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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 Civil Rights Act of 1964. Collection of compensation data and elimination of male/female pay disparities are also integral to Department of Labor 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 on 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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**Congressional Research Service**

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## Summary

According to some federal data, on average, full-time female workers earn approximately 20% less than full-time male workers. At least a portion of this gap is due to observable factors such as hours worked and the concentration of female workers in lower-paid occupations. Some interpret these data as evidence that discrimination, if present at all, is a minor factor in the pay differentials 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.

Currently, there are two federal laws that may provide a remedy to employees who believe that unlawful sex-based wage discrimination has occurred: the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964. Under the EPA, employers are prohibited 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. Thus, the EPA is narrowly focused on the factual question of whether an employer has, on the basis of sex, paid unequal wages for equal work. In contrast, Title VII, which prohibits employment discrimination on the basis of race, color, national origin, religion, and sex, is far broader in scope than the EPA and focuses on determining whether an employer had a discriminatory motive for paying workers differently on the basis of sex.

Meanwhile, the issue of pay equity has attracted substantial attention in recent congressional sessions. For example, 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 the 114<sup>th</sup> Congress. These bills include the Paycheck Fairness Act (H.R. 1619/S. 862), the Fair Pay Act (H.R. 1787), the End Pay Discrimination Through Information Act (S. 83), the Workplace Advancement Act (S. 2200), and the Gender Advancement in Pay Act (GAP Act; S. 2773). 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.

## Contents

Earnings Data for Male and Female Workers.....	1
Legal and Legislative Background.....	2
Laws That Combat Sex-Based Wage Discrimination .....	2
The <i>Ledbetter</i> Case and Subsequent Legislation .....	3
The Wal-Mart Case .....	4
Recent Legislation.....	7
Paycheck Fairness Act.....	7
Fair Pay Act.....	8
Other Bills in the 114 <sup>th</sup> Congress .....	9

## Contacts

Author Contact Information .....	9
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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 Civil Rights Act of 1964.<sup>2</sup> Collection of compensation data and elimination of male/female pay disparities are also integral to Department of Labor 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 on 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 Data for Male and Female Workers

Federal data show that full-time female workers have lower earnings than full-time male workers. Examination of some of the characteristics of female and male workers suggests that at least a portion of the differences in earnings are due to observable (nondiscriminatory) factors. At the same time, no widely accepted methodology is able to attribute the entirety of the wage gap to observable characteristics.

This section will use median weekly wage data from the Bureau of Labor Statistics (BLS) to illustrate the debate on the male-female pay gap.<sup>3</sup> This brief discussion does not attempt to comprehensively review this issue. Instead, it uses easily understood data from a widely used source to highlight common arguments and underscores the complexity of determining the causes of differences in the earnings of male and female workers.

In 2014, the median weekly wage for full-time female workers was \$719, or 83% of the \$871 median weekly earnings of full-time male workers.<sup>4</sup> Differences in earnings for certain subpopulations of workers suggest that some portion of the earnings gap is attributable to factors other than discrimination.

- *Female workers are concentrated in occupations with lower earnings.* For example, women account for 73% of the workers in personal care and service occupations (such as hairdresser or childcare worker), a field with median weekly earnings of \$487. Conversely, men account for 98% of the workers in construction and extraction occupations (such as bricklayers and mining machine operators), a field with median weekly earnings of \$756.<sup>5</sup>

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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> This source was chosen because it had a number of readily available cross-tabulations of earnings and other worker characteristics.

<sup>4</sup> Bureau of Labor Statistics, *Highlights of Women's Earnings in 2014*, November 2015, Table 1, <http://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf>.

<sup>5</sup> *Ibid.*, Table 2.

