

HOW TO CLOSE THE GENDER PAY GAP:
TRANSPARENCY IN DATA REGARDING COMPENSATION IS THE KEY

INTRODUCTION

The gender pay gap is usually referred to as the average difference in earnings between men and women.¹ Most research will express the gap as a ratio, which is calculated by subtracting the amount women earn for every dollar paid to men from 100 percent.² One of the earliest examples of women earning less than men stems from World War II. In 1940, about 28% of women in the U.S. participated in the labor force.³ However, World War II required about 16 million men to join the armed forces, which meant women had to play a more active role in the labor force by securing jobs traditionally held by men.⁴ This allowed some women to shift from low-paying service or retail jobs into higher-wage durable goods manufacturing jobs.⁵ Even though women started earning more money,⁶ the wage effects related to increases in the female labor supply were uniformly more negative for women than men.⁷

Since World War II, there has been a series of legislative efforts to address the gender pay gap. New laws have helped narrow the gender pay gap, but the gap still exists and explaining the causes of the gap is still a big challenge. Data suggests that there continues to be a systematic undervaluing of the work performed by women in comparison to substantially similar work

¹ *Gender Pay Gap*, CAMBRIDGE BUSINESS ENGLISH DICTIONARY (2019); see AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7 (2018), available at https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth [hereinafter AAUW]; see also *Gender Wage Gap*, ENCYC. BRITANNICA (Sept. 2018), <https://www.britannica.com/topic/gender-wage-gap>.

² ECON. POL'Y INST., GENDER WAGE GAP, available at <https://www.epi.org/data/#?subject=wagegap-mf> (last updated Feb. 19, 2019) [hereinafter EPI].

³ Daron Acemoglu et al., *Women, War and Wages: The Effect of Female Labor Supply on the Wage Structure at Mid-Century 1-2* (Nat'l Bureau of Econ. Research, Working Paper No. 9013, 2002), available at <https://www.nber.org/papers/w9013.pdf>.

⁴ *Id.* at 2.

⁵ Mark Aldrich, *The Gender Gap in Earnings during World War II: New Evidence*, 42 INDUS. & LAB. REV. 415, 420 (1989).

⁶ *Id.* at 423.

⁷ Acemoglu, *supra* note 3, at 30.

performed by men. There is no doubt that men, as a whole, earn higher wages than women; however, there is considerable debate as to whether the wage differences are based on gender discrimination. More transparency in wage rate reporting is required to properly assess whether gender discrimination is the root cause of the wage gap and, if so, how best to close the gap.

One of the most influential federal laws that addressed the U.S. gender pay gap is the Equal Pay Act of 1963 (the “Equal Pay Act”), which was signed into law by President Kennedy.⁸ The Equal Pay Act prohibits an employer from discriminating against an employee on the basis of sex.⁹ This means that employers cannot pay one employee a lower rate than that paid to an employee of the opposite sex in the same establishment if both employees are performing equal or similar work.¹⁰ However, employment decisions that create differences in pay rates between employees can be justified if they are based on a seniority or merit system, the quality or quantity of work, and any other differentials that are based on a “factor other than sex.”¹¹

Since the time it was enacted, courts have expanded the scope of the Equal Pay Act to provide uniform interpretations. For example, the Third Circuit Court of Appeals clarified that work only needs to be “substantially equal,” rather than identical, to fit within the protections of the Equal Pay Act.¹² In *Schultz v. Wheaton Glass Co.*, the Secretary of Labor brought an action against Wheaton Glass Company, claiming that female employees were being discriminated against because they were paid 10% less than male employees who had the same job title.¹³ The district court ruled that the differences in pay were justified because male employees were able to

⁸ See 29 U.S.C. § 206(d) (2012).

⁹ *Id.* at § 206(d)(1).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (1970) (“...Congress in prescribing ‘equal’ work did not require that the jobs be identical, but only that they must be substantially equal.”).

¹³ *Id.* at 261.

perform more tasks than women.¹⁴ The Third Circuit, however, rejected this conclusion because there was no logical justification for men to receive 21½ cents per hour more than their female counterparts when the additional tasks performed by men only paid two cents more than what was paid to women performing the same tasks.¹⁵ Moreover, Congress intended the Equal Pay Act to act as a “broad charter of women’s rights in the economic field.” To construe it narrowly, such as requiring the jobs to be identical, would destroy the remedial purposes intended.¹⁶

Several other federal laws have been passed to provide more protections to women in the workforce, such as Title VII of the Civil Rights Act of 1964.¹⁷ Nevertheless, women today continue to earn less than men do in nearly every occupation.¹⁸ Although the gap has narrowed since 1963, it has remained relatively unchanged the past ten years.¹⁹ In 2018, women in the U.S. were paid about 80 cents for every dollar paid to men.²⁰ That disparity in wage rates suggests that women earned about \$513 billion less than they would have earned had they received the rates paid to their male counterparts.²¹ Despite the enacted equal pay laws, it is believed that pay parity between women and men in the U.S. will not be reached until 2059.²²

¹⁴ *Id.* at 262-63.

¹⁵ *Id.* at 263.

¹⁶ *Id.*; see *Corning Glass Works v. Brennan*, 417 U.S. 188, 207-08 (1974).

¹⁷ See 42 U.S.C. § 2000e (2012).

¹⁸ LISA MAATZ & ANNE HEDGEPEETH, *WOMEN AND WORK: 50 YEARS OF CHANGE SINCE THE AMERICAN WOMEN REPORT 6*, available at https://www.dol.gov/wb/resources/women_and_work.pdf (last visited Mar. 27, 2019).

¹⁹ Nikki Graf et al., *The Narrowing, but Persistent Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/> (citing to data from the U.S. Census Bureau).

²⁰ AAUW, *supra* note 1, at 5; EPI, *supra* note 2; Charisse Jones, *Women lose \$513 billion a year in wages due to gender pay gap and math is worse for some*, USA TODAY (Oct. 23, 2018), <https://www.usatoday.com/story/money/2018/10/23/women-lose-500-billion-year-because-stubborn-gender-pay-gap/1728870002/>.

²¹ Jones, *supra* note 20.

²² INSTITUTE FOR WOMEN’S POLICY RESEARCH, *WOMEN’S MEDIAN EARNINGS AS A PERCENT OF MEN’S MEDIAN EARNINGS* (2018), available at https://iwpr.org/wp-content/uploads/2018/09/Q073_Wage-Gap-Update-2018_update.pdf [hereinafter IWPR].

Concerns about the gender pay gap exist outside of the United States as well. Korea, Estonia, Japan, Latvia, Chile, Canada, and the U.K. also have significant national gender pay gaps.²³ For example, in 2018, the gender pay gap in the U.K. was as large as 17.9%.²⁴ In addition, it is reported that women globally are paid about 63 cents for every dollar paid to men.²⁵ If the gender pay gap is occurring in every country of the world and every state in the U.S., it begs the question – what is driving this pay difference? There is no simple answer, because the gender pay gap may be a result of many different factors. Although not an exhaustive list, such factors include education, age, experience, familial responsibilities, and workplace choices like demand for overtime.

The fact that multiple factors may influence pay rate disparities between men and women does not mean that discrimination does not exist within the workplace, or that discrimination is not a contributing factor when certain compensation decisions are made. Instead, it reveals the importance of trying to figure out which factors contribute the most to the gender pay gap, and, more importantly, why those factors exist. With so many factors at play, the ability to identify and examine wage rate differences across business sectors is critical. The countries that have made the most progress in closing the gender pay gap are those that have increased transparency regarding compensation between employees within the same establishment.

²³ Devon Delfino, *12 Countries Where Men Earn Significantly More than Women*, BUS. INSIDER (Aug. 17, 2018), <https://www.businessinsider.com/countries-with-the-gender-pay-gap-2018-8>; see also INTERNATIONAL LABOUR ORGANIZATION, GLOBAL WAGE REPORT 2018/19: WHAT LIES BEHIND GENDER PAY GAPS 24-25 (2018), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf [hereinafter ILO].

²⁴ OFFICE FOR NATIONAL STATISTICS (UK), GENDER PAY GAP IN THE UK: 2018 3 (2018), available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2018/pdf> [hereinafter ONS]; see Feargal McGuinness & Doug Piper, *The Gender Pay Gap*, UK House of Commons Library Briefing Paper No. 7068 (Nov. 8, 2018), at 3, 6, available at <http://researchbriefings.files.parliament.uk/documents/SN07068/SN07068.pdf> [hereinafter Briefing Paper 7068].

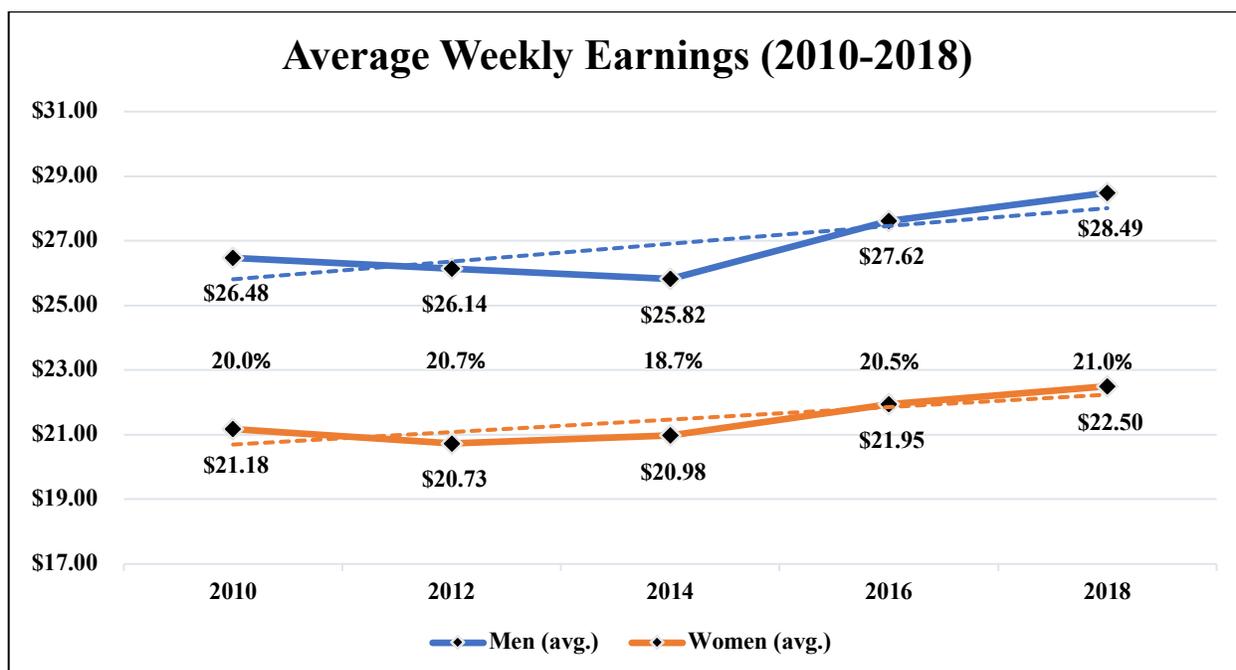
²⁵ Rupert Neate, *Global pay gap will take 202 years to close, says World Economic Forum*, GUARDIAN (Dec. 18, 2018), <https://www.theguardian.com/world/2018/dec/18/global-gender-pay-gap-will-take-202-years-to-close-says-world-economic-forum>.

