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CAN MILLENNIALS DELIVER ON EQUAL PAY? WHY THE TIME IS FINALLY RIGHT FOR PAY TRANSPARENCY

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INTRODUCTION

With the renewed spotlight on civil rights sweeping our country, the time may finally be right for private-sector employers to dismantle gender-based pay inequity by abandoning the practice of pay secrecy and embracing meaningful pay transparency policies that align with the rapidly changing legal and social landscape. Implementing a strategy of pay transparency is consistent with a growing number of state laws that incentivize, or require, such policies.[1] And, in the present climate, it is conceivable that employer-mandated pay transparency policies could be advocated at the federal level to combat pay inequity as part of a wider policy debate about income inequality and the disproportionate economic effect that the coronavirus (hereinafter "COVID-19") pandemic is having on working women. Moreover, adopting pay equity as a corporate objective fits into a broader social movement whereby millennials are seeking to affiliate with organizations that practice corporate social responsibility.[2] Such policies will benefit not only women but other diverse groups who are experiencing the effects of a discriminatory pay gap.[3]

1. *See* Erin Mulvaney, *Pandemic, Racial Protests Driving New Wave of Pay Equity Bills*, BLOOMBERG L. (Feb. 16, 2021, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/pandemic-racial-protests-driving-new-wave-of-pay-equity-bills.

2. *See* Christopher J. Waples & Benjamin J. Brachle, *Recruiting Millennials: Exploring the Impact of CSR Involvement and Pay Signaling on Organizational Attractiveness*, 27 CORP. SOC. RESP. & ENV'T MGMT. 870, 876 (2020). Millennials are the generational cohort group born between approximately 1980 and the early 2000s. *Id.* at 871.

3. Mulvaney, *supra* note 1.

2020 marks the centennial of the Nineteenth Amendment's ratification to the Constitution, granting women the right to vote.[4] While women have made great strides towards political and social equality with men over the past century, gender wage disparity persists.[5] No one theory purports to account fully for the discrepancy.[6] Rather, a confluence of economic and sociological factors, including gender-based discrimination, is likely at work. Most notably, occupational segregation[7] and the impact of motherhood[8] are widely recognized as contributing to the persistent wage gap. Both of these factors, while complex and nuanced, are arguably entangled with some aspect of gender-based discrimination.[9] And, while there is no uniform consensus on the precise percentage that discrimination contributes to the gender pay gap, it is undisputed that discrimination plays a role.[10]

Not surprisingly, multiple legislative solutions have been proposed at both the state and federal levels to address the persistent problem of the gender wage gap.[11] At the federal level, the Equal Pay Act of 1963

4. U.S. CONST. amend. XIX; *Women's Right to Vote*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xix (last visited Mar. 22, 2021).

5. According to the US Census Bureau, women earned 81.6 cents to every dollar earned by men in 2018. *Social Media Graphic: Earnings Differences*, U.S. CENSUS BUREAU, https://www.census.gov/library/visualizations/2019/comm/social-earnings-differences.html (Sept. 10, 2019).

6. *See* Virginija Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, 7 J. BUS. ECON. & MGMT. 85, 85-90 (2006) (discussing various theoretical approaches to the gender pay gap).

7. Elise Gould, Jessica Schieder & Kathleen Geier, *What Is the Gender Pay Gap and Is It Real?*, ECON. POL'Y INST. 20-21 (Oct. 20, 2016), https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/ (observing that a gender-based wage gap exists both between and within occupations).

8. *See, e.g.*, Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359 (2008) (footnotes omitted) ("[M]others experience worse labor market outcomes than women without children. Perhaps most well established is the motherhood wage penalty: mothers earn approximately [five percent] less per child than other workers, over and above any gender wage penalty. The penalty persists even after statistically controlling for education, work experience, race, whether an individual works full- or part-time, and a broad range of other human capital and occupational variables.").

9. *See* NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 24-28 (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.

10. *See* Gould et al., *supra* note 7, *passim*.

11. *See* Erin M. Connell & Kathryn G. Mantoan, *Mind the Gap: Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data*, 33 A.B.A. J. LAB. & EMP. L. 1, 20-23 (2017). According to Connell and Mantoan, gender pay gap may be defined as "the ratio between compensation paid to male and female employees. . . ." *Id.* at 23. Connell and Mantoan distinguish between a gender pay gap and a pay equity gap, which compares "earnings of men and women after controlling for a robust set of variables." *Id.* at 24-26.

(hereinafter "EPA"), which amended the Fair Labor Standards Act to prohibit unequal pay based on gender, was the first legislative attempt to address the issue.[12] As the wage gap has persisted over the decades, other legislative fixes have been proposed at the federal level, such as the Paycheck Fairness Act, which passed the House of Representatives in 2019, but has stalled in the Senate.[13] Perhaps more encouragingly, in recent years many states have successfully implemented laws aimed at reducing the gender wage gap.[14] Specifically, an increasing number of states are adopting provisions requiring salary history bans, mandatory disclosure of salary ranges in certain circumstances, prohibitions against barring employees from discussing pay in the workplace, and safe harbor provisions for those employers who conduct internal wage audits in an attempt to proactively counter wage disparity.[15] Of these laws, the predominant state legislative response has come in the form of salary history bans.[16] Yet such bans are subject to legal challenge as violating employers' First Amendment right to ask employees about prior salaries in order to make informed pay decisions, leaving circuit courts to decide the fate of these provisions.[17] Moreover, while salary history bans are well-intentioned, they do not necessarily ensure against blatant pay discrimination.[18] Whether an employer is unaware of past salaries of

12. 29 U.S.C. § 206(d); *Equal Pay Act of 1963*, NAT'L PARK SERV., https://www.nps.gov/articles/equal-pay-act.htm (Apr. 1, 2016) ("The Equal Pay Act . . . was one of the first federal anti-discrimination laws that addressed wage differences based on gender.").

13. Paycheck Fairness Act, H.R. 7, 116th Cong. (2019); *Actions Overview H.R.7 – 116th Congress (2019-2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7/actions (last visited Mar. 23, 2021).

14. *See, e.g.*, *Salary History Bans*, HR DIVE (Aug. 7, 2020), https://www.hrdive.com/news/salary-history-ban-states-list/516662/ (Aug. 7, 2020) (reporting on state salary bans); *Pay Equity and State-by-State Laws*, PAYCOR, https://www.paycor.com/resource-center/pay-equity-and-state-by-state-laws (Dec. 4, 2020) (reporting on pay equity laws by state). As of August 7, 2020, 19 states and 21 local governments had passed some variation of salary history bans. *Salary History Bans.*

15. *See* discussion *infra* Part I.

16. *See* sources cited *supra* note 14.

17. The first and only challenge thus far to a pay history ban was filed against the City of Philadelphia shortly after its passage. *See* Chamber of Com. for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 773 (E.D. Pa. 2018), *aff'd in part, vacated in part*, 949 F.3d 116 (3d Cir. 2020). After several years of litigation and an unsuccessful challenge in the Third Circuit, the Chamber declined to seek certiorari to the United States Supreme Court, opting instead to work collaboratively with the city on implementation of this new law. Anna Orso, *Starting Sept. 1, Philly Employers Can No Longer Ask Job Applicants Their Salary History*, PHILA. INQUIRER (Aug. 7, 2020), https://www.inquirer.com/news/philadelphia/philadelphia-to-enforce-salary-history-ban-september-20200806.html.

18. *See* Jeffrey A. Mello, *Why the Equal Pay Act and Laws Which Prohibit Salary Inquiries of Job Applicants Can Not Adequately Address Gender-Based Pay Inequity*, SAGE OPEN, July-Sept. 2019, at 1, 6 ("[I]nitial research is showing that the outcomes of salary inquiry bans may be the opposite of that intended by the proponents of the bans.").

equally qualified male or female candidates for a certain position does not necessarily prohibit the employer from offering less to the female candidate.[19] In this context, salary history bans are perhaps the least effective provisions of current state equal pay laws; yet, they have grabbed far more headlines than either the mandatory disclosure or safe harbor laws.[20] Ironically, it is precisely these latter remedies, grounded in notions of workplace pay transparency, that may make an actual difference in closing the wage gap.[21] As discussed more thoroughly below, such policies are supported by solid research indicating the value of pay transparency as a real fix for the problem of gender pay disparity.[22]

In the midst of this growing trend towards adoption of state gender pay equity laws that incorporate elements of pay transparency, this article argues that employers should, at a minimum, move towards implementing workplace pay policies reflective of these state laws. Ideally, however, even more radical change is warranted to alter the status quo of gender pay disparity that is stubbornly embedded into compensation structures in the United States. Such change requires employers to move beyond the more modest pay transparency provisions found in some state laws to embrace pay transparency policies that allow open access to salary information for all employees in an organization.[23] While this approach would represent a radical departure from the intransigent cultural taboo against pay transparency, there is increasing evidence that society may be ready to accept that change. The proliferation of social media websites like Salary.com, Glassdoor.com and PayScale already allows prospective employees to gather salary information,[24] while social media outlets like

19. *See id.* ("Employers react negatively when women refuse to disclose their salary and then negotiate for higher pay and may also assume, accurately or inaccurately, that women who refuse to disclose were earning substandard wages and prepare their salary offer accordingly.").

