Pay Equity Legislation

Jody Feder
Legislative Attorney

Linda Levine
Specialist in Labor Economics

September 20, 2010

Congressional Research Service
7-5700
www.crs.gov
RL31867

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The term "pay equity" originates from the fact that women as a group are paid less than men. In recent years, for example, women with a strong commitment to the workforce earned about 77 to 80 cents for every dollar earned by men. As women's earnings as a percentage of men's earnings have narrowed by less than 20 percentage points over the past 40-plus years, some members of the public policy community have argued that current anti-discrimination laws should be strengthened and that additional measures should be enacted. Others, in contrast, believe that further government intervention is unnecessary because the gender wage gap will narrow on its own as women's labor market qualifications continue to more closely resemble those of men.

The Equal Pay Act (EPA), which amends the Fair Labor Standards Act (FLSA), prohibits covered employers from paying lower wages to female employees than male employees for "equal work" on jobs requiring "equal skill, effort, and responsibility" and performed "under similar working conditions" at the same location. The FLSA exempts some jobs (e.g., hotel service workers) from EPA coverage, and the EPA makes exceptions for wage differentials based on merit or seniority systems, systems that measure earnings by "quality or quantity" of production, or "any factor other than sex." The "equal work" standard embodies a middle ground between demanding that two jobs either be exactly alike or that they merely be comparable. The test applied by the courts focuses on job similarity and whether, given all the circumstances, they require substantially the same skill, effort, and responsibility. The EPA may be enforced by the government, or individual complainants, in civil actions for wages unlawfully withheld and liquidated damages for willful violations. In addition, Title VII of the 1964 Civil Rights Act provides for the awarding of compensatory and punitive damages to victims of "intentional" wage discrimination, subject to caps on the employer's monetary liability.

The issue of pay equity has attracted substantial attention in recent Congresses. A number of measures, including bills that would provide additional remedies, mandate "equal pay for equivalent jobs," or require studies on pay inequity, have been introduced in each of the last several congressional sessions. In the 111th Congress, similar legislation has been introduced, including the Paycheck Fairness Act (H.R. 12/S. 182/S. 3772), the Fair Pay Act (H.R. 2151/S. 904), and the Title VII Fairness Act (S. 166). In addition, on January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 (H.R. 11/S. 181). This legislation supersedes the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by amending Title VII to clarify that the time limit for suing employers for pay discrimination begins each time they issue a paycheck. Although the House of Representatives passed both the Ledbetter legislation and the Paycheck Fairness Act as a combined package, the Senate did not combine the two bills and has not yet taken up the latter for a vote. Recently, however, Senator Reid reintroduced the Paycheck Fairness Act as S. 3772, and the bill has been placed on the Senate calendar.

Contents

Tables

Contacts

The persistence of gender-based wage disparities—commonly referred to as the pay or wage gap—has been the subject of extensive debate and commentary. Congress first addressed the issue more than four decades ago in the Equal Pay Act of 1963,[1] mandating an "equal pay for equal work" standard, and addressed it again the following year in Title VII of the 1964 Civil Rights Act.[2] Collection of compensation data and elimination of male/female pay disparities are also integral to Labor Department enforcement of Executive Order 11246, which mandates nondiscrimination and affirmative action by federal contractors. During the 1980s, some members of the public policy community sought to advance the earnings of women relative to men by pressing a "comparable worth" theory before state legislatures and in federal court litigation. During the last several decades, initiatives to strengthen and expand current federal remedies available to victims of unlawful sex-based wage discrimination have been taken up in Congress.

This report begins by showing the trend in the male-female wage gap and by examining the explanations that have been offered for its enduring presence. It next discusses the major laws directed at eliminating sex-based wage discrimination as well as relevant federal court cases. The report closes with a description of pay equity legislation that has been considered by Congress in recent years, including bills introduced in the 111th Congress.

The Gender Wage Gap

The Male-Female Pay Differential over Time

The term "pay equity" originates from the fact that women as a group are paid less than men. In 1960, half of all women employed year-round full-time (i.e., 50-52 weeks and at least 35 hours per week) earned more than $3,257 and half earned less than that amount. In the same year, the median annual earnings of men employed year-round full-time were $5,368. Almost five decades later, according to U.S. Census Bureau data for 2008, the median earnings of women with a strong commitment to the labor force were $35,745, while those of men were a substantially higher $46,367.

