

.

.

.

LEVELING THE PLAYING FIELD WITH **ANTI-DISCRIMINATION** AND EQUAL PAY LAWS

By: Michelle J. Douglass, Esq.





Message February 2020

This publication provides a brief overview of recent trends and developments in New Jersey including pay equity legislation and analyzes significant decisions and filings that have had an impact on those issues.

This publication should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Additionally, this publication is not an offer to perform legal services nor establishes an attorney-client relationship.

TABLE OF CONTENTS

1

Intro

R

Chapter 1

Trends in Equal Pay-Related Legislation

13

Chapter 2

Trends in Equal Pay-Related Litigation

20

Chapter 3

Proactive Measures By
Employers to Promote Gender
Equity

31

Contact Us

Introduction

WHAT IS THE GENDER PAY GAP AND WHY IT CAN'T BE EXPLAINED AWAY

WORKING WOMEN ARE PAID LESS THAN WORKING MEN

What is the Gender Pay Gap?

The gender wage gap is a measure of pay disparity between men and women. While it can be measured different ways, the data are clear: women are still paid much less relative to men (about 83 cents per dollar, according to the Economic Policy Institute), and progress on closing the gap has stalled. ¹

The gender wage gap is a measure of what women are paid relative to men. It is commonly calculated by dividing women's wages by men's wages, and this ratio is often expressed as a percent, or in dollar terms. This tells us how much a woman is paid for each dollar paid to a man. This gender pay ratio is often measured for year-round, full-time workers and compares the annual wages (of hourly wage and salaried workers) of the median ("typical") man with that of the median ("typical") woman; measured this way, the current gender pay ratio is 0.796, or, expressed as a percent, it is 79.6 percent (U.S. Census Bureau 2016). In other words, for every dollar a man makes, a woman makes about 80 cents.

The convention for using median wages and salary is better than using average wages and salary because averages can be skewed by a handful of people making much more or much less than the rest of the workers in a sample ² The median wage analysis must be adjusted, however, to a measurement on an hourly basis to account for the fact that men work more hours on average during the year, and that more women work part time. ³ This limited adjustment allows a comparison of women's and men's wages without assuming that women, who still shoulder a disproportionate mount of responsibilities at home, would be able or willing to work as many hours as their male counterparts.

¹ Elise Goud, Jessica Schieder, and Kathleen Geir, Economic Policy Institute Publication, What is the Gender Pay Gap and is it Real? October 20, 2016.
² Id.

³ See the "Documentation" section of the Economic Policy Institute's State of Working American Data Library (epi.org/data/).

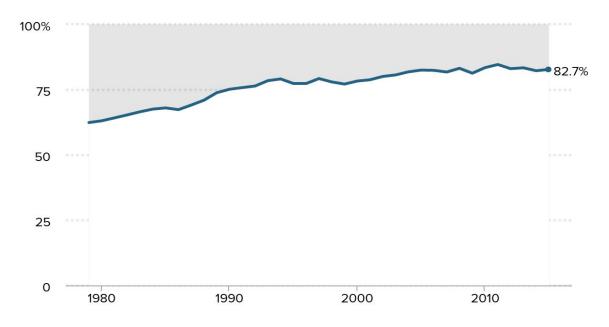
Computed this way using data from the federal government's Current Population Survey Outgoing Rotation Group, or CPS ORG in shorthand, the typical woman is paid 82.7 percent of what the typical man is paid (CPS ORG 2015). Or in common terms, women are paid 83 cents on the male dollar.

Over the past three and a half decades, substantial progress has been made to narrow the pay gap. Women's wages are now significantly closer to men's, but in recent years, that progress has stalled. According to the most recent data, as of 2015, women's hourly wages are 82.7 percent of men's hourly wages at the median (**Figure A**), with the median woman paid an hourly wage of \$15.67, compared with \$18.94 for men (**Figure B**).

FIGURE A

Progress in closing the gender pay gap has largely stalled

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

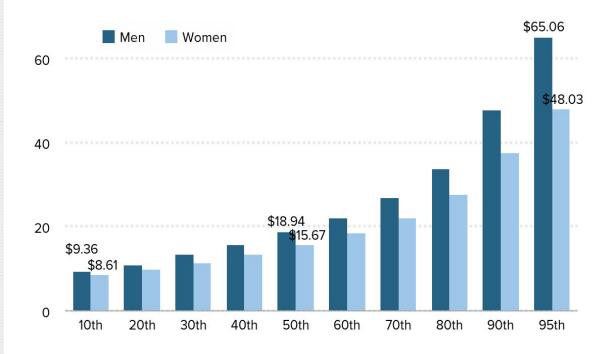


Source: EPI analysis of Current Population Survey microdata. For more information on the data sample see EPI's State of Working America Data Library.