20. *See id.* (discussing the potential counterproductive effects of salary history bans).

21. *See* Stephen Miller, *Transparency Shrinks Gender Pay Gap*, SHRM (Jan. 31, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/transparency-shrinks-gender-pay-gap.aspx ("The pay gap between men and women disappears for most jobs when employers adopt transparent pay practices, new research shows.").

22. *See* Sarah Lyons, Note, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 387-89 (2013). According to Lyons, pay secrecy is a "bad" social norm that fosters pay disparity by interfering with goals of antidiscrimination laws. *Id.* Lyons argues that this norm must be replaced by a new social norm of pay transparency. *Id.*

23. *See id.*; Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, 54 INDUS. RELS. 648, 664 (2015) (noting that laws prohibiting pay secrecy may reduce the gender pay gap).

24. *See* SALARY.COM, https://www.salary.com/ (last visited Mar. 31, 2021); GLASSDOOR, https://www.glassdoor.com/Salaries/index.htm (last visited Mar. 31, 2021); *Salary for Skill: Search*, PAYSCALE, https://www.payscale.com/research/US/Skill=Search/Salary (Mar. 7, 2021).

Facebook, Twitter and Instagram allow for further sharing of salary information among social groups,[25] especially millennials.[26] Moreover, a larger societal trend championed by younger generations is demanding action by corporations and governments to create a more equitable and just society in the workplace and beyond. In fact, there is mounting evidence that companies engaging in corporate social responsibility can attract millennials easier than companies that do not so engage.[27] Adding to these forces are early signs that COVID-19, which is wreaking havoc in the United States, is disproportionately impacting women, as many working mothers have been forced to bear the brunt of the disruption to schools and the childcare industry.[28] Some economists and labor rights advocates are concerned that the choices women are making to address this new reality, which include taking time off or resigning from their positions, pose a genuine threat to hard-earned economic gains won over a decade.[29] As one expert has warned, COVID-19 "could have a devastating economic impact on families, as well as women's long-term earnings and career advancement."[30] In other words, COVID-19 may well exacerbate the already existing wage gap, making the need to combat gender-based wage inequity all the more urgent.[31] Accordingly, this article argues that the time is right, both legally *and* socially, for private-sector employers to denounce the taboo of pay secrecy and to embrace meaningful pay transparency policies that align with the rapidly changing legal and societal landscape.

Part I of this article examines past and current legislative attempts to address the equal pay problem at both the federal and state levels.[32] Part

25. *See* Jessica Bennett, *I'll Share My Salary Information if You Share Yours*, N.Y. TIMES, https://www.nytimes.com/2020/01/09/style/women-salary-transparency.html (July 13, 2020).

26. *See* Waples & Brachle, *supra* note 2, at 871.

27. *Id.* at 876. Waples and Brachle hypothesize, inter alia, that being notified of an organization's corporate social responsibility activity would increase the organization's attractiveness to millennials. *Id.* at 873. Indeed, the data bore that out, suggesting that "young job seekers are attracted to organizations that highlight efforts to promote social welfare, regardless of the organization's pay strategy." *Id.* at 876.

28. *See* Shelly Banjo, *A Decade's Worth of Progress for Working Women Evaporated Overnight*, BLOOMBERG BUSINESSWEEK (June 3, 2020, 5:00 AM), https://www.bloomberg.com/news/articles/2020-06-03/coronavirus-is-disproportionately-impacting-women; *see also* Stephen Miller, *Pandemic Could Worsen the Gender Pay Gap*, SHRM (Aug. 10, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/pandemic-could-worsen-gender-pay-gap.aspx (citing research indicating that women who return to work after a prolonged absence earn seven percent less on average than men in the same position).

29. *See* sources cited *supra* note 28.

30. *See* Banjo, *supra* note 28.

31. *See* sources cited *supra* note 28.

32. *See* discussion *infra* Part I.

II discusses the case for pay transparency policies in the workplace and societal trends towards transparency, examines effective elements of pay transparency policies and pay audits, and suggests how private employers can adopt such policies to proactively decrease workplace pay inequity claims.[33] This article concludes that employers should proactively embrace robust pay transparency policies both to reduce the incidence of workplace pay disparity and to align with the changing legal and social landscape.[34]

I. LEGISLATIVE EFFORTS TO CORRECT THE GENDER WAGE GAP

A. Federal Legislative Initiatives

1. The Equal Pay Act of 1963

On June 10, 1963, President John F. Kennedy signed the EPA into law, proclaiming this legislation to be a "first step" towards eradicating wage inequality between the sexes.[35] Despite its promise, it is widely acknowledged that the EPA has fallen short of achieving its goal of eliminating gender-based wage disparities altogether.[36] Indeed, the "gender wage gap has narrowed by less than one-half a penny per year in the United States since 1963."[37] In addition to the multiple cultural and societal forces at work that create headwinds for women,[38] the inherent limitations of the Act, constrained further by administrative regulations and judicial interpretations, have hampered the ability of the EPA to bring about the wage equality envisioned by its drafters.[39]

As presently written, the EPA is proscriptive; it bans sex-based wage differentials but does not impose any affirmative obligations on

33. *See* discussion *infra* Part II.

34. *See* discussion *infra* Conclusion.

35. Remarks of the President at Signing of the Equal Pay Act of 1963, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (June 10, 1963), https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-001. In his remarks, President Kennedy explicitly acknowledged that further actions were needed to "achieve full equality of economic opportunity" for women. *Id.* Consistent with this view, he urged Congress to expand childcare centers and provide other support, including tax breaks. *Id.*

36. *See, e.g.*, Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 608-609 (2018) (discussing the shortcomings of the EPA).

37. PHILA., PA., CODE § 9-1131(1)(b) (2017), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-195997#foot-31-1.

38. *See* Gould et al., *supra* note 7, *passim*.

39. *See* Bornstein, *supra* note 36, at 585-86, 608-09.

employers.[40] Specifically, the Act bans sex-based pay discrimination only where employees can prove that they are being paid wages that are lower than wages paid to employees of the opposite sex who are performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" in the same establishment.[41] Litigants have long found it difficult to meet the standard of "equal work" as construed by the courts under the Act, and their lawsuits have faltered as a result.[42] The pursuit of a successful challenge under the Act has been further limited by narrow administrative and judicial interpretations of what it means to work in the same "establishment" and under "similar working conditions."[43]

Another significant impediment to successful litigation under the Act is the affirmative defense that permits an employer to shield itself from liability for differential wages by proving that the disparity arises from "any other factor other than sex."[44] This defense has been interpreted broadly by courts and has allowed employers to sweep in justifications that may appear to be gender-neutral on their face, but are predicated on the very biases and stereotypes that aid in the perpetuation of the wage disparity.[45] Of particular relevance here, reliance on an applicant's prior salary history, either alone or in combination with other job-related factors, is one such justification that has been accepted by some courts as a legitimate reason for paying differential wages to men and women under the penumbra of "any other factor other than sex."[46]

The decision in February 2020 by the United States Court of Appeals for the Ninth Circuit in *Rizo v. Yovino*, however, explicitly rejects salary history as a legitimate justification for wage disparities, whether standing alone or raised in combination with other factors.[47] Sitting en banc, the court overruled its earlier 1982 decision in *Kouba v. Allstate Insurance Co.*, which permitted consideration of salary history as an affirmative defense to an EPA claim if the employer takes prior pay into account in

40. 29 U.S.C. § 206(d).

41. *Id.*

42. Bornstein, *supra* note 36, at 608-609.

43. *Id.* at 607.

44. 29 U.S.C. § 206(d)(1).

45. Bornstein, *supra* note 36, at 608-609.

46. Jennifer Safstrom, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other than Sex" in Equal Pay Act Litigation*, 31 YALE J.L. & FEMINISM 135, 141-50 (2019); Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 ALA. C.R. & C.L. L. REV. 1, 30 (2019); Bornstein, *supra* note 36, at 609.