- *Full-time male workers work more hours than full-time female workers.* “Full-time” includes all workers who work 35 or more hours per week. Among persons who work full-time, male workers average 43.4 hours per week and female workers average 40.8.<sup>6</sup> Among full-time workers who work exactly 40 hours per week, the pay gap between male and female workers is lower than the overall gap for all full-time workers (11% vs. 17%).<sup>7</sup>
- *The earnings gap for younger workers and unmarried workers without children is smaller.* Among workers aged 25 to 34, the earnings gap is 10%. Among unmarried workers without children, the earnings gap is 6%.<sup>8</sup>

Interpretations of these data vary. Some suggest that these patterns illustrate that the pay gap between male and female workers is negligible and no further policy interventions are necessary. In contrast, proponents of further action note that some of the data that “explain” the pay gap, while not directly discriminatory, may be the result of discrimination. For example, female workers may be tracked to lower-paying fields, or supervisors may be hesitant to give more demanding work to female workers. Further, even among rigorous studies, no widely accepted methodology has been able to attribute the entirety of the pay gap to factors other than the sex of the worker, making it difficult to eliminate the possibility of discrimination.<sup>9</sup>

## Legal and Legislative Background

### Laws That Combat Sex-Based Wage Discrimination

As noted above, there are currently two federal laws that may provide a remedy to employees who believe that unlawful sex-based wage discrimination has occurred: the Equal Pay Act (EPA) and Title VII of the Civil Rights Act of 1964. The 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 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

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<sup>6</sup> Bureau of Labor Statistics, Current Population Survey, 2015 Annual Average, “Table 22: Persons at work in nonagricultural industries by age, sex, race, Hispanic or Latino ethnicity, marital status, and usual full- or part-time status,” <http://www.bls.gov/cps/cpsaat22.htm>.

<sup>7</sup> Bureau of Labor Statistics, *Highlights of Women’s Earnings in 2014*, November 2015, Table 5, <http://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf>.

<sup>8</sup> *Ibid.*, Table 7.

<sup>9</sup> For a summary of some relevant studies, see Natalia Kolesnikova and Yang Liu, “Gender Wage Gap May Be Much Smaller Than Most Think,” *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>10</sup> 29 U.S.C. §206(d)(1).

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

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 antidiscrimination 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 an additional equal amount in liquidated damages for a willful violation.<sup>16</sup> By contrast, in addition to backpay, Title VII authorizes compensatory and punitive damages in certain circumstances.<sup>17</sup> Such damages may only be recovered in cases of intentional discrimination, but not in 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>18</sup>

## The *Ledbetter* Case and Subsequent Legislation

In 2007, the Supreme Court issued a decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,<sup>19</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>20</sup> Although the plaintiff argued that each paycheck she received constituted a new violation of the statute and therefore reset the

(...continued)

<sup>12</sup> See, e.g., *EEOC v. Madison Cmty. United Sch. Dist.*, 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> 29 U.S.C. §216(b).

<sup>17</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>18</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. *Id.*

<sup>19</sup> 550 U.S. 618 (2007).

<sup>20</sup> 42 U.S.C. §2000e-2(a)(1).

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>21</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>22</sup> This change is applicable not only to Title VII, but also to the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act.<sup>23</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 v. Wal-Mart Stores, Inc.*,<sup>24</sup> the plaintiffs claimed that women had 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.<sup>25</sup> The plaintiffs argued that 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.

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.<sup>26</sup> 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>27</sup>

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<sup>21</sup> Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

<sup>22</sup> P.L. 111-2, codified as amended at 42 U.S.C. §2000e-5(e)(3).

<sup>23</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>24</sup> 222 F.R.D. 137 (N.D.Cal. 2004).

<sup>25</sup> *Dukes*, 222 F.R.D. at 146.

<sup>26</sup> *Id.* at 142.

<sup>27</sup> *Id.* at 155.

