

## CLOSING THE RESIDUAL WAGE GAP: WHERE THE LAW FAILS TO SECURE GENDER PAY PARITY

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### I. INTRODUCTION: THE GENDER WAGE GAP

While the United States officially prohibited gender-based wage discrimination fifty-five years ago<sup>i</sup>, disparity in pay has persisted. When performing substantially equal work, women continue to be compensated less than their male counterparts.<sup>ii</sup> Currently, women employed full-time in the U.S. experience a 20% deficit in earnings as compared to men.<sup>1</sup> The variance in wages between genders is most commonly presented either as a ratio (women’s median earnings to male’s median earnings) or as the actual wage gap (the variance in the earnings of men and women divided by men’s median earnings).<sup>2</sup> In the 1960’s when the wages of men and women were initially compared, women earned only 59 cents to a dollar earned by a man.<sup>3</sup> While the 21% increase in women’s comparative wages since the ‘60’s exhibits progress towards closing the wage gap, advancement towards complete wage equality has stalled<sup>iii</sup>. At its’ current rate of change, it is predicted that pay equity between genders will not be attainable until the year 2059.<sup>4</sup> Though women’s individual characteristics and achievements may contribute to *how* women are affected by disparate pay, as a whole, the wage gap undeniably affects *all* women. The wage gap afflicts women throughout the United States at every age and level of education, across race and ethnicity, and among other minority categories. When the data surrounding the wage gap is compiled in aggregate, it depicts a clear continuation of widespread gender inequality<sup>iv</sup>.

### II. FACTORS CONTRIBUTING TO THE WAGE GAP

The wage gap cannot be explained comprehensively by any one source. Rather, it is a composite of many factors derived primarily from implicit and explicit biases.<sup>v</sup> Due to the general population’s cognizance of stereotypes associated with women, implicit bias may cause unintentional discriminatory actions by employers.<sup>5</sup> While both men and women are effectively equally creative, there is a significant deficit in the compensation of women as compared to that of men for their intellectual property. Intellectual property law is commonly considered to secure equitable compensation for equitable contributions,<sup>6</sup> however, “women are statistically underpaid and under-

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<sup>1</sup> “The Simple Truth about the Gender Pay Gap.” (Spring 2018 ed.) *AAUW: Empowering Women Since 1881*, OAD, [www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/](http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/).

<sup>2</sup> *Id.*

<sup>3</sup> “Earnings.” *Women's Bureau (WB) - Recent Facts*, United States Department of Labor: Women's Bureau, Dec. 2015, [www.dol.gov/wb/stats/earnings\\_2014.htm#edu](http://www.dol.gov/wb/stats/earnings_2014.htm#edu).

<sup>4</sup> *Id.* at \*1

<sup>5</sup> Devine, P. G., Forscher, P. S., Austin, A. J., and Cox, W. T. L. (2012). Long-term reduction in implicit race bias: A prejudice habit breaking intervention. *Journal of Experimental Social Psychology*, 48, 1267-1278.

<sup>6</sup> Staff, LII. “Intellectual Property.” *LII / Legal Information Institute*, 2 July 2017, [www.law.cornell.edu/wex/intellectual\\_property](http://www.law.cornell.edu/wex/intellectual_property).

represented across various industries.”<sup>7</sup> To effectively rectify the enduring pay disparity, it is imperative to first identify the sources of the wage gap.

