Why the Equal Pay Act and Laws Which Prohibit Salary Inquiries of Job Applicants Can Not Adequately Address Gender-Based Pay Inequity

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Abstract
Despite passage of the Equal Pay Act (EPA) more than a half-century ago, surveys consistently show that women still earn significantly less than men. One factor to which this has been attributed is the use of current salary as a basis for a new job offer. Such a practice, it has been argued, perpetuates the kinds of salary differentials the EPA attempted to eradicate. As a result, many municipalities have passed laws which prohibit inquiries as to an applicant’s current salary. This article explores the nature of such laws and their limitations and offers alternative strategies to close the pay gap between genders.

Keywords
salary, inequity, gender, discrimination

The Equal Pay Act of 1963 (EPA) prohibits wage discrimination based on sex or gender for jobs that require equal skill, effort, and responsibility, and are performed under similar working conditions. Specifically, it mandates that

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . (Equal Pay Act of 1963, 29 U.S.C. § 206(d), Pub. L. 88-38)

Current Status of Equal Pay
At the time of passage of the EPA, women earned 59% of what men earned. More than a half-century later, women earn 80% of what men earn, Black and Latina women earn 60% and 55%, respectively, of what White males earn, Black women earn 87.5% of what Black men do, and Hispanic women earn 84% of what Hispanic men do (Sheth, Gail, & Gould, 2018). Although some progress has been made, clearly the purpose of the EPA in putting “an end to historical wage discrimination against women” has not been realized.

Gender Segregation Within Occupations and Industries
One of the reasons for this discrepancy is gender segregation which exists in our economy as well as within various occupations (Elbers, 2018; Sutherland, 2019). Half of the gender wage gap has been attributed to women working in different occupations and industries than men (Blau & Kahn, 2016). Although women currently hold 47% of jobs in the United States, they are under- and overrepresented in a variety of occupations. Consider that women account for 26.9% of chief executives, 19.3% of software developers, 10.3% of computer network architects, 15.9% of architects and engineers, 5.1% of firefighters, 15.4% of police and sheriff’s patrol officers, and 3.4% of construction employees (U.S. Department of Labor, 2019). At the same time, women account for 77.9% of human resource managers, 66.9% of education administrators, 81.6% of social workers, 97.6% of preschool and kindergarten teachers, 87.5% of special education teachers, 94% of child care workers, 71.5% of laundry

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and dry cleaning workers, 76.9% of personal care employees, 96% of speech-language pathologists, 73.8% of cashiers, 85.5% of travel agents, and 71.6% of office and administrative support staff, including 90.5% of receptionists and 94% of secretaries and administrative assistants (U.S. Department of Labor, 2019).

Gender segregation also exists within industries as women account for 37.4% lawyers but 86.4% paralegals and legal assistants, 35.7% of dentists but 97.1% of dental hygienists and 96% of dental assistants, 40.3% of physicians but 88.6% of registered nurses and 90.6% of medical assistants, and 9% of airline pilots but 74.9% of flight attendants (U.S. Department of Labor, 2019). Within job classifications, gender-based pay differentials persist in five of the highest paying occupations for women, including including healthcare workers (48% pay gap), teachers (24% pay gap), and nurses (24% pay gap) (Washington Center for Equitable Growth, 2017).

Occupational segregation based on gender is rooted in assumptions about the kinds of work for which each gender is best suited. Occupations which predominantly employ men pay better, regardless of skill or education level. In addition, those women who do find employment in male-dominated industries frequently interrupt their careers for family and child-rearing responsibilities (Cha, 2013). The presence of greater numbers of men in higher paying occupations is due, in part, to workplace cultures which expect, if not demand, long hours and facetime in the office, which does not accommodate flexibility requested by primary caregivers of family members who are disproportionately women. Men are more likely to move into executive-level positions than women due to the fact that women are 5 times more likely than men to take extended leaves from work of a year or longer for child rearing and other family caregiver responsibilities. Employees who take breaks for 12 months or longer have been found to experience 7.3% lower pay over their careers (Miller, 2019). More so, it has been found that as the percentage of women working in a given occupation increases, salaries in that occupation will decline, even when controlling for education and skills (Washington Center for Equitable Growth, 2017).

