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## GENDER PAY GAP: THE TIME TO SPEAK UP IS NOW

*Samantha M. Sbrocchi\**

### I. INTRODUCTION

In 1963, Congress took its first steps towards addressing the gender pay gap by enacting the Equal Pay Act of 1963 (“EPA”).<sup>1</sup> The EPA prohibits employers from discriminating “on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work on jobs.”<sup>2</sup> The EPA was designed to correct and eliminate employee salary structures that were based on the belief that women should be paid less than men.<sup>3</sup>

Fifty-five years later, the gender pay gap remains a substantial problem in employer-employee relationships nationwide.<sup>4</sup> Today, according to the U.S. Census Bureau, women who work full time in the United States are paid \$0.80 for every dollar that men are paid, and the pay gap is widest for women of color.<sup>5</sup> To illustrate, black women take home \$0.61 for every dollar that white men are paid.<sup>6</sup>

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<sup>1</sup> 29 U.S.C. § 206 (2018).

<sup>2</sup> *Id.* § 206(d)(1).

<sup>3</sup> *Rizo v. Yovino*, 887 F.3d 453, 460-61 (2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).

<sup>4</sup> Hallie Detrick, *Equal Pay Day: One State Beats Out New York and California for the U.S.’s Smallest Gender Pay Gap*, FORTUNE (Apr. 10, 2018), <http://fortune.com/2018/04/10/gender-pay-gap-by-state-equal-pay/>.

<sup>5</sup> NAT’L P’SHIP FOR WOMEN & FAMILIES, AMERICA’S WOMEN AND THE WAGE GAP 1 (Apr. 2019), <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/americas-women-and-the-wage-gap.pdf>.

<sup>6</sup> *Id.*

Additionally, Hispanic women and Native-American women each take home \$0.53 for every dollar that white non-Hispanic men are paid.<sup>7</sup>

Although this issue has been addressed many times throughout the course of history, this time, however, feels a bit different—in an exciting way. Women and men throughout the world have gathered together with the aspiration that governments, businesses, and employers will hear their voices through the dynamic presence of the recent #TimesUp movement on social media platforms.<sup>8</sup>

As wonderful as the movement is, unfortunately, the #TimesUp movement is simply not enough to solve the gender pay gap issue in society. This problem has played a strong role in employment for fifty-five years and counting. It is evident that previous measures adopted to solve this problem have not worked effectively. Thus, the law governing gender discrimination in compensation claims needs to change. It is up to all women being discriminated against in their compensation to change the way that employers treat them. To create that change, women must speak up. Fortunately, there is no better time to speak up than now.

Part II outlines the history of inconsistency regarding gender discrimination in compensation law. Part III discusses the recent developments in gender discrimination law. Part IV examines the recent #TimesUp movement. Part V reviews the current gender discrimination in compensation laws and the burdens of proof. Part VI sets forth my proposal for a change in the law that can close the gender wage gap.

## II. HISTORY

Prior to the EPA's enactment, women's presence in the workforce was significantly lower than men's.<sup>9</sup> Moreover, in the early 20th century, women made up only about twenty-five percent of the American workforce.<sup>10</sup> During this time, the Supreme Court, in various cases, struggled with determining whether policy that sought to protect women in the workforce in various capacities held greater weight than the right to freely contract with their employer.

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<sup>7</sup> *Id.*

<sup>8</sup> *History, TIME'S UP*, <https://www.timesupnow.com/history> (last visited Apr. 4, 2019).

<sup>9</sup> History.com Editors, *Equal Pay Act*, HISTORY, <https://www.history.com/topics/equal-pay-act> (last updated Apr. 2, 2019).

<sup>10</sup> *Id.*

For example, in *Muller v. Oregon*, the Supreme Court considered the constitutionality of an Oregon statute which mandated women to work fewer hours than men.<sup>11</sup> In this case, the Court analyzed whether a woman's liberty to negotiate contracts with her employer should be equal to that of a man's.<sup>12</sup> The Court held that Oregon's limit on the number of working hours of women was constitutionally allowed under the Fourteenth Amendment of the United States Constitution.<sup>13</sup> The Court supported its holding by noting that "the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."<sup>14</sup>

In *Adkins v. Children's Hospital of the District of Columbia*, the Supreme Court reviewed a law passed by Congress in 1918 to set minimum wages for women and children in the District of Columbia.<sup>15</sup> The purpose of the Act was to "protect women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."<sup>16</sup>

In its decision to reject the constitutionality of the statute, the Supreme Court recognized that this statute was enacted for the protection of adult women who are "legally as capable of contracting for themselves as men."<sup>17</sup> This was not a statute enacted for the protection of persons under legal disability or for the prevention of fraud.<sup>18</sup> As such, the Court determined that this statute:

forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige

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<sup>11</sup> *Muller v. Oregon*, 208 U.S. 412, 416 (1908).

<sup>12</sup> *Id.* at 417-18.

<sup>13</sup> *Id.* at 421.

<sup>14</sup> *Id.*

<sup>15</sup> *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525, 539-40 (1923).

<sup>16</sup> *Id.* at 541-42.

<sup>17</sup> *Id.* at 554.

<sup>18</sup> *Id.* at 554-55.

one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.<sup>19</sup>

In 1937, in *West Coast Hotel Co. v. Parrish*, the Supreme Court was faced with the same question posed fourteen years earlier in *Adkins*.<sup>20</sup> The State of Washington enacted a law fixing the minimum wage for women and minors for the purpose of protecting health and morals, “and which shall be sufficient for the decent maintenance of women.”<sup>21</sup>

The Court, in *Adkins*, declared women to be “of lawful capacity” holding the right to contract with her employer.<sup>22</sup> Where women were once seen as competent individuals fully capable of protecting themselves in the workplace, just fourteen years later, as a result of the Great Depression, women were seen as inferior and in desperate need of protection:

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively *defenseless* against the denial of a living wage is not only detrimental to their health and well being, but casts a *direct burden for their support upon the community*. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere.<sup>23</sup>

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<sup>19</sup> *Id.* at 539.

