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# Pay Equity: Legislative and Legal Developments

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# Pay Equity: Legislative and Legal Developments

## **Abstract**

[Excerpt] The persistence of gender-based wage disparities—commonly referred to as the pay or wage gap—has been the subject of extensive debate and commentary. Congress first addressed the issue more than four decades ago in the Equal Pay Act of 1963, mandating an “equal pay for equal work” standard, and addressed it again the following year in Title VII of the 1964 Civil Rights Act. Collection of compensation data and elimination of male/female pay disparities are also integral to Labor Department enforcement of Executive Order 11246 (initially issued by President Lyndon Johnson), which mandates nondiscrimination and affirmative action by federal contractors. During the last several decades, initiatives to strengthen and expand current federal remedies available to victims of unlawful sex-based wage discrimination have been taken up in Congress.

This report begins by presenting data trends in earnings for male and female workers and by discussing explanations that have been offered for the differences in earnings. It next discusses the major laws directed at eliminating sex-based wage discrimination as well as relevant federal court cases. The report closes with a description of pay equity legislation that has been considered or enacted by Congress in recent years.

## **Keywords**

pay equity, gender, wage gap, Congress, legislation, discrimination

## **Comments**

### **Suggested Citation**

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# Pay Equity: Legislative and Legal Developments

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## Summary

The term “pay gap” refers to the difference in earnings between male and female workers. While the pay gap has narrowed since the 1960s, female workers with a strong attachment to the labor force earn about 77 to 81 cents for every dollar earned by similar male workers. Studies have analyzed the earnings and characteristics of male and female workers and found that a substantial portion of the pay gap is attributable to non-gender factors such as occupation and employment tenure. Some interpret these studies as evidence that discrimination, if present at all, is a minor factor in the pay gap and conclude that no policy changes are necessary. Conversely, advocates for further policy interventions note that some of the explanatory factors of the pay gap (such as occupation and hours worked) could be the result of discrimination and that no broadly accepted methodology is able to attribute the entirety of the pay gap to non-gender factors.

The Equal Pay Act (EPA), which amends the Fair Labor Standards Act (FLSA), prohibits covered employers from paying lower wages to female employees than male employees for “equal work” on jobs requiring “equal skill, effort, and responsibility” and performed “under similar working conditions” at the same location. The FLSA exempts some jobs (e.g., hotel service workers) from EPA coverage, and the EPA makes exceptions for wage differentials based on merit or seniority systems, systems that measure earnings by “quality or quantity” of production, or “any factor other than sex.” The “equal work” standard embodies a middle ground between demanding that two jobs either be exactly alike or that they merely be comparable. The test applied by the courts focuses on job similarity and whether, given all the circumstances, they require substantially the same skill, effort, and responsibility. The EPA may be enforced by the government, or individual complainants, in civil actions for wages unlawfully withheld and liquidated damages for willful violations. In addition, Title VII of the 1964 Civil Rights Act provides for the awarding of compensatory and punitive damages to victims of “intentional” wage discrimination, subject to caps on the employer’s monetary liability.

The issue of pay equity has attracted substantial attention in recent Congresses. A number of measures, including bills that would provide additional remedies, mandate “equal pay for equivalent jobs,” or require studies on pay inequity, have been introduced in each of the last several congressional sessions. These bills include the Paycheck Fairness Act (H.R. 377/S. 84) and the Fair Pay Act (H.R. 438/S. 168) in the 113<sup>th</sup> Congress. This report also discusses pay equity litigation, including *Wal-Mart Stores v. Dukes*, a case in which the Supreme Court rejected class action status for current and former female Wal-Mart employees who allege that the company has engaged in pay discrimination.

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The persistence of gender-based wage disparities—commonly referred to as the pay or wage gap—has been the subject of extensive debate and commentary. Congress first addressed the issue more than four decades ago in the Equal Pay Act of 1963,<sup>1</sup> mandating an “equal pay for equal work” standard, and addressed it again the following year in Title VII of the 1964 Civil Rights Act.<sup>2</sup> Collection of compensation data and elimination of male/female pay disparities are also integral to Labor Department enforcement of Executive Order 11246 (initially issued by President Lyndon Johnson), which mandates nondiscrimination and affirmative action by federal contractors. During the last several decades, initiatives to strengthen and expand current federal remedies available to victims of unlawful sex-based wage discrimination have been taken up in Congress.