This Article will look at the problem of unequal pay and will argue that transparency regarding compensation of men and women must be increased before any decision can be made as to why the gender pay gap exists. This Article proceeds in three parts. Part I provides a comprehensive discussion of existing equal pay laws in the U.S. that prohibit pay discrimination by sex and an analysis of the most up-to-date data on the current gender pay gap in the U.S. It also examines theories as to why there is a pay gap and how clarity can be provided by increasing transparency. Part II provides a comprehensive discussion of the new equal pay laws in the U.K. It also provides an analysis of how the U.K. has reduced its gender pay gap by increasing transparency and how these laws can provide a road map for improving the pay gap in the U.S. Part III provides an analysis of the gender pay gap in Iceland and how the equal pay laws of Iceland differ from other countries.

In order to close the gender pay gap, countries need to amend current equal pay laws or pass new laws to require increased transparency of employer data. Increasing transparency of wage data in the workplace will better highlight the factors that need to be addressed in order to close the gender pay gap, and it is clear that laws aimed at increasing transparency need to have teeth to ensure compliance. By doing so, employees and regulators will also be able to more accurately determine whether women are being compensated fairly and whether pay rate disparities between men and women are the result of gender discrimination or other factors. Without this data, it is impossible to know whether and to what extent gender discrimination factors into the pay differential between men and women.

I. THE GENDER PAY GAP IN THE UNITED STATES

The enactment of federal and state legislation has, at times, helped narrow the gender pay gap in the U.S.; however, the country has in no way achieved pay parity. Although the gap was reduced significantly toward the end of the 1990s, the gap has remained mostly unchanged since.²⁶ For example, from 2010 to 2018, the difference in pay between men and women in the U.S. hardly improved and even increased at times.²⁷



This chart shows the average weekly earnings for men and women from 2010 to 2018. The percentages represent the gender pay gap for each year. According to the data, the gender pay gap varies year-to-year.

Source: Economic Policy Institute²⁸

According to the data, it appears that the gender pay gap is going to remain reasonably stable unless changes are made, either through new legislation or a societal shift in the way women are viewed in the workplace. The starting point to understanding how best to close the gender pay gap is to ascertain how the gender pay gap has increased or decreased over time, in light of federal

²⁶ EPI, *supra* note 2.

²⁷ *Id.*

²⁸ *Id.*; see Melissa Fugiero, *Equal Pay Act of 1963*, ENCYC. BRITANNICA (June 3, 2013), <https://www.britannica.com/topic/Equal-Pay-Act>.

legislation and other protections that have been put in place. The corollary to that is to understand how external factors influence the gender pay gap notwithstanding the passage of laws that were aimed at closing the gap. Only then can informed decisions be made on whether the gender pay gap can, in fact, be closed, and if so, how best to accomplish this goal.

A. Current Equal Pay Laws that Address Wage Discrimination

One of the first laws implemented to close the gender pay gap in the U.S. was the Equal Pay Act, which was signed into law by President Kennedy on June 10, 1963.²⁹ The springboard for the Equal Pay Act was the National War Labor Board, which, in 1942, called for “equal pay for equal work.”³⁰ Once the Equal Pay Act was enacted, employers engaged in commerce or in the production of goods for commerce were prohibited from gender-based discrimination in the payment of employee wages.³¹ The scope of what constituted gender-based discrimination was thereafter molded by the court.

One of the first higher courts to interpret the Equal Pay Act was the Third Circuit Court of Appeals, which held that comparative jobs need only be “substantially equal” and not identical to determine whether there was gender-based discrimination in the pay received by men and women working in those jobs.³² In *Schultz v. Wheaton Glass*, the Third Circuit explained that whether a job is “substantially equal” is determined by the content of a job rather than the title of a job.³³ If a job requires substantially equal skills, effort and responsibility, and is performed under similar working conditions, an employer is prohibited from paying unequal wages to men and women.³⁴

²⁹ See 29 U.S.C. § 206(d)(1).

³⁰ *Id.*

³¹ *Id.*

³² *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 261-63 (3d Cir. 1970).

³³ *Id.*

³⁴ *Id.*

Skill takes into account experience, ability, education, and training required to perform a job.³⁵ Effort refers to the amount of physical or mental exertion needed to perform a job.³⁶ Responsibility is the degree of accountability required to perform a job.³⁷ In addition, wage discrimination is only prohibited between jobs within a single establishment (i.e., a distinct physical place of business) and not within a business as a whole.³⁸ The only exception is when unusual circumstances are demonstrated.³⁹

Initially, Congress considered implementing the “equal pay for comparable worth” doctrine, rather than using the term “substantially equal.”⁴⁰ According to this doctrine, sex-based wage discrimination exists if employees in jobs occupied primarily by women are paid less than employees in job classifications filled primarily by men and the jobs are of equal value to the employer.⁴¹ However, the court found that the comparable-worth doctrine was rejected by Congress for two reasons.⁴² First, Congress believed the doctrine ignored the economic realities of supply and demand.⁴³ Second, Congress thought the doctrine would place an impossible task of determining the worth of comparable work on government agencies and on courts.⁴⁴

The Equal Pay Act was not overly rigid in its application, and exempted certain wage inequalities if they were based on seniority, merit, quantity or quality of production, or a factor other than sex.⁴⁵ One issue that arose was the failure of the Equal Pay Act to define the “factor

³⁵ EEOC v. Universal Underwriters Ins. Co., 653 F.2d 1243, 1245 (8th Cir. 1981).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 29 C.F.R. 1620.9(a) (2012).

³⁹ See *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1993) (entire school district is a single establishment for Equal Pay Act purposes).

⁴⁰ See *id.* at 265; see also H.R. 8898, 93rd Cong. (1973-1974) (Congress rejected the comparable-worth doctrine).

⁴¹ *Am. Fed. of State, County, and Mun. Employees (AFSCME) v. State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985).

⁴² *County of Washington v. Gunther*, 452 U.S. 161, 184 (1981) (discussed why Congress rejected comparable-worth doctrine).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 29 U.S.C. § 206(d)(1).

other than sex” defense. Although courts have not been consistent interpreting this defense, an example of a factor that can be considered by employers is market forces. In *Spaulding v. University of Washington*, the Ninth Circuit Court of Appeals held that pay differences can be justified if employers are constrained by market forces to set salaries under prevailing wage rates for different job classifications.⁴⁶ The rationale was that the reliance on a free market system in which employees in male-dominated jobs are compensated at higher rate than employees in dissimilar female-dominated jobs is not in and of itself discriminatory.⁴⁷

A year after the Equal Pay Act, Title VII of the Civil Rights Act of 1964 was enacted to provide further prohibitions against, among other things, pay discrimination in the workforce.⁴⁸ Under the relevant part of Title VII, employers are prohibited from discriminating against any individual with respect to his or her compensation because of the individual’s race, color, religion, sex, or national origin.⁴⁹ This language is similar to the Equal Pay Act, and someone who has an Equal Pay Act claim may also have a claim under Title VII. Moreover, Title VII prohibits employers from steering women into lower-paying jobs, unfairly denying women promotions, and otherwise indirectly impacting compensation based on gender-based discrimination.⁵⁰ Unlike the Equal Pay Act, however, Title VII only applies if an employer has more than 15 employees.⁵¹

One of the most important similarities between the Equal Pay Act and Title VII is that the affirmative defenses set in the Equal Pay Act are applicable to Title VII actions for sex-based wage discrimination.⁵² This was made clear by the Bennett Amendment to Title VII, which provides

⁴⁶ *Spaulding v. Univ. Of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984) (concluding that market forces are an example of a “factor other than sex” that employers can consider when making compensation decisions).

⁴⁷ *Am. Fed. of State, County, and Mun. Employees (AFSCME) v. State of Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985); *see also County of Washington v. Gunther*, 452 U.S. 161, 184 (1981).

⁴⁸ *See* 42 U.S.C. § 2000e.

⁴⁹ *Id.* at § 2000e-2(a)(1).

⁵⁰ *Id.* at §§ 2000e-2(a)(1)-(2).

⁵¹ *Id.* at § 2000e(b).

⁵² *Id.* at § 2000e-2(h); *see also* 29 U.S.C. § 206(d)(1).

that “it shall not be an unlawful employment practice for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized” by the Equal Pay Act.⁵³ Similar to the Equal Pay Act, therefore, wage-based discrimination under Title VII is justified if the employment decision is based on a seniority or merit system, on earnings by quantity or quality of production, and a differential based on any other factor other than sex.⁵⁴ Moreover, the Supreme Court explained that the Bennett Amendment was offered to be a “technical amendment” designed to resolve any potential conflicts between Title VII and the Equal Pay Act.⁵⁵

Notwithstanding certain similarities, there are significant differences between the Equal Pay Act and Title VII. One difference is the requirement to show that there was an intent to discriminate under Title VII. Under the Equal Pay Act, a plaintiff can recover by proving that she received lower pay for substantially equal work.⁵⁶ In contrast, Title VII claims typically require proof of an intent to discriminate.⁵⁷ Intent to discriminate is not needed under Title VII, however, if an employee can meet the requirements of a disparate impact⁵⁸ claim or prove that sex was a motivating factor for a compensation decision.

Another difference between the Equal Pay Act and Title VII is the burden-shifting structures. Claims based on Title VII follow the *McDonnell-Douglas* framework, which is a three-step burden-shifting structure.⁵⁹ Under this structure, the plaintiff must first establish a prima facie

⁵³ 42 U.S.C. § 2000e-2(h).