<sup>20</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386 (1937).

<sup>21</sup> *Id.* at 387.

<sup>22</sup> *Adkins*, 261 U.S. at 554-55.

<sup>23</sup> *Parrish*, 300 U.S. at 399 (emphasis added).

As a result, such freedom of contract that was once recognized as an unequivocal right of women in the workplace, was deemed to be not absolute in *Parrish*.<sup>24</sup> Thus, in its struggle of weighing the importance of public policy protections of women and their right to contract, the Supreme Court in *Parrish* determined that it was more important for women and children to be protected and work through a fixed minimum wage than to have the right to contract with their employer.<sup>25</sup> The Supreme Court overruled *Adkins* and held that women did not have an unlimited right to contract with their employer..

During World War II, as a result of the military's need for men to fight in the war, women became significantly more active in the workforce.<sup>26</sup> Approximately six million women maintained jobs during the war, in order to keep the economy and war effort in motion.<sup>27</sup> Between 1940 and 1945, the percentage of women in the workforce grew by 50 percent.<sup>28</sup>

Industry jobs once deemed to be only performed by men, such as driving trains and engineering jobs, were performed by women in high volumes for the first time in history.<sup>29</sup> During this time, women were paid less than the males who previously held those positions.<sup>30</sup> Consequently, women began to demand equal pay and thus, labor disputes broke out.<sup>31</sup> Therefore, in 1942 President Franklin D. Roosevelt issued an executive order creating the National War Labor Board ("NWLB"), primarily established to mediate between parties involved in industrial labor disputes.<sup>32</sup>

If a dispute could not be settled through mediation, members of the NWLB had the power to intercede and impose settlements in

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<sup>24</sup> *Id.* at 392.

<sup>25</sup> *Id.* at 400.

<sup>26</sup> History.com Editors, *supra* note 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Women Workers in World War II*, METROPOLITAN ST. U. DENVER, <https://msudenver.edu/camphale/thewomensarmycorps/womenwwii/> (citing SUSAN M. HARTMANN, *THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940S* (1982)).

<sup>29</sup> *World War II: 1939-1945*, STRIKING WOMEN: WOMEN & WORK, <https://www.striking-women.org/module/women-and-work/world-war-ii-1939-1945>.

<sup>30</sup> *Id.*

<sup>31</sup> History.com Editors, *Roosevelt (re)creates the National War Labor Board*, HISTORY, <https://www.history.com/this-day-in-history/roosevelt-recreates-the-national-war-labor-board> (last updated Feb. 22, 2019).

<sup>32</sup> *Id.*

order to prevent any halt of production.<sup>33</sup> In addition to mediating and settling issues between parties involved in labor disputes, the NWLB endorsed policies requiring that women receive equal pay in situations where women were *directly* replacing male workers.<sup>34</sup> For example, the NWLB urged employers to “voluntarily make adjustments which equalize wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations.”<sup>35</sup>

Furthermore, labor unions became involved and offered women help in their fight for equal pay.<sup>36</sup> The support offered by unions was motivated by a desire to keep wages high for the men who would eventually return to the workforce and step back into their roles.<sup>37</sup> Women were merely seen as placeholders for men’s jobs despite their desire to remain in the workforce.<sup>38</sup>

Three years later, a bill was introduced as the “Women’s Equal Pay Act” which would have made it illegal for women to be paid less than men for work of “comparable quality and quantity.”<sup>39</sup> Congress, unfortunately, could not muster enough votes to pass this Act, despite a multitude of campaigns by women’s groups.<sup>40</sup>

After World War II ended, men returned from the military seeking the jobs that they left in their hometowns. Federal and civilian policies allowed employers to replace female workers with male workers.<sup>41</sup> For the women who were able to keep their jobs, employers reclassified women’s jobs and as a result lowered their compensation.<sup>42</sup>

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<sup>33</sup> *Id.* (discussing that the President was concerned about a halt in production because the laborers were producing supplies for the war).

<sup>34</sup> History.com Editors, *supra* note 9.

<sup>35</sup> Beth Rowen, *The Equal Pay Act: A History of Pay Inequality in the U.S.*, INFOPLEASE, <https://www.infoplease.com/equal-pay-act> (last visited Apr. 4, 2019) (internal quotation marks omitted).

<sup>36</sup> Charlotte Alter, *Here’s the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <http://time.com/3774661/equal-pay-history/>.

<sup>37</sup> *Id.*

<sup>38</sup> *American Women and World War II*, KHAN ACAD., <https://www.khanacademy.org/humanities/us-history/rise-to-world-power/us-wwii/a/american-women-and-world-war-ii> (last visited Apr. 4, 2019).

<sup>39</sup> History.com Editors, *supra* note 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Equal Pay Act of 1963*, NAT’L PARK SERV. (Apr. 1, 2016), <https://www.nps.gov/articles/equal-pay-act.htm>.

<sup>42</sup> *Id.*

Jobs listed in newspapers were posted separately for men and women, and though most postings contained the same descriptions, the compensation was unequal.<sup>43</sup>

Several bills seeking equal pay for women throughout the 1950s failed to pass.<sup>44</sup> Campaign fights by women's groups would continue for another thirteen years before they would see a bill passed making gender discrimination in compensation illegal.<sup>45</sup>

At last, Congress enacted the Equal Pay Act of 1963, making it one of the first laws in American history aimed at reducing gender discrimination in the workplace.<sup>46</sup> President Kennedy signed the EPA as an amendment to the Fair Labor Standards Act.<sup>47</sup> The EPA of 1963 was followed by the Civil Rights Act of 1964, which ended segregation in public places and strengthened gender equality laws by making it illegal to discriminate on the basis of sex, race, religion, color, or national origin.<sup>48</sup>

Congress has since passed various statutes to protect women in the workforce.<sup>49</sup> For example, in 1978, the Pregnancy Discrimination Act prohibited employers from discriminating against pregnant employees based on pregnancy, childbirth, or related medical conditions.<sup>50</sup> Furthermore, the Family and Medical Leave Act of 1991 allowed parents of newborns, regardless of the parent's gender, to take time off to care for the child.<sup>51</sup>

### III. RECENT DEVELOPMENTS IN THE LAW

In 2007, the Supreme Court granted certiorari to review the decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* by the Eleventh Circuit.<sup>52</sup> The Plaintiff, Lilly Ledbetter, was one of very few female supervisors working at the Goodyear plant in Gadsden,

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Equal Pay Act of 1963*, *supra* note 41.