This report begins by presenting data trends in earnings for male and female workers and by discussing explanations that have been offered for the differences in earnings. It next discusses the major laws directed at eliminating sex-based wage discrimination as well as relevant federal court cases. The report closes with a description of pay equity legislation that has been considered or enacted by Congress in recent years.

## Earnings Trends Among Male and Female Workers

### Historical and Recent Data

This section uses two commonly cited federal data sources to discuss the earnings of full-time male and female workers.<sup>3</sup> The Census Bureau publishes data on the median annual earnings of full-time, year-round workers (i.e., at least 35 hours per week and at least 50 weeks per year). These data include workers age 15 and over and are available beginning in 1960. The Bureau of Labor Statistics (BLS) publishes data on the median weekly earnings of full-time workers (i.e., at least 35 hours per week, including part-year workers). These data include workers age 16 and over and are available beginning in 1979.

**Figure 1** uses these two data series to chart median female earnings as a percentage of median male earnings. The weekly wage gap has tended to be slightly smaller than the annual wage gap, though both have trended similarly. Considerations related to interpreting these data are discussed in the next section of this report.

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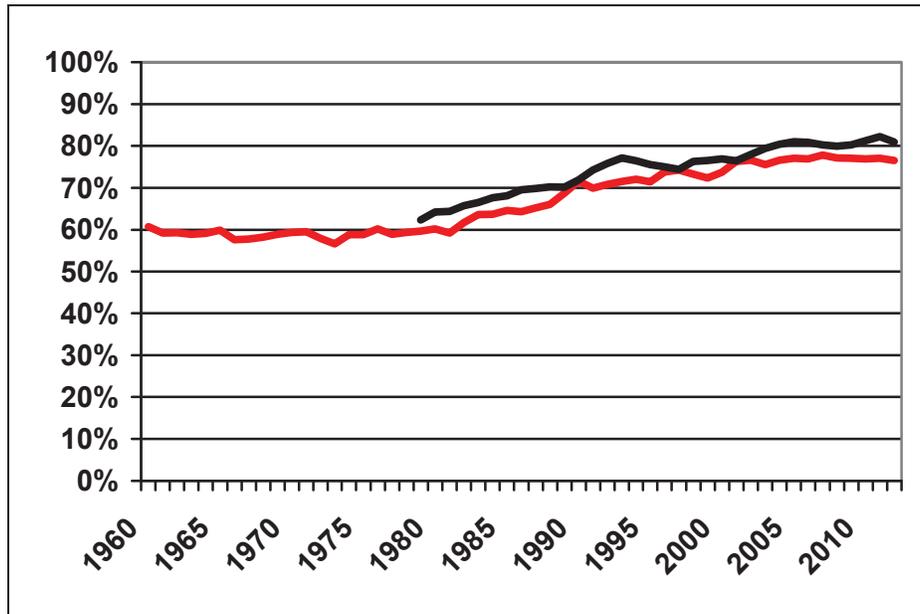
<sup>1</sup> 29 U.S.C. § 206(d).

<sup>2</sup> 42 U.S.C. §§ 2000e et seq.

<sup>3</sup> Comparisons between the earnings of male and female workers are typically limited to full-time workers. Since female workers are more likely to work part-time, comparisons that include all workers typically produce a pay gap to which a substantial portion is attributable to fewer female workers working full-time.

**Figure I. Female Earnings as a Percentage of Male Earnings, 1960-2012**

Full-time workers, median annual earnings (red line) and median weekly earnings (black line)



**Source:** Graph constructed by CRS using data from *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, United States Census Bureau, September 2013, Table A-4, <http://www.census.gov/prod/2013pubs/p60-245.pdf> and *Employment and Earnings*, United States Department of Labor, Bureau of Labor Statistics, Table 37, [http://www.bls.gov/opub/ee/2013/cps/annavg37\\_2012.pdf](http://www.bls.gov/opub/ee/2013/cps/annavg37_2012.pdf).