The gender pay gap also widens as employees ascend into the executive ranks (PayScale, 2018). Women who hold MBA degrees have been found to earn 74% of what men who hold an MBA earn as despite being equally credentialed, women with MBAs end up with different job titles, and economists (24% pay gap) (Watkins, 2018).

Exclusions From the EPA

A second reason for the limited efficacy of the EPA rests with the fact that there are four exclusions from its provisions. The exclusions provide for conditions or circumstances where an employer could justify pay differentials for employees who essentially hold the same positions and have the same responsibilities. These exclusions are noted in the statute as follows:

... except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. (Equal Pay Act of 1963, 29 U.S.C. § 206(d), Pub. L. 88-38)

Courts and legislators embrace the concept of seniority due to its objectivity. However, relative to closing the gender gap in pay, seniority-based pay systems, in and of themselves, perpetuate existing salary inequalities in male-dominated industries. Given that a good deal of gender segregation still exists in our economy and workplaces, as noted above, this seniority exception can wield a significant impact on maintaining the status quo relative to gender-based salary differentials. Merit-based pay systems, as well as those systems which determine compensation based on “quality” of production, are intertwined with organizational performance management systems, which have been found to suffer from high levels of subjectivity or bias (Choong & Embi, 2012; Demere, Sedatole, & Woods, 2018). It has been noted that although overt gender discrimination has become less frequent, covert and subconscious workplace gender biases persist and are increasing (Dworkin, Schipani, Milliken, & Kneeland, 2018). As a result, subjective assessments of “merit” or “quality of performance” can perpetuate and extend existing salary structures which are biased against women or other groups.

Is Salary History a Factor Other Than Sex?

The final exclusion, “factor other than sex,” has been cited as the most controversial affirmative defense an employer has in its arsenal to justify gender-based wage disparities and, combined with overly broad interpretations of the business necessity defense, found to undermine the ability of the EPA in eradicating gender-based pay discrimination (Palk &
Grunnsted, 2018). The “factor other than sex” exclusion is used so commonly to justify gender-based pay differentials that it has been referred to as both a “catchall defense” and “Any Reason Under the Sun” defense. In fact, “factor other than sex” has been used by employers as a defense in EPA claims more than the other three exceptions combined (Watkins, 2018).

There has been a recent trend of job applicants challenging an employer’s use of the job applicant’s current salary or salary history as a basis for gender-based salary differentials. Employers have argued that salary history is a neutral “factor other than sex” and, hence, a perfectly acceptable means of determining an appropriate salary for a new hire. However, job applicants have argued that because women continue to earn less than men for equal work, relying on current salary as a basis for an offer of new employment simply and unlawfully perpetuates these differentials.

In April 2018, the Ninth Circuit Court of Appeals addressed this issue in Rizo v. Yovino. Rizo was a new hire at the Fresno (CA) County Office of Education which had a policy of paying new hires 5% more than the new hire’s current salary. When Rizo, who relocated from Arizona, learned that that her male coworkers earned more than she did, she sued under the EPA. Her employer argued that its policy was not gender-discriminatory, based on an objective factor, and was applied equally to all new hires, regardless of gender. The court, however, found that “factors other than sex” is limited to legitimate job-related factors such as experience, education, prior work performance, and skills, and that past compensation isn’t a permissible consideration under the EPA. Specifically, it noted

Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.

It further noted “prior salary alone or in combination with other factors cannot justify a wage differential” and that relying on prior pay was inconsistent with the EPA’s express purpose, “to put an end to historical wage discrimination against women.” The case was appealed to the Supreme Court, which vacated the decision due solely to a procedural issue whereby the circuit court counted the opinion of a judge who wrote the ruling yet died prior to issuance of appeals court’s final decision. Currently, the case is back with the Ninth Circuit but is likely to be appealed again to the Supreme Court regardless of the Ninth Circuit disposition.

Eventual Supreme Court review of Rizo is likely given the fact that other six circuits have ruled on this issue and come to three different conclusions which differ from both each other as well as the Ninth Circuit interpretation. Two of these circuits have reached the conclusion that prior salary is indeed a “factor other than sex” and can lawfully serve as the basis for a salary offer; two have ruled that employers may rely on salary history if such reliance is based on a “legitimate business reason”; two others have ruled that salary history can be used to determine salary as long as it is done so in tandem with an additional sex-neutral factor, as will be explained below.