### A. *Implicit Bias*

#### 1. Undervaluation of Women’s Work and Aptitude

Women’s work and women themselves have historically been valued less than men. This is due in part to men being historically more educated than women.<sup>vi</sup> Though currently more women than men are obtaining diplomas, the stereotype that women are less educated and less qualified than men has persisted. Remarkably, women who obtain higher levels of education experience a larger wage gap than women who are less educated.<sup>vii</sup> Some critics of the wage gap argue that women’s recent educational engagement and emergence in the labor force has not allowed enough time for women to develop the necessary experience to be professionally competitive with men. The implications of this bias for women entering male-dominated fields involve an average decrease in wages as more women enter that field.<sup>viii</sup> The normative female gender role of women as caretakers may elicit an employer’s expectation for female employees to take time off from work to care for family members, therefore impeding on the woman’s career advancement both in title and salary. Though women who decide to have children experience greater pay disparity, research shows the “mothering effect” exists for all women. Employers have exhibited an implicit bias in hiring women, believing a female will not be as committed to her career due to maternal responsibilities.<sup>8</sup>

#### 2. Labor Force Participation and Occupational Segregation

A woman’s traditional role of housemaker and caregiver, along with the general conception of women’s wages as supplementary income, initially restricted available jobs to unskilled, domestic positions.<sup>9</sup> Women began to enter the labor market in large numbers through the 1950’s and 1960’s and became increasingly vocal about wage inequality,<sup>ix</sup> inducing Congress to take action through federal legislation.<sup>x</sup> Even with federal protections in place to enforce equality and promote diversity in the workplace, studies show that “women are disproportionately represented in education, office and administrative support, and health care occupations, [while] men are disproportionately represented in construction, maintenance and repair, and production and transportation occupations.”<sup>10</sup> The occupations (and college majors) chosen by women tend to procure lower wages, however, when compared to men in the same occupation and/or major, women are still consistently paid less.<sup>11</sup>

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<sup>7</sup> “WIPO Policy on Gender Equality.” World Intellectual Property Organization, 5 Aug. 2014.

<sup>8</sup> Rona Kaufman Kitchen, *Article: Eradicating the Mothering Effect: Women As Workers And Mothers, Successfully And Simultaneously*, 26 Wis. J.L. Gender & Soc’y 167 (Fall 2011)

<sup>9</sup> Goldberg Dey, Judy, and Catherine Hill. “Behind the Pay Gap.” *Behind the Pay Gap*, Apr. 2007, [www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf](http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf).

<sup>10</sup> Alexandra N. Phillips, *COMMENTS: Promulgating Parity: An Argument for a States-Based Approach to Valuing Women’s Work and Ensuring Pay Equity in the United States*, 92 Tul. L. Rev. 719 (February 2018)

<sup>11</sup> “Most Common Occupations for Women.” *Women’s Bureau (WB) Most Common Occupations for Women*, 2016, [www.dol.gov/wb/stats/most\\_common\\_occupations\\_for\\_women.htm](http://www.dol.gov/wb/stats/most_common_occupations_for_women.htm).

### 3. Salary Negotiation

Women are far less likely to negotiate than their male counterparts for higher wages and other workplace benefits or promotions.<sup>xi</sup> Women’s reluctance to negotiate stems in part from the societal bias that perceives men as confident and women as abrasive for engaging in pay negotiation. The concerns of women regarding how they are perceived in negotiations were validated by research stating, “both male and female managers are less likely to want to work with women who negotiate during a job interview.”<sup>12</sup> A primary inhibitor of successful female negotiation lies in the lack of access to information of comparable male co-worker salaries as well as employers utilizing past salary as a basis for new salary proposals. In the case of *Aileen Rizo v. Fresno County Office of Education*, the U.S. Court of Appeals for the Ninth Circuit found that basing starting salaries on an employee’s prior salary is a violation of the Equal Pay Act. The Court stated in their discussion:

At the time of the passage of the [Equal Pay Act], an employee’s prior pay would have reflected discriminatory marketplace that valued the equal work of one sex over the other. Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.<sup>13</sup>

While secrecy surrounding co-workers’ wages remains a primary barrier to wage equality, progress towards pay parity can be found in the Ninth Circuit’s ruling.

