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Renalia DuBose

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Compliance Requires Inspection: The Failure of Gender Equal Pay Efforts in the United States

by Renalia DuBose*

INTRODUCTION

On Friday, January 29, 2016, President Barack Obama expanded a previous executive order by requiring the Department of Labor to collect wage data based on gender, race, and ethnicity from contractors with at least 100 employees doing business with the federal government.¹ That previous executive order was the April 8, 2014 Executive Order 13665 entitled *Non-Retaliation for Disclosure of Compensation Information*² and was designed to amend the September 24, 1965 Executive Order 11246 entitled *Equal Employment Opportunity*³ by President Lyndon Johnson.⁴ Executive Order 13665 was issued to require transparency concerning compensation among private entities doing business with the federal government and to prohibit discrimination against employees working for these entities when they inquire about compensation information.⁵ President Obama expanded Executive Order 13665 to combat the wage gap between men and women. While the gap has narrowed slightly over the last two years, the median annual wage for a woman

* Assistant Professor of Law, Western Michigan University Thomas Cooley School of Law. University of Florida (B.S., 1978); University of South Florida (M.P.A., 1979); Nova Southeastern University (Ed. S., 1991); Florida Agricultural and Mechanical University (J.D., 2006).

1. Jim Puzanghera & Eval Halper, *Federal Officials to Collect Pay Data from Large Businesses*, TRIBUNE CONTENT AGENCY (Jan. 29, 2016), <http://tklist.us/2016/01/29/federal-officials-collect-pay-data-large-businesses/>.

2. Exec. Order No. 13665, 79 Fed. Reg. 20749 (Apr. 11, 2014).

3. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

4. Exec. Order No. 13665, 79 Fed. Reg. at 20749 (Apr. 11, 2014).

5. *Id.*

working full-time at the beginning of 2016 is 79% of that of a man who works full-time.⁶

The U.S. Chamber of Commerce has characterized the reporting requirements of the expanded Executive Order 13665 as being “too burdensome.”⁷ The Author of this Article believes the burdensome nature of the new reporting requirements should not be the focus of the gender wage gap issue; rather, the focus should center on past federal laws that should have remedied the wage gap. Further, the Author believes that laws designed to remedy the gender wage gap without rigorous inspection requirements produce minimal results.

Passed after the Civil War, the Fourteenth Amendment⁸ was to be a guarantee of rights to citizens of the United States, but not for women, as this Amendment was the first time the word “male” was inserted into the United States Constitution.⁹ The amendment states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States . . . to the whole number of male citizens twenty-one years of age in such State.¹⁰

In the post-Fourteenth Amendment United States, Americans struggled to understand the true meaning of the words “equal protection of the laws,” and that struggle became apparent during the second half of the twentieth century when Americans pressed their expectation that the federal government would protect its citizens from racial, ethnic, and gender discrimination.¹¹ In spite of the Equal Protection Clause of the

6. Puzanghera & Halper, *supra* note 1.

7. *Id.*

8. U.S. CONST. amend. XIV.

9. Roberta Francis, *The Equal Rights Amendment, Unfinished Business for the Constitution*, ERA TASK FORCE, <http://www.equalrightsamendment.org/history.htm> (last visited Sept. 11, 2016).

10. U.S. CONST. amend. XIV, §§ 1-2.

11. *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NATL ARCHIVES, <https://www.archives.gov/education/lessons/civil-rights-act/> (last visited Sept. 11, 2016).

Fourteenth Amendment, the road to significant federal legislation addressing gender pay inequality did not come for almost a century.¹² During the early decades of the twentieth century, women comprised less than 24% of the United States workforce; however, that number had increased to 37% of the civilian workforce by 1945 due to the shortage of male civilian workers caused by World War II.¹³ The dramatic effects of World War II cannot be overstated in that, between 1940 and 1945, the percentage of women in the workforce rose from 27% to 37%, and almost one-fourth of all married women worked outside the home.¹⁴

