An Unlevel Playing Field:
America’s Gender-Based Wage Gap, Binds of Discrimination, and a Path Toward Gender Equality

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I. Laws Alone Are Not Enough—But They’re a Start

The Equal Pay Act of 1963 states “No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, . . .” 29 U.S.C. §206(1). Now, over 50 years later, we are still struggling with the issue.

Statistics indicate that on a national average, women working full time in the United States were paid 80% of what men were paid. But this is the national average. In some areas of the country, the gap is even greater. For example, in Wyoming, statistics show that in 2015, a woman working full time is paid just 64% of what men earn. See http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/.

This, of course, is not just a problem in the United States. Far from it. Studies show that a gender wage gap exists in many countries around the world. See https://www.oecd.org/gender/data/genderwagegap.htm.

Although we would like to believe that the legal profession is more “enlightened” and that we have moved past the gender wage gap issue, it is unfortunately not the case. According to a 2014 U.S. Census Bureau survey, female attorneys made only 77% of what male attorneys made.
The disparity does not end with the wage gap. According to a February 2014 report from the National Association of Women Lawyers indicated that of the nation’s 200 largest firms, women comprise only 17% of the equity partners.

And just like women in other fields, it is difficult for women in the legal field to rectify the situations. A recent lawsuit filed by a female partner against a “Biglaw” firm is a perfect example. See https://bol.bna.com/chadbourne-gender-discrimination-case-gets-amended-complaint/.

The recent lawsuit alleges that a female non-equity partner informed her firm’s management that she, and other female attorneys, was being paid less than male counterparts. She went to the Human Resources Department and sought raises for the female attorneys. The response, however, is a stunning example of the difficulty many women face while trying to push for parity with their male counterparts.

The lawsuit alleges that rather than address the problem, the male leader of her practice group called her out in from of 60 equity partners, saying that she “needed to learn to behave,” and that her salary should be cut to teach her a lesson.

In other words, the woman who raised the issue was told to sit down and shut up, and told that she should be punished for raising the issue by making even less than her male counterparts.

Progress indeed.

Regardless of one’s opinions on the merits of her suit, it is important to recognize that the woman here had the knowledge regarding her rights and the ability to seek relief in the courts. Countless other women, however, particularly those outside the legal field, are not so fortunate.

Thus, despite the 1963 legislation, the wage gap persists at virtually all levels for a number of reasons, such as lack of knowledge of the salaries of the male counterparts, fear of reprisal for raising issue, or countless others. The Lilly Ledbetter Fair Pay Restoration Act extended the time people had to file a discrimination suit, but did not address the underlying problem. So, what else can be done? In the United States, new legislation, both at the national and the state level, is hoping to make a difference. Likewise, countries around the world are passing new laws to help solve these problems and close the wage gap.
As they say, “knowledge is power,” and here in the United States, legislation has been introduced to give women the ability to seek more knowledge about pay equity without fear of retribution. Nebraska Senator Deb Fisher (R), along with co-sponsors Iowa Senator Joni Ernst (R) and West Virginia Senator Shelley Moore Capito (R), has sponsored the “Workplace Advancement Act” (S.345). This proposed Act would amend the Equal Pay Act to state, in part, that it is a violation “to discharge or in any other manner retaliate against any employee because such employee has inquired about, discussed, or disclosed comparative compensation information for the purpose of determining whether the employer is compensating an employee in a manner that provides equal pay for equal work . . . “ See Attachment A. This proposed Act is similar to an Executive Order signed by President Obama in 2014 that prohibited such retaliation among federal contractors. See Attachment B.

The Workplace Advancement Act places no burden on an employer to make sure there is no gender wage gap. Rather, it simply provides protections ensuring that an employer cannot retaliate if an employee inquires as to whether she is being paid fairly and equally. The Bill has been referred to the Senate Health, Education, Labor, and Pensions subcommittee.

Some states, however, are ahead of the game and introduced or passed legislation of their own to try to close the gap. Minnesota, for example, has an extensive framework to ensure that government workers have added protections, and has had the framework for quite some time.