Economic Policy Institute

Women earn less than men at every wage level

Hourly wages by gender and wage percentile, 2015



Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata. For more information on the data sample see EPI's State of Working America Data Library.

Economic Policy Institute

It's not entirely clear why women have stopped gaining on men. But the tendency for women with children to receive systematically lower pay has stubbornly persisted, suggesting that the gender pay gap is not going away anytime soon. Economist Claudia Goldin's research supports this conclusion. According to Goldin, current trends indicate that women's wages will still be pulled down over the course of their working lifetimes, even after controlling for education and work time (Goldin 2014). 4

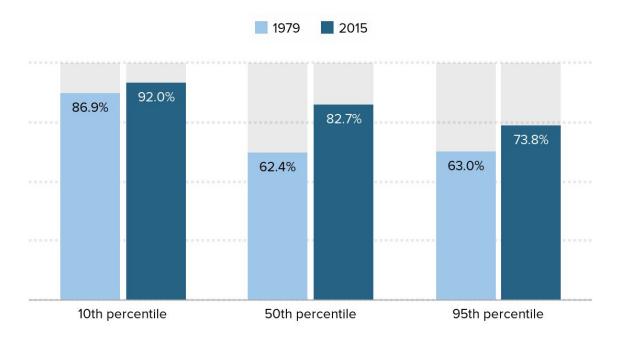
⁴ Goldin, Claudia. 2014. "<u>A Grand Gender Convergence: Its Last Chapter</u>." *American Economic Review*, vol. 104, no. 4, 1091–1119.

While the gender wage gap is a problem for women at every wage level, it is the wisest among top earners. In 2015, the gap between men's and women's hourly wages was smallest among the lowest-earning workers, with 10th percentile women earning 92.0 percent of men's wages. The minimum wage is partially responsible for this greater equality among the lowest earners. It sets a wage floor that applies to everyone, which means that people near the bottom of the distribution are likely to make more equal wages, even though those wages are very low (Figure C).

FIGURE C

The gender wage gap is still widest among top earners

Women's hourly wages as a share of men's at various wage percentiles, 1979 and 2015



Notes: The xth-percentile wage is the wage at which x% of wage earners earn less and (100-x)% earn more

Source: EPI analysis of Current Population Survey Outgoing Rotation group microdata

Economic Policy Institute

There are a range of factors that influence the different labor market experience of women and men in the form of society-wide constraints such as childbearing, choice of college major and female-dominated occupations. The scope of discrimination in the workplace is a very real factor responsible for a portion of the gender pay gap. Discrimination based on gender exists. Empirical evidence of outright discrimination in hiring, promotions, and even wage-setting is strong and includes the following:

- One famous study found that switching to blind auditions led to a significantly higher proportion of female musicians in orchestras (Goldin and Rouse 1997).⁵
- An experimental study of résumés submitted for job openings found bias against women and mothers and a preference for male applicants (Steinpreis, Anders, and Ritzke 1999). Another résumé study showed discrimination against women in the sciences (Moss-Racusin et al. 2012).
- Researchers have also found that women are viewed as less competent than men, and that mothers are judged as even less competent than childless women (Ridgeway and Correll 2004).
- In her book, Selling Women Short: The Landmark Battle for Workers' Rights at Wal-Mart (2004), Liza Featherstone reported that "women make up 72 percent of Wal-Mart's hourly workforce (nonsalaried workers), but only 34 percent of its managers are women. Women also earn less than their male counterparts in nearly every position at the company." 8

Goldin, Claudia, and Cecilia Rouse. 1997. <u>Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians.</u> National Bureau of Research Working Paper No. 5903.
 Steinpreis, Rhea E., Katie A. Anders, and Dawn Ritzke. 1999. "<u>The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study</u>." *Sex Roles*, vol. 41, nos. 7-8, 509–528.

⁷ Ridgeway, Cecilia L., and Shelley J. Correll. 2004. "<u>Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations</u>." Gender and Society, vol. 18, 510.

⁸ Featherstone, Liza. 2004. *Selling Women Short: The Landmark Battle for Workers' Rights at Wal-Mart*. New York: Basic Books.

The Economic Impact On Women

The economic impact on women caused by gender pay gap is significant. The average woman worker loses more than \$530,000 over the course of her lifetime because of the gender wage gap, and the average college-educated woman loses even more- nearly \$800,000 (IWPR 2016). ⁹

It's worth noting that each woman's losses will vary significantly based on a variety of factors—including the health of the economy at various points in her life, her education, and duration of periods out of the labor force—but this estimate demonstrates the significance of the cumulative impact. And, importantly, the gap may play a role in the retirement insecurity of older American women. 10

It is the goal of this eBook to educate you about the harsh reality of today, some 55 years after the passage of the <u>Civil Rights Act of 1964</u>, that gender discrimination in the workplace continues in the form of unequal pay and what can be done to prevent and remedy it. We are highly motivated at Burnham Douglass to eliminating the gender pay gap. We emphatically believe that equal opportunity and pay benefits not only women, it improves the overall family, education and society landscape.