#### *B. Explicit Bias: Intentional Discrimination*

By addressing the intentional discrimination resulting from employers’ explicit biases, federal statutes protecting against gender-based wage inequality have made notable progress in reducing the wage gap.<sup>14</sup> While it is important to acknowledge progress towards closing the wage gap, available legal recourse is limited in effectiveness. The current statutes do not fully protect against intentional discrimination: if they did, studies that control factors relating to implicit bias and other criteria would show an insubstantial pay disparity. Rather, studies have determined that 36% of the pay gap remains unexplained by “occupational and industry differences,”<sup>15</sup> indicating intentional discrimination as a primary source of the remaining gap.

### III. EXISTING REMEDIES FOR GENDER-BASED WAGE DISCRIMINATION

#### *A. Equal Pay Act of 1963 (EPA)*

Passed in 1963 as an amendment to the Fair Labor Standards Act (FLSA), the Equal Pay Act (EPA), “prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working

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<sup>12</sup> Milne-Tyte, Ashley. “Why Women Don’t Ask For More Money.” *NPR*, NPR, 8 Apr. 2014, [www.npr.org/sections/money/2014/04/08/300290240/why-women-dont-ask-for-more-money](http://www.npr.org/sections/money/2014/04/08/300290240/why-women-dont-ask-for-more-money).

<sup>13</sup> D.C.No.1:14-cv-00423- MJS. *Aileen Rizo v. Fresno County Office of Education*. Vol. 16-15372, 9 Apr. 2018.

<sup>14</sup> Marianne DelPo Kulow, *ARTICLE: Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws--A Necessary Tool For Closing the Residual Gender Wage Gap*, 50 *Harv. J. on Legis.* 385 (Summer 2013)

<sup>15</sup> “America’s Women and the Wage Gap: Fact Sheet” National Partnership for Women and Families. *Nationalpartnership.org*, Apr. 2018, [www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf](http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf).

conditions.”<sup>16</sup> To establish a prima facie case of wage discrimination under the EPA, the plaintiff must show that one or more persons of the opposite sex working in the same establishment (the comparator) receives a higher rate of pay and performs work substantially equal to that performed by the plaintiff. If the plaintiff establishes a prima facie case, the burden then shifts to the employer who must demonstrate that the differential in pay between the plaintiff and the comparator is explained by one of the four affirmative defenses. These defenses include pay based on a seniority system, merit system, a system which measures earnings by a quantity or quality of production, or a differential factor other than sex.<sup>xii</sup> The fourth affirmative defense can provide employers with a “loophole” to avoid liability. Notably, in the case of *Corning Glass Works v. Brennan*, the U.S. Supreme Court held the Second Circuit Court of Appeal’s ruling that a wage system, “phrased in terms of a neutral factor other than sex [that] nevertheless operated to perpetuate the effects of [sex-discrimination]”<sup>17</sup> was not a valid neutral factor other than sex. The courts neglected however to define what would establish a valid defense.

### *B. Title VII of the Equal Rights Act of 1964*

Title VII of the Equal Rights Act prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>18</sup> Title VII’s provisions allows sex-based discrimination cases decisions to be litigated under a broader scope than that of the EPA since Title VII applies to disparate compensation and other adverse employment decisions. Establishing a prima facie case under Title VII requires the plaintiff to establish they belong to a protected class and that their employer utilizes a compensation or employment policy that adversely impacts employees of that protected class.<sup>19</sup> Before a plaintiff may file a suit under Title VII, they must first file a complaint with the EEOC and allow for an investigation by the Commission which is not obligatory under the EPA. Under Title VII, the defendant is only required to identify a discriminatory employment policy as opposed to the EPA’s comparator burden of proof. Under the Bennett Amendment,<sup>xiii</sup> defendants to a Title VII discrimination case are afforded the same affirmative defenses as the EPA.