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.”<sup>28</sup> 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>29</sup> Finding that the possibility of discrimination in company compensation and promotion policies affected all of the plaintiffs in a common manner, the court approved the requested class certification.<sup>30</sup>

Wal-Mart appealed the district court’s class action certification, and a three-judge panel of the appellate court upheld the certification,<sup>31</sup> as did a subsequent ruling by a divided panel of appellate judges sitting en banc.<sup>32</sup> In a 5-4 decision in *Wal-Mart Stores, Inc. v. Dukes*, however, the Supreme Court reversed the class certification ruling.<sup>33</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>34</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 face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action.”<sup>35</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>36</sup> Ultimately, the Court’s decision has led some observers to conclude that it will make it more difficult for plaintiffs to receive class certification in employment discrimination cases in the future, a factor that may lead to a reduction in the number of such suits filed against larger employers.<sup>37</sup>

Despite this potential impact, it is important to note that the plaintiffs in the Wal-Mart case may still pursue their claims as individuals, or perhaps as part of a smaller class. Approximately 2,000

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<sup>28</sup> *Id.* at 142.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 166.

<sup>31</sup> *Dukes v. Wal-Mart*, 509 F.3d 1168, 1174 (9<sup>th</sup> Cir. 2007).

<sup>32</sup> *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9<sup>th</sup> Cir. 2010).

<sup>33</sup> 564 U.S. 338, 338 (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 360.

<sup>34</sup> Fed. R. Civ. P. 23(a).

<sup>35</sup> *Dukes*, 564 U.S. at 355.

<sup>36</sup> *Id.* at 353-58.

<sup>37</sup> Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 *Green Bag* 2d 375, 380 (2011). The decision, however, does not necessarily limit a plaintiff’s ability to bring a class action suit in other contexts. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Spokeo, Inc. v. Robins*, 2016 U.S. LEXIS 3046 (May 16, 2016).

claimants filed individual charges with the Equal Employment Opportunity Commission (EEOC) within a year of the *Dukes* decision,<sup>38</sup> while others filed new class action lawsuits that limited claims to stores located in a specified region, such as a single state. These states include California, Texas, Tennessee, and Florida.<sup>39</sup> These lawsuits, however, have not met with much success. In the California case, for example, the district court denied the plaintiffs' request for certification of a class consisting of 150,000 women working in Wal-Mart's California stores.<sup>40</sup> According to the court, the "newly proposed class continues to suffer from the problems that foreclosed certification of the nationwide class."<sup>41</sup> Meanwhile, the plaintiffs who refiled complaints against Wal-Mart in Florida have had their requests for class certification dismissed as time-barred under the statute of limitations,<sup>42</sup> while suits in Tennessee and Texas, both originally found to be time-barred, have been allowed to proceed under subsequent appellate court rulings.<sup>43</sup> 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>44</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*, many of the other large corporations that had been sued for pay discrimination entered 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.<sup>45</sup> Allegations of sexual harassment were also involved in the case. Beyond \$12 million set aside to pay the lead plaintiff, 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 antidiscrimination 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>46</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>47</sup>

<sup>38</sup> Alice Hines, "Wal-Mart Sex Discrimination Claims Filed by 2,000 Women," *Huffington Post*, June 6, 2010.

<sup>39</sup> Ariel Barkhurst, "Women Sue Wal-Mart for Discrimination," *Sun-Sentinel*, October 5, 2012, p. 1D.

<sup>40</sup> *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115 (N.D. Cal. 2013).

<sup>41</sup> *Id.* at 1118. *See also*, *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263 (W.D. Wis. 2013) (dismissing claims of employees in Wisconsin, Illinois, Indiana, and Michigan for failure to identify common questions of law or fact).

<sup>42</sup> *Love v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. LEXIS 143234, \*2 (S.D. Fla. September 23, 2013).

<sup>43</sup> *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6<sup>th</sup> Cir. 2015); *Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315 (5<sup>th</sup> Cir. 2014).

<sup>44</sup> *Dukes*, 222 F.R.D. at 149.

<sup>45</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>46</sup> *Id.*

<sup>47</sup> Brooke A. Masters and Amy Joyce, "Costco is the Latest Class-Action Target; Lawyers' Interest Increases in (continued...)"

