



ATTORNEYS AT LAW

2018 Labor and Employment Seminar

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Pay Equity and the New **Glass Ceiling**



Summary

- Current state of the wage gap
- Federal laws prohibiting pay discrimination
 - Equal Pay Act of 1963
 - Title VII of the Civil Rights Act of 1964
- State laws
- Recent case law regarding pay discrimination
- Recommendations



What is Pay Equity?

- “Equal pay for equal work.”
- Origin: Male v. Female
- Now, many state laws require equal pay across all groups
 - Sex, race, national origin, ethnicity, etc.
- Pay equity is growing more complex as pay and work structures evolve.



The Wage Gap – Historically

- The wage gap has been slowly closing over time.

Full-Time, Year-Round Workers			
Year	Women	Men	Female-to Male Earnings Ratio (%)
1965	\$26,123	\$43,593	59.90%
1980	\$31,803	\$52,863	60.20%
1995	\$36,047	\$50,466	71.40%
2010	\$41,562	\$54,027	76.90%



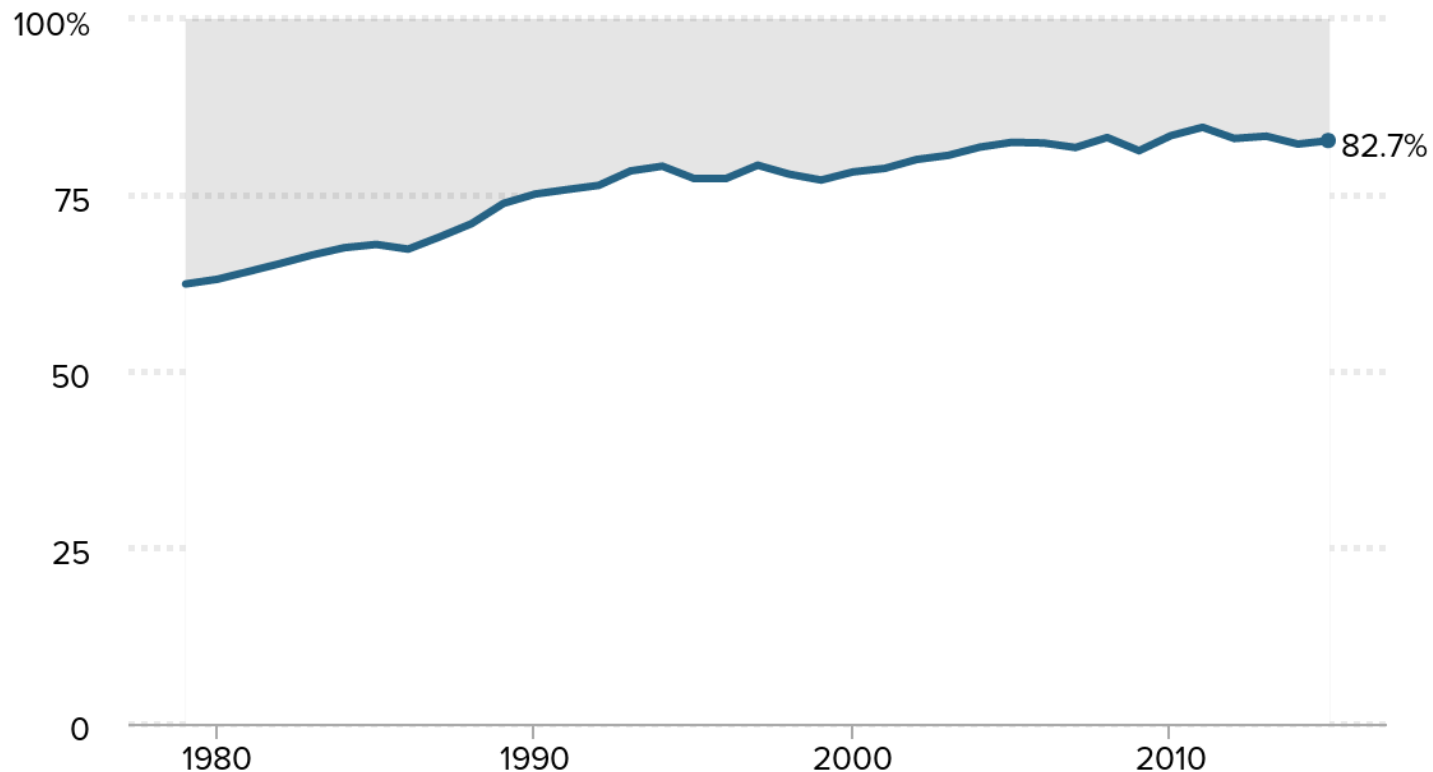
The Wage Gap – Today

- At the 10th percentile of wages, women earn 92 cents for every dollar paid to men.
- At the 95th percentile of wages, women earn 74 cents for every dollar paid to men.
- The average female worker loses more than \$530,000 over the course of her lifetime.
- The average college-educated female worker loses nearly \$800,000 over the course of her lifetime.



Progress in closing the gender pay gap has largely stalled

Women's hourly wages as a share of men's at the median, 1979–2015



Source: EPI analysis of Current Population Survey microdata. For more information on the data sample see EPI's State of Working America [Data Library](#).



The Stalled Wage Gap

- Since 1973:
 - 60% of the wage gap change due to drop in men's real earnings.
 - 40% of change due to increase in women's earnings.
- At current pace, the Institute for Women's Policy Research estimates that it will take 50 years to close the wage gap.



Federal Laws

- Equal Pay Act of 1963 (EPA)
- Title VII of the Civil Rights Act of 1964 (Title VII)
- Lilly Ledbetter Fair Pay Act of 2009
- Other federal laws ban discrimination in pay based on:
 - Age (ADEA)
 - Disability (ADA)



Federal Laws

- **Enforcement**
 - EEOC -- independent federal agency created by Congress in 1964 to eradicate discrimination in employment.
 - EEOC wields great power and discretion in achieving the goal of eradicating discrimination in employment.
