THE EQUAL PAY ACT: ALMOST FIFTY YEARS LATER, WHY WAGE GAP STILL EXISTS

Bridget Sasson*

THE EQUAL PAY ACT – Law makers enacted the Equal Pay Act to ensure that the post-war influx of female workers were valued at equal rates as men as well as ensuring that women as well as men had equal bargaining power in the workforce. Throughout its history the Equal Pay Act has failed to adequately rectify the problem of wage inequity. Thus, lawmakers have attempted to create additional legislation to fully address this problem but have had very little success.

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INTRODUCTION

This Comment will review the history of the Equal Pay Act (“EPA”) and recent legislation dealing with wage disparity and examine possible causes for the continuing wage gap. In 1963 John F. Kennedy signed the EPA, amending the Fair Labor Standards Act (“FLSA”) of 1938, making it illegal to pay women lower wages than

* Bridget Sasson J.D. Candidate Spring 2013, Duquesne University School of Law, B.S. Political Science and Business, University of Pittsburgh 2007.
men solely because of their sex. Nearly fifty years later, according to recent census statistics, women are still earning less than their male counterparts. The percentages have improved since the implementation of the EPA in 1963, when women earned 58.9% of what men earned. On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act (“Ledbetter Act”). The Ledbetter Act reversed the Supreme Court’s ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that a discriminatory compensation decision occurred each time an employee was paid pursuant to a discriminatory practice. Though the Ledbetter Act is a step in the right direction, more legislation is necessary to help close the wage gap. The most promising is the proposed Paycheck Fairness Act (“Paycheck Act”), which attempts to revise the exceptions to wage discrimination that have developed since the enactment of the EPA.

I. *Brief History of the Legal Concepts*

A. *The Equal Pay Act of 1963*

The EPA, a part of the FLSA, prohibits any employer from discriminating in regard to wages on the basis of sex when employees are performing equivalent work. Pay disparity between genders can also

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5. 550 U.S. 618 (2009); See GovTrack, *supra* n. 4.
be litigated under the Civil Rights Act of 1964 ("Civil Rights Act"). \(^8\) Title VII of the Civil Rights Act makes it an unlawful employment practice for an employer to discriminate against an individual in regard to compensation because of their sex. \(^9\) When filing a charge with the Equal Employment Opportunity Commission ("EEOC") or directly in federal court, most employees will file a claim under both the EPA and the Civil Rights Act. \(^10\) Both the EPA and the Civil Rights Act deal with compensation but have different qualifications for what employee/employers are covered and the time restrictions for filing a charge. \(^11\) The EPA is a complex statute that provides several conditions that must be met before equity in pay is required and, even when these working conditions are met, employers are granted many exceptions. \(^12\)

The EPA considers whether employers are paying unequal wages to men and women performing jobs that require substantially equal skill, effort, responsibility, and whether the work is performed under similar working conditions within the same establishment. \(^13\) To determine if two positions require substantially equal skill, the EPA considers the following factors: experience, ability, education, and training neces-


\(^9\) Id at § 2000e-2(a)(1) (2006). (“It shall be an unlawful employment practice for an employer [to] fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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.”)


\(^11\) Id. The Act requires employer to employ at least fifteen employee s who have 180 days to file a charge. Id. The EPA covers virtually all employers. Id. Employees have two years to file a charge. Id. See 29 U.S.C.S. § 203 (2006) (providing definitions used in the EPA).


\(^13\) Id.
sary to perform the required job functions. Effort is measured by the amount of mental or physical exertion that is needed to perform the job. Responsibility considers the amount of accountability required when performing the job. The working conditions factor consists of two parts: the physical surroundings and the hazards that the employee is exposed to when performing their job. Finally, working conditions within the same establishment requires that employees work in the same, distinct physical place of business. Even if all of these factors are met, employers may legally justify a difference in pay if they can prove that the reason for pay disparity falls under a statutory exception.