**Notes:** Annual earnings data include workers age 15 and over. Weekly earnings data include workers age 16 and over. Weekly wage data are not available prior to 1979.

In 2012, the median annual earnings for female workers who worked full-time, year round were 76.5% of male workers with a similar level of labor force attachment (\$49,398 v. \$37,791).<sup>4</sup> Using the weekly wage metric, female workers' median earnings in 2012 were 80.9% of male workers' (\$691 v. \$854).<sup>5</sup>

Another BLS publication estimated the median weekly earnings in 2011 for full-time male and female workers in various demographic groups. Some demographic groups had smaller wage gaps than the overall working population while others had larger gaps. For example, among workers between the ages of 25 and 34, female workers' earnings were 92.3% of male workers'. Conversely, the earnings of all female workers with at least a bachelor's degree were 74.9% of similarly educated male workers.<sup>6</sup>

<sup>4</sup> United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, September 2013, Table A-4, <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

<sup>5</sup> *Employment and Earnings*, United States Department of Labor, Bureau of Labor Statistics, Table 37, [http://www.bls.gov/opub/ee/2013/cps/annavg37\\_2012.pdf](http://www.bls.gov/opub/ee/2013/cps/annavg37_2012.pdf).

<sup>6</sup> United States Department of Labor, Bureau of Labor Statistics, *Highlights of Women's Earnings in 2011*, October 2012, Table 13, <http://www.bls.gov/cps/cpswom2011.pdf>.

## Considerations Related to Interpreting Gender Wage Data

Some have attributed the wage differentials discussed in the prior section to discrimination towards female workers. A significant body of research, however, has found that a substantial portion of the wage gap can be attributed to non-gender differences between male and female workers such as consecutive years in the labor force or the concentration of workers of a single gender in certain high- or low-paying occupations. While this body of research suggests that the unexplained portion of the wage gap is smaller than the raw wage gap discussed in the prior section, there is no broadly accepted methodology that is able to attribute the entirety of the raw wage gap to factors other than gender.<sup>7</sup>

Typically, studies that examine the wage gap compare the earnings of male and female workers while controlling for observable characteristics that may be related to earnings such as education and occupation. Most studies also consider hourly wages rather than weekly or annual wages to control for variations in the number of hours worked. For example, a frequently cited study by Blau and Kahn used data from 1998 to examine hourly wage differences between male and female workers while controlling for education, experience, occupation, industry, collective bargaining coverage, and other characteristics. When their full model was applied, it estimated an unexplained difference of about 9% between the earnings of male and female workers.<sup>8</sup> Another study, commissioned by the U.S. Department of Labor and using data from 2007, used a different data source from Blau and Kahn and controlled for a slightly different set of personal and human capital characteristics. It found an unexplained earnings differential of between 5% and 7%.<sup>9</sup>

Interpretations of these studies vary. Some view the attribution of substantial portions of the raw pay gap to non-gender factors as evidence that, if present at all, discrimination is a minor factor in the gender wage gap. Others note that many of the explanatory factors (such as occupation and job tenure) could themselves be influenced by discrimination and advocate for further policy interventions.

## Legal and Legislative Background

### Laws That Combat Sex-Based Wage Discrimination

The Equal Pay Act (EPA) is a 1963 amendment to the Fair Labor Standards Act that makes it illegal to pay different wages to employees of the opposite sex for equal work on jobs the performance of which requires “equal skill, effort, and responsibility,” and which are “performed under similar working conditions.”<sup>10</sup> The act also prohibits labor organizations and their agents from causing or attempting to cause sex-based wage discrimination by employers. Specifically

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<sup>7</sup> For a summary of some relevant studies, see Natalia Kolesnikova and Yang Liu, “Gender Wage Gap May Be Much Smaller Than Most Think,” *The Regional Economist*, published by the St. Louis Federal Reserve, October 2011, pp. 14-15, [http://www.stlouisfed.org/publications/pub\\_assets/pdf/re/2011/d/gender\\_wage\\_gap.pdf](http://www.stlouisfed.org/publications/pub_assets/pdf/re/2011/d/gender_wage_gap.pdf).