- Under EPA and many state laws, plaintiff can bring a claim privately instead of first filing a charge with the EEOC or state equivalent.



Federal Laws

- **Enforcement**

- The EEOC has identified pay equity as one of six enforcement priorities.
- In recent years, the EEOC has increased the number of EPA claims it has filed against employers.
 - 2017: 11 EPA claims
 - 2016: 6 EPA claims
 - 2015: 5 EPA claims



Equal Pay Act

- Creates as an amendment to the minimum wage provision of the FLSA.
- Employers may not pay men and women differently for “equal work.”
- The EPA defines “equal work” as work done:
 - In the same location;
 - Under similar working conditions; and
 - Using equal skill, equal effort, and equal responsibility.



Equal Pay Act

- What is **equal work**?
 - “Substantially equal” – not “identical.”
 - Look at job content, not title.
- What is **equal pay**?
 - All forms of pay. Examples:
 - Salary
 - Overtime and bonuses
 - Vacation
 - Benefits, stock options, and profit sharing.



Equal Pay Act

- **Affirmative Defenses:**
- Employers may provide unequal pay for equal work, if the differential in pay is attributable to:
 - A seniority system;
 - A merit system;
 - A system based upon quality or quantity of production;
or
 - Any factor other than sex.



Equal Pay Act

- **Affirmative Defenses:**
 - Merit, seniority, or incentive systems must be:
 - Based on predetermined criteria.
 - Applied consistently and even-handedly.
 - Communicated to all employees.
 - Must eliminate arbitrary decision making.



Equal Pay Act

- **Affirmative Defenses:**
 - Merit system:
 - Raises based on high performance
 - Must evaluate employees regularly
 - Can contain subjectivity (supervisor rating), but must be otherwise objective.



Equal Pay Act

- **Affirmative Defenses:**
 - Incentive system:
 - Pay is tied to quantity or quality of production
 - Common in sales jobs (*i.e.* commission)
 - Like merit systems, criteria must be objective and uniformly applied.
 - Seniority system:
 - Pay primarily based on length of service.



Equal Pay Act

- **Affirmative Defenses:**
 - For all bona fide systems, the employer must show that the system is the true reason for the difference in pay.
 - Existence of system is not sufficient.
 - System must be related to business and to job requirements.