It often is noted that even when comparisons are made between similar groups, women still are paid less than men. Women with a bachelor's degree employed year-round full-time earned $54,207 in 2008, while similarly educated men earned an average of $81,975. Male high school graduates were paid $43,493 on average, well above the $31,666 paid to female high school graduates. Women typically earn less than men of the same age as well. The wage gap is narrowest among young adults, and then it generally widens. Although these disparities between seemingly comparable men and women are sometimes taken as proof of sex-based wage inequities, the data have not been adjusted to reflect gender differences in *all* characteristics that can legitimately affect relative wages (e.g., college major or uninterrupted years of employment).

The size of the male-female wage gap has shrunk at a slow and uneven pace over time. As shown in **Table 1**, the pay differential narrowed steadily during the 1980s so that by the end of the decade women were being paid about 70 cents on the dollar. The extent of the reduction in the

[1] 29 U.S.C. § 206(d).

[2] 42 U.S.C. §§ 2000e et seq.

gender wage gap that occurred during the 1980s was not sustained during the 1990s. In addition, the median earnings series of the Census Bureau (columns 2 and 5) and of the Bureau of Labor Statistics (columns 3 and 6) show that the ratio of female-to-male wages fluctuated erratically between 1990 and 1999. The wage gap thus far during the 2000s has also narrowed to a lesser degree than during the 1980s. After shrinking fairly steadily through mid-decade, the gap has since remained much the same. Consequently, in recent years, women with a strong attachment to the job market have come to earn about 77-80 cents for every dollar earned by men.

Table 1. Ratio of Female-to-Male Earnings

Year	Year-round full-time workers[a]	Full-time workers[b]	Year	Year-round full-time workers[a]	Full-time workers[b]
2008	77.1	79.9	1983	63.6	66.7
2007	77.8	80.2	1982	61.7	65.4
2006	76.9	80.7	1981	59.2	64.6
2005	77.0	81.0	1980	60.2	64.4
2004	76.6	80.4	1979	59.7	62.5
2003	75.5	79.4	1978	59.4	n.a.
2002	76.6	77.9	1977	58.9	n.a.
2001	76.3	76.1	1976	60.2	n.a.
2000	73.7	76.0	1975	58.8	n.a.
1999	72.3	76.5	1974	58.8	n.a.
1998	73.2	76.3	1973	56.6	n.a.
1997	74.2	74.4	1972	57.9	n.a.
1996	73.8	75.0	1971	59.5	n.a.
1995	71.4	75.5	1970	59.4	n.a.
1994	72.0	76.4	1969	58.9	n.a.
1993	71.5	77.1	1968	58.2	n.a.
1992	70.8	75.8	1967	57.8	n.a.
1991	69.9	74.2	1966	57.6	n.a.
1990	71.6	71.9	1965	59.9	n.a.
1989	68.7	70.1	1964	59.1	n.a.
1988	66.0	70.2	1963	58.9	n.a.
1987	65.2	70.0	1962	59.3	n.a.
1986	64.3	69.2	1961	59.2	n.a.
1985	64.6	68.2	1960	60.7	n.a.
1984	63.7	67.8			

Source: U.S. Census Bureau data on year-round full-time workers, and U.S. Bureau of Labor Statistics data on full-time workers.

Note: The wage gap based on annual data (columns 2 and 5) is wider than the wage gap based on weekly data (columns 3 and 6) because women generally work fewer weeks and hours per week than men. In addition, the annual data include self-employed workers who have larger earnings differences by gender than the wage and salary workers covered by the weekly series. Regardless of the interval, the gender wage gap would be wider if all workers were compared because relatively more women than men work part-time or part-year schedules.

n.a. = not available.

a. Based on median annual earnings of all workers age 15 or older (14 or older before 1980) employed year-round full-time (i.e., 50-52 weeks a year and at least 35 hours a week), including the self-employed. Before 1989, earnings covered civilian workers only.

b. Based on median weekly earnings of wage and salary workers age 16 or older employed full-time.

Explanations of and Remedies for the Gender Pay Differential

The existence and persistence of the gender wage gap has led to a search for explanations. Basically, two schools of thought have developed. The human capital explanation has a supply-side focus—that is, it looks at the personal characteristics of working women and men. The sex-segregation-in-the-workplace or discrimination explanation has a demand-side focus—that is, it looks at the characteristics of the jobs in which women and men typically work.