In 1982, a Minnesota Task Force reported that female-dominated jobs were paid less than male-dominated jobs. To obtain equity, Minnesota began using a point scale, known as a “point system” to evaluate jobs to try to compare apples to oranges. As the Minnesota Office of Management and Budget states, “This goes beyond the familiar idea of equal pay for equal work where men and women with the same jobs must be paid equally. A policy to establish pay equity usually means: 1) that all jobs will be evaluated and given points according to the level of knowledge and responsibility required to do the job; and 2) that salary adjustments will be made if it is discovered that women are consistently paid less than [sic] men for jobs with similar points.” https://mn.gov/mmb/employee-relations/compensation/laws/local-gov/local-gov-pay-equity/.

Using this system, Minnesota obtained “full pay equity” in state employment in 2010. http://www.startribune.com/minnesota-s-pay-equity-achievement/202027901/. This system, however, only applies to state, as well as county and municipal, employment. It does not extend to the private sector.

Internationally, even more progressive steps are being taken. Iceland’s efforts are a prime example of new legislation designed to help ensure equal wages even in the private sector.

Iceland has introduced legislation (which by all accounts is expected to pass) that would require companies with greater than 25 employees to undergo a certification process to ensure the company’s pay policies follow the equal pay requirements. Companies will be required to document how they value education, experience, responsibility, and other factors when determining the wages. To pass certification, male and female wages must be within a 5% “unexplained” gap. Companies that fail the audit must publish the results to employees and unions, who would then have the right to seek compensation. The goal is for the gender pay gap to be eradicated by 2022. If the legislation is passed and is successful, Iceland’s example may provide a roadmap for others. See https://inews.co.uk/essentials/news/world/iceland-become-first-country-world-make-companies-prove-equal-pay-law/.

Iceland’s Minister of Social Affairs and Equality, Porsteinn Viglundsson, stated that he does not expect companies to fail these audits, because if an unknown discrepancy is found, the company can correct the issue. Id.
Mr. Víglundsson further stated that “[i]t is vital for society to secure equal rights, otherwise there is an overall loss to society,” and that “We are wasting resources by forgetting the basic human rights issue of gender equality.” Id.

II. Other than Moving to Iceland, What Can Be Done to Equalize the “Paying” Field?

It’s been fifty-four years since the passage of the Equal Pay Act. And despite the existence of that Act, plus two additional federal laws outlawing discrimination in pay among genders, women in the United States still earn significantly less than men. Aside from packing up and moving to Iceland, what tangible steps can women, men and law firms take to address his important issue?

The answers aren’t simple, and the solution isn’t one-size-fits-all. However, one thing is clear: this isn’t just a “woman’s” issue. It is an issue that requires buy-in and action from both men and women in order for real change to take place.
The good news is that there are concrete steps that can be taken to help address the situation. The publication “Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation,” by Lauren Stiller Rikleen has some of the best recommendations for specific actions that can make the compensation process more fair for female and male lawyers. As outlined in Rikleen’s article, the twelve recommendations include:

1. Building Transparency into the Compensation Process
2. Include a Critical Mass of Diverse Members of the Compensation Committee
3. Develop a System to Promote Fair and Accurate Allocation of Billing and Origination Credit
4. Require Diversity in Pitch Teams and Related Business-Development Efforts that Diverse Lawyers Become Part of the Client Team When Successful
5. Reward Behaviors that Promote Institutional Sustainability
6. Implement Formal Client Succession Protocols
7. Measure and Report Results
8. Develop a Process to Resolve Allocation Disputes Promptly and Equitably
9. Implement Training for All Involved in the Evaluation and Compensation Process
10. Engage the Client’s Role in Gender Equity
11. Implement Systems to Ensure Equitable Compensation for Partners on a Reduced-Hours Schedule
12. Maximize the Effectiveness of Affinity Groups

See Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation, pp. 31-44 (2013). Details about each of these steps, including implementation checklists, are available in this publication, which is a must read for law firms and management teams.

