



The State of Equal Pay in the 21st Century

By Wendi S. Lazar and Kerry C. Herman

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Gender Pay Equity, Then and Now

It's been nearly 54 years since the federal Equal Pay Act (EPA) passed Congress barring pay inequity based on sex,¹ and New York's state cognate, the New York State Equal Pay Act (NYS EPA), just celebrated its 50th anniversary.² Since the passage of these laws, the gap between a man's earnings and those of a woman has diminished considerably. For example, in 1964, shortly after the EPA went into effect, women earned 59 cents to every dollar earned by men.³ In 2016, the gap had narrowed to 79 cents to every dollar.⁴ As of 2015, the State of New York leads the nation with the smallest wage gap: women earned 89 percent of men's full-time earnings.⁵ These disparities deepen when race and ethnicity are taken into account.⁶

However laudable these accomplishments may be, economists are quick to acknowledge a notable trend: the wage gap is diminishing at a much slower rate than the initial decades after equal pay legislation was first enacted.⁷ In the five decades since equal pay became the law of the land, women entered every echelon of the American workforce. While men and women graduate in equal numbers from universities and graduate schools,⁸ and entry level earnings are on par at the beginning of their careers,⁹ studies show that the gender pay gap is greater for women with a college degree than for those without.¹⁰ Based on the rate of change since 1960, the pay gap will not be diminished until 2059; however, given the current rate of change, which is much slower, the gender pay gap may not be eliminated until as late as 2152.¹¹

There are a variety of explanations for the gender pay gap. Chief among them is the fact that women continue to bear primary responsibilities for child-rearing and homemaking in our society, which results in fewer working hours than men and reduced opportunities for promotion.¹² Another consideration is that women work

in industries that are paid less than those dominated by men.¹³ Although these factors bear some relation to systemic gender discrimination, they are not easily addressed by the framework of equal pay laws, which have a limited inquiry and no affirmative accommodation requirements. However, policymakers and employers have attempted to narrow the divide through efforts such as increasing the availability of paternity leave and creating more flexible work schedules. These efforts are commendable, but they may not be enough. Even adjusting the statistics to consider these non-discriminatory factors, economists project that the earnings ratio is still 92 percent, which means that women are still paid less than men for the same work for no other reason than their gender.¹⁴ Gender discrimination in all its forms, including pregnancy discrimination, failure to promote and even sexual harassment and bullying, affects the pay gap and result in women earning less.

Challenges with the Existing Legal Framework

Legislators and activists alike have been hard-pressed to address the persisting disparity. After 50 years of use, the existing discriminatory pay laws appear unable to remedy the remaining discriminatory wage differential. In large part, this is the result of a legal framework that presents substantial hurdles to women pursuing claims of pay discrimination.

In order to prevail on an equal pay claim under the EPA, a plaintiff need not show that the inequitable compensation was driven by intentional discrimination.¹⁵ However, she must demonstrate that she was paid a lower wage for the "equal work" performed within any "establishment" as her male peers.¹⁶ This presents a significant hurdle for litigants: the requirement to show an appropriate male comparator.¹⁷

To begin with, the term "establishment" has been narrowly defined as a distinct, "physically separate" place

of business – not an enterprise, which may comprise multiple establishments.¹⁸ As such, a woman providing services at her employer’s location in one city may not use as her comparator a male peer doing the same work in another.¹⁹

Even more demanding is the standard of “equal work,” which entails a demonstration that a comparator’s job required “equal skill, effort and responsibility.”²⁰ “Skill” concerns “such factors as experience, training education and ability;”²¹ “effort” concerns “the physical or mental exertion needed for the performance of the job;”²² and “responsibility” concerns “the degree of accountability required in the performance of the job,

cedures are limited to those available under the FLSA.³⁰ These vary greatly from those enacted by Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the law which prohibits discrimination in employment, generally.³¹ Under the EPA, remedies are limited to back pay, pay raises to the level of the opposite-sex counterpart, and, in the case of an intentional violation, 100 percent liquidated damages.³² With such limited exposure, employers have little incentive to remedy pay inequities. In contrast, Title VII allows for recoupment of compensatory and punitive damages, in addition to lost wages.³³ Likewise, the FLSA, and by extension the EPA, limits plaintiffs in bringing collective actions to seek class-wide relief.³⁴ Unlike

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with emphasis on the importance of a job obligation.”²³ Demonstrating such a high degree of similarity between work performed presents a challenge to plaintiffs, particularly for higher level executives and professionals, whose job responsibilities and duties are more particularized on a peer-to-peer level.²⁴

Finally, even when a plaintiff can demonstrate pay inequity with an appropriate male comparator, she will have failed to prove a prima facie case if there exists another male comparator whose pay was less than her total compensation.²⁵ This leaves the equal-pay litigant with the daunting task of defining the universe of comparators without the prior knowledge of what those comparators truly make, all at the great cost and effort of bringing such litigation to begin with.

