

## THE PAYCHECK FAIRNESS ACT: HELPING TO CLOSE THE WAGE GAP FOR WOMEN

More than forty years ago, President Kennedy signed the Equal Pay Act (EPA)<sup>1</sup> into law, making it illegal for employers to pay unequal wages to men and women who hold the same job and do the same work. At the time of the EPA's passage, women earned merely 58 cents to every dollar earned by men.<sup>2</sup> Although enforcement of the EPA as well as other civil rights laws has helped to narrow the wage gap, significant disparities remain and need to be addressed. The provisions of the Paycheck Fairness Act will strengthen current laws against wage discrimination and help realize the promise of equal pay for equal work.

### The Gender Wage Gap Persists

- Today, women working full-time, year-round earn only about 77 cents for every dollar earned by men. In 2002, the median annual earnings of women 15 and older were \$30,203, compared to \$39,429 for their male counterparts.<sup>3</sup>
- Minority women fare significantly worse. In 2002, the median earnings of African American women working full-time, year-round were \$26,882<sup>4</sup> compared to \$40,540<sup>5</sup> for white men; the median for Hispanic women was only \$21,910.<sup>6</sup> That means an African American woman earns just 66 cents to every dollar earned by a white man, while a Hispanic woman earns only 54 cents on the dollar.<sup>7</sup> In both cases, this pay gap for women of color is larger than it was in 2001.<sup>8</sup>
- An earnings gap exists between women and men across a wide spectrum of occupations. In 2003, for example, the median weekly wages earned by women physicians was just 59% of the median weekly wages of male physicians.<sup>9</sup> Women in sales and sales-related occupations earned only about 62% of the median weekly wages of men in equivalent positions.<sup>10</sup> In some occupations, the gap is narrower, but still substantial. Women in the construction industry earned median weekly wages that were about 83% of what their male counterparts earned.<sup>11</sup> And women in computer and mathematical occupations had weekly earnings that were only 80% of what their male counterparts earned.<sup>12</sup>
- In some occupations, women have actually lost ground. In a recent study of management positions in 10 industries that together employ over 70% of women in the workforce, the U.S. General Accounting Office found that women managers consistently made less than their male counterparts, and in seven of the 10 positions the pay gap had *increased* between 1995 and 2000.<sup>13</sup>
- There is not a single state in which women have gained economic equality with men.<sup>14</sup> As of 1999, Washington, D.C. was the area with the smallest wage gap, and yet women earned only 89% of men's earnings.<sup>15</sup> Wyoming had the widest gap, with women making as little as 64% of what men earned.<sup>16</sup> In four states (Hawaii, Oregon, South Dakota, and Virginia), the wage gap widened during the 1990s.<sup>17</sup>

- As women get older, the wage gap for them widens. When women start their careers, the pay gap is relatively small: females aged 15 to 24 working full-time have median earnings that are 90% of what their male counterparts earn. However, by the time they reach the critical years leading up to retirement, that 10% pay gap has nearly tripled: women aged 45 to 64 who work full-time earn only about 69% of what men do.<sup>18</sup>
- If women in the workforce earned the same as men (who work the same number of hours, have the same education, age, and union status and live in the same region of the country), their annual family income would rise by about \$4,000 and their poverty rates would be cut by half or more.<sup>19</sup> Pay inequity also follows women into retirement. Unmarried women in the workforce today will receive, on average, about \$8,000/year less in retirement income than their male counterparts; even controlling for number of years worked and educational levels, the pay gap during prime working years plus spending a career in a female-dominated job accounts for two-thirds of that retirement income gap.<sup>20</sup>

### **The Wage Gap Reflects Sex Discrimination**

The wage gap cannot be dismissed as the result of “women’s choices” in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account, there is still a significant, unexplained gap in men’s and women’s earnings. Thus, even when women make the same career choices as men and work the same hours, they still earn less.