<sup>8</sup> See Table 2a in Francine D. Blau and Lawrence M. Kahn, “The U.S. Gender Pay Gap in the 1990s: Slowing Convergence,” *Industrial and Labor Relations Review*, vol. 60, no. 1 (October 2006), pp. 45-66.

<sup>9</sup> CONSAD Research Corporation, prepared for the U.S. Department of Labor, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women*, January 2009, <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>.

<sup>10</sup> 29 U.S.C. § 206(d)(1).

permitted by the EPA, however, are wage differentials based on seniority systems, merit systems, systems that measure earnings by quality or quantity of production, or “any factor other than sex.”<sup>11</sup> The “equal work” standard embodies a middle ground between demanding that two jobs be either exactly alike or that they merely be comparable. The test applied by the courts focuses on job similarity and whether, in light of all the circumstances, they require substantially the same skill, effort, and responsibility.<sup>12</sup> An employer may not attempt to equalize wages to comply with the EPA by lowering the rate of pay for any employee.<sup>13</sup>

A year after passage of the EPA, Congress enacted the comprehensive code of anti-discrimination rules based on race, color, national origin, religion, and sex found in Title VII of the Civil Rights Act. The EPA and Title VII provide overlapping coverage for claims of sex-based wage discrimination, but differ in important substantive, procedural, and remedial aspects. A crucial difference is that the “equal work” standard of the EPA—requiring “substantial” identity between compared male and female jobs—does not limit an employer’s liability for intentional wage discrimination under Title VII. For example, in *Miranda v. B & B Cash Grocery Store, Inc.*,<sup>14</sup> the plaintiff’s inability to demonstrate that she performed the same work as higher paid males did not preclude a Title VII claim based on evidence male employees who performed fewer duties were paid more than she, or that the employer would have paid her more had she been a male. Thus, a violation of the EPA will generally violate Title VII, but the converse is not true.<sup>15</sup>

Additionally, the remedies for violation of the two laws differ. Under the EPA, a prevailing plaintiff may obtain backpay for any wages unlawfully withheld as the result of pay inequality and twice that amount in liquidated damages for a willful violation. By contrast, the Civil Rights Act of 1991 added to the backpay remedy authorized by Title VII a provision for jury trials and compensatory and punitive damages for victims of “intentional” sex discrimination in wage cases and otherwise.<sup>16</sup> Such damages may only be recovered, however, in cases of intentional discrimination, not in so-called “disparate impact” cases alleging the adverse effect of a facially neutral employment practice on a protected group member. In addition, the Title VII damages remedy is limited by dollar “caps,” which vary depending on the size of the employer.<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> E.g. *EEOC v. Madison Community United School District*, 818 F.2d 577 (7<sup>th</sup> Cir. 1987)(“equal work” requires a substantial identity rather than an absolute identity).

<sup>13</sup> 29 U.S.C. § 206(d)(1).

<sup>14</sup> 975 F.2d 1518 (11<sup>th</sup> Cir. 1992).

<sup>15</sup> 29 C.F.R. § 1620.27(a).

<sup>16</sup> 42 U.S.C. § 1981A. Compensatory damages include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses.” Punitive damages may be recovered where the employer acted “with malice or with reckless indifference” to the complaining employee’s federally protected rights.

<sup>17</sup> The sum total of compensatory and punitive damages awarded may not exceed \$50,000 in the case of an employer with more than 14 and fewer than 101 employees; \$100,000 in the case of an employer with more than 100 and fewer than 201 employees; \$200,000 in the case of an employer with more than 200 and fewer than 500 employees; and \$300,000 in the case of an employer with more than 500 employees.

## The *Ledbetter* Case and Subsequent Legislation

In 2007, the Supreme Court issued a decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,<sup>18</sup> a case in which the female plaintiff alleged that past sex discrimination had resulted in lower pay increases and that these past pay decisions continued to affect the amount of her pay throughout her employment, resulting in a significant pay disparity between her and her male colleagues by the end of her nearly 20-year career. Under Title VII, plaintiffs are required to file suit within 180 days “after the alleged unlawful employment practice occurred.”<sup>19</sup> Although the plaintiff argued that each paycheck she received constituted a new violation of the statute and therefore reset the clock with regard to filing a claim, the Court rejected this argument, reasoning that “a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”<sup>20</sup> As a result, the Court held that the plaintiff had not filed suit in a timely manner. Initially, the decision appeared to limit some pay discrimination claims based on Title VII, but did not affect an individual’s ability to sue for sex discrimination that results in pay bias under the Equal Pay Act, which does not contain the 180-day filing deadline.

