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J. Andrew Morgan

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

J. Andrew Morgan[1]

[1] J.D., University of Connecticut School of Law, Class of 2020. I am grateful to the great number of colleagues, friends, and family that took the time to assist me with this article. First, and foremost, to the staff of the Connecticut Journal of International Law: I am forever indebted to you for the rising success of the Journal and spending endless hours perfecting this paper. I would also like to thank Professor Peter Siegelman at the University of Connecticut School of Law for spending countless hours editing this article and discussing various arguments concerning the gender pay gap with me. This paper was awarded third place in The College of Labor & Employment Lawyers' 2019 writing competition, which is a direct result of Professor Siegelman's efforts and assistance.

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INTRODUCTION

The gender pay gap is usually referred to as the average difference in earnings between men and women.[2] 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.[3] One of the earliest examples of women earning less than men stems from World War II. In 1940, about 28% of women in the United States participated in the labor force.[4] However, World War II required about sixteen 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.[5] This allowed some women to shift from low-paying service or retail jobs into higher-wage durable goods manufacturing jobs.[6] Even though women started earning more money,[7] the wage effects related to increases in the female labor supply were uniformly more negative for women than men.[8]

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 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 or other factors. 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 United States' gender pay gap is the Equal Pay Act of 1963 (the "Equal Pay Act), which was signed into law by President Kennedy.[9] The Equal Pay Act prohibits an employer from discriminating against an employee on the basis of sex.[10] 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.[11] However, employment decisions that create differences in pay rates between employees can be justified if they are based on a

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[2] *See Gender Pay Gap*, CAMBRIDGE BUSINESS ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/gender-pay-gap (last visited Mar. 21, 2020). *See also* KEVIN MILLER & DEBORAH J. VAGINS, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7 (2018) [hereinafter AAUW]; *Gender Wage Gap*, ENCYC. BRITANNICA, https://www.britannica.com/topic/gender-wage-gap (last visited Mar. 21, 2020).

[3] *Gender Wage Gap*, ECON. POL'Y INST., https://www.epi.org/data/#?subject=wagegap-mf (last visited Feb. 20, 2020) [hereinafter EPI].

[4] 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).

[5] *Id.* at 1.

[6] Mark Aldrich, *The Gender Gap in Earnings During World War II: New Evidence*, 42 INDUS. & LAB. REL. REV. 415, 420 (1989).

[7] *See id.* at 423.

[8] Acemoglu et al., *supra* note 4, at 30.

[9] 29 U.S.C. § 206(d) (2018).

[10] *Id.* at § 206(d)(1).

[11] *Id.*

seniority or merit system, the quality or quantity of work, and any other differentials that are based on a "factor other than sex."[12]

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.[13] In *Schultz v. Wheaton Glass Company*, 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.[14] The district court ruled that the differences in pay were justified because male employees were able to perform more tasks than women.[15] 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.[16] Moreover, Congress intended the Equal Pay Act to act as a "broad charter of women's rights in the economic field."[17] To construe it narrowly, such as requiring the jobs to be identical, would destroy the remedial purposes intended.[18]

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.[19] Nevertheless, women today continue to earn less than men do in nearly every occupation.[20] Although the gap has narrowed since 1963, it has remained relatively unchanged the past ten years.[21] In 2018, women in the United States were paid about 80 cents for every dollar paid to men.[22] 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.[23] Despite the enacted equal pay laws, it is believed that pay parity between women and men in the United States will not be reached until 2059.[24]

Concerns about the gender pay gap exist outside of the United States as well. Korea, Estonia, Japan, Latvia, Chile, Canada, and the United Kingdom also have significant national

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[12] *Id.*

[13] Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970) ("…Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be substantially equal.").

[14] *Id.* at 261.

[15] *Id.* at 262–63.

[16] *Id.* at 263.

[17] *Id*. at 265.

[18] *Id.*; Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974).

[19] 42 U.S.C. § 2000e (2018).

[20] LISA MAATZ & ANNE HEDGEPETH, WOMEN AND WORK: 50 YEARS OF CHANGE SINCE THE AMERICAN WOMEN REPORT 6 (2014).

[21] Nikki Graf et al., *The Narrowing, but Persistent Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/ (citing to data from the U.S. Census Bureau).

[22] AAUW, *supra* note 2, at 5; EPI, *supra* note 3; 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/.

[23] Jones, *supra* note 22.

[24] INSTITUTE FOR WOMEN'S POLICY RESEARCH, WOMEN'S MEDIAN EARNINGS AS A PERCENT OF MEN'S MEDIAN EARNINGS (2018) [hereinafter IWPR].

gender pay gaps.[25] For example, in 2018, the gender pay gap in the United Kingdom was as large as 17.9%.[26] In addition, it is reported that women, globally, are paid about 63 cents for every dollar paid to men.[27] If the gender pay gap is occurring in every country of the world and every state in the United States, 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.

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 United States that prohibit pay discrimination by sex and an analysis of the most up-to-date data on the current gender pay gap in the United States. It also examines theories as to why or why not 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 United Kingdom. It also provides an analysis of how the United Kingdom 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 United States. Lastly, Part III provides an analysis of the gender pay gap worldwide and how other countries have addressed the gender pay gap by increasing transparency.

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 do 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

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[25] 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* INT'L LABOUR ORG., GLOBAL WAGE REPORT 2018/19: WHAT LIES BEHIND GENDER PAY GAPS 24–25 (2018) [hereinafter ILO].

[26] OFFICE FOR NAT'L STATISTICS, GENDER PAY GAP IN THE UK: 2018 3 (2018) [hereinafter ONS]. *See* Brigid Francis-Devine & Doug Pyper, *The Gender Pay Gap* 3 (House of Commons Library, Briefing Paper No. 7068, 2020) [hereinafter Briefing Paper 7068].

[27] 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.

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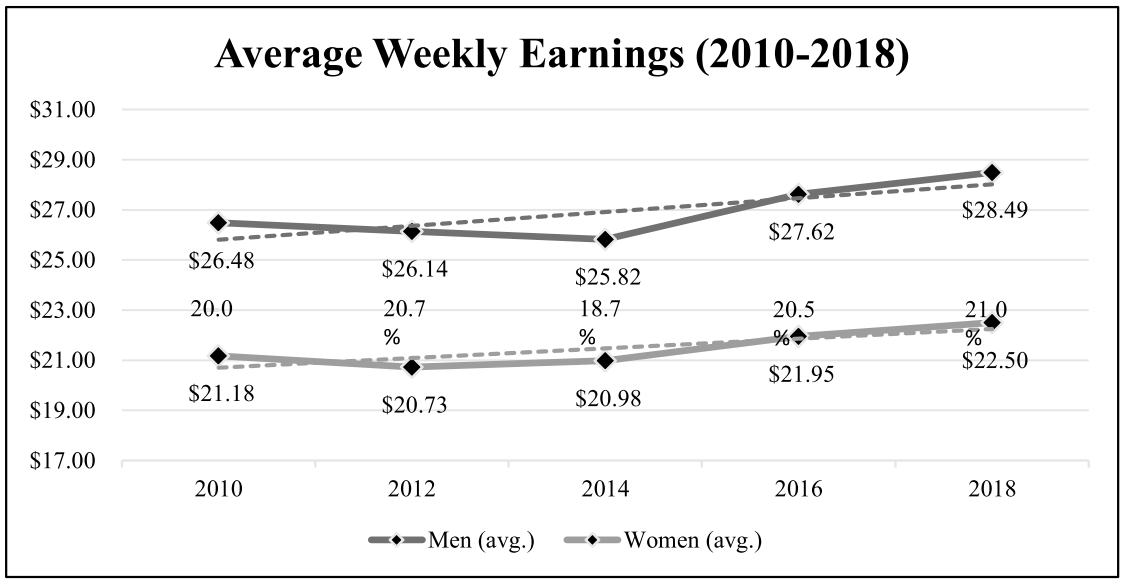
or other factors. Without this data, it is impossible to know whether and to what extent gender discrimination factors into the pay differential between men and women.