Once a plaintiff has established that she does not receive the same pay for the same work, an employer may nonetheless evade liability if it can demonstrate one of four affirmative defenses: that the disparity was the result of (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production, or (d) any factor other than sex.²⁶ In some circuits, to qualify for this last, catch-all defense, an employer need only show that the factor was gender-neutral and consistently applied.²⁷ In others, employers must also demonstrate that the factor served a legitimate business purpose that was related to the job at issue.²⁸ As a result, employers in some jurisdictions may lawfully pay greater wages based on an employee’s prior salary, status as primary breadwinner, or due to market forces – all policies that have a disparate impact on female workers.²⁹

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class actions which require an opt-out mechanism for potential plaintiffs, collective actions require all potential class members to affirmatively elect to join the class.³⁵ This significantly diminishes any leverage that might be gained by seeking class-wide relief of the already limited damages given potential plaintiffs – particularly those who are still employed by the defendant – are hesitant to affirmatively join such an action.

In some material respects, the New York EPA tracked the language of its federal predecessor: the prima facie case required a showing of a pay differential where the plaintiff was performing “equal work” in the same establishment as a male comparator. The state law also incorporated the federal EPA’s affirmative defenses, such that a pay differential could legitimately be based on a seniority system, a merit system, a system which measures earnings by quality or quantity, or any other factor other than sex.³⁶ However, the New York EPA allows for class actions, not collective actions.³⁷ And while the New York EPA allows only for recovery of back pay and liquidated damages,³⁸ plaintiffs may recover over a substantially greater period – six years, in comparison to the EPA’s two.³⁹

Recent Developments in Gender Pay Equity Laws

In the past year, legislators and rule-makers on both the federal and the state level have put into place laws and regulations aimed at improving the existing equal pay laws. These amendments address at least two major hurdles women have had to overcome in bringing these claims under prior laws. The first sets less exacting legal standards for plaintiffs and more rigorous requirements for defendants, in the hopes that plaintiffs seeking to prove inequality under the law may prevail. The

second aims to increase pay transparency in the hopes that increased access to pay information will allow both employees and employers to determine the fair value of work performed.

Congress has tried and failed to address the legal complications of the EPA through the oft-debated though never passed Paycheck Fairness Act.⁴⁰ In the interim, states – including New York – have passed more robust equal pay laws that provide more tools for plaintiffs to challenge pay inequity.⁴¹ Amendments to the state equal pay laws in New York and Maryland have broadened the definition of “establishment” to include an employer’s

allow employees to be more aware of whether they are being paid unfairly, which may spur women’s advocacy, through formal or informal means. Massachusetts’s new statute goes one step further: it prohibits employers from asking applicants about their earnings at prior places of employment.⁵⁴ Such a prohibition may prevent the systemic discrimination that results in a pay decision that is based on a “prior salary.” New York City is currently considering a similar bill.⁵⁵

In a similar vein, the EEOC has revised its EEO-1 reporting form to include disclosure of pay data starting with the 2017 report.⁵⁶ The EEO-1 Form must be submit-

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location in a single county,⁴² whereas changes to the California law have eliminated the “same establishment” requirement entirely.⁴³ In California, plaintiffs’ burden has been limited to demonstrating “substantially similar work,”⁴⁴ whereas in Massachusetts the new standard is “comparable work,”⁴⁵ and in Maryland one must demonstrate “work of a comparable character or work in the same operation, in the same business or the same type.”⁴⁶ Under the amended equal pay laws in New York, California and Maryland, employers can no longer rely upon the “any factor other than sex” catch-all but rather must demonstrate that the “bona fide” factor was both job-related and consistent with business and necessity,⁴⁷ and, in California and Maryland, that the factor accounts for the entire differential in pay.⁴⁸ In New York and California, a plaintiff can still prevail against the “bona fide factor other than sex” defense if she can identify an alternative practice that would not result in the gender-based pay disparity.⁴⁹ The Massachusetts legislature has eliminated the catch-all defense entirely and instead has added three additional defenses to the previously enumerated: geographic location; education, training or experiences that are reasonably related to the particular job; and travel, if it is a necessary condition of the position.⁵⁰ In an effort to make equal pay litigation more feasible, the New York amendment increased liquidated damages due to gender-based pay disparity threefold.⁵¹ In order to address pay disparities related to race or ethnicity, California has opened up its Fair Pay Act protections to those protected classes.⁵²