The Seventh and Eighth Circuits both allow employers to use prior salary, finding that it is indeed a “factor other than sex.” The Seventh Circuit, in Wernsing v. Ill Dept of Human Services, ruled “because wages at one’s prior employer are a ‘factor other than sex,’ an employer may use them to set pay consistently with the Act,” and an “employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age or religion.” The Eighth Circuit, in Taylor v. White, found “On its face, the Equal Pay Act does not suggest any limitation to the broad catch-all ‘factor other than sex’ affirmative defense” and “policies which may perpetuate pre-existing salary disparities by basing employees’ current salary on prior salaries for other positions are not necessarily gender biased.” However, both the Seventh and Eighth Circuits note that employers cannot use prior pay as a means of deflectioning attention from their own illegal employment practices if prior pay is simply a pretext for hiding the employer’s gender-based wage discrimination. Hence, both circuits interpreted the term “factor other than sex” very broadly.

In comparison, the Second and Sixth Circuits both ruled that legitimate business reasons proffered by employers can justify the use of salary history in setting wages. In Aldrich v. Randolph Cent. School Dist., the Second Circuit ruled that prior pay can be utilized if it “is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular position at issue.” The Sixth Circuit, in Beck-Wilson v. Principi, found that any other factor other than sex “does not include literally any other factor, but a factor that, as a minimum, was adopted for a legitimate business reason.”

The Tenth and Eleventh Circuits have both ruled that the use of salary history is justified only when used in tandem with another factor. In Rise v. QEP Energy, the Tenth Circuit found “the EPA precludes an employers from relying solely upon a prior salary to justify pay disparity” whereas the Eleventh Circuit, in Irby v. Bittick, ruled “While an employer may not rest on prior pay alone . . ., there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience.” This split, in which seven different circuits have reached four different conclusions on the same question, should be resolved soon but it is unlikely the resolution of the issue in either direction will be sufficient to close the gender-based pay gap.

Are Prohibitions on Salary Inquiries the Answer?

The displeasure of state and municipal legislatures with the outcomes of gender-based wage disparity cases heard by the
courts has motivated them to enact laws which prohibit employer inquiries as to job applicants’ current salary. These non-inquiry laws address the most controversial components of the courts’ analysis, namely, the interpretation of “factors other than sex” to be inclusive of salary history in attempting to ensure that substandard pay does not follow an employee from one employer to another and perpetuate wage discrimination based on gender as well as any other factor which is not job-related. Lawmakers who have supported such laws have cited the belief that the EPA has completely failed to accomplish what it set out to do (Nichols, 2018).

Not surprisingly, these laws have been met with some skepticism, at best, and resistance, at worse, on the part of employers and employer groups, given the relationship between salary history and the legal concept of personal privacy. In Japan, one of the most commonly asked questions in a job interview is “how much do you earn?” This is not surprising as Japanese law has essentially no individual privacy rights. Germany, on the contrary, has a very well-developed right to personal privacy and its Federal Labor Court has held that inquiries into a job applicant’s salary could only be justified if directly relevant to the employee’s job qualifications and could not be asked to establish a baseline for wage negotiation. In comparison with Germany, whose laws require that employers assume the burden of asking the question, the United States subscribes a doctrine of concern for managerial liberty whereby the government bears the burden of proving that restrictions on such inquiries are necessary and/or beneficial (Finkin, 2018). Lawmakers in the United States are attempting to side-step the personal privacy issue and shift the burden of proof to employers for justifying their interest in an applicant’s salary history.

**Legislative Activity**

**State level.** Massachusetts was the first state to address employer salary inquiries of job applicants when its legislature passed the Massachusetts Equal Pay Act (MEPA) in August of 2016, to go into effect July 2018. Under MEPA, employers may not inquire as to the current salary or wage history of any prospective employee from the prospective employee himself or herself. The statute provides two very limited situations in which an employer may seek this information: (a) to confirm wage or salary history information voluntarily shared by the prospective employee or (b) after an offer of employment with compensation has been made to the prospective employee. In addition, MEPA’s prohibition on employers seeking the salary or wage history of prospective employees extends to any efforts of the employer’s agents, such as a contract recruiter, executive search consultant, or job placement service. It is uncertain as to the possible utility of the latter exception as such inquiries are post-mortem to the formal job offer and the statute does not allow any action to be taken as a result of any information discovered by such inquiry.