I. FEDERAL ATTEMPTS AT CLOSING THE GENDER WAGE GAP

A. *The Women's Equal Pay Act of 1945*

The first piece of national legislation proposed to address gender pay inequality was the Women's Equal Pay Act of 1945.¹⁵ In spite of the increase in women working outside the home during World War II, Congress was not ready to address the gender wage gap, as evidenced by the failure of the proposed legislation.¹⁶ Congress debated the idea of equal pay for equal work because it wanted to ensure employers did not reduce wages to the detriment of men upon their return to the civilian workforce after World War II, not in an effort to equalize wages to the benefit of women.¹⁷ This failed legislation contained the phrase "comparable work," meaning that wages were to be established based on the difficulty of the jobs rather than the gender of the worker. The War Labor Board supported the notion of equal pay for equal work as evidenced by their established policies of "equal pay . . . for women" and "comparable quality and quantity" of work for men and women.¹⁸ Nevertheless, the Women's Equal Pay Act of 1945 was never signed into law; federal and civilian policies allowed employers to replace female workers with male workers after World War II.¹⁹ After World War II, newspapers routinely published

12. *Equal Pay Act of 1963*, NAT'L PARK SERV., <http://www.nps.gov/subjects/civilrights/equal-pay-act-1963.htm> (last visited Sept. 11, 2016).

13. *Id.*

14. *The History of Women in the Labor Movement*, SERV. EMPS. INT'L UNION-UNITED HEALTH WORKERS WEST, <http://www.seiu-uhw.org/archives/20663> (last visited Sept. 11, 2016).

15. S. 1178, 79th Cong. (1945).

16. *The History of Women in the Labor Movement*, *supra* note 14.

17. NAT'L PARK SERV., *supra* note 12.

18. *Id.*

19. *Id.*

classified advertisements separately for men and women, even for identical jobs, and employers reclassified jobs offering lower pay for women for jobs identical to those for men, in spite of the Equal Protection Clause of the Fourteenth Amendment.²⁰

B. The Equal Pay Act of 1963

For almost two decades after the failure of the Women's Equal Pay Act of 1945, numerous attempts were made but failed to secure federal legislation to address the gender wage gap in the United States.²¹ Entities of national notoriety, such as the U.S. Chamber of Commerce and the National Retail Merchants Association, justified the lower wages paid to women with explanations including the claim that women were more expensive to employ due to higher absenteeism and higher turnover rates.²² Additionally, because two-thirds of the households in the United States had breadwinning husbands and stay-at-home wives in the 1950s, attitudes dictated that women's income was not necessary to sustain households.²³ In 1944, Esther Peterson, a wife, teacher, and mother of four children, became the Amalgamated Clothing Workers Union's first lobbyist in Washington, D.C., and she was assigned to newly-elected Representative John F. Kennedy.²⁴ During her tenure, she worked to raise the minimum wage from 40 cents to 75 cents and to increase the number of industries covered by the Fair Labor Standards Act (FLSA)²⁵ to ensure minimum wage and overtime compliance for workers. In 1961, President Kennedy appointed Peterson to head the Women's Bureau of the Department of Labor, where she established the President's Commission on the Status of Women.²⁶ The Commission's final report²⁷ became the driving force that led to the eventual passage of federal legislation to address the

20. *Id.*

21. *History of the Struggle for Fair Pay*, NAT'L COMM. ON PAY EQUITY, <http://www.paquequity.org/info-history.html> (last visited Sept. 11, 2016).

22. NAT'L PARK SERV., *supra* note 12.

23. Melissa Fugiero, *The Equal Pay Act of 1963*, ENCYC. BRITANNICA, <http://www.britannica.com/topic/Equal-Pay-Act> (last visited Sept. 11, 2016).

24. *Esther Peterson*, AFL-CIO, <http://www.aflcio.org/About/Our-History/Key-People-in-Labor-History/Esther-Peterson-1906-1997> (last visited Sept. 11, 2016).

25. Pub. L. No. 75-718, 52 Stat. 1060 (1938).

26. *Esther Peterson*, *supra* note 24.

27. U.S. DEP'T OF LABOR, AM. WOMEN, REPORT OF THE PRESIDENT'S COMM'N. ON THE STATUS OF WOMEN (1963), <https://www.dol.gov/wb/American%20Women%20Report.pdf>.

gender wage gap in the United States: the Equal Pay Act of 1963.²⁸ Peterson submitted the draft of the Equal Pay Act to Congress on behalf of President Kennedy in February 1963.²⁹

