agreement, as defined in the Federal Service Labor-Management Relations Statute, entered into by an agency and the exclusive representative of employees in an appropriate unit to set terms and conditions of employment of those employees.

Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, weatherization, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

Contract means, unless otherwise indicated, any Government contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, that enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Department means the U.S. Department of Labor.

Employee notice clause means the contract clause that Government contracting departments and agencies must include in all Government contracts and subcontracts pursuant to Executive Order 13496 and this part.

Government means the Government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or non-personal services. The term ''personal property,'' as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ''non-personal services'' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federal financial assistance, as defined in 29 CFR 31.2.

Labor organization means any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

Order or *Executive Order* means Executive Order 13496 (74 FR 6107, January 30, 2009).

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order and this part.

Related rules, regulations, and orders of the Secretary of Labor, as used in § 471.2 of this part, means rules, regulations, and relevant orders of the Assistant Secretary for Employment Standards, or his or her designee, issued pursuant to the Executive Order or this part.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Simplified acquisition threshold means the dollar amount set by Congress under the Office of Federal Policy Procurement Act. As indicated in this Part, government contracts valued below the dollar amount set in the Simplified Acquisition Threshold are not subject to this Part.

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or non-personal services that, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order and this part.

Union means a labor organization as defined in paragraph (k) of this section.

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 471.2 What employee notice clause must be included in Government contracts?

(a) *Government contracts.* With respect to all contracts covered by this part, Government contracting departments and agencies shall, to the extent consistent with law, include the language set forth in Appendix A to Subpart A of Part 471 in every Government contract, other than collective bargaining agreements as defined in § 471.1 and purchase orders under the simplified acquisition threshold as defined in § 471.1.

(b) *Inclusion by reference not permitted.* The employee notice clause must be quoted verbatim in a contract, subcontract, or purchase order. The clause may not be made part of the contract, subcontract, or purchase order by words of incorporation or inclusion.

(c) *Adaptation of language.* Whenever the Assistant Secretary finds that an Act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions necessary to achieve the purposes of Executive Order 13496 and this part, the Assistant Secretary promptly shall issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

(d) *Obtaining employee notice poster.* The required employee notice poster, printed by the Department, will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster may also be downloaded from the Office of Labor-Management Standards Web site at *http://www.olms.dol.gov.* Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

(e) *Electronic postings of employee notice poster.* A contractor or subcontractor that customarily posts notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor and customarily used for employee notices, whether external or internal, a link to the Department of Labor's Web site that contains the full text of the poster. The language that must constitute the link is contained in Appendix B to Subpart A to Part 471.

§ 471.3 What exceptions apply and what exemptions are available?

(a) *Exceptions for specific types of contracts.* The requirements of this part do not apply to

(1) Collective bargaining agreements as defined in § 471.1.

(2) Government contracts that involve purchases below the simplified acquisition threshold as defined in § 471.1. Therefore, the employee notice clause need not be included in contracts for purchases below that threshold, provided that:

(i) No agency or contractor is permitted to procure supplies or services in a way designed to avoid the applicability of the Order and this part; and

(ii) The employee notice clause must be included in contracts and subcontracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract or subcontract will be less than the simplified acquisition threshold.

(3) Government contracts resulting from solicitations issued prior to the date of the effective date of this rule.

(b) *Exemptions for certain contracts.* The Deputy Assistant Secretary for Labor-Management Programs may exempt a contracting agency department or agency or groups of departments or agencies from the requirements of this part with respect to a particular contract or subcontract or any class of contracts or subcontracts when the Deputy Assistant Secretary finds that:

(1) The application of any of the requirements of this part would not serve its purposes or would impair the ability of the Government to procure goods or services on an economical and efficient basis; or

(2) Special circumstances require an exemption in order to serve the national interest.

(c) *Procedures for requesting an exemption and withdrawals of exemptions.* Requests for exemptions under this subsection from an agency or department must be in writing, and must be directed to the Deputy Assistant Secretary for Labor-Management Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5603, Washington, DC 20210. The Deputy Assistant Secretary for Labor-Management Programs may withdraw an exemption granted under this section when, in the Deputy Assistant Secretary's judgment, such action is necessary or appropriate to achieve the purposes of this part.

§ 471.4 What employers are not covered under this part?

(a) The following employers are excluded from the definition of ''employer'' in the National Labor Relations Act (NLRA), and are not covered by the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Or any Federal Reserve Bank;

(3) Or any State or political subdivision thereof, or any person subject to the Railway Labor Act;

(4) Or any labor organization (other than when acting as an employer);

(5) Or anyone acting in the capacity of officer or agent of such labor organization.