Some researchers have tried to explain the pay gap by examining differences in the average amounts of human capital (e.g., educational attainment) accumulated by women and men. Other researchers have looked to job-related factors for an explanation of the wage gap, with some particularly focusing on the relationship between sex segregation in the workplace and women's comparatively low wages. (In this instance, segregation refers to the clustering of women and men in different occupational groups, in different occupations within these groups, in different jobs within these occupations, and in different industries or firms performing the same jobs.) Still others have attributed the wage gap to a combination of personal characteristics (e.g., number of hours worked per week or year) and job characteristics (e.g., extent of unionization or size of firm). Although adjusting women's and men's wages for human capital and job-related differences considerably narrows the pay gap, it does not entirely eliminate it.[3]

Those who ascribe to the human capital explanation of the gender wage disparity argue that as women increasingly become like men in terms of their participation in the workforce, women's earnings will further approach those of men. They thus believe that no government intervention is warranted to achieve pay equity beyond current anti-discrimination measures. Others believe that sex-based wage discrimination is responsible for the pay gap that remains after accounting for gender differences in labor market qualifications. They support strengthened government enforcement of anti-discrimination laws and regulations, enhanced government dissemination of information about and provision of training in comparatively high-paying nontraditional jobs for women,[4] or employers paying female and male employees in comparable jobs the same wages. In the 1980s, the latter perspective led to largely unsuccessful lawsuits that brought "comparable worth" claims under Title VII of the Civil Rights Act. (These lawsuits are discussed in the next section of this report.)

---

[3] See CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, by Linda Levine, for a review of empirical analyses of the male-female wage gap.

[4] Congress has attempted to reduce occupational segregation. The Women in Apprenticeship and Nontraditional Occupations Act (WANTO, P.L. 102-530) provides technical assistance to employers and unions to promote women's employment in apprenticeable and other nontraditional jobs. Through FY1995, the Nontraditional Employment for Women Act (P.L. 102-235) had authorized the use of the Job Training Partnership Act's discretionary funds to develop demonstration programs to help women enter high-paying jobs where they were underrepresented.

The idea motivating comparable worth is that the size of a worker's paycheck should be related to job content rather than to the predominant sex of employees in an occupation. Comparable worth proponents argue that some jobs are undervalued—that is, pay relatively low wages—*because* they are largely held by women. Instead of continuing to largely rely on supply-demand conditions in the labor market to set wages and instead of waiting for further lessening of sex segregation in the workplace, comparable worth advocates typically propose that a job evaluation be conducted on all positions within a firm so they can be compared with each other in terms of such attributes as skill, effort, responsibility, and working conditions. Employers would then raise the wages of workers in all jobs or in female-dominated jobs deemed to be underpaid on the basis of the evaluation (i.e., jobs with wages below other jobs having the same total scores on the attributes included in the evaluation would be awarded raises).[5]

Legal and Legislative Background

Laws That Combat Sex-Based Wage Discrimination

The Equal Pay Act (EPA) is a 1963 amendment to the Fair Labor Standards Act that makes it illegal to pay different wages to employees of the opposite sex for equal work on jobs the performance of which requires "equal skill, effort, and responsibility," and which are "performed under similar working conditions."[6] The act also prohibits labor organizations and their agents from causing or attempting to cause sex-based wage discrimination by employers. Specifically permitted by the EPA, however, are wage differentials based on seniority systems, merit systems, systems that measure earnings by quality or quantity of production, or "any factor other than sex."[7] The "equal work" standard embodies a middle ground between demanding that two jobs be either exactly alike or that they merely be comparable. The test applied by the courts focuses on job similarity and whether, in light of all the circumstances, they require substantially the same skill, effort, and responsibility.[8] An employer may not attempt to equalize wages to comply with the EPA by lowering the rate of pay for any employee.[9]

A year after passage of the EPA, Congress enacted the comprehensive code of anti-discrimination rules based on race, color, national origin, religion, and sex found in Title VII of the Civil Rights Act. The EPA and Title VII provide overlapping coverage for claims of sex-based wage discrimination, but differ in important substantive, procedural, and remedial aspects. A crucial difference is that the "equal work" standard of the EPA—requiring "substantial" identity between compared male and female jobs—does not limit an employer's liability for intentional wage discrimination under Title VII. For example, in *Miranda v. B & B Cash Grocery Store, Inc.*,[10] the plaintiff's inability to demonstrate that she performed the same work as higher paid males did not

[5] See CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, for information on the potential labor market effects of relying upon job evaluation as a wage-setting mechanism to implement comparable worth.