The EPA provides four exceptions to the general rule prohibiting sex-based wage discrimination: seniority, merit, quantity or quality of production, or a factor other than sex. These exceptions are affirmative defenses and the employer has the burden to prove that they apply. Since the EPA is a strict liability statute, plaintiffs are not required to prove that the employer acted with discriminatory intent, but merely that the employer pays males more than females. Under the EPA, an employer carries both the burden of persuasion and proof of an affirmative defense.

The EPA does not allow a defendant em-

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14. *Id.* For example, two bookkeeping jobs may be considered equal under the EPA regardless if one of the employees has a master’s degree in physics, since that would not be required for the job. *Id.*

15. *Id.* For example, the worker at the end of the assembly line may also need to lift the assembled product as they complete the work, which may require more effort than other positions on the line and therefore it would not be a violation to pay this person more, regardless of their sex. *Id.*

16. EEOC, supra n. 12. For example, an employee who is given the duty of determining whether to accept customers’ personal checks has more responsibility than other employees; however, minor differences, such as turning out the lights at the end of the day, do not justify a difference in pay. *Id.*

17. *Id.* Physical surroundings can include the temperature of the work space as well as the fumes and ventilation available. *Id.*

18. *Id.* Some circumstances allow for physically separate places of business to be treated as one establishment. For example, when a central administrative unit hires employees, sets their wages, and assigns them to different work locations, the work sites can be treated as part of one establishment. *Id.*

19. *Id.*

20. *Id.*

21. EEOC, supra n. 12

22. See e.g. Bauer v. Curators of U. of Mo., 680 F.3d 1043, 1045 (8th Cir. 2012); Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1310–11 (10th Cir. 2006).

23. *Id.* at 1045.
employer to escape liability merely by articulating a legitimate non-discriminatory reason for the employment action. Rather, there the employer must provide proof that any difference in pay was based on a factor other than sex. To do so, the employer must successfully demonstrate that the difference in pay is justified by one of the exceptions, proving that the gender-neutral factor is the actual factor causing the wage difference. A plaintiff may counter an employer’s affirmative defense by producing evidence that the employer’s reason is actually a pretext for sex discrimination. If the plaintiff employee succeeds with this evidence, the employer’s affirmative defense will fail.

Prior to *Corning Glass Works v. Brennan*, employers used the market as a justification for lower wages. However, the Supreme Court held in *Corning* that employers could not justify paying women lower wages because of the going market rate. Further, differential wages between men and women that occurred simply because men would not work at the lower pay rates than women was not grounds for justification.

The appellate courts have interpreted the affirmative defenses differently. The factor “other than sex” has become a broad catchall defense for any factor that does not involve sex. Some circuits have interpreted this to mean that it is any other factor that also has a legitimate business need. Other circuits do not require an employer to justify a business related factor other than sex: they read the exception plainly, to mean “any other factor.” Presently, when prior salary is asserted as a defense to a claim of unequal pay, the court examines the

28. *Id.* at 205, 207.
29. *Id.* at 205.
30. *Fallon v. Ill.*, 882 F.2d 1206, 1211 (7th Cir. 1989).
31. Congress intended for any factor-other-than-sex defense to sex-based wage discrimination claims only when employer proves that the pay differential is rooted in legitimate business-related differences in work responsibilities and qualifications for particular positions at issue. See e.g. Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992); *EEOC v. J.C. Penney Co., Inc.*, 843 F.2d 249 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982); *Glenn v. Gen. Motors*, 841 F.2d 1567 (11th Cir. 1988).
32. See e.g. *Strecker v. Grand Forks County Social Serv. Bd.*, 640 F.2d 96 (8th Cir. 1980).
record to ensure that the employer does not rely on the prohibited “market force theory” to justify lower wages for female employees simply because the market might allow such wages. In correcting a difference in pay, no employee’s pay may be reduced. On the contrary, the lower paid employee’s pay must be increased.