⁵⁴ 29 U.S.C. § 206(d)(1).

⁵⁵ *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981) (discusses how Bennett Amendment made affirmative defenses of Equal Pay Act applicable to Title VII).

⁵⁶ 29 U.S.C. § 206(d)(1).

⁵⁷ 42 U.S.C. § 2000e-2(k)(1)(A).

⁵⁸ *Id.* at §§ 2000e-2(k)(1)(A), 2(m).

⁵⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (provides burdens for employees and employers under Title VII).

case of discrimination.⁶⁰ If able to do so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory action.⁶¹ If the employer is successful, then the burden shifts back to the plaintiff to show that the legitimate, nondiscriminatory reason is in fact pretext.⁶² In contrast, claims based on the Equal Pay Act follow a two-step structure. In *Stanziale v. Jargowsky*, the Third Circuit Court of Appeals explained that claims based on the Equal Pay Act require the plaintiff to first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing substantially “equal work.”⁶³ If they are able to do so, the burden of persuasion then shifts to the employer to demonstrate the applicability of one of the affirmative defenses.⁶⁴ Unlike Title VII claims, plaintiffs are not given another opportunity to prevail and will not be successful if an affirmative defense is applicable.

To be sure, both the Equal Pay Act and Title VII helped reduce the gender pay gap. In 1963, the gender pay gap was 41%.⁶⁵ In 2018, it was about 20%.⁶⁶ That measure of improvement is significant, and yet a significant gap remains. It seems logical that additional legislation could help narrow the gender pay gap further, and even President Kennedy acknowledged that the Equal Pay Act was only the “first step” and that “much remains to be done to achieve full equality of economic opportunity.”⁶⁷

⁶⁰ *Id.* at 802.

⁶¹ *Id.*

⁶² *Id.* at 804.

⁶³ *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000) (provides burdens for employees and employers under the Equal Pay Act).

⁶⁴ *Id.*

⁶⁵ Beth Pearsall, *50 Years after the Equal Pay Act, Parity Eludes Us*, AM. ASS’N OF UNIV. WOMEN (Mar. 18, 2013), <https://www.aauw.org/article/50-years-after-the-equal-pay-act-parity-eludes-us/>.

⁶⁶ EPI, *supra* note 2.

⁶⁷ *See* Fugiero, *supra* note 28.

B. Does Discrimination Explain the Gender Pay Gap?

Before considering how the gender pay gap can be further reduced, it is important to examine reasons other than discrimination for why the gap exists or is misrepresented. Individuals who support the belief that the gap is misrepresented or does not exist have argued that the gap can be explained by factors other than discrimination, such as the choices women make at the workplace and responsibilities women have outside of the workplace.⁶⁸ In contrast, individuals who believe that the gender pay gap is a direct result of discrimination have argued that data explicitly show that the earnings of women are less than men when considering certain aspects of the workplace and achievements.⁶⁹ What is clear is that even if the pay gap is not a direct result of gender-based wage discrimination, men generally make more than women at all ages, education levels, and within all occupations.⁷⁰

“Controlling for” age does not reduce the gender pay gap: women make less than men no matter how old they are. But the gap tends to widen drastically for women once they turn 35.⁷¹ Those that believe the gap does not exist or is misrepresented will try to rely on the fact that women

⁶⁸ John Phelan, *Harvard Study: “Gender Wage Gap” Explained Entirely by Work Choices of Men and Women*, FOUND. FOR ECON. EDU. (Dec. 10, 2018), <https://fee.org/articles/harvard-study-gender-pay-gap-explained-entirely-by-work-choices-of-men-and-women/>; Valentin Bolotnyy & Natalia Emanuel, *Why Do Women Earn Less Than Men? Evidence from Bus and Train Operators 2* (Jan. 2, 2019) (unpublished working paper) (on file with the Harvard University Department of Economics); Christina Hoff Sommers, *The Wage Gap Myth Exposed – By Feminists*, HUFFPOST (Jan. 23, 2014), https://www.huffpost.com/entry/wage-gap_b_2073804; Lisa Annese, *Dispelling the myths: why the gender pay gap does not reflect the ‘choices’ women make*, GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/sustainable-business/2016/nov/08/dispelling-the-myths-why-the-gender-pay-gap-does-not-reflect-the-choices-women-make>; see, e.g., CHRISTINE CORBETT & CATHERINE HILL, AM. ASS’N OF UNIV. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2-3 (2012), available at <https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf>.

⁶⁹ Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 588-90 (2018); see, e.g., AAUW, *supra* note 1.

⁷⁰ News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2018 (Jan. 17, 2019), <https://www.bls.gov/news.release/pdf/wkyeng.pdf> (data is available at Table 3 and Table 9) [hereinafter 2019 News Release]; ROSA CHO & ABAGAIL KRAMER, EVERYTHING YOU NEED TO KNOW ABOUT THE EQUAL PAY ACT 7 (2016), available at <https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf>.

⁷¹ 2019 News Release, *supra* note 70 (data available at Table 3).

tend to demand less hours or more flexible schedules in the workplace as they get older.⁷² This can be explained by several facts. First, women either get married or have children around the age of 35 and about 75% of single mothers are the sole provider for their family.⁷³ Thus, the gap in pay for women after the age of 35 appears to be misrepresented. Second, employed women living with a child under the age of 6 generally work an average of 4.3 hours per day.⁷⁴ This means that these mothers only work about 30 hours per week, which can explain why women demand less overtime compensation.⁷⁵ Third, of the workers who take time off, such as for parental, family or medical leave, women are twice as likely to experience a negative impact on their job or career than men.⁷⁶ In 2011, it was reported that 60% of men had access to paid leave, while only 57% of women had access.⁷⁷ This means that women were less likely than men to have access to paid leave, which would result in women being more likely to take leave without pay. Consequently, this data reveals that factors unrelated to discrimination can help explain why women generally earn less than their male counterparts.

Although child-rearing may explain why the gap widens for women over the age of 35 (and for women with children), it does not explain the gender pay gap for women of all ages with different types of responsibilities. For example, the median weekly earnings for women 24 or younger was \$558, while the median weekly earnings for the men in this same age bracket was

⁷² Bolotnyy & Emanuel, *supra* note 68.

⁷³ WOMEN'S BUREAU, U.S. DEP'T OF LAB., OVERVIEW OF WOMEN'S BUREAU, *available at* <https://www.dol.gov/wb/overview.htm> (last visited Mar. 26, 2019); WOMEN'S BUREAU, U.S. DEP'T OF LAB., MOTHERS AND FAMILIES, *available at* https://www.dol.gov/wb/stats/mother_families-text.htm#LFPMarital-Age (last visited Mar. 30, 2019).

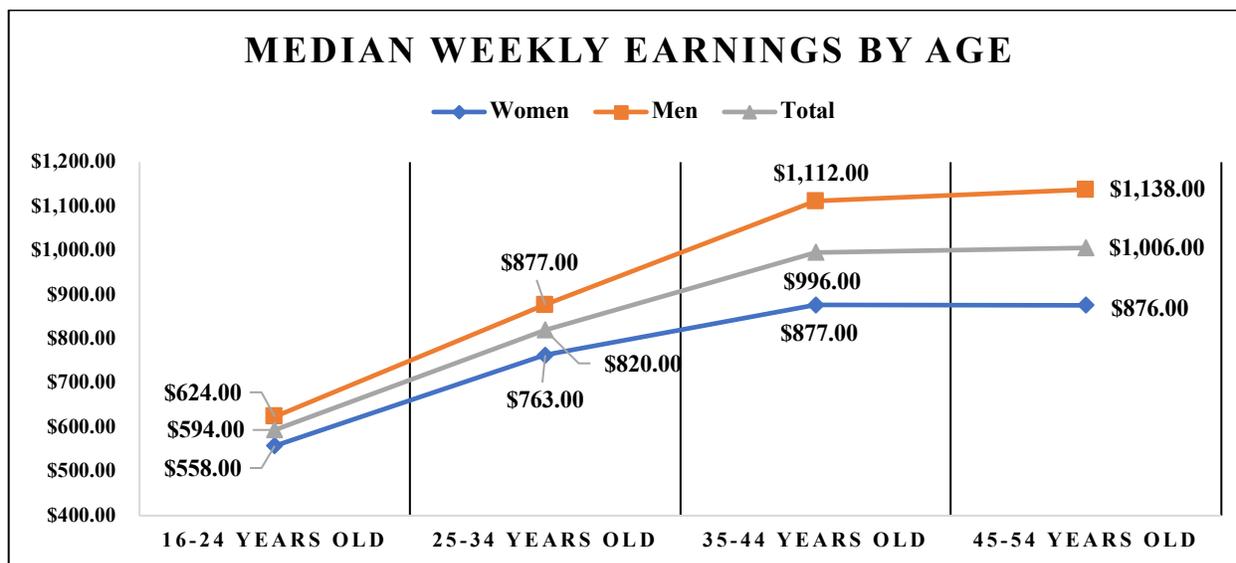
⁷⁴ News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, American Time Use Survey – 2017 Results (June 28, 2018), <https://www.bls.gov/news.release/pdf/atus.pdf>.

⁷⁵ *Id.*

⁷⁶ Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), <https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/>.

⁷⁷ COUNCIL OF ECONOMIC ADVISERS, 2015 ECONOMIC REPORT OF THE PRESIDENT 182 (Feb. 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp_complete.pdf [hereinafter CEA] (data contained in Table 4-4).

\$624.⁷⁸ Similarly, the median weekly earnings for women that were 34 or younger was \$763, while the median weekly earnings for the men of this age bracket was \$877.⁷⁹ Thus, women under the age 35 earn about 87% of what men earn.⁸⁰



This chart shows the median weekly earnings for certain age brackets in 2019. According to the data, the difference in pay between men and women significantly increases once women turn the age of 25.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁸¹

Similar to the gap in pay for women of different ages, there is also a gap between men and women at every level of education. The general idea behind achieving another degree is that earnings increase for both men and women as years of education increase. Accordingly, this might suggest that an increase in education will actually reduce the gender pay gap.⁸² Although the

⁷⁸ 2019 News Release, *supra* note 70 (data at Table 3).

⁷⁹ *Id.*

⁸⁰ Shawn Carter, *The gender pay gap in the US is still 20 percent – but millennial women are closing in on men*, CNBC (Aug. 7, 2017), <https://www.cnbc.com/2017/08/07/gender-pay-gap-is-still-20-percent-but-millennial-women-are-closing-in.html>; see Graf, *supra* note 19.