Please feel free to contact the author, Michelle Douglass <u>mdouglass@burnhamdouglass.com</u> or any members of our legal team, with questions, 856-751-5505, <u>info@burnhamdouglass.com</u>. We are truly passionate about this subject!

⁹ Institute for Women's Policy Research (IWPR). 2016. <u>Status of Women in the States</u> (online database). Accessed October 2016.

¹⁰ Elise Goud, Jessica Schieder, and Kathleen Geir, Economic Policy Institute Publication, What is the Gender Pay Gap and is it Real? October 20, 2016

Chapter 1

TRENDS IN EQUAL PAY-RELATED LEGISLATION



THE NEW JERSEY PAY EQUITY LAW

Although it has been more than 50 years since Congress passed the federal Equal Pay Act ("EPA") of 1963 and Title VII of the Civil Rights Act of 1964 to outlaw pay discrimination based on sex, the subject of wage inequality remains a contentious topic. Indeed, on April 24, 2018, New Jersey Governor Phil Murphy signed the Diane B. Allen Equal Pay Act (Equal Pay Act), requiring pay equality across all protected categories – not just gender – under the state's anti-discrimination law. New Jersey's Equal Pay Act is an amendment to New Jersey's Law Against Discrimination (known as the "LAD").

When the Diane B. Allen Equal Pay Act became law on July 1, 2018, New Jersey became the state with the most progressive pay equity statute in the nation. In the year since, there have been a smattering of lawsuits filed under the Allen Act. However, many believe those cases are just the tip of the iceberg. High-profile multi-million-dollar pay equity settlements in New Jersey – not to mention New York and across the country – are grabbing headlines and getting the attention of employees who are more attuned to their rights than ever before.

Specifically, under New Jersey's Equal Pay Act, it shall be an unlawful employment practice for "an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility." N.J.S.A. 10:5-12(t). The Act goes on to provide that "[a]n employer who is paying a rate of compensation in violation of this subsection shall

shall not reduce the rate of compensation of any employee in order to comply with this subsection." Furthermore, and importantly, the Act provides metrics by which an employer may pay a different rate of compensation to a member of a protected class relative to another similarly-situated employee, "only if the employer demonstrates that the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates:

- The differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
- The factor or factors are not based on, and do not perpetuate, a differential
 in compensation based on sex or any other characteristic of members of a
 protected class;
- Each of the factors is applied reasonably;
- One or more of the factors account for the entire wage differential; and,
- The factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential."

The comparison of wage rates is based on the wage rates in all of an employer's operations or facilities and is not limited to employees who work within a specific geographic area or region.

Employees also do not need to share the same job title or description under the new law but if they perform "substantially the same work" they must be paid the same rate. An aggrieved employee alleging discriminatory pay practices will be entitled to recover enhanced damages from his or her employer. Under the NJLAD, an employee is entitled to an award of compensatory damages, punitive damages if the conduct is willful, attorneys' fees and costs.

Under the New Jersey Equal Pay Act, a prevailing employee will be awarded treble damages (3x compensatory damages) in addition to the damages available under the NJLAD. Furthermore, the Equal Pay Act extends the statute of limitations for a discriminatory pay practice from two years to six years, thus expanding the reach of either the federal Equal Pay Act or NJLAD.

THE CURRENT STATE OF EQUAL PAY LAWS

There are forty-two states that have equal pay laws. The subject of wage inequality between the sexes remains a contentious topic, although it has been more than 50 years since the Federal Equal Pay Act (1963) and the Federal Civil Rights Act (1964) were passed.

In 1963, Congress passed the Equal Pay Act, which made it illegal for employers to pay women lower wages than men for equal work on jobs requiring the same skill, effort and responsibility. The act provides a cause of action for an employee to directly sue for damages.

In 1964, Congress passed the Civil Rights Act, including Title VII, which, among other things, prohibits discrimination in employment based on sex, and is also used in wage discrimination claims.



Most states have laws prohibiting wage discrimination based on sex. The language in the laws usually is like the federal Equal Pay Act and contains the same exceptions. Alabama and Mississippi have no equal pay laws. Louisiana, North Carolina, South Carolina, Texas, Utah, Wisconsin and the District of Columbia have pay-related provisions in their employment discrimination laws. Wisconsin and Louisiana specifically prohibit sex-based wage discrimination in their general employment discrimination laws. South Carolina, Texas, Utah and the District of Columbia prohibit wage discrimination based on protected class status in their general employment discrimination laws. New Jersey, New York Washington, Oregon, and California have the most far reaching equal pay laws in the nation.