Although the Court’s decision made it more difficult for employees to sue for pay discrimination under Title VII, the ruling was subsequently superseded by the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII to clarify that the time limit for suing employers for pay discrimination begins each time they issue a paycheck and is not limited to the original discriminatory action.<sup>21</sup> This change is applicable not only to Title VII of the Civil Rights Act, but also to the Age Discrimination in Employment Act (ADEA), the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA).<sup>22</sup>

## The Wal-Mart Case

In 2004, a federal district court permitted to proceed a class action on behalf of more than 1.5 million current and former female employees of Wal-Mart retail stores nationwide. In *Dukes et al. v. Wal-Mart Stores, Inc.*,<sup>23</sup> the plaintiffs claim that women over the past five years have been paid less than male workers in comparable positions and that the company systematically passed over female employees when awarding promotions to management. According to two studies conducted by a sociologist and a statistician for the plaintiffs, 65% of Wal-Mart’s hourly employees were women, but women made up only 33% of all management positions. The gender gap was even more striking when employment categories were further broken down; while the vast majority of Wal-Mart’s cashiers were women, only a small fraction were store managers, the top in-store management position. The studies also found that women employed on a full-time hourly basis earned less per year on average than their male counterparts, and the shortfall was substantial for female store managers.

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<sup>18</sup> 550 U.S. 618 (2007).

<sup>19</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>20</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

<sup>21</sup> P.L. 111-2.

<sup>22</sup> For more information on the *Ledbetter* decision and subsequent legislation, see CRS Report RS22686, *Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court’s Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by Jody Feder.

<sup>23</sup> 222 F.R.D. 137 (N.D.Cal. 2004).

At this initial stage, the district court considered only whether the evidence raised issues of law and fact common to all members of the proposed class sufficient for a class action to proceed under federal law. The court did not decide the merits of plaintiffs' discrimination claims or any issue of Wal-Mart liability. In its opinion, however, the court noted:

Plaintiffs present largely uncontested descriptive statistics which show that women working at Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time, that women take longer to enter management positions, and that the higher one looks in the organization the lower the percentage of women.<sup>24</sup>

Wal-Mart argued that any disparities were the result of decentralized decision-making at the regional and local level, not the result of any systematic employer bias, and that a massive class-action would be too large to administer. The court rejected that argument, however, noting that Title VII "contains no special exception for large employers." Moreover, "[i]nsulating our nation's largest employers from allegations that they have engaged in a pattern or practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives."<sup>25</sup> Thus, any "inference" of discrimination in company compensation and promotion policies was found to "affect all plaintiffs in a common manner," and warranted the requested class certification.<sup>26</sup>

Wal-Mart appealed the district court's class action certification, and a three-judge panel of the appellate court upheld the class action certification,<sup>27</sup> as did a subsequent ruling by a divided panel of appellate judges sitting en banc.<sup>28</sup> In a 5-4 decision in *Wal-Mart v. Dukes*, however, the Supreme Court recently reversed the class certification ruling.<sup>29</sup>

Under the Federal Rules of Civil Procedure, parties seeking class certification must show, among other things, that

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>30</sup>

According to the Court, the *Dukes* plaintiffs failed to meet the commonality requirement because they could not establish that Wal-Mart operated under a common, general policy of discrimination. Rather:

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. On its

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<sup>24</sup> Id. at 155.

<sup>25</sup> Id. at 142.

<sup>26</sup> Id. at 166.

<sup>27</sup> *Dukes v. Wal-Mart*, 509 F.3d 1168 (9<sup>th</sup> Cir. 2007).

<sup>28</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9<sup>th</sup> Cir. 2010).

<sup>29</sup> 131 S. Ct. 2541 (2011). The Court also unanimously held that claims for monetary relief may not be certified pursuant to Rule 23(b)(2), unless the monetary relief is incidental to the injunctive or declaratory relief. Id. at 2557.

