

THE PAYCHECK FAIRNESS ACT: HELPING TO CLOSE THE WAGE GAP FOR WOMEN

More than forty years ago, President Kennedy signed the Equal Pay Act (EPA)¹ into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar earned by men.² Although enforcement of the EPA as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. For these reasons, Senators Clinton and Kennedy and Representative DeLauro have introduced the Paycheck Fairness Act, which will strengthen current laws against wage discrimination and require the federal government to be more proactive in preventing and battling wage discrimination. Enactment of the Paycheck Fairness Act is critical to help realize the decades-old promise of equal pay for equal work.

The Gender Wage Gap Persists

- Women working full-time, year-round earn only about 77 cents for every dollar earned by men, only a slight improvement from 76 cents in 2003. In 2004, the median annual earnings of women 15 and older were \$31,223, compared to \$40,798 for their male counterparts.³
- Minority women fare significantly worse. In 2004, the median earnings of African American women working full-time, year-round were \$27,774⁴ compared to \$41,515⁵ for white men; the median for Hispanic women was only \$23,444.⁶ That means an African American woman earned just 67 cents for every dollar earned by a white man, while a Hispanic woman earned only 56 cents on the dollar.⁷ In both cases, this pay gap for women of color was only marginally smaller than it was in 2003.
- An earnings gap exists between women and men across a wide spectrum of occupations. In 2005, for example, the median weekly wages earned by women physicians were just 61% of the median weekly wages of male physicians.⁸ Women in sales and sales-related occupations earned only about 63% of the median weekly wages of men in equivalent positions.⁹ In some occupations, the gap is narrower, but still substantial. Women in the construction industry earned median weekly wages that were about 79% of what their male counterparts earned.¹⁰ And women in computer and mathematical occupations had weekly earnings that were 86% of what their male counterparts earned.¹¹
- In some occupations, women have actually lost ground. For example, in a recent study of management positions in 10 industries that together employ over 70% of women in the workforce, the U.S. Government Accountability Office (then the General Accounting Office) found that women managers consistently made less than their male counterparts, and in seven of the 10 industries the pay gap had *increased* between 1995 and 2000.¹²
- The earnings gap between women and men also persists across all educational levels. While education lifts all boats, it lifts men's boats much higher than women's. For example, among workers 18 and older with some high school education, women's median annual earnings were \$11,650, compared to \$18,043 for men.¹³ Graduation from high school boosted women's median earnings to \$19,175, yet the same high school degree yielded \$28,827 for men.¹⁴ Even a two-year associate's

degree gives men a much bigger bang for their buck (\$40,453 in median annual earnings) than it does for women (\$26,049).¹⁵ And earning a bachelor's degree yielded a median annual of income of \$32,394 for women, but a whopping \$50,527 for men.¹⁶ In fact, the pay gap is widest among non-Hispanic white men and women: men with just a high school diploma make almost as much (\$31,051) as white women who have graduated from college (\$32,006).¹⁷

- There is not a single state in which women have gained economic equality with men.¹⁸ As of 2002, Washington, D.C. was the area with the smallest wage gap, at 92%,¹⁹ whereas Wyoming had the widest gap, with women making about 66% of what men earned.²⁰
- As women get older, the wage gap for them widens. When women start their careers, the pay gap is relatively small: females aged 15 to 24 working full-time year-round have median annual earnings that are 94% of what their male counterparts earn.²¹ However, by the time they reach the critical years leading up to retirement, that 6% pay gap has quintupled: women aged 45 to 64 who work full-time earn only about 70% of what men do.²²
- If women in the workforce earned the same as men who work the same number of hours, have the same education, age, and union status and live in the same region of the country, their annual family income would rise by about \$4,000 and their poverty rates would be cut by half or more.²³ The Institute for Women's Policy Research calculated that a typical 25-year-old woman who graduated college in 1984 and who was in her mid-40s in 2004 has lost more than \$440,000 during that period due to the wage gap.²⁴
- Pay inequity also follows women into retirement. Unmarried women in the workforce today will receive, on average, about \$8,000/year less in retirement income than their male counterparts; even controlling for number of years worked and educational levels, the pay gap during prime working years, plus spending a career in a female-dominated job, accounts for two-thirds of that retirement income gap.²⁵ Women's loss of income in retirement due to pay inequity during their working years shows up primarily in their pensions and savings, not their Social Security. To the contrary, Social Security's progressive benefit formula and spousal benefits help women to counteract the effects of wage discrimination.²⁶

The Wage Gap Reflects Sex Discrimination

The wage gap cannot be dismissed as the result of "women's choices" in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account, there is still a significant, unexplained gap in men's and women's earnings. Thus, even when women make the same career choices as men and work the same hours, they still earn less.