47. Rizo v. Yovino, 950 F.3d 1217, 1232 (9th Cir. 2020).

combination with other factors and uses it to reasonably advance a business purpose.[48] In *Rizo*, the court unmasked salary history as a potential proxy for sex-based discrimination that can, if accepted as a legitimate basis for wage differentials, perpetuate the very wage inequality that the EPA is designed to dismantle.[49] The court expressly acknowledged:

> The statute places no limit on the factors an employer may consider in setting employees' wages, but it places on employers the burden of demonstrating that sex played no role in causing wage differentials. To meet this burden, employers may rely on any bona fide job-related factor other than sex. But relying on the heuristic of prior pay, rather than the actual factors associated with employees' current work, risks perpetuating historical sex discrimination.[50]

Prior wage history, therefore, "cannot serve as an affirmative defense to a prima facie showing of an EPA violation."[51] Whether, or to what extent, other circuit courts will follow the Ninth Circuit's unequivocal rejection of pay history as a legitimate explanation, in whole or in part, for wage differentials is yet to be determined.

Despite this welcome development, the EPA still suffers from the same impediments that plague the salary history bans proliferating in the states. To wit, prohibiting an employer from relying on an applicant's prior wage history does not itself prevent an employer from offering a lower salary to a woman even if the employer is unaware of her prior salary history. Equally important, women continue to be limited in their ability to assess the fairness of salary offers because pay secrecy still persists in many workplaces and is not prohibited under the EPA.[52]

2. Title VII of the Civil Rights Act of 1964

Following on the heels of the EPA, Congress sought to address a wider array of discriminatory conduct that was preventing individuals from participating equally in the broader social and economic fabric,

48. *Id.* at 1229.

49. *Id.* at 1219 ("The express purpose of the Act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate.").

50. *Id.* at 1232.

51. *Id.* at 1219-20.

52. *See* Bornstein, *supra* note 46, at 27-28.

including workplaces, through passage of the Civil Rights Act of 1964. Title VII of the Act is specifically aimed at eliminating myriad forms of discrimination in employment, including compensation discrimination on the basis of race, religion, color, sex, or national origin.[53] Title VII offers multiple pathways to assert a claim of wage discrimination predicated upon one or more of the following theories: an individual disparate treatment claim, a "pattern or practice" claim, or a disparate impact claim.[54] Like claims under the EPA, however, each of these Title VII claims has been met with obstacles. Absent "smoking gun" evidence of intentional pay discrimination, many courts that have considered claims based upon an individual disparate treatment theory have required litigants to provide evidence of a similarly-situated employee outside the litigant's protected class who is being paid more even though Title VII does not impose this requirement explicitly.[55] This "requirement" to provide comparator evidence is often difficult to satisfy and prevents women from moving their cases forward,[56] akin to the hurdle that the "equal work" requirement imposes under the EPA.[57] And, even if the employee clears the initial hurdle of proving a prima facie case, Title VII permits an employer to articulate a legitimate non-discriminatory reason for its differential wages that must then be proven to be a pretext for discrimination, placing a substantial burden on the employee.[58] Judicial interpretations of the employer's articulated defense align with interpretations of the "any other factor other than sex" defense under the EPA; thus, cases under Title VII often fare no better than claims under the EPA.[59] The two other theories that can be advanced to prove compensation discrimination, pattern or practice claims and disparate impact claims, have been similarly limited in their effectiveness because of broad judicial interpretations of defenses to these claims.[60]

Most notably, Title VII, like the EPA, does not impose any affirmative obligation on employers in the context of wage discrimination claims.[61] Nor does Title VII explicitly ban pay secrecy.[62] The real harm of pay secrecy and its ongoing impact on wage inequality was exposed in

53. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-5(e)(3)(A).
54. Bornstein, *supra* note 36, at 602-05.
55. *Id.* at 602-04.
56. *See id.* at 603.
57. *Id.* at 606-08.
58. *Id.* at 604.
59. *Id.* at 608-09.
60. *See id.* at 605-06.
61. *See id.* at 585-86.
62. *Id.* at 602-03.

2008, and lies at the heart of the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[63] The Court's *Ledbetter* decision provoked an impassioned dissent from Justice Ruth Bader Ginsburg and triggered the passage of the Lilly Ledbetter Fair Pay Act less than two years later.[64] An explanation of the case is warranted here.

In November 1998, Lilly Ledbetter retired from Goodyear Tire after a lengthy tenure that began in 1979 at its Gadsden, Alabama facility.[65] For the majority of her work life there, Ledbetter held the position of area manager, a position typically held by men.[66] At the time of her retirement, Ledbetter "received an anonymous note in her work mailbox detailing the salaries of three other men" in the same position who were being paid substantially more than her,[67] the only female area manager at that time. In March 1998, Ledbetter contacted the U.S. Equal Employment Opportunity Commission (hereinafter "EEOC"), alleging sex discrimination by Goodyear.[68] In July of that year, she filed a formal charge with the EEOC and in November, after taking early retirement, Ledbetter sued, claiming pay discrimination in violation of Title VII of the Civil Rights Act of 1964.[69] Although she began her employment in 1979 at the same rate of pay as her male co-workers, she was earning only $3,727 per month compared to fifteen men who earned from $4,286 per month (lowest paid man) to $5,236 per month (highest paid man) at the time of her retirement.[70] Ledbetter alleged that her present level of pay was discriminatorily low because of a series of impermissible gender-based decisions made earlier in her career with Goodyear, reflecting Goodyear's pervasive discrimination against female managers in general, and Ledbetter in particular.[71] Ledbetter had not filed any charges of discrimination with the EEOC related to these earlier pay decisions until her formal complaint in 1998.[72] The Court did not rule on whether this

63. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); *see also* Lyons, *supra* note 22, at 371.

64. Lyons, *supra* note 22, at 372-76.

65. *Ledbetter*, 550 U.S. at 621-22.

66. *Id.* at 643 (Ginsburg, J., dissenting).

67. *See* Heidi Brown, *Equal Payback for Lilly Ledbetter*, FORBES (Apr. 28, 2009, 2:45 PM), https://www.forbes.com/2009/04/28/equal-pay-discrimination-forbes-woman-leadership-wages.html#4ceff1f76065.

68. *Ledbetter*, 550 U.S. at 621-22.

69. *Id.*

70. *Id.* at 643 (Ginsburg, J., dissenting).

71. *Id.* at 659.

72. *Id.* at 621-22 (majority opinion).

pay discrepancy constituted unlawful discrimination, only whether her lawsuit had been timely filed within the requisite statute of limitations.[73]

Specifically, the Court was asked to decide whether Ledbetter had preserved her right to sue her employer for pay discrimination in violation of Title VII by filing a charge of discrimination with the EEOC within 180 days of the "unlawful employment practice."[74] What, then, was the "unlawful employment practice" that formed the basis of her claim? Ledbetter did not argue that the more recent denial of raises in 1997 and 1998, or the issuance of each paycheck thereafter, were motivated by a discriminatory purpose or intent; instead, she asserted that each of these acts perpetuated earlier discriminatory pay decisions that were outside the 180-day window.[75] Hence, she reasoned that her lawsuit was not time-barred because she had filed a charge of discrimination with the EEOC within 180 days of receipt of a paycheck that continued to reflect the earlier discriminatory decisions.[76] The Court rebuffed her argument, reasoning that the "current effects alone cannot breathe life into prior, uncharged discrimination."[77] In summary, the Court held that an employee must file a charge of discrimination with the EEOC within 180 days (or with the respective state agency within 300 days if the charge is also covered by a state or local anti-discrimination law) of a discriminatory pay decision, even if the employee was unaware of the employer's alleged unlawful employment practice at the time the decision was communicated to her.[78]

In a 5-4 split decision, the Court explicitly rejected the "paycheck accrual" argument that the time window for filing a claim starts anew each time the employer issues a paycheck that perpetuates the earlier discriminatory decision.[79] As a result, Ledbetter's lawsuit was barred, allowing prior acts of discrimination that impacted every salary decision thereafter, even if proved, to lie beyond the reach of the courts.[80] Ironically, pay secrecy (leading to Ledbetter's lack of knowledge of the discriminatory wage decisions) accounts for the very situation that Ledbetter found herself in—filing a charge of discrimination many years after a discriminatory wage decision had been made, the effects of which

73. *Id.* at 632.
74. *Id.* at 621-24.
75. *Id.* at 624, 628-29.
76. *Id.*
77. *Id.* at 628.
78. *Id.* at 623-624, 642-43.
79. *Id.* at 633-43.
80. *Id.* at 632, 642-43.

extended long into her tenure at Goodyear Tire. And, for that, she was punished by the Court. It is worth noting an additional irony here: Ledbetter, in fact, persuaded a jury that she had been the victim of sex-based wage discrimination perpetrated by Goodyear, and was awarded backpay, damages, and attorneys' fees,[81] all of which were stripped from her as a result of the Court's decision.