(b) Additionally, employers exclusively employing workers who are excluded from the definition of ''employee'' under the NLRA are not covered by the requirements of this part. Those excluded employees are employed:

(1) As agricultural laborers;

(2) In the domestic service of any family or person at his home;

(3) By his parent or spouse;

(4) As an independent contractor;

(5) As a supervisor as defined under the NLRA; or

(6) By an employer subject to the Railway Labor Act.

Appendix A to Subpart A of Part 471—Text of Employee Notice Clause

''1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The ''Secretary's Notice'' shall include the following information:

''NOTICE TO EMPLOYEES

RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

''It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.

''Under federal law, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through a duly selected union for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your terms and conditions of employment with your co-workers or a union; join other workers in raising work-related complaints with your employer, government agencies, or members of the public; and seek and receive help from a union subject to certain limitations.

Take action with one or more co-workers to improve your working conditions, including attending rallies on non-work time, and leafleting on non-work time in non-work areas.

Strike and picket, unless your union has agreed to a no-strike clause and subject to certain other limitations. In some circumstances, your employer may permanently replace strikers.

Choose not to do any of these activities, including joining or remaining a member of a union.

''It is illegal for your employer to:

Prohibit you from soliciting for the union during non-work time or distributing union literature during non-work time, in non-work areas.

Question you about your union support or activities.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in other activity for mutual aid and protection, or because you choose not to engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances, for example, as where doing so might interfere with patient care.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

It is illegal for a union or for the union that represents you in bargaining with your employer to: discriminate or take other adverse action against you based on whether you have joined or support the union.

''If your rights are violated:

Illegal conduct will not be permitted. The National Labor Relations Board (NLRB), an agency of the United States government, will protect your right to a free choice concerning union representation and collective bargaining and will prosecute violators of the National Labor Relations Act. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits and may order an employer or union to cease violating the law. The NLRB can only act, however, if it receives information of unlawful behavior within six months.

''If you believe your rights or the rights of others have been violated, you must contact the NLRB within six months of the unlawful treatment. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: *http://www.nlrb.gov.*

''Click on the NLRB's page titled About Us, which contains a link, Locating Our Offices. You can also contact the NLRB by calling toll-free: 1–866–667–NLRB (6572) or (TTY) 1–866–315–NLRB (1–866–315–6572) for hearing impaired.

''This is an official Government Notice and must not be defaced by anyone.

''2. The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

''3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

''4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

Appendix B to Subpart A of Part 471—Electronic Link Language

RIGHTS OF EMPLOYEES UNDER THE NATIONAL LABOR RELATIONS ACT

''It is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.''

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

§ 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?

(a) The Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to determine whether a contractor holding a covered contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by § 471.2(a) is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites, including all places where notices to employees are customarily posted both physically and electronically; and

(2) The provisions of the employee notice clause are included in government contracts, subcontracts or purchase orders entered into on or after [THE EFFECTIVE DATE OF FINAL RULE], or that the government contracts, subcontracts or purchase orders have been exempted under § 471.3(b).

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under § 471.13.

§ 471.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required by Executive Order 13496 and this part; and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include the name, address, and telephone number of the employee who filed the complaint (the complainant), the name and address of the contractor alleged to have violated Executive Order 13496 and this part, an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred, and any other pertinent information that will assist in the investigation and

resolution of the complaint. The complainant must sign the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under paragraph (a) of this section, the Deputy Assistant Secretary for Federal Contract Compliance will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of Executive Order 13496 and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of Executive Order 13496 or this part, the Deputy Assistant Secretary for Federal Contract Compliance will make reasonable efforts to secure compliance through conciliation.

(b) The contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with subcontractors to include the employee notice clause), and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance with Executive Order 13496 or this part.

(c) If a violation cannot be resolved through conciliation efforts, the Deputy Assistant Secretary for Federal Contract Compliance will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs, who may proceed in accordance with § 471.13.

(d) For reasonable cause shown, the Deputy Assistant Secretary for Labor-Management Programs may reconsider, or cause to be reconsidered, any matter on his or her own motion or pursuant to a request.

§ 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?

(a) *General.* (1) Violations of Executive Order 13496 and this part may result in administrative proceedings to enforce the Order and the part. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

(v) A contractor's refusal to take such action with respect to a subcontract as is directed by the Deputy Assistant Secretary for Federal Contract Compliance or the Deputy Assistant Secretary for Labor-Management as a means of enforcing compliance with the provision of this part.

(vi) A subcontractor's refusal to adhere to the requirements of this part regarding employee notice or inclusion of the contract clause in its subcontracts.

(2) If a determination is made by the Deputy Assistant Secretary for Federal Contract Compliance that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, he will refer the matter to the Deputy Assistant Secretary for Labor-Management Programs for enforcement consideration. The Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures set forth in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued pursuant to 29 CFR 18.57 to the Assistant Secretary. The decision will be served on all parties and amici.