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.³⁰

Gaining approval of the Equal Pay Act was difficult, and the initial draft was greatly scrutinized. The initial draft described “comparable work,” but the term was later changed to “equal work,” meaning, “jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions.”³¹ In addition, the Equal Pay Act prohibited employers from reducing the wages of men when they were found to be in violation of the Act.³² Due to concerns within the business communities throughout the country, Congress decided to make the Equal Pay Act an amendment to the FSLA, rather than a separate bill, because businesses were more accustomed to the investigative procedures and defined penalties of the FSLA.³³ Executive, administrative, and professional employees are not covered by FSLA requirements; therefore, these three groups of employees did not enjoy the protection of the Equal Pay Act.³⁴ Later, however, the Educational Amendments of 1972³⁵ made the provisions of the Equal Pay Act applicable to executive, administrative,

28. Pub. L. No. 88-38, 77 Stat. 56 (1963).

29. NAT'L PARK SERV., *supra* note 12.

30. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d)(1) (2012)).

31. NAT'L PARK SERV., *supra* note 12.

32. 29 U.S.C. § 206(d)(1)(iv).

33. NAT'L PARK SERV., *supra* note 12.

34. *The Fair Labor Standards Act of 1938, as amended*, U.S. DEP'T OF LABOR (Mar. 2004), available at <http://www.dol.gov/whd/regs/statutes/fairlaborstandact.pdf>.

35. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

and professional employees.³⁶ President Kennedy described the Equal Pay Act as “a significant step forward” but conceded that “much remains to be done to achieve full equality of economic opportunity.”³⁷ On June 10, 1963, the day President Kennedy signed the Equal Pay Act, women earned 59 cents for every dollar earned by men in the United States.³⁸ On January 29, 2016, the day President Obama announced the expansion of Executive Order 13665 to require the Department of Labor to collect wage data based on gender, race, and ethnicity from contractors with at least 100 employees doing business with the federal government, women earned 79 cents for every dollar earned by men in the United States.³⁹

C. *The Civil Rights Act of 1964: Title VII*

The Civil Rights Act of 1964⁴⁰ was the next major federal legislation that was intended to address equal treatment of women in the workplace. While it was a flashpoint in over a century of struggles in the United States to end discrimination on numerous fronts, it was perceived as a significant victory for women.⁴¹ The 1960s was a critical time for the Civil Rights Movement, as events including the March on Washington and the bombings of Birmingham’s 16th Street Baptist Church received national television coverage.⁴² On July 11, 1963, President Kennedy stressed the need for a national civil rights bill in a nationally televised address, and he submitted such a bill to Congress during that year. President Kennedy’s assassination in November did not stall the effort throughout the nation, as President Lyndon Johnson vigorously moved the bill forward.⁴³ The Civil Rights Act of 1964 was signed into law on July 2, 1964.⁴⁴ This landmark legislation has numerous titles to address areas of discrimination, such as Title I – Voting Rights, Title II – Public

36. Education Amendments, § 3, 86 Stat. at 235.

37. *John F. Kennedy, XXXV President of the United States: 1961-1963, 233 – Remarks Upon Signing the Equal Pay Act*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsbl.edu/ws/?pid=9267> (last visited Sept. 11, 2016).

38. *National Equal Pay Enforcement Task Force*, WHITEHOUSE.GOV, https://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf (last visited Feb. 2, 2016).

39. Puzzaghera & Halper, *supra* note 1.

40. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

41. *Civil Rights*, LAW LIBRARY OF CONGRESS, <https://memory.loc.gov/ammem/awhhtml/awlaw3/civil.html> (last visited Sept. 11, 2016).

42. *Civil Rights Act of 1964*, NAT’L PARK SERV., <http://www.nps.gov/subjects/civilrights/1964-civil-rights-act.htm> (last visited Sept. 11, 2016).

43. *Id.*

44. *Id.*

Accommodations, and Title III – Education.⁴⁵ Title VII – Employment states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .⁴⁶

In the initial draft, Title VII did not include the word “sex,” and there was no prohibition against workplace discrimination based on gender. According to his critics, Representative Howard W. Smith, a conservative democrat from Virginia who opposed federal civil rights, inserted the term “sex” into the legislation hoping to defeat the Civil Rights Act.⁴⁷ Smith defended his action by claiming he supported women’s rights as evidenced by his association with organizations such as the National Women’s Party. Representative Martha W. Griffiths, a democrat from Michigan, led the fight to keep the word “sex” in Title VII.⁴⁸ Another feature of Title VII was the creation of the Equal Employment Opportunity Commission (EEOC), which was tasked with investigating violations of the new statute.⁴⁹ In 1979, the enforcement of the Equal Pay Act was shifted to the EEOC where it presently resides.⁵⁰