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>48</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 Stores, Inc. v. Dukes*, remanded the case for reconsideration and application of the proper legal standard for evaluating commonality.<sup>49</sup> Despite the more stringent post-*Dukes* standards for certification for some class actions, the district court ruled in favor of the Costco plaintiffs on remand.<sup>50</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>51</sup> Thus, the court held that the Costco plaintiffs had demonstrated sufficient commonality to warrant class action status. The Costco case eventually settled for \$8 million.<sup>52</sup>

## 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. A number of measures have been introduced in the 114<sup>th</sup> Congress. The two most well-known of these are the Paycheck Fairness Act and the Fair Pay Act, both of which have been introduced repeatedly in every congressional session for a decade or more. Other bills in the 114<sup>th</sup> Congress include the End Pay Discrimination Through Information Act, the Workplace Advancement Act, and the Gender Advancement in Pay Act, or GAP Act. Each of these bills is described briefly below.

### Paycheck Fairness Act

Introduced in each of the last several congressional sessions, the Paycheck Fairness Act (H.R. 1619/S. 862) 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 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

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(...continued)

Potentially Lucrative Discrimination Suits," *Washington Post*, August 18, 2004, at A01.

<sup>48</sup> 240 F.R.D. 627 (D. Cal. 2007).

<sup>49</sup> *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 974 (9<sup>th</sup> Cir. Cal. 2011).

<sup>50</sup> *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540 (N.D. Cal. 2012).

<sup>51</sup> *Id.* at 509.

<sup>52</sup> Bob Egelko, "Costco to pay \$8 million to settle gender-bias suit," *SF Gate*, December 20, 2013.

an additional amount equal to the backpay award as liquidated damages.<sup>53</sup> Compensatory damages are not authorized, and consequently, awards do not include sums for physical or mental distress, medical expenses, or other costs.<sup>54</sup> The Paycheck Fairness Act would authorize EPA class actions and compensatory and punitive damages. 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,” not derived from a sex-based differential in compensation, and accounts for the wage differential at issue, 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 EEOC would also 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. 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. 1787), 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>55</sup> it may provide greater protection to 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, the EPA 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>56</sup>

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<sup>53</sup> 29 U.S.C. §§216-17.

<sup>54</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>55</sup> See *Fallon v. State of Illinois*, 882 F.2d 1206, 1213 (7<sup>th</sup> Cir. 1989).

<sup>56</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 (continued...)

Finally, the Fair Pay Act would require all covered employers to maintain comprehensive records of the method 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 research purposes. The EEOC would also be required to provide technical assistance to implement the proposed ban on racial, ethnic, or gender discrimination between employees working in equivalent jobs.

## Other Bills in the 114<sup>th</sup> Congress

As noted above, several new bills have been introduced in more recent congressional sessions. Although they differ slightly, both the End Pay Discrimination Through Information Act (S. 83) and the Workplace Advancement Act (S. 2200) would expand the EPA's antiretaliation provisions to prohibit an employer from retaliating against an employee who has discussed salary information with other employees. Broader in scope, the Gender Advancement in Pay Act (GAP Act; S. 2773) would not only adopt similar prohibitions against retaliation based on the sharing of wage information, but also would alter the employer defenses available under the EPA. Specifically, the act would exempt employers from EPA liability for wage differentials that are based on expertise, a shift differential, or any business-related factor other than sex, including education, training, or experience. The bill would also toll the statute of limitations when an EPA suit is brought or an EEOC charge is filed, as well as add civil penalties to the EPA for willful violations of the statute. These penalties would be capped in varying amounts based on the size of the employer. Funds derived from these penalties would be used to create a grant program and to support a Comptroller General inquiry that would involve a multistate study on strategies to increase the participation of women in high-demand occupations and industries in which women are underrepresented. In addition, the bill would require the Department of Labor and the EEOC to develop technical assistance materials to assist small businesses in complying with the law.

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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. Washington* 770 F. 2d 1401 (9<sup>th</sup> Cir. 1985). *See also*, *American Nurses Ass'n v. 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).