Delaware (House Bill 1, 2005) and Oregon (Oregon Equal Pay Act of 2017) each enacted laws during 2017 comparable with that of Massachusetts. In both states, employers cannot inquire as to current salary or salary history of a job applicant prior to hiring and may inquire only after an offer is made for the sole purpose of confirming previous salary. The Oregon statute contains an exclusion for current employees moving to a new position with the same employer whereby the employee’s salary is obviously already known by the employer.

New Jersey (Executive Order 1), New York (Executive Order No. 161), and Pennsylvania (Executive Order 2018-18-03) each prohibit state agencies from inquiring or investigating prior salary history of applicants but coverage is not extended to private employers. In New York, however, Albany (Local Law No. P for 2016), Suffolk (Resolution No. 1856-2018), and Westchester (Resolution No. 28-2018) counties each have parallel statutes which prohibit inquiries of applicant salary histories for all employers. The Suffolk County statute further prohibits searches of publicly available records which might contain salary information of job applicants.

California (Assembly Bill 168) and Vermont (Bill H.294) statutes went into effect in 2018 and each restricts an employer’s use of salary history in setting salaries, prohibits employers from requesting salary history, and allows for voluntary disclosure of salary by applicants. California provides an exception for confirmation of salaries which are public under state and federal freedom of information laws.

Connecticut (Public Act No. 18-8) and Hawaii (S.B. No. 2351) statutes both went into effect on January 1, 2019. Each permits voluntary disclosure but the Hawaii statute expressly provides that employers CAN use information volunteered by applicants in making offers as well as verify such information. Hawaii does prohibit employers, however, from searching publicly available records or reports to determine an applicant’s current salary or salary history.

**City level.** A number of cities have passed ordinances which prohibit employer inquiry as to a job applicant’s salary or salary history. New York’s statute (Law No. 2017/067) parallels most of the state statutes in that it prohibits all employers from inquiring as to salary history of job applicants, allows them to ask about salary after the individual has been hired, and allows job applicants to volunteer salary information at their own discretion. San Francisco’s ordinance (Ordinance No. 142-17) goes one step further as in addition to permitting voluntary disclosure by applicants, it provides for required written authorization by applicants for prospective employers to seek salary information, and further bars employer disclosure of current or former employee’s salary without the employee’s consent.

Pittsburgh (Pittsburgh Code of Ordinances, Chapter 181.13), Chicago (Executive Order No. 2018-1), Louisville (Ordinance No. 066), Kansas City (Resolution No. 180519),
and New Orleans (Executive Order MJL 17-01) each have ordinances which ban salary inquiries by city departments. New Orleans also includes all city contractors under its provisions.

The most publicized of the city ordinances was the first one which was passed and subsequently immediately challenged in court. In January 2017, the Philadelphia Commission on Human Relations passed Regulation No. 7—Wage Equity Ordinance, which prohibits salary inquiries of prospective employees. Schedules to take effect in May 2017, the US Chamber of Commerce for Greater Philadelphia challenged it in court. On April 30, 2018, a judge ruled that any prohibition of employers from inquiring about applicant salary or salary history violated the Constitutional right to free speech granted by the First Amendment but, at the same time, ruled that employers could still not rely on any such salary or salary history in making job offers unless the applicant willingly disclosed her or his salary or salary history. To wit, the Ordinance has two separate parts; the first is prohibition of employer inquiries as to a prospective employee’s wage history (known as the “inquiry provision”) while the second is making use of wage history at any stage in the employment process to determine salary for a new employee (known as the “reliance provision”). The court found that the inquiry provision violated the free speech clause of the First Amendment but that such free speech concerns were not implicated by the reliance provision and hence upheld that second portion of the Ordinance. The Court did commend the city for pursuing a "novel method of attempting to reduce the wage gap" in issuing its decision.