<sup>47</sup> History.com Editors, *supra* note 9.

<sup>48</sup> History.com Editors, *Civil Rights Act of 1964*, HISTORY, <https://www.history.com/topics/black-history/civil-rights-act> (last updated Sept. 20, 2018).

<sup>49</sup> *Id.*

<sup>50</sup> 48 U.S.C. § 2000e(k) (2018).

<sup>51</sup> 29 U.S.C. § 2601 (2018).

<sup>52</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).



Alabama.<sup>53</sup> After two decades at Goodyear Tire & Rubber Co., Inc., and facing several instances of sexual harassment, her boss told her that he did not believe that a woman should be holding a supervisory position at Goodyear.<sup>54</sup> Ms. Ledbetter overheard her co-workers boasting about their overtime pay but did not think much of it until she received an anonymous note listing the salaries of three male managers at her company.<sup>55</sup> As the facts of the case unraveled, Plaintiff was only earning \$3,727 per month compared to 15 men who earned from \$4,286 per month, roughly 15% more than Plaintiff, to \$5,236 per month, roughly 40% more than Plaintiff.<sup>56</sup>

During Plaintiff's years of working at Goodyear's factory, employees were given raises on the basis of performance evaluations.<sup>57</sup> After receiving a series of negative evaluations that later turned into positive ones, Plaintiff's salary still never came close to that of male employees in similar positions at Goodyear.<sup>58</sup>

In July of 1998, Plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging she had received "a discriminatorily low salary as an Area Manager because of her sex."<sup>59</sup> After an early retirement in November of 1998, Plaintiff filed a lawsuit against her former employer alleging sex discrimination under Title VII of the Civil Rights Act of 1964 and under the EPA.<sup>60</sup>

After the lawsuit was filed, the jury found that "Goodyear did not involuntarily transfer Plaintiff from the position of Area Manager to Technology Engineer because of her age, sex, or in retaliation for her having complained of sex discrimination."<sup>61</sup> However, on the ground of the Title VII pay claim, the jury recommended \$223,776 in back pay, \$4,662 for mental anguish, and \$3,285,979 in punitive damages.<sup>62</sup> The court limited the punitive damages to \$295,338,

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<sup>53</sup> *Lilly Ledbetter Fair Pay Act*, NAT'L WOMEN'S L. CTR. (Jan. 29, 2013), <https://nwlc.org/sources/lilly-ledbetter-fair-pay-act/>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Ledbetter*, 550 U.S. at 634 (Ginsburg, J., dissenting).

<sup>57</sup> *Id.* at 618.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 643-44 (Ginsburg, J., dissenting).

<sup>60</sup> *Id.* at 618.

<sup>61</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507235, at \*1 (N.D. Ala. Sept. 24, 2003).

<sup>62</sup> *Id.* at \*1-2.

combined with the mental anguish award of \$4,662 because, under Title VII actions against employers with more than 500 employees, there was a \$300,000 cap on compensatory and punitive damages.<sup>63</sup>

The case went to the United States Court of Appeals for the Eleventh Circuit, which reversed the lower court's decision on the ground that Plaintiff, by law, could only bring a lawsuit for allegations in relation to pay decisions 180 days before she brought her complaint with the EEOC.<sup>64</sup>

The court explained:

In summary, because Goodyear had a system for periodically reviewing employee salaries, Ledbetter could recover on her disparate pay claim only to the extent she proved intentional discrimination in the one decision affecting her pay made within the limitations period created by her EEOC charge, or, at most, the last such decision made immediately preceding the limitations period. Because she failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions was a pretext for sexual discrimination, the district court should have granted Goodyear judgment as a matter of law. We therefore reverse the judgment of the district court and instruct the court to dismiss Ledbetter's complaint with prejudice.<sup>65</sup>

The case reached the Supreme Court in 2007, and by a 5-4 vote, the Court upheld the Eleventh Circuit's decision ruling that the Plaintiff failed to file her Title VII claim within the 180 day time frame as discussed in the Eleventh Circuit's decision.<sup>66</sup>

Despite its ruling, it is evident that the Supreme Court was aware of what occurred in the workplace:

The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts "easy to identify." A worker knows immediately if she is denied a promotion or

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<sup>63</sup> *Id.*

<sup>64</sup> Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1178 (11th Cir. 2005).

<sup>65</sup> *Id.* at 1189-90.

<sup>66</sup> Ledbetter, 550 U.S. at 618-20.

transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries. *See, e.g., Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-1009 (10th Cir. 2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries); *McMillan v. Massachusetts Soc. For Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper). Tellingly, as the record in this case bears out, Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings.<sup>67</sup>

The Court is right on the mark. It is extremely unlikely for an employee to have access to information such as a co-worker's salary. Consequently, most employees do not have the information at their fingertips to help them identify whether they are being discriminated against in the first place.

It is evident that this decision failed to stay on the same path of the progressive laws that had been previously enacted under Title VII of the Civil Rights Act of 1964 and other civil rights statutes. After this decision, Congress was standing farther away from its goal of eliminating discrimination in the workplace. Where it once took one step forward, Congress appeared to be taking one step back by allowing pay discrimination to continue.

Justice Ruth Bader Ginsburg, in her powerful dissent, reminded Congress that "[o]nce again, the ball is in [its] court. As in 1991, the

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<sup>67</sup> *Id.* at 649-51 (Ginsburg, J., dissenting).

Legislature may act to correct this Court's parsimonious reading of Title VII."<sup>68</sup> And that it did.

