

**THE LEGAL, ETHICAL, AND STRATEGIC
IMPLICATIONS OF GENDER DISCRIMINATION
IN COMPENSATION: CAN THE FAIR PAY
ACT SUCCEED WHERE THE EQUAL PAY
ACT HAS FAILED?**

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ABSTRACT

Despite the fact that the Equal Pay Act has been law since 1963, women's pay lags behind men's at every occupational level. Congress is now considering bills, like the *Fair Pay Act* and the *Paycheck Fairness Act*, to remedy salary inequities. This article explores the topic of pay equity as it relates to gender discrimination and provides a review of the research and literature related to the gender pay gap issue. The authors argue that the enforcement of existing law offers more promise in ameliorating pay disparities than does the proposed Fair Pay Act. The authors further contend that there are barriers to change, including social and cultural factors, which have limited the reach and effectiveness of the law in reducing the gender pay disparity.

In April 2005, Senator Tom Harkin (D-Iowa) introduced the Fair Pay Act of 2005 to address pay difference between white men and women and minorities [1]. The legislation "would address the historic pattern of undervaluing and underpaying so-called women's jobs" [2]. The bill says that "where working conditions are similar, wages should also be similar" [2]. The proposed legislation seeks to address the gender wage-gap issue that has plagued the workplace for decades.

Gender-based wage disparity continues to spark discussion, research, and proposals for remedy. A national group, Business and Professional Women USA,

Table 1. Gender Wage Gap Selected Years: 1963-2003*

Year	Men's Earnings	Women's Earnings	Dollar Disparity	Percent Disparity
2003	\$40,668	\$30,724	\$9,994	24.5%
2002	\$39,429	\$30,203	\$9,226	23.4%
2001	\$38,275	\$29,215	\$9,060	23.7%
2000	\$37,339	\$27,355	\$9,984	26.7%
1999	\$37,701	\$27,208	\$10,493	27.8%
1963	\$28,684	\$16,908	\$11,776	41.1%

*Data for this table were derived from "The Age Gap Over Time" table, <http://www.pay-equity.org/info-time.html> [5].

cited polls showing that unfair pay tops the list of concerns that working women have, as it is a problem that plagues them throughout their working lives and even affects their pension and retirement benefits, which are often based on the income they receive during their careers [2].

As of 2004, according to Senator Harkin, women earned 76 cents for each dollar paid to men [2]. The General Accountability Office (GAO), previously known as the General Accounting Office, found that during the period 1983-2000 women earned 44 percent less than men [3]. During the last five years there has been some improvement in closing this gap, but it has not been significant (See Table 1). In 1963 when the Equal Pay Act was signed into law, women who were employed full-time earned 59 cents for every dollar earned by men. While some may argue that this is evidence of the progress women are making in the workplace, others point out that at this pace, women will not achieve pay parity with men until 2050 [4].

Substantial evidence exists of significant pay differences between men and women across the economic spectrum, as evidenced by a survey conducted by the National Association for Female Executives (NAFE) in 2004 [cited in 6]. In some cases, the difference was narrow, but for a majority of jobs the pay gap was substantial. For example, women accountants with more than twenty years experience earned \$85,375 in 2004, while their male counterparts received \$119,625, a difference of almost 30 percent. This pattern repeats itself in many other fields (see Table 2).

Even in fields traditionally dominated by women, men were paid at a higher rate. Wage disparities in the social work profession, for example, have been documented for more than forty years [7], including a 1995 study showing the median income for female social workers was \$34,135 versus \$37,503 for their male counterparts [8].

Better-educated women are not immune from the pay gap. Training for a traditionally male-dominated field does not ensure that women will receive the same money as men. At the lower economic levels, women who took vocational training were steered into lower paying fields like cosmetology,

Table 2. Wage Disparities Between Males and Females in Professional Positions*

	Male Earnings	Female Earnings	Percent Disparity
Accountants (20 yrs experience)	\$119,625	\$80,375	30.0%
Health Care Executives	\$195,783	\$152,673	23.0%
Allergists/Immunologists	\$254,289	\$190,983	25.0%
Surgeons	\$489,000	\$337,031	30.0%
Head Librarians	\$69,000	\$63,117	10.0%
Social Workers	\$37,503	\$34,135	9.7%
Nonprofit Administrators	\$88,825	\$55,000	38.0%

*Data from a survey conducted by the National Association of Female Executives (NAFE), cited in [6].

day care, and medical transcription rather than plumbing, electrical work, or carpentry, traditional male jobs that pay twice as much. The ranks of administrative and clerical workers are traditionally filled by women. Yet, female secretaries and administrative assistants earned \$27,612, but men who filled those positions were paid \$29,796, a differential of 7 percent [6].

