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A Mechanism to Close the Gender Wage Gap: Mandatory Wage Transparency in Washington State

Mackenzie Taylor

I. INTRODUCTION

“One cannot simply outperform inequality.”¹ Megan Rapinoe, a professional U.S. soccer player, encapsulated the income inequality reality for many women when she testified before Congress on March 24, 2021.² In 2019, the United States Women’s National Soccer Team (USWNT), which Rapinoe plays for, filed a lawsuit against the United States Soccer Federation alleging unequal pay in comparison to their male counterparts.³ Rapinoe and her fellow teammates have dedicated themselves to shining a light on the gender wage gap within not only professional sports but also every affected industry.⁴ They aim to do so by pursuing legal remedies and using their

¹ Francesca Donner & Emma Goldberg, *In 25 Years, the Pay Gap has Shrunk by Just 8 Cents*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/equal-pay-day-explainer.html> [<https://perma.cc/9ZJR-Q5V7>].

² See generally *id.*

³ Eric Bachman, *The EEOC Back U.S. Women’s Soccer Team In Pay Discrimination Case*, FORBES (Aug. 4, 2021), <https://www.forbes.com/sites/ericbachman/2021/08/04/the-eeoc-backs-us-womens-soccer-team-in-pay-discrimination-case/?sh=37d4a7a421a4> [<https://perma.cc/AL5Q-DNTJ>].

⁴ See Annie Grayer, *Megan Rapinoe Shines Spotlight on Pay Fight and Unequal NCAA Amenities in Capitol Hill Testimony*, CNN POLITICS (updated Mar. 25, 2021), <https://www.cnn.com/2021/03/24/politics/megan-rapinoe-equal-pay-day-congress-testimony/index.html> [<https://perma.cc/4WDV-YFCQ>].

platform to fight for pay equity.⁵ In February 2022, the USWNT successfully settled its lawsuit for equal pay.⁶ Under the settlement, the court awarded \$24 million in shared payments to the women's team as back pay for the years it received unequal pay to the men's team.⁷ The U.S. Soccer Federation also pledged to “equalize pay between the men’s and women’s national teams in all competitions . . . in the next collective bargaining agreements.”⁸ The USWNT’s battle with unequal pay illustrates that women from all forms of employment are affected by the gender wage gap.

The gender wage, defined as “the difference in [median] earnings between women and men,”⁹ is an issue that has been around for generations and has

⁵ See *id.*; see also Homero De la Fuente & David Close, *US Women’s National Soccer Team Players Appeal Equal Pay Lawsuit Decision*, CNN SPORTS (updated July 23, 2021), <https://www.cnn.com/2021/07/23/sport/uswnt-us-soccer-equal-pay-appeal/index.html> [https://perma.cc/24VZ-8UTN]; Benjamin Siegel & Katie Kindelan, *Soccer Star Megan Rapinoe Testifies Before Congress on Gender Pay Gap*, ABC NEWS (Mar. 24, 2021), <https://abcnews.go.com/GMA/News/soccer-star-megan-rapinoe-testifies-congress-gender-pay/story?id=76635386> [https://perma.cc/HY5Z-4LQ2].

⁶ Andrew Das, *U.S. Soccer and Women’s Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html> [https://perma.cc/38SL-8NCC].

⁷ *Id.*

⁸ *Id.*

⁹ Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> [https://perma.cc/78AR-LHDB]; see Kevin Miller & Deborah Vagins, *The Simple Truth About the Gender Wage Gap*, AM. ASS’N OF UNIV. WOMEN 7 (2018), <https://www.aauw.org/resources/research/simple-truth/> [https://perma.cc/5HPQ-HVX4].

affected a diverse group of women.¹⁰ Attention to gaps in equal pay in the United States can be traced all the way back to at least 1869 when the New York Times received a letter to the editor that questioned why female government employees were paid less than their male counterparts.¹¹ Unequal pay between men and women is nothing new, but while it has been the subject of international, national, and local legislation, the gender wage gap has yet to be solved completely.¹² The gender wage gap “can prevent women from achieving economic independence and security.”¹³ This needs to change.

Generally, the gender wage gap “refers to the difference in [median] earnings between women and men.”¹⁴ The gender wage gap is most often expressed as a ratio, which is calculated by dividing the average amount women earn by the average amount men earn.¹⁵ For example, in 2017, the average salary for women in the United States was \$41,977, and the average

¹⁰ See generally Joe McCarthy, *What Is the Gender Pay Gap and How Do We Close It?*, GLOB. CITIZEN (Mar. 11, 2021), <https://www.globalcitizen.org/en/content/what-is-the-gender-pay-gap/> [<https://perma.cc/5EHV-2JCU>].

¹¹ 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/> [<https://perma.cc/LE99-H5GF>].

¹² See ELISE GOULD ET. AL., WHAT IS THE GENDER PAY GAP AND IS IT REAL?, 1 ECON. POL'Y INST. (2016) <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/> [<https://perma.cc/5BGG-7D4H>]; see generally U.N. ECON. AND SOC. COMM'N FOR W. ASIA, *Beijing Declaration and Platform for Action*, <https://archive.unescwa.org/our-work/beijing-declaration-and-platform-action> [<https://perma.cc/H58V-2TVR>]; The Equal Pay Act 29 U.S.C. § 206(d); WASH. REV. CODE § 49.58.005 (3)(c).

