



SOME POSITIVE STRIDES TOWARD EQUAL PAY

Lawmakers move to reduce gender-based salary disparities

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April 28, 2009 is “Equal Pay Day.” The National Committee on Pay Equity (NCPE) established Equal Pay Day in 1996 to help raise public awareness of the ongoing disparity between men’s and women’s wages.

Equal Pay Day is always a Tuesday because that is typically the day on which women’s wages catch up with men’s wages – from the previous week.

The Equal Pay Act was passed in 1963, at a time when women earned approximately 59 cents to every dollar earned by men. In 2007, 44 years later, the American Association of University Women Educational Foundation published a study – “Behind the Pay Gap” – revealing that, despite the remarkable gains made in education in recent decades, women still earn only 80 percent of what men earn one year after college.

According to the AAUW study, women earn 69 percent of what men earn 10 years after college, even after taking in account variables like hours, occupation and parental status. The choice of major did not dictate the discrepancy. For example, female education majors earn 95 percent of what male educators earn one year after college. Similarly, female biologists earn 75 percent of what male biologists earn one year after

college. Additionally, research conducted by the National Association of Women Lawyer consistently shows that women lawyers, particularly those at the partnership levels, earn substantially less than their male counterparts.

The gap is worse for women who are not college graduates and for women of color.

We have seen some positive steps towards remedying wage disparities this year – the passage of the Lilly Ledbetter Fair Pay Act; the proposed Connecticut Equal Pay Act; the introduction of the Paycheck Fairness Act in the U.S. Senate in January. Yet, it may be a fair question to ask whether there is still a need for Equal Pay Day. The answer is, unfortunately, a resounding “yes.”

Untimely Claim

Consider Lilly Ledbetter’s case. Ledbetter worked as a plant supervisor at Good-year Tire and Rubber for 19 years. Just before taking early retirement, Ledbetter filed a sex discrimination charge with the EEOC alleging that she was paid less than her male counterparts.

Ledbetter struggled all the way to the U.S. Supreme Court (*Ledbetter v. Goodyear Tire & Rubber Co. Inc*) with the issue of whether her claim was time-barred because she



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could not establish that Good-year acted with discriminatory intent regarding pay decisions made within 180 days of her EEOC charge. The Supreme Court affirmed the Eleventh Circuit decision

that Ledbetter’s pay discrimination claim was untimely.

Justice Ruth Bader Ginsberg’s rousing dissent made many practical points about pay practices. She noted that pay disparities are often incremental and hard to detect; comparative pay information is often secret; nontraditional employees like Ledbetter are afraid to make waves; and pay disparities are really different for other adverse employment actions like promotions, transfers, and hiring and firing decisions because you can’t always tell when the adverse action occurs.

Ginsberg’s dissent rallied Congress to pass the Lilly Ledbetter Fair Pay Act, retroactive to May 28, 2007, the day before the Supreme Court decision. It was the first piece of legislation that President Barack Obama signed into law.

Under the act, an individual subjected to pay discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a charge:

- When a discriminatory pay decision or other discriminatory practice affecting pay is adopted.
- When the individual becomes subject to a discriminatory pay decision or other

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discriminatory practice affecting pay.

- When the individual's pay is affected by the application of a discriminatory pay decision or other discriminatory practice, including each time the individual receives pay that is based on such pay decision or other practice.

The act adopts the "paycheck rule," which restarts the time period for filing a pay discrimination charge with the EEOC with *every new paycheck*. It applies not only to raises, but also to promotions, transfers, and evaluations that could affect pay. The "paycheck rule" provides plaintiffs with an opportunity to bring pattern and practice cases that reach back in time beyond the two-year period for recovering lost wages, to when the initial discriminatory pay decisions were made. While these changes have been heralded by employee advocates, the

act has caused much consternation among employers.

However, the act did not give employees a blank check with regard to these claims. For example, the act limits any potential back pay to the two years preceding the filing of the charge. Additionally, there still are many challenges that employees continue to face in attempting to bring an equal pay claim.

Employer Justifications

For example, employers often justify pay disparities by citing a multitude of reasons such as differing education, work experience, or labor market. Additionally, employers often enact policies which prohibit employees from sharing pay information, allowing the perpetuation of pay discrimination through secrecy and fear of discipline, and in some cases threat of

legal action, under the guise of disclosure of confidential information. The pending Paycheck Fairness Act would prohibit such policies.

Of course, one positive step that employers can take towards helping women achieve true pay equity and at the same time avoid legal liability is to ensure that they create fair, consistent and objective processes for setting and reviewing pay decisions. This requires management training and oversight and a commitment to confronting subtle biases regarding the value of men's versus women's work.

For those employers who choose to continue past practices that permit disparities to persist, they do so at their own risk. The Ledbetter Act gives women an imperfect, yet potent tool by which to attain what has been thus far unattainable – equal pay for equal work. ■