Pay Equity Legislation

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Summary

The term "pay equity" originates from the fact that women as a group are paid less than men. In recent years, for example, women with a strong commitment to the workforce earned about 77 to 80 cents for every dollar earned by men. As women's earnings as a percentage of men's earnings have narrowed by less than 20 percentage points over the past 40-plus years, some members of the public policy community have argued that current anti-discrimination laws should be strengthened and that additional measures should be enacted. Others, in contrast, believe that further government intervention is unnecessary because the gender wage gap will narrow on its own as women's labor market qualifications continue to more closely resemble those of men.

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. 1519/S. 3220) and the Fair Pay Act (H.R. 1493/S. 788). Meanwhile, in *Wal-Mart Stores v. Dukes*, the Supreme Court recently 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,[1] mandating an "equal pay for equal work" standard, and addressed it again the following year in Title VII of the 1964 Civil Rights Act.[2] Collection of compensation data and elimination of male/female pay disparities are also integral to Labor Department enforcement of Executive Order 11246, which mandates nondiscrimination and affirmative action by federal contractors. During the 1980s, some members of the public policy community sought to advance the earnings of women relative to men by pressing a "comparable worth" theory before state legislatures and in federal court litigation. 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 showing the trend in the male-female wage gap and by examining the explanations that have been offered for its enduring presence. 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.

The Gender Wage Gap

Historical and Current Trends

Disparities between the pay of male and female workers are well-established, though the magnitude of the difference has decreased over time. In 1960, the median earnings for females employed full-time, year-round (i.e., 50-52 weeks per year and at least 35 hours per week) were 60.7% of males' median earnings. By 2010, the median earnings for female workers employed full-time year-round were 77.4% of the earnings of male workers with the same level of labor force attachment.[3]

Figure 1 charts the ratio of median female earnings to median male earnings since 1960. While there is a clear long-term narrowing of the wage gap, the rate of change has varied. Between 1960 and 1980, the gap was fairly consistent, with female earnings varying between 56.6% and 60.7% of male earnings. Throughout the 1980s, the gap narrowed relatively quickly, and by 1990, female earnings were almost 72% of male earnings. Since then, the gap has narrowed at a slower rate, and since 2004, female earnings have been between 76.6% and 77.4% of male earnings.

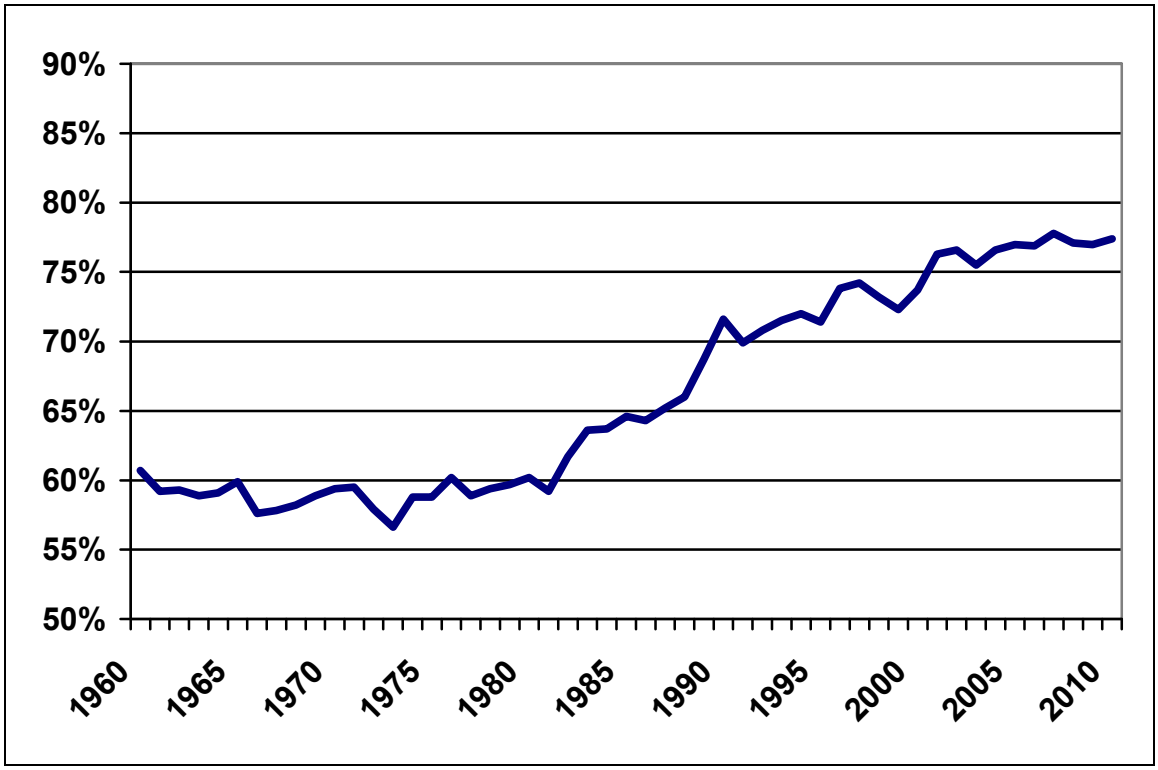
[1] 29 U.S.C. §206(d).