¹³ McCarthy, *supra* note 10.

¹⁴ Bleiweis, *supra* note 9; Miller & Vagins, *supra* note 9.

¹⁵ See J. Andrew Morgan, *How to Close the Gender Pay Gap: Transparency in Data Regarding Compensation is Key*, 35 CONN. J. INT'L L. 407, 409 (2020); See Miller & Vagins, *supra* note 9, at 7.

salary for men in the United States was \$52,146; therefore, in 2017, women earned about eighty percent of what men earned, which translates to a twenty percent gap between the average earnings of men and women.¹⁶ Beginning in the second half of the twentieth century, the gender wage gap narrowed from forty percent in 1960 to twenty-three percent in 2012 as women progressed in education and participated more in the workforce.¹⁷ Although the gender wage gap has narrowed, it still persists.¹⁸

Closing the gender wage gap is an important step toward complete gender equality; when women earn lower wages, gender inequality is perpetuated, and women's independence and bargaining power is diminished.¹⁹ The gender wage gap "is rooted in systemic inequalities," such as women being overrepresented in informal jobs that are not protected by labor laws; the motherhood penalty; discriminatory hiring practices; and the undervaluing of women in the workforce.²⁰ The workforce is also heavily gendered, meaning gender stereotypes push women away from careers traditionally dominated by men and push men away from careers traditionally dominated by women.²¹ Women dominate industries such as domestic work and child care,

¹⁶ See Miller & Vagins, *supra* note 9, at 7.

¹⁷ *Id.* at 5; Heidi Hartman, *The Lost Decade of Wage Growth for Women*, ECON. POL'Y INST. (2014), <https://www.epi.org/blog/lost-decade-wage-growth-women/> [<https://perma.cc/5ZCA-2QRT>].

¹⁸ See GOULD ET AL., *supra* note 12; Nicole Michele Barnhart, *Gender Wage Inequality: Is More Legislation the Answer?*, 40 SEATTLE U. L. REV. 1435, 1437 (2017).

¹⁹ Megan O'Donnell et al., *Closing Gender Pay Gaps*, CTR. FOR GLOB. DEV. (Sept. 16, 2020), <https://www.cgdev.org/publication/closing-gender-pay-gaps> [<https://perma.cc/2NJ2-KEEA>].

²⁰ U.N. WOMEN, *Explainer: Everything You Need to Know About Pushing for Equal Pay*, (Sept. 14, 2020), <https://www.unwomen.org/en/news/stories/2020/9/explainer-everything-you-need-to-know-about-equal-pay> [<https://perma.cc/4YUT-K3KD>].

²¹ *Id.*

which are also the industries suffering from lower wages.²² There is also evidence that when women entered professions dominated by men, the overall wages for that profession decline.²³ The workforce is a cycle of inequality that needs to be shifted and refocused to value the work women perform. Everyone, regardless of their gender, should have the opportunity to make societal contributions and receive the same respect and compensation as others with different identities.

The gender wage gap is a complex issue and is not attributable to a single cause.²⁴ Factors like gender discrimination, age, education, race, class, sexual orientation, and disability all contribute to the wage gap.²⁵ However, a portion of the gap remains unexplained.²⁶ According to economists Francine D. Blau and Lawrence M. Kahn, about forty-one percent of the gender wage gap is unexplained by “things such as occupation, educational attainment, and years of experience.”²⁷ This unexplained portion is partly due to discrimination, “even if it is subtle and subconscious,” because a woman’s salary at a new job is often based on her salary at a prior job, so any pay discrimination she endured in the past would be reflected in future jobs.²⁸

²² *Id.*

²³ Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 583 (2018).

²⁴ Miller & Vagins, *supra* note 9, at 14.

²⁵ See Morgan, *supra* note 15, at 409, 411; Miller & Vagins *supra* note 9, at 14.

²⁶ GOULD ET AL., *supra* note 12.

²⁷ Sarah Jane Glynn, *Explaining the Gender Wage Gap*, CTR. FOR AM. PROGRESS (May 19, 2014), <https://americanprogress.org/article/explaining-the-gender-wage-gap/> [<https://perma.cc/P9FW-Q3PL>].

²⁸ *Id.*; EQUITABLE GROWTH, *Gender Wage Inequality in the United States: Causes and Solutions to Improve Family Well-Being and Economic Growth* (Mar. 25, 2019), <https://equitablegrowth.org/gender-wage-inequality-in-the-united-states-causes-and-solutions-to-improve-family-well-being-and-economic-growth/> [<https://perma.cc/DK3K-SGSR>].

