

EMPLOYEES IN THE WORKPLACE

Expert Analysis

Will New Legislation Cure The Gender Pay Gap?

Over 50 years ago, Congress passed the Equal Pay Act of 1963 with the seemingly simple aim of eliminating wage differentials based on sex.¹

In 1966, New York followed suit with its own Equal Pay Act.² Both had serious challenges and barriers for plaintiffs bringing claims of gender inequity. While the gender pay gap narrowed slightly in the years immediately following the passage of these acts, it has since remained stagnant. In 2014, the average woman only earned 83 percent of the average male's income nationwide.³ New York's pay inequality was only slightly better at 87 percent.⁴ This disparity exists even for the highest earning industries. Indeed, a recent study found that female professionals and executives experience greater pay disparity than their middle-class and blue-collar counterparts.⁵

Clearly, legislators underestimated the problem and the desire of employers to fix it. Gender discrimination, like

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racial prejudice, runs deep, and whether it is because of issues related to family responsibility, poor negotiation skills or the biased assumption by employers that women are not the primary wage earners, employers continue to pay women less. Unfortunately, the various equal pay acts have placed burdens on

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plaintiffs that make it difficult to bring claims and succeed in the courtroom.

One consistent problem has been defining a "comparator" to prove the wage inequity. Often in small or mid-sized workplaces, positions differ slightly, peers work in different locations under different leadership, or male and female colleagues start with a different salary

which disqualifies them as a comparator. Another hurdle of past legislation was the failure to call for wage transparency and to protect against disclosure from retaliation. Often a woman knows she is earning less but does not have access to information on other employees' compensation, making it impossible to bring a claim against the employer. In the United States, what someone earns in the job is often more private than what happens in the bedroom.

In 2015, New York joined California in passing amendments to state equal pay acts that aim to address the legislation's stagnant progress and shortcomings, by narrowing the availability of affirmative defenses for the employer and, to a degree, beginning to address the wage disclosure issue. The aim is to make pay discrimination claims easier to litigate, to increase punitive damages in order to dissuade employers from allowing gender pay disparity, and to assist those who have already fallen victim to such disparity in vindicating their rights.

Recent Legislative Efforts

As part of the Women's Equality Agenda, New York's Equal Pay Act was amended in 2015 and, effective January of this year, the law has been changed

to make pursuit of a pay disparity claim easier for the litigant. First and foremost, an employer's affirmative defense has been winnowed. Previously, employers in New York were able to escape liability by demonstrating that a pay disparity was the result of a "factor other than sex," consistent with the federal cognate; the new law requires a showing that the disparity is job-related.⁶ Further, New York employees can now use as comparators peers who work for the employer at another establishment within the same county—previously women claiming pay disparity were forced to demonstrate inequality against a colleague in their own office.⁷ Additionally, it is now unlawful for employers to prohibit discussions, inquiries or disclosures relating to pay and compensation.⁸ Finally, violation of equal pay laws may now amount to treble damages.⁹

In a similar vein, California has made changes to its own equal pay act, known as the California Fair Pay Act, the effects of which may be felt here in New York. Specifically, one of the amendments allows employees to use as comparators colleagues working in other states.¹⁰ As such, the rising tide of pay equity in California may stretch as far as New York.

Potential Impact

The aim of the recent legislation is to make bringing equal pay claims easier. Currently, these claims are filed far less often and are far less successful than other claims of employment discrimination.¹¹

The first significant change to the New York Equal Pay Act, the limitation of the affirmative defense, could allow these claims to be more successful.¹² One previously accepted defense that may now come under higher scrutiny under this new standard is the decision

to pay employees based on salaries from previous positions.¹³ This practice creates a vicious cycle that only serves to perpetuate the gender pay gap wherein each employer is able to pay women lower wages than their male colleagues simply because other employers do the same.¹⁴ However, under the amended New York Equal Pay Act, if a plaintiff can demonstrate that the practice has a disparate impact based on gender, that an alternative practice exists that would serve the same business purpose, and

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that the employer has refused to adopt the alternative practice, then the affirmative defense will fail.¹⁵ Assuming this practice would have a disparate impact based on sex, a plaintiff could argue that the failure to pay a female employee the higher wage of her male counterpart would constitute an alternative practice that the employer failed to adopt.

Similarly, a "head of household" rationale for pay disparity previously could have withstood the "factor other than sex" test.¹⁶ Such a policy would historically have a negative effect upon women, who were traditionally second earners in a family. Under the job-relatedness standard set forth in New York's new act, the number of mouths an employee has to feed would be irrelevant to the job requirement and therefore not an actionable affirmative defense under the act.

Another change under the amendments is the broadening of the pool of comparators by allowing plaintiffs to use evidence of colleagues who hold the same position, but work in a different establishment. The failure to demonstrate an appropriate comparator has long been a significant hurdle for equal pay claims.¹⁷ While the amended act allows litigants to draw from comparators in any of the employer's establishments within the county,¹⁸ the requirement to demonstrate equal work—rather than substantial similarities or comparable characteristics between the position at issue¹⁹—remains a significant barrier to litigation. Even though the broadening of the comparator pool may seem helpful to litigants asserting these claims, it may not make a significant difference on the gender pay gap itself, which has persisted even though pay discrimination claims under Title VII do not require any comparator evidence.²⁰

More promising again are the efforts to make pay more transparent. Like the other amendments to the New York Equal Pay Act, this will assist litigants in pleading pay discrimination claims, as data regarding pay has traditionally been difficult to obtain outside of the discovery process.

