



Equal Pay, Equal Work: The Latest Developments

Labor and Employment Group Webinar

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Agenda

- I. Context: Persistent Pay Disparities Drive Action**
- II. Primary Legal Framework:
Laws that Prohibit Discrimination**
- III. Secondary Legal Framework:
Laws that Require Transparency, Limit Disclosures, et cetera**
- IV. New Focus: Requirements for Paid Leave**
- V. New Focus: Temporary and Contingent Workforces**

Context: Persistent Pay Disparities Drive Action

Gender Pay Disparity Statistics

- **In 2022, women earned an average of 82% of what men earned, based on median hourly earnings of both full time and part time workers**
- **That is only slightly different than two decades ago; in 2002, women earned an average of 80% of what men earned**

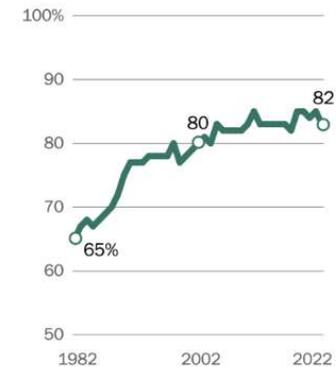
Source: Pew Research Center | <https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/>

Gender Pay Disparity Statistics

- The relative lack of progress in the past 20 years is very different than the 20 years prior to that
- In 1982, the pay disparity was \$0.65 to the dollar

Gender pay gap narrowed in the 1980s and '90s, but progress has stalled since

Women's median hourly earnings in the U.S. as a % of men's median hourly earnings



Note: Samples include employed workers ages 16 or older with positive earnings, working full time or part time, excluding the self-employed.
Source: Pew Research Center analysis of the Current Population Survey outgoing rotation group files (IPUMS).

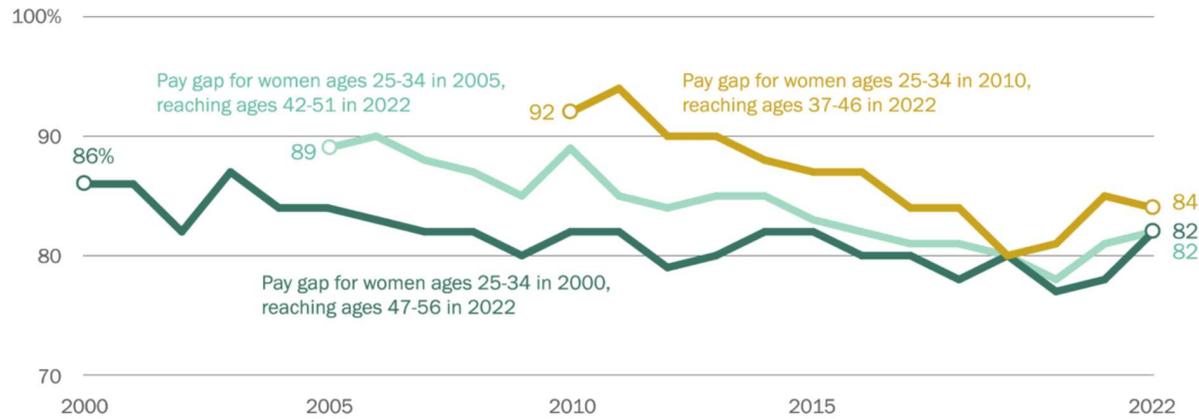
PEW RESEARCH CENTER

Source: Pew Research Center | <https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/>

Gender Pay Disparity Statistics

As women age, their pay relative to the pay of men of the same age decreases

Median hourly earnings of women in the U.S. as a % of the median hourly earnings of men of the same age, starting at ages 25 to 34 in the years shown and ending at the ages reached in 2022



Note: Samples include employed workers with positive earnings, working full time or part time, excluding the self-employed.
Source: Pew Research Center analysis of the Current Population Survey outgoing rotation group files (IPUMS).

