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¹¹ *Kerr v. Commissioner*, 113 T.C. 449 (1999); *Estate of Jones v. Commissioner*, 116 T.C. 121 (2001); *McCord v. Commissioner*, 120 T.C. 358 (2003).

¹² *Estate of Newhouse v. Commissioner*, 94 T.C. 193 (1990).

¹³ *Estate of Davis v. Commissioner*, 110 T.C. 530 (1998); *Estate of Simplot v. Commissioner*, 112 T.C. 130 (1999).

¹⁴ 120 T.C. 358 (2003).

¹⁵ T. C. Memo 2000-51.

¹⁶ T. C. Memo 2003-280.

¹⁷ *Kimbell v. United States*, 244 F.Supp.2d 7000 (N.D. Texas 2002).

¹⁸ *Id.* at 7003.

¹⁹ *Estate of Wayne C. Bongard, Deceased, James A. Bernards, Personal Representative, Petitioner v. Commissioner of Internal Revenue, Respondent*, 124 T.C. No. 8 (2005).

²⁰ *Id.* at 62.

THE PAY GAP TAX CREDIT AS A REMEDY FOR
GENDER PAY DISPARITY

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I. INTRODUCTION

Before the 1960s, women either stayed home to raise children or worked in professions that were considered 'women's fields' such as nursing or teaching. Career opportunities were limited. Former Supreme Court Justice Sandra Day O'Connor graduated third of 102 students from Stanford Law School but when she applied for a position at a law firm, she was asked to fill a secretarial position instead.¹ Although women have entered the work force in large numbers in the past forty years and are better educated and have more experience than ever before, their salaries lag behind those of men's when comparing similar education, experience and occupation.²

Corporations have had over forty years to put in place mechanisms to ensure that women and men are treated equally in pay and promotions. In 2006, women earn on average 77

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cents for every dollar that a man earns.³ A gender pay gap exists in all professions regardless of whether these positions are traditionally filled by women or men.⁴ One of the excuses that companies use to explain pay inequities is that women opt out of the workforce for pregnancy and child rearing.⁵ Yet this does not explain disparities in compensation when looking strictly at education, profession and years of experience. The Equal Pay Act of 1963 was designed to remedy this problem, but has proven ineffective at closing the gap. This paper explores the use of the tax code to provide pay equalization and to encourage employers to address pay disparity issues.

II. BACKGROUND

In 2003 the number of working women reached nearly 65 million.⁶ By 2012, it is projected that women will account for 48% of the labor force.⁷ It is documented that jobs such as nursing, teaching and secretarial which have been traditionally held by women are viewed as being worth less than male-dominated occupations. Yet even in these occupations, women earn less than men. Female registered nurses earn 12% less than their male colleagues.⁸ Female college and university professors earn 21% less than their male counterparts.⁹ A female professor from Boise State University puts the pay gap issue in easily understandable terms. She has been a professor for 25 years and her pay gap has ranged from 20-40% when compared to men in her department. This means that she has been working "six out of her 25 years without pay".¹⁰ In occupations such as word processing and typing which have typically been filled by women, women earn 8% less than males.¹¹

In occupations that have traditionally been filled by men, the pay gap is even more pronounced. Women physicians earn 41% less than men.¹² Female computer scientists and systems

analysts, a field that women have not been particularly encouraged to enter, face a pay differential of 19%.¹² Evelyn Murphy, the author of *Getting Even* refers to this as 'working while female'.¹³

At the current pace, in Connecticut, it is projected that women will enjoy pay equity with men by 2050.¹⁴ In thirteen states women will not reach parity with men until after that year.¹⁵

Although women have earned more bachelors and advanced degrees than men since 1982 and 1981 respectively, their salaries still lag behind men with similar degrees and experience.¹⁶ Women have not made any headway into full pay equity. There is a large disparity which cannot be explained even when factoring in occupation, industry, race, marital status and job tenure.¹⁷ The only plausible explanation is discrimination.