⁸¹ 2019 News Release, *supra* note 70 (data at Table 3).

⁸² Tanya Tarr, *How This Study Misses the Mark On Equal Pay And The Pay Gap*, FORBES (Nov. 30, 2018), <https://www.forbes.com/sites/tanyatarr/2018/11/30/how-this-study-misses-the-mark-on-equal-pay-and-the-pay-gap/#4ddf8d0b42c1>.

earnings of women do increase as they pursue higher levels of education, the gender pay gap does not decrease.⁸³

Individuals that believe the gender pay gap does not exist or is misrepresented have argued that the gap regarding education can be explained by other factors, such as the types of degrees pursued by women in college.⁸⁴ However, according to the different earnings men and women receive at each educational level, women must obtain one more degree than men in order to receive similar compensation. For example, the median weekly earnings for women with a high school degree is only \$9 more than the median weekly earnings for men with less than a high school diploma.⁸⁵ Moreover, men experience a larger increase in earnings than women do when an advanced degree is obtained. The median weekly earnings for men goes from \$1,384 to \$1,774 when an advanced degree is achieved.⁸⁶ In contrast, the median weekly earnings for women who obtain an advanced degree only increases from \$1,041 to \$1,323.⁸⁷ Although both experience an increase in earnings when such a degree is obtained, men experience an increase of about \$108 more than women do. Although the types of degrees pursued in college may explain the pay gap for some women, this does not explain the gender pay gap for women of all educational levels with different types of degrees and achievements.

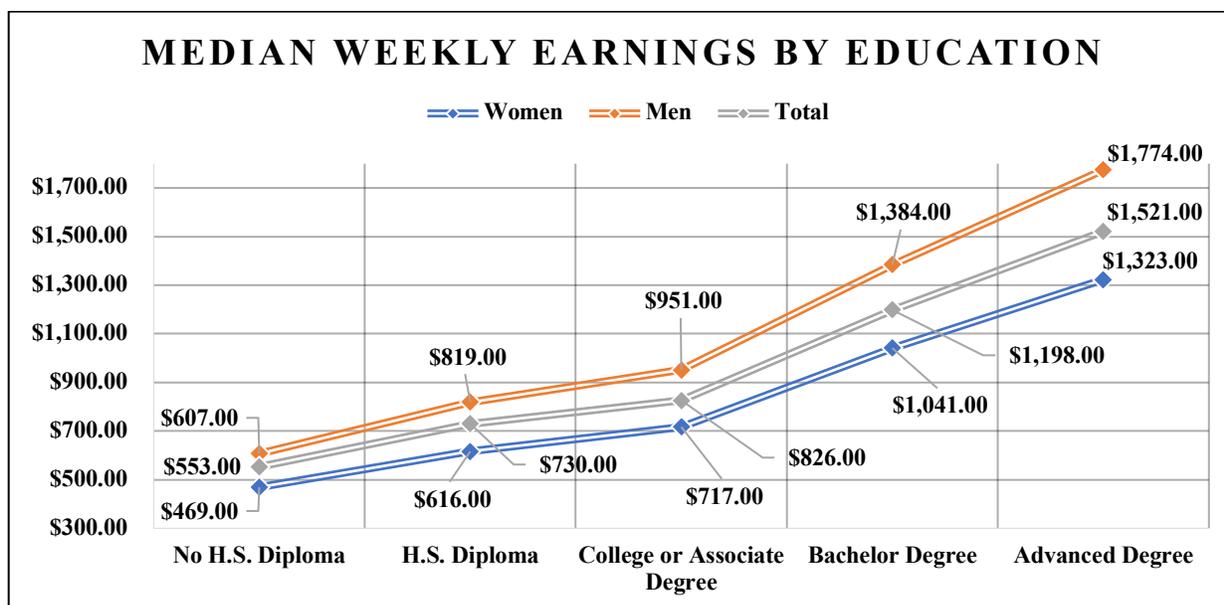
⁸³ MAATZ & HEDGEPEETH, *supra* note 18, at 8; *see* 2019 News Release, *supra* note 70 (data is available at Table 9).

⁸⁴ CORBETT & HILL, *supra* note 68, at 1-2.

⁸⁵ 2019 News Release, *supra* note 70 (data at Table 9).

⁸⁶ *Id.*

⁸⁷ *Id.*



This chart shows data from 2019 regarding differences in pay between men and women with certain educational levels. Accordingly, women must obtain at least one more degree than men in order to have similar earnings.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁸⁸

Lastly, there is a difference in pay between men and women in nearly all occupations. Skeptics about the realities of gender-based wage discrimination have explained this fact in a variety of ways. The first argument is that the gap within an occupation can be explained by the fact that women make different choices in the workplace than men do, which leads to women being paid less.⁸⁹ For example, a recent paper by two Harvard PhD students asserts that the pay differences among male and female employees working at the Massachusetts Bay Transportation Authority (“MBTA”) can be explained by women valuing workplace flexibility more than men, and by women having a lower demand for overtime work hours than men.⁹⁰ This argument is based, in part, on the belief that women have other responsibilities outside of the workforce, such as taking care of children. However, according to the President’s 2015 Economic Report,

⁸⁸ *Id.*

⁸⁹ Phelan, *supra* note 68; Annese, *supra* note 68; *see e.g.*, Bolotnyy & Emanuel, *supra* note 68.

⁹⁰ Bolotnyy & Emanuel, *supra* note 68, at 1.

workplace flexibility policies can actually help families meet both their family and professional goals, while also benefitting women and the economy.⁹¹

The second argument is that pay differentials occur within an occupation because men and women tend to gravitate toward different industries.⁹² However, the gap does not change drastically whether a certain occupation or industry employs more women than men. In those occupations where women represented 50% or more of the workforce, the average gender pay gap was still 87.24%, meaning that men were still being compensated at a higher level.⁹³ Similarly, in the occupations where women represented less than 50% of the workforce, the average gender pay gap was 81.27%.⁹⁴ Moreover, in 2018, it was reported that the median weekly earnings of men are higher than the median weekly earnings of women across almost every occupation.⁹⁵ Certain occupations may have higher or lower gaps than others, but there is no tangible correlation between the percentage of women in a specific occupation or industry and the gender pay gap.

	Median Weekly Earnings for All Employees	Median Weekly Earnings for Men	Median Weekly Earnings for Women	Gender Pay Gap
Occupations that Women Represent \leq 50% of All Employees	\$895	\$995	\$845	87.24%
Occupations that Women Represent $>$ 50% of All Employees	\$1,099	\$1,183	\$952	81.27%

This chart shows data from 2018 regarding the percentage of women in a certain occupation. All data above reflects the average. According to the data, women in both groups of occupations are paid less than their male counterparts.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁹⁶

⁹¹ CEA, *supra* note 77.

⁹² Avik Roy, *It's Time That We End the Equal Pay Myth*, FORBES (Apr. 16, 2012), <https://www.forbes.com/sites/realspin/2012/04/16/its-time-that-we-end-the-equal-pay-myth/#6775b0851408>.

⁹³ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LAB., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION, available at <https://www.bls.gov/cps/cpsaat39.pdf> (last visited Mar. 30, 2019) [hereinafter BLS].

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Industry	Median Weekly Earnings for All Employees (Avg.)	Median Weekly Earnings for Men (Avg.)	Median Weekly Earnings for Women (Avg.)	Gender Pay Gap (Avg.)
Management	\$1,429	\$1,585	\$1,236	77.98%
Business & Financial Operations	\$1,216	\$1,383	\$1,105	79.90%
Computer & Mathematical	\$1,539	\$1,604	\$1,345	83.85%
Life, Physical, & Social Sciences	\$1,270	\$1,357	\$1,156	85.19%
Community & Social Service	\$913	\$984	\$886	90.04%
Legal	\$1,467	\$1,910	\$1,243	65.08%
Education, Training, & Library	\$1,002	\$1,235	\$934	75.63%
Healthcare Practitioners	\$1,140	\$1,383	\$1,078	77.95%
Food Preparation	\$501	\$533	\$473	88.74%
Cleaning & Maintenance	\$551	\$604	\$407	78.97%
Personal Care & Service	\$544	\$638	\$517	81.03%
Sales	\$742	\$846	\$696	82.27%
Administrative Support	\$717	\$738	\$711	96.34%
Transportation & Material Moving	\$689	\$724	\$538	74.31%

This chart shows data from 2018 regarding differences in pay between men and women of certain industries. According to the data, women in each industry are paid less than their male counterparts.

Source: U.S. Department of Labor, Bureau of Labor Statistics⁹⁷

The last argument by gender pay gap skeptics is that the gap within occupations actually reflects the fact that men are more attracted to higher-paying jobs than women are.⁹⁸ However, a gap is found in both low-paying and high-paying occupations.⁹⁹ Of the 172 occupations that provided sufficient data to the Bureau of Labor Statistics in 2018, only 16% of the occupations showed a gender pay gap of 10% or less.¹⁰⁰ Moreover, the most significant gaps were found in the higher-paying occupations.¹⁰¹ For example, the gender pay gaps for physicians and surgeons, chief executives, pharmacists, and lawyers were all higher than the average pay gap of the U.S.¹⁰²

⁹⁷ *Id.*

⁹⁸ Roy, *supra* note 92; CORBETT & HILL, *supra* note 68, at 1-2.

⁹⁹ BLS, *supra* note 93.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

High-Paying Occupations for Women	Percentage of Female Workers in Occupation (%)	Gender Pay Gap (%)	Difference in Women's Earnings for Every Dollar Earned by the Male Counterpart
Total, full-time wage and salary workers	44.5	81.09	- \$0.19
Physicians and Surgeons	42.5	66.7	- \$0.333
Chief Executives	27.9	69.7	- \$0.303
Pharmacists	62.7	83.2	- \$0.268
Personal Financial Advisors	35.2	73.2	- \$0.268
Marketing and Sales Managers	46.4	73.5	- \$0.265
Lawyers	40.3	80.0	- \$0.200
Computer & Information System Managers	25.4	89.9	- \$0.101

This chart shows data from several of the highest-paying jobs for full-time workers in 2018. According to the data, women are more likely than men to earn significantly less for the highest-paying occupations.