B. Recent Legislation: The Ledbetter Act

On May 29, 2007, the Supreme Court, through a decision authored by Justice Alito, held that the time for the plaintiff, Lilly Ledbetter, to file a charge of employment discrimination with EEOC under Title VII began when the discrete discriminatory act occurred. Filing could have occurred upon termination, failure to promote, denial of transfer, or refusal to hire. However, Ledbetter failed to file within the proper 180-day time limit of any of these events. Upon President Obama’s signing of the Ledbetter Act into law in 2009, it overruled the Supreme Court’s previous decision. Under the Ledbetter Act, each paycheck that is discriminatory compensation creates an actionable EEOC claim, regardless of when the discrimination began. Employers may file a charge within 180 days of when their compensation is subjected to or affected by a discriminatory compensation decision made by their employer. While the Ledbetter Act does not directly

33. *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009). The “market force theory” consists of employers justify paying women lower wages because they would agree to work for less, while male employees required higher wages to do the same work. *Corning*, 417 U.S. at 205. Therefore, employers could claim that the labor market dictated the going wage each gender was paid and not their discriminatory practice. *Id.* Additionally, past lower wages resulting from “market force theory” may not form the basis for continuing wage discrimination. *Kouba*, 691 F.2d at 876.

34. See 42 U.S.C.S. 2000e.

35. *Ledbetter*, 550 U.S. at 621. Ledbetter originally filed an EPA claim but the District Court granted summary judgment for the defendant, Goodyear. *Id.* at 622.


37. *Id.* The Ledbetter Act applies to the following existing statutes: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990. *Id.*

38. *Id.* The Ledbetter Act is “retroactive…effective as of May 28, 2007…and applies to all claims of discriminatory compensation pending on or after that date.” *Id.*
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impact the EPA, it does affect the Civil Rights Act, which also governs compensation discrimination in regard to gender.39

C. Pending/Proposed Legislation: Paycheck Fairness Act

A problem plaguing employees since the adoption of the EPA is access to compensation information. The Paycheck Act tries to address this issue. This act was reintroduced to Congress on January 23, 2013.40 The last attempt to enact the Paycheck Act failed to receive the necessary Senatorial votes for cloture required to move forward for consideration.41 The Paycheck Act attempts to amend the EPA to revise remedies for, enforcement of, and exceptions to prohibitions against sex discrimination in the payment of wages (specifically regarding the affirmative defense of “any other factor other than sex”).42 The Paycheck Act would limit affirmative defenses to only bona fide factors, such as education, training, or experience.43 It would prohibit a plaintiff employee’s demonstration that an alternative scenario existed that would serve the same purpose without producing a difference in pay and further showing that the employer refused to adopt such an alternative.44 Most importantly, the Paycheck Act prohibits retaliation for inquiring about, discussing, or disclosing the compensation of the employee(s) in response to a charge filed or investigation.45 Finally, the Paycheck Act holds employers who violate sex discrimination prohibitions liable in a civil action for compensatory or punitive damages.46


41. GovTrack, *supra* n. 6.

42. *Id.*

43. *Id.* The proposed legislation limited the bona fide factors (acting in good faith) defense to cases where the employer demonstrates that such factor: is not based upon or derived from a sex-based differential in compensation, is job-related with respect to the position in question, and is consistent with business necessity. *Id.*

44. *Id.*


46. *Id.*
II. Analysis

When Congress enacted the EPA it made several findings with regard to the effects of gender-based differences in wages including stifling the greatest use of the available labor resources.\(^{47}\) According to the United States Department of Labor, women make up about 47% of the United States labor force.\(^{48}\) Of the women who participate in the workforce, 36% have college degrees.\(^{49}\) Women account for 52% of all persons employed in management positions.\(^{50}\) However, in 2009 women earned 89% of their male counterparts’ income for ages 25 to 34 and 93% among 16 to 24-year-olds.\(^{51}\) The greatest wage gap occurs between women and men over 35; with women only making 75% of their male counterparts.\(^{52}\) So we must ask: what is ultimately responsible for wage disparity? Gender discrimination or women’s career choices?