[6] 29 U.S.C. § 206(d)(1).

[7] Id.

[8] E.g. EEOC v. Madison Community United School District, 818 F.2d 577 (7th Cir. 1987)("equal work" requires a substantial identity rather than an absolute identity).

[9] 29 U.S.C. § 206(d)(1).

[10] 975 F.2d 1518 (11th Cir. 1992).

preclude a Title VII claim based on evidence male employees who performed fewer duties were paid more than she, or that the employer would have paid her more had she been a male. Thus, a violation of the EPA will generally violate Title VII, but the converse is not true.[11]

Additionally, the remedies for violation of the two laws differ. Under the EPA, a prevailing plaintiff may obtain backpay for any wages unlawfully withheld as the result of pay inequality and twice that amount in liquidated damages for a willful violation. By contrast, the Civil Rights Act of 1991 added to the backpay remedy authorized by Title VII a provision for jury trials and compensatory and punitive damages for victims of "intentional" sex discrimination in wage cases and otherwise.[12] Such damages may only be recovered, however, in cases of intentional discrimination, not in so-called "disparate impact" cases alleging the adverse effect of a facially neutral employment practice on a protected group member. In addition, the Title VII damages remedy is limited by dollar "caps," which vary depending on the size of the employer.[13]

"Comparable Worth" Litigation and Other Judicial Developments

During the 1980s, some litigants tried to substitute job equivalency for the "equal work standard" in the EPA through so-called comparable worth Title VII cases. As previously mentioned, whole classes of jobs are undervalued according to comparable worth theory because they traditionally have been predominately held by women. Because of alleged labor market bias against female-dominated jobs, Title VII plaintiffs contended that pay discrimination claims should not be limited by the EPA standard, requiring that jobs be substantially "equal" or similar for different pay rates to be considered discriminatory. Instead, Title VII wage-based discrimination actions against employers could be predicated on job evaluation studies, they argued, which compared the value of women's jobs to those of men who perform work that is dissimilar, but of equivalent or comparable worth to the employer.

Although not a comparable worth case, *County of Washington v. Gunther* held that the EPA's equal work standard was not a restriction on Title VII relief for intentional sex-based discrimination in pay between dissimilar male and female jobs.[14] But the Supreme Court did not speak specifically to the Title VII standard of proof for wage discrimination, since in *Gunther* the county's intention was clearly demonstrated by its failure to redress underpayment of wages to female employees revealed by its own pay evaluation study. Outside of such "refusal to pay" cases, however, where no market surveys or pay evaluations were done, the courts have been reluctant to second-guess the wage rate dictated by the local labor market for dissimilar jobs. In a pair of decisions, the Ninth Circuit firmly rejected Title VII liability for a public employer's failure to pay equal wages to male and female employees allegedly performing comparable

11 29 C.F.R. § 1620.27(a).

12 42 U.S.C. § 1981A. Compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." Punitive damages may be recovered where the employer acted "with malice or with reckless indifference" to the complaining employee's federally protected rights.

13 The sum total of compensatory and punitive damages awarded may not exceed $50,000 in the case of an employer with more than 14 and fewer than 101 employees; $100,000 in the case of an employer with more than 100 and fewer than 201 employees; $200,000 in the case of an employer with more than 200 and fewer than 500 employees; and $300,000 in the case of an employer with more than 500 employees.

14 452 U.S. 161 (1981).

duties. That case, *AFSCME v. State of Washington*,[15] held that the state lawfully paid employees in predominantly male job classifications more than it paid employees in predominantly female classifications, even though a state-commissioned study concluded that the male and female classifications were "comparable." Reliance on market forces of supply and demand to set compensation for dissimilar male and female jobs was not *per se* illegal since "[n]either law nor logic deems the free market system a suspect enterprise." The state "may" have discretion to enact a comparable worth plan, the court held, but "Title VII does not obligate it to eliminate an economic inequality which it did not create."[16] Earlier, in *Spaulding v. University of Washington*,[17] the same court denied a comparable worth claim by members of the female nursing faculty of the University of Washington who alleged that they were underpaid by comparison to other faculty departments.[18]