On January 29, 2009, President Barack Obama signed into law the first piece of legislation of his Administration, known as the "Lilly Ledbetter Fair Pay Act of 2009."<sup>69</sup> This Act serves both to directly overturn the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, while also amending the Civil Rights Act of 1964.<sup>70</sup>

The Lilly Ledbetter Fair Pay Act of 2009 allows employees to file an equal-pay lawsuit within 180 days of each new paycheck affected by the discriminatory act.<sup>71</sup> To clarify, the Supreme Court had ruled in *Ledbetter* that employees must bring a discrimination in compensation lawsuit within 180 days of the date that their employer makes the initial discriminatory wage decision—not the date of their most recent paycheck.<sup>72</sup>

On the date of its enactment, the White House issued a statement on its blog stating: "President Obama has long championed this bill and Lilly Ledbetter's cause, and by signing it into law, he will ensure that women like Ms. Ledbetter and other victims of pay discrimination can effectively challenge unequal pay."<sup>73</sup>

#### IV. #TIMESUP

The #TimesUp movement was initiated in 2017 as a result of a series of scandals that had broken out revealing that a multitude of Hollywood actresses were paid significantly less than their male counterparts.<sup>74</sup> And with that, the #TimesUp movement was born.

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<sup>68</sup> *Id.* at 661 (Ginsburg, J., dissenting).

<sup>69</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

<sup>70</sup> *Id.*

<sup>71</sup> Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/laws/statutes/epa\\_ledbetter.cfm](https://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm) (last visited Apr. 9, 2019).

<sup>72</sup> *Ledbetter*, 550 U.S. at 618.

<sup>73</sup> Macon Phillips, *Now Comes Lilly Ledbetter*, WHITE HOUSE BLOG (Jan. 25, 2009, 1:48 PM), <https://obamawhitehouse.archives.gov/blog/2009/01/25/now-comes-lilly-ledbetter>.

<sup>74</sup> History, *supra* note 8 (discussing that both the #TimesUp and #MeToo movements share similar goals for women's empowerment. While the #TimesUp movement focuses primarily on safety and equity in the workplace, the #MeToo movement encourages women to speak out against all forms of harassment and sexual violence). See Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike*, TIME (Mar. 22, 2018, 5:21 PM), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements>.

The #TimesUp movement was created to motivate women to fight for change including, but not limited to, safety and overall equality in the workplace.<sup>75</sup> On January 1, 2018, a group of more than three hundred Hollywood women launched the movement for many reasons, one being, “[to] shift the paradigm of workplace culture.”<sup>76</sup>

The main goal of the #TimesUp movement is to focus on changing longstanding policies as well as enacting legislation that protects women in a multitude of situations.<sup>77</sup> In addition, the Time’s Up Legal Defense Fund was created as a resource of legal and financial support for women to bring lawsuits against employers and/or sexual assault abusers.<sup>78</sup>

Having only been launched early in 2018, the movement, through its powerful presence, has already brought positive change to the world. For example, after being pushed by its high-profile employee, Reese Witherspoon, who is also one of the three hundred founding members of the #TimesUp movement, helped persuade HBO to identify and eliminate any pay disparities that were occurring within the organization.<sup>79</sup>

After this audit, HBO decided to eliminate existing pay disparities within its company; “We’ve proactively gone through all of our shows. In fact, we just finished our process where we went through and made sure that there were no inappropriate disparities in pay; and where there were, if we found any, we corrected it going forward. And that is a direct result of the Time’s Up movement,” says HBO’s President, Casey Bloys.<sup>80</sup>

The #TimesUp movement is an excellent example of a continuous societal effort to defeat the gender wage gap. However, the #TimesUp movement cannot do it alone. Thus, it is up to Congress to provide further protections for women by enacting laws that will eradicate the sexist pay gaps that are still prevalent in the workforce.

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<sup>75</sup> *About Time’s Up*, TIME’S UP, [https://www.timesupnow.com/about\\_times\\_up](https://www.timesupnow.com/about_times_up) (last visited Apr. 4, 2019).

<sup>76</sup> Michael Nordine, *Time’s Up: 300 Women in the Film Industry Launch Initiative to Fight Sexual Harassment*, INDIEWIRE (Jan. 1, 2018, 1:33 PM), <https://www.indiewire.com/2018/01/times-up-sexual-harassment-1201912414/>.

<sup>77</sup> Langone, *supra* note 74.

<sup>78</sup> *Id.*

<sup>79</sup> Jennifer Calfas, *HBO Says It Fixed Its Gender Pay Gap Because of Reese Witherspoon*, MONEY (Apr. 10, 2018) <http://money.com/money/5234524/hbo-pay-gap-reese-witherspoon/>.

<sup>80</sup> *Id.*

## V. CURRENT LAWS AND ITS BURDEN OF PROOF

Fifty-five years of what can only be described as the fight for a better tomorrow, the justice system is left to wrestle with laws that do not provide enough protection for women employees.

Today, several federal laws protect the rights of employees to be free from discrimination in their compensation.<sup>81</sup> These federal laws include: The EPA of 1963 and Title VII of the Civil Rights Act of 1964.<sup>82</sup>

### A. Equal Pay Act

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of “many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”<sup>83</sup>

In order to make a *prima facie* case under the Act, an employee must show that “an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>84</sup> Interestingly, the Act is silent with regard to who holds the burden of proof.<sup>85</sup> Legislative history has indicated that the employee has the burden of proof on this issue.<sup>86</sup>

Further, under the EPA, proof of the employer's discriminatory intent is not necessary for the plaintiff to prevail on her claim.<sup>87</sup> Thus,

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<sup>81</sup> *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> (last visited Apr. 4, 2019).

<sup>82</sup> *Id.*

<sup>83</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. REP. NO. 88-176, at 1 (1963)).

