

CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN

More than forty years ago, President Kennedy signed the Equal Pay Act (EPA)¹ into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. The following year, Title VII of the Civil Rights Act of 1964 was enacted, making it illegal to discriminate, including in wages and pay, on the basis of sex, race, color, religion, and national origin. At the time of the EPA's passage in 1963, women earned merely 59 cents to every dollar earned by men.² 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.

In addition, the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.* severely limited workers' ability to vindicate their rights under federal anti-discrimination laws. To reverse the Supreme Court's harmful decision, in 2007 the House of Representatives passed the Lilly Ledbetter Fair Pay Act. Lead sponsor Senator Edward Kennedy (D-MA) has introduced this act in the Senate. To further strengthen current laws against wage discrimination and require the federal government to be more proactive in preventing and battling wage discrimination, lead sponsors Senator Hillary Rodham Clinton (D-NY) and Representative Rosa DeLauro (D-CT) have introduced the Paycheck Fairness Act.³ Similarly, lead sponsors Senator Tom Harkin (D-IA) and Delegate Eleanor Holmes Norton (D-DC) have introduced the Fair Pay Act to ensure equal pay to those with comparable jobs. Strengthening of equal pay laws is critical to help realize the decades-old promise of equal pay for equal work.

The Gender Wage Gap Persists

The wage disparities are of particular concern in light of the present state of the economy. The majority of Americans say that they are worried about the economy and 85 percent believe the economy is getting worse.⁴ Women are feeling particularly anxious about the economy (67 percent), and their concern is well-justified.⁵ Although the general population has suffered because of the economic downturn, women have had a greater loss of jobs and a greater loss in wages than men during this period.⁶

- Women working full-time, year-round earn only about 77 cents for every dollar earned by men, virtually the same amount women earned in 2005. In 2006, the median annual earnings of women ages 15 and older working full-time, year-round were \$32,515, compared to \$42,261 for their male counterparts.⁷
- Minority women fare significantly worse. In 2006, the median earnings of African American women working full-time, year-round were \$30,352⁸ compared to \$48,420⁹ for white, non-Hispanic men; the median for Hispanic women was only \$25,198.¹⁰ This means that an African American woman earned just 63 cents for every dollar earned by a white, non-Hispanic man, while a Hispanic woman earned only 52 cents on the dollar compared to her white, non-Hispanic male counterpart.¹¹ In both cases, this pay gap for women of color was only marginally smaller than it was in 2004.¹²

- An earnings gap exists between women and men across a wide spectrum of occupations. In 2006, for example, the median weekly wages earned by women physicians were just 72% of the median weekly wages of male physicians.¹³ Women in sales and sales-related occupations earned only about 64% of the median weekly wages of men in equivalent positions.¹⁴ While the gap is narrower in some occupations, it is still substantial. Women in the construction industry, for example, earned median weekly wages that were only 86% of what their male counterparts earned.¹⁵ And women in computer and mathematical occupations had weekly earnings that were 85% of the wages paid their male counterparts.¹⁶
- In some occupations, women have actually lost ground. For example, in a study of management positions in 10 industries that together employ over 70% of women in the workforce, the U.S. Government Accountability Office (then the General Accounting Office) found that women managers consistently made less than their male counterparts; in seven of the 10 industries, the pay gap had *increased* between 1995 and 2000.¹⁷
- The earnings gap between women and men also persists across all educational levels.¹⁸ While education lifts all boats, it lifts men's boats much higher than women's. For example, in 2006 among workers 25 years of age and older with some high school education, women's median annual earnings were \$15,162, compared to \$24,092 for men.¹⁹ Graduation from high school boosted women's median earnings to \$21,609, yet the same high school degree yielded \$33,074 for men.²⁰ Even a two-year associate's degree gives men a much bigger bang for their buck (\$42,462 in median annual earnings) than it does for women (\$29,091).²¹ And while earning a bachelor's degree yielded a median annual of income of \$38,221 for women, it produced a whopping \$55,425 for men.²² In fact, the pay gap is widest among non-Hispanic white men and women: non-Hispanic white men with just a high school diploma make almost as much (\$36,539) as non-Hispanic white women who have graduated from college (\$39,006).²³
- There is not a single state in which women have gained economic equality with men.²⁴ As of 2006, Washington, D.C. was the area with the smallest wage gap, at 98%, whereas Louisiana had the widest gap, with women making about 66% of what men earned.²⁵
- 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, year-round have median annual earnings that are 94% of what their male counterparts earn.²⁶ However, by the time they reach the critical years leading up to retirement, that 6% pay gap has increased almost five times: women aged 45 to 64 who work full-time, year-round earn only 71% of what men do.²⁷
- If women in the workforce earned the same amounts 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.²⁸ The Institute for Women's Policy Research has calculated that a typical woman who graduated college from 1984 and who was in her mid-40s in 2004 has lost more than \$440,000 during that period due to the wage gap.²⁹