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 United States; 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.[28] For example, from 2010 to 2018, the difference in pay between men and women in the United States hardly improved and even increased at times.[29]



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 Institute[30]

According to 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 legislation and other protections that have been put in place. The corollary to that

[28] EPI, *supra* note 3.
[29] *Id.*
[30] *Id.*

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 United States was the Equal Pay Act, which was signed into law by President Kennedy on June 10, 1963.[31] The springboard for the Equal Pay Act was the National War Labor Board, which, in 1942, called for "equal pay for equal work."[32] 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.[33] 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, 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.[34] In *Schultz v. Wheaton Glass Company*, 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.[35] 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.[36] Skill takes into account experience, ability, education, and training required to perform a job.[37] Effort refers to the amount of physical or mental exertion needed to perform a job.[38] Responsibility is the degree of accountability required to perform a job.[39] 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.[40] The only exception is when unusual circumstances are demonstrated.[41]

Initially, Congress had considered implementing the "equal pay for comparable worth" doctrine, rather than using the term "substantially equal."[42] Under the comparable-worth doctrine, sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by

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[31] 29 U.S.C. § 206(d) (2018).

[32] Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), https://time.com/3774661/equal-pay-history/.

[33] 29 U.S.C. § 206(a).

[34] Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970).

[35] *Id.*

[36] *Id.* at 261.

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

[38] *Id.*

[39] *Id.*

[40] 29 C.F.R. § 1620.9(a) (2020).

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

[42] *See* Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970).

men and the jobs are of equal value to the employer.[43] However, the comparable-worth doctrine was rejected by Congress for two reasons.[44] First, Congress believed the doctrine ignored the economic realities of supply and demand.[45] Second, Congress thought the doctrine would place an impossible task of determining the worth of comparable work on government agencies and on courts.[46]

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.[47] One issue that arose was the failure of the Equal Pay Act to define the "factor 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 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.[48] The Ninth Circuit has stated that the rationale is that 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.[49]

A year after the Equal Pay Act, Title VII of the Civil Rights Act of 1964 was enacted to provide further prohibitions against pay discrimination in the workforce.[50] Under 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.[51] This 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 impacting compensation based on gender-based discrimination.[52] Unlike the Equal Pay Act, however, Title VII only applies if an employer has more than 15 employees.[53]

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.[54] This was made clear by the Bennett Amendment to Title VII, which provides 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

[43] AFSCME v. Washington, 770 F.2d 1401, 1404 (9th Cir. 1985).

[44] Cty. of Washington v. Gunther, 452 U.S. 161, 184–88 (1981) (discussing why Congress rejected comparable-worth doctrine).

[45] *Id.* at 184.

[46] *Id.*

[47] 29 U.S.C. § 206(d)(1) (2018).

[48] Spaulding v. Univ. of Wash., 740 F.2d 686, 708 (9th Cir. 1984) (providing an example of a "factor other than sex" that employers can consider when making compensation decisions).

[49] AFSCME v. Washington, 770 F.2d 1401, 1408 (9th Cir. 1985).

[50] 42 U.S.C. §§ 2000e–2000e-3 (2018).

[51] 42 U.S.C.§ 2000e-2(a)(1) (2018).

[52] *Id.* at § 2000e-2(a).

[53] 42 U.S.C. § 2000e(b) (2018).

[54] *See* 42 U.S.C. § 2000e-2(h) (2018); *see also* 29 U.S.C. § 206(d)(1) (2018).

Pay Act.[55] 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.[56] 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.[57]

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.[58] In contrast, Title VII claims typically require proof of an intent to discriminate.[59] Intent to discriminate is not needed under Title VII, however, if an employee can meet the requirements of a disparate impact claim or prove that sex was a motivating factor for a compensation decision.[60]

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.[61] Under this structure, the plaintiff must first establish a prima facie case of discrimination.[62] If able to do so, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory action.[63] If the employer is successful, then the burden shifts back to the plaintiff to show that the legitimate, nondiscriminatory reason is in fact pretext.[64]

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."[65] If able to do so, the burden of persuasion then shifts to the employer to demonstrate the applicability of one of the affirmative defenses.[66] Unlike Title VII claims, plaintiffs are not given another opportunity to prevail and will not be successful if an affirmative defense is applicable.

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[55] 42 U.S.C. § 2000e-2(h) (2018).

[56] 29 U.S.C. § 206(d)(1) (2018).

[57] Cty. of Washington v. Gunther, 452 U.S. 161, 170 (1981) (discussing how Bennett Amendment made affirmative defenses of Equal Pay Act applicable to Title VII).

[58] *See* 29 U.S.C. § 206(d)(1) (2018).

[59] 42 U.S.C. § 2000e-2(k) (2018).

[60] *Id.* at § 2000e-2(k)(1)(A).

[61] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (discussing burdens for employees and employers under Title VII).

[62] *Id.* at 802.

[63] *Id.*

[64] *Id.* at 804.

[65] Stanziale v. Jargowsky, 200 F.3d 101, 107–08 (3d Cir. 2000) (discussing burdens for employees and employers under the Equal Pay Act).

[66] *Id.*

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%.[67] In 2018, it was about 20%.[68] 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."[69]

b. Whether Discrimination Explains the Gender Pay Gap

Before considering how the gender pay gap can be further reduced, it is important to examine other reasons 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.[70] In contrast, individuals who believe that the gender pay gap is a direct result of discrimination have argued that data explicitly shows that the earnings of women are less than men when considering certain aspects of the workplace and achievements.[71] Whichever side you support, it is beyond peradventure that women are generally being paid less than men. 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.[72]

As for the gender pay gap between men and women of certain ages, it is clear that women make less than men no matter how old they are. Additionally, the gap tends to widen drastically for women once they turn 35.[73] Those that believe the gap does not exist or is misrepresented will try to rely on the fact that women tend to demand less hours or more flexible schedules in the workplace as they get older.[74] This can be explained by several facts.

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[67] Lynda Robinson, *Here's how The Washington Post relegated JFK signing the landmark Equal Pay Act to the women's page*, WASHINGTON POST (Apr. 4, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/04/04/on-equal-pay-day-heres-how-the-washington-post-relegated-the-equal-pay-act-signed-by-kennedy-to-the-womens-page/.

[68] EPI, *supra* note 3.

[69] *See* Robinson, *supra* note 67.

[70] *See e.g.,* John Phelan, *Harvard Study: "Gender Wage Gap" Explained Entirely by Work Choices of Men and Women*, FOUND. FOR ECON. EDUC. (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 (June 5, 2019) (unpublished manuscript) (on file with the Harvard University Department of Economics); Christina Hoff Sommers, *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; CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2–3 (2012).

[71] *See e.g.,* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 588–94 (2018). *See also* AAUW, *supra* note 1.

[72] News Release, U.S. Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2019 (Jan. 17, 2020) (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).

[73] 2019 News Release, *supra* note 72.

[74] Bolotnyy & Emanuel, *supra* note 70, at 3.

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.[75] 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.[76] This means that these mothers only work about 30 hours per week, which can explain why women demand less overtime compensation.[77] 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.[78] In 2011, it was reported that 60% of men had access to paid leave, while only 57% of women had access.[79] 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 there are explanations as to why the gap is the widest 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 that were 24 or younger was $558, while the median weekly earnings for the men in this same age bracket was $624.[80] 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.[81] Thus, women under the age 35 earn about 90% of what men earn.[82]

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[75] WOMEN'S BUREAU, *Overview of Working Women Toda*y, U.S. DEP'T OF LABOR, https://www.dol.gov/wb/overview.htm (last visited Mar. 26, 2019); WOMEN'S BUREAU, *Mothers and Families*, U.S. DEP'T OF LABOR., https://www.dol.gov/wb/stats/mother_families-text.htm#LFPMarital-Age (last visited Mar. 30, 2019).