D. Ledbetter v. Goodyear Tire & Rubber Co.

Another major step in addressing the gender wage gap in the United States involved the United States Supreme Court case of *Ledbetter v. Goodyear Tire & Rubber Co.*⁵¹ As previously stated, the EEOC, instituted by Title VII of the Civil Rights Act of 1964, has been responsible for enforcement of the Equal Pay Act since 1979.⁵² Enforcement provisions of the EEOC require charges of employment discrimination to be filed with the EEOC within 180 days after the alleged discriminatory practice occurs.⁵³ This 180-day requirement also applies to discriminatory pay-setting practices, even if the employee was not aware of the discriminatory

45. 42 U.S.C. § 2000a (2012).

46. 42 U.S.C. § 2000e-2(a)(1) (2012).

47. *Teaching with Documents*, *supra* note 11.

48. *Id.*

49. 42 U.S.C. § 2000e-5 (2012).

50. Fugiero, *supra* note 23.

51. 550 U.S. 618 (2007).

52. Fugiero, *supra* note 23.

53. 42 U.S.C. § 2000e-5(e)(1) (2012).

act due to confidentiality of pay in private industries.⁵⁴ The 180-day limit may be extended to 300 days in jurisdictions with local or state laws prohibiting the particular form of discrimination.⁵⁵ Plaintiffs in Title VII actions are entitled to a maximum of two years of back pay if they are successful.⁵⁶ In *Ledbetter*, the plaintiff alleged that female supervisors were denied raises in a discriminatory manner as compared to male supervisors throughout her employment with Goodyear. At the trial level, Goodyear denied the allegation, but the court ruled against Goodyear. The United States Court of Appeals for the Eleventh Circuit reversed the decision, holding that the 180-day requirement caused her claim to be untimely; therefore, she was not entitled to the two years of back pay.⁵⁷ The Supreme Court affirmed the decision, holding that the 180-day statute of limitation barred her recovery.⁵⁸ On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009⁵⁹ into law as an amendment to Title VII of the Civil Rights Act of 1964 clarifying that the 180-day time limit restarts each time discriminatory compensation or another discriminatory practice occurs.⁶⁰

As previously mentioned, the Equal Pay Act of 1963 was the first significant federal legislation designed to address the gender wage gap in the United States.⁶¹ When the Equal Pay Act was passed, women earned 59 cents for every dollar earned by men.⁶² This Article outlines numerous attempts by Congress to address the gender wage gap in the United States for decades after passage of the Equal Pay Act; however, on the day President Obama announced the expansion of Executive Order 13665, January 29, 2016, the median annual wage for a woman working full-time at the beginning of 2016 was 79% of that of a man who works full-time.⁶³

54. MARK ROTHSTEIN ET AL., EMPLOYMENT LAW CASES AND MATERIALS 380 (5th ed. 2015).

55. *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm (last visited Mar. 21, 2016).

56. 42 U.S.C. § 2000e-5(g)(1) (2012).

57. *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, *supra* note 55.

58. *Id.*

59. Pub. L. No. 111-2, 123 Stat. 5 (2009).

60. *Id.*

61. *Id.*

62. *Fifty Years After the Equal Pay Act, Assessing the Past, Taking Stock of the Future*, NAT'L EQUAL PAY TASK FORCE (June 10, 2013), available at https://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_rport_june_10_2013.pdf.

63. Puzanghera & Halper, *supra* note 1.

E. The National Equal Pay Task Force

In 2010, President Obama initiated the National Equal Pay Task Force, comprised of experts from four federal agencies—the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Office of Personnel Management—in an effort “to crack down on violations of equal pay laws – so that women get equal pay for an equal day’s work.”⁶⁴ According to the Task Force’s 2013 report, *Fifty Years After the Equal Pay Act, Assessing the Past, Taking Stock of the Future*, a significant portion of the gender wage gap cannot be explained even when issues such as labor market experience of women and job characteristics of women are controlled.⁶⁵ The progress toward equal pay has been slow. In 1980, the gender wage gap was 60%; in 1990, the gap was 72%; in 2000, the gap was 74%.⁶⁶ Based on data provided by the Department of Labor’s Bureau of Labor Statistics, women took advantage of new educational opportunities during the post-Equal Pay Act era, but those educational gains did not result in a significant closing of the gender wage gap. In 1981, women earned 50% of all bachelor’s and master’s degrees in the United States.⁶⁷ In 2000, women earned 57% of all bachelor’s degrees and 58% of all master’s degrees.⁶⁸ In 2009, the number did not change for women earning bachelor’s degrees but increased for master’s degrees to 60%.⁶⁹ In 1980, women earned 25% of all professional degrees awarded to students who earned their first professional degree, and that number grew to 38% by 1990 and 45% by 2000.⁷⁰ For doctoral degrees, the numbers were 30% in 1980, 36% in 1990, and 44% in 2000.⁷¹ Although women have made advances in education, the wage gap persists even among highly-paid supervisory and management positions in the United States; in 2011, some of the largest wage gaps occurred in management occupations.⁷²