Title VII of the Civil Rights Act of 1964 (Title VII)

- Prohibits discrimination in all aspects of employment.
- Broader than EPA.
 - Prohibits wage discrimination on the basis of race, color, sex, religion or national origin.
 - Prohibits wage discrimination even when the jobs are not identical.
- Thus, employee who has EPA claim likely has viable Title VII claim.



Title VII of the Civil Rights Act of 1964 (Title VII)

- Must show:
 - Discriminatory intent; or
 - Facially neutral policy with disparate impact.
- Need not show “equal work.”
- Same affirmative defenses available under EPA are available under Title VII.



Lilly Ledbetter Fair Pay Act of 2009

- The Act overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
 - The court's decision restricted the time period for filing complaints of pay discrimination.
- The Act provides that the statute of limitations clock resets after each discriminatory pay decision.
- Thus, each paycheck that contains discriminatory compensation is a separate violation.



State & Municipal Laws

- Several states have taken lead in combatting pay equity.
- Contain broader employee protections than federal laws
- Mandate employers to make dramatic changes to workplace pay equity practices.
 - Audits
 - Compliance measures
 - Hiring practices



Minnesota

- Local Government Pay Equity Act (1984)
- Requires all public jurisdictions such as cities, counties, and school districts to eliminate any gender-based wage inequities.
- Must report pay equity implementation report every 3 years.
- Non-compliance results in fines and funding reduction.
- Applies only to gender—not race, ethnicity, etc.



Minnesota

- Statute has been effective in eliminating disparity.
- 1976:
 - 4% of managers were women
 - 25% of professional employees were women
- 2014:
 - 30,000 state employees received raises
 - 50.3% of state employees were female
 - 46% of professional-level employees were female



California

- CA Equal Pay Act (1949)
- CA Fair Pay Act (2016)
- General rule:
 - No wage disparity for “substantially similar work.”
 - “Substantially similar work” is viewed as a composite of skill, effort, and responsibility.
 - This is broader than the EPA language – “equal work.”



California

- Other protections:
 - Employer cannot justify pay disparity based on prior salary.
 - Plaintiff can compare wages between multiple offices/facilities.
 - Cannot prohibit employees from disclosing or discussing wages with others.
- Can bring private right of action or file complaint with state division of labor.



California

- Defenses:
 - Seniority;
 - Merit;
 - A system that measures quality or quantity of production; or
 - A bona fide factor other than sex (e.g., education, training, or experience) consistent with business necessity.



New Jersey

- Similar to California
- But, workers being compared must work in same “geographic region.”
- Not limited to gender – prohibits discrimination across all protected classes.
- Employer cannot prohibit discussion of wage information.
- Can recover liquidated damages for willful violations.
 - 300% of wages recoverable.



Other States

- Washington and Maryland (similar to NJ and CA)
- Oregon and Massachusetts
 - Provide employers some form of “safe harbor” if conduct pay equity analysis.
 - MA requires analysis within three years of action.
- Cities have also enacted pay equity ordinances
 - E.g. New York City banned questions about salary history in hiring process.



Significant Cases

- **Salary History**
- *Rizo v. Yovino* (9th Cir. 2017)
 - Plaintiff, a public employee, challenged under EPA the county's practice of using salary history to determine starting salary.
 - Plaintiff started at minimum-level salary based on prior job pay. Pay was below that of male peers.
 - County said pay policy was not based on sex.



Significant Cases

- **Salary History**
- *Rizo v. Yovino* (9th Cir. 2017)
 - 9th Circuit ultimately held that policy violated EPA.
 - “Reliance on past wages simply perpetuates the past pervasive discrimination that the [EPA] seeks to eradicate.”
 - Prior job salary is not “job related.”



Significant Cases

- **Salary History**
- *Lauderdale v. Illinois Dep't of Human Servs.* (7th Cir. 2017)
 - Upheld policy that based pay increases *in part* on prior salary.
 - Court: no EPA violation unless pay discrepancy based on sex. No proof here that plaintiff's prior wages were lower because of sex discrimination.