However, the factors contributing to this unexplained portion, beyond discrimination, are not yet wholly known or measurable.²⁹

Washington State's efforts to protect and promote equal pay illustrates the need to increase knowledge and understanding of the unexplained factors perpetuating the gender pay gap. Washington has one of the longest histories of protecting and promoting equal pay in the workforce.³⁰ Yet, Washington ranks in the lower half of states in the United States when it comes to the gender wage gap.³¹ Women in Washington State earn about seventy-nine percent of what men earn, compared to the national level of eighty-two percent.³²

The Washington State legislature must pass a bill that mandates wage reporting for all employers with 100 or more employees. This mandate would aid in revealing other factors that are contributing to the gender wage gap within Washington. To effectively address and close the gender wage gap, comprehensive data must be collected to uncover the unknown factors perpetuating it.

This article focuses on how the gender wage gap affects women because women endure most of the negative impacts that stem from the gender wage gap. While the gender wage gap affects women as a whole, its impact varies when broken down by race, sexual orientation, motherhood status, education level, and many other factors.³³ For example, the gender wage gap for white

²⁹ See generally Glynn, *supra* note 27.

³⁰ See generally Laura Davis, *HB 1696: Updating Washington's Equal Pay and Opportunities Act*, MUN. RSCH. AND SERV. CTR. (Aug. 5, 2019), <https://mrsc.org/Home/Stay-Informed/MRSC-Insight/August-2019/HB-1696-Updating-Washington-s-EPOA.aspx> [<https://perma.cc/6HL6-W4VG>].

³¹ See NAT'L WOMEN'S L. CTR., WAGE GAP OVERALL STATE RANKINGS (Mar. 2021), <https://nwlc.org/wp-content/uploads/2021/03/Overall-Wage-Gap-State-By-State-2021-v2.pdf> [<https://perma.cc/58AJ-HNU3>] [hereinafter STATE RANKINGS].

³² *Id.*

³³ See generally Miller & Vagins, *supra* note 9.

women is about twenty-one percent, for Black women it is about thirty-seven percent, and for Latina women it is about forty-five percent.³⁴ Understanding the gender wage gap and how it affects different populations of women is extremely important in the fight to close the gap. While this article focuses on women generally because its proposed solution of implementing pay transparency legislation in Washington is aimed at uncovering the factors that perpetuate the gap, data collection must be designed to capture the intersectionality of these identities. Once researchers discover these unknown underlying factors, state legislators may take further action by enacting more comprehensive and tailored legislation aimed at addressing the ways in which different populations of women are affected by the wage gap.

Part I of this article discusses both the historical and current state of the gender wage gap. Part II of this article discusses the background of the gender wage issue in a global, national, and local context. Additionally, this section outlines the current national and local legislation aimed at closing the gap. Part III will propose the solution that Washington State must adopt legislation mandating wage transparency reporting for those who employ 100 or more employees. Finally, Part IV will address potential criticisms of increasing wage transparency and responses to those criticisms outlining why pay transparency would be beneficial.

II. BACKGROUND: NATIONALLY AND LOCALLY

The gender wage gap is pervasive. It affects people in every region of the world and people of different races, ages, physical abilities, and education

³⁴ NAT'L P'SHIP FOR WOMEN & FAM., *Quantifying America's Gender Wage Gap by Race/Ethnicity* (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf> [<https://perma.cc/2T88-Q45A>].

levels.³⁵ The gender wage gap is more than just one man being paid more than one woman; it is an issue of inequality that is woven into the fabric of society.³⁶

This section will start by discussing the global gender wage gap along with global efforts to close the gap. Then, subsection A will outline federal equal pay legislation as well as the status of the national gender wage gap in the United States. Finally, subsection B will outline Washington State’s equal pay legislation and its current gender wage gap.

The gender pay gap affects women across the world; it is not an issue unique to the United States.³⁷ Globally, women earn about sixty-eight percent of what men earn on average.³⁸ The World Economic Forum (WEF) estimates that it will take about 136 years to close the gender wage gap worldwide.³⁹ Though the global gender wage gap is wide, global efforts have been made to address its persistence. For example, in September 1995, governments from all around the world met for the Fourth World Conference on Women in Beijing.⁴⁰ At the end of this conference, 189 countries signed the Beijing Declaration and Platform for Action and committed to “enact and enforce legislation that guaranteed the rights of women and men to equal pay

³⁵ See generally McCarthy, *supra* note 10; Miller & Vagins, *supra* note 9.

³⁶ See McCarthy, *supra* note 10.

³⁷ See *id.*

³⁸ See WORLD ECON. F., GLOB. GENDER GAP REP. 5 (2021), https://www3.weforum.org/docs/WEF_GGGR_2021.pdf [<https://perma.cc/M6RW-63BF>] (The global wage gap widened by 0.6% between 2020 and 2021).

³⁹ *Id.* (This report averages the gender wage gap in 156 countries; therefore, not every country in the world is represented in this wage gap calculation).

⁴⁰ U.N. REG’L INFO. CTR. FOR W. EUR., *250 Years Needed to Bridge the Pay Gap*, (Sept. 17, 2020), <https://unric.org/en/250-years-needed-to-bridge-the-pay-gap/> [<https://perma.cc/39U3-3JUB>].

for equal work or work of equal value.”⁴¹ However, the global wage gap persists and closing it will likely depend on the individual efforts of countries, organizations, and companies to eliminate the difference in their respective national gender wage gaps.⁴² Because global efforts have not been wholly successful in closing the gender wage gap, solutions should be implemented on a more individualized national or local level.