<sup>84</sup> *Id.* (internal quotation marks omitted).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409 (10th Cir. 1993).

by making a prima facie showing, a presumption of discrimination will arise.<sup>88</sup>

An employer's justification for unequal compensation between employees of different genders on the basis of being "a legitimate business reason" will suffice.<sup>89</sup> There are four court approved exceptions to the EPA—three of which are specific and one of which can be described as a "catch all" provision.<sup>90</sup> To wit, where a different payment is made to employees of opposite sexes pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.<sup>91</sup>

Once the employee carries her burden of showing that the employer pays employees of one sex more than employees of the opposite sex, the burden of proof shifts to the employer to prove that the difference in pay is warranted as an affirmative defense under one or more of the Act's four exceptions.<sup>92</sup> The plaintiff will then have the opportunity to counter the employer's affirmative defense by showing that the proffered reasons are a pretext for discrimination.<sup>93</sup>

The United States Court of Appeals of the Second Circuit has previously noted that "Congress enacted the Equal Pay Act '(r)ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor.'"<sup>94</sup>

At the heart of the Act is one major policy goal: equal pay for equal work.<sup>95</sup> "The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced."<sup>96</sup> Remedies under the EPA range from compensatory

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<sup>88</sup> *Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999).

<sup>89</sup> *Bentivegna v. People's United Bank*, No. 2:14-cv-599 (ADS)(GRB), 2017 WL 3394601, at \*16 (E.D.N.Y. 2017).

<sup>90</sup> *Corning*, 417 U.S. at 196.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Christiana v. Metropolitan Life Ins.*, 839 F. Supp. 248, 252-53 (S.D.N.Y. 1993).

<sup>94</sup> *Corning*, 417 U.S. at 206 (alteration in original) (quoting *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973)).

<sup>95</sup> *Id.* at 207.

<sup>96</sup> *Id.* (alteration in original).

damages, punitive damages, attorney's fees, back payment of wages and compensation, or injunction proceedings.<sup>97</sup>

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

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.<sup>98</sup>

Before an employee makes a claim against an employer for discrimination under Title VII of the Civil Rights Act of 1964, the EEOC “must first ‘endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.’”<sup>99</sup> Upon the EEOC’s determination that reconciliation between the employee and the employer is unattainable and the employee’s claim has merit, the employee may proceed to file a lawsuit in federal court.<sup>100</sup>

Congress imposed a duty on the EEOC of attempting reconciliation of the parties prior to the initiation of a lawsuit under Title VII of the Civil Rights Act of 1964, and courts have the authority to review whether the EEOC has fulfilled its duty.<sup>101</sup>

Although this duty is imposed, the EEOC has been granted wide latitude in choosing which informal methods are to be used.<sup>102</sup> Regardless of which approach the EEOC chooses to take, it must notify the employer of the employee’s claim and give the employer an opportunity to discuss the matter.<sup>103</sup>

To make out a *prima facie* case of disparate pay under Title VII, a plaintiff must show the following:

- (1) she is a member of a protected class;
- (2) she was paid less than similarly situated non-members of [her] class for work requiring substantially the same responsibility.<sup>104</sup>

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<sup>97</sup> *Remedies For Employment Discrimination*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/remedies.cfm> (last visited Apr. 4, 2019).

<sup>98</sup> *Title VII of the Civil Rights Act of 1964*, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Apr. 4, 2019).

<sup>99</sup> *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1649 (2015).

<sup>100</sup> *Id.* at 1649 (citing 42 U.S.C. § 2000e-5(f)(1)).

<sup>101</sup> *Id.* at 1647-48.

<sup>102</sup> *Id.* at 1648.

<sup>103</sup> *Id.*

<sup>104</sup> *Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999).



A court will analyze a claim for unequal pay under Title VII based on standards similar to those used under the EPA except that Title VII requires the plaintiff to prove the third prong—that the disparate pay was motivated by discriminatory animus.<sup>105</sup> Discriminatory animus occurs when the employer’s actions are taken with the intent to discriminate against the employee.<sup>106</sup>

If the plaintiff succeeds in making her prima facie case, the burden will then shift to the defendant-employer to set forth a legitimate, non-discriminatory reason for the difference in pay among employees.<sup>107</sup> If the defendant-employer succeeds in satisfying its burden, “the presumption of animus drops out of the picture.”<sup>108</sup>

After this occurs, the burden shifts back to the plaintiff to demonstrate that the defendant’s actions were the result of “impermissible discrimination.”<sup>109</sup> To clarify what exactly “impermissible discrimination” entails: “the plaintiff need not prove that the explanation offered by the employer was entirely false ‘but only that . . . [the defendant’s] stated reason was not the only reason’ and that consideration of an impermissible factor ‘did make a difference.’”<sup>110</sup>

However, it is not enough for a plaintiff to “merely rationalize, explain, or disagree with an employer’s proffered non-discriminatory reasons to survive summary judgment.”<sup>111</sup> Instead, the plaintiff’s burden at this stage is to demonstrate that “the evidence, taken as a whole, is sufficient to support a reasonable inference that prohibited discrimination occurred.”<sup>112</sup>

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<sup>105</sup> *Bentivegna v. People’s United Bank*, No. 2:14-cv-599 (ADS)(GRB), 2017 WL 3394601, at \*16 (E.D.N.Y. 2017).

<sup>106</sup> *Employee Need Not Prove Employer Animus as an Element of a Disability Discrimination Claim*, 37 NO. 4 CAL. TORT REP. NL 4 (Apr. 2016).

<sup>107</sup> *Bentivegna*, 2017 WL 3394601, at \*17.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (alteration in original).

<sup>111</sup> *Id.* (“[A] plaintiff’s factual disagreement with the validity of an employer’s non-discriminatory reason for an adverse employment decision does not, by itself, create a triable issue of fact.”).

<sup>112</sup> *Id.* (citing *James v. N.Y. Racing Ass’n*, 233 F.3d 149, 156 (2d Cir. 2000)); *see also* *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) (explaining that courts should examine “the entire record to determine whether the plaintiff could satisfy his ultimate burden of persuading the trier of fact that the defendant discriminated against the plaintiff.” (internal quotation marks omitted)).