SALARY HISTORY BAN

A salary history ban prohibits employers from asking applicants about their current or past salaries or benefits. They generally also prohibit employers from seeking this information through an agent or from sources other than the applicant, such as the applicant's former employers.



Salary history bans are designed to address gender pay inequality. We know that it has long been illegal for employers to pay different wages to men and women for the same work. However, a significant pay gap still exists. The salary history ban is designed to put a stop to that.

A salary history ban prohibits employers from asking applicants about their current or past salaries or benefits. They generally also prohibit employers from seeking this information through an agent or from sources other than the applicant, such as the applicant's former employers. Here's a more detailed list of questions or statements the salary history ban prohibits:

- The term generally refers to the communication of any question or statement to an applicant;
- Or an applicant's current or former employer;
- Or a current or former employee;
- Or an agent of the applicant's current or former employer (in writing or otherwise) for the purpose of obtaining an applicant's salary history;
- Or search publicly available records or reports for the purpose of obtaining an applicant's current or former compensation data.

As of February 2019, there are 13 statewide bans and 10 local bans on salary history. The laws are aimed at ending the cycle of pay discrimination and some go further than merely banning pay history questions. A few also prohibit an employer from relying on an applicant's pay history to set compensation if discovered or volunteered; others prohibit an employer from taking disciplinary action against employees who discuss pay with coworkers.

The list of existing salary history bans is as follows:

•California

- San Francisco
- •Connecticut
- Delaware
- •Hawaii
- •Illinois
 - Chicago
- •Louisville, KY
- •New Orleans, LA
- Massachusetts
- •Michigan
- •Kansas City, MO
- New Jersey
- •New York
 - New York City
 - Albany County
 - Suffolk County
 - Westchester County
- Oregon
- Pennsylvania
 - Philadelphia
 - Pittsburgh
- •Puerto Rico
- Vermont
- •Wisconsin

Chapter 2

TRENDS IN EQUAL PAY-RELATED LITIGATION

The Case Law in New Jersey Under the EPA is Minimal

To date, there is little case law interpreting New Jersey's Equal Pay Act, N.J.S.A. 10:5-12 (t). Afterall it only recently went into effect: July 1, 2018. The Federal Equal Pay Act, 29 U.S.C. Sec. 205, et. seq., on the other hand, has existed since 1963 when it amended the Fair Labor Standards Act. There is plenty of case law interpreting the Federal Equal Pay Act and the Equal Employment Opportunity Commission has provided guidance in the form of regulations that implement the federal workplace discrimination laws.

Although there is some symmetry, the Federal Equal Pay Act is different from the New Jersey Equal Pay Act in several significant ways. For instance, the burden to prove a claim under the law in New Jersey is easier and provides better remedies does the federal law.

One of the biggest changes is that the New Jersey Equal Pay Act expands the "substantially similar" analysis that's common under the federal law. Instead, the New Jersey law. For example, auto detailers are arguably worth about the same as housemaids. To prevail on a claim of wage discrimination under the Federal Equal Pay Act, a plaintiff must show that she was paid less for doing equal work as compared to her male colleagues.

Furthermore, the New Jersey law has a treble damages clause. Some successful claimants may be eligible for three times their lost wages as a form of punitive damages. In short, New Jersey pay discrimination cases may be easier to win than under the Federal law.

The only New Jersey case law since the passage of the New Jersey Equal Pay Act was decided on January 14, 2019 by United States District Judge William Martini in *Perrotto v. Morgan Advanced Materials, PLC, et al.,* which held that the New Jersey Equal Pay Act cannot be applied retroactively. This means that the court held that the new law cannot be applied to conduct that occurred before July 1, 2018.

So far, the only guidance offered under New Jersey jurisdiction is the New Jersey Model Jury Charge. Model Jury Charge 2.24A is intended for claims of unequal pay brought under the Diane B. Allen Equal Pay Act (New Jersey Equal Pay Act), N.J.S.A. 10:5-12(t), which makes it unlawful "[f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the

employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility." *Ibid*.



Rep. Mikie Sherrill Receives Standing Ovation after Delivering Final Floor Speech on Equal Pay Bill which strengthens and closes loopholes in the 1963 Federal Equal Pay Act. Click here to read the transcript.