- A 2003 study by U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for — demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure — women still earned, on average, only 80% of what men earned in 2000.²⁷ That is, 20% of the pay gap between women and men could not be explained or justified.
- One extensive study that examined occupational segregation and the pay gap between women and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work (as well as education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.²⁸

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

- In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys' network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first." Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career, and women aren't. Retail is for housewives who just need to earn extra money."²⁹ The case is proceeding as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.
- In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed the Equal Employment Opportunity Commission alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay \$54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.³⁰
- In 2004, Wachovia Corp. admitted no wrongdoing but agreed to pay \$5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over six years.³¹

Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is among women's top work-related priorities. For instance, nine in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL-CIO rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.³²

**The Paycheck Fairness Act Is Designed to Close Loopholes in the Law
and Block Rollbacks in Federal Enforcement
that Have Hindered Efforts to Secure Equal Pay for Equal Work**

The persistence of wage disparities as well as the experiences of litigants under the Equal Pay Act demonstrate the need for stronger laws to ensure that women are paid equal wages for equal work. Enactment of the Paycheck Fairness Act,³³ introduced in the Senate by Sen. Hillary Rodham Clinton and in the House of Representatives by Rep. Rosa DeLauro, would update and strengthen the EPA in important ways, including:

■ **Improving Equal Pay Act Remedies**

The Act toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated (fixed and limited) damages and back pay awards, which tend to be insubstantial. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available.

■ **Making it Easier to Bring Class Action Equal Pay Act Claims**

The Act allows an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently, it is very difficult to bring EPA suits as class actions because the EPA, adopted prior to the current federal class action rule (FRCP Rule

23), requires plaintiffs to opt *in* to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt *out* of the class.

- **Improving Collection of Pay Information by the Equal Employment Opportunity Commission (EEOC)**

The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **Prohibiting Employer Retaliation**

The Act prohibits employers from punishing employees for sharing salary information with their co-workers. Without the ability to learn about wage disparities, it is difficult for employees to evaluate whether they are experiencing wage discrimination and to take action to assert their rights under the law. But many employers currently place a "gag rule" on discussions of salaries among employees.

- **Closing a Loophole in an Employer Defense**

Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an "affirmative defense"³⁴ that the pay differential is based on a "factor other than sex."³⁵ Some employers have argued for interpretations of this affirmative defense that are so broad (e.g., to include factors such as a male worker's stronger salary negotiation skills or higher previous salaries) that they may themselves be "based on sex" and would seriously undermine the EPA.³⁶ The Act tightens this affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance – such as differences in education, training, or experience.

- **Eliminating the "Establishment" Requirement**

Under the EPA, in order to determine that there is wage discrimination, the wage comparison must be made between employees working at the same "establishment."³⁷ Some courts have interpreted this to mean that wages paid in different facilities or offices of the same employer cannot be compared even if the employer is paying workers different salaries for the same work.³⁸ The Act clarifies that a comparison need not be between employees in the same physical place of business.

- **Developing Voluntary Guidelines for and Recognizing Model Employers**

The Act directs the Department of Labor to develop guidelines to enable employers voluntarily to compare wages paid for different jobs to determine whether their pay scales accurately reflect the requirements of the jobs. This will help employers to eliminate unfair disparities between occupations traditionally dominated by men and by women. The Act also establishes an award, to be administered by the Labor Department, to recognize and promote the achievements of employers who have made strides to eliminate pay disparities.

- **Increasing Training, Research, and Education**

The Act provides for increased training for EEOC employees to help them identify and respond to wage discrimination claims. It also calls for enhancing various research and education programs at the Department of Labor, including programs to research ways to eliminate gender-based pay disparities and provide information to employers to assist them in eradicating such disparities.