Women account for 92% of nurses and 82% of elementary/middle school teachers.¹⁸ In fields such as civil engineering and pilots/flight engineers, women account for only 9% and 3% respectively. Even taking into consideration that the number of females entering those fields is low, salaries between men and women are still not on par which is further evidence of discrimination against women.

Numerous companies have been subjected to complaints for failing to hire or promote women. Among the more notable recent settlements was the Voice of America, U.S. Information Agency in 2000, for \$543 million.¹⁹ In 2004, Abercrombie & Fitch entered a consent decree for \$50 million¹⁹ and Morgan Stanley, an investment firm, settled for \$54 million.²⁰

III. PAST LEGISLATION

In 1963 Congress passed the Equal Pay Act, the first modern employment discrimination statute requiring equal pay for equal work. Since 1978, this law has been administered by the Equal Employment Opportunity Commission (EEOC). Every year since 1998, approximately 24,000 sex discrimination complaints have been filed with the Equal Employment Opportunity Commission. In 2004, 10,000 sex discrimination complaints were resolved with \$100.8 million recovered in those complaints.²¹ Although some claims have been resolved through EEOC, the Commission lacks the resources necessary to respond to all cases in a timely manner.²²

IV. PROPOSED LEGISLATION

There are two legislative proposals in Congress that aim to address the pay gap issue. The Fair Pay Act (S.840/H.R.1697) would require that "jobs that are held predominantly by women could not be paid less than jobs held predominantly by men if those jobs are equivalent in value".²³ This Act does include exceptions for paying different rates if those rates are based on seniority, merit or quantity/quality of work. The other proposal is the Paycheck Fairness Act (S.841/H.R.1687) which would require a review of the EEOC data collection, make it easier for women to bring class action suits, and enlarge recoverable damages under the Equal Pay Act. Additionally, the Paycheck Fairness Act recommends measures aimed at helping employers to eliminate the gender pay gap. The Paycheck Fairness Act would bolster the Equal Pay Act in several ways (see footnote 24).²⁴

V. OTHER REMEDIES

In *Getting Even*, Evelyn Murphy urges that the law provide an incentive for CEOs to address the gender pay gap issue by tying the bonuses of CEOs to closing the pay gap within their companies.²⁵ Shareholders could be instrumental in putting additional pressure on companies to take such steps.

The Massachusetts Institute of Technology (MIT), Mitsubishi, and the State of Minnesota have made strides in addressing gender pay disparities. At MIT, a female biology professor was denied an additional 200 feet of lab space, even though she knew space was available.²⁶ In comparing her lab space to that of her male counterparts, she found that male faculty members of the same rank had from 3,000-6,000 square feet versus her 1,500. She also found out that men of lower rank and less experience had more space than she had as a tenured, full professor. Eventually her dean helped her obtain the additional space. The professor realized that during her twenty-one years at the school, women were treated differently than men in many instances. She found that there were only 15 tenured women versus 194 tenured men, the same number as when she began teaching at MIT in 1973. A committee further examined the salary, lab and office space and presented the results to MIT's President who acknowledged the inequities and vowed to address them. Each year a committee at MIT reviews pay, hiring and promotions issues to ensure that they are equitable. The school benefited from positive publicity which showed MIT as a good model for addressing gender pay inequities.²⁷

In 1996, Mitsubishi found itself in the middle of a sexual harassment class-action suit involving approximately 300 women. A firestorm of publicity followed and in a consent decree Mitsubishi agreed to pay \$34 million to the employees.