Justice Ginsburg, a longtime champion of workplace equality, authored an incisive dissenting opinion on behalf of herself and three other justices.[82] In a rare move, she read her dissent from the bench.[83] Justice Ginsburg rejected the Court's interpretation of the statute, admonishing the Court for failing to understand and account for the practical realities of the manner in which pay discrimination occurs, is detected, and uniquely benefits an employer, which is markedly different from other types of discrete (and more public) discriminatory decisions, such as denial of promotions, transfers, refusals to hire, and termination decisions.[84] As she pointedly observed, compensation is often not discussed in the workplace among employees either because of workplace norms or an explicit employer policy or practice that maintains the confidentiality of salary information, as was the case here.[85] Further, pay differentials that may be the result of discrimination may be further masked when an employee is not denied a raise outright, but receives a raise that is significantly lower than her male colleagues, which is unknown to her at the time.[86] Unlike most adverse employment decisions, a small pay discrepancy is often difficult to recognize until more than 180 days after the pay decision is made. Specifically, Justice Ginsburg observed that pay discrimination often occurs in small increments over large periods of time, and that pay information of fellow workers is typically confidential and unavailable for comparison.[87] And even when small discrepancies are known, they "may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves."[88] In addition, she explained the unique manner in which discriminatory pay decisions benefit an employer

81. *Id.* at 644 (Ginsburg, J., dissenting).

82. *Id.* at 643-61.

83. Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST (May 30, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html.

84. *Ledbetter*, 550 U.S. at 645, 649-51 (Ginsburg, J., dissenting).

85. *Id.* at 649-50.

86. *Id.*

87. *Id.* at 650.

88. *Id.* at 645.

by reducing an employer's costs each time the differential pay check is issued.[89] This is not the case with other decisions involving gender-based discrimination. For example, when a male employee is promoted over a female, the employer must still pay a higher wage to the person promoted; the employer is not thereby enriched in the same way as when it engages in gender-based pay discrimination.[90]

Moreover, Justice Ginsburg noted that the EEOC, the federal administrative agency charged with enforcing Title VII, had adopted an interpretation of the charge-filing requirement in a series of administrative decisions as well as in this case that was consistent with the interpretation offered by Ledbetter.[91] Justice Ginsburg admonished the majority for "dismiss[ing] the EEOC's considerable 'experience and informed judgment'" and failing to accord that judgment "at least respectful attention."[92] Like Ledbetter, Justice Ginsburg believed that the 180-day window should begin to run anew after each discriminatory paycheck is issued.[93] As long as a charge of discrimination is filed within 180 days of a discriminatory paycheck, the right to file suit is preserved. As noted above, however, Justice Ginsburg's interpretation of the statute did not prevail, and Ledbetter was not able to hold Goodyear accountable for the alleged pay discrimination that she experienced for over a decade.[94]

Sounding a call to action, Justice Ginsburg challenged Congress to amend Title VII to achieve Congress's desired purpose, stating as follows:

> This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. . . . Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.[95]

3. The Lilly Ledbetter Fair Pay Act

After the Supreme Court issued its decision in the *Ledbetter* case, a backlash resulted in the public arena. Responding to Justice Ginsburg's challenge, Congress passed the Lilly Ledbetter Fair Pay Act, which modified Title VII (as well as the Age Discrimination in Employment Act,

89. *Id.* at 650-51.
90. *Id.*
91. *Id.* at 655-56.
92. *Id.* at 656 n.6 (quoting Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986)).
93. *See id.* at 660-61.
94. *Id.* at 642-43 (majority opinion).
95. *Id.* at 661 (Ginsburg, J., dissenting) (citations omitted).

the Americans with Disabilities Act, and the Rehabilitation Act) to recognize an employee's right to file a lawsuit as long as a charge of discrimination is filed within 180 days of receipt of a discriminatory paycheck even if the present discrimination is predicated on a prior discriminatory pay decision that is now outside the 180 day window.[96] Title VII now explicitly provides that an "unlawful employment practice . . . includ[es] each time wages, benefits, or other compensation is paid, resulting in whole or in part from [a discriminatory] decision or other practice."[97]

Congress, in effect, trumped the Supreme Court's interpretation of the statute with the passage of this Act. But the Lilly Ledbetter Fair Pay Act does not go far enough. Although the Act remedies, to some degree, the effects of pay secrecy, it fails to recognize and eliminate pay secrecy itself for the role it plays in enabling and perpetuating sex-based wage disparities, a role which Justice Ginsburg spoke to so eloquently in her dissenting opinion.[98] As a result of the Act, employees who later become aware of wage discrimination will now be permitted to proceed with their lawsuit; however, wage disparities that exist in workplaces characterized by pay secrecy will remain unknown and, therefore, unremedied.[99]

4. Proposed Paycheck Fairness Act

The most recent and yet unsuccessful attempt to attack the gender pay gap was passed by the Unites States House of Representatives on March 27, 2019, but has since languished in the Senate.[100] The proposed Paycheck Fairness Act[101] is an ambitious piece of legislation that goes a long way towards remedying some of the impediments in the existing federal legislation that bans wage discrimination. Most significantly, the proposed bill specifically addresses some of the most often cited criticisms levied against the EPA by replacing the affirmative defense of "any other factor other than sex" with "a bona fide factor other than sex, such as education, training, or experience" and incrementally expanding the concept of what it means for employees to work in the "same

96. 42 U.S.C. § 2000e-5(e)(1); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

97. 42 U.S.C. § 2000e-5(e)(3)(A).

98. *See Ledbetter*, 550 U.S. at 643-61 (Ginsburg, J., dissenting).

99. *See* Lyons, *supra* note 22, at 364-65.

100. *See Actions Overview H.R.7 – 116th Congress (2019-2020)*, *supra* note 13.

101. H.R. 7, 116th Cong. (2019).

establishment."[102] The proposal also incorporates a salary history ban (by prohibiting employers from inquiring into or relying on an applicant's prior wages),[103] mirroring many of the salary history bans recently enacted by the states.[104] The bill tackles the issue of pay secrecy by broadening anti-retaliation protection for employees who discuss or inquire into wages and banning non-disclosure agreements as to wages.[105] The Act, however, fails to mandate universal pay transparency by private employers, which is needed to disrupt and delegitimize the underlying social norm that shrouds gender-based pay inequity in secrecy.[106] And, whereas the Act moves the concept of pay transparency forward by directing the EEOC to collect and annually publish aggregate pay data by sex, race and ethnicity according to industry and occupation, there is no requirement for publication of employer-specific data.[107] Although the Act implements changes that arguably would advance the fight towards wage equality, it still falls short because it does not mandate pay transparency or incentivize voluntary pay audits, two practices which have the potential to strike a significant blow to gender-based pay discrimination.[108]

5. Section 7 of the National Labor Relations Act

The efficacy of ending pay secrecy and actively promoting pay transparency to achieve wage equality can be gleaned from the rise in employee advocacy under the protection of section 7 of the National Labor Relations Act (hereinafter "NLRA").[109] Specifically, Section 7 of the NLRA provides an avenue for covered employees to address wage inequality by "engag[ing] in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[110] Included within the broad penumbra of concerted activities is the right to advocate for better wages without fear of retribution by an employer.[111] Reciprocally, an employer policy that bans employees from discussing

102. *Id.* § 3(a).
103. *Id.* § 3(b).
104. *See Salary History Bans*, *supra* note 14.
105. H.R. 7 § 3(b).
106. *See* Lyons, *supra* note 22, at 390-91.
107. H.R. 7 § 8.
108. H.R. 7.
109. 29 U.S.C. § 157.
110. *Id.*
111. *See id.* § 158(a)(1).

wages violates the Act.[112] During the past decade, this principle was affirmed by the National Labor Relations Board's Office of the General Counsel in 2011 and 2012, in a series of memoranda that implicated employer social media policies.[113] In those memoranda, the General Counsel discussed numerous cases in which employers were found to have violated the Act by adopting overly broad social media policies that could be interpreted by employees to ban wage discussions on these platforms.[114] Utilizing pay transparency as a means of advocating for better wages by sharing wage information on social media platforms, via spreadsheets or other forms of communication, would arguably be protected under Section 7.

