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Verdict

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JOANNA L. GROSSMAN

For the Love of Batgirl: California Passes Much-Needed Fair Pay Law

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Yvonne Craig, who played Batgirl in the 1960s television show, recently passed away. As Batgirl, she fought for truth and justice against fictional adversaries; and in a public service announcement that aired in the 1970s, she fought for equal pay for real women.



In the PSA (view [here](http://www.youtube.com/watch?v=Mtq9RHRDWuA) (<http://www.youtube.com/watch?v=Mtq9RHRDWuA>)), Batgirl barges into a warehouse where Batman and Robin are tied up. A bomb ticks threateningly, and Batman yells: “Quick, Batgirl, untie us before it’s too late.” She hesitates, telling the dynamic duo that “[i]t’s already too late. I’ve worked for you a long time, and I’m paid less than Robin.” “Holy discontent,” says Robin, like a boss who has been told for the first time he is not actually allowed to grope his secretary. Batman tells Batgirl that this is “no time for jokes.” Batgirl persists: “It’s no joke. It’s the federal equal pay law: Same employer means equal pay for men and women.” And with his familiar intonation, Robin exhorts: “Holy Act of Congress!” Batman is unimpressed and asks Batgirl if we can “talk about this later.” The narrator concludes the scene with this cliffhanger: “Will Batgirl save the dynamic duo? Will she get equal pay? Tune in tomorrow or contact the wage and hour division listed in your phone book under the U.S. Department of Labor.”

Craig, may she rest in peace, put her face and her beloved fictional persona behind the

Equal Pay Act (EPA), the centerpiece of the federal effort to eradicate pay discrimination. This law—enacted in 1963, one year before the broader ban on employment discrimination embodied in Title VII—guarantees equal pay for equal work for men and women who do the same job for the same employer. The EPA has been an important tool in remedying pay discrimination, as has Title VII, which prohibits employers from taking sex into account when making or implementing any decisions about pay.

Both laws, however, have significant limitations, and neither has been successful in bridging the gender wage gap, which has hardly budged since the 1980s. New fair pay laws that try to address some of the clear obstacles to pay equity have languished in Congress. California, however, has recently passed a law, the Fair Pay Act, which promises to fill in some of the gaps in federal law.

California’s Fair Pay Act: Key Legislative Findings

As a predicate to the Fair Pay Act (FPA), the California legislature made four key findings, justifying its conclusion that “the state’s equal pay provisions and law regarding wage disclosures must be improved” in order to “eliminate the gender wage gap in California.”

First, the legislature made a finding that the gender wage gap is alive and well. Women working full time make 84 cents for every dollar a man earns, a gap that “extends across all occupations.” The gap is “far worse for women of color,” with Latina women making only 44 cents for every dollar earned by a white man.

This finding is consistent with national data on the gender wage gap, although the California legislature found that the pay gap for Latina women was worse in California than anywhere else. In general, researchers disagree about the size of the gender wage gap, but not its existence. It exists at every level of earnings—from physicians and surgeons at the top (63 cents on the dollar) to teacher’s aides at the very bottom. Not surprisingly, the gap lasts throughout the employment life cycle and, due in large part to percentage based raises, grows over time. One aggregate measure shows that in their fifteen prime earning years, women earned only 38 percent of what men did. And although the gap narrowed significantly in the 1980s, it has hardly changed since. (Detailed information about the wage gap, and its change over time, is available on the National Committee on Pay Equity’s website [here \(http://www.pay-equity.org\)](http://www.pay-equity.org).) And study after study has concluded that some portion of the wage gap remains after controlling for every conceivable factor, meaning that discrimination must play some role.

Second, the legislature found that even with a slightly narrower wage gap in California than nationwide, the “persistent disparity in earnings still has a significant impact on the

economic security and welfare of millions of working women and their families.” Women are more likely than men to live in poverty, especially those who are single mothers or women of color.

This finding is also consistent with national statistics, as female-headed households comprise a majority of those living below the poverty line. Moreover, because of the growth over the life cycle of the wage gap, and retirement systems that reflect annual salary, women have substantially fewer resources in retirement than men (even though their life spans are longer).

Third, the legislature found that although California law has prohibited gender-based pay discrimination since 1949, it has failed to fulfill its original goal of addressing “the segregation of women into historically undervalued occupations.” Rather, it has evolved to be virtually identical to the federal EPA, which, while useful, is limited in scope and is not equipped to tackle the problem of occupational segregation.