CAUSES OF THE GENDER PAY GAP

There is no question that the gender pay gap exists. The most-disputed issue is whether such a gap is the result of discrimination or human capital variables, such as the level of education, experience, and job tenure [9]. Not all of the gender gap, however, can be explained away by these factors. The General Accountability Office issued a report in October 2003, based on 18 years of data, which found that 20 percent of the earnings gap could not be explained after considering such human capital factors [3]. Similarly, a report issued by the Council of Economic Advisors in 1998 found that when variables such as education and experience are held constant, a pay gap remains, forcing the conclusion that some of this gap is due to discrimination [10].

Another variable in the gender gap is the intermittency of women's employment or a woman's choice to pursue flexible work situations to raise a family. Women drop out of the work force or work part-time after they have children. Because they sacrifice their prime earning years to domestic obligations, women's pay suffers in comparison to men's [6]. Gender differences in physician pay have been linked to such career-family tradeoffs [11]. Research indicates that a "sizable" wage penalty results from such intermittent labor force participation [12].

A third issue is occupational sex segregation or occupational *crowding* [13]. Warren Farrell argued that men earn more because they enter higher-paying fields [14]. In his book, *Why Men Earn More*, Farrell claimed that women are socialized

to choose the care-giving professions, while men need to provide for their families and thus need to choose higher paying jobs [14]. Farrell argued that women play it safe by choosing secure occupations that have lower financial risk, but are not as financially rewarding [14].

The counterargument to Farrell's theory is the fact that even in low-paying jobs like counter attendants, dishwashers, or child-care workers, men make more money. According to Farrell's own data, a male child-care worker earns \$19,188, while his female peer makes \$16,952. Male dishwashers earn \$15,080, while women garner only \$14,176. Women have the edge in packaging and packing because they earn \$18,200 to a male's \$17,940 [6]. Although none of the above jobs involve taking financial risks, they are traditionally female jobs, and so women earn less.

A variety of factors influences gender pay disparities, including human capital variables, job intermittency, and occupational sex segregation. Discrimination may account for the portion of the gap that cannot be rationalized by these variables, but it also underlies these same factors, leading to a more complex phenomenon than legislation alone can remedy.

THE EQUAL PAY ACT OF 1963

The Equal Pay Act, which was enacted into law as an amendment to the Fair Labor Standards Act, was the first law to require that the women's pay be equal to that of men when their jobs are equal [15]. The purpose of the law was to eliminate discrimination and the negative effect on living standards caused by women receiving lower wages. The Equal Pay Act provided that an employer shall not discriminate between employees in any establishment [15, p. 335] on the basis of sex by paying wages to employees at a lesser rate than that paid to employees of the opposite sex for equal work on jobs requiring "equal skill, effort and responsibility" for their performance conducted under similar working conditions [15, p. 335].

To prove discrimination under this law, a woman has to show that she is receiving less pay for work that is substantially equal and that the reason is based on gender [15]. But what does "substantially equal" mean? Under the act, "equal work" means jobs requiring equal skill, effort, and responsibility performed under similar working conditions. "Equal skill" is defined as experience, training, education, and overall ability required or regularly used in the performance of the job and "equal effort" means the amount of mental and physical exertion demanded of the employee in the performance of the job. "Responsibility" means the accountability of the employee and working conditions and includes not only workplace hazards but other environmental factors involved in the job [15, p. 336]. Establishing equality of work, skill, effort and responsibility may be difficult, but further proving that inequality of pay is the result of gender is even more daunting.