In addition to making equal pay claims more viable, recent legislative efforts have focused on another tool towards pay equity: transparency. Each of the new state laws provides more robust protections for employees who openly discuss or disclose pay-related information in the workplace.⁵³ Such open discourse will

ted by private employers with 100 or more employees and federal contractors and subcontractors with more than 50 employees. The revised form will require employers to place employees in “pay bands” that are based on each employee’s W-2-reported income and identify each employee’s race, ethnicity, gender and job category (e.g. senior executives, professionals, technicians, laborers).⁵⁷ Employers will also be required to report the aggregate hours worked by each employee.⁵⁸ This information will be a useful device in determining whether employers are inequitably making pay decisions based on gender and may also help employers identify inequitable treatment.

White Collar and Professional Pay Gap

In May 2016, the *Wall Street Journal* reported that women who work in highly skilled white-collar jobs actually fare worse than those in blue-collar jobs and the legislative remedies are unlikely to cure this gap.⁵⁹ They found that professions such as medicine, finance, and other professions, where long hours, risk-taking, and job-hopping are rewarded, have the widest gap.⁶⁰ Relying on Census Bureau data from the years 2010 through 2014, the *WSJ* reported that women with bachelor’s degrees or higher earned 76 percent of the compensation earned by their male peers and women with less than a high school diploma working full time earned 79 percent of the compensation earned by their male peers.⁶¹ For top-tier women, some economists say, men taking paternity leave, more flexible schedules, and creating positions that are interchangeable and not dependent on long hours could make a difference.⁶²

Similarly, in the legal profession, women are paid less than their male colleagues at every level of practice and the disparity worsens at contract and equity partner levels.⁶³ Whether because of gender discrimination, family leave and part-time issues, or the failure of proper met-

rics, disbursements of credit, non-billable work, or mentor and sponsorship programs to assist women in their climb up the ranks of law firms, the result is that fewer women lawyers are in leadership positions and at the top ranks at firms and are paid less.

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In addition, women who are not rewarded are leaving law firms for corporations as in-house lawyers or leaving the profession entirely.⁶⁴ But the women who remain in the profession, as published by the ABA Commission on Women in the Profession, are increasingly found in high profile roles in the judiciary, Fortune 500 corporations and law schools.⁶⁵ Accordingly, when private firms cannot compete with these other institutions, they will need to change their pay systems or lose the talent and maybe even their female clients who want to be represented by female and diverse lawyers.

In numerous studies, including the ABA's Closing the Gap reports, origination credit is often at the heart of the pay gap problem.⁶⁶ Often, women are not given credit for new clients they cultivate and fewer women receive split credit on matters. In addition, women are pressured to collaborate with other partners rather than initiate their own matters.⁶⁷ Finally, recent lawsuits over pay equity are becoming a trend and exposing these discriminatory practices at large law firms.⁶⁸ With liabilities increasing, firms, large and small, will be forced to develop new metrics and overall strategies and initiatives to level the playing field.

The Role of Unconscious Bias

The greatest difference between the gender pay gap of 1963 and that of today is the underlying rationale for the disparity. It's no longer commonplace for employers to intentionally pay a woman less, simply because of her gender. Rather, pay inequity stems from the metrics that we use to determine success and their inherent biases. Taking the law firm example, female attorneys are less often privy to client exposure – a critical component of advancement and, ultimately, compensation.⁶⁹ Similarly, women are often excluded from informal mentorship opportunities, which deprives them of inheriting valuable books of business.⁷⁰ Outside of the law firm context, studies have shown that women executives are perceived negatively when they demonstrate stereotypically male traits. For example, a female CEO who talks disproportionately longer at a meeting than her male counterparts is seen as less competent and less suitable for leadership

than a male CEO.⁷¹ Such perceptions affect compensation decisions when companies employ evaluation metrics, such as a 360 review process, that are wrought with opportunity for such biases to intercede. It's no surprise that 360 review processes and their ilk systematically undervalue the performance of women and subsequently affect their compensation.⁷² Ideally, the amended laws and regulations regarding pay equity may provide a greater opportunity for plaintiffs to challenge such disparity. At minimum, one hopes they invite employers' introspection about how such ingrained gender stereotypes ultimately lead to disparate compensation schemes with their companies.