[76] News Release, U.S. Dep't of Labor, American Time Use Survey – 2017 Results (June 28, 2018).

[77] *Id.*

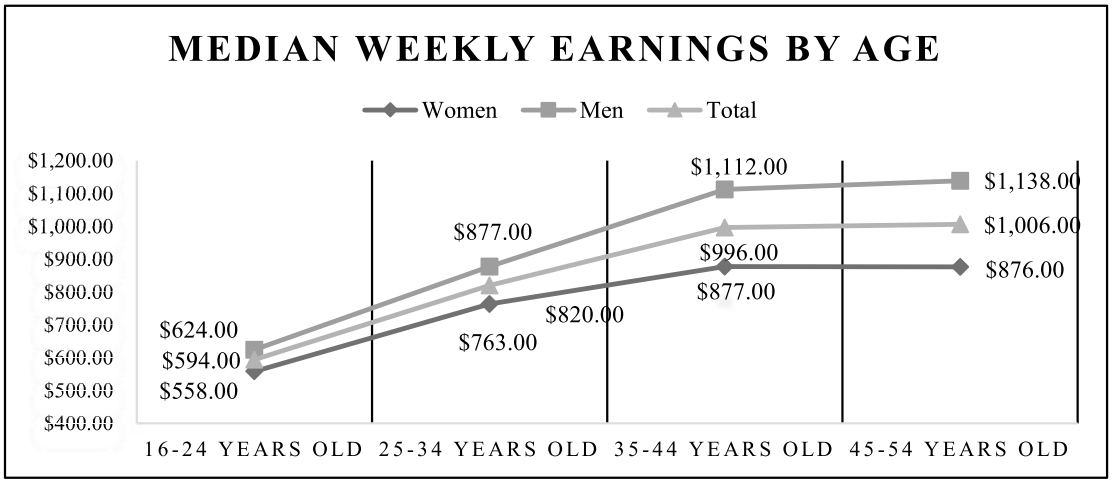
[78] Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/.

[79] COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 182 (Feb. 2015) [hereinafter CEA].

[80] 2019 News Release, *supra* note 72, at Table 3.

[81] *Id.*

[82] *See* Shawn M. 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 also* Graf, *supra* note 21.



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 Statistics[83]

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.[84] Although the earnings of women do increase as they pursue higher levels of education, the gender pay gap does not decrease.[85]

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.[86] 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.[87] Moreover, men experience a larger increase in earnings than women do when an advanced degree is obtained. The median weekly earnings

[83] 2019 News Release, *supra* note 72, at Table 3.

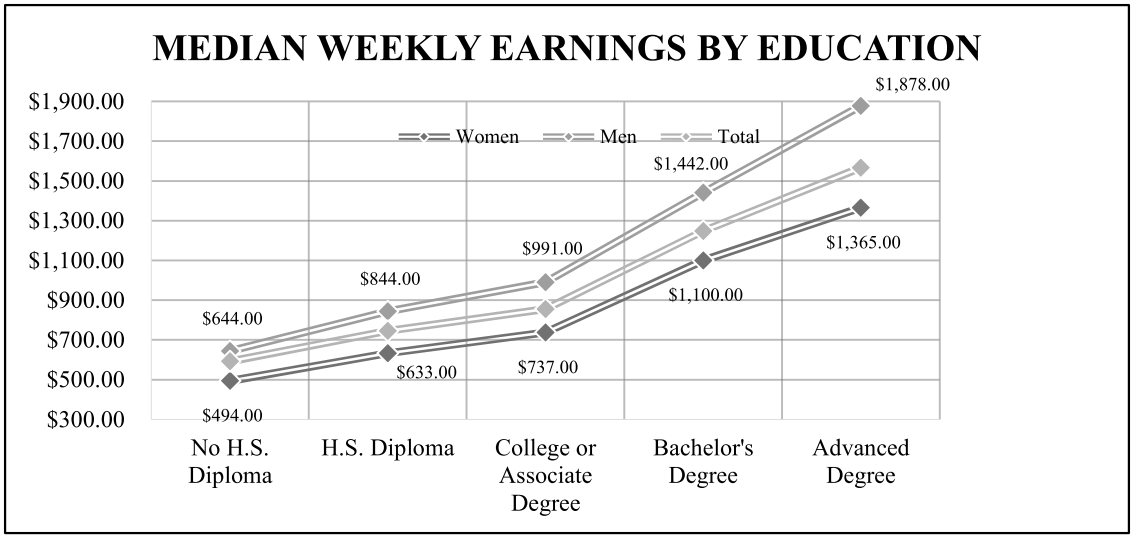
[84] Tanya Tarr, *How This Study Misses the Mark on Equal Pay and the Pay Gap*, FORBES (Nov. 30, 2018), https://www.forbes.com/sites/tanyatarr/2018/11/30/how-this-study-misses-the-mark-on-equal-pay-and-the-pay-gap/#4ddf8d0b42c1.

[85] *See* MAATZ & HEDGEPETH, *supra* note 20, at 8–9. *See also* 2019 News Release, *supra* note 72, at Table 9.

[86] CORBETT & HILL, *supra* note 70, at 1–3.

[87] 2019 News Release, *supra* note 72, at Table 9.

for men goes from $1,442 to $1,878 when an advanced degree is achieved.[88] In contrast, the median weekly earnings for women who obtain an advanced degree only increases from $1,100 to $1,365.[89] 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.



This chart shows data from 2019 regarding differences in pay between men and women with certain educational levels. According to the data, 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 Statistics[90]

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.[91] For example, a group of Harvard professors have asserted that the pay differences of employees working at the Massachusetts Bay Transportation Authority

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *See e.g.,* Phelan, *supra* note 70*;* Annese, *supra* note 70; Bolotnyy & Emanuel, *supra* note 70.

("MBTA") can be explained by women valuing workplace flexibility more than men and women having a lower demand for overtime work hours than men.[92] 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, workplace flexibility policies can actually help families meet both their family and professional goals, while also benefitting women and the economy.[93]

The second argument is that pay differentials occur within an occupation because men and women tend to gravitate toward different industries.[94] 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.[95] Similarly, in the occupations where women represented less than 50% of the workforce, the average gender pay gap was 81.27%.[96] 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.[97] 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.

[92] Bolotnyy & Emanuel, *supra* note 70, at 3.

[93] CEA, *supra* note 79.

[94] 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.

[95] *Labor Force Statistics from the Current Population*, U.S. DEP'T OF LABOR, https://www.bls.gov/cps/cpsaat39.pdf (last visited Mar. 30, 2019) [hereinafter BLS].

[96] *Id.*

[97] *Id.*

Source: U.S. Department of Labor, Bureau of Labor Statistics[98]

Industry	Median Weekly Earnings for All Employees (Average)	Median Weekly Earnings for Men (Average)	Median Weekly Earnings for Women (Average)	Gender Pay Gap (Average)
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 Statistics[99]

[98] *Id.*
[99] *Id.*

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.[100] However, a gap is found in both low-paying and high-paying occupations.[101] 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.[102] Moreover, the most significant gaps were found in the higher-paying occupations.[103] 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 United States.[104]

High-Paying Occupations for women	Percentage of Female Workers in Occupation (%)	Gender Pay Gap (%)	Difference in Women's Earnings for Every Dollar Earned by 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.