- **Halting Rollbacks and Retreats by the Department of Labor**

The Department of Labor is charged with ensuring that employers that do business with the federal government do not discriminate and take affirmative action to ensure equal opportunity. Under the

Bush Administration, however, the Labor Department has refused to use the tools at its disposal to detect and take enforcement action against wage discrimination by federal contractors. To the contrary, it has proposed guidelines and regulations that would tie its hands. For instance, the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors has proposed narrowing the scope of its investigations into systemic wage discrimination,³⁹ and it has proposed to eliminate a vital tool for detecting wage discrimination and other types of discrimination.⁴⁰ Moreover, the Department has removed information about women's rights to equal pay from its website and has discontinued proactive activities to educate the public and enforce the law. The Act requires the Labor Department to reinstate many of these activities and to utilize all investigatory and enforcement tools at its disposal.

■ **Sparkling the Development of Salary Negotiation Skills Training**

The Act establishes a competitive grant program to develop training programs for women and girls on how to negotiate better compensation packages, and directs the Secretaries of Labor and Education to integrate the programs developed into education and job training programs under their respective jurisdictions.

Conclusion

Equal pay for equal work is at the foundation of equality in the workplace. Wage discrimination undermines family economic security today and retirement income tomorrow. American women and their families cannot afford paychecks that are shortchanged just because the workers who earned them are women. The provisions of the Paycheck Fairness Act propose concrete steps to respond to the ongoing injustice of wage discrimination.

NOTES

¹ 29 U.S.C. § 206(d).

² U.S. Census Bureau, Historical Income Tables – People, Table P-40. Woman's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin: 1960 to 2003, at <http://www.census.gov/hhes/income/histinc/p40.html> (last visited Mar. 31, 2006).

³ U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2004, Current Population Reports, Consumer Income, P60-229, Table 1: Money Income and Earnings Summary Measures by Selected Characteristics: 2003 and 2004, at 5 (Aug. 2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf> (last visited Mar. 31, 2006). The “improvement,” which was not statistically significant, was due to the fact that, while both men’s and women’s median earnings declined between 2003 and 2004, men’s wages fell more steeply than women’s. *Id.* at 8.

⁴ U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2004–People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin, and Sex, available at http://pubdb3.census.gov/macro/032005/perinc/new05_113.htm (last visited Mar. 31, 2006). (Individual tables available at http://pubdb3.census.gov/macro/032005/perinc/new05_000.htm (last visited Mar. 31, 2006).)

⁵ U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2004–People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin, and Sex, available at http://pubdb3.census.gov/macro/032005/perinc/new05_056.htm (last visited Mar. 31, 2006).

⁶ U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2004–People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin, and Sex, available at http://ferret.bls.census.gov/macro/032004/perinc/new05_117.htm (last visited Mar. 31, 2006).

⁷ National Women’s Law Center calculations based on selected tables, U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, available at http://pubdb3.census.gov/macro/032005/perinc/new05_000.htm (last visited Mar. 31, 2006).

⁸ National Women’s Law Center calculations based on Bureau of Labor Statistics, U.S. Dep’t of Labor, Household Data Annual Averages, Table 39: Median weekly earnings of full-time wage and salary workers by detailed occupation and sex 259 (2005 Income) available at <http://www.bls.gov/cps/cpsaat39.pdf> (last visited Mar. 31, 2006).

⁹ *Id.* at 260.

¹⁰ *Id.* at 261.

¹¹ *Id.* at 258. See also Suzanne Riss, *Salary Survey 2005: How Can We Close the Gender Pay Gap?*, NAFE Magazine, Winter 2005, at 18, 22-23 available at http://www.nafe.com/images/NAFE_Magazine/2005salarygap.pdf and http://www.nafe.com/images/NAFE_Magazine/2005salarychart.pdf (last visited Mar. 31, 2006).

¹² See U.S. General Accounting Office, *Women in Management: Analysis of Selected Data from the Current Population Survey 18-19*, GAO-02-156 (Oct. 2001), available at <http://www.gao.gov/new.items/d02156.pdf> (last visited Mar. 31, 2006).