### C. Bennett Amendment

What is referred to as the “Bennett Amendment” is a “technical amendment” to Title VII of the Civil Rights Act of 1964 and was designed for the purposes of resolving any future conflicts between Title VII and the EPA.<sup>113</sup>

The Bennett Amendment provides that:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act of 1963].<sup>114</sup>

In *Washington County v. Gunther*, the Supreme Court interpreted the Bennett Amendment such that:

The language of the Bennett Amendment-barring sex-based wage discrimination claims under Title VII where the pay differential is “authorized” by the Equal Pay Act suggests an intention to incorporate into Title VII only the affirmative defenses of the Equal Pay Act, not its prohibitory language requiring equal pay for equal work, which language does not “authorize” anything at all.<sup>115</sup>

Put simply, the Bennett Amendment was set forth to guarantee that both courts and administrative agencies adopt a consistent interpretation of like provisions in both the EPA and Title VII.<sup>116</sup>

To further clarify, claims for sex-based wage discrimination may be brought under both the EPA and Title VII, even though no member of the opposite gender holds an equal but higher paying job, “provided that the challenged wage rate is not exempted under the EPA’s affirmative defenses as to wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex.”<sup>117</sup>

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<sup>113</sup> *Walter v. KFGO Radio*, 518 F. Supp 1309, 1316 (D.N.D. 1981).

<sup>114</sup> *Id.*

<sup>115</sup> *Wash. Cty. v. Gunther*, 452 U.S. 161, 162 (1981).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 161.

## VI. A CHANGE IN THE LAW IS THE BEST SOLUTION TO CLOSE THE GENDER WAGE GAP

There is no denying the fact that since 1963, when Congress took its first steps towards eliminating the gender pay gap through its enactment of the EPA, the United States has seen the law fight to close the gender wage gap, but ultimately failed to do so.

However, despite an overall positive change in the law, more change is required. Hence, the author proposes two changes in the law that may be the solution to overcoming and finally closing the gender wage gap.

### A. The Enactment of Salary Disclosure Laws

An employee's salary is typically viewed as private information between an employee and her employer. Often, this information is only shared with an individual's spouse, family members, or an accountant. Employees are generally uncomfortable revealing this information to anyone else, especially co-workers. And, as such, if no information is revealed, it is nearly impossible for a female employee to become aware of any potential discrimination against her by her employer.

There is currently no law that prohibits an employer from disclosing employee compensation. If employers were required by law to disclose salaries of employees who hold similarly situated roles, one could argue that the gender pay gap could narrow. By requiring employers to disclose salaries of similar employees, an employee would have direct notice of whether she is being discriminated against pursuant to her compensation.

It is undeniable that the best kind of evidence for an employee-plaintiff is a clear statement from the employer.<sup>118</sup> Therefore, overcoming the plaintiff's difficult burden of proof, especially when she is required to prove an employer's *intent*, would be more attainable with this knowledge.

Put yourself in the shoes of an employee who has reason to believe that she is being paid less than a male employee holding a substantially similar job to hers. Without taking on an awkward

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<sup>118</sup> Alice Orchiston, *For Women Fighting the Gender Pay Gap Discrimination Law is Limited*, CONVERSATION (Jan. 10, 2018, 11:58 PM), <http://theconversation.com/for-women-fighting-the-gender-pay-gap-discrimination-law-is-limited-89918>.

conversation which would require her to ask her co-worker how much he is being paid, how else is she supposed to obtain the evidence to confirm her belief? Of course, she can ask her employer directly for compensation records, but that is a difficult and risky conversation to have, often resulting in rejection, nevertheless. If she were to ask for this information directly, the employer may be suspicious that she is considering litigation, which could lead to a breakdown in the employment relationship.<sup>119</sup>

Thus, the enactment of salary disclosure laws that require an employer to disclose employees' salaries would certainly put an employee on notice of whether she is being discriminated against. Because it is unlikely that an employer would continue to discriminate against female employees in the form of compensation, if the salary disclosure laws were enacted, the gender pay gap would likely be on the road to closing for good.

### ***1. The Latest Trend in Relation to Salary Disclosure Laws***

Several cities and states have enacted legislation that, put broadly, prohibits a prospective employer in the public or private sector from asking questions about an interviewee's compensation history.<sup>120</sup> The rationale is that if employers want to inquire about an interviewee's salary, they are using the information to calculate their own salary offer if the interviewee qualifies for the job. Employers also prefer to have this information because it can allow them to write off candidates who they may consider too expensive, and therefore save both time and energy.<sup>121</sup>

States and cities throughout the United States have taken such action to prevent salaries from being discussed because of the

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<sup>119</sup> *Id.*

<sup>120</sup> Áine Cain et al., *9 Places in the US Where Job Candidates May Never Have to Answer the Dreaded Salary Question Again*, BUS. INSIDER (Apr. 10, 2018, 9:08 AM), <https://www.businessinsider.com/places-where-salary-question-banned-us-2017-10>.

<sup>121</sup> Christopher D'Angelo, *The Latest Trend in Employment Law: Banning Salary History Inquiries*, L.J. NEWSL. (Sept. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/09/01/the-latest-trend-in-employment-law-banning-salary-history-inquiries/?slreturn=20180817132639>.

continuing gender pay gap issue.<sup>122</sup> While the laws enacted in each of these jurisdictions have the same goal, they are individually unique.<sup>123</sup>

For example, the New York City salary disclosure law was passed in May 2017 and prohibits employers from inquiring about an interviewee's previous salary history.<sup>124</sup> However, if a prospective employee voluntarily discloses this information, a "safe harbor" is established for the employer, and New York City Law will permit the employer to rely on that information in making salary offers.<sup>125</sup> An exception to this law is when a federal, state, or local law authorizes an employer to verify an interviewee's prior salary or requires disclosure of such figure.<sup>126</sup>

As of 2018, additional cities such as San Francisco, Albany, and San Diego have enacted salary ban legislation.<sup>127</sup> For example, as of July 1, 2018, San Francisco's salary ban legislation, known as "Salary History Ordinance" or "Parity in Pay Ordinance" took effect.<sup>128</sup> Similar to New York City's salary ban legislation, San Francisco's Ordinance prohibits an employer from doing any of the following:

- (1) Inquiring about an applicant's salary history, whether directly, indirectly, personally or through an agent, including application forms or interviews;
- (2) Considering or relying on an applicant's salary history as a factor in determining whether to hire an applicant or what salary to offer an applicant;
- (3) Refusing to hire or retaliate against an applicant for not disclosing his/her salary history;
- (4) Releasing a current or former employee's salary history to a prospective employer without written

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<sup>122</sup> *Id.* (using as examples New York City, Philadelphia (on hold as of May 23, 2018), California, Delaware, Massachusetts, New Orleans, Oregon, Pittsburgh and Puerto Rico).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Joseph Maddaloni Jr. & Cynthia L. Flanagan, *Salary History Ban Laws Aim to Close Gender Pay Gaps*, N.J. L.J. (Mar. 20, 2018), <https://www.law.com/njlawjournal/2018/03/20/salary-history-ban-laws-aim-to-close-gender-pay-gaps/>.

<sup>128</sup> Bianca Saad, *San Francisco Salary History Ordinance Effective July 1*, HR WATCHDOG (May 31, 2018), <https://hrwatchdog.calchamber.com/2018/05/san-francisco-salary-history-july-1/>.

authorization from the current or former employee.<sup>129</sup>

Under the Salary History Ordinance:

while an employer is allowed to consider salary history when an applicant discloses it voluntarily and without prompting, salary history *alone* cannot justify a pay disparity between employees of different sexes, races or ethnicities who perform substantially similar work. However, under state law, salary history cannot justify a pay differential. Therefore, employers may not consider prior salary, even if it was voluntarily disclosed by the applicant.<sup>130</sup>

The New Jersey Law Journal offers some advice for employers regarding the recent trend in the enactment of salary disclosure laws:

The demand for pay equality is only going to grow, continuing to put pressure on legislators at all levels to consider implementing similar pay-equity legislation across the country. Despite the risks, employers are well advised not to wait for these laws to be enacted and enforced, but to take a proactive approach to pay equity. Employers should revise their employment applications and recruitment procedures to remove salary history questions. Employers should also revise their recruitment policy and hiring documentation to expressly state that the employer prohibits inquiries about an applicant's current or prior earnings or benefits.<sup>131</sup>

Someone's past salary should not dictate their future salary—especially if their past salary is a product of the gender wage gap. Thus, eliminating an employer's request for an interviewee's pay history is a step in the right direction.

Another recent trend is that companies are blatantly disclosing the salaries of their employees.<sup>132</sup> For example, the government has

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Maddaloni Jr. & Flanagan, *supra* note 127.

<sup>132</sup> Todd Henneman, *Pay Transparency: Paid in Full Disclosure*, WORKFORCE (Mar. 25, 2015), <https://www.workforce.com/2015/03/25/pay-transparency-paid-in-full-disclosure/>.

made federal employees' salaries public record.<sup>133</sup> Federal workers have mixed reviews about such disclosure, most in favor, but many prefer that the salary disclosure is not searchable by name.<sup>134</sup>

Accordingly, "employee compensation records allow for public oversight of hiring practices and serve as a valuable resource for managers."<sup>135</sup> Additionally, the availability of information serves as a deterrent for government corruption.<sup>136</sup>

In contrast, if private employers were required to disclose the salaries of their employees it would most likely have the same deterrent effect. Knowing that employees will have access to co-employees' salaries, specifically, those who hold titles in the same or substantially similar positions, it is likely that employers would not participate in any gender discriminatory compensation practices in the first place to avoid a claim under Title VII of the Civil Rights Act.

As with anything, there are negative effects to disclosing company employees' salaries. Workers who become aware of what other co-workers are being compensated might be dissatisfied and feel undercompensated and, in turn, leave the company.

Negative effects of salary disclosure do not outweigh the need for such disclosure and the need to eliminate the gender pay gap. The benefits to such disclosure are astounding. Disclosure of salaries help employees take charge of their careers, the employee may model her behavior after co-workers who are compensated more, or employees may make the jump to switch to higher-paying jobs, potentially outside of the company.<sup>137</sup> Furthermore, work-induced stress will be reduced when employees will no longer be worried about whether they are being compensated enough or being evaluated fairly.<sup>138</sup> Ultimately, "[w]hen everyone understands what's going on in the company, they ultimately will do a better job."<sup>139</sup>

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<sup>133</sup> *Search Federal Employee Salaries*, FEDS DATA CTR., <https://www.fedsdatacenter.com/federal-pay-rates/> (last visited Apr. 4, 2019).

<sup>134</sup> Mike Maciag, *Disclosing Public Employee Pay Troubles Some Officials*, GOVERNING (Apr. 18, 2012), <http://www.governing.com/news/state/gov-survey-disclosing-government-employee-salaries-troubles-public-officials.html>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Henneman, *supra* note 132.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

## 2. *The Initial Burden of Proof Should be Shifted to Employers*

If the law is not changed to require the employer to disclose workers' salaries to other employees, the author urges the courts to shift the initial burden of proof on the *employer*, instead of on the employee. This would serve as a way to deter employers from discriminating against their female workers in the first place.

As previously mentioned, multiple portions of Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* stated it best:

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity. Even if an employee suspects that the reason for a comparatively low raise is not performance but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable.<sup>140</sup>

Requiring an employer to carry the burden in wage discrimination cases takes very little effort on the part of the employer. The employer can easily produce salary documentation of other employees (including, but not limited to, W-2 forms, payroll documentation, contracts with other employees, and wage verification forms, etc.), which could clear up issues during litigation.

If it is revealed that the employer is, in fact, paying a female employee less than a male employee, the employer will have the opportunity to offer a legal justification for the disparate wage gap.

Likewise, some states are starting to consider implementing the shift of the burden of proof onto the employer. The New Jersey State

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<sup>140</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting).