II. IS THE GENDER WAGE GAP REAL?

Notwithstanding the credibility of data regarding the gender wage gap provided by the Department of Labor, critics question whether the wage gap is a matter of perception or reality for numerous reasons. Critics

64. *Fifty Years After the Equal Pay Act*, *supra* note 62.

65. *Id.* at 6.

66. *Id.* at 17.

67. *Id.* at 14.

68. *Id.*

69. *Id.* at 20.

70. *Id.* at 14.

71. *Id.*

72. *Id.* at 7.

point out that the Department of Labor's Time Use Survey shows women who work full-time work 8.01 hours per day while similarly situated men work 8.75 hours per day, and people who work longer hours should be expected to earn more.⁷³ Additionally, gender differences in occupations are significant, but the proponents and opponents of the push to address gender pay inequality disagree regarding the causes of gender-based occupational segregation. Proponents claim discriminatory practices among employers, including refusal to hire females in male-dominated occupations, such as science, technology, engineering, and mathematics, result in lower pay for women.⁷⁴ On the other hand, opponents claim that women tend to choose professions that provide more comfortable working conditions, fewer risks, and regular work hours. These opponents argue men typically suffer more work-related injuries and deaths than women and are willing to expose themselves to unpleasant working conditions in order to earn higher wages.⁷⁵ Another critical area of discussion involves whether the pay of young, childless women in large cities should be included with other women, especially older women, when calculating the gender pay gap. This discussion involves issues such as when controlling for the fact that older women make less than older men due to past discrimination, and women make the choice to exit the workforce when they have children while men do not, the wage gap is disappearing in the United States.⁷⁶ News agencies throughout the United States are eager to report that young, childless women in 147 of the largest 150 cities earn more than men. Nevertheless, these same news agencies admit working women in the United States earn about 80% of what men earn.⁷⁷ Statistics from the Bureau of Labor Statistics for the fourth quarter of 2015 support this assertion.⁷⁸

In spite of the debates regarding this critical topic, the relevant question remains: Why is there a gender wage gap in the United States while

73. Carrie Lukas, *There Is No Male-Female Wage Gap*, WALL ST. J. (Apr. 12, 2011, 12:01 AM), available at <http://www.wsj.com/articles/SB10001424052748704415104576250672504707048>.

74. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 26.

75. Lukas, *supra* note 73.

76. Penelope Trunk, *A Salary Gap Between Men and Women? Oh, Please*, CBS MONEY WATCH (July 30, 2010, 12:25 AM), <http://www.cbsnews.com/news/a-salary-gap-between-men-and-women-oh-please/>.

77. Belinda Luscombe, *Workplace Salaries: At Last, Women on Top*, TIME MAG. ONLINE (Sept. 1, 2010), <http://content.time.com/time/business/article/0,8599,2015274,00.html>.

78. *Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2015*, U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS (Jan. 22, 2016), available at <http://www.bls.gov/news.release/pdf/wkyeng.pdf>.

legislation should have remedied the situation over half a century ago? The American Association of University Women (AAUW) has advocated for gender equity in education and the workplace for over 130 years, and utilized the *2008-09 Baccalaureate and Beyond Longitudinal Study* from the U. S. Department of Education's National Center for Education Statistics to examine the lives of students nationwide who received bachelor's degrees between July 1, 2007, and June 30, 2008, one year after graduation.⁷⁹ According to the AAUW report, *Graduating to a Pay Gap—The Earning of Women and Men One Year After College Graduation*, the answer to the relevant question is twofold in that when researchers control for differences in education and employment, discrimination and cultural gender norms create a gender gap between women and men, and the wage gap is approximately 7% one year after graduation from college. Education and employment differences between men and women do, in fact, account for a portion of the gender wage gap. Controlling for education majors and employment differences is critical in that men tend to major in areas such as engineering and computer science, while women tend to major in areas such as education and social sciences; the former produces higher-paying jobs while the latter produces lower-paying jobs.⁸⁰ Women's choices, such as college degree, employment, and hours worked, explain much of the gender wage gap; however, approximately one-third of the wage gap remains unexplained.⁸¹