Although this protected right to advocacy can be employed as a tool to bring about greater wage equality, the right is limited in scope. Section 7 covers only private sector non-supervisory employees, thereby excluding managerial level employees, agricultural laborers, and independent contractors.[115] As recent news reports have revealed, however, concerns about wage disparities span the spectrum from hourly workers, such as baristas, to salaried and professional workers, including museum employees and digital designers.[116]

Individuals and groups of employees have sought to advance their goal of better and fairer wages by collecting and publishing wage data from co-workers and colleagues employed in the same industry. For example, an art museum curator and her collaborators in Philadelphia created a crowdsourced spreadsheet that captures salaries of museum workers at all levels within the organization and across the globe as a means of dismantling "the culture of silence and fear" when it comes to discussing wages and working conditions.[117] Modeling this effort, baristas working at local coffee shops in Philadelphia created and shared a spreadsheet where workers could post their wages anonymously,

112. *See id.* §§ 157-158.

113. OFF. OF THE GEN. COUNS., NAT'L LAB. RELS. BD., OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011); OFF. OF THE GEN. COUNS., NAT'L LAB. RELS. BD., OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012); OFF. OF THE GEN. COUNS., NAT'L LAB. RELS. BD., OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012); *The NLRB and Social Media*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/the-nlrb-and-social-media (last visited March 10, 2021).

114. *See* sources cited *supra* note 113.

115. 29 U.S.C. § 152(3).

116. See *infra* notes 117-119 and accompanying text.

117. Juliana Feliciano Reyes, *A Philly Art Museum Curator Helped Start a Crowdsourced List of 2500+ Museum Salaries*, PHILA. INQUIRER (June 18, 2019), https://www.inquirer.com/news/art-museum-salaries-transparency-spreadsheet-20190618.html.

inspiring baristas across the country to do the same.[118] Digital designers also collected and published wage data from an anonymous census, hoping to create a database of information that employees can use to negotiate better salaries.[119] While these efforts at pay transparency may have produced some tangible results for some workers, such as those reported by the self-identified Art + Museum Transparency group, the success is largely dependent upon the courage of workers to self-publish this information while risking potential adverse action from their employers.[120]

More pointedly, if any of the employers of the individuals and groups mentioned above had sought to take action against these employees for sharing wage information, only those participants who are classified as non-supervisory employees would have been able to invoke the protection of Section 7 against employer reprisals.[121] The remaining employees would have been left searching for statutory protection under state laws, as discussed below.[122] Thus, the goal of pay equity through pay transparency for all workers across all industries cannot be achieved with only the protection afforded by Section 7 of the NLRA.

6. Federal Contractor Status and Pay Transparency Rules

Frustrated by the inaction of Congress, President Obama advanced the efforts to eradicate wage inequality by using his limited executive authority to promote pay transparency in the context of federal contracting. On April 8, 2014, President Obama issued Executive Order 13,665, which prohibits federal contractors from retaliating against "any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant."[123] If an employer is found to have violated the law, the consequences can be

118. Juliana Feliciano Reyes, *Philly Barista Spreadsheet Inspires Coffee Shop Wage Transparency Across the U.S.*, PHILA. INQUIRER (Oct. 9, 2019), https://www.inquirer.com/business/barista-wages-spreadsheet-coffee-shop-tips-transparency-20191009.html.

119. Juliana Feliciano Reyes, *300 Philadelphia Designers Disclose Their Pay for Tech Salary 'Census'*, PHILA. INQUIRER (Jan. 14, 2020), https://www.inquirer.com/jobs/tech-salary-negotiation-philadelphia-pay-raise-ux-designers-20200114.html.

120. *See* Lauren Scharf, *Demystifying Museum Compensation: A Look Inside the "Art + Museum Salary Transparency" Spreadsheet*, MUSEUM COUNCIL OF GREATER PHILA. (Oct. 24, 2019), https://www.philadelphiamuseumcouncil.com/news/art-museum-transparency.

121. *Id.*

122. *See* discussion *infra* Section I.B.

123. Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 11, 2014) (amending Exec. Order No. 11,246).

severe, including debarment and the loss of federal contracts.[124] Unlike the NLRA, Executive Order 13,665 protects all employees of a federal contractor from retaliation, excluding employees who misuse or otherwise abuse their access to confidential salary information.[125] However, only the employees of federal contractors are protected under the penumbra of this executive order. Consequently, the reach of Executive Order 13,665 is inherently limited. And, like the proposed Paycheck Fairness Act, the order does not mandate pay transparency by employers.[126]

B. State Legislative Efforts to Correct Gender Wage Disparity

While federal legislation addressing wage equity has been slow to change, state laws have taken the lead in expanding their individual pay equity laws by including new provisions that, for purposes of discussion here, generally fall into four categories: (1) salary history bans,[127] (2) wage transparency laws that prohibit employers from barring employees from discussing pay in the workplace or retaliating against them when they do, (3) mandatory wage disclosures that require employers to provide ranges of salaries for open positions to prospective employees either automatically or upon request, and (4) safe harbor provisions that protect employers against lawsuits if certain proactive measures are followed, such as pay audits.[128] Although the state legislative landscape is changing quickly in this area, as of the date of this article, the greatest number of laws falls in category one, with nineteen states and twenty-one local governments passing some form of salary history ban.[129] Approximately nineteen states have some sort of wage transparency laws prohibiting

124. *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,322-23 (Sept. 28, 1965).

125. *See* Exec. Order No. 13,665, 79 Fed. Reg. 20,749, 20,749.

126. *See id.* at 20,749-50.

127. *See infra* pp. 271-73 and note 133. *See also* Mello, *supra* note 18, at 3. Salary history has traditionally been used by employers in determining salary levels for prospective employees. This practice has led to gender-based salary differentials, which employers justify under the Equal Pay Act as a "factor other than sex." Applicants argue, however, that such inquiries perpetuate the differentials between the sexes. *See infra* pp. 271-73 and note 133.

128. For a running list of state and local salary history bans, see *Salary History Bans*, *supra* note 14, which is updated frequently to account for the ever-changing state legal landscape in this area. This website provides direct links to most of the state and local laws regarding equal pay. *Id.* Accordingly, the website is also a reference point to other state law equal pay provisions such as the safe harbor provisions and the non-retaliation provisions discussed below. *Id.*

129. *Id.*

employers from barring salary discussions in the workplace.[130] Four states—California, Colorado, Ohio and Washington—have passed provisions related to mandatory disclosure of wages, and just three states—Colorado, Massachusetts and Oregon—offer a safe harbor for employers who proactively conduct wage audits for pay equity.[131] These laws are examined more thoroughly below.

1. Salary History Bans

It is undisputed that salary history bans have been the predominant state legislative response to gender wage disparity to date, with at least nineteen statewide bans and numerous other local bans currently in place.[132] But are they effective in shrinking the gender pay gap? The research is mixed.[133] Generally, those who argue in favor of salary history bans (hereinafter "SHB") assert that prohibiting employers from asking about wages in prior employment breaks the cycle of historically lower salaries for women.[134] In one study, researchers examining the effects of California's salary history ban found that there was a causal impact of salary history bans on female earnings, with a ten percent decrease in the gender earnings gap, concluding that "the early effects of California's SHB shows that this policy has the intended result of reducing pay

130. Denise M. Visconti, *Keeping Compliant with Expanding State and Local Equal Pay Laws*, LITTLER (Aug. 19, 2019), https://www.littler.com/publication-press/publication/keeping-compliant-expanding-state-and-local-equal-pay-laws (providing a list of states with wage transparency protections).

131. *See Salary History Bans*, *supra* note 14.

132. *Id.*

133. *See* Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California's Salary History Ban* 16-17 (Nat'l Bureau Econ. Rsch., Working Paper No. 27054, 2020), https://www.nber.org/papers/w27054 (finding statewide female-male earnings ratios increased after salary history bans implemented); *but cf.* Mello, *supra* note 18, at 5-6 (finding that salary history bans actually have the *opposite* effect by increasing the gender wage gap). Mello states: "Salary inquiry refusals have produced actual results which are opposite of those intended. Mello, *supra* note 18, at 5-6. A 2017 survey found that women who were asked about and refused to disclose their salary histories were offered 1.8 [percent] less than women who did disclose. . . . At the same time, men who refused to disclose received offers which were 1.2 [percent] higher than men who did disclose." *Id.* at 5-6 (citation omitted). *See also* James Spindler & Jeff Meli, *Salary History Bans and Gender Discrimination* 6, 44-45 (U. TEX. SCH. L. L. & ECON. RSCH., Paper No. E587, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361431 (finding that in certain circumstances, bans increase the gender wage gap).