<sup>30</sup> Fed. R. Civ. P. 23(a).

face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action.<sup>31</sup>

In its ruling, the Court emphasized that plaintiffs must provide “significant proof” that a “specific employment practice” led to the discrimination, and rejected as insufficient statistical and anecdotal evidence offered by the plaintiffs.<sup>32</sup> Although the Court’s decision makes it more difficult for employees to receive class certification and thus makes it less likely that large employers will face similar suits in the future, it is not necessarily the end of the litigation. Plaintiffs may still pursue their claims as individuals, or perhaps as part of a smaller class.

Indeed, approximately 2,000 claimants filed individual charges with the Equal Employment Opportunity Commission (EEOC) within a year of the *Dukes* decision,<sup>33</sup> while others have filed new class action lawsuits that limit claims to stores located in a specified region, such as a single state. These states include California, Texas, Tennessee, and Florida.<sup>34</sup> These lawsuits, however, have not met with much success. In the California case, for example, the district court recently denied the plaintiffs’ request for certification of a class consisting of 150,000 women working in Wal-Mart’s California stores. According to the court, the “newly proposed class continues to suffer from the problems that foreclosed certification of the nationwide class.”<sup>35</sup> Meanwhile, the plaintiffs who refiled complaints against Wal-Mart in Texas, Tennessee, and Florida have had their requests for class certification dismissed as time-barred under the statute of limitations,<sup>36</sup> although some of these decisions have been appealed. Because the statute of limitations is tolled for individual claims, these rulings do not preclude the original *Dukes* plaintiffs from filing individual claims, nor do they prevent new plaintiffs with fresh claims from filing class action lawsuits against the company in the future.

Ultimately, if any of the claims against Wal-Mart go to trial, the female plaintiffs carry the burden of proving that the company engaged in an intentional pattern and practice of discriminating in pay and promotions. The record to date suggests that this may be no easy task, in part due to subjectivity in the company’s personnel procedures and the fact that, prior to January 2003, the company apparently failed to post or document most available promotion opportunities.<sup>37</sup> There may be limited data on how many employees, male or female, applied for most of these positions. But if they prevail, whether at trial or by settlement, substantial monetary damages may be available to members of the plaintiff class under Title VII.

Prior to the Court’s decision in *Dukes*, other large corporations that had been sued for pay discrimination had a tendency to enter into settlement agreements. For example, the investment firm Morgan Stanley reportedly agreed to pay \$54 million to settle government claims that it systematically underpaid and failed to promote its women executives. Allegations of sexual harassment were also involved in the case. Beyond \$12 million set aside to pay the lead plaintiff,

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<sup>31</sup> Wal-Mart, 131 S. Ct. at 2554.

<sup>32</sup> *Id.* at 2553-56.

<sup>33</sup> Steve Painter, “Arkansas Democrat-Gazette,” June 13, 2012.

<sup>34</sup> Ariel Barkhurst, “Women Sue Wal-Mart for Discrimination,” *Sun-Sentinel*, October 5, 2012, p. 1D.

<sup>35</sup> *Dukes v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. LEXIS 109106 (N.D. Cal. Aug. 2, 2013).

<sup>36</sup> *Love v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. LEXIS 143234 (S.D. Fla. Sept. 23, 2013); *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875 (M.D. Tenn. 2013); *Odle v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 159351 (N.D. Tex. Oct. 15, 2012).

<sup>37</sup> *Dukes*, 222 F.R.D. at 149.

a consent decree provides \$40 million for any of about 340 other potential discrimination victims who are able to prove their claims, and another \$2 million to establish internal anti-discrimination programs. For a period of three years, the decree required appointment of a firm ombudsman for sex discrimination issues and of an external monitor to review Morgan Stanley's adherence to the settlement and its progress at preventing discrimination.<sup>38</sup> Shortly after settlement in the Morgan Stanley case, both Boeing and Citigroup agreed to settle similar pay equity lawsuits, and Costco was sued for similar reasons.<sup>39</sup>