(3) Within 25 days (10 days in the event that the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Assistant Secretary.

(4) After the expiration of time for filing exceptions, the Assistant Secretary may issue a final administrative order, or may make such other disposition of the matter as he or she finds appropriate. In an expedited proceeding, unless the Assistant Secretary issues a final administrative order within 30 days after the expiration of time for filing exceptions, the administrative law judge's recommended decision will become the final administrative order. If the Assistant Secretary determines that the contractor has violated Executive Order 13496 or the regulations in this part, the final administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in § 471.14, impose appropriate sanctions and penalties, or any combination thereof.

§ 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has been issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Assistant Secretary will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, among which reasons must be a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section, however, will not be imposed if:

(1) The head of the contracting agency, or his or her designee, continues to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been afforded an opportunity for a hearing.

(d) In enforcing Executive Order 13496 and this part, the Assistant Secretary may:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure of the contractor to comply with its contractual provisions as required by section 7(a) of Executive Order 13496 and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under section 7(b) of Executive Order 13496 providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under section 7(b) of Executive Order 13496

providing that no contracting agency may enter into a contract with any non-complying subcontractor.

(e) Whenever the Assistant Secretary has exercised his or her authority pursuant to paragraph (d) of this section, the contracting agency must report the actions it has taken to the Assistant Secretary within such time as the Assistant Secretary will specify.

(f) Periodically, the Assistant Secretary will publish and distribute, or cause to be published and distributed, to all executive agencies a list of the names of contractors and subcontractors that have, in the judgment of the Assistant Secretary under § 471.13(b)(4) of this part, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts or subcontracts under the Executive Order and the regulations in this part.

§ 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Assistant Secretary takes the following action, a contractor or subcontractor must be given the opportunity for a hearing before the Assistant Secretary:

(a) Issues an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under sections 7(a) or (b) of Executive Order 13496 and § 471.14(d)(1) or (2) of this part; or

(b) Includes the contractor on a published list of non-complying contractors under section 7(c) of Executive Order 13496 and § 471.14(f) of this part.

§ 471.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts or subcontracts under Executive Order 13496 and this part may request reinstatement in a letter to the Assistant Secretary. If the Assistant Secretary finds that the contractor or subcontractor has come into compliance with Executive Order 13496 and this part and has shown that it will carry out Executive Order 13496 and this part, the contractor or subcontractor may be reinstated.

Subpart C—Ancillary Matters

§ 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?

Section 11 of Executive Order 13496 grants the Secretary the right to delegate any of his/her functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?

Rulings under or interpretations of Executive Order 13496 or the regulations contained in this part will be made by the Assistant Secretary or his or her designee.

§ 471.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

The sanctions and penalties contained in § 471.14 of this part may be exercised by the Assistant Secretary against any contractor or subcontractor who fails to take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration or enforcement of Executive Order 13496 or this part.

§ 471.23 What other provisions apply to this part?

(a) The regulations in this part implement Executive Order 13496 only, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 9 of Executive Order 13496, each contracting department and agency must cooperate with the Assistant Secretary, the Deputy Assistant Secretary for Labor-Management Programs, and/or the Deputy Assistant Secretary for Federal Contract Compliance, and must provide such information and assistance as the Assistant Secretary or Deputy Assistant Secretary may require, in the performance of his or her functions under the Executive Order and the regulations in this part.

(c)(1) Consistent with section 15 of Executive Order 13496, nothing in this subpart shall be construed to impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Consistent with section 15 of Executive Order 13496, nothing contained in the Executive Order or this part, or promulgated pursuant to Executive Order 13496 or this part, is intended to create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Neither Executive Order 13496 nor this part creates any such right or benefit.

Signed in Washington, DC, July 20, 2009.

Shelby Hallmark,

Acting Assistant Secretary for Employment Standards.

John Lund,

Deputy Assistant Secretary, Office of Labor-Management Standards.

Lorenzo D. Harrison,

Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs.