134. *See* Emina Causevic, Note, *Following the States' Lead: A Proposed Amendment to the Equal Pay Act*, 49 U. TOL. L. REV. 741, 751-52 (2018). Causevic argues that the federal Equal Pay Act should be amended to include provisions to mandate pay transparency, prohibit employer inquiry into salary history, and include a "comparable work" provision, replacing the "equal work" provision of the law. *Id.* at 759-60.

inequities experienced by female employees."[135] Thus, at least superficially, there are some arguments to be made for the efficacy of salary history bans.

Still other studies show that employers themselves, independent of governmental intervention, have begun to eliminate the salary history question to prospective female candidates.[136] Yet even with downward pressure on salary history, the gender wage gap persists, again raising the question: Does it work? Such a ban would have done nothing to assist Lilly Ledbetter in her claim against her employer, only knowledge of her male counterparts' salaries could do that. But such knowledge was not only unavailable to Ms. Ledbetter, it was considered *confidential* under her employer's pay secrecy policies.[137]

Because salary history bans implicate speech, constitutional challenges can be expected based on First Amendment grounds. Indeed, the first challenge to a salary history ban was brought against the City of Philadelphia, one of the first jurisdictions in the country to pass such a law.[138] The city's ordinance specifically bans employers from inquiring into an applicant's prior pay history (hereinafter "Inquiry Provision") and relying upon that history to determine the salary for the position the applicant is seeking (hereinafter "Reliance Provision").[139] In a motion for a preliminary injunction, the Chamber of Commerce and other high-profile employers in the city argued that the restrictions on past salary inquiries and reliance on salary history violate their First Amendment free speech rights.[140] Both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit have weighed in on the issue, reaching different conclusions on the Inquiry Provision at this early stage in the litigation.

In lengthy opinions, both the district court and the Third Circuit concluded that the Reliance Provision raises no First Amendment concerns because no speech is targeted.[141] The courts differed, however, on the constitutionality of the Inquiry Provision. Although both courts

135. Drew Thomas McNichols, Essays in Labor Economics 91 (2019) (Ph.D. dissertation, University of Oregon) (ProQuest).

136. *See* Mello, *supra* note 18, at 5.

137. *See* Lyons, *supra* note 22, at 382.

138. *See* Chamber of Com. for Greater Phila. v. City of Philadelphia, 319 F. Supp. 3d 773 (E.D. Pa. 2018), *aff'd in part, vacated in part*, 949 F.3d 116 (3d Cir. 2020).

139. PHILA., PA., CODE § 9-1131 (2017), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-195897#JD_9-1113.

140. *See Chamber of Com. for Greater Phila.*, 319 F. Supp. 3d at 779.

141. *Id.* at 800-804; Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d at 134-36 (affirming district court's refusal to enjoin enforcement of the reliance provision).

held that the Inquiry Provision implicates commercial speech rights, the courts disagreed on the sufficiency of the evidence offered in support of the city's claim that a ban on salary history would advance the city's goal of closing the wage gap.[142] This disparate view of the evidence largely explains the courts' divergent conclusions. The district court found that the provision did not pass constitutional muster; by contrast, the Third Circuit concluded that the provision satisfied constitutional norms. Specifically, the Third Circuit rejected the district court's review of the city's evidence, noting that the lower court imposed "too high a burden on the [c]ity."[143] Instead, the Third Circuit adopted a more deferential view of the evidence, reasoning that the means chosen by the city to achieve its goal need not be proven with certainty, particularly here, where the city was proposing an "innovative solution" to an intractable problem.[144] Indeed, the court reasoned that the city "did offer substantial evidence in the form of testimony and metanalysis of relevant research to support the need for the Inquiry Provision," even though "reasonable minds can debate whether the [c]ity's evidence placed the need for, and potential effectiveness of, the Inquiry Provision beyond doubt."[145] Accordingly, the Third Circuit denied the motion for a preliminary injunction on both the Inquiry and Reliance Provisions while further action in this litigation is pending.[146] Given the constitutional rights at stake and the growing number of salary history bans, future litigation on the constitutionality of these laws is likely.

2. State Pay Transparency Laws

There are other, arguably more effective, laws in the battle for gender wage equity than salary history bans, and states and municipalities are quickly taking the lead in implementing some of them. As enumerated above, these laws are rooted in notions of pay transparency, and include provisions such as mandatory wage disclosures upon request by a job applicant, prohibitions on preventing employees from discussing wages in the workplace and retaliating against employees who do so, and safe harbor language protecting employers who proactively audit their workplaces for gender wage inequity.[147]

142. 949 F.3d at 136-37, 142-46, 148-49, 153-57.
143. *Id.* at 145-46.
144. *Id.* at 149.
145. *Id.* at 145.
146. *Id.* at 157.
147. *See supra* Section I.B.1.

States that have implemented one or more of these pay transparency laws did so in response to the theory that pay transparency increases gender pay equity. The research on the efficacy of pay transparency is well developed, with generally widespread agreement that pay transparency does reduce the gender wage gap.[148] As one researcher concluded, while the case for pay transparency may be complex, "it seems that the main thrust of greater salary transparency would be in the direction of greater fairness in the eyes of most employees and the public."[149] Unfortunately, pay *secrecy*, rather than pay *transparency*, has been the norm for many years, as open sharing of salary information is still considered taboo in the United States.[150] "Pay secrecy includes rules, policies, and practices that prohibit workers from discussing or sharing information about their earnings."[151] Thus, pay secrecy appears in the form of both institutionally enforced workplace policies, as well as social norms that reinforce the perceived impropriety of sharing wage information.[152] As a first step to erasing wage inequality, some states have recognized the harm that pay secrecy can have on female workers and have outlawed pay secrecy.[153] A 2015 study found that women who live in states outlawing pay secrecy have higher wages and lower gender wage gaps than women who do not live in such states, and that this result is especially so for women with college degrees.[154]

Pay transparency is premised on the fact that women cannot mount legal challenges for gender wage claims if they are uncertain about what their male counterparts are being paid.[155] Thus, in states such as Massachusetts, Hawaii, Illinois, Colorado, and Maryland, employers cannot prohibit employees from discussing or sharing salary information.

148. *See, e.g.*, Kim, *supra* note 23, at 661 (2015) (finding average wages for women increased four to five percent after laws banning pay secrecy enacted); *see also* Miller, *supra* note 21 (reviewing research showing that transparency can combat unconscious wage bias); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 796 (2014) (pointing to unionized environments for evidence of lower pay inequity where wage transparency is higher).

149. *See* Estlund, *supra* note 148, at 799. Estlund argues that the trend towards greater workplace transparency increases labor market decisions, and that greater transparency should extend to pay information as well. *Id.*

150. *See* Lyons, *supra* note 22, at 380-81. Lyons notes that in a society where discussing salary is considered socially rude, many legal challenges under either Title VII or the EPA are raised only after plaintiffs learn inadvertently about salary of male counterparts in the workplace. *Id.* at 381-82.

151. *See* Kim, *supra* note 23, at 649 (citations omitted).

152. *See* Lyons, *supra* note 22, at 382 (stating that social norms against salary discussion are sometimes reinforced by employer policies).

153. *See* Kim, *supra* note 23, at 653-54.

154. *See id.* at 664.

155. *See* Estlund, *supra* note 148, at 785.

Likewise, employers in these states cannot retaliate against those employees who do discuss their wages in the workplace.[156] Still other states like California and Ohio require employers to affirmatively disclose salary ranges upon request of a candidate, and/or to give pay information about a position as part of the hiring process.[157]

Currently, three states—Colorado, Massachusetts and Oregon—go beyond pay transparency and mandatory disclosure laws by adding safe harbor provisions that protect employers who proactively conduct pay audits within their organizations.[158]

For a closer look at how some of these provisions work, Colorado's sweeping equal pay statute serves as a helpful model, as it incorporates pay transparency provisions and prohibits the perpetuation of pay secrecy policies.[159] For example, Colorado's statute prohibits employers from the following:

> (a) Seeking the wage rate history of a prospective employee;
>
> (b) Discriminating or retaliating against a prospective employee for failing to disclose salary history;
>
> (c) Discharging, disciplining, discriminating against, coercing, intimidating, threatening or interfering with an employee who inquires about, discloses, compares or otherwise discusses the employee's wage rate;
>
> (d) Prohibiting an employee from disclosing the employee's wage rate as a condition of employment; and
>
> (e) Requiring an employee to sign a waiver or other document that prohibits the employee from disclosing wage information.[160]

In addition, the Colorado law includes a safe harbor provision for employers who can demonstrate that any statutory violation was in good faith by providing "evidence that within two years prior to the date of the commencement of a civil action . . . , the employer completed a thorough

156. *See Salary History Bans*, *supra* note 14.