PEW RESEARCH CENTER

Source: Pew Research Center | <https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/>



Pay Disparity by Race

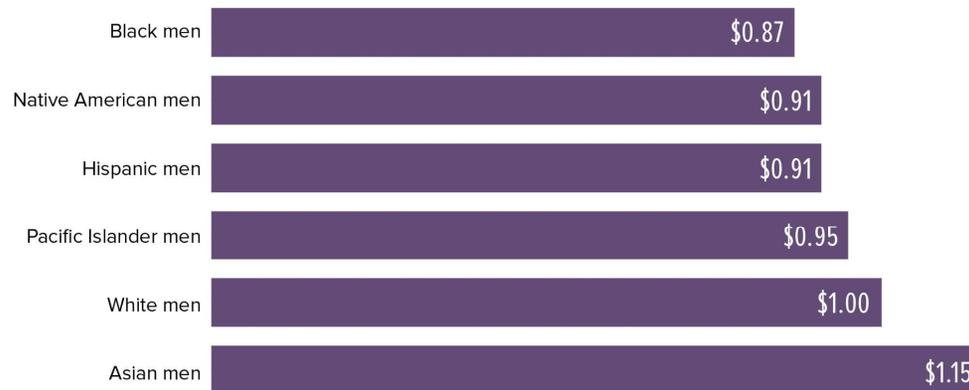
- **Median weekly earnings for Black men were 80.2% of the median for White men**
- **For Hispanic men, median weekly earnings were 74.3% of the median for White men**
- **The difference was less among women:**
 - **Black women's median earnings were 89.6% of those for White women**
 - **Earnings for Hispanic women were 77.5% of those for White women**

Source: Bureau of Labor Statistics | <https://www.bls.gov/news.release/pdf/wkyeng.pdf>

Pay Disparity by Race

Black Men Earn Less on the Dollar Than Male Workers of Other Races

On average, black men in the U.S. earn 87 cents for every dollar earned by white men, based on data from a sample of 1.8 million employees surveyed between January 2017 and February 2019.



Source: PayScale.

Source: Society of Human Resources Management | <https://www.shrm.org/topics-tools/news/benefits-compensation/black-workers-still-earn-less-white-counterparts#:~:text=On%20average%2C%20black%20men%20earned,by%20a%20white%20male%20worker>

Primary Legal Framework: Laws that Prohibit Discrimination

Effect of Changes to Salary History and Pay Equity

- **Federal Equal Pay Act of 1963**
 - Requires equal pay for employees whose jobs require equal skill, effort, and responsibility, and are performed under the same working conditions
- **Grown and expanded over the years**
 - Many states not only have their own equal pay laws, but also have specific language (e.g., California states you must have equal pay for substantially similar work regardless of the location)
 - Employees have a protected right to discuss their wages and have the right to access certain wage and salary information

Federal Law: Equal Pay Act 1963

- **29 U.S.C. § 206**
- **Requires equal wages to men and women who perform jobs that:**
 - **Require substantially equal skill, effort, and responsibility**
 - **Are performed within the same establishment under similar working conditions**
- **The job content determines “skill,” “effort,” and “responsibility“**
 - **The EEOC outlines definitions for these terms**

Federal Law: Equal Pay Act 1963

- **Valid justifications for pay differences (affirmative defenses that employer has to prove)**
 - **Seniority**
 - **Merit system**
 - **System measuring earnings by quality or quantity of production**
 - **Bona fide factor other than sex, such as education, training, or experience**
- **If a pay differential is found, the pay must be increased for the lower-paid employee**

Federal Law: Equal Pay Act 1963

***Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017)**

“Reliance on past wage simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reached the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.”

Federal Law: Title VII

- **Title VII**
 - Prohibits discrimination in compensation and other terms and conditions of employment (hiring, firing, etc.)
- **Broader reach than the EPA**
 - “Similarly situated”: similar tasks, similar skill, effort, responsibility, working conditions, and are similarly complex or difficult
 - Need not be in the same department or location
- **Intentional differences (disparate treatment)**
- **Systemic differences (disparate impact)**

Federal Contractors & Subcontractors

- **Office of Federal Contract Compliance Program (OFCCP) Requirements**
 - **Executive Order 11246:**
 - The contractor will not discriminate ... because of race, color, religion, sex, sexual orientation, gender identity, or national origin.
 - The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.
 - Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

State Laws

- **As of July 1, 2022, all states have *some kind* of fair employment practices law that prohibits discrimination on the basis of sex—this can include compensation**
 - See Minnesota Human Rights Act
- **All states have equal pay laws – i.e. employers cannot pay employees of one sex at rates lower than rates paid to employees of the opposite sex**
 - Most modeled after EPA