Plaintiffs filing for employment discrimination under Title VII were required to do so, “within one hundred eighty days after the alleged unlawful employment practice occurred.”<sup>20</sup> In *Ledbetter v. Goodyear Tire and Rubber Co.*, the U.S. Supreme Court ruled the statute of limitations begins on the day of the initial instance of discriminatory pay. In 2009, President Obama overruled the Supreme Court’s decision and amended Title VII with the Lilly Ledbetter Fair Pay Act; allowing a plaintiff to file a claim of wage discrimination within 180 days of each discriminatory act, or when a plaintiff is affected by the discriminatory act.<sup>21</sup>

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<sup>16</sup> “The Equal Pay Act of 1963.” *The Equal Pay Act of 1963 (EPA)*, [www.eeoc.gov/laws/statutes/epa.cfm](http://www.eeoc.gov/laws/statutes/epa.cfm).

<sup>17</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223, 41 L. Ed. 2d 1, 1974 U.S. LEXIS 62, 9 Fair Empl. Prac. Cas. (BNA) 919, 74 Lab. Cas. (CCH) P33,078, 7 Empl. Prac. Dec. (CCH) P9374 (U.S. June 3, 1974)

<sup>18</sup> “Civil Rights Act of 1964, 78 Stat. at 255.

<sup>19</sup> *Id.* at \*16

<sup>20</sup> 42 U.S.C. § 2000e-5(e) (2006).

<sup>21</sup> *Id.* at \*16

#### IV. WHERE THE LAW FAILS TO PROTECT AGAINST GENDER WAGE INEQUALITY

The primary flaw in the existing statutes lies in the requirement of a plaintiff to be aware of and produce evidence of the pay disparity they are experiencing. Neither the EPA or Title VII include provisions that assist women in obtaining the comparative wage information necessary to bring a claim forward. The widely accepted company culture of wage secrecy leaves a majority of women ignorant to discriminatory practices. To protect unsuspecting employees from discrimination, legislation must be passed that promotes access to comparative wage data and enhances awareness of pay disparity for employees and employers alike.

Mandatory wage disclosure laws would better equip women with the tools necessary to combat wage inequality. Existing wage disclosure laws have shown to have some impact on the wage gap, but are “primarily directed at public sector jobs.”<sup>22</sup> With 90% of American’s employed in the private sector,<sup>23</sup> the effects of these limited disclosure laws are insignificant in minimizing the overall wage gap. Expanding wage disclosure laws and salary audits would also encourage employers to identify and correct disparate treatment that may have arisen unconsciously and provide the opportunity to explain disparities in pay explainable by affirmative defenses. Bias training can also help employers prevent against disparate treatment as a result of implicit bias.

While sharing wage information is outright forbidden in many organizations, the notion of discussing one’s compensation is typically extremely uncomfortable for most Americans.<sup>xiv</sup> This trend has begun to decrease as information sharing has become common practice with the rise of the internet and technology. Wage transparency will also better equip women with symmetrical information in negotiations. Dane Atkinson, the CEO of SumAll (a data analytics company), promotes wage transparency as a negotiation tool stating, “[employees are] not necessarily negotiating for themselves; the environment negotiates for them.”<sup>24</sup>

#### V. CONCLUSION

The deceleration of closing the gender wage gap can be primarily attributed to a decrease in the weight of implicit bias factors to the overall wage gap. It is pertinent to address the shortcomings of current legislation in sufficiently protecting employees from wage discrimination. Looking forward, the most sensible next step is to clearly define what constitutes a “differential factor other than sex” to be considered a universally valid affirmative defense, preventing employers from escaping liability for disparate treatment.

Moreover, passing wage disclosure laws is essential to closing the wage gap. In addition to facilitating a positive work environment and enhancing employee morale, wage transparency will better equip women to preemptively protect and retroactively defend themselves from gender-based wage discrimination as well as allowing employers to make corrections themselves.

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<sup>22</sup> *Id.* at \*20

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

<sup>24</sup> Covert, Bryce. “Why This Company Decided To Make Its Salaries Public To All Employees.” *ThinkProgress*, 27 June 2014, [thinkprogress.org/why-this-company-decided-to-make-its-salaries-public-to-all-employees-d7a08929b3c9/](http://thinkprogress.org/why-this-company-decided-to-make-its-salaries-public-to-all-employees-d7a08929b3c9/).