Conclusion

It will take meaningful change in the structure of companies, businesses, industry and professional organizations to end the gender pay gap across different levels of employees. However, the companies that lead with flexibility, diversity and thoughtful talent recruitment will benefit. The new statutory legal frameworks will likely help diminish the gaps where comparative work is an issue but will not change the condition of women professionals without altering other major policy, performance and compensation practices that affect women disparately and are at the heart of discrimination. Finally, flexibility and other workplace initiatives must succeed if women and men are to succeed in the workplace. ■

1. 29 U.S.C. § 206(d).
2. N.Y. Lab. L. § 194.
3. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage: 2015* cb16-158 (Sep. 13, 2016).
4. *Id.*
5. Am. Assoc. of Univ. Women, *The Simple Truth about the Gender Pay Gap* (Spring 2017).
6. *Id.* at 11 (finding that Hispanic and African American women have an earnings ratio of 54% and 63%, respectively; whereas, Asian American women have a higher earnings ratio of 85%).
7. *Id.* at 4.
8. U.S. Dep't of Educ., *Digest of Education Statistics*, Table 318.30 (2015), available at https://nces.ed.gov/programs/digest/d15/tables/dt15_318.30.asp.
9. See Claudia Goldin, Lawrence Katz & Ilyana Kuziemko, *The Homecoming of American College Women: The Reversal of the College Gender Pay Gap*, 20 J. of Econ. Perspectives 133 (Fall 2006).
10. Janet Adamy and Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, Wall St. J. May 17, 2016, <http://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938>.
11. Am. Assoc. of Univ. Women, *The Simple Truth about the Gender Pay Gap*, (Spring 2017).
12. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, IZA DP No. 9656 (Jan. 2016), available at <http://ftp.iza.org/dp9656.pdf>.
13. *Id.* Whether this remains a "non-discriminatory" factor remains to be seen, as some labor economists have found that wages in an industry are lowered as women enter the field whereas wages in an industry increase when men enter it. See Asav Levanon, Paula England & Paul Allison, *Occupational Feminization & Pay: Assessing Casual Dynamics Using 1950-2000 U.S. Census Data*, 88(2) Social Forces J. 865 (Dec. 2009).

14. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, IZA DP No. 9656 (Jan. 2016), available at <http://ftp.iza.org/dp9656.pdf>.
15. *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000) (“[U]nlike Title VII, the EPA does not require a plaintiff to establish an employer’s discriminatory intent.”) (citations omitted).
16. 29 U.S.C. § 206(d).
17. *Steele v. Pelmor Labs., Inc.*, 642 F. App’x 129 (3d Cir. 2016) (failure to identify an appropriate male comparator defeated EPA claim).
18. 29 C.F.R. § 1620.9.
19. See *Jaburek v. Foxx*, 813 F.3d 626 (7th Cir. 2016) (plaintiff failed to establish *prima facie* claim under the EPA where comparators worked in different offices).
20. 29 C.F.R. § 1620.13(a).
21. 29 C.F.R. § 1620.15(a).
22. 29 C.F.R. § 1620.16(a).
23. 29 C.F.R. § 1620.17(a).
24. See, e.g., *EEOC v. Port Auth. of New York & New Jersey*, 768 F.3d 247 (2d Cir. 2014) (attorneys did not perform “equal work”); *Carey v. Foley & Lardner LLP*, 577 F. App’x 573 (6th Cir. 2014) (partners in law firm did not perform “equal work”).
25. *Ghirado v. Univ. of S. Calif.*, 156 F. App’x 914, 915 (9th Cir. 2005); *Lavin-McElenev v. Marist Coll.*, 239 F.3d 476, 481 (2d Cir. 2001).
26. 29 U.S.C. § 206(d)(1).
27. *Id.*
28. See, e.g., *Aldrich Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999); *Timmer v. Michigan Dep’t of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Ledbetter v. Alltel Corp. Servs., Inc.*, 437 F.3d 717 (8th Cir. 2006); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988).
29. *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697 (7th Cir. 2006) (market forces were a legitimate factor in determining salary in EPA claim); but see *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542 (5th Cir. 2001).
30. 29 U.S.C. § 216.
31. 42 U.S.C. § 1981a.
32. 29 U.S.C. §§ 216, 260.
33. 42 U.S.C. § 1981a.
34. See 29 U.S.C. § 216(b).
35. Compare 29 U.S.C. § 216(b) with Fed. R. Civ. P. 23.
36. N.Y. Lab. L. § 194.
37. Cf. *Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351, 353 (S.D.N.Y. 1999) (class action claims for New York state wage and hour claims initiated under New York Labor Law Article 6).
38. N.Y. Lab. L. § 198(1)(a).
39. Compare N.Y. Lab. L. § 198(3), with 29 U.S.C. § 255.
40. See Paycheck Fairness Act, H.R.1619, 114th Cong. (2015); Paycheck Fairness Act, S. 862, 114th Cong. (2015).
41. See, e.g., New York Achieve Pay Equity Law, codified at N.Y. Lab. L. § 194; California Fair Pay Act, codified at Cal Lab. Code § 1197.5; Maryland Equal Pay for Equal Work Act, codified at Md. Code Lab. & Empl. § 3-301–3-308; Massachusetts Act to Establish Pay Equity, 2016 Mass. Acts ch. 177 (effective July 1, 2018).
42. N.Y. Lab. L. § 194(3); Md. Code Lab. & Empl. § 3-304(b)(2).
43. See Cal. Lab. Code § 1197.5(a).
44. *Id.*
45. 2016 Mass. Acts ch. 177 § 2(d).
46. Md. Code Lab. & Empl. § 3-304(b)(1)(i).
47. See N.Y. Lab. L. § 194(1)(d)(ii).
48. Cal Lab. Code § 1197.5(a)(3); Md. Code Lab. & Empl. § 3-304(c)(7)(iii).
49. N.Y. Lab. L. § 194(1)(d)(ii).
50. 2016 Mass. Acts ch. 177 § 2(d).
51. N.Y. Lab. L. § 198(1-b).
52. Cal Lab. Code § 1197.5(b).
53. N.Y. Lab. L. § 194(4); Md. Code Lab. & Empl. § 3-304.1(a); Cal Lab. Code § 1197.5(k); 2016 Mass. Acts ch. 177 § 2(c)(3).
54. 2016 Mass. Acts ch. 177 § 2(c)(1)-(2).
55. Int. 1253-2016 (Introduced Aug. 16, 2016). On Nov. 4, 2016, Mayor de Blasio signed an executive order prohibiting New York City agencies from asking job applicants about their salary history.
56. 81 Fed. Reg. 45479–45496
57. *Id.* at 45485-87.
58. *Id.* at 45487-89.
59. Janet Adamy and Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, Wall St. J. May 17, 2016, <http://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938>.
60. *Id.*
61. *Id.*
62. *Id.*
63. The NAWL Annual National Survey of Retention and Promotion of Women in Law Firms, sponsored by the Nat’l Assoc. of Women Lawyers, available at <http://www.nawl.org/p/cm/fid=506> (hereinafter “NAWL Survey”); see also Jeffrey A. Lowe, 2016 *Partner Compensation Survey*, Major, Lindsey & Africa.
64. Wendi S. Lazar, Stephanie A. Scharf & Michele Coleman Mayes, *Building Momentum for the Pay Equity Movement in BigLaw*, Law 360 (Dec. 21, 2016), available at <https://www.law360.com/legalindustry/articles/874605/building-momentum-for-the-pay-equity-movement-in-biglaw>.
65. ABA, Comm’n on Women in the Profession, *A Current Glance at Women in the Law* (Jan. 2017), available at http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf.
66. See, e.g., Lauren Rikleen, *Closing the Pay Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation* (2013), available at https://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf (hereinafter “Closing the Gap”); NAWL Survey, *supra*, note 63.
67. Joan C. Williams and Veta T. Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 42-43 (July 2010), available at <http://worklifelaw.org/Publications/SameGlassCeiling.pdf>.
68. See, e.g., *Ribeiro v. Sedgwick LLP*, 2016 WL 6473238 (N.D. Cal. Aug. 10, 2016); *Campbell v. Chadbourne & Parke LLP*, No. 16 Civ. 6832, (S.D.N.Y., filed Aug. 31, 2016).
69. Lizzy McLellan, *Law Firms a ‘Petri Dish’ for Bias, Gender Inequity*, Law.com (Oct. 25, 2016), available at <http://www.law.com/sites/almstaff/2016/10/25/law-firms-a-petri-dish-for-bias-gender-inequity>.
70. *Id.*
71. *Closing the Pay Gap*, *supra*, note 66, at 19-20.
72. Adam. T. Klein and Nantiya Ruan, *Title VII Class Certification: Issue Certification and Targeting Specific Employment Practices Post Dukes and Comcast* (Apr. 2015), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2015/april/eo/klein_title7.authcheckdam.pdf.