- A 2003 study by U.S. Government Accounting Office found that, even when all the key factors that influence earnings are controlled for – demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure – women still earned, on average, only 80% of what men earned in 2000.<sup>21</sup> That is, 20% of the pay gap between women and men could not be explained or justified.
- A 1999 study covering all industries and occupations across all regions of the United States found that between one quarter and one-half of the wage gap is due solely to differences in pay between men and women working in the same establishments and in similar jobs.<sup>22</sup>

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

- In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys’ network for promotions that prevented women’s career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because “God made Adam first.” Another woman alleged that when she applied for a raise, her manager said, “Men are here to make a career, and women aren’t. Retail is for housewives who just need to earn extra money.”<sup>23</sup>
- In 2001, the Equal Employment Opportunity Commission found that Los Angeles County had created a two-tiered pay system: one for men and another for women. The county had started a nonprofit organization to ease the caseload of attorneys in the county counsel’s office. The auxiliary lawyers, who were mostly women, were paid 20% less than the county counsel lawyers, who were mostly men.<sup>24</sup>

- Texaco agreed in January 1999 to pay \$3.1 million to 186 women who worked in mid-level positions at corporate offices across the country and who were consistently paid less than their male counterparts.<sup>25</sup>
- In November, 1999, Boeing Co., the second largest federal contractor, agreed to pay over \$4.5 million to resolve claims by the Office of Federal Contract Compliance Programs that the company underpaid women and minorities.<sup>26</sup>

Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is a high priority for women. For instance, more than nine in 10 women (92%) responding to the “Ask a Working Women Survey” conducted by the AFL-CIO rated “stronger equal pay laws” as a “very important” or “somewhat important” legislative priority,<sup>27</sup> making it the highest-rated priority overall.

### **The Provisions of the Paycheck Fairness Act Are Designed to Close Loopholes that Have Hindered Efforts to Secure Equal Pay for Equal Work**

The persistence of wage disparities, as well as the experiences of litigants under the Equal Pay Act, demonstrate the need for stronger laws to ensure that women are paid equal wages for equal work. The Paycheck Fairness Act, introduced in the Senate by Sen. Tom Daschle (S. 76) and in the House of Representatives by Rep. Rosa DeLauro (H.R. 1688), has many cosponsors; the proposal is also a part of the omnibus Civil Rights Act of 2004 (the “FAIRNESS Act”) introduced by Sen. Ted Kennedy (S. 2088) and Rep. John Lewis (H.R. 3809).

Enactment of the provisions of the Paycheck Fairness Act will update and strengthen the EPA in important ways, including:

- **Improving Equal Pay Act Remedies**

The Act will toughen the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated damages and back pay awards, which tend to be very insubstantial. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available.

- **Making it Easier to Bring Class Action Equal Pay Act Claims**

The Act will allow an EPA lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure (FRCP). Class actions are important because they ensure that relief will be provided to all those who are injured by the unlawful practice. Currently it is very difficult to proceed as a class action because the EPA, adopted prior to the current federal class action rule (FRCP Rule 23), requires plaintiffs to opt *in* to a suit. Under the federal rule, class members are automatically considered part of the class until they choose to opt *out* of the class.

- **Improving Collection of Pay Information by the Equal Employment Opportunity Commission (EEOC)**

The Act will require the EEOC to issue regulations within 18 months requiring employers to submit pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC’s ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

- **Prohibiting Employer Retaliation**

Many employers place a “gag rule” on discussions of salaries among employees. The Act will prohibit employers from punishing employees for sharing salary information with their co-workers. Without the ability to learn about wage disparities, it is difficult for employees to evaluate whether they are experiencing wage discrimination and to take action to assert their rights under the law.

- **Closing a Loophole in the EPA**

Under the EPA, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an “affirmative defense”<sup>28</sup> that the pay differential is based on a “factor other than sex.”<sup>29</sup> Some employers have argued for interpretations of this affirmative defense that are so broad (e.g., to include factors such as a male worker’s stronger salary negotiation skills or higher previous salaries) that they may themselves be “based on sex” and would seriously undermine the EPA.<sup>30</sup> The Act will tighten this affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance – such as differences in education, training, or experience.

- **Eliminating the “Establishment” Requirement**

Under the EPA, in order to determine that there is wage discrimination, the wage comparison must be made between employees working at the same “establishment.”<sup>31</sup> Some courts have interpreted this to mean that wages paid in different facilities or offices of the same employer cannot be compared even if the employer is paying workers different salaries for the same work.<sup>32</sup> The Act will clarify that a comparison need not be between employees in the same physical place of business.