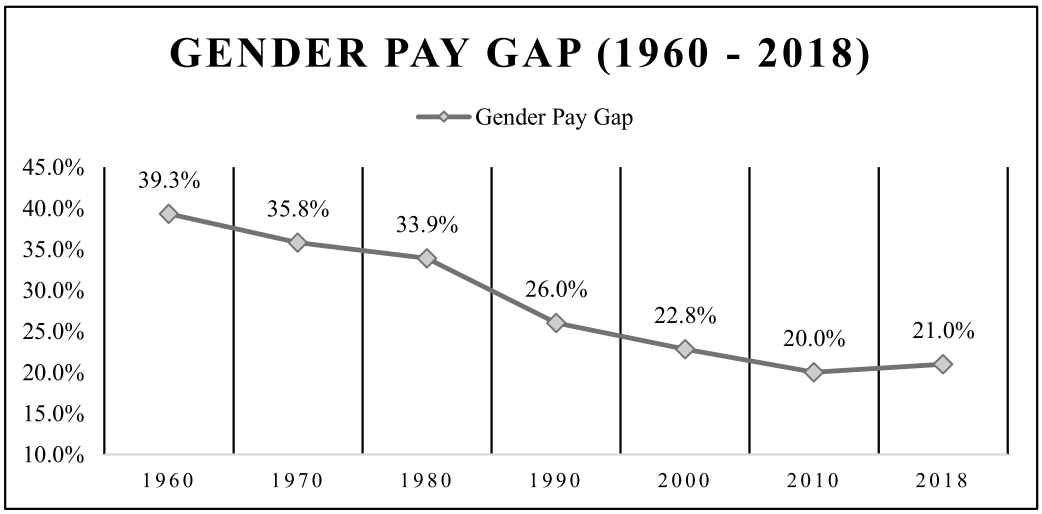
Source: U.S. Department of Labor, Bureau of Labor Statistics[105]

c. Solutions to Increase Transparency Regarding the Gender Pay Gap

[100] Roy, *supra* note 94; CORBETT & HILL, *supra* note 70, at 2.
[101] *See* BLS, *supra* note 95.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

The inquiry regarding what creates 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 can create skepticism that analyzing data is a reliable method to measure the gap.[106] No matter how you measure the gender pay gap, 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,[107] the United States 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 of 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 United States should consider several 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 Center[108]

[106] 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) ("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 remarkably clear and (unfortunately) consistent about the scale of the gap.").

[107] IWPR, *supra* note 24.

[108] EPI, *supra* note 3. *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/.

i. The Paycheck Fairness Act

One piece of proposed legislation that should be considered is the Paycheck Fairness Act (the "PFA").[109] 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."[110] The PFA also would provide procedural protections to the Equal Pay Act.[111] The rationale for introducing the bill was because Congress determined 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.[112]

The first benefit of enacting the PFA would be to update the definition of a work "establishment" under the Equal Pay Act.[113] 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."[114] 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.[115] This is essential because many businesses today operate of 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.[116] 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.[117] 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 factor, such as education, training, or experience that is consistent with business necessity.[118] In addition, a factor will not qualify as an affirmative defense if the employee can show that the employer refused to implement an existing

[109] Paycheck Fairness Act, S. 862, 114th Cong. (2015).
[110] *Id.*
[111] *Compare* Paycheck Fairness Act, S. 270, 114th Cong. at § 2(4)(B) (2015), *with* Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2018).
[112] Paycheck Fairness Act, S. 862, 114th Cong. § 2(2) (2015).
[113] *See id.* at § 3(a)(C).
[114] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2018). *See also* Schultz v. Wheaton Glass Co., 421 F.2d 259, 261–63 (3d Cir. 1970).
[115] Paycheck Fairness Act, S. 862, 114th Cong. § 3(a)(C) (2015).
[116] *Id.*
[117] 29 U.S.C. § 206(d)(1) (2018).
[118] Paycheck Fairness Act, S. 862, 114th Cong. §§ 3(a)(B)(i)-(ii) (2015).

alternative employment practice that would have the same business purpose but not produce a pay differential.[119] This is similar to the business necessity standard under Title VII.[120]

The third potential benefit of the PFA would be to improve the remedies available under the Equal Pay Act.[121] Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.[122] 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. According to the PFA, prevailing plaintiffs could recover both compensatory and punitive damages.[123]

The last potential benefit of the PFA would be to prohibit employers from retaliating against employees for sharing salary information with coworkers.[124] 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.[125] 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.[126] Allowing 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.[127] 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").[128] 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."[129] The FPA would also amend certain aspects of the Equal Pay Act. However, the last time it was introduced it was struck down.[130]

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

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[119] *See id.* at §§ 3(a)(B)(iv).
[120] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).
[121] Paycheck Fairness Act, S. 862, 114th Cong. § 3(c)(1) (2015).
[122] 29 U.S.C. § 206(d)(3) (2018).
[123] Paycheck Fairness Act, S. 862, 114th Cong. § 3(c)(1) (2015).
[124] *Id.* at § 3(b).
[125] *See* 29 U.S.C. § 215(a)(3) (2018). *See also* 29 U.S.C. § 206(d)(1) (2018).
[126] Paycheck Fairness Act, S. 862, 114th Cong. § 3(b) (2015).
[127] Emma Newburger, *Nancy Pelosi and Democratic Lawmakers Unveil the Paycheck Fairness Act in an Effort to Close the Gender Wage Gap*, CNBC (Jan. 30, 2019 12:56 PM), https://www.cnbc.com/2019/01/30/nancy-pelosi-unveils-the-paycheck-fairness-act-to-close-the-pay-gap.html.
[128] Fair Pay Act of 2017, H.R. 2095, 115th Cong. (2017).
[129] *Id.*
[130] *Id.*

jobs.[131] The FPA would require employers to pay equal wages to employees as long as they perform "equivalent jobs."[132] This includes taking into account skills, effort, responsibility, and working conditions.[133]

The second potential benefit of the FPA would be to improve the remedies available under the Equal Pay Act.[134] Under the Equal Pay Act, the available remedies are back-pay and sometimes liquidated damages.[135] Much like the PFA, under the FPA, prevailing plaintiffs could recover both compensatory and punitive damages.[136]

The third potential benefit of the FPA would be to clarify the "factor other than sex" defense.[137] 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.[138] 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."[139] The bona fide factor may be based on education, training, or experience.[140] 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.[141] 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.[142]

iii. Revised EEO-1

Since neither the Paycheck Fairness Act nor the Fair Pay Act has been passed, it is unclear whether these bills would actually further reduce the gender pay gap. Thus, the United States needs to consider solutions other than amending the current equal pay laws. Since it is unclear what factors contribute the most to the gender pay gap, the United States 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

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[131] *See* Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970). *See also* 29 U.S.C. § 206(d)(1) (2018).

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

[133] *Id.*

[134] *Id.* at § 5(a)(1).

[135] 29 U.S.C. § 206(d)(3) (2018).

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

[137] *Id.* at § 3(a)(iv).

[138] 29 U.S.C. § 206(d)(1) (2018).

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

[140] *Id.*

[141] *Id.*

[142] *See* Paycheck Fairness Act, S. 862, 114th Cong. § 3(a) (2015). *See also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

and employers. This kind of data collection system has been successfully implemented by many countries, such as the United Kingdom, Australia, Germany, and Iceland.[143]

More importantly, the Equal Employment Opportunity Commission ("EEOC") has already taken the initiative to implement such a system in the United States.[144] In 2010, the EEOC and other agencies were asked by President Obama to identify ways to improve enforcement of federal laws prohibiting pay discrimination.[145] This led to the idea of collecting data from certain employers in order to analyze the correlation between employee gender and compensation.[146] 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.[147]

However, the EEOC would like to make revisions to EEO-1 so more data can be gathered and analyzed, which hopefully can better explain the gender pay gap. On July 14, 2016, the EEOC sought approval from the Office of Management and Budget ("OMB") to revise the EEO-1 data collection system by including two new components.[148] 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.[149] 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."[150] This data would then be formatted into twelve pay bands for the ten EEO-1 job categories.[151] Both components would apply to filers, both private sector businesses and Federal contractors, who have 100 or more employees.[152] However, contractors with 50 to 99 employees would only need to submit data required under the first component.[153]

Although OMB approved of the first component, they believed the second component violated the Paperwork Reduction Act of 1995.[154] 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.[155] Upon completion of this

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[143] *See infra* Parts II.C & III.