Defenses to Equal Pay Claims

- **Must be a legitimate factor for pay discrepancy**
- **Nearly all circuits (including the 9th) do not allow previous salary to be considered**
- **Permitted defenses:**
 - **Seniority system**
 - **Merit System**
 - **Systems that measure by quantity or qualification of production**
 - **Bona fide measure – education, experience, training**

Practical Tips for Fair Pay Compliance

- Undertake ***privileged*** audit of actual pay disparity by gender, race, and ethnicity
 - Identify positions that would qualify as “substantially similar” (or your relevant state’s languages)
 - Audit job descriptions
 - Review statewide compensation records and systems to identify positions where there is potential unequal pay for substantially similar work – even if at different physical locations – and determine whether the entirety of that pay discrepancy is justified based on one of the recognized justifications
- Update written policies and procedures
 - Ensure you are prohibiting gender, race, and ethnic based pay discrimination for similar work
 - Delete policies that prohibit employees from discussing their wages
 - Add formal complaint procedures
 - Prohibit retaliation against employees who make equal pay complaints
 - Consider creating formal policies documenting justifications for pay discrepancies

Secondary Legal Framework: Laws that Require Transparency, Limit Disclosures, etc.

Wage Disclosure Protections

- **Laws that bar employers from prohibiting employees to discuss or disclose their own wages**
 - **Federal National Labor Relations Act**
 - **California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, Washington**

Salary History Inquiry Bans

- **Federal Contractors**
- Alabama
- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Nevada
- New Jersey
- New York
- North Carolina (state agencies)
- Oregon
- Pennsylvania (state agencies)
- Puerto Rico
- Rhode Island
- Vermont
- Virginia
- Washington
- Several localities (Atlanta (city agencies), New Orleans (city agencies), Philadelphia, and others)

States with “Bans on Bans”

- **Michigan**
 - Prohibits salary history bans in the state.
 - Local governments may not regulate the information that employers must request, require, or exclude on an application for employment or during the interview process
- **Wisconsin**
 - Local governments may not prohibit employers from soliciting the salary history of prospective employees

Pay Transparency Laws

- **Laws that require employers to include compensation information to applicants or current employees**
 - **Applicability differs by state (number of employees, location of remote employees, etc.)**
 - **Some states require employers to provide compensation information to applicants proactively, others upon request**
 - **Uncertainty in some laws in how coverage applies to remote workers**

Pay Transparency Laws

- **California**
- **Colorado**
- **Connecticut**
- **Hawaii**
- **Illinois**
- **Maryland**
- **Nevada**
- **New York**
- **Rhode Island**
- **Washington**
- **Many localities**
 - **New York City**
 - **Jersey City**
 - **Cincinnati**
 - **Toledo**

Posting Salary Range

- **Some states require that an employer post the salary range in the job postings:**
 - California
 - Colorado
 - Washington
 - New York
 - Hawaii
 - Illinois
- **Up next:**
 - Bills are pending and may be considered in 2024 in several states including Massachusetts, Oregon, Vermont, and Virginia

Goals of Transparency, Disclosure Laws

- Promote pay equity by allowing employees to discuss wages with each other
- Promote pay equity by increasing visibility into salary level as set by employer
- Promote pay equity by prohibiting employers from basing offered salary on potential hire's salary history (which could be suppressed by inequity)
- Promote pay equity by prompting an audit where disclosure, or an employee request, does indeed point out a disparity
- Promote pay equity

Pay Data Reporting (CA)

Prior to 2023:

- *Reporting requirement went into effect in 2020*
- *Applies to private employers of 100 or more employees (with at least one employee in California)*
- *Based on same foundational data as EEO-1 report, with the same categories for establishment, job category, race, ethnicity, and sex*
- *Then requires employees to be grouped by “pay band”*

Pay Data Reporting (CA)

Effective 2023:

- ***Adds a new reporting requirement: “Within each job category, for each combination of race, ethnicity, and sex, the median and mean hourly rate.”***
- ***That means, separate from the pay bands, the W-2 data for each EEO-1 group has to be analyzed to create two hourly rate data points***
- ***Also a requirement for a separate report of only those employees are hired through staffing agencies, if 100 or more employees meet that criteria***