In contrast to the above corporations, Costco has chosen to defend itself in court. Although a federal district court granted class-action status to the plaintiffs in *Ellis v. Costco Wholesale Corp.*,<sup>40</sup> a federal appeals court subsequently vacated the district court's ruling regarding commonality and, specifically noting the Supreme Court's decision in *Wal-Mart v. Dukes*, remanded the case for reconsideration and application of the proper legal standard for evaluating commonality.<sup>41</sup> Despite the more stringent post-*Dukes* standards for class action certification, the district court ruled in favor of the Costco plaintiffs on remand.<sup>42</sup> In its decision, the court distinguished the facts in the case from those in the *Dukes* lawsuit, noting that the discrimination claims were limited to a much smaller number of plaintiffs seeking specific management positions, that the promotion process was controlled by central management, and that the plaintiffs had identified this process as the specific employment practice that was subject to challenge. According to the court, "[i]t is this 'common direction' and the identification of specific practices ..., in addition to the smaller size and scope of the class, that separates this case from *Dukes*."<sup>43</sup> Thus, the court held that the Costco plaintiffs had demonstrated sufficient commonality to warrant class action status.

## Recent Legislation

Although the Ledbetter legislation discussed above is the only new pay discrimination law enacted by Congress in recent years, the issue of pay equity continues to garner congressional attention. Indeed, a number of measures have been introduced repeatedly in each of the last several congressional sessions. The two most prominent of these are the Paycheck Fairness Act and the Fair Pay Act, both of which are described below.

### Paycheck Fairness Act

Introduced in each of the last several congressional sessions, the Paycheck Fairness Act (H.R. 377/S. 84 in the 113th Congress) would increase penalties for employers who pay different wages to men and women for "equal work," and would add programs for training, research, technical assistance, and pay equity employer recognition awards. The legislation would also make it more

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<sup>38</sup> Brooke A. Masters, "Wall Street Sex-Bias Case Settled; Morgan Stanley Agrees to Pay \$54 Million," *Washington Post*, July 13, 2004, at E01.

<sup>39</sup> Brooke A. Masters and Amy Joyce, "Costco is the Latest Class-Action Target; Lawyers' Interest Increases in Potentially Lucrative Discrimination Suits," *Washington Post*, August 18, 2004, at A01.

<sup>40</sup> 240 F.R.D. 627 (D. Cal. 2007).

<sup>41</sup> *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9<sup>th</sup> Cir. Cal. 2011).

<sup>42</sup> *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012).

<sup>43</sup> *Id.* at 509.

difficult for employers to avoid EPA liability, and proposed safeguards would protect employees from retaliation for making inquiries or disclosures concerning employee wages and for filing a charge or participating in any manner in EPA proceedings. In short, while this legislation would adhere to current equal work standards of the EPA, it would reform the procedures and remedies for enforcing the law.

Under the EPA, as noted, prevailing plaintiffs may recover backpay in an amount equal to the total difference between wages actually received and those to which they are lawfully entitled and an additional amount equal to the backpay award as liquidated damages.<sup>44</sup> Compensatory damages are not authorized, and consequently, awards do not include sums for physical or mental distress, medical expenses, or other costs.<sup>45</sup> The Paycheck Fairness Act would authorize EPA class actions and “such compensatory and punitive damages as may be appropriate.” In addition, the legislation would establish more restrictive standards for proof by employers of an affirmative defense to EPA liability based on any “bona fide factor other than sex.” Thus, for a pay factor to be “bona fide,” the employer would have to establish that it was “job related,” consistent with “business necessity,” and not derived from a sex-based differential in compensation, and that the employer’s purpose could not be accomplished by less discriminatory alternative means.

Another aspect of EPA enforcement addressed by proposed pay equity bills concerns employer recordkeeping and the conduct of technical assistance, research, and educational programs by federal agencies. For example, the Paycheck Fairness Act would mandate record-keeping and data collection for better enforcement of the law. The measure would direct the EEOC to survey data currently available to the government and, in consultation with sister agencies, to identify additional sources of pay information that may be marshaled to support federal anti-discrimination efforts. The EEOC would be required to issue regulations for the collection of pay data from employers based on sex, race, and ethnicity, taking into consideration the burden placed on employers and the need to protect the confidentiality of required reports. In addition, the Secretary of Labor would be directed to develop job evaluation guidelines based on objective factors of education, skill, independence, and decision-making responsibility for *voluntary* use by employers in eliminating unfair pay disparities between traditionally male- and female-dominated occupations. Technical assistance and a recognition program would be awarded to employers who voluntarily adjust their wage scales pursuant to such a job evaluation. Finally, a “National Award for Pay Equity in the Workplace” would be established to recognize employers who demonstrate “substantial effort to eliminate pay disparities between men and women.”

