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# Paycheck Fairness: A Report From NELA-NY's Gender Discrimination Committee

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At a recent NELA-NITE, the Gender Discrimination Committee asked why, a half-century after the enactment of the federal Equal Pay Act, do women earn 77 cents for every dollar earned by men? What can be done about it? We did not achieve consensus, but we did explore a number of possible answers.

## The 77 Cent Statistic

This oft-cited statistic represents the ratio of women's to men's median annual earnings for full-time year-round workers, and it has remained static since 2008. A more dramatic gap exists between the earnings of a composite "average man" and women in some minority groups. In addition, occupation-specific data show the greatest pay gaps exist in professional settings where salaries are individually negotiated and pay transparency is discouraged.

## The Federal Equal Pay Act (29 U.S.C. 206(d)) – A Plaintiff's Frustrations

The Equal Pay Act (EPA) could do more to close the wage gap. The statute requires a plaintiff within the same establishment as her male comparator(s) to show that she performed equal work on a job requiring equal skill, effort and responsibility. The "equal work" showing (at the EPA's second prima facie prong) makes sense where a comparator is working on the same factory line, as was contemplated when the EPA was passed as a 1963 amendment to the Fair

Labor Standards Act (FLSA). But the standard is more difficult to apply to the work of administrative, executive and professional employees (who have been covered by the EPA since 1972).

Regulations and case law define "equal work" as substantially equal, but not necessarily identical. In practice, courts often use minor disparities in job tasks to find work is unequal. They also defer to employers' claims that work in different departments cannot be compared, making it extremely difficult for professional women to assert EPA claims.

in question, the Seventh and Eighth Circuits do not. Moreover, courts (including those within this Circuit) typically permit employers to determine pay based on factors that may reflect inequality within the job market, such as prior salary, requested salary, and need to match another's salary offer.

Other challenges facing plaintiffs are the EPA's limited remedies (there are no compensatory or punitive damages) and its requirement, as part of the FLSA, that individual plaintiffs opt-in to class action litigation. These challenges are, perhaps, more frustrating in light of the

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The EPA's fourth affirmative defense, which permits an employer to pay a woman less if her lower pay is "based on any other factor other than sex," threatens to eviscerate the rule. While the Second Circuit requires a showing that the pay differential is justified by business necessity and related to the job

strengths of the EPA, when compared to Title VII, in that the EPA: (1) is a strict liability statute, that requires no showing of "intent"; (2) has no administrative exhaustion requirement; and (3) has a two or three year statute of limitations (depending on whether the violation was willful).

## The Paycheck Fairness Act – Proposed Update to the EPA

The Paycheck Fairness Act (PFA), sponsored by Rep. DeLauro (D-CT) and Sen. Reid (D-NV), would amend the EPA by permitting recovery of compen-

*See PRACTICE POINTERS, page 18*

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<sup>1</sup> See Reports by Obama Administration and Institute for Women's Policy Research at <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000613.pdf> and <http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications>.

<sup>2</sup> *Women in America, Indicators of Social and Economic Well-Being*, U.S. Dept. of Commerce, Econ. and Statistics Admin. and Exec. Office of the Pres., Office of Management and Budget (March 2011). At [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/Women\\_in\\_America.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf)

<sup>3</sup> Recent occupational data, compiled by the Institute for Women's Policy Research can be found online at <http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications>.

<sup>4</sup> See discussions of legislative history in Julienne James, Note: *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. Rev. 1873 (2004) and Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17 (2010).

<sup>5</sup> 29 C.F.R. 1620.13(a); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995).

satory and punitive damages, changing to an opt-out class action rule, increasing anti-retaliation protections, and requiring employers to report wage data to the EEOC.

The PFA would also amend the EPA's definition of "establishment" but not that of "equal work." The current definition of "establishment" ("the same physical office or facility") would be broadened to include "all workplaces located in the same county or political subdivision of a State." With the change, for example, a female bank teller could compare her salary to that of a male bank teller working at a branch across town. Since the PFA leaves the "equal work" requirement unaltered, a female vice president at that bank would still, in all likelihood, be unable to compare her work to that of male vice presidents in different departments (regardless of branch).

The PFA would amend the fourth affirmative defense to permit differential pay based on "a *bona fide* factor other than sex, such as education, training or experience", and then *only* where an employer can show the factor was: (1) not based on a sex-based differential in compensation; (2) job-related to the position; and (3) consistent with business necessity. This would end the circuit

split over business necessity and job-relatedness. It could also increase scrutiny of employers' conclusory salary-matching justifications, requiring them to demonstrate that the basis for the differential (i.e. the market rate) was not itself tainted by sex discrimination. The House's Committee Report recommends employers do this by providing evidence that women's earnings in the given position are not frequently or consistently lower than men's.

### Other Models

The PFA's success is uncertain; it failed to achieve cloture in the Senate during last November's lame duck session, but was recently reintroduced. Even if success were assured, are there other avenues that would help to close the pay gap?

The Gender Discrimination Committee also explored other models for addressing pay equity and other legislative efforts, such as the proposed New York State Fair Pay Act, (which passed in the Assembly and is currently being considered by the NYS Senate Finance Committee). New York's Act is designed to address pay gaps for minorities as well as for women. It would cover "equivalent" as opposed to "equal" jobs and bar the use of "market rates" as a *bona fide* factor for paying different wages.

### Recommendations

The Committee reached consensus concerning two key avenues for legislative reform (in addition to those proposed by the PFA). First, we support any reform that would increase the transparency of compensation data: victims of pay discrimination cannot address their predicament where they do not know comparators' salaries. Second, we support the liberalization of the "equal work" rule to a "comparable work" or "equivalent work" standard that would employ a broader comparison methodology and apply a totality of circumstances test, based on the particular situation. Considerations might include: (1) technical or specialized knowledge; (2) level of education; (3) managerial skills and experience; (4) human relations skills and experience; (5) capital management skills and experience; (6) physical and/or mental effort; (7) exposure to hazardous working conditions; and (8) whether the requisite level of knowledge or skill may be acquired on the job or require special training.

Finally, the Committee urges advocates to contact their elected representatives, support legislative initiatives, and share ideas for change. We cannot afford to wait another 50 years to effect real progress. ■