THE FAIR PAY ACT OF 2005

The Fair Pay Act of 2005 would alter the language of the Equal Pay Act. Instead of requiring equal pay for equal work, the act would demand equal pay for jobs that are *comparable* in skill, effort, responsibility, and working conditions [16]. Since the Fair Pay Act would apply to companies individually, firms could not reduce one group's wages to ensure pay equality. Employers would be required to disclose their job categories and pay scales to the Equal Employment Opportunity Commission (EEOC) [1]. This information could be used by the EEOC for research purposes or published in reports [1]. Further, the public would have access to the information [1]. Wage differentials paid under a seniority merit system or a program that measures earnings by quantity or quality of production would still be allowed [1].

The bill would make it easier for victims of wage discrimination to recover because it permits women and racial and ethnic minorities to file claims against employers with the EEOC [16]. Under the Equal Pay Act, a woman who believes that she is not being paid fairly must bring a lawsuit and engage in a lengthy discovery process to determine if she earns less than her male counterpart [16]. In her testimony before the Senate Committee on Health Education, Labor and Pensions on June 8, 2000, Judith Applebaum of the National Women's Law Center provided several examples of EEOC equal pay case settlements, including a \$100,000 settlement involving a female professor at Eastern Michigan University [10]. Since 1992 the EEOC has secured almost \$100 million in settlements for gender wage-related charges [10]. The Labor Department's Office of Federal Contract Compliance Program (OFCCP) collected \$15 million in pay for women and minorities in 1999, including large settlements from Boeing and Texaco [10]. Yet, the pay gap persists.

Under the provisions of the Fair Pay Act, statistics on pay would be available by law from the employer. Fewer lawsuits would be filed because employees would be fully aware of what the pay levels are. Requiring disclosure of job categories and pay scales could discourage employers from paying women and racial and ethnic minorities less than white males.

The Fair Pay Act raises the specter of comparable worth that was a cornerstone of a previous version of the Paycheck Fairness Act, first introduced by then-Senator Tom Daschle (D-S.D.) and touted by President Clinton in 1999. That bill would have codified the concept of comparable worth by requiring the OFCCP to determine objectively a job's worth by considering the working conditions and knowledge or skill required to perform a task. That bill was attacked on several fronts. Critics claim that experience and risk, two factors that increase men's average wages vis-à-vis women's, would not be considered as relevant job-related criteria [17]. As a result, traditionally female occupations would be treated as comparable to male occupations (secretaries versus truck drivers), and white-collar jobs would be considered more valuable than blue-collar work [17].

The Labor Department might decide that administrative assistants would be paid as much as oil drillers and teachers as much as construction workers [17]. What appears to be problematic is the actual determination of comparable worth. When comparing positions in dissimilar occupations across multiple industries, what data and evidence will be used as proof?

Politically conservative critics regard such legislation as bureaucratic meddling in the marketplace, a “step toward an economy ruled by bureaucratic diktat” [17]. Business claims that legislation like the Fair Pay Act and the Paycheck Fairness Act are based on an assumption that women cannot make it on their own and that they are channeled into certain occupations by a sexist society [17]. Furthermore, they argue that if comparable worth requires firms to pay women higher than market wages, fewer women would be hired [17]. Conservatives argue that the 76 percent disparity between male and female wages is attributable to the fact that women have less work experience and are more likely to work at jobs that permit them to take time out of their working careers to raise children [17].

Supporters of the Fair Pay Act and Paycheck Fairness Act argue that “deeply rooted wage stereotypes” cause employers to pay according to sex and not according to “skill, effort, responsibility, and working conditions necessary to do the job” [18]. Further, research has shown that the higher the percentage of women in a particular job or occupation, the lower the relative wage for that job [20]. In a study of occupations in service industries, the findings indicate that as the “percentage of women in the identified occupational groups increases, the weekly salaries decrease” [21, p. 24]. Labor advocates claim that women’s current compensation issues stem mainly from sex segregation. Studies show that two-thirds of white women and three-quarters of African-American women work in three areas: sales and clerical, service, and factory jobs [19]. Supporters of the Fair Pay Act believe that “if men and women are doing comparable work, they should be paid a comparable wage” [19]. So, if a woman is an emergency service operator or a social worker, both predominantly female occupations, she should be paid as much as a fire dispatcher or a probation officer, both of which are male-dominated jobs [19].