Gender discrimination is still present in the workplace after over half a century since the passing of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, and this gender discrimination, leading to wage disparities, is evidenced by the number of claims filed with the EEOC and the highly publicized millions of dollars awarded to females in back pay.⁸² In 1997, the number of sex discrimination and Equal Pay Act charges filed with the EEOC was 25,862; in 2002, the number was 26,792; in 2008, the number was 29,326; in 2015, the number was 27,369.⁸³ Some of the numbers may be duplicated because individuals

79. Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap, The Earnings of Women and Men One Year After College Graduation*, AM. ASS'N UNIV. WOMEN 35 (Oct. 2012), available at <http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf>.

80. *Id.* at 1-2.

81. *Id.* at 5.

82. *Id.* at 2-3.

83. *Charge Statistics FY 1997 through FY 2015*, U.S. OFFICE OF EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 11, 2016).

often file charges in multiple categories of discrimination.⁸⁴ In 1984, General Motors Corporation and the United Auto Workers paid \$42.2 million to resolve an EEOC complaint alleging race and sex discrimination.⁸⁵ In 2004, Morgan Stanley paid \$54 million to resolve an EEOC complaint in conjunction with the U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP) alleging sex discrimination.⁸⁶ In 2002, Coca Cola paid \$4.1 million to resolve an EEOC/OFCCP complaint alleging race and sex discrimination that benefitted over 900 current and former female employees, many of whom were women in professional positions.⁸⁷ In 2004, Wachovia Corporation paid \$5.5 million to resolve an EEOC/OFCCP complaint to over 2,000 female workers who were underpaid.⁸⁸ In 2014, JPMorgan Chase paid \$1.4 million to resolve an EEOC complaint made by female mortgage brokers.⁸⁹ In 2013, Burger King paid \$2.5 million to settle EEOC claims of “egregious” sexual harassment of eighty-nine women.⁹⁰ In 2015, Moreno Farms paid \$17 million to settle EEOC claims of sexual harassment where female workers were subjected to forced sex, groping, and verbal abuse.⁹¹ Women who objected to the treatment were fired.⁹²

Cultural gender norms also contribute to the unexplained portion of the gender wage gap. According to the AAUW report, experimental evidence confirms biases against women in the workplace, and this is especially true in occupations where men have traditionally held the positions.⁹³ For example, male engineering majors are more likely to be working as engineers one year after graduation than are female engineering majors.⁹⁴ Among business majors, males earned just over

84. *Id.*

85. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 18.

86. *Id.* at 22.

87. *Id.* at 3.

88. *Id.* at 22.

89. Chris Isidore, *JPMorgan to Pay \$1.5 Million in Sex Discrimination Case*, CNN MONEY (Feb. 4, 2014, 12:00 PM), <http://merrickmediation.com/eec-settlements-announced-in-january/>.

90. *EEOC Verdicts and Settlements Announced in January*, MERRICK MEDIATION, <http://merrickmediation.com/mediation-notes/> (last visited Sept. 11, 2016).

91. *EEOC Wins Jury Verdict of over \$17 Million for Victims of Sexual Harassment and Retaliation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Sept. 10, 2015), <http://www1.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm?renderforprint=1>.

92. *Id.*

93. *Graduating to a Pay Gap*, *supra* note 79, at 3.

94. *Id.* at 2.