Some more recent judicial developments in equal pay and promotional opportunities for women should also be noted. On June 21, 2004, a federal district judge in San Francisco permitted to proceed a class action on behalf of more than 1.5 million current and former female employees of Wal-Mart retail stores nationwide. In *Dukes et al. v. Wal-Mart Stores, Inc.*,[19] the plaintiffs claim that women over the past five years have been paid less than male workers in comparable positions and that the company systematically passed over female employees when awarding promotions to management. According to two studies conducted by a sociologist and a statistician for the plaintiffs, 65% of Wal-Mart's hourly employees were women, but women make up only 33% of all management positions. The gender gap was even more striking when employment categories are further broken down; while the vast majority of Wal-Mart's cashiers are women, only a small fraction are store managers, the top in-store management position. The studies also found that women employed on a full-time hourly basis earned less per year on average than their male counterparts, and the shortfall was substantial for female store managers.

At this initial stage, the district court considered only whether the evidence raised issues of law and fact common to all members of the proposed class sufficient for a class action to proceed under federal law. The court did not decide the merits of plaintiffs' discrimination claims or any issue of Wal-Mart liability. In its opinion, however, the court noted:

> Plaintiffs present largely uncontested descriptive statistics which show that women working at Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time, that women take longer to enter management positions, and that the higher one looks in the organization the lower the percentage of women.[20]

Wal-Mart argued that any disparities were the result of decentralized decision-making at the regional and local level, not the result of any systematic employer bias, and that a massive class-action would be too large to administer. The court rejected that argument, however, noting that Title VII "contains no special exception for large employers." Moreover, "[i]nsulating our

[15] 770 F. 2d 1401 (9th Cir. 1985).

[16] Id. at 1407.

[17] 740 F. 2d 686 (9th Cir. 1984).

[18] See also American Nurses Ass'n v. State of Illinois, 606 F. Supp. 1313 (N.D.Ill. 1985)(Congress never intended to incorporate a comparable worth standard in Title VII and such a concept is neither sound nor workable).

[19] 222 F.R.D. 137 (N.D.Cal. 2004).

[20] Id. at 155.

nation's largest employers from allegations that they have engaged in a pattern or practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives."[21] Thus, any "inference" of discrimination in company compensation and promotion policies was found to "affect all plaintiffs in a common manner," and warranted the requested class certification.[22]

Wal-Mart appealed the district court's class action certification, and a three-judge panel of the appellate court upheld the class action certification,[23] as did a subsequent ruling by a divided panel of appellate judges sitting en banc.[24] Wal-Mart has reportedly appealed to the Supreme Court.[25] If the case goes to trial, the female plaintiffs carry the burden of proving that the company engaged in an intentional pattern and practice of discriminating in pay and promotions. The record to date suggests that this may be no easy task, in part due to subjectivity in the company's personnel procedures and the fact that, prior to January 2003, the company apparently failed to post or document most available promotion opportunities.[26] There may be limited data on how many employees, male or female, applied for most of these positions. But if they prevail, whether at trial or by settlement, substantial monetary damages may be available to members of plaintiff class under Title VII.

More recently, the investment firm Morgan Stanley has reportedly agreed to pay $54 million to settle government claims that it systematically underpaid and failed to promote its women executives. Allegations of sexual harassment were also involved in the case. Beyond $12 million set aside to pay the lead plaintiff, a consent decree provides $40 million for any of about 340 other potential discrimination victims who are able to prove their claims, and another $2 million to establish internal anti-discrimination programs. For a period of three years, the decree required appointment of a firm ombudsman for sex discrimination issues and of an external monitor to review Morgan Stanley's adherence to the settlement and its progress at preventing discrimination.[27] Shortly after settlement in the Morgan Stanley case, both Boeing and Citigroup agreed to settle similar pay equity lawsuits, and Costco was sued for similar reasons.[28] A federal district court recently granted class-action status to the plaintiffs in the Costco lawsuit,[29] although the company is reportedly planning to appeal the decision.[30]

Meanwhile, in 2007 the Supreme Court issued a decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[31] a case in which the female plaintiff alleged that past sex discrimination had resulted in lower pay increases and that these past pay decisions continued to affect the amount of her pay

---

[21] Id. at 142.

[22] Id. at 166.

[23] Dukes v. Wal-Mart, 509 F.3d 1168 (9th Cir. 2007).

[24] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010).

[25] Steven Greenhouse, "Wal-Mart Asks Supreme Court to Hear Discrimination Suit," *New York Times*, August 26, 2010, p. B1.