A. Nationally

The United States enacted several pieces of federal legislation to remedy the gender wage gap. This legislation has aided in narrowing the gap; however, it continues to exist.⁴³ The first federal equal pay legislation was the Equal Pay Act of 1963 (EPA).⁴⁴ Prior to World War II (WWII), women largely performed unpaid work in the private sphere, such as domestic home duties and family caretaking.⁴⁵ Due to WWII, women entered the workforce at unprecedented rates to fill the gap left by men who left to serve in the war.⁴⁶ From this point forward, more and more women entered the workforce.⁴⁷

⁴¹ Lisa Anderson, *Gains and Gaps in Women’s Fight for Gender Equality Since 1995: Report*, THOMSON REUTERS FOUND. (Mar. 8, 2015), <https://www.reuters.com/article/us-global-women-equality/gains-and-gaps-in-womens-fight-for-gender-equality-since-1995-report-idUSKBN0M507H20150309> [<https://perma.cc/2DUY-2HVC>]; *id.*

⁴² *See generally* McCarthy, *supra* note 10.

⁴³ *See* Tom Spiggle, *The Gender Pay Gap: Why It’s Still Here*, FORBES (May 25, 2021), <https://www.forbes.com/sites/tomspiggle/2021/05/25/the-gender-pay-gap-why-its-still-here/?sh=7c427f717baf> [<https://perma.cc/83NY-L3G5>].

⁴⁴ Morgan, *supra* note 15.

⁴⁵ Rosa Cho, *Everything You Need to Know About the Equal Pay Act*, INT’L CTR. FOR RSCH. ON WOMEN, <https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf> [<https://perma.cc/5H5F-LEUR>].

⁴⁶ *Id.*

⁴⁷ *Id.*

Between 1944 and 1963, legislators made various attempts to equalize pay between men and women through legislation, all of which failed to pass Congress until President Kennedy signed the EPA into law in 1963.⁴⁸

The EPA prohibits employers from engaging in wage discrimination on the basis of sex.⁴⁹ Specifically, an employer cannot pay employees of different sexes different rates within the “same establishment if both employees are performing [equal] work.”⁵⁰ If, however, the difference in pay between employees of opposite sexes is based on seniority; merit; quantity or quality of production; or any other factor other than sex, then a difference in pay is permitted.⁵¹ In 1963, the year of the EPA’s passage, women made just fifty-nine percent of what men were earning, equating to a gap of about forty-one percent.⁵² Almost fifty years later, in 2011, the gender wage gap narrowed, and women were earning about seventy-seven percent of what men earned, equating to a gap of about twenty-three percent.⁵³ Since 2011,

⁴⁸ *Id.*

⁴⁹ 29 U.S.C. § 206(d); I recognize that gender and sex are not the same thing, and these words are not interchangeable. However, legislation, especially legislation enacted decades ago, often uses the words sex and gender interchangeably. My use of the word sex to refer to the gender wage gap is to strictly reflect the language contained in the laws I am referring to and quoting. For further explanation about the differences between sex and gender, please visit <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> [https://perma.cc/SFB9-9NMU] or <https://www.medicalnewstoday.com/articles/232363#sex> [https://perma.cc/76R4-M48C].

⁵⁰ Morgan, *supra* note 15.

⁵¹ 29 U.S.C. § 206(d).

⁵² Cho, *supra* note 45.

⁵³ NAT’L EQUAL PAY TASKFORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf [https://perma.cc/3Y3L-32U9].

the gap has closed even more, with women currently earning about eighty-two percent of what men earn.⁵⁴ Clearly, the enactment of the Equal Pay Act has aided in narrowing the gender wage gap nationally, but it has not succeeded in completely closing the gap and ensuring men and women are paid equally and fairly.

In 1964, just one year after the passage of the EPA, the Civil Rights Act was passed.⁵⁵ Title VII of the Civil Rights Act reinforced the EPA's protections by prohibiting employers from discriminating in compensation.⁵⁶ This Act is broader than the EPA because it additionally prohibits discrimination in employment for several protected classes, including: race, sex, national origin, disability, and age; Title VII's equal pay protection extends beyond just gender.⁵⁷ As for addressing the gender wage gap, the Title VII was especially important because, unlike the EPA, it prohibited employers from discriminating in compensation, hiring and termination, promotions and demotions, and employment terms and conditions, whereas the EPA only prohibited discrimination in wages and compensation.⁵⁸ Also, Title VII provided employees with more theories of liability to bring a claim under, such as: disparate treatment, negligence, harassment, and retaliation.⁵⁹

⁵⁴ Janelle Jones, *5 Facts about the State of the Gender Pay Gap*, U.S. DEP'T OF LAB. BLOG (Mar. 19, 2021), <https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap> [<https://perma.cc/JZ6J-JHAC>].

⁵⁵ See The Civil Rights Act of 1964, 42 U.S.C. § 2000e.