¹³ National Women’s Law Center calculations based on U.S. Census Bureau, Educational Attainment in the United States: 2004, Detailed Tables, Table 9 (2005), available at <http://www.census.gov/population/www/socdemo/education/cps2004.html> (last visited Mar. 31, 2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Misha Werschkul & Erica Williams, Institute for Women’s Policy Research, *The Status of Women in the States: 2004*, at 26 (Amy B. Caiazza and April Shaw, eds., 2004).

¹⁹ *Id.*

²⁰ *Id.*

²¹ National Women’s Law Center calculations based on selected tables, U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2004–People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin, and Sex, available at http://pubdb3.census.gov/macro/032005/perinc/new05_127.htm (female) and http://pubdb3.census.gov/macro/032005/perinc/new05_073.htm (male) (last visited Mar. 31, 2006).

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- ²² National Women's Law Center calculations based on selected tables, U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2004—People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin, and Sex, *available at* http://pubdb3.census.gov/macro/032005/perinc/new05_145.htm (female) and http://pubdb3.census.gov/macro/032005/perinc/new05_091.htm (male) (last visited Mar. 31, 2006).
- ²³ AFL-CIO & Institute for Women's Policy Research, Equal Pay for Working Families: National and State Data on Pay Gap and Its Costs 1 (1999), *available at* <http://www.aflcio.org/issues/jobseconomy/women/equalpay/EqualPayForWorkingFamilies.cfm> (last visited Mar. 31, 2006).
- ²⁴ Institute for Women's Policy Research, Memo to John Roberts: The Gender Wage Gap is Real 2 (Sept. 2005), *available at* <http://www.iwpr.org/pdf/C362.pdf> (last visited Apr. 14, 2006).
- ²⁵ Olivia S. Mitchell, Phillip B. Levine, & John W. Phillips, The Impact of Pay Inequality, Occupational Segregation, and Lifetime Work Experience on the Retirement Income of Women and Minorities ix (AARP, Sept. 1999), *available at* http://assets.aarp.org/rgcenter/econ/9910_women.pdf (last visited Mar. 31, 2006).
- ²⁶ *Id.*
- ²⁷ U.S. General Accounting Office, Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2, GAO-04-35 (Oct. 2003), *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-04-35> (last visited Mar. 31, 2006).
- ²⁸ See Kimberly Bayard, Judith Hellerstein, et al., New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data, 21 J. Labor Economics 887, 904 (2003).
- ²⁹ Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, The San Francisco Chron., Apr. 29, 2003, at B1, *available at* sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL (last visited Mar. 31, 2006).
- ³⁰ Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), *available at* <http://www.morganstanley.com/cgi-bin/morganstanley.com/pressroom.cgi?action=load&uid=352> (last visited Apr. 14, 2006).
- ³¹ See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. Wachovia Corp., Case No. 2001-OFC-0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 14, 2005), *available at* http://www.oalj.dol.gov/PUBLIC/OFCCP/DECISIONS/ALJ_DECISIONS/OFC/2001OFC00004_A.pdf (last visited Apr. 17, 2006); *Wachovia to Pay \$5.5M in Discrimination Case*, Tampa Bay Business Journal, Sept. 24, 2004, *available at* <http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html> (last visited Mar. 31, 2006).
- ³² AFL-CIO, 2004 Ask a Working Woman Survey Report, at 9 (2004) *available at* <http://www.aflcio.org/issues/jobseconomy/women/speakout/upload/aawwreport.pdf> (last visited Mar. 31, 2006).
- ³³ Another important legislative proposal, the Fair Pay Act, introduced in the Senate by Sen. Tom Harkin and in the House of Representatives by Del. Eleanor Holmes Norton, would extend the reach of the equal pay laws to cover wage discrimination that results from occupational segregation on the basis of sex, race, and ethnicity.
- ³⁴ In wage discrimination cases, an affirmative defense is one that admits the existence of a wage disparity but asserts a legally permissible reason for the disparity.
- ³⁵ 29 U.S.C. § 206(d)(1).
- ³⁶ See, e.g., *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (employer computed minimum salaries for new sales agents based on their prior salaries).
- ³⁷ 29 U.S.C. § 206(d)(1).
- ³⁸ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).
- ³⁹ Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 69 Fed. Reg. 67246 (Nov. 16, 2004).
- ⁴⁰ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey; Proposed Rule, 71 Fed. Reg. 3373 (Jan. 20, 2006).