\$45,000 while females earned just over \$38,000 one year after graduation.⁹⁵ The numbers were \$38,634 compared to \$31,924 for social science majors and \$55,142 compared to \$48,493 for engineering or engineering technology majors.⁹⁶ These differences in salaries are often attributed to the cultural norms regarding expected behavior of women in the workplace. For example, there is a “motherhood penalty” stemming from biases against working women that begins during the earliest years of employment, whether or not they have children. This bias leads to perceptions of lowered commitment and lessened commitment to the workplace.⁹⁷

Additionally, women are expected to be “nice” in the workplace, and this cultural bias affects how women negotiate for their salary upon hire and how they negotiate for raises throughout their employment.⁹⁸ The effects of this cultural bias are exacerbated in the United States where almost half of all employees work in environments where discussion of salaries among employees is either discouraged or forbidden.⁹⁹ The cyberattack of Sony Pictures Entertainment revealed the depth of the wage gap even in Hollywood when confidential contracts with leading stars were leaked on December 3, 2014.¹⁰⁰ “I failed as a negotiator because I gave up early Are we socially conditioned to behave this way? . . . Could there still be a lingering habit of trying to express our opinions in a certain way that doesn’t ‘offend’ or ‘scare’ men[,]” stated Academy Award winning actress Jennifer Lawrence.¹⁰¹ Lawrence admits she did not press the negotiations in *American Hustle* because she did not want to appear to be “difficult” or “spoiled.”¹⁰² She was angry when she realized men did not have similar concerns when negotiating.¹⁰³ According to *Forbes Magazine*, Lawrence was the highest paid women in

95. *Id.* at 14.

96. *Id.* at 2, 13.

97. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 28.

98. *Graduating to a Pay Gap*, *supra* note 79, at 32.

99. *Id.* at 27.

100. David Robb, *Sony Hack: A Timeline*, DEADLINE.COM (Dec. 22, 2014, 1:25 PM), <http://deadline.com/2014/12/sony-hack-timeline-any-pascal-the-interview-north-korea-2013-25501/>.

101. Jennifer Lawrence, *Why Do I Make Less Than My Male Co-Stars?* LENNYLETTER.COM (Oct. 13, 2015), <http://www.lennyletter.com/work/a147/jennifer-lawrence-why-do-i-make-less-than-my-male-costars/>.

102. *Id.*

103. *Id.*

Hollywood earning \$52 million in 2015; Robert Downey, Jr. was the highest earning male at \$82 million.¹⁰⁴

III. STRATEGIES TO ADDRESS THE GENDER WAGE GAP

How do we as a society close the gender wage gap in the United States? Women must take an active role in the efforts to close the gender wage gap. First, women must research their intended occupations with an eye on the financial implications of their choices because those choices have financial implications for a lifetime.¹⁰⁵ Women tend to choose occupations based on whether they are helping others, while men choose occupations based on financial rewards and personal interests.¹⁰⁶ More women need to realize that high level health occupations, engineering, and computer science majors help people *and* earn high salaries.¹⁰⁷ Second, women must learn to research their professional worth in order to become more skilled at negotiating for higher salaries early in their careers. Accepting lower salaries early in an employee's professional life can have lifelong financial implications.¹⁰⁸

Next, policymakers have a role to play in closing the gender wage gap. When the National Equal Pay Task Force was announced during President Obama's January 27, 2010 State of the Union address, a follow-up press release from the White House explained, "The President is establishing a National Equal Pay Task Force. To make sure we uphold our nation's core commitment to equality of opportunity, the Obama Administration is implementing an Equal Pay initiative to improve compliance, public education, and enforcement of equal pay laws."¹⁰⁹ The Author of this Article believes compliance requires inspection, and pay secrecy inhibits the inspection necessary to close the gender wage gap in the United States. President Obama announced the expansion of Executive Order 13665 on January 29, 2016 in order for the Department of Labor to collect wage data based on gender, race, and ethnicity from contractors with at least 100 employees doing business with the federal government and to prohibit discrimination against employees working for these entities when they inquire about compensation information.¹¹⁰ The purpose of

104. Adam Howard, *Jennifer Lawrence: Why do I Make Less Than My Male Co-stars?* MSNBC (Oct. 13, 2015), <http://www.msnbc.com/msnbc/jennifer-lawrence-why-do-i-make-less-my-male-co-stars>.

105. *Graduating to a Pay Gap*, *supra* note 79, at 31.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 29.