[144] 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).

[145] Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113, 5114 (Feb. 1, 2016).

[146] *Id.*

[147] 29 C.F.R. § 1602.7 (2020) (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).

[148] Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45479 (July 14, 2016).

[149] Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113.

[150] *Id.*; 42 U.S.C. § 2000e-8(c)(1)-(3) (2018).

[151] Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113, 5117.

[152] *Id.* at 5119.

[153] *Id.* at 5119.

[154] Memorandum from Neomi Rao, Admin'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, to Victoria Lipnic, Acting Chair, Equal Emp't. Opportunity Comm'n (Aug. 29, 2017). *See also* Stay the Effectiveness of the EEO-1 Pay Data Collection, 82 Fed. Reg. 43362 (Sept. 15, 2017).

[155] 44 U.S.C. § 3506(c)(1) (2018).

review, OMB makes a determination regarding how to proceed.[156] In this case, OMB initially approved of the data collection system, but later changed its decision for two reasons.[157] First, OMB felt that the continued collection of this information was contrary to the standards of the Paperwork Reduction Act.[158] Second, OMB was concerned that these reporting requirements would place too large of a burden on businesses and that the EEOC did not adequately address privacy and confidentiality issues.[159]

Accordingly, the National Women's Law Center and others sued, alleging that OMB violated the Paperwork Reduction Act, that it exceeded its statutory authority in reviewing and staying the collection of pay data, and that the notice disapproving the revisions was a nullity.[160] On March 4, 2019, the court granted summary judgment for the plaintiffs since OMB's stay of EEOC's pay data collection was illegal.[161] The rationale for the court's decision was that the government's position was based on "hyper-technical formatting changes that have no real consequences for employers."[162] 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.[163]

Unless this judgment is appealed, the United States will have successfully taken the first step at increasing 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. Publicization of the reports may lead to public embarrassment or criticism for some employers, but this may incentivize employers to change their policies in order to report more favorable data the following year.

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 United States is 18.4% (using hourly wages) and 25.7% (using monthly earnings).[164] Although these numbers are large, the United States is not considered to have one of the largest gender pay gaps when compared to the other 73 countries that provided relevant data.[165] According to the ILO's analysis, one country with a larger gender pay gap than the United States is the United Kingdom.[166]

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[156] *Id.*
[157] Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 74–75 (D.D.C. 2019).
[158] *Id.* at 75.
[159] *Id.*
[160] *Id.* at 76.
[161] *Id.* at 92.
[162] *Id.* at 92.
[163] *Id.* at 92.
[164] ILO, *supra* note 25, at 24–25.
[165] *See id.*
[166] *Id.*; Briefing Paper 7068, *supra* note 26, at 6. *See also* Adrián Francisco Varela, *These are the Countries with the Worst Gender Pay Gaps*, BUS. INSIDER (Dec. 2, 2018).

a. The U.K. Equal Pay Act 1970

The United Kingdom 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.[167] On June 7, 1968, women at a Ford factory in the United Kingdom discovered that they were being paid about 15% less than men doing the same work.[168] Ford refused to amend its compensation policies, and a strike was organized.[169] This eventually led to the United Kingdom 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.[170] 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.[171]

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.[172] Even though the U.K. Equal Pay Act was enacted in 1970, it was not implemented until 1975.[173] 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.[174] 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 United Kingdom 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. [175] 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."[176] Another change was that

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[167] *Equal Pay & the Equal Pay Act 1970*, NAT'L EDUC. UNION, https://www.teachers.org.uk/women/equal-pay-equal-pay-act-1970 (last visited Feb. 26, 2019).
[168] *Id.*
[169] *Id.*
[170] Equal Pay Act 1970, c. 41 (Eng.).
[171] *Id.* at § 2(1).
[172] *Id.* at § 1.
[173] *Id.* at § 9(1).
[174] *Id.* at § 1(1)(b).
[175] Equality Act 2010, c. 15 (Eng.).
[176] *Compare* Equal Pay Act 1970, c. 41, § 1(1) (Eng.), *with* Equality Act 2010, c. 15, Ch. 3, §§ 65–70 (Eng.).

discrimination was prohibited outside of the workplace. While the U.K. Equal Pay Act only prohibited discrimination in the workplace,[177] the U.K. Equality Act expanded protection against discrimination in society as a whole.[178] The type of discrimination prohibited was also expanded. The U.K. Equal Pay Act requires discrimination to be based on a protected characteristic.[179] Whereas the U.K. Equality Act prohibited direct and indirect discrimination, which means a woman does not need to prove they are being paid less than a man in order to bring a claim.[180] 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 United Kingdom. In 2010, it was reported that the United Kingdom gender pay gap was still 19.8%.[181] Moreover, it was reported that, even with the new laws, it could still take almost a century before pay parity was achieved.[182] Instead of enacting additional laws that were similar to the U.K. Equality Act, the United Kingdom decided to take a new approach – to increase transparency within the workforce.

The first time the United Kingdom 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 equality.[183] The biggest downfall of this initiative, however, was that compliance was voluntary for employers.[184] Accordingly, the United Kingdom 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 United Kingdom 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").[185]

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[177] Equal Pay Act 1970, c. 41, § 1(1) (Eng.).
[178] Equality Act 2010, c. 15, Ch. 2 (Eng.).
[179] Equal Pay Act 1970 c. 41, § 1(1)(a) (Eng.).
[180] Equality Act 2010, c. 15, Ch. 2, §§ 13, 19 (Eng.).
[181] OFFICE FOR NAT'L. STATISTICS, GENDER PAY GAP IN THE UK: 2018 (2018).
[182] 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.
[183] GOV'T EQUALITIES OFFICE., THINK, ACT, REPORT: ONE YEAR ON 11 (2012).
[184] *Id.*
[185] *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 (Eng.). *See also* Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353 (Eng.).

i. General Application of the Regulations

The 2017/172 Regulations came into force on April 6, 2017.[186] 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.[187] Any employer who fits within this criteria is referred to as a "relevant employer."[188] In addition, relevant employers are required to provide details on gaps related to average bonuses paid and the proportion of men and women who received bonuses.[189]

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 5th each year.[190] Originally, the Regulations did not consider public or government authorities as a "relevant employer."[191] However, the United Kingdom included public sector employers under the Regulations by enacting the 2017/353 Regulations, which came into force on March 31, 2017.[192] Relevant employers in the public sector include government departments, the armed forces, local authorities, NHA bodies, and most schools.[193] 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.[194] This data must be kept on the website for at least three years.[195] Second, relevant employers must also publish this data on a government website, [196] which is designated by the Secretary of State and must be published by March 30th each year.

The Regulations increase transparency by making gender pay gap information available to the public. However, the United Kingdom 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

[186] Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 1(1) (Eng.).
[187] *Id.* at Explanatory Notes ¶ 1.
[188] *Id.* at § 1(2).
[189] *Id.*
[190] *Id.*
[191] *Id.* at § 1(6).
[192] Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, § 1(1) (Eng.).
[193] *See id.* at §§ 2(3)–(5).
[194] Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 15(1)(a) (Eng.).
[195] *Id.* at § 15(1)(b).
[196] *Id.* at § 15(2).