- **Developing Voluntary Guidelines**

The Act will direct the Labor Department to develop guidelines to enable employers voluntarily to compare wages paid for different jobs to determine whether their pay scales accurately reflect the requirements of the jobs. This will help employers to eliminate unfair disparities between occupations traditionally dominated by men and by women.

- **Increasing Training, Research, and Education**

The Act will provide for increased training for EEOC employees to identify and respond to wage discrimination claims. It also calls for enhancing various research and education programs at the Labor Department, including conducting research on ways to eliminate gender-based pay disparities and providing information to employers to assist them in eradicating such disparities.

- **Recognizing Model Employers**

The Act will establish an award, to be administered by the Labor Department, to recognize and promote the achievements of employers who have made strides to eliminate pay disparities.

### **Conclusion**

Equal pay for equal work is at the foundation of equality in the workplace. Wage discrimination affects family economic security today and retirement income tomorrow. American women and their families cannot afford paychecks that are shortchanged just because the workers who earned them are women. The provisions of the Paycheck Fairness Act propose concrete steps to respond to the ongoing injustice of wage discrimination.

## NOTES

<sup>1</sup> 29 U.S.C § 206(d).

<sup>2</sup> COUNCIL OF ECONOMIC ADVISERS, EXPLAINING TRENDS IN THE GENDER WAGE GAP 1 (1998).

<sup>3</sup> U.S. CENSUS BUREAU, INCOME IN THE UNITED STATES: 2002, Current Population Reports, P60-221, at 10 (Sept. 2003), available at <http://www.census.gov/prod/2003pubs/p60-221.pdf>.

<sup>4</sup> U.S. CENSUS BUREAU, Current Population Survey, 2003 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2002--People 15 Years Old and Over by Total Money Earnings in 2002, Age, Race, Hispanic Origin, and Sex, available at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_114.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_114.htm). (Individual tables available at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_000.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_000.htm).)

<sup>5</sup> U.S. CENSUS BUREAU, Current Population Survey, 2003 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2002--People 15 Years Old and Over by Total Money Earnings in 2002, Age, Race, Hispanic Origin, and Sex, at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_057.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_057.htm).

<sup>6</sup> *Id.*, at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_117.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_117.htm).

<sup>7</sup> National Women's Law Center calculations based on selected tables at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_000.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_000.htm).

<sup>8</sup> In 2001, the pay gap between white men and women of color was 69% for African American women and 56% for Hispanic women. National Women's Law Center calculation based on U.S. CENSUS BUREAU, Detailed Income Tabulations from the Current Population Survey, March 2001, Table PINC-05: Work Experience in 2001\_\_People 15 Years Old and Over by Total Money Earnings in 2001, Age, Race, Hispanic Origin and Sex, available at [http://ferret.bls.census.gov/macro/032002/perinc/new05\\_063.htm](http://ferret.bls.census.gov/macro/032002/perinc/new05_063.htm) and [http://ferret.bls.census.gov/macro/032002/perinc/new05\\_064.htm](http://ferret.bls.census.gov/macro/032002/perinc/new05_064.htm).

<sup>9</sup> National Women's Law Center calculations based on BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, Household Data Annual Averages, Table 39: Median weekly earnings of full-time wage and salary workers by detailed occupation and sex, 250 (2003 Income) available at <http://www.bls.gov/cps/cpsaat39.pdf>.

<sup>10</sup> *Id.*, at 251.

<sup>11</sup> *Id.*, at 252.

<sup>12</sup> *Id.*, at 249.

<sup>13</sup> See, U.S. GENERAL ACCOUNTING OFFICE, WOMEN IN MANAGEMENT: ANALYSIS OF SELECTED DATA FROM THE CURRENT POPULATION SURVEY, 18-19, GAO-02-156 (Oct. 2001), available at <http://www.equality2020.org/Women.pdf>; see also, STAFFS OF REPS. JOHN DINGELL AND CAROLYN MALONEY, A NEW LOOK THROUGH THE GLASS CEILING: WHERE ARE THE WOMEN?, THE STATUS OF WOMEN IN MANAGEMENT IN TEN SELECTED INDUSTRIES (Jan 2002), available at <http://www.equality2020.org/glass.pdf>.