110. Puzanghera & Halper, *supra* note 1.

this expansion of Executive Order 13665 is to provide wage information for the government and for workers to fight pay discrimination.¹¹¹

Based on an Institute for Women's Policy Research report, half of all workers surveyed—51% women and 47% men—report discussion of wage information is discouraged or prohibited or can lead to punishment. In spite of public records laws, 18% of women and 11% of men in public sector employment surveyed reported discussion of wage information is discouraged or prohibited. In the private sector, 62% of women and 60% of men reported wage and salary information is secret. Interestingly, single mothers (63%) more than any other group reported pay discussion is discouraged or prohibited in the workplace.¹¹² The AAUW suggests transparency regarding pay does not mean everyone needs to know everyone's pay; rather, making salary ranges available for specific jobs increases a sense of fairness and trust in the workplace.¹¹³ A recent Harris Poll conducted on behalf of the American Psychological Association examined the correlation between distrust in the workplace and job performance. According to the corresponding article, *Employee Distrust is Pervasive in the U.S. Workforce*, the gender pay gap may play a role in employee distrust in the workplace, and openness, honesty, transparency, and trust are necessary for a high-performing workplace.¹¹⁴

Next, policymakers must pass new laws designed to close the gender wage gap as early laws, such as the Equal Pay Act of 1963, were only initial steps toward gender pay equality.¹¹⁵ The Paycheck Fairness Act has been introduced in Congress numerous times since 2011 and was reintroduced in 2015.¹¹⁶ As introduced to the 114th Congress in 2015, the bill would amend the Equal Pay Act. As currently proposed, the Paycheck Fairness Act prohibits retaliation for inquiring about, discussing, or disclosing the wages of the employee or another employee in response to a complaint or charge, or in furtherance of a sex discrimination investigation, proceeding, hearing, or action, or an investigation conducted by the employer and amends the Civil Rights Act of 1964 to require the EEOC

111. *Fact Sheet, Notice of Proposed Rulemaking, Government Contractors, prohibitions Against Pay Secrecy Policies and Actions, Office of Contract Compliance Programs*, U.S. DEP'T OF LABOR, <http://www.dol.gov/ofccp/PayTransparencyFactSheet.html> (last visited Sept. 11, 2016).

112. *Pay Secrecy and Wage Discrimination*, INST. FOR WOMEN'S POL'Y RES. (Jan. 2014), <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/>.

113. *Graduating to a Pay Gap*, *supra* note 79, at 28.

114. *Employee Distrust is Pervasive in U.S. Workforce*, AM. PSYCHOLOGICAL ASS'N, <http://www.apa.org/news/press/releases/2014/04/employee-distrust.aspx> (last visited Sept. 11, 2016).

115. *John F. Kennedy*, *supra* note 37.

116. S. 84, 113th Cong. (2013-2014).

to issue regulations for collecting from employers compensation data and other employment-related data (including hiring, termination, and promotion data) disaggregated by the sex, race, and national origin of employees for use in the enforcement of federal laws prohibiting pay discrimination.¹¹⁷ The Paycheck Fairness Act addresses numerous aspects of the gender wage gap and closes many loopholes in existing laws.¹¹⁸ Two critical aspects of the Paycheck Fairness Act are the prohibition against employer retaliation for sharing salary information with coworkers and improving the collection of pay data by the EEOC.¹¹⁹ The Author of this Article believes these segments of the Act are critical because compliance with existing or new laws requires inspection of pay data if the gender wage gap is to be closed in the United States.

The progress toward gender pay equality has been slow; nevertheless, there has been steady progress since the Equal Pay Act was passed.¹²⁰ The Paycheck Fairness Act would be a major step toward closing the gender wage gap, but this major step has not received Congressional approval.¹²¹ While the expansion of Executive Order 13665 might be a small step toward gender pay equality, it is a step nonetheless.¹²² The Author of this Article believes collecting wage data from federal contractors is a step toward more inspection to ensure compliance with existing laws. Further, prohibiting discrimination against employees working for these entities when they inquire about compensation information helps to lift the veil of secrecy, which enhances the opportunities for employers to perpetuate the gender wage gap. If the gender wage gap is to be closed in the United States, employers must comply with existing and future gender wage discrimination laws. If the gender wage gap is to be closed in the United States, compliance requires inspection.

117. H.R. 1619, 114th Cong. (2015-2016).

118. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 34.

119. *How the Paycheck Fairness Act Will Strengthen the Equal Pay Act*, NAT'L WOMEN'S L. CTR. (May 2015), <http://nwlc.org/resources/how-paycheck-fairness-act-will-strengthen-equal-pay-act/>.

120. *Fifty Years After the Equal Pay Act*, *supra* note 62, at 17.

121. *Id.* at 34.

122. Non-Retaliation for Disclosure of Compensation Information, Exec. Order No. 13665, 79 Fed. Reg. 20749 (Apr. 11, 2014).