Occupational segregation is a result of society’s view, still entrenched, that there are “men’s jobs” and “women’s jobs.” A tool developed by economists, the Index of Occupational Dissimilarity, measures the degree of occupational segregation by the percentage of male or female workers who would have to change jobs in order for each occupation to have gender representation that reflected the workforce as a whole. A value of one indicates a completely segregated workforce; a value of zero indicates a completely integrated one. Although the score on this index has declined (indicating greater gender integration), the score was .50 in 2011, which means that fully half of women or men would have to change occupations to achieve completely integration. (A detailed and scholarly treatment of the occupational segregation problem, published by the Institute for Women’s Policy Research, is available [here](http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done) (<http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done>.) Why does occupational segregation matter? In addition to the problem that people may be channeled by stereotypes about social norms into jobs they do not enjoy and for which they are not well suited, the stark reality is that so-called women’s jobs pay less. A [recent GAO report](http://www.gao.gov/new.items/d1210.pdf) (<http://www.gao.gov/new.items/d1210.pdf>) found that while women represent 49 percent of the overall workforce, they comprise 59 percent of the low-wage workforce.

Fourth, the legislature made a finding that “[p]ay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists.” And, although California law already prohibits pay secrecy policies and retaliation for inquiring about pay, “in practice many employees are unaware of these protections and others are afraid to exercise these rights due to potential retaliation.”

Pay secrecy is indeed a significant problem. As we learned from the high profile Lilly Ledbetter case (discussed [here](http://writ.news.findlaw.com/commentary/20070710_brake.html) (http://writ.news.findlaw.com/commentary/20070710_brake.html) and [here](http://writ.news.findlaw.com/grossman/20090928.html) (<http://writ.news.findlaw.com/grossman/20090928.html>)), the difficulty employees face in learning that pay discrimination has occurred allows it to go unchecked. Pay decisions are usually made in secret. And even though it is illegal to do so, not only under California law but under the National Labor Relations Act, many employers expressly prohibit employees from discussing pay with one another or inquiring about the pay of co-workers. (The National Women’s Law Center [has compiled a fact sheet](http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf) (<http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf>) about the problem of pay secrecy.) And while an employee knows if he or she has been fired, a pay decision is not obviously or inherently adverse—the offer of a job and a starting salary or a raise may seem like a good thing, unless the employee is told, or later learns, that others were paid more to do a similar job. (Deborah Brake and I examine studies about other obstacles to perceiving and challenging discrimination [here](http://writ.news.findlaw.com/grossman/20070904.html) (<http://writ.news.findlaw.com/grossman/20070904.html>)).

How California Proposes to Tackle the Problem of Unequal Pay

The new law changes state equal pay law in a few significant ways, some of which make sense only with a more complete understanding of how the federal equal pay law operates. The EPA requires employers to pay men and women the same for “equal work.” A plaintiff can challenge an ongoing violation of the EPA at any time, and may seek recovery for the prior two years of discrimination, three if the violation is “willful.” But here are the downsides: (1) the Act allows for several affirmative defenses, even when unequal pay is proven, including that the wage disparity is due to “a factor other than sex,” a broad and uncontrolled exception that threatens to swallow the rule of equal pay; (2) an employee cannot win an Equal Pay Act claim without a comparator—that is, an actual man to whom she can point who is working for the same employer, at the same physical location, doing the same job, and earning more than she is; and (3) the EPA does not permit awards of compensatory or punitive damages; plaintiffs are limited to back pay and other limited equitable remedies.

The California Fair Pay Act tackles some of these limitations head on—meaning that California’s law, which once dovetailed the federal law, will provide greater protections against unequal pay. First, the new law changes the standard from “equal work” to “substantially similar work,” which will stop employers from pointing to minor differences between jobs (or even intentionally creating minor differences between jobs) to avoid equal pay liability. Moreover, the law eliminates the requirement that the plaintiff and the comparator work for the same “establishment;” they need only work for

the same “employer.”

Second, the new law narrows the affirmative defenses. It requires that the employer’s reliance on any of them be “reasonable” and, importantly, that the employer prove the factor(s) explains the entirety of the wage differential. Moreover, if the employer relies on a “factor other than sex,” it must demonstrate that “the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.” In other words, the employer must defend its reliance the way it defends neutral rules with a disparate impact on one sex.

Third, the FPA provides that an employer who violates the new standard for equal pay must remedy the action with back pay plus an equal amount in damages, presumably a greater deterrent for employers.

Finally, the law addresses the pay secrecy problem by providing that an employer “shall not prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights [to equal pay].” Nor may the employer retaliate against an employee for discussing pay or for seeking protection under the equal pay law.

Conclusion

This law is not going to fix the problem of pay inequity singlehandedly. But it is a meaningful step in the right direction—and a blueprint for Congress, which has allowed several reasonable pay equity bills to languish despite a clear need for them. Neither this law nor the leading bill at the federal level, the Paycheck Fairness Act, addresses the problem of occupational segregation, which means a substantial cause of the wage gap will go unchecked. But we should not let the perfect be the enemy of the good—California should be praised for taking the lead on this important issue.



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