Part of this settlement required that Mitsubishi be monitored for three years by representatives from the EEOC, Mitsubishi, and an external individual. Mitsubishi's management supported efforts to change the culture of the company. Without the support of management, the reforms would not have been successful.²⁶

In 1982, the State of Minnesota decided to adopt a comparable worth initiative after some female employees provided evidence that jobs held by women on average paid 20% less than those of men.²⁸ Minnesota was the first state to pass a pay equity law for public workers, phasing pay equity in over a four year period.²⁹ Now the pay structure is reviewed every two years and salaries are adjusted accordingly. Women in Minnesota earn 97 cents for each dollar a man earns. While it is not on par with men, it is closer than the general female population's pay of 77 cents to each dollar a man earns.²⁶

VI. A POSSIBLE TAX REMEDY

Current law has not reduced the gender pay disparity. As of 2005, women are still not on par with men with similar education and experience. Economist Heather Boushey, from the Center for Economic and Policy Research, suggested that a tax credit remedy would be a solution to the problem because it would provide some remedy for gender pay inequities.³⁰ Based on this idea a personal income tax credit model is proposed. A tax table could be created which would breakdown employment information by gender, age, education, occupation, region, size of company and salary. Job responsibilities would be classified based on the Hay Guide Chart-Profile Method of Job Evaluation system.³¹

The Hay System was developed by E. N. Hay & Associates, a wage and salary consulting firm, in the 1950s and

is still used today.³² It is based on the job and does not take gender into account. The system provides "a fair and equitable method of rating the importance of all jobs in a company".³³ For example, a human resources manager position would be analyzed based on the job description for that position. The Hay System assigns a specific range of ratings such as 1-4 or 1-10 to each job requirement depending on the ranking of those requirements relative to the specific job. Job requirements include expertise, accountability, experience, functions, financial impact, discretion, number of staff supervised and influence of the position within the company. Salary ranges are then assigned without gender involvement. The focus is on the job, not the individual who fills it.

One potential scheme for a tax-based remedy, therefore, would be based upon a comparison of an employee's total compensation to that of her peers. Factors which could be used to determine job salary parity include:

- Age: 18-20, 21-25, 26-29, 30-39, 40-49, 50-59 and 60-70
- Education: high school graduate, associate's, bachelor's, master's, Ph.D., J.D., and M.D.
- Work location based on the 5 regions: North, South, East, West and Mid-West
- Company size: under 50, under 100, 101-199, 200-299, 300-399, 400-499, 500-599, 600-1,000, 1,001-4,999, 5,000-9,999 and over 10,000 and,
- Hay Score

Computations of the pay disparity tax credit would be based upon a woman's adjusted gross income (AGI) in comparison with the average AGI of a man with identical or similar job responsibilities.

Women would be able to look at the tax credit table utilizing their personal information. The table would indicate what the average man is paid that corresponds to their particular bracket. The difference between what women made and what men were paid based on comparable worth, would be the credit women would receive every April when filing their federal income tax return.

The advantage of the women's tax credit would be that women would be paid fairly for equal work as it relates to that of a man in a similar situation. Women who have been receiving public assistance could potentially now earn a decent standard of living. It has been noted that "nearly 40% of poor working women could leave welfare programs" if they received pay equity wage increases.³⁴ EEOC claims for pay inequities would be reduced. A women's pension and social security pension would also be higher.

Implementing the tax credit plan would initially be a large undertaking in setting up the various components involved. Once established, it would become a matter of maintaining and updating information on a yearly basis until it eventually was phased out. The complexity and cost of developing the tables, fielding questions and dealing with taxpayer confusion, and reconciling inappropriate tax credit filings would be difficult hurdles to overcome. Another disadvantage is that the burden of this remedy is carried by all of the taxpaying public. There is little incentive for offending corporations, those with significant gender pay disparities, to address the gap in their own organizations.

This IRS solution, however, is better than what is currently in place because the Equal Pay Act has not been effective in eliminating gender-based pay inequities. After forty-three years, women earn 23 cents less than a man earns for

comparable skills and knowledge. The Equal Pay Act is not effective in part because it relies on women to bring legal action against employers.³⁵ Pursuing legal action negatively impacts women financially as well as brings their credibility into question³⁶ which can hinder their future employment prospects.