4.) The proportions of female and male full-pay employees in the lower, low middle, upper middle, and upper quartile pay bands.[197]

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 United Kingdom anticipated 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.[198] 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%.[199] 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.[200] WIPP, a British advertising company, reported that women received about 25% less than their male counterparts.[201] In addition, Stoke City Football Club reported women earned about 30.5% less than their male counterparts regarding mean hourly earnings.[202]

Furthermore, the Regulations induced employers to address current compensation policies. For example, EasyJet, the United Kingdom's busiest discount airline, reported that men earned about 52% more than women.[203] 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.[204] In addition, some companies tried to weaken the negative results of reports by providing its 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%.[205] Instead of remaining silent after publishing its report, PwC (U.K.) addressed its gender pay gap report from 2018 by publishing a supplemental report. Although PwC (U.K.) was considered to have the highest gap amongst its peers, it was evident that the mean gender pay gap decreased 0.6% from

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[197] *Id.* at §§ 2(1)(a)–(f).

[198] *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/; Andrew Powell, *Women and the Economy* 4 (House of Commons Library, Briefing Paper No. CBP06838, 2019) [hereinafter Briefing Paper CBP06838].

[199] *See* Calfas, *supra* note 198.

[200] 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.

[201] *See id.*

[202] *See* Calfas, *supra* note 198.

[203] *See* Alderman, *supra* note 200.

[204] *See id.*

[205] 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.

2017.[206] In addition, PwC (U.K.) published a five-point action plan to further lower its divide.[207]

Even if executives in the United Kingdom 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.[208] 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.[209] 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 United Kingdom. From 2017 to 2018, the gender pay gap for all employees dropped from 18.4% to 17.9%.[210]

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.[211] 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 are more likely to stay in paid work in the years following.[212] 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.[213] In addition, the pay gap widened substantially for women after the birth of their first child.[214] Based on the data collected, the United Kingdom can now justify implementing additional measures that focus on specific groups of employees, such as women with children.

iii. Problems that Remain After the Regulations

The rationale for enacting the Regulations in the United Kingdom 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.[215] Although transparency is improved, there are several problems with the Regulations.

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[206] *See* PWC, DIVERSITY PAY REPORT 2018 3 (2018).
[207] *See id.* at 2.
[208] Alderman, *supra* note 200.
[209] *Id.*
[210] Briefing Paper 7068, *supra* note 26, at 7.
[211] *See id.* at 6.
[212] BARRA ROANTREE & KARTIK VIRA, INST. FOR FISCAL STUD., BRIEFING NOTE 234: THE RISE AND RISE OF WOMEN'S EMPLOYMENT IN THE UK 2 (2018).
[213] *See* Briefing Paper CBP06838, *supra* note 198, at 3. *See also* Briefing Paper 7068, *supra* note 26, at 6.
[214] *See* Briefing Paper 7068, *supra* note 26, at 9.
[215] *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Notes ¶ 1.

One problem is that it is unclear which department, agency, or public body has the power to enforce the Regulations for relevant employers in the private sector. Unlike the private sector, it is evident that the Equality and Human Rights Commission (the "EHRC") is responsible for monitoring and enforcing the reporting requirements of relevant employers in the public sector. Based on the explanatory memorandum of the 2017/353 Regulations, "[t]he [EHRC] is responsible for monitoring how public authorities are complying with the specific duties and can take enforcement action."[216] In addition, the EHRC has published an enforcement policy that encourages relevant employers to meet the requirements of the Regulations.[217] The enforcement policy states that the EHRC has the ability to investigate non-compliant businesses and issue public sector duty compliance notices for failure to comply with reporting duties.[218] Thus, the text of the enforcement policy and of the Regulations makes it is clear that the EHRC can enforce the reporting requirements in the public sector.[219]

On the other hand, it is unclear whether the same holds true for the private sector. Under the explanatory memorandum of the 2017/172 Regulations, "[f]ailure to comply with these Regulations would be an unlawful act…and would fall within the existing enforcement powers of the [EHRC]."[220] Unlike the 2017/353 Regulations, the 2017/172 Regulations do not explicitly state who has the authority to monitor relevant employers in the private sector. Instead of stating that the EHRC is "responsible" and "can take enforcement action," the 2017/172 Regulations only say that it "would fall within the existing powers of the [EHRC]."[221] Moreover, the enforcement policy of the EHRC does not mention private sector employers.[222]

It could be argued that the Government intended for the EHRC to monitor private sector employees. Under the 2017/172 Regulations, "[f]ailure to comply with an obligation imposed by these Regulations constitutes an 'unlawful act' within the meaning of section 34 of the Equality Act 2006 (c. 3), which empowers the [EHRC] to take enforcement action."[223] The problem is that this statement is only found in the explanatory notes and not in the actual text. Moreover, the 2017/172 Regulations are issued under section 78 of the U.K. Equality Act.[224] According to section 78, "[t]he regulations may make provision for a failure to comply with the regulations—(a) to be an offense punishable on summary conviction by a fine not exceeding level 5 on the standard scale; (b) to be enforced, otherwise than as an

[216] *See* Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, Explanatory Memorandum ¶ 7.16.

[217] EQUALITY & HUMAN RIGHTS COMM'N, CLOSING THE GAP: ENFORCING THE GENDER PAY GAP REGULATIONS (2018) [hereinafter EHRC].

[218] *See id.* at 1–3.

[219] *See id.*

[220] *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Memorandum ¶ 7.12.

[221] *Compare id.*, *with* Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353, *supra* note 216, at ¶ 7.16.

[222] EHRC, *supra* note 217.

[223] *See* Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, Explanatory Notes ¶ 13 (Eng.).

[224] *See* Equality Act 2010, c. 15, pt. 5, Ch. 3, § 78 (Eng.).

offence, by such means as are prescribed."[225] However, neither section 78 nor the 2017/172 Regulations state which department, agency, or public body has the responsibility to enforce compliance of these requirements.

It seems that Parliament intended explicitly for enforcement policies of the 2017/172 Regulations to be stated in the regulation itself. Parliament could have stated that failure to comply with the Regulations would be considered an unlawful act within the meaning of the U.K. Equality Act of 2006, but it did not.

It is also possible that the EHRC will apply its enforcement powers to the private sector even though it is not required to. However, such a belief is misleading because the EHRC does not have the resources to monitor relevant employers in both sectors. During the first year the Regulations were enforced, it was reported that over 10,000 employers reported gender pay gap data.[226] Accordingly, it is unlikely that the EHRC will be able to monitor and take action against relevant employers of both sectors who fail to comply with the Regulations.

Another issue related to enforcement is the inability to monitor relevant employers in both the private and public sectors, because the Regulations do not impose civil or criminal penalties if relevant employers fail to comply with the reporting requirements. Under the Regulations, relevant employers are prohibited from evading the reporting requirements unless a specific exception applies. The first exception applies when an employee is employed under a contract personally to do work.[227] The second exception applies when an employer does not possess data on an employee, or when it is not reasonably practicable for an employer to obtain data on an employee.[228] Although the affirmative defenses of the Regulations are clearer than those of the U.K. Equality Act, there is no civil or criminal penalty for relevant employers if they fail to comply with the reporting requirements altogether. The only penalty an employer may experience is reputational damage, which may result in higher societal pressure to change.

A second problem with the Regulations is the number of relevant employers in the private sector that are required to report data. Relevant employers in the private sector only account for about 0.1% of all businesses.[229] In 2018, it was reported that about 8,000 private sector businesses qualified as relevant employers or were required to comply with the reporting requirements.[230] This means that the Regulations only cover about 33% of all employees in the United Kingdom.[231]

Therefore, the United Kingdom should consider expanding the definition of "relevant employer" to include small and medium sized enterprises ("SMEs"), which refers to

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[225] *See id.* at §§ 78(5)(a)–(b).

[226] *What is the Gender Pay Gap at Your Company?*, BBC (Apr. 5, 2018), https://www.bbc.com/news/business-43632763.

[227] Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, § 2(3)(a) (Eng.).

[228] *Id.* at § 2(3)(b).