## **Fair Pay Act**

The Fair Pay Act (H.R. 438/S. 168 in the 113th Congress), which has predecessors dating back to the 103<sup>rd</sup> Congress, would go further than the Paycheck Fairness Act by proposing a fundamental expansion to the scope of the EPA, which is presently confined to sex-based wage differentials, by adding racial and ethnic minorities as protected classes under that law. Intentional wage discrimination against these groups is already prohibited by Title VII. But Title VII and the EPA have different standards of proof, and because proof of intent to discriminate is not required by the “equal pay for equal work” standard of the EPA,<sup>46</sup> it may provide greater protection to

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<sup>44</sup> 29 U.S.C. §§ 216-17.

<sup>45</sup> E.g. *Hybki v. Alexander & Alexander, Inc.*, 536 F. Supp. 483 (W.D.Mo. 1982) (emphasizing damages for pain and suffering are not available under the EPA).

<sup>46</sup> See *Fallon v. State of Illinois*, 882 F.2d 1206 (7<sup>th</sup> Cir. 1989).

minority groups than Title VII in many cases. The EPA’s catchall exception, affording employers broad immunity for pay differentials attributable to “factors other than sex,” would be significantly narrowed by the Fair Pay Act. A compensatory and punitive damages remedy, without statutory limit, would replace the present EPA backpay and liquidated damages scheme, based on the Fair Labor Standards Act.

Significantly, the Fair Pay Act would also redefine the basic statutory standard of the EPA by requiring employers to pay equal wages regardless of sex, race, or national origin to workers in “equivalent jobs.” Unlike the current law, Equal Pay Act claims based on wage disparities between dissimilar jobs—for example, a janitor and a clerk—would be permitted if they are determined to be “equivalent” in some largely undefined manner. By substituting job equivalency for the “equal work standard” in the EPA, the Fair Pay Act arguably could revive legal issues similar to those confronted by the federal courts during the 1980s in so-called “comparable worth” Title VII cases.<sup>47</sup>

Finally, the Fair Pay Act would require all covered employers to maintain comprehensive records of “the method, system, calculations, and other bases used” to set employee wages and to file annual reports with the EEOC detailing the racial, ethnic, and gender composition of the employer’s workforce broken down by job classification and wage or salary level. Such reports would be available for “reasonable” inspection and examination upon request of any person, pursuant to EEOC regulations, and could be used by the Commission for such “statistical and research purposes ... as it may deem appropriate.” The EEOC would also be required to “carry on a continuing program of research, education, and technical assistance” to implement the proposed ban on racial, ethnic, or gender discrimination between employees working “in equivalent jobs.”

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<sup>47</sup> During the 1980s, some litigants tried to substitute job equivalency for the “equal work standard” in the EPA through so-called “comparable worth” Title VII cases. Under the comparable worth principle, whole classes of jobs are undervalued because they traditionally have been predominately held by women. Because of alleged labor market bias against female-dominated jobs, Title VII plaintiffs contended that pay discrimination claims should not be limited by the EPA standard, requiring that jobs be substantially “equal” or similar for different pay rates to be considered discriminatory. Instead, Title VII wage-based discrimination actions against employers could be predicated on job evaluation studies, they argued, which compared the value of women’s jobs to those of men who perform work that is dissimilar, but of equivalent or comparable worth to the employer. The courts, however, were not receptive to the comparable worth argument. *See AFSCME v. State of Washington* 770 F. 2d 1401 (9<sup>th</sup> Cir. 1985). *See also*, *American Nurses Ass’n v. State of Illinois*, 606 F. Supp. 1313 (N.D.Ill. 1985) (Congress never intended to incorporate a comparable worth standard in Title VII and such a concept is neither sound nor workable).