Source: U.S. Department of Labor, Bureau of Labor Statistics¹⁰³

C. Solutions to Increase Transparency Regarding the Gender Pay Gap

The sources of the gender pay gap is without a doubt a contentious topic. Although data reveals that women are generally being paid less than men, the presence of alternative methods to measure the gap makes it difficult to assess.¹⁰⁴ No matter how you measure the gender pay gap, however, it is clear that there is a difference in pay between men and women. Since it is believed that pay parity will not be reached until 2059,¹⁰⁵ the U.S. needs to consider additional approaches to figure out what is causing pay inequalities.

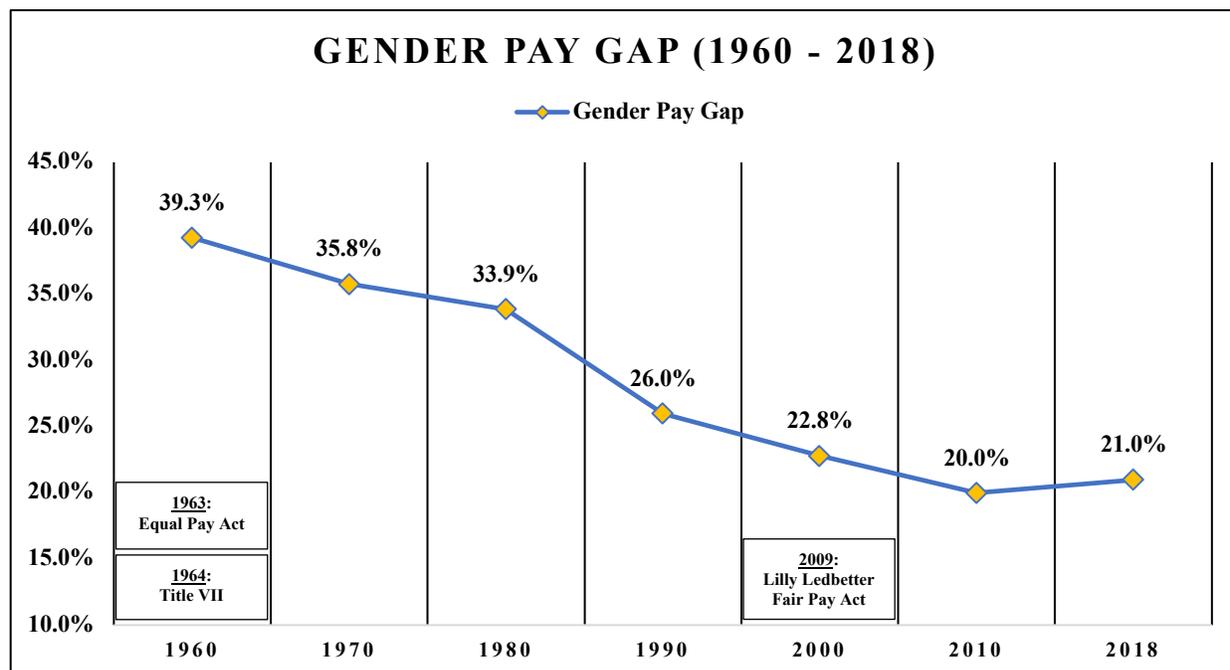
This can be done by examining aspects of the labor market and how social norms regarding women have changed over time. However, this could lead to conflicting reports, similar to how arguments based on gender pay gap data are perceived. Instead, the U.S. should consider several

¹⁰³ *Id.*

¹⁰⁴ ELISE GOULD ET AL., ECON. POLICY INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN'T BE EXPLAINED AWAY 1 (2016), *available at* <https://www.epi.org/files/pdf/112962.pdf> (“The presence of alternative ways to measure the gap can create a misconception that data on the gender wage gap are unreliable. However, the data on the gender wage gap are remarkable clear and (unfortunately) consistent about the scale of the gap.”).

¹⁰⁵ IWPR, *supra* note 22.

proposed laws and systems that could help increase transparency regarding compensation between men and women within the workforce. Although passing new laws over the past 60 years has not eliminated gender pay differences, there does seem to be a correlation between new laws and a closing of the gender pay gap.



This chart shows the average gender pay gap from 1963 to 2018. According to the data, the gender pay gap tends to be reduced after an equal pay law is enacted.

Sources: Economic Policy Institute and National Women’s Law Center¹⁰⁶

i. *The Paycheck Fairness Act*

One piece of proposed legislation that should be considered is the Paycheck Fairness Act (the “PFA”).¹⁰⁷ The intended purpose of the PFA is to “amend the Fair Labor Standards Act of 1938 to provide more effective remedies to [women discriminated against] in the payment of wages on the basis of sex.”¹⁰⁸ The PFA also would provide procedural protections under the Equal

¹⁰⁶ EPI, *supra* note 2; see also Abby Lane et al., *The Wage Gap Over Time*, NAT’L WOMEN’S L. CTR. (May 3, 2012), <https://nwlc.org/blog/wage-gap-over-time/>.

¹⁰⁷ See Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. (2015).

¹⁰⁸ See *id.*

Pay Act.¹⁰⁹ The rationale for introducing the bill was a determination that, despite the enactment of the Equal Pay Act, many women continue to earn significantly lower pay than men for equal work, which suggests that pay disparities must be the result of continued intentional discrimination or the lingering effects of past discrimination.¹¹⁰

The first benefit of enacting the PFA would be to update the definition of a work “establishment” under the Equal Pay Act.¹¹¹ Under the Equal Pay Act, a determination of wage discrimination is based on the comparison of the earnings between a male and female employee who perform “substantially equal” jobs and work within the same “establishment.”¹¹² If the PFA is passed, the legal definition of “establishment” would be broadened. According to the PFA, wage comparisons may be made between employees who perform substantially equal jobs at any of the employer’s places of business that are located in the same country or political subdivision.¹¹³ This is essential because many businesses today operate out multiple offices in the same area.

The second potential benefit of the PFA would be to clarify the “factor other than sex” defense in the Equal Pay Act.¹¹⁴ Under the Equal Pay Act, an employer will not be liable if the employer can show that a pay differential is based on a seniority or merit system, the quality or quantity of production, or a factor other than sex.¹¹⁵ However, the Equal Pay Act does not explain what constitutes a “factor other than sex.” The PFA would provide guidance as to what qualifies as a “factor other than sex,” which would result in more consistent interpretations by courts. According to the PFA, a “factor other than sex” defense must be based on a bona fide, job-related

¹⁰⁹ Compare *id.* at § 2(4)(B), with 29 U.S.C. § 206(d).

¹¹⁰ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. § 2(2) (2015).

¹¹¹ See *id.* at § 3(a)(C).

¹¹² 29 U.S.C. § 206(d)(1); see *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 261-63 (3d Cir. 1970).

¹¹³ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. § 3(a)(C) (2015).

¹¹⁴ *Id.*

¹¹⁵ 29 U.S.C. § 206(d)(1).

factor, such as education, training, or experience that is consistent with business necessity.¹¹⁶ In addition, a factor will not qualify as an affirmative defense if the employee can show that the employer refused to implement an existing alternative employment practice that would have the same business purpose but not produce a pay differential.¹¹⁷ This is similar to the business necessity standard under Title VII.¹¹⁸

The third potential benefit of the PFA would be to improve the remedies available under the Equal Pay Act.¹¹⁹ Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.¹²⁰ However, these remedies usually provide inadequate compensation and are insufficient to deter future violations of the law by employers who view them as a cost of doing business. Under the PFA, prevailing plaintiffs could recover both compensatory and punitive damages, as sex discrimination plaintiffs can now do under Title VII.¹²¹

The last potential benefit of the PFA—and the most innovative one—is to prohibit employers from retaliating against employees for sharing salary information with coworkers.¹²² This would increase transparency regarding wage discrimination, because employees would be able to learn about wage disparities and evaluate whether they are being discriminated against. Under the Equal Pay Act, employers are prohibited from retaliating against an employee who asserts his or her rights under the Act, but it does not address situations involving salary discussions.¹²³ According to the PFA, employers would not be able to retaliate against employees for either seeking redress or inquiring about the wage practices of the employer.¹²⁴ Allowing

¹¹⁶ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. §§ 3(a)(B)(i)-(ii) (2015).

¹¹⁷ *See id.* at §§ 3(a)(B)(iv).

¹¹⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹¹⁹ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. § 3(c) (2015).

¹²⁰ 29 U.S.C. § 206(d)(3).

¹²¹ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. § 3(c)(1) (2015).

¹²² *Id.* at § 3(b).

¹²³ *See* 29 U.S.C. § 215(a)(3); *see also* 29 U.S.C. § 206(d)(1).

¹²⁴ Paycheck Fairness Act, H.R. 1619, S. 862, 114th Cong. § 3(b) (2015).

transparency of wage differences without the fear of retaliation is critical to providing societal-based factors to work alongside legislation to address the gender pay gap.

Although the PFA has been struck down on numerous occasions, it was recently reintroduced by House Speaker Nancy Pelosi in January 2019.¹²⁵ Since the Republicans currently control the Senate it is possible that the PFA may be struck down a fifth time.

ii. *The Fair Pay Act*

Another introduced law that should be considered is the Fair Pay Act (the “FPA”).¹²⁶ According to the bill, the purpose of the FPA is to “amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex, race, or national origin, and for other purposes.”¹²⁷ The FPA would also amend certain aspects of the Equal Pay Act. However, the last time it was struck down.¹²⁸

The first potential benefit of the FPA would be to expand the current protections of the Equal Pay Act to additional women in the workforce. Under the Equal Pay Act, gender-based wage discrimination is prohibited only between workers performing “substantially” the same jobs.¹²⁹ The FPA would require employers to pay equal wages to employees as long as they perform “equivalent jobs.”¹³⁰ This includes taking into account skills, effort, responsibility, and working conditions.¹³¹

¹²⁵ Emma Newburger, *Nancy Pelosi and Democratic lawmaker unveil the Paycheck Fairness Act in an effort to close the gender wage gap*, CNBC (Jan. 30, 2019), <https://www.cnbc.com/2019/01/30/nancy-pelosi-unveils-the-paycheck-fairness-act-to-close-the-pay-gap.html>.

¹²⁶ Fair Pay Act of 2017, H.R. 2095, 115th Cong. (2017).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970); see also 29 U.S.C. § 206(d)(1).

¹³⁰ Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 3(a) (2017).