A second tax credit approach to the pay gap problem draws upon the Swedish model. The Swedish Equal Opportunities Act of 1991 requires all employers, regardless of size to assess the levels of pay disparity within their own organization and to provide a remediation plan to address problems.³⁷ There are two main components of the policy: it prohibits gender-based discrimination and responsibility is placed squarely on employers to take steps to promote workplace equality. Employers are required to undergo this analysis and report results annually.

Using the Scandinavian model in combination with a corporate tax credit incentive would encourage companies that make progress at reducing pay disparities. This tax credit would convince corporations to address gender pay inequities which would increase shareholder confidence and generate positive publicity for the company. Such publicity would have the added benefit of being used as a recruitment tool for the corporation.

Corporations are interested in reducing the amount of corporate tax paid and typically look for opportunities to obtain tax credits. Tammy Propst, author of *Incentives: There for the Asking*, refers to the priority that corporations put on incentives: "companies that are most successful at doing this have made incentives and credits a priority in the corporate culture."³⁸ This approach still may not curb or stop gender pay inequities but is an option that should be considered.

There are some disadvantages with this strategy. Similar to the personal income tax remedy, the cost of the corporate tax credits would be borne by all taxpayers and corporations that fail to close the gap in their organizations would not be held financially accountable or required to pay their fair share. The tax credits would encourage corporations to close the gap, rather than hold the organizations directly accountable for failure to address the issue of women's pay inequities. Another disadvantage is that if the tax credit is given at the state level, corporations may shop around to see which state will provide the best tax credit incentives, which could potentially promote a bidding war among states. This tax credit scheme could also become a pawn in the political arena.

In the recent past, the State of Connecticut has used tax credits as an enticement for two companies, the Royal Bank of Scotland and UBS, an investment firm.³⁹ In the 1990s, Connecticut offered UBS, \$145 million in corporate tax credits to relocate to Connecticut. In 2005, Connecticut decided that jobs at the Royal Bank of Scotland were worth \$87,000 each in tax credits. However, both corporations are required to meet specific performance goals which are tied to increasing employment rates within Connecticut.

The advantage for Connecticut is that if goals are not met, the funds are returned. Demetrios Giannaros, member of the Connecticut Finance, Revenue and Bonding Committee believes that "taxpayer-financed breaks allow one company to have an unfair advantage over its competitors".⁴⁰ Large corporations benefit from tax credits because of the sizeable numbers of employees they employ as well as square footage of office space involved. Interestingly, a New York Times article indicated that 183 companies within Connecticut had received state financing and 68 had not met expected targets.⁴¹

These issues would require some consideration in developing a gender gap tax credit program.

VII. CONCLUSION

Fair pay is good strategy for employers to follow for several reasons. Many women are the breadwinners in their families and if they are paid fairly, they will not negatively affect programs such as unemployment and welfare. A report from the Institute for Women's Policy Research revealed that unequal pay takes a significant toll on working women and their families over their lifetime. The total earnings of women average only 38% of what men earn.⁴² When these women are paid unfairly, it directly affects their current earnings as well as social security and pension benefits at retirement.

The Equal Pay Act has been ineffective in closing the pay gap disparity between men and women. The use of a tax credit plan either directed to women as part of their annual tax filing or to corporations as incentive to address gender pay inequities could close the gap. Pay would be fair and equal based on job responsibilities, not the gender factor.

Once women in the United States are educated about continuing pay gap issues and are informed of the tax credit plan, they will rally behind efforts to have it signed into Federal law. Corporations also would address gender-based pay inequities particularly if a corporate tax credit plan was implemented. If corporations are not aware of pay gap inequities or insist that inequities do not exist, this tax credit plan would at the very least, encourage employers to review their pay structure.