Significant Cases

- **Salary History**
- *Taylor v. White* (8th Cir. 2003)
 - Female army employee challenged policy that resulted in her receiving lower salary than male counterparts.
 - Army argued that pay disparity was based on a salary retention policy intended to retain skilled workers and protect workers' salaries.
 - Court: prior salary or salary retention policy is a "factor other than sex" allowed under EPA.



Significant Cases

- **Summary: Salary History**
 - Federal circuit courts are split as to whether employers can rely solely on prior salary to meet the “legitimate factor other than sex” defense to an EPA claim.
 - 7th and 8th Circuits: Employers can use prior salary to justify a pay disparity
 - 6th, 9th, 10th, 11th Circuits: Use of a prior salary cannot alone justify a pay disparity.
 - Other Circuit Courts: No clear decision in either direction.



Significant Cases

- **EPA Retaliation**

- *Donathan v. Oakley Grain, Inc.* (8th Cir. 2017)
- Female employee alleged she was not given same bonuses as male coworkers, among other inequities.
- She emailed company president. Plaintiff's manager then told president of likely layoff's at facility.
- Plaintiff laid off 8 days later.
- DC held that company had valid reason to terminate



Significant Cases

- **EPA Retaliation**

- *Donathan v. Oakley Grain, Inc.* (8th Cir. 2017)
- 8th Circuit reversed, holding that there was sufficient evidence to believe plaintiff's complaint was basis for termination.



Significant Cases

- **Who is an Employee under EPA?**
- Courts apply multi-factor test to determine employment status. Factors include:
 - Company's ability to hire and fire employee;
 - Extent of company supervision over employee;
 - Sharing of profits, losses, and liabilities;
 - Reporting structure.



Significant Cases

- **Who is an Employee under EPA?**
- *Campbell v. Chadbourne & Parke LLP* (SDNY 2017)
 - Female partner at law firm paid less than male partners brought claim under EPA
 - Firm argued partner is not an “employee” under the EPA
 - Court disagreed, and denied summary judgment to firm.



Significant Cases

- **Class Actions**

- Many pay equity claims are litigated as class actions.
- Challenge employer's formal policy, or allege "pattern or practice."
- New state laws have looser definitions of "equal work," which may allow for larger classes of plaintiffs.



Significant Cases

- **Class Actions**

- *Barrett v. Forest Laboratories, Inc.* (SDNY 2015)
- 11 female pharmaceutical sales representatives alleged that company was paying male employees of equal or lesser seniority more money.
- Plaintiffs successfully certified a nationwide collective action under the EPA.
- Notice was sent to 2,000 potential class members. Over 350 opted in.
- Settled in 2017 for \$4 million.



Cases to Watch

- *Ellis v. Google, LLC* (San Francisco Superior Court)
 - Class action under the California Fair Pay Act
 - Plaintiffs broadly challenged Google's company-wide compensation policy.
 - Plaintiffs initially included almost all female employees
 - Court initially dismissed complaint as too broad.
 - Plaintiffs narrowed claims to 30 job titles among 6 "job families."
 - Court allowed complaint to proceed to discovery.



Cases to Watch

- *Kassman v. KPMG, LLP* (SDNY)
 - Class action for pay and promotion discrimination under EPA and Title VII.
 - After certification of EPA class, over 1,100 members opted in.
 - The plaintiffs seek over \$400 million in damages.



Recommendations

- Pay equity statutes are moving quickly
 - Almost every state has a pay equity law.
 - Laws are broadening to protect across sex, race, ethnicity, national origin, religion, etc.
 - Laws contain looser definition of “equal work” – make it easier to make out a claim.



Recommendations

- **Ensure Compliance with Current Law**
 - Identify whether pay disparities exist.
 - Conduct analysis of pay across and between different groups.
 - Review hiring and promotion policies
 - Identify whether policies promote pay disparities.
 - Hire expert to review current merit, performance, incentive, or seniority systems
 - Must ensure system will justify any pay disparities.



Recommendations

- **Get Ahead of the Game for Future Legislative Changes**
 - Review and amend policies regarding employee discussion of wages
 - Increase pay transparency.
 - Compare pay and policies with other company offices or locations.



Questions

Thank you!