Contrary to conservative fears, supporters claim that the Fair Pay Act would not tamper with the market system. First, women who sue under the law would have to prove that the reason for the pay differential is discrimination and not market factors [19]. Second, supporters point to the fact that twenty states have adopted the notion of comparable worth by raising the pay of teachers, nurses, clerical workers, librarians, and other female-dominated jobs that paid less than those of men. For example, Minnesota established a pay equity program when it discovered that similarly skilled female jobs paid 20 percent less than male jobs [19]. A California study found that children’s social service workers and probation officers are equivalent in “skills, efforts, responsibility and working conditions,” so the County of Los Angeles increased the pay for female-dominated social work jobs by 20 percent [5]. Similar pay equity studies have been conducted in

Wisconsin, Oregon, and Hawaii [5]. States have tackled the issue of pay discrimination over a period of years at a cost of 3 percent to 4 percent of the payroll [19].

BEYOND LEGAL REMEDIES: BARRIERS TO CHANGE

Although the Equal Pay Act was enacted into law more than forty years ago, it is clear that gender pay disparities persist. Barriers inhibit the closure of pay gaps based on gender and are created by behavioral factors, corporate culture, and other organizational factors, as well as political, social, economic, and sociocultural factors in the external environment. Can the Fair Pay Act attack these barriers more effectively than the Equal Pay Act? To address this question, it is important to understand the nature of existing impediments to change.

Behavioral Factors

At the individual level, behavioral variables perpetuate the pay gap. The lack of awareness of pay inequities by individual women causes them to undervalue their personal contributions. Contributing to this lack of awareness is wage secrecy. In 2001, The National Committee on Pay Equity defined “wage secrecy” as one of the top ten reasons for gender wage gap [5]. Both social norms that deem the discussion or questioning of others’ salaries to be inappropriate and corporate policies that discourage or forbid such discussions contribute to women’s inability to assess accurately their pay relative to their male counterparts. A lack of knowledge about what a position “pays” further perpetuates the wage gap when a woman negotiates her future salary [5].

Beyond the issue of awareness is behavior related to salary negotiation. According to Babcock and Laschever, women simply don’t demand and often fail to negotiate for salary at all [22]. In a study of female administrators and executive managers, Cheryl Thompson-Stacy found that 80 percent of the interviewees accepted their positions without negotiating salary [23]. The author contends that women and minorities do not negotiate as well as men [23]. The failure to negotiate for higher salaries at the initial hiring results in lower base pay that perpetuates the wage disparities as women progress through their careers. Evelyn Murphy contended that gender stereotypes are not just *outside*, “but also inside of us, prompting women to feel that it’s not right to ask for money themselves” [24, p. 279]. One of the provisions of the Paycheck Fairness Act would establish a grant program to provide training for women and girls on how to negotiate better salary and compensation packages [25]. No such provision appears in the Fair Pay Act.

Corporate Culture and Policies

At the organizational level, there are also barriers to change that are embedded in company policies and culture. Some organizations are very secretive with respect to reward systems and pay policies [26]. Less-open systems tend do

“concentrate power at the top” [26, p. 22] and afford employers greater flexibility in both the design and administration of rewards. A policy of secrecy with regard to the communication of rewards requires less time and effort in pay administration than does an open system in which pay administration is critical to the effective motivation of employees [26]. It also opens the door to gender pay discrimination. Although the Fair Pay Act would require disclosure to the EEOC, it is unlikely that open reward and pay systems would follow suit, given the perceived loss of flexibility and costs of administration.

Organizational policies and culture also affect opportunities for upward mobility afforded women, which result in wage disparities. A study of more than 12,000 professional men and women indicated that “professional women encounter significant barriers in gaining access to meaningful supervisory jobs” and that the “gender segregation and the allocation of differential supervisory positions among professionals may contribute primarily to the lower earnings of female supervisors and the unequal pay between male and females” [27, p. 1035]. Policies with regard to promotional opportunities and career channeling enable organizations to sidestep the issue of wage disparities as covered under the Equal Pay Act. While the Fair Pay Act has the potential to compensate for career channeling through comparable worth, it will not open any additional opportunities for supervisory experience.