[229] Chris Rhodes, *Business Statistics* 5, (House of Commons Library Briefing Paper No. 06152, 2019) [hereinafter Briefing Paper 06152].

[230] *Id.*

[231] *See id.*; Angela Henshall, *What Iceland can Teach the World about Gender Pay Gaps*, BBC (Feb. 10, 2018), http://www.bbc.com/capital/story/20180209-what-iceland-can-teach-the-world-about-gender-pay-gaps.

employers with fewer than 250 employees.[232] In 2018, it was reported that there were about 5.7 million SMEs in the United Kingdom, which accounted for over 99% of all businesses.[233] Instead of including all SMEs, the United Kingdom could expand the Regulations to only medium-sized businesses, which refers to employers with 50 to 249 employees. If able to do so, about 35,000 additional private sector employers would be required to report gender pay gap information.[234] This would quadruple the total number of private sector employers that must comply with the Regulations.

Business Sizes (Private Sector)	**# of Businesses**	**Percentage of All Businesses In Private Sector**	**Employment Percentage**
SMEs (0-250 employees)	5,660,000	99.8%	60%
Micro (0-9 employees)	5,416,000	95.5%	33%
Small (10-49 employees)	210,000	3.7%	15%
Medium (50-249 employees)	35,000	0.6%	13%
Large (250+ employees)	8,000	0.1%	40%
Total (All Businesses):	**5,668,000**	**100%**	**100%**

This chart shows data regarding the size of private sector businesses in the United Kingdom in 2018. According to the data, if the reporting requirements of the Regulations were expanded to medium-sized businesses then about 35,000 companies would be added to the list of companies that are required to report gender pay gap information.

Source: BEIS, Business Population Estimates[235]

Nevertheless, expanding the definition of "relevant employer" to employers with fewer employees is only beneficial if the United Kingdom can improve enforcement or make relevant employers comply with the Regulations. This is because it is clear that current relevant employers are taking advantage of the unclear language in the Regulations. Even though it was revealed that 78% of all the relevant employers paid men more than women, some relevant employers simply entered zeroes in every field, reported mathematically

[232] *See* Briefing Paper 06152, *supra* note 229, at 5.
[233] *See id.*
[234] *See id.*
[235] *See id.*

impossible numbers, and/or removed certain employees from calculations.[236] Also, about 1,500 relevant employers, or about 10%, missed the reporting deadline altogether.[237] It is clear that external public pressure is not enough, and the only way to make real progress in reducing the pay gap is to impose civil or criminal sanctions for noncompliance with the Regulations.

The United Kingdom must do more than increase transparency in order to close the gender pay gap. Nevertheless, the first step of resolving any issue is to realize that there is an issue. Without the Regulations, companies and regulators seeking to enforce equal pay laws would have scarce evidence that a gap existed and there would also be less pressure to close the gap. Unlike the United States, the United Kingdom has taken the first step and is in a better position to implement additional effective measures to close the gender pay gap. The United Kingdom should first try to resolve enforcement issues by providing clarity as to which department, agency, or public body has authority to enforce compliance and by implementing penalties if relevant employers fail to comply. If successful, the United Kingdom should then try to expand the number of employers that must report and publish gender pay gap information.

III. THE GENDER PAY GAP WORLDWIDE

The gender pay gap is a global concern that expands beyond the United States and the United Kingdom. As of 2018, it was reported that women globally were paid 63 cents for every dollar paid to men.[238] 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.[239]

One organization that has been collecting global gender gap information since 2006 is the World Economic Forum (the "WEF"). In addition to tracking this data, the WEF also created the Global Gender Gap Index, which is an annual global report based on information from 149 countries.[240] According to the 2018 Global Gender Gap Report, there are two important takeaways about pay between men and women globally. First, on average, women make 68% of what men earn.[241] Second, based on current trends, it is projected that it will take 108 years to close the global gender pay gap.[242]

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?

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[236] *See* Briefing Paper 7068, *supra* note 26, at 8. *See also* Alexandra Topping et al., *Gender Pay Gap: Multiple Firms Submit Questionable Data*, GUARDIAN (Mar. 29, 2018), https://www.theguardian.com/news/2018/mar/29/gender-pay-gap-several-firms-submit-questionable-data.

[237] *1,500 Companies Miss Gender Pay Deadline*, BBC (Apr. 5, 2018), https://www.bbc.com/news/business-43651780.

[238] 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.

[239] *See* WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2018 (2018).

[240] *Id.* at vii.

[241] *Id.* at 7.

[242] *See id.* at viii.

More importantly, what is the correct method to close the gender pay gap? The United States has relied on current equal pay laws and tried to implement a data collection system. On the other hand, the United Kingdom 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. Attempts by Other Countries to Close the Gap Through Transparency

Although the global pay gap is extremely high, some countries have implemented certain measures that are more impactful than measures of other countries. Similar to the United Kingdom, Germany has used transparency to close its pay gap. In 2017, Germany passed the Remuneration Transparency Act (the "RTA").[243] The purpose of enacting the RTA was to promote and enforce equal pay between women and men performing equal or equivalent work.[244]

In order to promote and enforce pay equality, the RTA prohibits direct and indirect remuneration discrimination based on gender.[245] Direct remuneration discrimination exists if an employee earns less based on his or her gender than what an employee of the other gender receives, has received, or will receive for equal work or work of equal value.[246] In addition, direct discrimination can exist if a woman earns less because of reasons related to pregnancy or maternity.[247] Indirect remuneration discrimination exists where apparently neutral provisions, criteria or practices would, on the grounds of gender, put employees at a particular disadvantage compared to employees of the other gender.[248] However, such provisions, criteria, or practices may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[249] For example, criteria related to the labor market, performance, and work results can justify differences in pay between men and women.[250]

Pursuant to the RTA, employees of an employer with over 200 workers have a right to review compensation information so they can compare their remuneration with the pay of colleagues of the opposite sex that perform equal or equivalent work.[251] Although this does not allow employees to review the exact pay of other employees, it does allow employees of both genders to examine criteria and procedures used for wage-setting.[252] Employees are also able to inspect the average gross monthly salary of a comparison group, which consists of at least six employees.[253] If employers fail to comply with these requests then an employer may

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[243] Entgelttransparenzgesetz [EntgTranspG] [Transparency in Wage Structures Act], June 30, 2017, Bundesgesetzblatt [BGBl I] (Ger.), http://www.gesetze-im-internet.de/englisch_entgtranspg/englisch_entgtranspg.pdf.

[244] *Id.* at § 1.

[245] *Id.* at § 3(1).

[246] *Id.* at § 3(2).

[247] *Id.*

[248] *Id.* at § 3(3).

[249] *Id.*

[250] *Id.*

[251] *Id.* at §§ 10–11.

[252] *Id.*

[253] *Id.* at § 10(1).

be required to provide evidence in court to show principles of the RTA were not violated.[254] Furthermore, if an employer has more than 500 workers they are legally obligated to provide a report that illustrates the employer's pay structure and gender equality.[255] This report must explain how the measures adopted by a company will promote gender equality and equal pay, and must also describe the impact these measures will have on the workforce.[256]

The assumption is that the RTA will increase transparency, which will increase demands by women for higher pay. These demands will then help close the gender pay gap. This is very similar to the United Kingdom's rationale for enacting the Regulations. In order to create greater transparency, the RTA allows employees to discover the median remuneration of a group of colleagues of the opposite sex that perform equal or equivalent work.[257] The issues with the RTA are very similar to the issues of the Regulations. The RTA does not allow women to discover the exact wages men earn and does not impose sanctions for non-compliance.[258] However, unlike the Regulations, the RTA expands the number of employers required to comply by covering employers with over 200 employees.