157. *Id.*

158. *See* COLO. REV. STAT. § 8-5-104(1)(b) (2021); MASS. GEN. LAWS ch. 149, § 105A(d) (2018); OR. REV. STAT. § 652.235(1) (2020).

159. Equal Pay for Equal Work Act, ch. 247, 2019 Colo. Sess. Laws 2411 (codified as amended at COLO. REV. STAT. §§ 8-5-101 to -104, 8-5-201 to -203 (2021)).

160. COLO. REV. STAT. § 8-5-102(2).

and comprehensive pay audit of its workforce, with the specific goal of identifying and remedying unlawful pay disparities."[161]

Part 2 of Colorado's statute enacted "Transparency in Pay and Opportunities for Promotion and Advancement."[162] Under this part, employers are required to disclose hourly or salary compensation, or a range of such compensation, for each job opportunity.[163] It also requires employers to "keep records of job descriptions and wage rate history for each employee for the duration of the employment plus two years after the end of employment in order to determine if there is a pattern of wage discrepancy."[164]

While state legislation adopting some pay transparency provisions is certainly a good first step towards reducing the gender wage gap, will it affect real change? For example, even in states that have adopted mandatory pay disclosures, those laws do not require open access to salary information for all employees by gender. Rather, they require employers to disclose salary ranges upon request by the applicant.[165] This type of transparency is imperfect, as nothing prevents an employer from offering salaries at the lower end of the disclosed range to female applicants.[166] Moreover, the onus is on the applicant to ask affirmatively for information — something that an applicant competing for a job may be hesitant to do.[167] Similarly, laws that protect an employee's right to discuss salary may not necessarily result in an employee's exercise of that right if the employee perceives that such conduct goes against workplace convention.[168]

In summary, both past and current federal and state laws continue to address the issue of gender pay equity, but inequities persist.[169] Current legislative attempts to address the issue simply do not go far enough to affect lasting change.[170] As argued in Part III, below, that change will be hastened when private employers abandon notions of pay secrecy and embrace true pay transparency policies, premised on open access to salary

161. *Id.* § 8-5-104(1)(b)(II).

162. Equal Pay for Equal Work Act § 8, 2019 Colo. Sess. Laws at 2416.

163. § 8-5-201(2).

164. *Id.* § 8-5-202.

165. *See* sources cited *supra* note 14.

166. *See* Bornstein, *supra* note 36, at 595-97 (citing studies that show employers pay women less than men in most occupations).

167. *See* sources cited *supra* note 14; *see also* Lyons, *supra* note 22, at 385 ("[W]here so-called 'bad' social norms exist, any given individual may wish to diverge from that norm-prescribed behavior, but she may not be able to do [so] for fear of social sanction.").

168. Lyons, *supra* note 22, at 364-65, 380-84.

169. *Id.* at 363-64.

170. Bornstein, *supra* note 36, at 586.

information. The time is right for that approach, as it aligns with current social norms of cultural transparency generally and the quickly evolving landscape of state law in this area.

II. PAY TRANSPARENCY POLICIES IN THE WORKPLACE

A. The Case for Pay Transparency

Research across disciplines strongly supports the finding that pay transparency policies reduce the gender wage gap.[171] A recent study by PayScale[172] analyzed 1.6 million compensation survey responses from September 2017 to September 2019, and found that "overall results are definitive: transparent pay policies narrow the gender wage gap when all other compensable factors are accounted for and controlled, and completely closes across the majority of industries, occupations and job levels."[173] Given the strength of such findings, attention should focus on convincing employers to adopt such policies. Indeed, there are several arguments that employers should find persuasive.

First, as addressed in Part I, above, the state legal landscape is changing rapidly in the area of pay equity legislation, and many of the newest state laws are including provisions for pay transparency.[174] Although change in federal law has stymied at present, it is possible that the tidal wave of state laws in this area will eventually pressure federal lawmakers to adopt similar laws at the national level. Thus, from a legal compliance perspective, proactive adoption of pay transparency policies is forward thinking.[175]

Perhaps one of the most compelling arguments for adopting pay transparency policies is the widespread social pivot away from the non-inclusive, white male-dominated workplace typical of the twentieth century, towards a more diverse and equitable workplace of the twenty-first century. While workplaces in the mid-to-latter part of the twentieth

171. *See, e.g.*, Lyons, *supra* note 22, at 389-90; Estlund, *supra* note 148, at 786; Kim, *supra* note 23, at 664.

172. *See Does Pay Transparency Close the Gender Wage Gap? Pay Equity for Men and Women*, PAYSCALE 3, 15 [hereinafter "*PayScale Report*"], https://www.payscale.com/content/whitepaper/Pay-Transparency-Closing-Gender-Wage-Gap.pdf (last visited Mar. 29, 2021) (PayScale is a for-profit software company that provides extensive, data-driven compensation analysis and research for its clients, with open access to its compensation research). *See also About Us*, PAYSCALE, https://www.payscale.com/about (last visited Mar. 29, 2021).

173. *See PayScale Report*, *supra* note 172, at 3.

174. *See supra* Section I.B.2.

175. *See* Visconti, *supra* note 130.

century did attempt to increase equity, such attempts were mandated by policies such as affirmative action, and laws like Title VII of the Civil Rights of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[176] These laws imposed a compliance model of equity, but do they go far enough in changing the persistent workplace culture of inequity? Some social scientists argue that the difference now is that grassroots efforts, spearheaded by younger, socially conscious Americans demanding corporate social responsibility (hereinafter "CSR") on a host of issues, are placing enormous pressures on big business to address systemic workplace inequities.[177] These millenials want workplaces with purpose,[178] and they are more comfortable taking action to promote social change.[179] And it seems that at least some workplaces are taking notice of this trend. For example, Whole Foods Market has a pay transparency policy with the rationale that "[s]alary information for all—including the company's leadership—is available to all inquiring team members. Wage transparency helps promote inclusiveness and ensures our compensation system is fair."[180] Recent widespread protests around the world focusing on racial inequality may well have a spillover effect, as companies are increasingly pressured to face workplace injustice generally, thus potentially raising the concern over pay disparity to a major CSR issue.[181] Thus, in the current environment of heightened social justice activity, it has arguably never been a more strategic moment for corporations to adopt pay transparency

176. *See Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers (Nov. 21, 2009).

177. *See* John Izzo, *What Matters Most to Millennials? Millennials Want to Matter*, SUSTAINABLE BRANDS (Mar. 29, 2018, 12:00 AM), https://sustainablebrands.com/read/organizational-change/what-matters-most-to-millennials-millennials-want-to-matter.

178. For a thorough discussion of workplaces with purpose, *see* JOHN IZZO & JEFF VANDERWIELEN, THE PURPOSE REVOLUTION *passim* (Berrett-Koehler Publishers, Inc., 2018) (examining the workplace trend of embracing social good in response to demands from customers, employees and other stakeholders).

179. *See* Izzo, *supra* note 177 ("Another attribute of the millennial generation is they are actively engaged. . . . And not only do they have opinions, they take action. . . .").

180. Rachel Mucha, *Pay Transparency: A New Tool to Boost Employee Engagement*, HR MORNING (Feb. 15, 2019), https://www.hrmorning.com/articles/pay-transparency-a-new-tool-to-boost-employee-engagement/ (statement of Whole Foods Market explaining its policy rationale).

181. *See* Estlund, *supra* note 148, at 789 (footnote omitted) ("Public disclosure of accurate information on socially salient terms and conditions of employment can help to ensure that corporations follow through with these promises of social responsibility. But what does this have to do with information about salaries? That both depends on and may help to determine whether economic inequality and egregious pay disparities—currently a topic of generalized public concern and debate—can enter the pantheon of major CSR issues for which particular corporations (at least large 'branded' corporations) are pressured to take responsibility.").

in the name of gender equity. From a branding perspective, this is helpful in two ways: first, consumers are increasingly mindful of such CSR behavior, and second, employers who wish to attract and retain millennials will find such policies appealing to those workers.[182]

Another reason to adopt workplace pay transparency policies is that, in many instances, pay information is already being shared *via* internet websites such as Glassdoor and Pay-Scale, which track salary information for certain companies.[183] Moreover, thanks in large part to social media websites like Facebook and Twitter, there is evidence that discussing salary is no longer as taboo as it once was, especially among millennials and Gen Zers.[184] Such social media communication has promoted discussion of all aspects of life, making the sharing of salary information inevitable.[185] Under those circumstances, disclosing salary information within the context of the employer's overall compensation plan should help the employer retain control of the salary narrative.[186] To place that argument in economic terms, information is critical to the fair and efficient working of labor markets; as the cost of salary information decreases in an ever-transparent market, it becomes less beneficial for employers to adhere to pay secrecy.[187]

Still, employers may argue that pay transparency is bad for the bottom line, citing trade secrets and proprietary information as reasons to retain pay secrecy.[188] Cynthia Estlund, in her article "Extending the Case for Workplace Transparency to Information About Pay," argues that such

182. *See, e.g.*, Waples & Brachle, *supra* note 2, at 876 (finding that young job seekers are attracted to organizations that highlight CSR).