- Pay inequity also follows women into retirement. Unmarried women in the workforce today will receive, on average, about \$8,000 a 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.³⁰ Women's loss of income in retirement due to pay inequity during their working years shows up primarily in their pensions and savings, not their Social Security. To the contrary, Social Security's progressive benefit formula and spousal benefits help women to counteract the effects of wage discrimination.³¹

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 Accountability Office (then the General 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 2000.³² That is, there remains a 20% pay gap between women and men that cannot be explained or justified.
- One extensive study that examined occupational segregation and the pay gap between women and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work (as well as for education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.³³

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.”³⁴ The Ninth Circuit recently reaffirmed the case as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.³⁵
- In February 2007, a federal judge approved a \$2.6 million settlement against Woodward Governor Company for gender discrimination with respect to pay, promotions and training. The Equal Employment Opportunity Commission (EEOC) sued the global engine systems and

parts company on behalf of female employees working at two of the company's plants. Pursuant to the terms of the agreement, an outside individual will oversee the company's implementation of and compliance with the settlement, including the development of written job descriptions for the positions at issue as well as performance appraisals and a compensation review process.³⁶

- In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed by the EEOC alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay \$54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.³⁷
- In 2004, Wachovia Corporation admitted no wrongdoing but agreed to pay \$5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over six years.³⁸ 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 among women's top work-related priorities. For instance, nine in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL-CIO in 2004 rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.³⁹ Similarly, a January 2007 national survey of 1000 unmarried adult women by Women's Voices Women Vote found that 73% of respondents said that support for pay equity legislation would make them "much more likely" to support a Congressional candidate.⁴⁰

Legislation Is Needed to Close Loopholes in the Law, Block Rollbacks in Federal Enforcement, and Promote Truly Equal Pay for Equal Work

Unfortunately, the way courts have interpreted Title VII and the Equal Pay Act is insufficient to remedy the persistence of wage disparities and demonstrates the need for stronger laws to ensure that women are paid equal wages for equal work.⁴⁰

The Lilly Ledbetter Fair Pay Act

Enactment of the Lilly Ledbetter Fair Pay Act, passed by the House of Representatives on July 31, 2007 and currently pending in the Senate, would reverse the recent Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* and help to ensure that individuals subjected to unlawful pay discrimination are able to effectively assert their rights under the federal anti-discrimination laws. The bill would reinstate prior law and adopt the paycheck accrual rule, making clear that pay discrimination claims on the basis of sex, race, national origin, age, religion and disability accrue whenever a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is affected by the decision or practice, including whenever s/he receives a discriminatory paycheck.

The Paycheck Fairness Act

Enactment of the Paycheck Fairness Act, introduced in the Senate by Sen. Hillary Rodham Clinton and in the House of Representatives by Rep. Rosa DeLauro, would update and strengthen the EPA in important ways,⁴¹ including:

- **Improving Equal Pay Act Remedies**

The Act toughens the remedy provisions of the EPA by allowing prevailing plaintiffs to recover compensatory and punitive damages. The EPA currently provides only for liquidated (fixed and limited) damages and back pay awards, which tend to be 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.

- **Facilitating Class Action Equal Pay Act Claims**

The Act allows 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 bring EPA suits as class actions 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 EEOC**

The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed 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**

The Act prohibits employers from punishing employees for sharing salary information with their coworkers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

- **Closing a Loophole in the Employer Defense**

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"⁴¹ that the pay differential is based on a "factor other than sex."⁴² 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 salary) that they may themselves be "based on sex" and would seriously undermine the EPA.⁴³ The Act tightens 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.

- **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."⁴⁴ 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.⁴⁵ The Act clarifies that a comparison need not be between employees in the same physical place of business.

- **Developing Voluntary Guidelines for and Recognizing Model Employers**

The Act directs the Department of Labor 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. The Act also establishes 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.

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

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

- **Reinstating Pay Equity Programs and Enforcement at the Department of Labor**

The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors.⁴⁶ The Act also directs means to implement of the Equal Opportunity Survey, a vital tool for detecting wage and other types of discrimination.⁴⁷

- **Sparking the Development of Salary Negotiation Skills Training**

The Act establishes a competitive grant program to develop training programs for women and girls on how to negotiate better compensation packages, and directs the Secretaries of Labor and Education to integrate the programs developed into education and job training programs under their respective jurisdictions.

Fair Pay Act

Far too many occupations in the United States remain dominated by one gender. In female-dominated fields, moreover, wages have traditionally been depressed and continue to reflect the artificially suppressed pay scales that were historically applied to so-called “women’s work.” The Fair Pay Act, introduced in the Senate by Senator Tom Harkin (D-IA) and in the House of Representatives by Delegate Eleanor Holmes Norton (D-DC), would address this problem by extending the reach of the equal pay laws in the following ways:

- **Providing Equal Pay for Equivalent Jobs**

The Act would equalize wage disparities between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions.

- **Protecting Victims of Wage Discrimination**

Similar to the Paycheck Fairness Act, the Fair Pay Act provides punitive and compensatory damages to victims of wage discrimination. It also prohibits retaliation against individuals who exercise their rights under the law.

- **Requiring Employer Record Keeping**

The Act requires all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity.