<sup>14</sup> BUREAU OF NATIONAL AFFAIRS, *No Economic Equality for Women Found in Any State, Report Finds*, 19 EMP. DISCRIMINATION REP. 576 (2002) (citing INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE STATUS OF WOMEN IN THE STATES (Amy B. Caiazza, ed., 4th ed. 2003).

<sup>15</sup> INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE STATUS OF WOMEN IN THE STATES 26 (Amy B. Caiazza, ed., 4th ed. 2003).

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.* at 25.

<sup>18</sup> National Women's Law Center calculations based on selected tables, U.S. CENSUS BUREAU, Current Population Survey, 2003 Annual Social and Economic Supplement, Table PINC-05. Work Experience in 2002--People 15 Years Old and Over by Total Money Earnings in 2002, Age, Race, Hispanic Origin, and Sex, available at [http://ferret.bls.census.gov/macro/032003/perinc/new05\\_000.htm](http://ferret.bls.census.gov/macro/032003/perinc/new05_000.htm).

<sup>19</sup> AFL-CIO & THE INSTITUTE FOR WOMEN'S POLICY RESEARCH, EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON PAY GAP AND ITS COSTS 1 (1999), <http://www.aflcio.org/issuespolitics/women/equalpay/EqualPayForWorkingFamilies.cfm>.

<sup>20</sup> OLIVIA S. MITCHELL, PHILLIP B. LEVINE, & JOHN W. PHILLIPS, THE IMPACT OF PAY INEQUALITY, OCCUPATIONAL SEGREGATION, AND LIFETIME WORK EXPERIENCE ON THE RETIREMENT INCOME OF WOMEN AND MINORITIES ix (AARP, Sept. 1999), available at [http://research.aarp.org/econ/9910\\_women\\_1.html](http://research.aarp.org/econ/9910_women_1.html).

<sup>21</sup> U.S. GOVERNMENT ACCOUNTING OFFICE, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 2, GAO-04-35 (Oct. 2003), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-35>.

<sup>22</sup> KIMBERLY BAYARD ET AL., NEW EVIDENCE ON SEX SEGREGATION AND SEX DIFFERENCES IN WAGES FROM MATCHED EMPLOYEE-EMPLOYER DATA 30 (Nat'l Bureau of Econ. Research, Working Paper No. 7003, 1999).

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<sup>23</sup> Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, THE SAN FRANCISCO CHRON., Apr. 29, 2003, at B1, available at [sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL](http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL).

<sup>24</sup> Evelyn Larrubia, *U.S. Calls Lawyer Pay Plan Biased Equity*, LOS ANGELES TIMES, Aug. 30, 2001, at B3.

<sup>25</sup> Press Release, U.S. Department of Labor, *Texaco to Pay \$3.1 Million to Women Professionals and Executives in Largest Pay Discrimination Settlement*, (January 6, 1999) (on file with the Department of Labor); Richard W. Stevenson, *Texaco Is Said to Set Payment Over Sex Bias*, N.Y. TIMES, Jan. 6, 1999, at C1.

<sup>26</sup> Press Release, U.S. Department of Labor, *Boeing Agrees to End Pay Disparity: Second Largest Federal Contractor Will Adjust Pay Practices Corporate Wide* (Nov. 19, 1999) (on file with the U.S. Department of Labor); *Boeing Agrees to Pay \$4.5 Million as Bias Settlement*, L.A. TIMES, Nov. 20, 1999, at C1; Mike Maharry, *Boeing Denies Discrimination Charges, Pays Back Pay to Women, Minorities*, KNIGHT-RIDDER TRIB. BUS. NEWS, Nov. 20, 1999; *45,000 Women May Be Included in Bias Suit Against Boeing*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2000, at C1.

<sup>27</sup> AFL-CIO, *Ask a WORKING WOMAN: SURVEY 2002 7* (2002) available at <http://www.aflcio.org/yourjobeconomy/women/upload/aaww.pdf>.

<sup>28</sup> In wage discrimination cases, an affirmative defense is one that admits the existence of a wage disparity but asserts a legally permissible reason for the disparity.

<sup>29</sup> 29 U.S.C. § 206(d)(1).

<sup>30</sup> See, e.g., *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (employer computed minimum salaries for new sales agents based on their prior salaries).

<sup>31</sup> 29 U.S.C. § 206(d)(1).

<sup>32</sup> See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).