Human Resource Practices

The common human resource practice of basing the pay of new hires on their salary history, rather than on responsibility and experience, also perpetuates the wage gap [28]. When increases in salary for promotions are based on current salary, women have difficulty catching up to their male counterparts. Further, according to the National Committee on Pay Equity, stereotyping continues, since women are offered lower wages because their salaries are viewed as supplemental income [5].

While ignoring the problem of gender wage disparity can be costly, top management may perceive that equitable pay initiatives are too expensive and believe that perpetuating wage disparities actually reduces personnel costs. Human resource professionals have identified gaining top management support as the major barrier to change in addressing the gender-based pay gap [28]. They agree that once an unjustified gap is identified, it can be corrected through a sequence of pay increases [28]. The problem is that top management refuses to “acknowledge that a gender-based pay gap exists” [28, p. 2]. Change would require that the ethical dimensions of equal pay become part of the corporation’s culture and its values.

Societal and Environmental Factors

Another problem in dealing with gender pay disparity is that the issue itself is the manifestation of a more systemic and deeply rooted gender discrimination

problem in society. Human capital differences such as education and experience, which economists identify to “explain” the gender wage gap, are often the result of discrimination [5]. The education system subtly reinforces channeling women into careers that pay less. Women are discouraged by teachers and families from entering the science, math, and technology fields [29]. Evidence of such thinking can be found in the comments of Harvard President Lawrence Summers about the dearth of women in the sciences [30]. The sparse numbers of tenured women at Ivy League universities in a variety of disciplines may be the tip of the iceberg in an educational system that sends messages to girls even in the primary grades that they have a lower chance of achieving a high-status job than males do. Such discriminatory attitudes continue as women enter the workforce and face obstacles in attaining career-enhancing experience. Women may not be offered “career shaping assignments” and, therefore, are unable to gain the experience needed to advance [5].

The economic and political climate has a significant impact on the pace and direction of change with respect to issues such as pay equity. During periods of economic downturn when there is a weak job market, it is likely that less attention is paid to pay equity issues because women are grateful to have a job and steady income. Changes in the political climate may also impede steady progress in closing the pay gap. Opportunities for improvement in gender pay equity created with the establishment of the White House Office for Women’s Initiatives and Outreach under the Clinton Administration were thwarted when the Bush Administration decided to close it [31]. Given the political philosophy of the current administration, improvement and change through the legislative process are not imminent.

A STRATEGIC CASE FOR CLOSING THE GENDER WAGE GAP

The Fair Pay Act cannot break down all the barriers to change, but corporate recognition of the importance of addressing the gender pay gap issue can. Sound corporate strategies consider both the internal condition of the firm and external factors, and seek a fit between internal strengths and weaknesses and external opportunities and threats [32]. An organizational weakness rises to the level of strategic concern when that weakness leaves the firm vulnerable to external threats or inhibits the firm’s ability to take advantage of key opportunities. A case can be made that the gender wage gap poses a significant threat to firms whose human resource practices do not compensate people equitably.

A firm’s human capital, as a core competency or strength, can provide competitive advantage if it supports firm strategies. Companies seek to build such capital by developing the skill base necessary to pursue future strategies, by recruiting and retaining a skilled and diverse employee base, and by maintaining a satisfied, motivated, and productive workforce. Such organizational strength may be eroded if organizations fail to recruit and retain women with the skills necessary

to pursue strategic goals. In addition, perceived pay inequity can act as a *dissatisfier* creating negative tension [33]. Inequity in compensation or reward will motivate an individual to reduce that inequity, perhaps through a reduction in work effort, and the strength of the motivation to reduce the inequity varies directly with the perceived magnitude of the imbalance [33]. If women in an organization become aware of a significant disparity in pay, they may reassess their relative work contributions. Organizational efficiency and productivity could suffer. Further, the mere perception of gender bias or discrimination with respect to compensation has the potential to affect not only worker motivation and productivity, but also job satisfaction, employee morale, and ultimately turnover [34]. Internal weaknesses emanating from the failure to address inequitable pay reduces firm competitiveness and increases the organization's vulnerability to external threats.