A. Is Wage Discrimination the Sole Culprit of the Wage Gap?

A 2009 report commissioned by the Department of Labor, asserted that all but $0.05 to $0.07 of the wage gap could be explained by factors other than sexual discrimination.\(^{53}\) However, the Department of Labor also stated that it might never be possible to determine what portion of the wage gap was attributable to overt discrimination against female workers.\(^{54}\) A non-discriminatory reason for pay dis-

47. Id. Other reasons for implementation were decreases conditions necessary for worker health and efficiency, labor disputes that burdening commerce, obstruction of the free flow of goods in commerce, and a possible construing of unfair methods of competition. Id.
50. Id.
52. Id.
54. Id.
parity can be explained by women’s profession choices.\textsuperscript{55} Women tend to choose employment fields traditionally viewed as “women’s fields,” requiring less human capital.\textsuperscript{56} Since women are already crowded in female dominated professions, there is a larger supply of qualified workers, which results in a decrease in demand and allows employers to pay women less.\textsuperscript{57} In 1999, women working in predominately female occupations earned 25.9\% less than women working in predominately male occupations.\textsuperscript{58} In comparison, men that worked in female dominated fields earned only 12.5\% less than men that worked in male-dominated fields.\textsuperscript{59} The difference in these percentages leads to another possible source for wage disparity: life choices.

In the United States, women are primarily responsible for childcare, which may require them to have more flexible work schedules.\textsuperscript{60} While approximately 71\% of mothers with children under the age of 18 are in the workforce,\textsuperscript{61} 26\% of these working mothers work part-time. Additionally, in two parent families, only the father is employed 25.3\% of the time compared to 7.6\% of households where only the mother is employed.\textsuperscript{62} Acting as a caregiver is not the only reason women work part-time. A Cornell University study found that women, on average, suffer a 5\% pay penalty per child and receive

\begin{itemize}
\item \textsuperscript{56} \textit{Id.} at 11. Jobs that require less human capital do not involve skills that atrophy with extended use. \textit{Id.} In 2009, 92\% of registered nurses, 81.9\% of all elementary and middle school teachers and 97.8\% of all preschool and kindergarten teachers were women. In comparison, only 7.1\% of all civil engineers, 9.4\% of electrical and electronics engineers, and 10\% of all aerospace engineers were female. Department for Professional Employees, \textit{Professional Women: Vital Statistics} 2, http://www.pay-equity.org/PDFs/ProfWomen.pdf (last updated April 2010).
\item \textsuperscript{57} Boraas & Rodgers III, \textit{supra} n. 55, at 11.
\item \textsuperscript{58} \textit{Id.} at 6.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} EEOC, \textit{Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities}, http://www.eeoc.gov/policy/docs/caregiving.html (accessed July 16, 2012). Women are also primarily responsible for caring for the elderly, including caring for parents, in-laws, and spouses, and eldercare responsibilities are generally much less predictable than childcare. \textit{Id.}
negative employment reviews after childbirth.\textsuperscript{63} A 2001 study conducted by sociologists Budig and England examined the differences in work patterns between mothers and non-mothers.\textsuperscript{64} The results showed that leave from work, part-time employment, and decreased seniority and experience collectively explain no more than about one-third of the wage disparity (called the “motherhood penalty”).\textsuperscript{65} The study concluded that the remaining two-thirds of the wage disparity must result from an actual decrease in productivity post-childbirth and/or discrimination.\textsuperscript{66} The Cornell study discussed culture and societal norms that influence employers’ perceptions, such as the notion that mothers should always be available for their children which conflicts, with the contrasting belief that the “ideal worker” should be unencumbered and always available for their employer.\textsuperscript{67} This discrepancy may not actually exist, but the perception that a working mother cannot successfully satisfy both of these societal demands may still result in her having a “decreased value” in the workplace.\textsuperscript{68} The study also tested whether fathers received the same kind of discrimination and pay penalty as mothers. Fathers were actually found to have an advantage over non-fathers because of an increased commitment to working in order to provide for their families.\textsuperscript{69} The experiment concluded that mothers were rated as less competent and committed to their work than non-mothers and as a result, caused discrimination against mothers when making hiring and salary decision, while fathers received higher starting salary offers.\textsuperscript{70}