¹³¹ *Id.*

The second potential benefit of the FPA would be to improve the remedies available under the Equal Pay Act.¹³² Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.¹³³ Much like the PFA, under the FPA, prevailing plaintiffs could recover both compensatory and punitive damages.¹³⁴

The third potential benefit of the FPA would be to clarify the “factor other than sex” defense.¹³⁵ Under the Equal Pay Act, an employer will not be liable if the employer can show that a pay differential is based on a seniority or merit system, the quality or quantity of production, or a factor other than sex.¹³⁶ According to the FPA, differences in pay are justified if the payment is made pursuant to a seniority or merit system, a system that measures earnings by quantity or quality of production, or “a differential based on a bona fide factor other than sex, race, or national origin.”¹³⁷ The bona fide factor may be based on education, training, or experience.¹³⁸ In addition, the FPA specifies that a factor will not qualify as an affirmative defense if the employer cannot demonstrate that the factor is job-related or furthers a legitimate business purpose.¹³⁹ An employee can also rebut this if they can prove that an alternative employment practice exists that would serve the same business purpose without producing such differential and the employer refused to adopt the practice, which is also seen in the PFA and Title VII.¹⁴⁰

¹³² *Id.* at § 5(a)(1).

¹³³ 29 U.S.C. § 206(d)(3).

¹³⁴ Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 5(a)(1) (2017).

¹³⁵ *Id.* at § 3(a).

¹³⁶ 29 U.S.C. § 206(d)(1).

¹³⁷ Fair Pay Act of 2017, H.R. 2095, 115th Cong. § 3(a) (2017).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*; *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

iii. *Revised EEO-1*

Since it is unclear what factors contribute the most to the gender pay gap, the U.S. should consider increasing transparency regarding compensation between men and women employees. For example, transparency can be increased by collecting pay data from employers concerning pay for both men and women, including based on job titles, education levels and work experience. This allows data to be used to focus efforts on certain industries and employers. This kind of data collection system has been successfully implemented by many countries, such as the U.K., Germany, and Iceland.¹⁴¹

The Equal Employment Opportunity Commission (“EEOC”) has already taken the initiative to implement such a system in the U.S.¹⁴² In 2010, the EEOC and other agencies were asked by President Obama to identify ways to improve enforcement of federal laws prohibiting pay discrimination.¹⁴³ This led to the idea of collecting data from certain employers in order to analyze the correlation between employee gender and compensation.¹⁴⁴ The idea of collecting data is not novel. Since 1966, the EEOC has required employers with 100 or more employees to file a report, an EEO-1, that describes the number of individuals employed by a job category, i.e., sex, race, and ethnicity.¹⁴⁵

However, the EEOC would like to make revisions to EEO-1 so more data can be gathered and analyzed, which hopefully can better explain (and possibly put pressure on) the gender pay gap. On July 14, 2016, the EEOC sought approval from the Office of Management and Budget

¹⁴¹ See *infra* Parts II & III.

¹⁴² Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports (Jan. 29, 2016), *available at* <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.

¹⁴³ 81 Fed. Reg. 5113, 5114 (Feb. 1, 2016).

¹⁴⁴ *Id.*

¹⁴⁵ 29 C.F.R. § 1602.7 (2019) (requiring all businesses subject to Title VII of the 1964 Civil Rights Act that have 100 or more employees to report data concerning the racial and ethnic composition of their employees).

(“OMB”) to revise the EEO-1 data collection system by including two new components.¹⁴⁶ The first component collects the same data that is gathered by the currently approved EEO-1, but includes data about an employee’s ethnicity, race, and sex regarding a job category.¹⁴⁷ The second component collects data on employees’ W-2 earnings and hours worked, which EEO-1 filers are already required to maintain in the “ordinary course of business.”¹⁴⁸ This data would then be formatted into 12 pay bands for the ten EEO-1 job categories.¹⁴⁹ Both components would apply to filers, both private sector businesses and Federal contractors, who have 100 or more employees.¹⁵⁰ However, contractors with 50 to 99 employees would only need to submit data required under the first component.¹⁵¹

Although OMB approved of the first component, they concluded that the second component violated the Paperwork Reduction Act of 1995.¹⁵² Under this Act, an agency that proposes to collect information must first conduct its own evaluation of the need for the collection of this information and what types of burdens this would create.¹⁵³ Upon completion of this review, OMB makes a determination regarding how to proceed.¹⁵⁴ In this case, OMB initially approved of the data collection system, but changed its decision for two reasons.¹⁵⁵ First, OMB felt that the continued collection of this information was contrary to the standards of the Paperwork Reduction Act.¹⁵⁶ Second, OMB was concerned that these reporting requirements would place too

¹⁴⁶ See 81 Fed. Reg. 45479 (July 14, 2016).

¹⁴⁷ See 81 Fed. Reg. 5118.

¹⁴⁸ *Id.*; see 42 U.S.C. § 2000e-8(c)(1)-(3).

¹⁴⁹ See 81 Fed. Reg. 5118.

¹⁵⁰ *Id.* at 5118-19.

¹⁵¹ *Id.* at 5119.

¹⁵² See Memorandum from Neomi Rao, Admin, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm’n (Aug. 29, 2017), <https://perma.cc/R3LH-XYDD>; see also Stay the Effectiveness of the EEO-1 Pay Data Collection, 82 Fed. Reg. 43362 (Sept. 15, 2017).

¹⁵³ Paperwork Reduction Act of 1995, 44 U.S.C. § 3506(c)(1) (1982).

¹⁵⁴ *Id.* at §§ 3506(c)(1), (e)(1).

¹⁵⁵ Nat’l Women’s Law Ctr. v. OMB, No. 17-cv-2458(TSC), 2019 U.S. Dist. LEXIS 33828, *10-12 (D.D.C. Mar. 4, 2019).

¹⁵⁶ *Id.*

large of a burden on businesses and that the EEOC did not adequately address privacy and confidentiality issues.¹⁵⁷

Accordingly, the National Women’s Law Center and others sued, alleging that OMB violated the Paperwork Reduction Act, exceeded their statutory authority in reviewing and staying the collection of pay data, and the notice disapproving the revisions was a nullity.¹⁵⁸ On March 4, 2019, the court granted summary judgment for plaintiffs, concluding that OMB’s stay of EEOC’s pay data collection was illegal.¹⁵⁹ The rationale was that the government’s position was based on “hyper-technical formatting changes that have no real consequences for employers.”¹⁶⁰ Although formatting changes can be burdensome, the government failed to demonstrate why the data specifications of the revised EEO-1 would increase the burden on employers.¹⁶¹

Unless this judgment is appealed, the U.S. will have successfully taken the first step at increasing pay transparency. By requiring certain data from employers on gender and earnings, compensation decisions of certain employers will be brought to light. It will also help determine whether there is true discrimination in certain workforces, and whether other factors are being considered during compensation decisions. More importantly, these reports will be available to the public. This may lead to public embarrassment or criticism, which may incentivize employers to change their policies in order to report more favorable data the following year.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at *14-15.

¹⁵⁹ *Id.* at *58.

¹⁶⁰ *Id.* at *57-58.

¹⁶¹ *Id.* at *58.

II. THE GENDER PAY GAP IN THE UNITED KINGDOM

The gender pay gap is not only a problem in the United States. According to a 2018-2019 global wage analysis conducted by the International Labour Organization (“ILO”), the median gender pay gap in the U.S. is 18.4% (using hourly wages) and 25.7% (using monthly earnings).¹⁶² Although these numbers are large, the U.S. is not considered to have one of the largest gender pay gaps when compared to the other 73 countries that provided relevant data.¹⁶³ According to the ILO’s analysis, a country with a larger gender pay gap than the U.S. is the United Kingdom.¹⁶⁴

A. The U.K. Equal Pay Act 1970

The U.K. did not address issues regarding the gender pay gap until the 1960s. At that time, it had been common practice in the private sector, and parts of the public sector, to have separate and lower rates of pay for women.¹⁶⁵ On June 7, 1968, women at a Ford factory in the U.K. discovered that they were being paid about 15% less than men doing the same work.¹⁶⁶ Ford refused to amend its compensation policies, and a strike was organized.¹⁶⁷ This eventually led to the U.K. enacting the Equal Pay Act 1970 (the “U.K. Equal Pay Act”), which was designed to prevent discrimination between men and women concerning terms and conditions of employment.¹⁶⁸ In addition, the U.K. Equal Pay Act introduced an implied equality clause into all employment contracts, which eliminated separate and lower rates of pay.¹⁶⁹

¹⁶² ILO, *supra* note 23, at 24-25.

¹⁶³ *See id.*

¹⁶⁴ *Id.*; see Briefing Paper 7068, *supra* note 24, at 6; see also Adrian Francisco Varelo, *These are the countries with the worst gender pay gaps*, BUS. INSIDER (Dec. 2, 2018).

¹⁶⁵ NATIONAL EDUCATION UNION, EQUAL PAY & THE EQUAL PAY ACT 1970, available at <https://www.teachers.org.uk/women/equal-pay-equal-pay-act-1970> (last visited Feb. 26, 2019).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Equal Pay Act 1970 c. 41 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1970/41/contents>.

¹⁶⁹ *Id.* at § 2(1).

Although the U.K. Equal Pay Act was designed to provide equal pay for men and women performing equivalent work, employers were still able to figure out ways to pay men and women differently.¹⁷⁰ Even though the U.K. Equal Pay Act was enacted in 1970, it was not implemented until 1975.¹⁷¹ This provided employers time to discover methods to avoid complying with the Act. For example, employers re-graded jobs and changed job titles of employees, which justified pay differences between men and women even if both were performing equivalent work. In addition, the term “equivalent” was not clear.¹⁷² For example, an employer could raise women pay rates to the lowest pay rates of men. Thus, even if the jobs of women were more demanding than the jobs of men the terms and conditions for women were still “not less favourable” than those of men.

B. The U.K. Equality Act 2010

Since pay inequalities still existed after the U.K. Equal Pay Act, the U.K. decided to replace several of its equal pay laws. This led to the enactment of the Equality Act 2010 (the “U.K. Equality Act”), which was designed to ensure that men and women, full-time or part-time, were given equal pay.¹⁷³ The U.K. Equality Act was also able to provide more protections to women in the workforce by changing certain provisions of the U.K. Equal Pay Act.

One important change that was made under the U.K. Equality Act was that employers could not discriminate regarding pay, benefits, terms and conditions if men and women are performing “equal work,” as opposed to “equivalent work.”¹⁷⁴ Another change was that discrimination was prohibited outside of the workplace. The U.K. Equal Pay Act only prohibits discrimination in the

¹⁷⁰ *Id.* at § 1.

¹⁷¹ *Id.* at § 9(1).

¹⁷² *Id.* at § 1(1)(b).