It remains an open question as to whether simply banning prohibitions on pay discussions will have a significant impact on the gap alone. To date, at least 10 states have already enacted similar laws,²¹ without any substantial reduction in pay inequality but maybe, it is too early to see their effect. Protections against pay disclosures and pay inquiries between non-supervisory co-workers have been protected as concerted activity under Section 7 of the National Labor Relations Act for nearly 20 years.²² Notwithstanding the

illegality of such prohibitions, over 60 percent of private sector employees are barred from discussing wages with their colleagues, under workplace policies.²³ Further, where no such policy exists, it remains a social norm to avoid discussions related to pay.²⁴

On the federal level, the Equal Employment Opportunity Commission (EEOC) has also proposed changes to its own EEO-1 reporting forms that would require private employers and federal contractors with 100 or more employees to set forth “pay bands” and identify the employees within those bands based on protected characteristics, including gender, as well as provide the number of hours each employee worked.

One hopes that this affirmative requirement of setting forth pay disparities will have a more meaningful impact on employers as they consider and award compensation and may prompt adjustments to such decisions accordingly.²⁵ Indeed, the District of Columbia, where the majority of workers are federal employees whose pay data is much more transparent, leads the nation with the smallest earnings ratio.²⁶

Conclusion

Ultimately, there is no simple truth or easy cure to the gender pay gap. Women have family responsibilities, and the United States has poor child-care and family leave programs that disproportionately affect women. In addition, women have not been in the work force as long as men and maybe they don't have the same skill or confidence in negotiating compensation. However, the new legislation does give a woman a fair chance to access information about her employer's salary scale, to be able to present a claim without her employer shutting her down with affirmative defenses, and to allow her

a true comparator to prove inequitable compensation.

New York has worked hard to pass legislation that could equal the playing field for women at work and in doing so has given them renewed hope that they can earn their appropriate value rather than leave the workplace. Let's hope they do.



1. 29 U.S.C. §206(d).
2. N.Y. Lab. L. §194.
3. Bureau of Labor Statistics, U.S. Dept. of Labor at <http://www.bls.gov/opub/ted/2016/womens-earnings-83-percent-of-mens-but-vary-by-occupation.htm>.
4. American Association of University Women, “The Simple Truth about the Gender Pay Gap,” 7 (Spring 2016).
5. 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>.
6. N.Y. Lab. L. §194(1)(d).
7. Id. at §194(3).
8. Id. at §194(4).
9. Id. at §194(1-a).
10. California Fair Pay Act, codified at Cal Lab. Code §1197.5.
11. Compare Statistics on Equal Pay Act Charges, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm> (973 Equal Pay Act charges filed in 2015) with Statistics on Americans with Disabilities Act Charges, <https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (26,968 ADA charges filed in 2015) and Statistics on Age Discrimination in Employment Act, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (20,144 ADEA charges filed in 2015).
12. N.Y. Lab. L. §194(1)(d).
13. *Engelmann v. Nat'l Broadcasting Co.*, No. 94 Civ. 5616, 1996 WL 76107, at *10 (S.D.N.Y. Feb. 22, 1996) (holding that salary matching “falls into the catch-all factor-other-than-sex” defense); but see *Drury v. Waterfront Media*, No. 05 Civ. 10646, 2007 WL 737486, at *4 (S.D.N.Y. March 8, 2007) (“Salary matching...[is a] reasonable, gender-neutral business tactics.”).
14. Laszlo Block, “How the ‘what's your current salary?’ question hurts the gender pay gap,” WASHINGTON POST (April 29, 2016), <https://www.washingtonpost.com/news/on-leadership/wp/2016/04/29/how-the-whats-your-current-salary-question-hurts-the-gender-pay-gap>.

15. N.Y. Lab. L. §194(1)(d).

16. See 29 C.F.R. §1620.21 (stating that, under the federal Equal Pay Act, which had the same affirmative defense as the state analogue, a “head of household” defense would be scrutinized, but not unlawful).

17. See *County of Washington v. Gunther*, 452 U.S. 161, 178-79 (1981) (“In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay.”).

18. N.Y. Lab. L. §194(4).

19. Cf. Cal Lab. Code §1197.5 (requiring equal pay for “substantially similar work”); Maryland Equal Pay for Equal Work Act, Md. Code, Lab. & Empl. §3-304 (requiring equal pay for “work of comparable character or...work of the same type”).

20. *Gunther*, 452 U.S. at 178-79 (holding that Title VII does not require comparators to demonstrate pay discrimination).

21. See Pay Secrecy Fact Sheet, Women's Bureau of U.S. Dept. of Labor (August 2015), https://www.dol.gov/wb/media/pay_secrecy.pdf (setting forth pay transparency laws for California, Colorado, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey and Vermont).

22. *NLRB v. Main St. Terrace Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000); *Fredericksburg Glass & Mirror*, 323 N.L.R.B. 165, 173-74 (1997).

23. American Association of University Women, “The Simple Truth about the Gender Pay Gap,” 19 (Spring 2016).

24. See generally Leonard Bierman and Rafael Gely, “Love, Sex and Politics—Sure—Salary—No Way: Workplace Social Norms and the Law,” 25 Berkeley J. of Empl. & Labor L. 167 (2004).

25. See Bouree Lam, “When Everyone Knows How Much Everyone Else Is Paid,” THE ATLANTIC, (Mar. 28, 2016) <http://www.theatlantic.com/business/archive/2016/03/pay-transparency-gender-gap/475683/> (noting that a company that published its employees' pay was inclined to make adjustments to its compensation system that results in gender pay disparity).

26. American Association of University Women, “The Simple Truth about the Gender Pay Gap,” 7 (Spring 2016).