NOTES

¹ 29 U.S.C. § 206(d).

² U.S. Census Bureau, Historical Income Tables – People, Table P-40: Woman's Earnings as a Percentage of Men's Earnings by Race and Hispanic Origin: 1960 to 2005, *available at* <http://www.census.gov/hhes/www/income/histinc/p40.html> (last visited Feb. 22, 2007).

³ As of April 4, 2007, 17 Senators and 71 Representatives had joined the bill as cosponsors.

⁴ The Majority Staff of the Committee on Health, Education, Labor, and Pensions, *Taking a Toll: The Effects of the Recession on Women* (2008).

⁵ *Ibid.*

⁶ *Ibid.*

⁷ U.S. Census Bureau, Current Population Survey, 2007 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2006 – People 15 Years Old and Over by Total Money Earnings in 2006, Age, Race, Hispanic Origin, and Sex, *available at* http://pubdb3.census.gov/macro/032007/perinc/new05_000.htm (last visited March 17, 2008).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ National Women's Law Center calculations based on U.S. Census Bureau, Current Population Survey, 2007 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2006 – People 15 Years Old and Over by Total Money Earnings in 2006, Age, Race, Hispanic Origin, and Sex, *available at* http://pubdb3.census.gov/macro/032007/perinc/new05_000.htm (last visited March 17, 2008).

¹² In 2004, an African American woman earned 61 cents for every dollar a white man earned, while a Hispanic woman earned 52 cents; National Women's Law Center calculations based U.S. Census Bureau, Current Population Survey, 2005 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2004 – People 15 Years Old and Over by Total Money Earnings in 2004, Age, Race, Hispanic Origin and Sex, *available at* http://pubdb3.census.gov/macro/032005/perinc/new05_000.htm (last visited March 17, 2008).

¹³ U.S. Department of Labor, U.S. Bureau of Labor Statistics, Women in the Labor Force: A Databook, Report 1002 (September 2007), *available at* <http://www.bls.gov/cps/wlf-databook-2007.pdf> (last visited March 17, 2008).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.* See also Suzanne Riss, Salary Survey 2005: *How Can We Close the Gender Pay Gap?*, NAFE Magazine, Winter 2005, at 18, 22-23 *available at* http://www.nafe.com/images/NAFE_Magazine/2005salarygap.pdf and http://www.nafe.com/images/NAFE_Magazine/2005salarychart.pdf (last visited Feb. 26, 2007).

¹⁷ 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.gao.gov/new.items/d02156.pdf> (last visited Feb. 23, 2007).

¹⁸ Judy Goldberg Dey & Catharine Hill, AAUW Education Foundation, *Behind the Pay Gap* (2007), *available at* <http://www.aauw.org/research/upload/behindPayGap.pdf> (last visited April 17, 2008).

¹⁹ U.S. Census Bureau, Current Population Survey, 2007 Annual Social and Economic Supplement, Table PINC-03: Educational Attainment – People 25 Years Old and Over, by Total Money Earnings in 2006, Work Experience in 2006, Age, Race, Hispanic Origin and Sex, *available at* http://pubdb3.census.gov/macro/032007/perinc/new03_000.htm (last visited March 17, 2008).

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- ²⁰ *Ibid.* Numbers for high school graduate includes those who earned a GED.
- ²¹ *Ibid.*
- ²² *Ibid.*
- ²³ *Ibid.*
- ²⁴ Amy Ciazza, April Shaw, & Misha Werschkul, *Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region*, Table 3a, (Institute for Women's Policy Research, 2004), available at <http://www.iwpr.org/pdf/R260.pdf> (last visited Feb. 26, 2007).
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- ²⁷ *Ibid.*
- ²⁸ AFL-CIO & Institute for Women's Policy Research, Equal Pay for Working Families: National and State Data on Pay Gap and Its Costs, 1 (1999), available at <http://www.aflcio.org/issues/jobseconomy/women/equalpay/EqualPayForWorkingFamilies.cfm> (last visited Feb. 23, 2007).
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- ³¹ *Id.*
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- ³⁵ *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), available at [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/\\$file/0416688.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openelement) (last visited Feb. 26, 2007).
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- ³⁷ Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), available at <http://www.eeoc.gov/press/7-12-04.html> (last visited Feb. 25, 2007).
- ³⁸ See Office of Federal Contract Compliance Programs, *U.S. Dep't of Labor v. Wachovia Corp.*, Case No. 2001-OFC-0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 21, 2004), available at <http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205183> (last visited Feb. 26, 2007); *Wachovia to Pay \$5.5M in Discrimination Case*, Tampa Bay Business Journal, Sept. 24, 2004, available at <http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html> (last visited Feb. 26, 2007).
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- ⁴⁰ Memorandum from Greenberg Quinlan Rosner Research to Women's Voices Women Vote, 13 (Feb. 12, 2007) (on file with the National Women's Law Center).
- ⁴¹ Although neither the House nor the Senate have held votes on the Paycheck Fairness Act, both the House and the Senate held hearings on both bills in 2007 in conjunction with Equal Pay Day.