The net result of this decision is that Philadelphia employers currently may inquiry about salary history but not use that information in preparing job offers. However, the upholding of the reliance provision is essentially useless because if employers can inquiry about salary history, it will be exceedingly difficult, if not impossible, for a job applicant to prove that the employer actually relied on that information in preparing job offers. At the time of this writing, both the City and the Chamber have filed appeals to the Third Circuit Court of Appeals. The outcome of this case will set significant precedent for challenges of other municipal and state statutes or, conversely, encourage other state and municipalities to enact such laws if upheld.

Continued challenges by employers or employer groups may, however, not be necessary. In 2017, legislatures in both Illinois and New Jersey passed bills which would prohibit employer inquiries as to job applicants’ salary history but both were vetoed by the respective state governors. In 2018, both Michigan (Local Government Labor Regulatory Limitation Act of 2015) and Wisconsin (Assembly Bill 748) passed laws which prohibit bans on inquiries of current salary or salary history by local governments. These laws are based on the long-standing employer arguments of the importance of addressing salary expectations at the very beginning of the recruiting and hiring process. Employers profess that inquiries as to current salary and salary history are valuable screening devices which aid in avoiding wasted time on the parts of both applicants and employers. Other employer arguments against salary inquiry bans is that a given employer may use information on current salary to provide applicants with a salary increase while reducing their operating expenses by hiring a new employee at a salary lower than her or his predecessor and/or beneath the budgeted salary for the position (Milligan, 2018). This can be important for line managers who ultimately make hiring decisions and do so within the confines of a zero-sum budget. Such aggregated savings can be used to reward and retain high performing employees as well as to create new positions and expand employment opportunities for others.

**Are Salary Inquiry Bans Working Thus Far?**

Regardless of whether there is any relevant state or municipal statute restricting salary inquiries, employers are moving away from seeking salary information from job applicants. A 2018 survey found that 37% of employers already prohibit inquiries into salary history, regardless of whether any relevant state or municipal law exists regarding such; 35% prohibit such inquiries only where there are laws in effect which prohibit them; and 27% do not prohibit inquiries about salary or salary history. However, 40% of those employers who have no ban intend to implement one within the coming year. Such policies have been implemented generally without incident as 44% of employers who have implemented a ban on salary inquiry found it “very easy” to do so (Maurer, 2018).

One study has found that policies which limit employer access to wage history benefit those with relatively lower wages as employers without information on wage history arranged more face-to-face interviews and asked more questions during interviews than those employers who had wage information (Barach & Horton, 2017). These outcomes allow job applicants a greater opportunity to present their potential value and contributions to employers. This same study found, however, that low current salaries can deter employers from making job offers, presumably as employers sense that applicants have less value or skills. When evaluating salary requirements or requests of job applicants, 84% of employers of all sizes across industries report using salary history either a “great deal” or “moderate amount” in evaluating such salary expectations (World at Work, 2018).

Salary inquiry refusals have produced actual results which are opposite of those intended. A 2017 survey found that women who were asked about and refused to disclose their salary histories were offered 1.8% less than women who did disclose. Salary negotiation behaviors have similarly been attributed to lower salary outcomes for Black job applicants than White job applicants. Minority job applicants are generally expected to negotiate less than their majority counterparts and those that do negotiate experience lower salary
outcomes than those members of their group who don’t as well as their majority counterparts who choose to negotiate (Hernandez, Avery, Volpone, & Kaiser, 2019). At the same time, men who refused to disclose received offers which were 1.2% higher than men who did disclose (Frank, 2017).

These results suggest that gender bias very much affects salary nondisclosures. Employers react negatively when women refuse to disclose their salary and then negotiate for higher pay and may also assume, accurately or inaccurately, that women who refuse to disclose were earning substandard wages and prepare their salary offer accordingly. Men are rewarded for being negotiators whereas women who displayed the same behavior were seen as overly aggressive. More so, women who negotiate salary offers are not only less unsuccessful in these pursuits but also face social ostracizing for doing so (Bowles, 2014). It is also probably true that higher salaried males may choose to disclose their salaries more readily than lower salaried females as a negotiation tactic. Although salary inquiry bans are still relatively new and further research is needed on the effects of voluntary disclosure versus nondisclosure, initial research is showing that the outcomes of salary inquiry bans may be the opposite of that intended by the proponents of the bans. Although salary inquiries are neutral on their face, they have been shown to disproportionately affect women by perpetuating a system of wage disparities based on gender (Watkins, 2018). Indeed, one recent survey of Chief Human Resource Officers by the Hay Group found that two thirds of this group felt that restricting inquiries into salary history would do little to nothing to improve wage inequity (Milligan, 2018).