Legislature had proposed a bill (S.B. 992) that “would place significant burdens on New Jersey employers by creating the presumption of illegal discrimination where any employee of one gender is paid less in wages and benefits than employees of the other gender performing ‘substantially similar work.’”<sup>141</sup>

For employers to avoid the imposition of liability, damages, and other penalties, employers would be required to prove that the entire difference in compensation is fully justified by valid excuses as set forth by the New Jersey law. Under this bill, a difference in pay for substantially similar jobs is justified by the legal excuses of a seniority system or a merit system.<sup>142</sup> Additionally, an employer may set forth other rationales for the difference in pay such as bona fide factors other than sex, including training, education, experience, or the quantity or quality of the employee’s work product.<sup>143</sup>

Employers would also be required to demonstrate that such excuse lacks the effect of perpetuating gender-related differences in compensation, as well as proving that the legal excuses are, in fact, “job-related” to the specific line or work in question and is justified by a business need.<sup>144</sup>

If the employer is able to justify the difference in compensation as a legitimate business necessity, the employee will have the opportunity to convince the court that “an alternative business practice exists serving the same purpose which does not produce a wage difference.”<sup>145</sup> If the employee successfully does this, the employer will be unable to rely on the factor originally set forth.<sup>146</sup>

The bill proposed in New Jersey is very similar to the federal “Lily Ledbetter Fair Pay Act of 2009.”<sup>147</sup> Under this federal law, the look-back period starts with the most recent paycheck negatively affected by discrimination, regardless of when the discrimination started.<sup>148</sup> The New Jersey bill, however, is different from the federal law as follows:

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<sup>141</sup> *Changes in N.J. Law Against Discrimination Would Put the Burden of Proof on Employers*, ARCHER L., <https://www.archerlaw.com/changes-in-n-j-law-against-discrimination-would-put-the-burden-of-proof-on-employers/> (last visited Apr. 4, 2019).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

First, unlike the federal law, which limits back pay to two years from when the charge of discrimination is actually filed, the New Jersey law would allow recovery for the entire period of time the employee alleges she has been affected by a discriminatory decision; and

Second, the federal law, like almost all anti-discrimination laws, requires that the employee prove illegal discrimination. Because the proposed law would *reverse the burden of proof as to gender-based pay claims*, employers may be at a very significant disadvantage in attempting to prove the particulars of decisions made many years before by employees long gone from the organization.<sup>149</sup>

Additionally, the New Jersey bill proposed to make any agreement illegal between employers and employees that attempts to shorten the statute of limitations with respect to claims under the New Jersey Law Against Discrimination.<sup>150</sup>

In January 2018, the New Jersey Senate could not gather enough votes to override Governor Chris Christie's conditional veto of S.B. 992.<sup>151</sup> In a preliminary vote, the Senate voted 23-11 for an override, which was four votes short of overriding the veto.<sup>152</sup> As of today's date, S.B. 992 has not been revived under New Jersey's new governor, Phil Murphy.<sup>153</sup>

Despite an unfortunate turn of events on S.B. 992, it is encouraging to see that some states are beginning to recognize a clear burden of proof issue in gender discrimination in compensation claims. By shifting the burden of proof to employers, New Jersey, if the bill was enacted, would have undeniably taken a step in the right direction to narrow the pay gap. This author encourages states to enact legislation similar to New Jersey's proposal and fight for the equal rights of female-employees. Let's close the wage gap once and for all.

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *New Jersey Senate Fails to Override Veto on Pay Equity Bill, With Others Pending in the Senate*, SEYFARTH SHAW, LLP (Jan. 27, 2017), <https://www.seyfarth.com/publications/OM012717NJ-LE>.

<sup>152</sup> *Id.*

<sup>153</sup> *Bills 2018-2019*, N.J. OFF. LEG. SERV., <https://www.njleg.state.nj.us/bills/BillsByNumber.asp>.

## VII. CONCLUSION

Although the federal government and state governments have attempted to provide female employees with legal protections from wage discrimination over the years, the continuing gender wage gap reveals that these attempts have not solved the problem.<sup>154</sup> Realistically, the legal requirement for proving that an employer is participating in the gender wage gap has created a burden of proof that is often impossible for a female employee to meet.<sup>155</sup> This difficulty is due to a lack of documented proof accessible to the employee in support of her claim. Additionally, notifying an employer of an employee's claim will likely sever the employment relationship between the two and, in turn, the employee will be forced to choose whether to carry on with her employment and continue receiving disparate pay or fight for her equal rights. No female should have to decide between keeping a job and fighting for equal pay.

As it turns out, "fewer than 30 percent of the gender discrimination claims filed with the Equal Employment Opportunity Commission since 2004 have resulted in favorable outcomes for the woman filing the complaint, while more than half were dismissed with a finding of no reasonable cause."<sup>156</sup> Shifting the burden of proof from the female employee to the employer could, out of many benefits, mitigate gender bias.<sup>157</sup>

The International Labor Organization agrees with this theory because it has determined that a proactive model, "which places the responsibility on employers to demonstrate that their wage policies are equitable, is the most effective tool against gender wage discrimination."<sup>158</sup>

Thus, it is undeniable that if the federal government or each state's government would enact a law shifting the burden of proof to the employer for all wage discrimination claims, the gap would, indeed, begin to close.

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<sup>154</sup> SONJA ERICKSON, POLICY OPTIONS FOR CLOSING THE GENDER WAGE GAP (Mar. 2015), <https://truman.missouri.edu/sites/default/files/publication/policy-brief-03-2015-policy-options-for-closing-the-gender-wage-gap.pdf>

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 6.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

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Amy Landecker once said: “There are people out there every day really fighting the fight for equal rights, equal pay, equal treatment. They’re inspiring.”<sup>159</sup>

Truer words have never been spoken. To all the people out there fighting for equality: keep fighting and keep inspiring.

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<sup>159</sup> *Equal Pay Quotes*, BRAINY QUOTE, [https://www.brainyquote.com/topics/equal\\_pay](https://www.brainyquote.com/topics/equal_pay) (last visited Apr. 4, 2019).