[2] 42 U.S.C. §§2000e et seq.

[3] All data in this section are from *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, United States Census Bureau, September 2011, Table A-5, http://www.census.gov/prod/2011pubs/p60-239.pdf.

Figure 1. Female Earnings as a Share of Male Earnings, 1960-2010

Median earnings, full-time year-round workers



Source: Graph constructed by CRS using data from the United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, September 2011, Table A-5. Full report available at http://www.census.gov/prod/2011pubs/p60-239.pdf.

Note: Data include all workers age 15 and over.

Further examination of Census data from 2010 show that male-female earnings disparities persist even after controlling for common predictors of personal earnings. For example, the median earnings for female workers with a bachelor's degree and employed full-time year-round were 72.4% of those of male workers in the same category. Among full-time year-round workers in professional and related occupations, the median earnings for female workers were 73.1% of those of male workers.[4] Female workers also earn less than male workers in the same age range, though the differences tend to be narrower among younger workers. Among full-time year-round workers between the ages of 15 and 24, females' earnings were 89.0% of males'. Among workers age 45 to 64, female workers earned about 73.4% of what males did. While some interpret these data as evidence of gender-based discrimination, it is important to note that they do not account for all characteristics that can legitimately affect earnings such as college major or uninterrupted years of employment.

[4] Ibid. Table A-6. Earnings by educational attainment are limited to workers 25 years of age and over. Earnings by industry include all workers age 15 and over.

Explanations of and Remedies for the Gender Pay Differential

Two primary schools of thought have developed to explain the persistence of the wage gap. The human capital explanation has a supply-side focus—that is, it looks at the personal characteristics of working women and men. The occupational sex segregation explanation has a demand-side focus—that is, it looks at the characteristics of the jobs in which women and men typically work.

The human capital explanation posits that there are fundamental differences in the skill sets of male and female workers, and that these differences in human capital explain the wage gap. Proponents of this perspective suggest that as male and female workers' human capital characteristics continue to converge, the wage gap will be eliminated. They thus believe that no government intervention is warranted to achieve pay equity beyond current anti-discrimination measures.

The sex segregation explanation recognizes that men and women cluster in different occupations, and that the jobs in which women concentrate tend to have lower wages. Proponents of the sex segregation explanation suggest that jobs in which female workers cluster are paid relatively low wages not because they are less demanding than higher-paid jobs, but because they are predominantly held by women.

Supporters of the sex segregation explanation often support government action beyond enforcement of existing anti-discrimination laws. They support, for instance, increased dissemination of information and provision of training in high-paying jobs in which women are underrepresented.[5] Advocates have also suggested that pay within firms should be set by the "comparable worth" principle. Under this premise, jobs within a firm are evaluated and pay is set by skills, responsibilities, and working conditions. Comparable worth proponents suggest that setting pay in this way will raise the pay in female-dominated occupations and close the wage gap.[6]

The human capital explanation and occupational sex segregation explanations are not mutually exclusive. Indeed, some researchers have used a combination of the explanations to explain a considerable portion of the wage gap.[7] There is no widely accepted methodology, however, that explains the entirety of the wage gap, leaving ambiguity as to what role, if any, employer bias may play in the wage gap.

[5] The Women in Apprenticeship and Nontraditional Occupations Act (WANTO, P.L. 102-530) created one such program.

[6] See CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, by Linda Levine, for information on the potential labor market effects of relying upon job evaluation as a wage-setting mechanism to implement comparable worth.

[7] See CRS Report 98-278, *The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?*, by Linda Levine, for a review of empirical analyses of the male-female wage gap.

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."[8] 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."[9] 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.[10] An employer may not attempt to equalize wages to comply with the EPA by lowering the rate of pay for any employee.[11]

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.*,[12] 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.[13]

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.[14] 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

[8] 29 U.S.C. §206(d)(1).

[9] *Id.*

[10] E.g. EEOC v. Madison Community United School District, 818 F.2d 577 (7th Cir. 1987)("equal work" requires a substantial identity rather than an absolute identity).

[11] 29 U.S.C. §206(d)(1).

[12] 975 F.2d 1518 (11th Cir. 1992).

[13] 29 C.F.R. §1620.27(a).

[14] 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.

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.[15]

"Comparable Worth" Litigation

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. As previously mentioned, whole classes of jobs are undervalued according to comparable worth theory 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.