The New Jersey Model Jury Charges Provide Guidance

The Model Jury Charge instructs that "substantially similar work" as work that is substantially similar "when viewed as a composite of skill, effort and responsibility." *Ibid.* The charge notes that it is not necessary that the two jobs be identical; the New Jersey Equal Pay Act only requires proof that in the aggregate, the performance of the two jobs in comparison demands "substantially similar" skill, effort and responsibility. *Id.* The crucial issue is whether the essential aspects of the two jobs being compared are "substantially similar." Insignificant, insubstantial, or trivial differences do not matter and may be disregarded. *Id.*

In evaluating whether the performance requirements of the two jobs are substantially similar, what must be considered is the "skill," "effort" and "responsibility" required for these jobs. *Id.* The Model Jury Charge provides an explanation of what is meant by the terms "skill," "effort," and "responsibility." These terms, however, do not constitute separate tests,

rather the plaintiff must only show by a preponderance of the evidence that she performed work that was substantially like the work performed by the male employee or employees when viewed as a composite of skill, effort and responsibility. *Id*.

Importantly, fringe benefits, vacation and holiday pay and overtime are all a part of the analysis. *Id.* The Defendant employer may, however, assert affirmative defenses and defeat a claim of unequal pay if it can prove that the difference in compensation is the result of a valid seniority or merit system. *Id.* The plaintiff may defeat the employer's affirmative defenses by showing that the seniority or merit system is not valid. *Id.* That is, a plaintiff can defeat the employer's defense by showing that it's seniority or merit system was not valid, but rather was a pretext, or excuse, for paying higher wages to male employees for equal work.

States with Similar Laws

California, Maryland, Massachusetts, Minnesota, New York, and Washington have equal pay laws akin to that of New Jersey. Probably the closest to New Jersey is California's law that allows employees to be compared even if they do not work at the same establishment, or if they do not share the "same" or "substantially equal" jobs, that is, so long as the employees are "similarly situated" a plaintiff may succeed.

The states that have enacted equal pay laws similar to that of New Jersey have issued important substantive decisions which may influence the courts in deciding cases under the new Equal Pay Act.

On June 14, 2017, the District Court for the Southern District of New York issued a decision in *Campbell v. Chadbourne & Parke LLP*, which denied a law firm's motion to dismiss equal pay allegations on the grounds that a partner in a law firm is not an "employee" under the EPA. In that case, a female partner claimed that she was paid less than her male peers. ¹¹ The law firm defendant tried to dispense with the claims quickly – before substantial discovery had taken place – by arguing that the term "partner" and the terms of the operative partnership agreement foreclosed the possibility that female partners could be considered employees under the EPA. ¹²

15

⁺¹¹ Campbell v. Chadbourne & Parke LLP, No. 16-CV-6832 (JPO), 2017 WL 2589389 (S.D.N.Y. June 14, 2017).

¹² Id. at *2.

The court denied summary judgment on the grounds that additional discovery was necessary to determine "employment" status under the factors set forth in Clackamas Gastroenterology Associates, P.C. Those factors are: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. ¹³

Plaintiffs argued that additional discovery would show that the law firm's hiring, firing, and promotion decisions, as well as decisions concerning any individual partner's degree of control, autonomy, and access to profits are determined exclusively by the firm's Management Committee. ¹⁴ Given the fact-sensitive nature of the factors used to determine employment status, the court denied the law firm's motion for summary judgment until additional discovery could be taken relating to those factors.

Other courts have addressed employers' use of merit systems. For example, in Summy-Long v. Pennsylvania State University, the Third Circuit affirmed summary judgment against a female physician who alleged that she was paid less than male physicians for the same work. ¹⁵ The Third Circuit held that the University defendants had shown that the salary disparities were the result of a merit system. ¹⁶ In particular, the Third Circuit noted that numerous items in the record "reflected a lack of academic performance in comparison to her colleagues." ¹⁷ Among other things, she had been urged to increase publications and to obtain external funding to support her research. She also "failed to apply to renew her National Institute of Health grant even after being reminded repeatedly for three years by her superior." ¹⁸ The Court held that this evidence established that "[t]he difference in [her] salary compared to her male coworkers resulted from, among other things, her lack of publications and failure to obtain external funding." ¹⁹

¹³ Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003).

¹⁴ Campbell, supra, at *3.

¹⁵ Summy-Long₊v. Pennsylvania-State University, No. 17-1206, 2017 WL 5125627, at *1 (3d Cir.-Nov. 6, 2017).

¹⁶ *Id*. at *2.

⁺¹⁷ Id.

¹⁸ *Id*.

¹⁹ *Id*.

litigation regarding whether two individuals are engaged in "substantially similar work" under "similar working conditions," which is the new standard for comparing gender-based differences in pay. Experts in vocational science may be hired to argue these points in litigation. Federal courts, in interpreting the federal Equal Pay Act, have held that the jobs of male and female employees should be compared to determine if they are "substantially equal." (Stanley v. Univ. of S. California, 178 F.3d 1069, 1073-1074 (9th Cir. 1999); citing 29 C.F.R. § 1620.13.)