ENDNOTES

- ¹ EVELYN MURPHY & E.J. GRAFF, GETTING EVEN. 55 (2005).
- ² See *id.* at 17.
- ³ See *id.* at 3.
- ⁴ http://www.pay-equity.org/PDFs/PaycheckFairnessAct_April2005.pdf
- ⁵ Murphy, *supra* note 1, at 82.
- ⁶ http://www.dpeaflcio.org/policy/factsheets/fs_2003_prowomen.htm.
- ⁷ http://www.dpeaflcio.org/policy/factsheets/fs_2004_Professional_Women.htm. [hereinafter *Professional Women*].
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ Murphy, *supra* note 1, at 72.
- ¹¹ *Professional Women*, *supra* note 7.
- ¹² Available at: <http://www.pay-equity.org/PDFs/ProfWomen.pdf>. [hereinafter *Pay-Equity*].
- ¹³ Murphy, *supra* note 1, at 174.
- ¹⁴ <http://www.aflcio.org/issues/jobseconomy/women/equalpay/CT.pdf>.
- ¹⁵ <http://www.pay-equity.org/PDFs/payequitysummarytable.pdf>.
- ¹⁶ *Pay-Equity*, *supra* note 12.
- ¹⁷ Available at: <http://www.gao.gov/atext/d0435.txt>.
- ¹⁸ *Pay-Equity*, *supra* note 12.
- ¹⁹ Murphy, *supra* note 1, at 58-59.
- ²⁰ Janet Stites, *Equal Pay for the Sexes*, HR MAGAZINE, May 2005, at 64-70.
- ²¹ *Id.* at 64-70.
- ²² <http://www.gao.gov/new.items/gg00104t.pdf>.
- ²³ <http://www.pay-equity.org/info-leg.html>.
- ²⁴ <http://www.nwlc.org>. This site identifies several important elements of the Paycheck Fairness Act which would allow plaintiffs to recover compensatory/punitive damages and make it easier to bring class actions claims. The law would automatically include individuals as part of a class action claim until they chose to opt out of it. It would also require the EEOC to issue pay data regulations within 18 months and oblige employers to submit pay data information which would also be useful in ensuring that employers comply with pay equity laws. It would close the broad loophole for employers in using the 'factor other than sex' defense and clarify the wording used in the Equal Pay Act as it refers to wage comparisons. The latter states that employees must be working at the 'same establishment', but the Paycheck Fairness Act would permit employees to be at another location. It would direct the Labor Department to develop wage comparison

guidelines and establish a system to be administered by the Labor Department to reward employers who have made advances to eliminate pay inequities. It would provide increased training for EEOC employees in handling wage discrimination claims. The Labor Department would be charged with ensuring that employers who do business with the government comply with equal opportunity regulations and would fund a training program to help women negotiate compensation packages.

²⁵ Murphy, *supra* note 1, at 287.

²⁶ Murphy, *supra* note 1, at 237-265.

²⁷ *Id.*

²⁸ <http://www.pay-equity.org/PDFs/ProgressiveModels.pdf>.

²⁹ <http://www.cebcglobal.org>.

³⁰ Heather Boushey. *Narrowing the Pay Gap*, THE BOSTON GLOBE, April 20, 2004, at A15.

³¹ http://www.shrm.org/hrresources/WHITEPAPERS_Published/CMS_0000053ASP

³² <http://www.haygroup.com/Exertise> or see

<http://www.worldatwork.com/annreport/generic/html/report-02-accomptl.html> for information on founder Edward Ned Hay.

³³ http://www.poa.net.au/news/twi/hay_job_evaluation_scheme.htm.

³⁴ National Committee on Pay Equity (2000 Bureau of Labor Statistics).

³⁵ Andrew Taylor. *Calls for New Laws to Tackle Gender Pay Gap*, FINANCIAL TIMES, July 5, 2005, at 4.

³⁶ <http://www.pay-equity.org> fact sheet.

³⁷ http://www.sweden.se/templates/cs/Print_BasicFactsheet_4123.aspx

³⁸ Tammy Propst, *Incentives: There for the Asking*, EASTON, 39, February 2004, at 25.

³⁹ Avi Salzman, *Another Deal, Another Tax Break*, THE NEW YORK TIMES, September 25, 2005, at 14CN.1.

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 14.

⁴² <http://www.pay-equity.org/index>.