Although a well-intended means of attempting to address gender-based pay inequity, salary inquiry bans clearly have some additional limitations in their ability to fulfill expectations. First, salaries of a significant number of public sector employees are disclosed under applicable state freedom of information or transparency laws. Even though some salary inquiry ban statutes prohibit employers from researching public sector employer salaries, this information is readily available and inquiries as to such untraceable. It is impossible to either monitor employer covert access to relevant salary databases or prove that employers have used such publicly disclosed information they may obtain in making job offers. Second, employees who seek to stay with the same employer and be promoted from within will usually have their new salary at least partially determined by their current salary as 89% of employers rely on current salary and salary history when making an offer to an internal candidate (Maurer, 2018). Hence, employers who have compensation structures which either intentionally or unintentionally discriminate based on gender will have such practices continue unless current salary is mitigated from consideration when hiring internally. Finally, all state and municipal laws which prohibit employer salary inquiries still allow for voluntary disclosure of current salary by job applicants. It is likely that individuals who earn higher salaries will more readily disclose such than individuals who earn lower salaries. Even though some statutes prohibit such disclosures from being considered when determining the compensation to be included as part of a job offer, the burden of proof that such violations have taken place falls on the job applicant who may have a difficult time proving that the information was, indeed, considered and overrode consideration of other job-related factors.

**Recommendations**

It seems quite ironic as well as problematic that more than a half-century after passing a law which expressly prohibits gender-based pay inequity, the United States finds itself ranked 28th in the world relative to gender pay equity (Knauer, 2017). Clearly the EPA has not lived up to Congressional intent and efforts to bolster gender-based equity in pay have proven insufficient. Even though the Equal Employment Opportunity Commission has expressly advised employers not to rely on prior salary when making a salary offer to a new hire (U.S. Equal Employment Opportunity Commission, 2019), further intervention is needed. The only true way to eradicate gender-based discrimination in pay will involve collective actions of Congress, the courts, policymakers, and employers.

**Congress—Amend the EPA**

Fifty-six years of experience has shown that “any other factor other than sex” gives employers carte blanche to discrimination on wages related to gender and then simply and creatively offer up a justification post-mortem. With more than a half-century of experience to explore the meaning of “any other factor other than sex,” Congress needs to address court interpretations regarding permissible exceptions under this clause. This is especially salient when considering that seven different circuits have issued four different interpretations as to whether salary history is a permissible factor. At the very least, the meaning of “any other factor other than sex” should be more clearly defined with precise language and specific examples based on the dual objective of ensuring both equal pay and employer freedom to run their businesses as they see fit. Preferably, though, this clause should be removed in its entirety as history has shown that it provides little utility other than an employer “safe harbor.”

It should be noted that since 1977, there have been repeated attempts to amend the EPA and such an attempt is currently before Congress. The proposed Paycheck Fairness Act (PFA) would amend the EPA by (a) prohibiting employers from asking job applicants about their current salary or salary history, (b) outlawing the use of salary history in determining salary offers, and (c) shifting the burden of proof to employers to prove that gender-based wage disparities are job-related. Similar to most of the state laws currently in place, the Act would allow job applicants to
voluntarily disclose salary history after an employment offer is extended to support negotiations for an increased wage. However, as written, the PFA would still allow employers to justify pay disparities are being “job-based” or “consistent with business necessity.” The Act also proposes to replace “any other factor other than sex” with “bona fide factor other than sex, such as education, training, or experience.” Although such restriction of the final exclusion clause of the EPA is still an improvement, the “bona fide” language still provides employers with some unnecessary latitude.