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<sup>i</sup> Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)

<sup>ii</sup> “The Simple Truth about the Gender Pay Gap.” (Spring 2018 ed.) *AAUW: Empowering Women Since 1881*, 0AD, [www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/](http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/).

<sup>iii</sup> Blau, Francine D., and Lawrence M. Kahn. “The Gender Wage Gap: Extent, Trends, and Explanations.” *Discussion Paper No. 9656*, Institute for the Study of Labor: Germany, Jan. 2016, [ftp.iza.org/dp9656.pdf](http://ftp.iza.org/dp9656.pdf).

<sup>iv</sup> While wages for both genders experience an increase with age, women’s salaries grow more slowly, causing the pay gap to widen over the course of their employment. The wage gap was shown, in 2014, to grow from 9% to 21% as a woman ages from 16 to 65+ years old.<sup>iv</sup> Similarly, as men and women attain higher levels of education, both sustain a raise in pay with women’s pay increasing at a lower rate than males.<sup>iv</sup> This makes wage gap more severe at higher levels of educational achievement where women with advanced degrees earn 72 cents for every dollar earned by a man with an advanced degree, while women with less than a high school diploma earn 79 cents to a dollar earned by a comparable male<sup>iv</sup>. The most egregious disparity is experienced by African American and Hispanic women.<sup>iv</sup> Though when compared to men of the same ethnicity African American and Hispanic women actually experience the lowest wage gap (10% for African American women and 8% for Hispanic women) when compared to all men, the wage gap widens substantially (30% and 39% respectively).

<sup>v</sup> United States, Congress, Community Relations Service. “Understanding Bias: A Resource Guide.” *Understanding Bias: A Resource Guide*. [www.justice.gov/crs/file/836431/download](http://www.justice.gov/crs/file/836431/download).

<sup>vi</sup> Lyons, Nona P. “Women’s Education.” *Encyclopedia of Educational Research*, 6th ed., vol. 1522-24, 1992.

In 1947, the ratio of women to men who attended college was merely 22% (“*Years of School Completed by Persons 14 to 29 Years Old by School Enrollment, Age and Sex for the United States Population*.” *United States Census Bureau, Apr. 1947*.): a result of legal and cultural barriers to female education. This ratio would grow to 87% by 1978 (“*Single Years of School Completed by Persons 14 Years and Older by Age and Sex*.” *United States Census Bureau, Mar. 1975*.) and by 2017 women’s graduation rate from college exceeded that of men by 3% (“*Percentage of the U.S. Population with a College Degree 1940-2017, by Gender* | *Statistic*.” *Statista*, 2018.)

<sup>vii</sup> Goldberg Dey, Judy, and Catherine Hill. “Behind the Pay Gap.” *Behind the Pay Gap*, Apr. 2007, [www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf](http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf).

<sup>viii</sup> *Id.* at \*ii

<sup>ix</sup> *Id.* at \*ix

<sup>x</sup> Alexandra N. Phillips, *COMMENTS: Promulgating Parity: An Argument for a States-Based Approach to Valuing Women’s Work and Ensuring Pay Equity in the United States*, 92 Tul. L. Rev. 719 (February 2018)

<sup>xi</sup> *Id.* at \*xii

<sup>xii</sup> “Chapter 12.” *EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE*, by DAVID J. WALSH, 5E ed., SOUTH-WESTERN, 2018, pp. 445–448.

<sup>xiii</sup> “Milestones: 1981.” *Milestones in the History of the U.S. Equal Employment Opportunity Commission: 1981*, [www.eeoc.gov/eeoc/history/35th/milestones/1981.html](http://www.eeoc.gov/eeoc/history/35th/milestones/1981.html).

<sup>xiv</sup> *Id.* at \*xii