[FR Doc. E9–17577 Filed 7–31–09; 8:45 am]

BILLING CODE P

I

111TH CONGRESS
1ST SESSION

H. R. 1020

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2009

Mr. JOHNSON of Georgia (for himself, Mr. MILLER of North Carolina, Ms. SCHAKOWSKY, Mr. BISHOP of Georgia, Ms. LEE of California, Mr. LOEBSACK, Mr. NADLER of New York, Mr. CHANDLER, Mr. PATRICK J. MURPHY of Pennsylvania, Mr. SCOTT of Virginia, Mr. PASTOR of Arizona, Mr. LATOURETTE, Mr. DOGGETT, Mr. CONYERS, Mr. DELAHUNT, Mr. STUPAK, Ms. WASSERMAN SCHULTZ, Ms. MCCOLLUM, Mr. COURTNEY, Ms. BALDWIN, Mr. DEFAZIO, Mrs. LOWEY, Mr. HIGGINS, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. GUTIERREZ, Mr. BRALEY of Iowa, Mr. MARKEY of Massachusetts, Mrs. MALONEY, Mr. WATT, Mr. CARSON of Indiana, Mr. GEORGE MILLER of California, Ms. JACKSON-LEE of Texas, Mr. BOSWELL, Mr. SKELTON, Mr. BARROW, Mr. STARK, and Ms. LINDA T. SÁNCHEZ of California) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 1 of title 9 of United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Arbitration Fairness Act of 2009".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, open-

ing a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the

systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

SEC. 3. DEFINITIONS.

Section 1 of title 9, United States Code, is amended—

(1) by amending the heading to read as follows: **"§ 1. Definitions"**;

(2) by inserting before "'Maritime'" the following:

"As used in this chapter—";

(3) by striking "'Maritime transactions'" and inserting the following:

"(1) 'maritime transactions';";

(4) by striking "commerce" and inserting the following:

"(2) 'commerce'";

(5) by striking ", but nothing" and all that follows through the period at the end, and inserting a semicolon; and

(6) by adding at the end the following:

"(3) 'employment dispute', as herein defined, means a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act;

"(4) 'consumer dispute', as herein defined, means a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

"(5) 'franchise dispute', as herein defined, means a dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which—

"(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

"(B) the operation of the franchisee's business pursuant to such plan or system is sub-

stantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

"(C) the franchisee is required to pay, directly or indirectly, a franchise fee; and

"(6) 'pre-dispute arbitration agreement', as herein defined, means any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement.".

SEC. 4. VALIDITY AND ENFORCEABILITY.

Section 2 of title 9, United States Code, is amended—

(1) by amending the heading to read as follows: **"§ 2. Validity and enforceability"**,

(2) by inserting "(a)" before "A written";

(3) by striking ", save" and all that follows through "contract", and inserting "to the same extent as contracts generally, except as otherwise provided in the title"; and

(4) by adding at the end the following:

"(b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—

"(1) an employment, consumer, or franchise dispute; or

"(2) a dispute arising under any statute intended to protect civil rights.

"(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

"(d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.".

SEC. 5. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.

○

II

111TH CONGRESS
1ST SESSION

S. 931

To amend title 9 of the United States Code with respect to arbitration.

IN THE SENATE OF THE UNITED STATES

APRIL 29, 2009

Mr. FEINGOLD (for himself, Mr. DURBIN, Mr. KERRY, Mr. WHITEHOUSE, Mr. WYDEN, Mr. UDALL of New Mexico, Mr. MERKLEY, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Arbitration Fairness Act of 2009".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commer-

cial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are forcing millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize or understand the importance of the deliberately fine print that strips them of rights, and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue public, written decisions, arbitration often offers none of these features.

(7) Many corporations add to arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While

some courts have been protective of individuals, too many courts have erroneously upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE, AND CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, FRANCHISE, AND CIVIL RIGHTS DISPUTES

"§ 401. Definitions

"In this chapter—

"(1) the term 'civil rights dispute' means a dispute—

"(A) arising under—

"(i) the Constitution of the United States or the constitution of a State; or

"(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accom-

modations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

"(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual;

"(2) the term 'consumer dispute' means a dispute between a person other than an organization who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

"(3) the term 'employment dispute' means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203);

"(4) the term 'franchise dispute' means a dispute between a franchisee with a principal place of business in the United States and a franchisor arising out of or relating to contract or agreement by which—

"(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

"(B) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

"(C) the franchisee is required to pay, directly or indirectly, a franchise fee; and

"(5) the term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

"§ 402. Validity and enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement

shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.

"(b) APPLICABILITY.—

"(1) IN GENERAL.—An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

"(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1, by striking "of seamen," and all that follows through "interstate commerce";

(B) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(C) in section 208—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(D) in section 307—

(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

"4. Arbitration of employment, consumer, franchise, and civil rights disputes ..... 401".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.

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•S 931 IS

ACC Extras

Supplemental resources available on www.acc.com

Employment Law of In-House Counsel.
Program Material. May 2009
http://www.acc.com/legalresources/resource.cfm?show=358104

The Latest Trends In EEO Law: How Are They Creating Risk For Your Workplace?
Webcast Transcript. March 2008
http://www.acc.com/legalresources/resource.cfm?show=141398

Responding to EEO Agency Charges of Discrimination.
InfoPak. September 2009
http://www.acc.com/infopaks

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.