The fields that women choose to enter and the perception of working mothers are stereotypes deeply rooted in our country’s culture. In 1987, about 18\% of wives earned more than their husbands.\textsuperscript{71} By 2009, this percentage had increased to 29\%.\textsuperscript{72} The precise reason for

\begin{itemize}
  \item[64.] Id. at 3.
  \item[65.] Id.
  \item[66.] Id.
  \item[67.] Id. at 11.
  \item[68.] Correll & Benard, supra n. 63, at 11.
  \item[69.] Id. at 22
  \item[70.] Id. at 31.
  \item[72.] Id.
the increase in wives earnings could be attributed to many aspects, including the growing acceptance of men as caregivers. Women cannot afford to wait for societal norms to change, thereby creating a necessity for legislation addressing pay inequity to help close the wage gap.

B. What is the Best Means to Fix Legislation, Transparency in Wages?

Lilly Ledbetter only became aware of the disparity in her payment when she received an anonymous note that three men who began work the same year and were doing the same job were earning 15 to 40% more than she was. Pay discrimination happens quietly and discretely; some employers suggest or require that information regarding pay not be disclosed to coworkers. The EPA is supposed to protect employees from discrimination in regard to pay and promotions; but how can an employee know if they are being victimized without access to this information? The Paycheck Fairness Act was an attempt to make this information more available, particularly to women, and shift the burden of proving a bona fide reason for wage disparity to employers. Those who opposed the legislation believed that it would not fix the problem and would result in an increase of meritless lawsuits. The only cure for wage discrimination is for employers to make informed decisions based on merit when determining pay and promotions. In order to force the employers’ hands, the law must provide discriminated workers with the necessary tools to discover that they are victims of wage disparity. Wage transparency is necessary for all parties to be on equal footing when making decisions about pay and promotions. Nothing in the Paycheck Fairness Act would force any organization to lower or set wages of employees: it would simply allow employees to inquire about possible pay disparity without the threat of retaliation.

73. Coy & Dwoskin, supra n. 53.
74. Id.
76. Id. at 2.
77. National Women’s Law Center, What the Paycheck Fairness Act Would Really Do,
CONCLUSION

In 1963 when the EPA was signed, women were earning 59 cents for every dollar a man made. The most recent information states that this number is up to about 77 cents, which is about a one-half a cent increase each year. A female college graduate will lose out on about 1.2 million dollars over her career; professional school graduates will lose about 2 million dollars. The wage gap continues to affect retired women, age fifty and older, who receive only 56 cents for every pension and annuity income per dollar received by men. Additionally, the typical female worker’s retirement account accumulated $34,000 in savings, while her male counterpart held $70,000.

The pay gap is a problem that not only undervalues female workers but also affects the family unit they help support. In 2010, about 1.8 million two-parent families relied exclusively on women’s earnings. In that same year, female-headed households made up 51.8% of the households receiving food stamp benefits compared to 26.2% of all households with children. Additionally, 57.8% of working mother single families fell under the federal poverty line, meaning they made less than $17,568 per year. The wage gap translates to about $10,800 less in yearly earnings for female workers; money that could be used to help provide for their families.

The wage gap is not a problem that only affects women, but rather an issue that affects society as a whole. As women continue to increase their workforce participation, they need to be compensated appropriately and proportionate to their male counterparts. Certain factors that affect the wage gap cannot be magically or quickly fixed.

78. The National Committee on Pay Equity, supra n. 3.
80. The National Committee on Pay Equity, supra n. 3.
82. Id. at 2.
83. Id. at 1-2.
84. Id. at 3.
85. Id. at 1.
86. National Women’s Law Center, supra n. 81 at 1.
such as the women’s choice in profession or the biological fact that women have a greater role in childbirth. What *can* be fixed is employee access to pay information. The Paycheck Fairness Act is the most promising recent legislation that would bring transparency to wages and protects employees from retaliation. In the fifty years since the Equal Pay Act implementation, strides have been made for women in the workforce. However, until women are making a dollar for every dollar a man makes, there is room for improvement.