However, given that the New Jersey Equal Pay Act's statutory language is broader, we anticipate that New Jersey courts will interpret the new law to cover gender pay gaps in a greater number of situations than in the past.

Given that the burden of proof has increased for employers to meet one of the two exemptions from equal pay, we anticipate there is also likely to be litigation regarding whether those exemptions, such as seniority or merit systems, were "applied reasonably" and "account for the entire wage differential," as now required by the new law. In our view, the new law dramatically shifts the balance of these claims in favor of employees. In the absence of clearly defined standards or criteria in a compensation system, it may be difficult for employers to defend their unequal compensation practices. If these purported seniority or merit-based compensation systems are not implemented and rigorously enforced in an objectively reasonable and transparent manner, we anticipate that employers will have a hard time proving that any such system was reasonably applied as a matter of law and demonstrably accounts for the entire wage differential.

Another monumental shift in the New Jersey equal pay law was realized recently with the enactment of the salary history ban, effective January 2020, which forbids an employer from paying an employee who is a member of a legally protected class less than other employees with similar job duties, unless the employer has a legitimate business reason for the pay.

The Garden State law forbids private employers from asking about or even considering a worker's wage and salary experience, making it — along with the New York salary history ban — one of the more stringent salary bans. The law went into effect on Jan. 1, 2020.

Exceptions of New Jersey Salary History Ban

However, there are several situations in which an employer may consider salary history such as:

- If the applicant voluntarily, "without prompting or coercion," provides the information
- The employer may ask an applicant to provide written authorization to confirm salary history after the employer has made a job offer that includes the applicant's compensation and benefits

Language in the law expressly notes that it does not apply to:

- Internal transfers or promotions
- Previous knowledge gained by the employer as a result of prior employment with the employer
- An employer acting under a federal law or regulation that requires the disclosure or verification of salary history for employment or that requires knowledge of salary history to determine an employee's compensation

In addition, employers are allowed to discuss the "terms and conditions" of incentive and compensation plans the applicant was entitled to at a previous employer, provided that: (1) the employer does not ask about the specific dollar amounts involved in the plans and (2) the job the applicant applied for with the prospective employer includes an incentive or commission component.

The salary history ban addresses a gap in the state's Equal Pay Act where the law does not clearly address whether employer inquiries into a prospective employee's compensation or benefits are allowed. The salary ban law has not yet been tested in a court of law in New Jersey.

The U.S. Court of Appeals for the Third Circuit, however sided with the City of Philadelphia, saying it can ban employers from asking job applicants their salary history. ²¹ The 3rd U.S. Circuit Court of Appeals partially

²⁰ California Labor Code Section 432.3, which went into effect on January 1, 2018, prohibits public and private employers from seeking or relying upon the salary history of applicants for employment.

²¹ The Chamber of Commerce for Greater Philadelphia v. The City of Philadelphia, No. 18-2175 (3d Cir. 2020).

reversed a lower court's 2018 decision that said the city could not ban employers from asking about salary history but could ban them from using it to determine wages.

The Greater Philadelphia Chamber of Commerce sued the city after the law was passed in 2017, saying the law would violate employers' First Amendment rights to ask potential hires about their salary history.

The Third Circuit Appeals Court found no constitutional violation because the salary history ban law did not restrict an employer from communicating an applicant's worth. An employer, the Court noted, may still discuss an applicant's value based on her qualifications and abilities. The salary history Ordinance "simply attempts to prevent the employer from unknowingly incorporating past wage discrimination into the terms of an applicant's job offer." ²² Since the employer remains free to communicate its own valuation of the employee by making as many offers at whatever salary it deems appropriate, the Ordinance did not unnecessarily restrict the employer's First Amendment right to free speech. ²³

New Jersey falls within the Third Circuit jurisdiction, so it is highly unlikely that any challenge to the New Jersey salary history ban law will succeed based on a First Amendment violation claim. We anticipate that challenges will arise based on a former employer's disclosure to a prospective employer regarding the employee's earnings history. The main concern being compliance problems across different states or jurisdictions. For example, in Tennessee, it's acceptable to ask about salary expectations, but this is not lawful in California. If a person volunteers their salary information, it's OK for



The Ordinance [salary history ban] simply attempts to prevent the employer from unknowingly incorporating past wage discrimination into the terms of an applicant's job offer."

employers to use the information in California, but not in Oregon.

²² Id. at *29

²³ *Id*. at 30.