[26] Dukes, 222 F.R.D. at 149.

[27] Brooke A. Masters, "Wall Street Sex-Bias Case Settled; Morgan Stanley Agrees to Pay $54 Million," *Washington Post*, July 13, 2004, at E01.

[28] Brooke A. Masters and Amy Joyce, "Costco is the Latest Class-Action Target; Lawyers' Interest Increases in Potentially Lucrative Discrimination Suits," *Washington Post*, August 18, 2004, at A01.

[29] Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (D. Cal. 2007).

[30] Abigail Goldman, "Costco Job-Bias Lawsuit Advances," *Los Angeles Times*, January 12, 2007, at C2.

[31] 550 U.S. 618 (2007).

throughout her employment, resulting in a significant pay disparity between her and her male colleagues by the end of her nearly 20-year career. Under Title VII, plaintiffs are required to file suit within 180 days "after the alleged unlawful employment practice occurred."[32] Although the plaintiff argued that each paycheck she received constituted a new violation of the statute and therefore reset the clock with regard to filing a claim, the Court rejected this argument, reasoning that "a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[33] As a result, the Court held that the plaintiff had not filed suit in a timely manner. Initially, the decision appeared to limit some pay discrimination claims based on Title VII, but did not affect an individual's ability to sue for sex discrimination that results in pay bias under the Equal Pay Act, which does not contain the 180-day filing deadline. Although the Court's decision made it more difficult for employees to sue for pay discrimination under Title VII, the decision was recently superseded by the Lilly Ledbetter Fair Pay Act of 2009 (discussed below), which amended Title VII to clarify that the time limit for suing employers for pay discrimination begins each time they issue a paycheck.[34]

Recent Legislation

The issue of pay equity has garnered considerable congressional attention in recent years. A number of measures were introduced in each of the last several congressional sessions, and several similar bills have been introduced in the 111th Congress, including the Paycheck Fairness Act (H.R. 12/S. 182/S. 3772) and the Fair Pay Act (H.R. 2151/S. 904), both of which are discussed below. In addition, on January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 (H.R. 11/S. 181). This legislation supersedes the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* by amending Title VII to clarify that the time limit for suing employers for pay discrimination begins each time they issue a paycheck and is not limited to the original discriminatory action. This change is applicable not only to Title VII of the Civil Rights Act, but also to the Age Discrimination in Employment Act (ADEA), the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA). For more information on the Ledbetter decision and subsequent legislation, see CRS Report RS22686, *Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court's Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by Jody Feder.

Paycheck Fairness Act

Introduced in each of the last several congressional sessions, the Paycheck Fairness Act (H.R. 12/S. 182/S. 3772 in the 111th Congress) would increase penalties for employers who pay different wages to men and women for "equal work," and would add programs for training, research, technical assistance, and pay equity employer recognition awards. The bill would also make it more difficult for employers to avoid EPA liability, and proposed safeguards would protect employees from retaliation for making inquiries or disclosures concerning employee wages and for filing a charge or participating in any manner in EPA proceedings. In short, while this bill adheres to current equal work standards of the EPA, it would reform the procedures and

32 42 U.S.C. § 2000e-2(a)(1).

33 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

34 P.L. 111-2.

remedies for enforcing the law. In the 111th Congress, the House of Representatives passed both the Ledbetter legislation and the Paycheck Fairness Act as a combined package on January 9, 2009. Although the Senate did not combine the two bills when it passed the Ledbetter legislation, the Senate indicated that it would take up the Paycheck Fairness Act later in the congressional session. Recently, Senator Reid reintroduced the Paycheck Fairness Act as S. 3772, and the bill has been placed on the Senate calendar.

Under the EPA, as noted, prevailing plaintiffs may recover backpay in an amount equal to the total difference between wages actually received and those to which they are lawfully entitled and an additional amount equal to the backpay award as liquidated damages.[35] Compensatory damages are not authorized, and consequently, awards do not include sums for physical or mental distress, medical expenses, or other costs.[36] As introduced in the 111th Congress and passed by the House, the Paycheck Fairness Act would authorize EPA class actions and "such compensatory and punitive damages as may be appropriate." In addition, the bill would establish more restrictive standards for proof by employers of an affirmative defense to EPA liability based on any "bona fide factor other than sex." Thus, for a pay factor to be "bona fide," the employer would have to establish that it was "job related," consistent with "business necessity," and not derived from a sex-based differential in compensation, and that the employer's purpose could not be accomplished by less discriminatory alternative means.