183. While pay information is not available for all workplaces, information on Glassdoor and PayScale allows employees to compare market rates and salary ranges for certain jobs. *See* GLASSDOOR, *supra* note 24; *Salary for Skill: Search*, *supra* note 24.

184. *See* Jessica Lutz, *Millennials Are Slowly Killing Salary Secrecy—And That's a Good Thing*, FORBES (Nov. 30, 2017, 8:30 AM), https://www.forbes.com/sites/jessicalutz/2017/11/30/millennials-are-slowly-killing-salary-secrecy-and-thats-a-good-thing/?sh=183bd64e6015. Lutz reports survey findings showing that sixty-three percent of millennials between the ages of eighteen and thirty-six have shared salaries with family, forty-eight percent have shared with friends, and thirty percent have shared with co-workers. *Id.* By contrast, only forty-one percent of baby boomers between the ages of fifty-three and seventy-one have shared their salary with family, twenty-one percent have shared with friends, and just eight percent have shared with co-workers. *Id.*

185. *See* Adewale Ajayi & Yewande Alli, *Managing Pay Transparency*, KPMG, https://assets.kpmg/content/dam/kpmg/ng/pdf/tax/Managing-Pay-Transparency.pdf (last visited Mar. 31, 2021).

186. *Id.* (noting that pay transparency breeds trust, improves teamwork, and alleviates gossip regarding pay policies).

187. *See* Estlund, *supra* note 148, at 787 ("[I]f labor markets are to work fairly and efficiently, information is critical.").

188. *Id.* at 792.

reasons are weak.[189] Even if pay secrecy may give the employer a competitive advantage by preventing competitors from "poaching" good employees through higher salary offers, the "employers' desire to avoid lawful labor market competition for their at-will employees ought not to count as a legitimate commercial interest in confidentiality. It should raise no bar against a public disclosure mandate that is intended in part to improve labor market competition and employees' bargaining power."[190]

Finally, research supports the notion that pay transparency has a positive organizational effect in increasing workplace trust,[191] as well as employee engagement, retention, and job satisfaction.[192] This leads to increased job productivity and profits.[193] In particular, pay decisions that are communicated as part of a broader pay program can improve employee morale.[194] According to Jingcong Zhao, a senior content marketing manager at PayScale, "[w]hen employees understand how pay decisions are made, they're more likely to feel confident they are fairly paid, which matters because we've learned the way people feel about their pay is closely linked to their level of engagement and satisfaction at work."[195] While this research seems to contradict conventional beliefs that knowing a co-worker's salary will depress morale, "perceptions of unfairness might be *more* likely to flourish in the face of secrecy."[196]

B. Elements of a Pay Transparency Policy

Despite the strong evidence that pay transparency is beneficial to the workplace, statistics show that most workplaces default to the culture of pay secrecy, and this is so, even where companies recognize that they should be more transparent. For example, according to the 2019 PayScale Compensation Best Practices Survey, only eighteen percent of surveyed employers responded that they have a formal compensation plan and share

189. *Id.*

190. *Id.* at 793.

191. *Id.* at 794. *See also* Ajayi & Alli, *supra* note 185 (Trust "is one of the most important singular arguments for pay transparency. Pay transparency helps to breed trust, which in turn improves teamwork significantly.").

192. *PayScale Report*, *supra* note 172, at 2.

193. *Id.*

194. *See id.* at 5, 13.

195. Stephen Miller, *Employers Less Transparent About Pay, Aspire to Be More Open*, SHRM (Mar. 1, 2019), https://shrm.org/resourcesandtools/hr-topics/compensation/pages/employers-less-transparent-about-pay.aspx.

196. Estlund, *supra* note 148, at 794 (emphasis added) ("[C]ontrary to the conventional wisdom of managers, . . . pay transparency tends to increase worker satisfaction and productivity, in part by fostering greater trust and perceptions of fairness.").

with employees the pay range for their position, even though twenty-eight percent of employers responded that they aspire to do so.[197]

If a workplace wishes to increase pay transparency, how would it go about doing so? This inquiry should begin by recognizing that there are different degrees of pay transparency, conceptualized on a spectrum from least transparent to most transparent.[198] According to the Compensation Best Practices Report (hereinafter "CBPR") conducted by PayScale in 2019, adoption of pay transparency policies could include one of five levels of transparency on that spectrum, as follows:

> Level 1: Transparency is minimal, based on information obtained through an employee's paycheck (forty-six percent of CBPR respondents);
>
> Level 2: Workplace consults market data or conducts limited study to inform compensation for some jobs, but information is not widely disseminated to employees (twenty-three percent of CBPR respondents);
>
> Level 3: Has a basic compensation plan with strategy and pay ranges, and employees have some idea of that information (eighteen percent of CBPR respondents);
>
> Level 4: Has comprehensive compensation strategy with data to support decisions (eight percent of organizations); and
>
> Level 5: Full transparency regarding compensation strategy, philosophy and pay, with some publication of pay (includes government employers, but few private employers).[199]

In deciding which level of pay transparency to adopt, organizations should consider, at a minimum, complying with current state law provisions, including prohibiting salary history questions during the hiring process, providing, upon request, mandatory disclosure of salary ranges by job description, prohibiting policies that bar employees from discussing pay in the workplace, and conducting internal wage audits to ensure gender wage equity. Yet while these steps may provide some legal cover, ultimately, Level 5 transparency is achieved by affirmatively supplying wage information for all employees, whether the information is

197. Miller, *supra* note 195.
198. *PayScale Report*, *supra* note 172, at 6.
199. *Id.*

specifically requested or not.[200] Companies such as Whole Foods Market, GoDaddy, and Jet.com lead the way on this by allowing employees throughout the organization to compare salaries based on job title.[201] Such voluntary disclosures may have the added benefit of avoiding shareholder inquiries and "demonstrat[ing] social responsibility, [thereby] limiting exposure to public scrutiny."[202]

C. Pay Audits

Employers who seek to undergo pay audits to uncover wage or equity gaps[203] must do so with care.[204] Understandably, employers may fear opening a proverbial Pandora's box of pay disparity. While the results of such audits may make employers more intentional about pay decisions prospectively, both for new hires and for existing employees, deciding how to correct current pay discrepancies may be costlier than planned. Employers may also fear that doing nothing, once they have knowledge of disparities, increases legal risk.[205] But the benefits arguably outweigh the risks. The audit may well be favorable, in which case publicizing results could enhance company reputation.[206] Additionally, the mere fact of a wage audit is per se protective against equal pay claims under several state safe harbor provisions.[207] Finally, pay audits align with corporate social responsibility, which is increasingly important in today's political and social environment.

CONCLUSION

Focus on state law salary history bans, while important, is not the solution to eliminating the gender wage gap. State laws that encourage some wage transparency are a better solution, and federal law needs to

200. *Id.*

201. *See* Connell & Mantoan, *supra* note 11, at 23.

202. *Id.* at 18.

203. *Id.* at 23-26. A distinction can be made between a pay gap audit—defined as the determination of the average earnings between women and men without controlling for variables that may legitimately impact pay—and a pay equity audit, which assesses pay practices against legal standards and compares earnings of comparable employees to determine whether the pay is unequal. *Id.*

204. *Id.* at 26-27 (warning that pay audits should be conducted with outside counsel to allow exploration of results without jeopardizing attorney-client privilege).

205. *Id.* at 16-17.

206. *Id.* at 16-18.

207. *See, e.g., id.* at 9-10.

follow suit.[208] But real and lasting change comes only with employer commitment to open and full disclosure of salary information.[209] The time is right for this change, both legally and socially.[210] The wall of silence that surrounds issues of wage equity must be torn down by mandating pay transparency by private employers. Otherwise, cultural norms against discussing wages with fellow workers will remain entrenched in our workplace fabric and pay secrecy policies will continue to proliferate. Where salary discussions are considered taboo and employer practices regarding the establishment of wages are shrouded in secrecy, pay equity is unlikely to be achieved. Millennials are leading the way on this transformation. It is time for employers to follow.

208. *See supra* Parts I-II.
209. *See supra* Part II.
210. *See supra* Part II.