Chapter 3

PROACTIVE MEASURES BY EMPLOYERS TO PROMOTE GENDER EQUITY

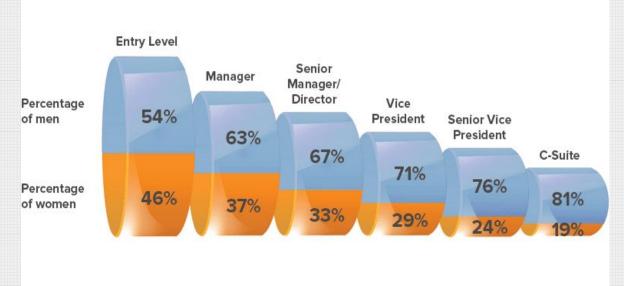
HR IS KEY IN HELPING EMPLOYERS PROMOTE GENDER EQUALITY

In 2016, Facebook COO Sheryl Sandberg said, before a packed room of world leaders at the World Economic Forum in Davos, Switzerland, "Men still run the world—and it's not going that well." Some predict that it will take more than 100 years to achieve gender parity at the C-suite level.²⁴

Human Resource professionals are in a unique position to make change. Not only are HR leaders in charge of their organizations' recruiting, diversity and compensation efforts, but the profession itself is dominated by women. The problem, however, is that many organizations dictate the culture and those organizations not committed to gender diversity will not see an HR department able to effectuate any meaningful progress toward becoming diverse and inclusive.

Gender Representation in the Corporate Pipeline in 2016

At the current rate of progress, it will take more than 100 years to achieve gender parity at the C-suite level.



Source: Source: McKinsey & Co. and LeanIn.org's Women in the Workplace 2016.

According to Katie Donovan, founder and equal pay consultant for Equal Pay Negotiations LLC, HR is naturally positioned to take the lead because "Human resources has all the data and can see the big picture." "They are probably aware of the big problem long before anyone else, says Donovan, "They can't solve [it] alone, but they can lead, inspire, advocate ... and push back when managers are about to put the organization at risk with questionable compensation decisions."

²⁴ Report, McKinsey & Co and Leanin.org and Mercer's 2016 When Women Thrive Report

In our experience, most HR departments are viewed and operated as a branch of the corporate leadership without any true independence. Companies that do not permit a self autonomous HR department tend to adopt the attitudes and culture of upper management.

One step in the right direction an employer can take is to permit an autonomous operation of the HR department free from explicit and subtle forms of coercion to conform to leadership values, unless those values blatantly reinforce gender diversity.

An autonomous HR department can move away from the common practice of requiring job applicants to provide salary history as part of the application process, since women are more likely to be coming into a new position with lower previous compensation than their male counterparts.

Offering more-flexible workplaces is one-way HR can help retain more women and move toward gender equity at all ranks and pay levels. HR leaders should embrace options like partial or full telecommuting, flexible work schedules, and professional part-time roles. This is a sound business decision since fewer women who experience career interruptions the company gains in retaining institutional knowledge, maintaining productive, well-trained employees with minimal turnover.

ENSURE WOMEN ARE NOT UNDER-REPRESENTED IN SENIOR LEADERSHIP

Globally, the proportion of senior leadership roles held by women—24 percent—has risen just 3 percent in the past five years, according to a 2016 analysis from the audit, tax and advisory firm Grant Thornton. This analysis makes clear that companies that don't promote or hire women to senior leadership do so at their own peril: an assessment of 1,050 companies in the U.S., the U.K. and India found that companies with men-only boards of directors forgo potential profits to the tune of \$655 billion across the three economies. Indeed, women in leadership roles help to grow business. Think about it, most women, whether single or in households, play a dominant role in the purchase of all goods.

In the technology industry, the logic for paying women a fair wage is easy to follow. Technology companies thrive by attracting and retaining the best talent, including women, and by driving competitive advantage through innovation. There is a substantial body of research indicating that gender-diverse teams are more productive and innovative and drive better results than homogenous ones.

The key benefits of gender diversity were reported by the National Center for Women and Information Technology and include better financial performance, superior team dynamics, teams that stay on schedule and under budget, and improved employee performance. A factor of importance to the technology industry is that of enabling innovation. The Journal of Innovation-Management Policy & Practice found that gender-diverse teams "foster novel solutions leading to radical innovation."

The McKinsey Global Institute makes the financial case for gender diversity and wage equality, stating, "The business case for the advancement and promotion of women is compelling." ²⁶ The benefits of diverse views include higher returns on equity and greater performance. When three or more women are represented in executive leadership, companies tend to perform better on return on equity (+10.7 percent), profits (+91.4 percent), and stock price growth (+36 percent). However, in a sample of 1,500 companies, gender diversity is a top priority for only 28 percent of them, and for 33 percent of those surveyed, diversity is absent from their strategic agenda.3 McKinsey advocates best practices to address this underleveraged opportunity, including "tracking and eliminating gender pay gaps."²⁷

Of course, training, coaching and providing fair and impartial performance evaluations are critical and practical steps can take to level the workplace for men and women.