Another aspect of EPA enforcement addressed by proposed pay equity bills concerns employer recordkeeping and the conduct of technical assistance, research, and educational programs by federal agencies. For example, the Paycheck Fairness Act would mandate record-keeping and data collection for better enforcement of the law. The measure would direct the Equal Employment Opportunity Commission (EEOC) to survey data currently available to the government and, in consultation with sister agencies, to identify additional sources of pay information that may be marshaled to support federal anti-discrimination efforts. The EEOC would be required to issue regulations for the collection of pay data from employers based on sex, race, and ethnicity, taking into consideration the burden placed on employers and the need to protect the confidentiality of required reports. In addition, the Secretary of Labor would be directed to develop job evaluation guidelines based on objective factors of education, skill, independence, and decision-making responsibility for *voluntary* use by employers in eliminating unfair pay disparities between traditionally male- and female-dominated occupations. Technical assistance and a recognition program would be awarded to employers who voluntarily adjust their wage scales pursuant to such a job evaluation. Finally, a "National Award for Pay Equity in the Workplace" would be established to recognize employers who demonstrate "substantial effort to eliminate pay disparities between men and women." As introduced in the 111th Congress and passed by the House, H.R. 12 does not include a requirement—contained in previous versions of the legislation—that the Secretary of Labor develop guidelines that would help employers craft job evaluations enabling them to compare different jobs with the objective of eliminating "unfair pay disparities" between traditionally male- and female-dominated occupations. Thus, the employer award would not be based on an employer's adjustment of the establishment's wage scales pursuant to the aforementioned job evaluation guidelines.

---

[35] 29 U.S.C. §§ 216-17.

[36] E.g. Hybki v. Alexander & Alexander, Inc., 536 F. Supp. 483 (W.D.Mo. 1982) (emphasizing damages for pain and suffering are not available under the EPA).

Fair Pay Act

The Fair Pay Act (H.R. 2151/S. 904 in the 111th Congress), which has predecessors dating back to the 103rd Congress, would go further than the Paycheck Fairness Act by proposing a fundamental expansion to the scope of the EPA, which is presently confined to sex-based wage differentials, by adding racial and ethnic minorities as protected classes under that law. Intentional wage discrimination against these groups is already prohibited by Title VII. But Title VII and the EPA have different standards of proof, and because proof of intent to discriminate is not required by the "equal pay for equal work" standard of the EPA,[37] it may provide greater protection to minority groups than Title VII in many cases. The EPA's catchall exception, affording employers broad immunity for pay differentials attributable to "factors other than sex," would be significantly narrowed by the Fair Pay Act. A compensatory and punitive damages remedy, without statutory limit, would replace the present EPA backpay and liquidated damages scheme, based on the Fair Labor Standards Act.

Significantly, the Fair Pay Act would also redefine the basic statutory standard of the EPA by requiring employers to pay equal wages regardless of sex, race, or national origin to workers in "equivalent jobs." Unlike the current law, Equal Pay Act claims based on wage disparities between dissimilar jobs—for example, a janitor and a clerk—would be permitted if they are determined to be "equivalent" in some largely undefined manner. By substituting job equivalency for the "equal work standard" in the EPA, the Fair Pay Act arguably could revive legal issues similar to those confronted by the federal courts during the 1980s in so-called "comparable worth" Title VII cases.

Finally, the Fair Pay Act would require all covered employers to maintain comprehensive records of "the method, system, calculations, and other bases used" to set employee wages and to file annual reports with the EEOC detailing the racial, ethnic, and gender composition of the employer's workforce broken down by job classification and wage or salary level. Such reports would be available for "reasonable" inspection and examination upon request of any person, pursuant to EEOC regulations, and could be used by the Commission for such "statistical and research purposes ... as it may deem appropriate." The EEOC would also be required to "carry on a continuing program of research, education, and technical assistance" to implement the proposed ban on racial, ethnic, or gender discrimination between employees working "in equivalent jobs."

Author Contact Information

Jody Feder
Legislative Attorney
jfeder@crs.loc.gov, 7-8088

Linda Levine
Specialist in Labor Economics
llevine@crs.loc.gov, 7-7756

[37] See Fallon v. State of Illinois, 882 F.2d 1206 (7th Cir. 1989).