Courts—More Closely Scrutinize “Any Other Factor Other Than Sex”

As is the case with most claims brought by employees and job applicants against employers, the initial burden of proof, which can be substantial, especially for an external applicant, is on the employee or applicant. The inherent unfairness of this has been noted in tandem with the argument that a presumption of discrimination should be the standard in disparate treatment analysis in cases which involve gender discrimination whereby the burden of proof of legal compliance shifts to the employer (Dworkin et al., 2018). In addition to this shifting burden of proof, courts need to vigorously examine the facts of cases with gender-based wage disparities and consider statistical correlations between seemingly “objective” factors, such as salary history and gender. Absent an affirmative Supreme Court ruling that salary history is not an acceptable basis for gender-based wage disparities, circuit courts can expressly disavow prior salary history as a “factor other than sex,” which will greatly increase the opportunity to close the wage gap between men and women and force employers to determine salary based on job responsibilities and associated necessary qualifications, experiences, and skills of job applicants.

Policymakers—Enforce Wage Transparency and Employee Communication Rights

Policymakers and state legislatures can take it upon themselves to enact measures which address gender-based pay inequity. The federal government can require full wage transparency for all federal contractors and recipients of federal funds, much like these employers are required to provide affirmative action. Such transparency has already been shown to reduce the gender-based wage gap among federal government agencies for which such a policy is required (Canales, 2018). Although such a policy would exclude the overwhelming majority of US employers, it would not only be a step in the right direction but also allow unaffected employers to see the benefits associated with wage transparency.

As will be discussed below, the National Labor Relations Act (NLRA) provides employees under its purview the right to share and discuss salary information; however, the NLRA exempts most administrative and professionally classified employees from its provisions. States legislatures can extend this NLRA-given right to share and discuss salary information to all exempt/professional/executive-level employees who are not covered under the NLRA. As of this writing, California, Connecticut, Delaware, Maryland, Massachusetts, New York, and Oregon prohibit employers from restricting discussions or inquiries by any employees concerning pay and prohibit retaliation against such activity (Connell & Mantoan, 2018). Such laws can greatly aid in promoting gender-based pay equity as well as facilitate trust between employers and employees.

Employers—Wage Transparency and NLRA Compliance

Employers have the greatest responsibility in addressing gender-based pay inequities simply because they are the ones who created the disparities in the first place. Employers can and should enact appropriate policies and practices as outlined below on their own initiative without government mandates or intervention. However, in the absence of such initiative, appropriate legislative activity, consistent with the goals of the EPA, should be undertaken as noted above.

Under the assumption that employers should not use current salary as the basis for a job offer and although the relevant laws pertaining to inquiries of such do not prohibit voluntary disclosure of salary under the First Amendment, employers can formally request that applicants not disclose their current salary during the screening and hiring process to reduce systemic gender bias in compensation. Although employees and job applicants may still exercise their First Amendment right to free speech, as noted by the Third Circuit in Philadelphia, employers can discourage such sharing. Although pay inquiries in the United States are not necessarily a violation of individual privacy rights, a majority of adult workers believe that job applicants should not be asked about their pay history (Glassdoor, 2017).

Employers can also be completely transparent regarding employee salaries and make such information available to all employees. In 2016, Natasha Lamb, Managing Director at Arjuna Capital, filed shareholder resolutions at nine technology companies (Adobe, Amazon, Apple, eBay, Expedia, Facebook, Google, Intel, and Microsoft) calling for transparency in wages to ensure gender-based equity. Seven of the nine companies, the exceptions being Google and Facebook, eventually disclosed such data (Covert, 2017). After this call for accountability, Amazon and Microsoft reported paying females 99.9 and 99.8 cents on the dollar, respectively, relative to males in comparable roles (Nickelsburg, 2016). Salary transparency has a positive effect on employee motivation due to the perceptions that pay secrecy reinforces perceptions of discrimination. Pay secrecy policies reinforce not
only perceived gender biases but also racial biases (Wong, 2019). Transparency in pay practices affords the only way to truly eradicate unlawful gender-based pay inequity. Transparency should be easy for employers to implement if they have established narrow pay ranges and starting salaries for jobs prior to beginning recruiting efforts. If employers determine the value of positions, rather than individuals, pay transparency policies will be easy to implement as they’ll be reinforced by a sound compensation classification methodology. Such a practice should be easily defended in the event of a lawsuit, however, transparency policies should greatly reduce, if not completely eliminate, such complaints.