¹⁷³ See Equality Act 2010, c. 15 (U.K.), available at <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

¹⁷⁴ Compare Equal Pay Act 1970 c. 41, § 1(1), with Equality Act 2010, c. 15, Ch. 3, §§ 65-70.

workplace.¹⁷⁵ Under the U.K. Equality Act, however, discrimination is prohibited in the workplace and also in society as a whole.¹⁷⁶ The type of discrimination prohibited was also expanded. The U.K. Equal Pay Act requires discrimination to be based on a protected characteristic.¹⁷⁷ Under the U.K. Equality Act, direct and indirect discrimination is prohibited, which means a woman does not need to prove they are being paid less than a man in order to bring a claim.¹⁷⁸ For example, with the changes under the U.K. Equality Act, a woman could bring a claim against an employer simply because a provision, criterion, or practice of an employer particularly disadvantaged her.

C. The Equality Act 2010 Regulations 2017

Although the U.K. Equality Act provided more protections to women in the workforce, the gender pay gap still remained an issue in the U.K. In 2010, it was reported that the U.K. gender pay gap was still 19.8%.¹⁷⁹ And even with the new laws, it has been suggested that it could still take almost a century before pay parity was achieved.¹⁸⁰ Instead of enacting additional laws that were similar to the U.K. Equality Act, the U.K. decided to take a new approach, one focused on increasing transparency in the workforce.

The first time the U.K. tried to address pay inequalities by increasing transparency was in 2011. The Government Equalities Office implemented the *Think, Act, Report* initiative, which asked employers to publish any gender pay gap information that could help achieve gender

¹⁷⁵ Equal Pay Act 1970 c. 41, § 1(1).

¹⁷⁶ Equality Act 2010, c. 15, Ch. 2.

¹⁷⁷ Equal Pay Act 1970 c. 41, § 1(1)(a).

¹⁷⁸ Equality Act 2010, c. 15, Ch. 2, §§ 13, 19.

¹⁷⁹ ONS, *supra* note 24, at 2.

¹⁸⁰ Amie Tsang, *British Companies Must Reveal How They Pay Women vs. Men*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/business/britain-salary-gender-gap.html>.

equality.¹⁸¹ The biggest problem with this initiative, however, was that compliance was voluntary for employers.¹⁸² Accordingly, the U.K. decided that it needed to legally require employers to comply with this reporting system and provide guidelines as to what information needed to be reported. In 2017, the U.K. amended the U.K. Equality Act by implementing two regulations: the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172) (the “2017/172 Regulations”); and the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) (the “2017/353 Regulations”) (collectively, the “Regulations”).¹⁸³

i. General Application of the Regulations

The 2017/172 Regulations came into force on April 6, 2017.¹⁸⁴ According to the 2017/172 Regulations, private and voluntary sector employers with 250 or more employees are required to publish and report specific data regarding its gender pay gap annually.¹⁸⁵ In addition, relevant employers (those with 250 or more employees) are required to provide details on gaps related to average bonuses paid and the proportion of men and women who received bonuses.¹⁸⁶

The term “relevant employer” includes both private and public sectors. Private sector organizations that are part of a group must report individually if they are relevant employers, and this information must be reported by April 4th each year.¹⁸⁷ Originally, the Regulations did not

¹⁸¹ GOVERNMENT EQUALITIES OFFICE., THINK, ACT, REPORT: ONE YEAR ON 11 (2012), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/128778/think-act-report-annual-report.pdf.

¹⁸² *Id.*

¹⁸³ *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 (U.K.), *available at* <https://www.legislation.gov.uk/uksi/2017/172/contents>; *see also* Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353 (U.K.), *available at* <https://www.legislation.gov.uk/uksi/2017/353/contents>.

¹⁸⁴ *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 1(1).

¹⁸⁵ *See id.* at Explanatory Notes ¶ 1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

consider public or government authorities as a “relevant employer.”¹⁸⁸ However, public sector employers were covered by the Regulations when the 2017/353 Regulations were enacted, which came into force on March 31, 2017.¹⁸⁹ Relevant employers in the public sector include government departments, the armed forces, local authorities, NHA bodies, and most schools.¹⁹⁰ As for the requirements of relevant employers, these employers must do two things. First, relevant employers must publish specific gender pay gap data and a written statement on its website.¹⁹¹ This data must be kept on the website for at least three years.¹⁹² Second, relevant employers must also publish this data on a government website, which is designated by the Secretary of State and must be published by March 30th each year.¹⁹³

The Regulations increase transparency by making gender pay gap information available to the public. However, the U.K. also made sure that the required information covered a broad range of topics that could impact pay inequalities in the workplace. Pursuant to the Regulations, a relevant employer is required to publish the following information each year:

- 1.) The difference between both the mean and median hourly rate of pay for women and men that are full-time employees;
- 2.) The difference between both the mean and median bonus pay for women and men;
- 3.) The proportions of female and male employees who were paid bonus pay; and
- 4.) The proportions of female and male full-pay employees in the lower, low middle, upper middle, and upper quartile pay bands.¹⁹⁴

¹⁸⁸ *Id.* at § 1(6).

¹⁸⁹ *See* Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, § 1(1).

¹⁹⁰ *See id.* at §§ 2(3)-(5).

¹⁹¹ *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 15(1)(a).

¹⁹² *See id.* at § 15(1)(b).

¹⁹³ *See id.* at § 15(2).

¹⁹⁴ *See id.* at §§ 2(1)(a)-(f).

ii. *The Results After Implementing the Regulations*

The goal of the Regulations was to shine a light on the pay practices of employers and what factors could stall career advancements of women. By requiring relevant employers to publish and report gender pay gap information, the U.K. anticipated that these reports would incentivize employers to avoid or respond to negative results, which would then reduce pay inequalities within the workforce.

The Regulations came into force on April 6, 2017, and more than 10,000 employers publicly reported their gender pay gap data the following year.¹⁹⁵ It was clear that the reports were going to produce embarrassing and uncomfortable results for several large employers. The data indicated that more than 78% of all relevant employers paid men more than women and that the median pay gap was around 9.7%.¹⁹⁶ Moreover, the data produced significant results for certain industries, particularly banks, airlines, and soccer clubs. Goldman Sachs' Britain office reported that women were paid an average of 56% less than men.¹⁹⁷ WIPP, a British advertising company, reported that women received about 25% less than their male counterparts.¹⁹⁸ In addition, Stoke City Football Club reported women earned about 30.5% less than their male counterparts regarding mean hourly earnings.¹⁹⁹

Furthermore, the Regulations induced employers to address current compensation policies. For example, EasyJet, the U.K.'s busiest discount airline, reported that men earned about 52%

¹⁹⁵ See *id.* at § 1(1); see also Jennifer Calfas, *Almost 80% of U.K. Companies Pay Women Less Than Men*, TIME (Apr. 5, 2018), <http://time.com/5229228/gender-wage-gap-uk/>; see also See Feargal McGuinness, *Women and the Economy*, House of Commons Library Briefing Paper No. CBP06838, (Mar. 9, 2018), at 4, available at <http://researchbriefings.files.parliament.uk/documents/SN06838/SN06838.pdf> [hereinafter Briefing Paper CBP06838].

¹⁹⁶ See *id.*

¹⁹⁷ Liz Alderman, *Britain Aims to Close Gender Pay Gap with Transparency and Shame*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/britain-gender-pay-gap.html>.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

more than women.²⁰⁰ After reporting and publishing this data, a male executive of EasyJet took a 4.6% pay cut to match the salary of his female predecessor and pledged to more than triple the wages of its female pilots.²⁰¹ In addition, some companies tried to weaken the negative results of reports by providing their own interpretation of the data. In 2018, it was reported that PwC (U.K.) had the largest gap among the “Big Four” accounting firms with a gender pay gap of 43.8%.²⁰² Instead of remaining silent after publishing its report, PwC addressed its gender pay gap report from 2018 by publishing a supplemental report. Although PwC was considered to have the highest gap amongst its peers, it was evident that the mean gender pay gap decreased from 2017.²⁰³ In addition, PwC published a five-point action plan to further lower its divide.²⁰⁴

Even if executives in the U.K. did not feel internal pressure to make changes to their existing corporate structure, pressure also was applied by external sources. For example, Mills & Reeve LLP, a British law firm, determined that it was paying women 32% less than men.²⁰⁵ Even though executives and partners of the firm did not feel obliged to make changes to improve their pay gap, large clients of the firm requested more female representation from the firm.²⁰⁶ Thus, it is clear that the Regulations are having an impact on employers, and data has shown that the Regulations have impacted the overall gender pay gap in the U.K. From 2017 to 2018, the gender pay gap for all employees dropped from 18.4% to 17.9%.²⁰⁷

²⁰⁰ *See id.*

²⁰¹ *See id.*

²⁰² *See* Stephanie Wix, *PwC has the highest gender pay gap among the Big Four at 43.8%*, INT’L ACCT. BULL. (Mar. 16, 2018), <http://www.internationalaccountingbulletin.com/News/pwc-uk-has-the-highest-gender-pay-gap-among-the-big-four-of-438-6085850>.

²⁰³ *See* PwC, DIVERSITY PAY REPORT 2018 3 (2018), *available at* <https://www.pwc.co.uk/annualreport/assets/2018/pdf/annual-report-18-diversity-pay-report.pdf>.

²⁰⁴ *See id.* at 2.

²⁰⁵ *See* Alderman, *supra* note 197.

²⁰⁶ *See id.*

²⁰⁷ *See* Briefing Paper 7068, *supra* note 24, at 7.

More importantly, the Regulations increased transparency as to which factors contributed significantly to the gender pay gap. After receiving data from relevant employers for the first time, it was reported that the overall pay gap was higher than the pay gap of part-time employees.²⁰⁸ This is presumably because part-time workers tend to earn less than full-time workers and women are more likely to have part-time jobs. In addition, this could be because women are less likely to drop out of the labor market around the time they have their first child, and more likely to stay in paid work in the years following.²⁰⁹ The Regulations provided the necessary data to further support these presumptions. After the Regulations were enforced, it was reported that 39% of all women employed were part-time, while only 12% of all men employed were part-time.²¹⁰ In addition, the pay gap widened substantially for women after the birth of their first child.²¹¹ Based on the data collected, the U.K. can now justify implementing additional measures that focus on specific groups of employees, such as women with children.