Another country that has tried to reduce its gender pay gap by increasing transparency is Australia. Although this is similar to the United Kingdom and Germany, Australia's equal pay laws contain more stringent requirements. Since 1998, Australia has required publicly-listed companies to report the wages of senior executives.[259] In 2012, Australia enacted the Workplace Gender Equality Act (the "WGEA"), which was designed to require certain employers to promote gender equality in the workplace.[260] The WGEA also established the Workplace Gender Equality Agency in order to promote and improve gender equality in Australia.[261] Under the WGEA, private sector employers with over 100 employees are required to report information regarding gender pay gaps.[262] If any employer has over 500 employees then they also must have a formal policy or strategy in place that improves gender pay issues.[263]

The equal pay laws of Germany and Australia are very similar. Both countries require smaller employers to comply and employers with over 500 employees are held to a higher standard. Unlike the RTA, however, the WGEA also places a legal obligation on employers to report information and implement strategies and has expanded the requirements for certain industries.[264] For example, financial institutions have additional reporting requirements,

[254] *Id.* at § 15(5).
[255] *Id.* at § 21.
[256] *Id.*
[257] *Id.* at § 3.
[258] *Id.* at § 11(3).
[259] Brian Jebb & Sarah Henchoz, *INSIGHT: Governments are Increasingly Turning to Pay Disclosure Requirements in an Attempt to Even the Corporate Playing Field*, BLOOMBERG L.: DAILY LABOR REPORT (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.
[260] *Workplace Gender Equality Act 2012* (Cth) pt I s 2A (Austl.).
[261] *Id.* at pt III.
[262] *Id.* at pt I ss 3(1).
[263] *See id.* at pt I s 3, pt IV s 13, pt IVA s 19.
[264] *Id.* at pt I ss 5 sub-divs (7)–(8).

which are enforced by the Banking Executive Accountability Regime.[265] Again, however, the WGEA suffers from the same flaws seen in most of these laws: the inability to enforce these laws because of the lack of civil or criminal penalties if employers fail to comply.[266]

b. How One Country May Close the Gap by 2022

It is clear that the greatest issue encountered when closing the 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.

Iceland has stated its commitment to closing the gender pay gap by 2022.[267] 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%.[268] 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").[269]

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.[270] In order to obtain this certificate, employers must implement an equal pay management system that follows the guidelines of the EPS.[271] 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.[272]

The overall goal of the EPS is to reduce gender-based wage discrimination and to promote greater equality in wages between women and men.[273] However, many countries have had the same goal and failed to close the gap. 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

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[265] *See* Explanatory Memorandum, Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017 (Cth) ch 1 ss 1.20, 1.21. (Austl.).

[266] *See Workplace Gender Equality Act 2012* (Cth) pt IVA s 19D (Austl.).

[267] Jebb & Henchoz, *supra* note 259.

[268] *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/.

[269] *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/.

[270] *See* Act on Equal Status and Equal Rights of Women and Men, No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016, and No. 56/2017 s. 3 art. 18 (Ice.).

[271] *See id.*

[272] *See id.* at s. 2 art. 13.

[273] *See id.* at s. 1 art. 1.

the end of 2018, while smaller employers are given more time to receive the certification.[274] 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.[275] 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 United Kingdom, 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.[276] In addition, employees can receive compensation for financial and non-financial losses from employers.[277]

In the end, Iceland is able to do the very thing the United Kingdom, Germany, and Australia failed to do when enacting their 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.[278] 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 United Kingdom would be required to comply with the reporting requirements.[279] In addition, about 7 million additional employees in the United Kingdom would be covered.[280] Altogether, the EPS covers almost 46% more of Iceland's labor force than the Regulations do in the United Kingdom.[281]

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 filled by women and that there was no notable gender pay gap among employees.[282] Whereas, it was reported that electricity and gas companies in the United Kingdom have an average gender pay gap of about 15.2%.[283] More specifically, British Gas Services Limited (U.K.), which is a subsidiary of one of the largest energy and home services companies in the United Kingdom, reported that women

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[274] *Looking for Information About Equal Pay in Iceland? All About the Equal Pay Standard*, KVENRÉTTINDAFÉLAG ISLANDS (Apr. 1, 2018), http://kvenrettindafelag.is/2018/looking-for-information-about-equal-pay-in-iceland-all-about-the-equal-pay-standard/.

[275] *See id.*

[276] Act on Equal Status and Equal Rights of Women and Men, No. 10/2008, as amended by Act No. 162/2010, No. 126/2011, No. 62/2014, No. 79/2015, No. 117/2016, and No. 56/2017 s. 3 art. 18 (Ice.).

[277] *See id.* at s. 5 art. 31.

[278] Ministry of Finance & Economic Affairs, *Equal Pay Certificate*, GOVERNMENT OF ICELAND, https://www.government.is/topics/human-rights-and-equality/equal-pay-certification/ (last visited Feb. 26, 2020) (discusses which companies and institutions must obtain the certification in question 5 of the Q&A section).

[279] *See* Briefing Paper 06152, *supra* note 229, at 5.

[280] *See id.*

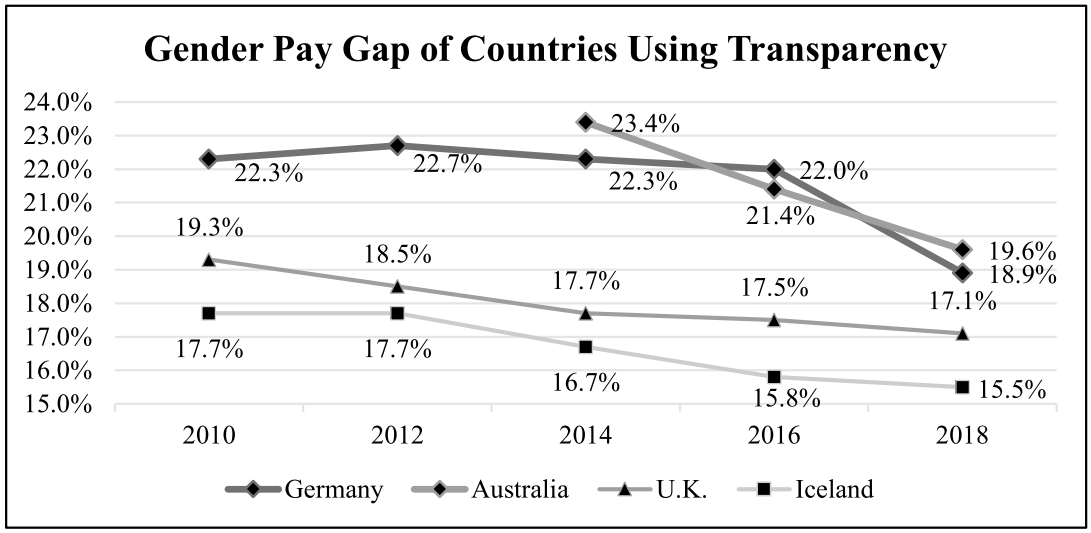
[281] *See* Henshall, *supra* note 231.

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

[283] *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.

earn a little more than half of what a typical male employee earns.[284] 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%.[285]

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



This chart shows the average gender pay gap regarding hourly earnings for all employees from 2010 to 2018.

Sources: Economic Policy Institute; Office for National Statistics; Eurostat; and WGEA[286]

CONCLUSION

Every country is 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

[284] *See id.*

[285] GOVERNMENT EQUALITIES OFFICE, BRITISH GAS SERVICES LIMITED GENDER PAY GAP REPORT (2017).

[286] EPI, *supra* note 3; ONS, *supra* note 26 ; EUROSTAT, EUROPEAN COMMISSION, GENDER PAY GAP STATISTICS (2019), https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=sdg_05_20&plugin=1; WORKPLACE GENDER EQUALITY AGENCY (AUSTL.), PAY EQUITY (Apr. 1, 2019), http://data.wgea.gov.au/industries/1#pay_equity_content.

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.