Although not a comparable worth case, *County of Washington v. Gunther* held that the EPA's equal work standard was not a restriction on Title VII relief for intentional sex-based discrimination in pay between dissimilar male and female jobs.[16] But the Supreme Court did not speak specifically to the Title VII standard of proof for wage discrimination, since in *Gunther* the county's intention was clearly demonstrated by its failure to redress underpayment of wages to female employees revealed by its own pay evaluation study. Outside of such "refusal to pay" cases, however, where no market surveys or pay evaluations were done, the courts have been reluctant to second-guess the wage rate dictated by the local labor market for dissimilar jobs. In a pair of decisions, the Ninth Circuit firmly rejected Title VII liability for a public employer's failure to pay equal wages to male and female employees allegedly performing comparable duties. That case, *AFSCME v. State of Washington*,[17] held that the state lawfully paid employees in predominantly male job classifications more than it paid employees in predominantly female classifications, even though a state-commissioned study concluded that the male and female classifications were "comparable." Reliance on market forces of supply and demand to set compensation for dissimilar male and female jobs was not *per se* illegal since "[n]either law nor logic deems the free market system a suspect enterprise." The state "may" have discretion to enact a comparable worth plan, the court held, but "Title VII does not obligate it to eliminate an economic inequality which it did not create."[18] Earlier, in *Spaulding v. University of Washington*,[19] the same court denied a comparable worth claim by members of the female nursing faculty of the University of Washington who alleged that they were underpaid by comparison to other faculty departments.[20]

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[15] 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.

[16] 452 U.S. 161 (1981).

[17] 770 F. 2d 1401 (9th Cir. 1985).

[18] *Id.* at 1407.

[19] 740 F. 2d 686 (9th Cir. 1984).

[20] 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).

The *Ledbetter* Case and Subsequent Legislation

Meanwhile, in 2007 the Supreme Court issued a decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[21] 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."[22] 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."[23] 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.[24] 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). 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.

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.*,[25] 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 make up only 33% of all management positions. The gender gap was even more striking when employment categories are further broken down; while the vast majority of Wal-Mart's cashiers are women, only a small fraction are 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.

[21] 550 U.S. 618 (2007).

[22] 42 U.S.C. §2000e-2(a)(1).

[23] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

[24] P.L. 111-2.

[25] 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.[26]

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."[27] 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.[28]

Wal-Mart appealed the district court's class action certification, and a three-judge panel of the appellate court upheld the class action certification,[29] as did a subsequent ruling by a divided panel of appellate judges sitting en banc.[30] In a 5-4 decision in *Wal-Mart v. Dukes*, however, the Supreme Court recently reversed the class certification ruling.[31]

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."[32]

According to the Court, the *Wal-Mart* 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."[33]

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[26] *Id.* at 155.

[27] *Id.* at 142.

[28] *Id.* at 166.

[29] Dukes v. Wal-Mart, 509 F.3d 1168 (9th Cir. 2007).

[30] Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010).

[31] 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.

[32] Fed. R. Civ. P. 23(a).

[33] Wal-Mart, 131 S. Ct. at 2554.

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.[34] 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 the end of the litigation. Plaintiffs may still pursue their claims as individuals, or perhaps as part of a smaller class. Indeed, some of the Wal-Mart plaintiffs have reportedly filed at least two new class action lawsuits against the company – one in California and one in Texas – but have limited their claims to stores located in a single state.[35]

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.[36] 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 plaintiff class under Title VII.

Prior to the Court's decision in *Wal-Mart*, 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, 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.[37] 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.[38]

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*.,[39] 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.[40] In the wake of the *Wal-Mart* decision, the *Ellis* plaintiffs are likely to have greater

[34] *Id.* at 2553-56.

[35] Patrick Danner, "Floresville Woman Added to Suit," *San Antonio Express-News*, January 21, 2012, p. 2C.

[36] Dukes, 222 F.R.D. at 149.

[37] Brooke A. Masters, "Wall Street Sex-Bias Case Settled; Morgan Stanley Agrees to Pay $54 Million," *Washington Post*, July 13, 2004, at E01.

[38] 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.

[39] 240 F.R.D. 627 (D. Cal. 2007).

[40] Ellis v. Costco Wholesale Corp., 657 F.3d 970 (9th Cir. 2011).

difficulty meeting the commonality requirements that are a prerequisite for receiving class certification.

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. 1519/S. 3220 in the 112th Congress)[41] 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. In the 111th Congress, the House of Representatives passed both the Ledbetter legislation and the Paycheck Fairness Act as a combined package. The Senate, however, did not combine the two bills when it passed the Ledbetter legislation, and the Paycheck Fairness Act subsequently failed to pass in a procedural vote.

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.[42] Compensatory damages are not authorized, and consequently, awards do not include sums for physical or mental distress, medical expenses, or other costs.[43] 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

[41] S. 3220 is identical to S. 797, which was introduced earlier in the 112th Congress.

[42] 29 U.S.C. §§216-17.

[43] 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).

data collection for better enforcement of the law. The measure would direct the Equal Employment Opportunity Commission (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. 1493/S. 788 in the 112th Congress), which has predecessors dating back to the 103rd 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,[44] 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, 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.

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

[44] See Fallon v. State of Illinois, 882 F.2d 1206 (7th Cir. 1989).

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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