The rationale for enacting the Regulations in the U.K. was to increase transparency regarding the gender pay gap. Under the Regulations, women are able to discover whether men in similar positions are being paid more or less, which allows the public to know whether discrimination is a factor.²¹² Unlike the U.S., the U.K. has taken the first step and is in a better position to implement additional effective measures to close the gender pay gap.

²⁰⁸ *See id.* at 6.

²⁰⁹ BARRA ROANTREE & KARTIK VIRA, INSTITUTE FOR FISCAL STUDIES, BRIEFING NOTE 234: THE RISE AND RISE OF WOMEN'S EMPLOYMENT IN THE UK 2 (2018), available at <https://www.ifs.org.uk/uploads/BN234.pdf>.

²¹⁰ *See* Briefing Paper CBP06838, *supra* note 195, at 3; *see also* Briefing Paper 7068, *supra* note 24, at 6.

²¹¹ *See* Briefing Paper 7068, *supra* note 24, at 10.

²¹² *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Notes ¶ 1.

III. THE GENDER PAY GAP WORLDWIDE

The gender pay gap is a global concern that expands beyond the U.S. and the U.K. As of 2018, it was reported that women globally were paid 63 cents for every dollar paid to men.²¹³ In order to reduce the global gender pay gap, several international organizations have tried to track the gender pay gap among countries. The rationale is that having this information available to the public will raise global awareness of the global gender pay gap and put pressure on countries to close the gender pay gap.²¹⁴

Most equal pay laws make it illegal to pay women less than men. However, if it is illegal to pay women less than men then why are countries not able to close the global pay gap? More importantly, what is the correct method to close the gender pay gap? The U.S. has relied on current equal pay laws and tried to implement a data collection system. On the other hand, the U.K. has successfully implemented a data reporting system that relies on public transparency and accountability, but has experienced issues enforcing the requirements of the system.

A. How One Country May Close the Gap by 2022

A significant issue encountered when trying to close a country's gender pay gap is the ability to require companies to actually comply with the laws. Accordingly, transparency and public embarrassment are not enough to force employers to change compensation policies that negatively affect women. A majority of the current policies in place fail to close or reduce the gap because companies lack an incentive to do so if they know they will not be penalized. However, one country that has resolved this obstacle is Iceland.

²¹³ Neate, *supra* note 25.

²¹⁴ WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2018 (2018), *available at* http://www3.weforum.org/docs/WEF_GGGR_2018.pdf (discusses purpose of collecting information in Preface section).

Iceland has stated its commitment to closing the gender pay gap by 2022.²¹⁵ Although the WEF reported that Iceland was the top country regarding gender parity for the past nine years, Iceland's gender pay gap still remains between 14% and 18%.²¹⁶ So, is the 2022 goal feasible? The answer is uncertain, but Iceland is the first country to take gender pay gap issues to the next level. On January 1, 2018, Iceland became the first country in the world to legally enforce equal pay by adopting the Equal Pay Standard (the "EPS").²¹⁷

Pursuant to the EPS, all companies and institutions, public or private, with 25 or more employees are required to annually obtain a "certificate" that illustrates pay equality between men and women in the workplace.²¹⁸ In order to obtain this certificate, employers must implement an equal pay management system that follows the guidelines of the EPS.²¹⁹ The system must also be approved by an accredited auditor or regulator, who must determine whether the system establishes that women and men are being paid equally.²²⁰

So, what makes the EPS different from other equal pay laws? First, Iceland has acknowledged that this goal cannot be achieved overnight so employers must be treated differently based on size. Under the EPS, large firms and institutions that have a workforce of more than 250 employees must become certified by the end of 2018, while smaller employers are given more

²¹⁵ See Brian Jebb & Sarah Henchoz, *INSIGHT: Governments are Increasingly Turning to Pay Disclosure Requirements in an Attempt to Even the Corporate Playing Field*, BLOOMBERG L. (June 29, 2018), <https://news.bloomberglaw.com/daily-labor-report/insight-governments-are-increasingly-turning-to-pay-disclosure-requirements-in-an-attempt-to-even-the-corporate-playing-field>.

²¹⁶ See Emma Charlton, *Women in Iceland have walked out of work to dispute the gender pay gap*, WORLD ECON. F. (Oct. 25, 2018), <https://www.weforum.org/agenda/2018/10/women-in-iceland-have-walked-out-of-work-to-dispute-the-gender-pay-gap/>; see also Tara John, *Iceland Makes Equal Pay the Law*, TIME (Jan. 4, 2018), <http://time.com/5087354/iceland-makes-equal-pay-the-law/>.

²¹⁷ *New Icelandic law on Equal Pay Certification entered into force on January 1, 2018*, MINISTRY OF SOC. AFF. (Ice.) (Jan. 4, 2018), <https://www.government.is/news/article/2018/01/04/New-Icelandic-law-on-Equal-Pay-Certification-entered-into-force-on-January-1-2018/>.

²¹⁸ See Act on Equal Status and Equal Rights of Women and Men, IST 85:2012 s. 3 art. 18.

²¹⁹ See *id.*

²²⁰ See *id.* at s. 2 art. 13.

time to receive the certification.²²¹ For example, employers with a workforce between 90 to 149 must become certified by 2020, while employers with a workforce between 25 to 90 must become certified by 2021.²²² Thus, all companies and institutions with 25 or more employees must become certified by January 1, 2021.

Second, Iceland has differentiated themselves from most countries in the area of enforcement. Similar to the U.K., Iceland does rely on public embarrassment to force employers to change. However, Iceland took the next step by enforcing civil penalties if an employer fails to receive the certificate on time or violates any provision of the EPS. An employer who fails to comply with the EPS can be fined up to 50,000 ISK, about €350 or \$500, per day of noncompliance.²²³ In addition, employees can receive compensation for financial and non-financial losses from employers.²²⁴

In the end, Iceland is able to do the very thing the U.K. failed to do when enacting its equal pay laws: having the ability to actually enforce the laws. Although the EPS only applies to about 1,180 employers and 147,000 employees, this represents about 80% of the entire labor force in Iceland.²²⁵ To put things into perspective, if the language of the EPS was incorporated into the Regulations about 245,000 additional private sector employers in the U.K. would be required to comply with the reporting requirements.²²⁶ In addition, about 7 million additional employees in

²²¹ See *Looking for information about equal pay in Iceland? All about the Equal Pay Standard*, KVENRETTINDAFELAS ISLANDS (Apr. 1, 2018), <http://kvenrettindafelag.is/2018/looking-for-information-about-equal-pay-in-iceland-all-about-the-equal-pay-standard/>.

²²² See *id.*

²²³ See Act on Equal Status and Equal Rights of Women and Men, IST 85:2012 s. 3 art. 18.

²²⁴ See *id.* at s. 5 art. 31.

²²⁵ MINISTRY OF FINANCE & ECONOMIC AFFAIRS, GOVERNMENT OF ICELAND, EQUAL PAY CERTIFICATE, available at <https://www.government.is/topics/human-rights-and-equality/equal-pay-certificate/> (last visited Feb. 26, 2019) (discusses which companies and institutions must obtain the certification in question 5 of the Q&A section).

²²⁶ See Chris Rhodes, *Business statistics*, House of Commons Library Briefing Paper No. 06152 (Dec. 12, 2018), at 5, available at <http://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf> [hereinafter Briefing Paper 06152].

the U.K. would be covered.²²⁷ Altogether, the EPS covers almost 46% more of Iceland's labor force than the Regulations do in the U.K.²²⁸

It seems plausible that Iceland will become the first country to close the gap, and it might do so by 2022. In 2018, Reykjavik Energy, one of the largest energy providers in Iceland, reported that 51% of management positions are employed by women and that there was no notable gender pay gap among employees.²²⁹ Whereas, it was reported that electricity and gas companies in the U.K. have an average gender pay gap of about 15.2%.²³⁰ More specifically, British Gas Services Limited (U.K.), which is a subsidiary of one of the largest energy and home services companies in the U.K., reported that women earn a little more than half of what a typical male employee earns.²³¹ As seen in British Gas Services Limited's 2017 gender pay report, the median gender pay gap between men and women in the company is 37.5%.²³²

Greater transparency of pay discrepancies affords women the knowledge needed to influence employers to make changes. It is difficult for female workers to complain about pay inequalities if they are not aware that they are being paid differently. In addition, transparency allows more information to be revealed about what factors truly impact the gender pay gap. Although countries have tried to increase transparency, it is clear more is needed to close pay gaps, such as civil penalties. Accordingly, it is not only essential that countries trying to increase

²²⁷ *See id.*

²²⁸ *See* Angela Henshall, *What Iceland can teach the world about gender pay gaps*, BBC (Feb. 11, 2018), <http://www.bbc.com/capital/story/20180209-what-iceland-can-teach-the-world-about-gender-pay-gaps>.

²²⁹ *See Strength Through Diversity: Meet the Women in Geothermal*, SEEQUENT (Dec. 13, 2018), <https://www.seequent.com/blog/2018/12/11/investing-in-the-future>.

²³⁰ *Fixing the gender pay gap in the energy industry*, ENGERATI (May 7, 2018), <https://www.engerati.com/energy-management/article/energy-development/fixing-gender-pay-gap-energy-industry>.

²³¹ *See id.*

²³² *See* GOVERNMENT EQUALITIES OFFICE, BRITISH GAS SERVICES LIMITED GENDER PAY GAP REPORT (2017), available at <https://gender-pay-gap.service.gov.uk/Employer/C4sdnneJ/2017>.

transparency provide effective data reporting systems, but also provide for civil and/or criminal penalties for noncompliance with reporting requirements.

IV. CONCLUSION

Most countries are facing pressure to close the pay gap between men and women. No country has achieved pay parity; however, data suggests that the countries having the most success in closing the gender pay gap have done so through increased transparency in employer wage data. Increasing transparency of wage data in the workplace will better highlight the factors that need to be addressed in order to close the gender pay gap, and it is clear that laws aimed at increasing transparency need to have teeth to ensure compliance. To better understand the root causes of pay disparity between men and women, we need to examine employer wage data. Without this data, it is impossible to know whether and to what extent gender discrimination factors into the pay differential between men and women. Without proper enforcement mechanisms, we cannot know if there has been compliance with data reporting requirements.

There is a push, worldwide, to close the gender pay gap. Most of the laws enacted have not closed the gap as quickly as expected, and the laws that appear to be having the most success focus first on transparency of employer wage data. Transparency is the key to understanding the causes and extent of the pay disparity between men and women, and it is a critical first step therefore in closing the pay gap.