New Focus: Requirements for Paid Leave

Goal: Increase Total Compensation

- **Thirteen states and the District of Columbia have enacted mandatory paid family leave systems**
- **A policy goal is to increase total compensation for lower wage workers by providing paid-leave**
- **Requirements for when leave must be granted and the amount of leave employees accrue will vary from state-to-state**
 - **Consult experienced counsel in the state where you operate with questions**

Goal: Increase Total Compensation

- **Paid Leave Oregon: Went into effect Jan. 1, 2023, employees can begin applying for benefits as of Sept. 3, 2023.**
- **Employees eligible are those who have earned at least \$1,000 the year before applying for benefits**
- **Workers can receive up to 12 weeks of leave in 52-week period to be used for:**
 - Baby bonding leave: birth, adoption of child, placement of foster child
 - To care for a family member with a serious health condition
 - Employee's serious health condition
 - Survivors of domestic violence assault
- **Those who are pregnant, have given birth or have health issues related to childbirth may be eligible for up to 14 weeks of paid leave.**
- ***Unlike CA PFL, job is protected by law when on paid leave if employee has worked at least 90 consecutive days.***

Goal: Increase Total Compensation

- **In Colorado -- only FMLA if employees are eligible.**
- **Paid Family and Medical Leave**
 - **Benefits start January 1, 2024**
 - **Eligible if employee has earned at least \$2,500 at their job**
 - **Qualifying reasons:**
 - Birth of child, adoption, foster care placement
 - Serious health condition
 - Care for family member with a serious health condition
 - Safe leave due to domestic violence
 - Matters relating to active military duty
 - **Employers can require that leave taken run concurrently with any leave taken under the FMLA.**
 - **Leave is job protected – cannot be fired if employee has been on the job for at least 180 days.**

Goal: Increase Total Compensation

- **SB 616– Expansion of Paid Sick Leave**

- Increases the minimum mandated paid sick leave days from three days to five days.
- Discussion on number of “days” for longer shifts
- Prohibits employers from asking for documentation for leave.
- Still allows accrual at one hour per 30 hours worked, but increases use cap from 24 hours or “three days,” to 40 hours, or “five days,” per year, and increases accrual cap from 48 hours or “six days” to 80 hours or “ten days.”
- Effective January 1, 2024

Goal: Increase Total Compensation

- On January 1, 2024, the Illinois Paid Leave for All Workers Act took effect
- The law allows workers to earn at least one hour of paid leave for every 40 hours worked, up to 40 hours of leave per year
- The leave can be taken “for any reason” (that is, not limited to the employee’s own or family’s illnesses)
- Employers may enact “reasonable, clearly communicated policies” that set out circumstances in which a request for leave may be denied, “due to operational necessity”
- State resources available at:
<https://labor.illinois.gov/laws-rules/paidleave.html>

New Focus: Temporary and Contingent Workforces

Goal: Increase Total Compensation

- **New Jersey Temporary Workers' Bill of Rights Law**
 - Enacted early 2023
 - Policy goal is to promote pay equity/parity between covered temporary laborers employed by “temporary help service firms” and directly-hired similarly situated employees
 - Requires:
 - Payment of hourly rate to temporary laborers equal to what is provided to directly hired comparable employees
 - Requires an hourly cost of benefits to be included in the calculation

Source: New York Law Journal |
<https://www.law.com/newyorklawjournal/2023/10/03/new-jersey-temporary-workers-bill-of-rights/>

Goal: Increase Total Compensation

- **Illinois Day and Temporary Labor Services Act**
 - Enacted 2023; rulemaking under way
 - Policy goal is to promote pay equity/parity between covered day or temporary laborers and directly-hired similarly situated employees, if the laborer works more than 90 calendar days in a 12-month period for a third-party employer
 - Requires:
 - Payment of hourly rate to temporary laborers equal to what is provided to directly hired comparable employees
 - Requires similar benefits, with option to provide monetary equivalent in the calculation

Source: Illinois Department of Labor

Key Takeaways

- **The floor is raising – and is uneven for multistate employers**
 - Like minimum wage, state laws that impose greater requirements than federal law apply within those jurisdictions
 - This is a complex landscape for multistate employers
 - **Decision: Satisfy the highest standard, everywhere, or adopt different policies in different locations**
- **The rules are changing**
 - Several states are creating paid-leave systems, with specifics TBD
 - Employers can struggle to adapt to contradictory or changing information
- **The trends seem likely to continue**

Questions?

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