In terms of the external environment, the increased attention and focus on the gender pay gap issue poses a threat to those organizations whose policies and reward systems foster inequity. These companies not only risk the loss of valuable human resources, but face potentially costly litigation associated with EEOC charges or potential lawsuits [28]. With the increasing number of wage-related charges being filed by women and substantial financial settlements being negotiated, the threat looms larger [10]. Such costs extend far beyond the legal and administrative expenses involved in responding to these suits and charges, and include the potential loss of business because of negative public perceptions.

Organizations that pursue a diversity strategy [35] and/or strive to effectively manage an increasingly diverse workforce must address the pay gap issue. A diverse workforce is needed to respond to a diverse consumer base and marketplace. Organizations that fail to address gender pay disparities run the risk of losing the valuable skills of female employees. The ability to both recruit and retain women who are critical to the firm's success may be jeopardized. Ultimately, organizational efficiency suffers as a result of employee turnover, the underutilization of women and their skills, and the diversion of attention from the company goals.

Under the current business climate, attention has been focused on ethics and social responsibility in business. Companies are addressing such issues in their strategic planning process because of the potential long-term implications. The gender pay disparity issue certainly falls under this umbrella. Given the number of complaints filed with the EEOC [28], the number of law suits [28], and the publicity surrounding current gender pay disputes involving such firms as Wal-Mart [28], organizations must view gender pay disparity as an important strategic issue. Public perceptions can affect the economic success and viability of firms. Gender-based pay discrimination is an ethical issue, and business should be concerned with developing proactive efforts to close the gender pay gap so as to build socially responsible reputations.

While passage of legislation is unlikely, the failure of organizations to address the issue of gender pay disparity and discrimination invites future government regulation. Strategically, firms should resolve to close the gender pay gap rather than reacting to government-imposed restrictions and requirements.

CONCLUSION

Studies show that in nearly 10 million households the woman is the sole breadwinner and that families headed by women too often struggle to pay rent or mortgages, buy food, provide medical care, pay for increased heating and utility costs, and save for children's education [16]. Yet for most of these households, the women—who are as educated and experienced as the men working beside them—are paid on average 76 cents for each dollar the man makes [2]. Depending on her education, the average woman loses between \$700,000 and \$2 million over her lifetime because of unfair pay practices [24]. Because women live longer than men, elderly women face financial jeopardy because of the pay inequities they suffered during their working lives [36].

The fact that women take low-paying, part-time jobs that provide few benefits so they can be home to care for their families reinforces the employers' ability to exploit a low-wage labor pool rather than create better jobs. Women take such positions because of lack of day care or flex time, and family leave policies leave them no alternative. Such choices lead to lower wages throughout their working careers which lead to lower pensions (if indeed they qualify at all) than those of their male counterparts.

Although there has been some progress in reducing the gender pay gap since 1963, pay discrimination persists. The law can only address the symptoms of discrimination, but its causes are more deeply rooted and require changes in organizations' cultural norms and societal attitudes. If equal pay for equal work has yet to be achieved, the likelihood of achieving equal pay for comparable work is even dimmer. Legislation will not break down the barriers to change that exist within the organization, nor is it sufficient to change the individual behaviors of women or external political and social influences.

Reducing the gender wage gap must be a business, government, and societal priority. Wise business strategy and business ethics dictate that employers take steps to address gender-based pay inequities, but failing that, there are some public policy initiatives that might be undertaken. First, stronger laws to require paid family leave and flex-time options would enable women to maintain their careers instead of dropping out of the workforce for several years to care for children [37]. Second, the United States government and private companies need to fund high-quality, on-site daycare. Third, better enforcement of existing laws by the EEOC and OFCCP is necessary. Both of these agencies should be auditing corporations to determine whether women in their employ are paid less than their

male counterparts performing similar work [37]. Such policies may be denounced as too costly, but U.S. productivity would inevitably be raised by “fully exploiting and enhancing the talents of women” [37].

Given the current political climate, it is unlikely that the Fair Pay Act will become law. Prospects for passage of the Paycheck Fairness Act, introduced into both Houses in 2005, are equally dim. Although government action is important, it is not enough. The cooperation of the private sector, based on the recognition that addressing pay inequity in the corporation makes good economic, strategic, and ethical sense, is fundamental to successfully closing the gender pay gap.

ENDNOTES

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