⁵⁶ *Id.*

⁵⁷ See Practical L. Lab. & Emp., *Title VII and EPA Comparison Chart*, [https://1.next.westlaw.com/1-592-5665?isplc=true&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&OWSessionId=7bd8696de15e4a808e015e51d583136d&fromAnonymous=true&bhcp=1](https://1.next.westlaw.com/1-592-5665?isplc=true&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=7bd8696de15e4a808e015e51d583136d&fromAnonymous=true&bhcp=1) [<https://perma.cc/N324-MLBJ>]; FED. TRADE COMM'N, *Protections Against Discrimination and Other Prohibited Practices*, <https://www.ftc.gov/site-information/no-fear-act/protections-against-discrimination> [<https://perma.cc/7DXD-TH2P>].

⁵⁸ See Practical L. Lab. & Emp., *supra* note 57.

⁵⁹ *Id.*

Under the EPA, employees were limited in the type of claim they could bring because they were required to show they received less compensation than a co-worker of the opposite gender for similar work; there was only one avenue to prove discrimination under the EPA.⁶⁰ Therefore, Title VII of the Civil Rights Act provided additional avenues for individuals facing pay discrimination based on gender to seek remedy.

Though Title VII provided equal pay protections, it originally imposed a significant limitation on those who brought a claim.⁶¹ To bring a wage claim under Title VII, the person alleging discrimination was required to bring the claim within 180 days of suffering the discrimination, not 180 days from when the individual became aware of the discrimination.⁶² This placed a limitation on individuals suffering wage discrimination because “women rarely learn of [discrimination] soon after it occurs.”⁶³ The Supreme Court affirmed this interpretation of Title VII in *Ledbetter v. Goodyear Tire & Rubber Co.*⁶⁴

Writing for the dissent in *Ledbetter v. Goodyear*, Justice Ginsburg passionately highlighted that “[c]ompensation disparities . . . are often hidden from sight” and patterns of pay discrimination occurs incrementally.⁶⁵ Justice Ginsburg further asserted that pay information is “often hidden from the aggrieved employee’s view”; and therefore, the employee would not know within the 180-day filing period that they received lower wages and would

⁶⁰ *Id.*

⁶¹ Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws – A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 417 (2013).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 649, 650 (2007) (Ginsburg, J. dissenting).

be ultimately barred from seeking a remedy.⁶⁶ Her dissent highlights how the gender wage gap is perpetuated by pay secrecy policies; narrowly tailored legislation; and a lack of access to information; which wage transparency would provide. When women learn of unequal pay too late, there is no legal recourse to cure the discriminatory pay practice, and the gender wage gap lives on.

In response to *Ledbetter v. Goodyear*, Congress passed the Lilly Ledbetter Fair Pay Act (hereinafter “Ledbetter Act”).⁶⁷ In 2009, Congress enacted its third piece of federal legislation regulating equal pay with the goal of broadening equal pay protections and promoting accessibility for filing claims.⁶⁸ The Act extended the statute of limitations for when an employee can file a wage discrimination claim under Title VII from 180 days within when the first discriminatory paycheck was issued to 180 days within their most recent discriminatory paycheck.⁶⁹ The Act granted employees more time to evaluate if they have been subjected to pay discrimination, so they are able to file a pay discrimination claim and seek a remedy.⁷⁰

Along with passing the Ledbetter Act, the Obama Administration created the National Equal Pay Enforcement Taskforce in order uncover and remedy violations of equal pay laws.⁷¹ This task force brought together four federal agencies: the Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ), the Department of Labor (DOL), and the Office

⁶⁶ Jason Lewis, *Wage Discrimination and the Difficulty to Prove*, 13 PUB. INT. L. REP. 66, 68 (2008).

⁶⁷ Miller & Vagins, *supra* note 9, at 23.

⁶⁸ See generally Kulow, *supra* note 61; *id.*

⁶⁹ Kulow, *supra* note 61.

⁷⁰ NAT’L WOMEN’S L. CTR., *Lilly Ledbetter Fair Pay Act* (Jan. 29, 2013), <https://nwlc.org/resource/lilly-ledbetter-fair-pay-act/> [<https://perma.cc/8SLY-6FF4>].

⁷¹ NAT’L EQUAL PAY TASKFORCE, *supra* note 53.

of Personnel Management (OPM).⁷² It found five persistent challenges in the enforcement of equal pay legislation.⁷³ The five challenges are as follows. First, equal pay laws are enforced by three different agencies and those agencies do not consistently coordinate their responsibilities.⁷⁴ Second, understanding the gender wage gap can be improved as data becomes more accessible.⁷⁵ Third, both employers and employees are not adequately educated on their rights and obligations as related to wage discrimination.⁷⁶ Fourth, the Government Accountability Office (GAO) found an eleven percent wage gap in the federal workforce.⁷⁷ Fifth, and finally, the existing equal pay legislation does not provide adequate tools to combat the gender wage gap.⁷⁸

In 2020, the national gender wage gap was about eighteen percent in the United States, meaning that women earned about eighty-two percent of what men earned.⁷⁹ With the help of the three pieces of equal pay legislation outlined above, the gender wage gap has narrowed from forty-one percent in 1963 to eighteen percent in 2020.⁸⁰ If the rate of closure between 1960 and 2017 continues, then the gender wage gap in the United States is expected to close in 2059.⁸¹ However, the rate of closure has slowed over the last two decades and if gender wage gap continues to close at this slower rate, the wage gap is expected to close in 2106.⁸² Though meaningful progress has

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Jones, *supra* note 54.

