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Equal Pay Day: The Persistent Wage Gap and Legislative Trends

More than 50 years after the Equal Pay Act of 1963 required equal pay for equal work, a wage gap persists between similarly situated men and women in the workforce. Each year, Equal Pay Day highlights that gap by marking the date when the average woman will earn the amount that her average male counterpart earned the previous year. This year, that day is April 2. Because of that continued pay difference and other issues of workplace inequality made more visible by the #MeToo movement, lawmakers at all levels are working on legislative fixes to close the wage gap. This update discusses key trends in equal pay legislation.

The Current State of the Law

The U.S. Congress first addressed the gender wage gap with the Equal Pay Act of 1963, which prohibits employers from paying women less than men for equal work at jobs that require the same skill, effort, and responsibility and are performed under similar working conditions.[1] The Equal Pay Act does not, however, reach unequal pay based on (1) a seniority system, (2) a merit system, (3) an incentive system based on quantity or quality, or (4) "any other factor other than sex." [2]

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which expanded the protections under the Equal Pay Act and extended the time that a woman could sue for violations of the Equal Pay Act.

Although these laws narrowed the gender pay gap, women on average still earn [about 20 percent less](#) than their male counterparts.

The Paycheck Fairness Act

Just this past week, the U.S. House of Representatives acknowledged that the Equal Pay Act "has not worked as Congress originally intended," [3] and [so passed the Paycheck Fairness Act](#). The Paycheck Fairness Act will make three sets of major changes to the Equal Pay Act if it passes the U.S. Senate and is enacted into law.

First, the Paycheck Fairness Act requires equal pay for "substantially similar work," as opposed to the old standard of "equal work." Second, it replaces the catchall defense under the Equal Pay Act. Under the Equal Pay Act, an employer need only show a difference in pay is based on a factor other than sex. The Paycheck Fairness Act, instead, would require that an employer show a bona fide reason for the pay difference, such as education, training, or experience. Third, the Paycheck Fairness Act bans employers from considering prior salary in evaluating candidates, protects employee discussions about wages, and prevents employers from retaliating against employees for reporting or filing a complaint for gender-based pay differences or for discussing wages.

The Paycheck Fairness Act also increases significantly the penalties for failure to comply and mandates various administrative measures and reporting requirements.

Although it received bipartisan support in the House, the Republican-controlled Senate is unlikely to schedule a vote on the Paycheck Fairness Act. Still, we expect the wage gap—and how to close it—will continue to be on federal legislators' agendas for some time to come. In the meantime, and without a federal fix, several states and localities have taken up the equal pay banner and enacted or updated their own laws.

State and Local Equal Pay Trends

Several states and localities—including California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, Oregon, Washington, and Suffolk County, New York—have enacted laws that feature many of the same hallmarks as the Paycheck Fairness Act.[4]

Some recent laws reach much further than the Paycheck Fairness Act, however, by targeting unequal treatment beyond wage differences and significantly ramping up penalties for offending employers. In Washington, for example, employers not only have to comply with wage equality laws, they must also treat men and women equally in any career advancement opportunities they provide.[5] In California by the end of the year, all publicly held corporations with their "principal executive office" in that state must have at least one board director who is a woman.[6] Employers in New Jersey are now on the hook for treble damages for equal pay and retaliation violations and subject to penalties for continuing violations during a six-year statute of limitations.[7]

States are also recognizing the efforts some employers have undertaken to tackle the wage gap by providing those employers with safe harbors from liability. In Massachusetts and Oregon, for example, employers will not be liable for certain damages for gender-based pay differences within three years of conducting audits that reveal such differences if they are making reasonable progress toward eliminating the differences in pay.[8]

Continued Dialogue and Legislative Action

As long as earnings between men and women remain unequal, employers should expect lawmakers to continue highlighting—and legislating—issues of gender-based pay differences and workplace inequality. Meanwhile, with a divided federal government for the time being, changes will continue to percolate at the state and local levels.

ENDNOTES

[1] 29 U.S.C. § 206(d)(1).

[2] *Id.*

[3] Paycheck Fairness Act, H.R.7, 116th Cong. § 2(5)(B) (2019).

[4] *See, e.g.*, Cal. Labor Code § 432.3 (2019); Conn Gen. Stat. § 31-40z (2019); Haw. Rev. Stat. § 378-2.4 (2019); Md. Code Ann. Lab. & Empl. §§ 3-304, 3-304.1 (2016); Mass. Gen. Laws ch. 149, § 105A(d) (2018); N.J. Rev. Stat. § 10:5-12(t) (2018); N.Y. Lab. Law § 194 (2016); Or. Rev. Stat. § 652.220 (2019); Wash. Rev. Code § 49.58.020 (2018); Suffolk Cty. Code, ch.528 (changes effective June 30, 2019).

[5] *See* Wash. Rev. Code § 49.58.030 (2018).

[6] *See* Cal. Corp. Code § 301.3 (2019); *see also id.* § 2115.5 (2019).

[7] *See* N.J. Rev. Stat. §§ 10:5-12(a), 10:5-13 (2018).

[8] *See* Or. Rev. Stat. § 652.235 (2019); Mass. Gen. Laws ch. 149, § 105A(d) (2018).

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