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Novel Approaches to Correcting the Gender Wage Gap

FEDERAL EQUAL PAY LEGISLATION in the United States has a history of major initiatives followed by years of inactivity. In 1963, Congress passed the Equal Pay Act,¹ which prohibits sex-based wage discrimination between men and women who perform “equal work.” Then, for nearly 50 years, there was a dearth of federal legislative activity on equal pay until Congress passed the Lilly Ledbetter Fair Pay Act of 2009.² This law clarified that liability for pay discrimination based on age, religion, national origin, race, sex, and disability will accrue each time an employee receives a discriminatory paycheck. There has not been a major federal equal pay statute since 2009, despite the persistence of an average gender wage gap of 85 cents per dollar in 2018, according to the Pew Research Center.³

In recent years Congress attempted unsuccessfully to pass the Paycheck Fairness Act,⁴ a comprehensive bill that, among other things, narrows employer defenses to sex-based wage discrimination and creates a nationwide ban on using salary history to justify pay decisions. However, in light of recent social movements highlighting wage inequality and high-profile pay discrimination lawsuits, it appears that federal inactivity on equal pay is becoming untenable. Into this void step individual states and localities, which have come up with novel, creative approaches to closing the wage gap. These initiatives include employer equal pay “safe harbors,” local and statewide salary history bans, and pay data reporting.

An equal pay “safe harbor” is a legislatively backed incentive for employers to conduct “equal pay audits,” or self-evaluations, of their own compensation structures and make salary adjustments based on their findings. (Employers cannot reduce pay to equalize wage disparities,⁵ so these adjustments will be pay bumps). The benefit to employers is that they can avail themselves of an affirmative defense, thereby avoiding some or all liability in state equal pay lawsuits. Massachusetts, Oregon, and Colorado have rolled out their own versions of equal pay safe harbors in recent years.⁶

Equal Pay Audit

To obtain the benefit of a safe harbor, an equal pay audit must generally 1) be completed within a certain time frame prior to the filing of an equal pay complaint or administrative charge, 2) be completed in good faith, 3) be reasonable in detail and scope in light of the size of the employer’s operations, and 4) be related to the protected class asserted by the plaintiff.⁷ With some variance, the employer must also demonstrate reasonable progress toward eliminating unlawful gender-based wage differences revealed by the audit.⁸ By incentivizing employers to

systematically review and adjust their pay practices, state governments have found a creative way to fill in the gaps left by federal legislative inactivity.

Salary History Bans

Salary history bans are another creative legislative approach to addressing persistent pay gaps. Salary history bans can take several forms but are generally aimed at preventing employers from capitalizing on the persistence of the wage gap in setting pay, thereby perpetuating the gap further.⁹ Salary history bans

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may prohibit employers from inquiring about an applicant’s prior history. They may also prohibit retaliation against employees who discuss their wages with their colleagues. Others may go further and make it impermissible for employers to base pay decisions on prior compensation. The website HRDive keeps a running list of the states and localities that have enacted salary history bans. As of October 31, 2019, the list includes 17 states (including California) and 19 localities (including San Francisco).¹⁰ Other states and localities may soon follow.

A third, novel approach to rectifying wage discrimination comes from across the pond. In April 2017, Great Britain began requiring certain employers with 250 or more employees to report and publish data on their institutions’ gender pay gaps (including bonuses).¹¹ This data is publicly available and searchable on a government website.¹² The pay data requirement can be thought of as an experiment in sunshine legislation—by obligating employers to publicize their compensation issues, industries will be pressured to align themselves with equal pay best practices.

New Jersey adapted this approach, requiring certain public contractors to submit an “equal pay report” to the government. Public contractors must report covered employees’ wages by pay bands that are disaggregated by sex, race, exempt status, and ethnicity.¹³

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In California, lawmakers proposed, but were unsuccessful in passing, a pay data reporting obligation similar to that required by the U.S. Equal Employment Opportunity Commission in the controversial EEO-1 “Component 2” report, which is currently being litigated.¹⁴ California Senate Bill 171 would have required employers with 100 or more employees to submit a pay data report with data points for compensation, race, ethnicity, sex, and job type.¹⁵ Depending on the future of the EEO-1 Component 2, California and other states may try again to enact a pay data reporting requirement.

While there are many contributors to the persistent wage gap, states and localities increasingly view themselves as part of the solution. Without significant federal legislative activity on equal pay, state and local lawmakers likely will continue to act with creative and novel initiatives to equalize wages. ■

¹ The Equal Pay Act of 1963, 29 U.S.C. §206(d) (1963) [hereinafter Equal Pay Act].

² The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §2000a, 123 Stat. 5 (2009).

³ Nikki Graf, et al., *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RESEARCH CENTER, Nov. 19, 2019, available at <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts>.

⁴ Paycheck Fairness Act, H.R. 7, 116th Cong. (2019-2020).

⁵ See Equal Pay Act, *supra* note 1, at §206(d)(1).

⁶ See, e.g., The Oregon Equal Pay Act of 2017, OR. REV. STAT. §§652.210 *et seq.* (2018).

⁷ *Id.* at §652.235.

⁸ See, e.g., An Act to Establish Pay Equity, MASS. GEN. LAWS ch. 149, §105A(d) (2016).

⁹ See, e.g., *Rizo v. Yovino*, 887 F. 3d 453, 456 (9th Cir. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 706 (2019).

¹⁰ HRDive, Salary history bans: A running list of states and localities that have outlawed pay history questions, (Nov. 19, 2019), <https://www.hrdive.com/news/salary-history-ban-states-list/516662> (last viewed Dec. 29, 2019).

¹¹ Francis Perraudin, *What is Gender Pay Gap Reporting, and What Does it Mean?*, THE GUARDIAN (Nov. 19, 2019), available at <https://www.theguardian.com/society/2019/feb/28/what-is-gender-pay-gap-reporting-and-what-does-it-mean>.

¹² GOV.UK, Search and compare gender pay gap data, <https://gender-pay-gap.service.gov.uk> (last viewed Dec. 29, 2019).

¹³ James M. McDonnell, *New Jersey Labor Department Revises Equal Pay Act Data Reporting Requirements*, JACKSON LEWIS (Nov. 20, 2019), <https://www.jacksonlewis.com/publication/new-jersey-labor-department-revises-equal-pay-act-data-reporting-requirements> (last viewed Dec. 29, 2019).

¹⁴ See *National Women’s Law Center v. Office of Management and Budget*, 358 F. Supp. 3d 66 (D. D.C., 2019).

¹⁵ Jackson Lewis P.C., *Like EEO-1 Component 2, California Pay Data Reporting Stalls*, NAT’L LAW REV. (Sept. 23, 2019), <https://www.natlawreview.com/article/eo-1-component-2-california-pay-data-reporting-stalls>.