Endnote

1 Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation: by Lauren Stiller Rikleen, Presented by the ABA Presidential Task Force on Gender Equality and the Commission on Women in the Profession. Available at: http://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.auth-checkdam.pdf.
115TH CONGRESS  
1ST SESSION  

S. 345

To amend the Fair Labor Standards Act of 1938 to strengthen equal pay requirements.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 8 (legislative day, FEBRUARY 6), 2017

Mrs. FISCHER (for herself, Mrs. ERNST, and Mrs. CAPITTO) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act of 1938 to strengthen equal pay requirements.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Workplace Advance-
5 ment Act”.

6 SEC. 2. ENHANCED ENFORCEMENT OF EQUAL PAY ACT RE-
7 QUIREMENTS.

8 Section 15(a) of the Fair Labor Standards Act of
9 1938 (29 U.S.C. 215(a)) is amended—
(1) in paragraph (5), by striking the period and inserting "; or"; and

(2) by adding at the end the following:

"(6) to discharge or in any other manner retaliate against any employee because such employee has inquired about, discussed, or disclosed comparative compensation information for the purpose of determining whether the employer is compensating an employee in a manner that provides equal pay for equal work, except that this paragraph shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's job functions discloses the wages of such other employees to an individual who does not otherwise have access to such information, unless such disclosure is in response to a charge or complaint or in furtherance of an investigation, proceeding, hearing, or action under section 6(d), including an investigation conducted by the employer. Nothing in paragraph (6) shall be construed to limit the rights of an employee provided under any other provision of law.”.

SEC. 3. SENSE OF CONGRESS.

It is the sense of Congress that—
(1) gender-based discrimination in wages or compensation violates existing law; and

(2) Congress re-commits itself to the principles of equal pay for equal work as enshrined in section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d); commonly referred to as the "Equal Pay Act of 1963") and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).
Attachment B

The White House
Office of the Press Secretary
For Immediate Release
April 08, 2014

Executive Order -- Non-Retaliation for Disclosure of Compensation Information

EXECUTIVE ORDER

NON-RETALIATION FOR DISCLOSURE OF COMPENSATION INFORMATION

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 etc. seq., and in order to take further steps to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

Section 1. Policy. This order is designed to promote economy and efficiency in Federal Government procurement. It is the policy of the executive branch to enforce vigorously the civil rights laws of the United States, including those laws that prohibit discriminatory practices with respect to compensation. Federal contractors that employ such practices are subject to enforcement action, increasing the risk of disruption, delay, and increased expense in Federal contracting. Compensation discrimination also can lead to labor disputes that are burdensome and costly.

When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist. Such prohibitions (either express or tacit) also restrict the amount of information available to participants in the Federal contracting labor pool, which tends to diminish market efficiency and decrease the likelihood that the most qualified and productive workers are hired at the market efficient price. Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices, which will contribute to a more efficient market in Federal contracting.

Sec. 2. Amending Executive Order 11246. Section 202 of Executive Order 11246 of September 24, 1965, as amended, is hereby further amended as follows:

(a) Paragraphs (3) through (7) are redesignated as paragraphs (4) through (8).

(b) A new paragraph (3) is added to read as follows:

"The contractor will not discharge or in any other manner discriminate 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. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information."
Sec. 3. Regulations. Within 160 days of the date of this order, the Secretary of Labor shall propose regulations to implement the requirements of this order.

Sec. 4. Severability. If any provision of this order, or the application of such provision or amendment to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to limit the rights of an employee or applicant for employment provided under any provision of law.

It also shall not be construed to prevent a Federal contractor covered by this order from pursuing a defense, as long as the defense is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants, subject to paragraph (3) of section 202 of Executive Order 11246, as added by this order.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to a department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 6. Effective Date. This order shall become effective immediately, and shall apply to contracts entered into on or after the effective date of rules promulgated by the Department of Labor under section 3 of this order.

BARACK OBAMA

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