⁸⁰ See generally Cho, *supra* note 45; Jones, *supra* note 54.

⁸¹ Miller & Vagins, *supra* note 9, at 5.

⁸² *Id.*

been made nationally to narrow the gap, the gap still persists and is a continuing issue that must be addressed through state remedies.

B. Locally: Washington State

Washington State has historically been committed to the policy that fairness among workers is promoted through equitable compensation.⁸³ For example, Washington State passed its first equal pay legislation, the Equal Pay Act, in 1943, twenty years prior to federal equal pay legislation.⁸⁴ This law “required employers pay women the same wages as ‘similarly employed’ men ‘absent a factor or factors other than sex.’”⁸⁵ Thus, if an employer justified paying a female employee less than a similarly employed male based on a factor other than sex, the employer did not engage in wage discrimination.⁸⁶ Though Washington’s Equal Pay Act was a step toward closing the gender wage gap, courts and employers in Washington were unable to interpret vague portions of this law because “the legislative history [did] not provide any guidance for interpreting the state provision.”⁸⁷ Therefore, Washington courts turned to the federal Equal Pay Act to interpret the statute.⁸⁸

In March of 2018, Washington’s Equal Pay Act was amended for the first time in seventy-five years.⁸⁹ This amendment recodified the Equal Pay Act

⁸³ WASH. REV. CODE § 49.58.005(1).

⁸⁴ Davis, *supra* note 30.

⁸⁵ *Id.*; WASH. REV. CODE § 49.12.175.

⁸⁶ Michael Reiss, *Washington’s New Pay Equity Law Creates More Stringent Requirements for Employers*, DAVIS WRIGHT TREMAINE (Apr. 11, 2018), <https://www.dwt.com/blogs/employment-labor-and-benefits/2018/04/washingtons-new-pay-equity-law-creates-more-string> [<https://perma.cc/QJ6Z-SPWX>].

⁸⁷ Davis, *supra* note 30.

⁸⁸ *Id.*

⁸⁹ Reiss, *supra* note 86.

to the Equal Pay and Opportunities Act (EPOA).⁹⁰ The EPOA expanded equal pay protections in multiple ways.⁹¹ First, the expanded protections redefined “similarly employed” to mean working for the same employer; requiring similar skills, effort, and responsibility; and working under similar conditions.⁹² Next, the expansion prohibited employers from limiting career advancement based on gender.⁹³ Additionally, employers could no longer prohibit their employees from discussing salary and wages.⁹⁴ Lastly, the expansion also created more stringent requirements for a “bona fide factor” defense.⁹⁵ Under the EPOA, a bona fide factor defense allows an employer to defend a difference in compensation only when it is job related, necessary for business, not based on a difference in gender, and accountable for the entire differential.⁹⁶

In 2019, the Washington Legislature amended the EPOA again. This amendment prohibited employers from inquiring into the wage or salary history of applicants and, when requested, required employers to provide applicants and internal transferees with a salary range for the position.⁹⁷ Employers who rely on prior salaries or wages when setting pay can and do perpetuate the gender wage gap if a candidate faced wage discrimination in

⁹⁰ Davis, *supra* note 30; *see also* WASH. REV. CODE § 49.58.

⁹¹ Reiss, *supra* note 86.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ PERKINS COIE, *Washington’s Salary Ban and New Wage Disclosure Requirements Take Effects July 28*, (July 23, 2019), <https://www.perkinscoie.com/en/news-insights/washingtons-salary-history-ban-and-new-wage-disclosure-requirements-take-effect-july-28.html> [<https://perma.cc/NP5Q-47B6>]; NAT’L WOMEN’S L. CTR. 3, *Progress in the States for Equal Pay*, (Nov. 2020), <https://nwlc.org/wp-content/uploads/2019/12/State-Equal-Pay-Laws-2020-11.13.pdf> [<https://perma.cc/94YN-3U7A>].

the past.⁹⁸ For example, a candidate's prior salary may have been influenced by gender biases or inequalities rather than an objective measure of that candidate's value.⁹⁹ Therefore, when an employer inquires into a candidate's prior salary and uses that prior salary to set a new salary, instead of setting the candidate's salary on objective factors such as prior experience or education, the employer perpetuates the gender wage gap.¹⁰⁰ By prohibiting this practice, Washington state took another step toward pay equity.

Additionally, Washington's effort to equip candidates with relevant salary information for a position through this 2019 amendment further aids in narrowing the wage gap. Studies have shown that when candidates are better informed about wages and benefits for a position they seek, the pay gap narrows.¹⁰¹ Therefore, by requiring employers to provide this information to candidates upon request, Washington is promoting equal pay protections through mandatory disclosure.