23

²⁵ Diaz-Garcia, C., Gonzalez-Moreno, A., & Saez-Martinez, F. (2013). Gender diversity within R&D teams: Its impact on radicalness of innovation. Innovation: Management Policy and Practice, 15(2), 149–160.

²⁶ McKinsey Global Institute. (2015). Promoting gender parity in the global workplace. Retrieved from

http://www.mckinsey.com/insights/organization/promoting_gender_parity_in_the_global_workplace

27 Id.

PAY EQUITY AUDIT GOES FAR IN LEVELING THE PLAYING FIELD



Since states like New Jersey and New York have far reaching pay equity statutes, including treble damages, compliance, or the lack therefor carries with it the possibility of significant liability.

It is best practice for employers to conduct self-audits to evaluate whether their compensation practices promote gender pay equity. A Report by the Women's Foundation provides an excellent guide for employers for reaching gender pay equity. ²⁸ A summary of the findings of the Report are as follows:

Employers should determine whether gender-based wage disparities exist in their organizations.

- Employers should conduct self-audits to evaluate whether their compensation practices promote gender pay equity.
- Quantitative self-audits include analyses of pay by job title, pay band, or department to identify gender-based pay disparities.
- Qualitative self-audits guide employers through open-ended questions to determine if their compensation practices promote pay equity.
- Employers should be accountable for completing self-audits and working toward remediating any gender pay disparities identified during this process.

²⁵ Diaz-Garcia, C., Gonzalez-Moreno, A., & Saez-Martinez, F. (2013). Gender diversity within R&D teams: Its impact on radicalness of innovation. Innovation: Management Policy and Practice, 15(2), 149-160.

²⁶ McKinsey Global Institute. (2015). Promoting gender parity in the global workplace. Retrieved from

http://www.mckinsey.com/insights/organization/promoting gender parity in the global workplace

²⁷ Id.

²⁸ Erickson, Sonja, M.A., Pay Equity Best Practices Guidelines, A Report for the Women's Foundation, (2015).

Employers should evaluate whether their current compensation system is equitable.

- Compensation systems should be evaluated from a gender equity
 perspective which goes beyond the concept of "equal pay for equal
 work." Instead, the goal should be to understand what constitutes fair pay
 for all workers.
- Employers should use a standardized methodology to assess the internal and external value of each position in their organization. Pay rates should reflect the value of every position regardless of the type of work or job title.
- Employers should consider non-wage compensation, such as
 opportunities available to parttime workers, and flexible scheduling, in an
 evaluation of equal pay practices.

Employers should ensure transparency concerning organizational compensation policies.

- Salary ranges for all job titles should be made public and available to all job applicants.
- Employers should develop and implement policies which prohibit pay secrecy and eliminate penalties for discussing pay.
- Employers should consider joint evaluation processes when making pay raise and promotion decisions and ensure that these decisions are justifiable and well documented.

For each best practice, this report includes: a summary discussion of the practice and how it can help close the gender pay gap in either the public or private sector; examples of how states have followed the best practice; and possible indicators for measuring whether the best practice is shrinking the gender pay gap. See,

https://static1.squarespace.com/static/545815dce4b0d75692c341a8/t/5b589833352f5321607f1a24/1532532986485/Gender+Pay+Equity+Report.pdf

POWERFUL TOOL: SUING UNDER THE EQUAL PAY ACT.

Women are now the primary breadwinners in almost half of all-American families with children—yet the wage gap persists. Along with increased corporate transparency and legislative action, the Equal Pay Act is an invaluable tool for fighting unequal pay.

Despite being the film's biggest draw, Oscar-winning actress Jennifer Lawrence was paid less than any of her male costars in *American Hustle*. Gillian Anderson, who plays Scully in *The X[±]Files*, was initially offered half of David Duchovny's proposed salary for the television show's 2016 revival. Players on the U.S. women's national soccer team earned as little as 40 percent of what their male counterparts made, even though the women's team generated \$20 million more revenue than the men's team in 2015.²⁹

These are but a few recent examples of prominent women speaking out about a decades-long fight. It's a simple demand—equal pay for equal work—but one that defies easy solutions. One powerful tool for demanding fair pay, however, is suing under the Equal Pay Act.

²⁹ Andrew Das, Top Female Players Accuse U.S. Soccer of Wage Discrimination, N.Y. Times (Mar. 31, 2016),

www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html; Bill Chappel, U.S. Women's Soccer Team Members File Federal Equal-Pay Complaint, NPR (Mar. 31, 2016),

www.npr.org/sections/thetwo-way/2016/03/31/472522790/members-of-u-s-women-s-national-team-file-federal-equal-pay-complaint.

CONTACT US TO LEARN MORE ABOUT YOUR RIGHTS