Non-exempt employees have the right, under the NLRA, to discuss all terms and conditions of employment with each other. This includes the sharing of salary information as well as the filing of complaints regarding unlawful employer restrictions on such activity. Despite the fact that the National Labor Relations Board has repeatedly articulated its position that employees must be permitted the right to share and discuss individual compensation as well as employer compensation practices and policies, employers still enact policies which discourage, restrict, or outright prohibit such activity (Connell & Mantoan, 2018). Bans on employee disclosure of their salaries among colleagues have been effective in preventing workers from demanding both higher pay and pay equity. More than 60% of private sector employees report that their employers have policies prohibit workers from discussing their salaries with their coworkers, in spite of the fact that such policies run counter to the NLRA. With few penalties for such violation of the NLRA, employers have little incentive to follow the law (Ansel & Boushey, 2017). Employers who are covered under the NLRA should be required to communicate this right to employees and/or post this right in a conspicuous place, much as they are required to post information pertaining to terms of the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), and Family and Medical Leave Act (FMLA), among others. At the same time, penalties for violation of this right, as well as any other provision of the NLRA, should result in more severe consequences for employers.

A lack of salary transparency and/or an outward prohibition on salary discussion and disclosures by employees almost always masks employer-known salary discrepancies, keeping the victims of such discrepancies without the knowledge and information they need to ensure their rights under both the NLRA and EPA. The costs to employers of both pay transparency and non-restriction of employee rights to discuss pay are negligible yet have many benefits. In addition to allowing employers to proactively address unlawful compensation practices, pay transparency and allowing employees to exercise their NLRA-given rights to share and discuss compensation levels can result in increased employee motivation and commitment through the senses of trust and equity they provide. In addition, transparency affords employers the opportunity to address any such inequity complaints internally, avoiding potentially costly and time-consuming litigation and associated unfavorable press.

**Conclusion**

The status of equal pay in the United States can be summed up as 59 years (and counting) with only 21 cents to show. There is no reason for gender-based pay inequity to continue but the EPA cannot, as written, fulfill its ideals for a variety of reasons. Occupational and industry-specific gender segregation persists. The EPA allows for exclusions and its ambiguous terms, especially “any other factor other than sex” have been interpreted differently by the courts. Bans on salary history inquiries, although well-intended, are not delivering the expected results. Lack of salary transparency combined with employer policies which prohibit discussions of salary by employees create a non-level playing field for salary discussions between employees and employers. This latter phenomena has been cited in describing gender-based pay discrimination as a “market failure caused by insufficient and asymmetric information about the value of work” (Eisenberg, 2011), related to the fact that employees, particularly at lower levels of the organization, often have far less information about labor market conditions and rates than employers do. Hence, complete pay transparency on the part of employers is necessary to create an efficient labor market (Eisenberg, 2011).

The time to act is now. Employers can and should take the lead in eradicating the gender-based pay inequities they themselves have created. Compensation for positions should be determined prior to recruiting, based on the value of a given job to the organization. This is particularly helpful for new entrants to the labor market as salary history inquiry bans only affect those job applicants who have a salary history. Applicants who are seeking their first jobs would not have protection from and could be subject to gender-based salary inequities unless employers establish a system of classifying and appropriately compensating positions before recruiting commences.

Not using salary history, even when known, to determine initial compensation will help prevent past inequities from being carried forward. Alerting employees covered under the NLRA of their right to discuss terms and conditions of work, which include salary, will promote equity. Complete salary transparency allows for exempt-level employees, at which level significant gender-based pay disparities exist, to be equitably compensated regardless of gender.

Legislatures and courts can simultaneously pass and amend laws to assist employers with compliance-related issues. Although such laws, as evidenced by the EPA and state and local statutes which prohibit salary inquiries, are well-intentioned, evidence shows that they are not sufficient to address the ongoing inequities experienced. Nonetheless, clearer interpretations of “any other factor other than sex” or, preferably, its removal from the EPA, shifting the burden of
proof to employers in prima facie pay disparity cases, stricter penalties for employer violations of information sharing provision of the NLRA, and policies which encourage, if not mandate, full pay transparency will all aid in closing the gender-based pay gap.

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