This 2019 amendment to the EPOA appears to be a useful and meaningful tool in the fight for equal pay in Washington State. The amendment provides employees and prospective employees with tools to gain access to vital wage data so they can make informed employment decisions.¹⁰² However, because the legislature enacted the amendment in 2019, there is little data available that examines the effects and impacts of the amendment on the state's gender wage gap. Though Washington has a long history of promoting equal pay in the workplace through state legislation, the wage gap within Washington persists. As of March 2021, women in Washington earn about seventy-nine

⁹⁸ NAT'L WOMEN'S L. CTR., *supra* note 97, at 1.

⁹⁹ Robin Bleiweis, *Why Salary History Bans Matter to Securing Equal Pay*, CTR. FOR AM. PROGRESS (Mar. 24, 2021), <https://americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/> [<https://perma.cc/XK7M-2B3Z>].

¹⁰⁰ *See generally id.*

¹⁰¹ NAT'L WOMEN'S L. CTR., *supra* note 97, at 1.

¹⁰² *See generally* PERKINS COIE, *supra* note 97.

percent of what men in Washington earn, which translates to a twenty-one percent wage gap. Further, Washington ranked thirty-fourth among all fifty states for the widest gap and ranked lower than the national average wage gap, which is about an eighteen percent gap.¹⁰³ In fact, Washington's gender wage gap began widening in 2014.¹⁰⁴ So, why is the gap persistent in Washington State when pay discrimination is illegal? What factors are contributing to the gap in Washington? And what additional methods could Washington employ to narrow and close the gender wage gap? The next section of this article will address these questions along with many others.

III. MANDATORY WAGE TRANSPARENCY IN WASHINGTON

This part of the article will be broken down into three sections. Section A will compare equal pay legislation in California and Washington to highlight laws and policies that have led to a narrower gap in California. Section B will compare equal pay legislation in Iceland and Washington to again highlight laws and policies that have led Iceland to become the most gender-equal nation in the world.¹⁰⁵ Finally, Section C will propose the solution of adopting mandatory wage reporting legislation in Washington state. Both California and Iceland have adopted some form of pay transparency legislation and both areas have narrower wage gaps than Washington; thus illustrating that pay transparency is a viable solution and that it must be

¹⁰³ STATE RANKINGS, *supra* note 31.

¹⁰⁴ See Angela Poe Russel, *Women's Salaries in Washington Show Signs of Stalling Compared to Men*, KING 5 (Jan. 9, 2020), <https://www.king5.com/article/news/local/take-5/washington-state-gender-pay-gap/281-77746ac2-9797-420a-aa7b-d42bcc7fc57c> [<https://perma.cc/X6LP-JZ25>].

¹⁰⁵ WORLD ECON. F., GLOB. GENDER GAP REP. 6 (2021), https://www3.weforum.org/docs/WEF_GGGR_2021.pdf [<https://perma.cc/V529-HRJR>].

implanted in Washington State as well.¹⁰⁶ This section will also explain how and why pay transparency will aid in narrowing Washington’s gender wage gap.

A. Case Study Comparison: California

First, this section will outline California’s history of equal pay legislation and protections. Next, it will highlight similarities as well as differences in Washington and California’s equal pay legislation. Finally, it will discuss possible explanations for California’s narrower wage gap.

As of 2021, women in California earn about eighty-eight percent of what men earn, which translates to a gender wage gap of twelve percent.¹⁰⁷ California has the fourth narrowest gap among states, and its gap is six percent narrower than the national gender wage gap.¹⁰⁸ In 1949, California enacted the Equal Pay Act, an act similar to Washington’s Equal Pay Act, in order to address pay inequality between men and women.¹⁰⁹ This statute provided that an employer may not pay any employee at a rate less than an employee of the opposite sex “in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”¹¹⁰ However, differences in pay were permissible where they were based on systems of

¹⁰⁶ See discussion *infra* Section III A, III B.

¹⁰⁷ STATE RANKINGS, *supra* note 31.

¹⁰⁸ *Id.*

¹⁰⁹ CAL. COMM’N ON THE STATUS OF WOMEN AND GIRLS, *Statutory History of Equal Pay Laws in California and the United States*, <https://women.ca.gov/californiapayequity/additional-tools-resources/statutory-history-of-equal-paw-laws-in-california-and-the-u-s/> [<https://perma.cc/AKB3-L3WX>] (last visited Oct. 25, 2021).

¹¹⁰ *Id.*

seniority, merit, quantity production, or where “differentials [were] based on any bona fide factor other than sex.”¹¹¹

In 1960,¹¹² eleven years after the enactment of the California Equal Pay Act, women were making about sixty percent of what men earned.¹¹³ Then, in 1990, women were making about seventy percent of what men were making.¹¹⁴ Clearly, California’s gender wage narrowed in the decades following the enactment of California’s Equal Pay Act. However, employers “were able to find loopholes in order to pay women less than their male counterparts while avoiding lawsuits” and other legal consequences.¹¹⁵

To address the weaknesses in its Equal Pay Act and to expand on its protections, California passed the Fair Pay Act in 2015.¹¹⁶ When this law was passed in 2015, women in California were earning about eighty-four percent of what men were earning.¹¹⁷ The Fair Pay Act made two significant changes to the Equal Pay Act: first, it removed the “same establishment” requirement, and second, it replaced the “‘equal’ and ‘same’ job, skill, effort, and

¹¹¹ *Id.*

¹¹² Ashley A. Halberda, *The New Shade of Grey Created by California’s Fair Pay Act*, L. PRAC. TODAY (Mar. 14, 2016), <https://www.lawpracticetoday.org/article/the-new-shade-of-grey-created-by-californias-fair-pay-act/> [https://perma.cc/WDG4-APL7]. During my research, 1960 was the earliest year I could find a record of the gender wage gap in California.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *What is California’s Equal Pay Act and Does it Impact Me?*, AEGIS LAW FIRM (Nov. 16, 2020), <https://www.aegislawfirm.com/blog/2020/november/what-is-california-s-equal-pay-act-and-does-it-i/> [https://perma.cc/98ES-N6P3].

¹¹⁶ CAL. COMM’N ON THE STATUS OF WOMEN AND GIRLS, *supra* note 109.

¹¹⁷ *Women’s Earning in California*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/regions/west/news-release/2017/womensearnings_california_20170214.htm [https://perma.cc/45GX-99GR] (last visited Oct. 28, 2021).

responsibility standard” with a standard that just requires “substantially similar work.”¹¹⁸ These changes expanded access to pursuing a judicial remedy for a person who believes they are facing wage discrimination based on gender because they could now compare their wages against an employee of a different gender at any location for the same employer and in any similar, rather than exact same, job.¹¹⁹ Access to this information helps an individual bring a wage discrimination claim more easily because employers would not be able to hide unequal compensation by keeping employees with different salaries separated in different facilities or locations; employees now have a wider base to compare their salary against in order to discern if they are being equally paid.

More recently, the California legislature amended its Equal Pay Act twice in 2017.¹²⁰ The first amendment specified that the Equal Pay Act applied to both public and private employers.¹²¹ The second amendment included three changes to the Act.¹²² First, it banned an employer’s reliance on an applicant’s salary history information in deciding to offer employment or a specific salary.¹²³ Second, it provided that an employer could not seek salary information about an applicant.¹²⁴ Finally, it required that an employer, if reasonably requested, provide the pay scale for the relevant position to the applicant.¹²⁵ In 2017, women in California earned about eighty-three percent of the average male earning; this was a drop from the average percent in 2015 and the lowest average wage for women in California since 2001.¹²⁶ It is not

¹¹⁸ CAL. COMM’N ON THE STATUS OF WOMEN AND GIRLS, *supra* note 109.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ U.S. BUREAU OF LAB. STAT., *supra* note 117.

entirely clear why the gender wage gap in California widened in 2017, but these two amendments were intended to propel the effort in closing the gender wage gap forward.¹²⁷

In 2020, Governor Newsom signed into law pay reporting requirements for certain employers.¹²⁸ The legislature recognized the progress in the area of equal pay in California, but a wage gap continued to exist.¹²⁹ Accordingly, the California legislature enacted this new law with the intent that wage data collection will allow state agencies “to more efficiently identify wage patterns and will allow for targeted enforcement of equal pay or discrimination laws.”¹³⁰ The pay reporting requirement applies to California employers with 100 or more employees and who were required to file an annual EEO-1 report under federal law.¹³¹ An EEO-1 report is “a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by race/ethnicity, sex and job categories”; therefore, only employers already subject to the demographic data report are now subject to the pay data

¹²⁷ See generally Ben Christopher, *California’s Gender Pay Gap: How Two Proposed Laws Aim to Close It*, CAL. MATTERS (June 23, 2020), <https://calmatters.org/economy/2017/07/californias-gender-pay-gap-two-proposed-laws-aim-close/> [<https://perma.cc/3DTB-Y4NU>].

¹²⁸ Kimberly Carter, *New Pay Data Reporting Requirements for California Employers*, JDSUPRA (OCT. 16, 2020), <https://www.jdsupra.com/legalnews/new-pay-data-reporting-requirements-for-87858/> [<https://perma.cc/75NM-23WE>] (This pay reporting requirement is not an amendment to California’s equal pay legislation or labor code, it was added as a new section to the California Government Code); see CAL. GOV’T CODE § 12999.

¹²⁹ S.B. 973, 2020 Leg. (Cal. 2020).

¹³⁰ *Id.*

¹³¹ Carter, *supra* note 128.

report.¹³² This pay report must be filed with the California Department of Fair Employment and Housing (DFEH), the agency authorized to implement the pay data reporting statute, on March 31st each year.¹³³ The pay data report must outline “the compensation and hours worked [by] employees, broken down by sex, race, ethnicity, and job category.”¹³⁴

Washington and California both have strong laws and policies that protect and promote equal pay. While these states have very similar equal pay laws, California’s pay gap is about ten percent narrower than Washington’s pay gap.¹³⁵ Both states have Equal Pay Acts that outlaw gender discrimination in pay for similar work.¹³⁶ Further, each state allows a difference in pay as long as it is based on a factor other than gender, such as seniority.¹³⁷ Finally, Washington and California both prohibit employers from inquiring into an applicant’s prior salary history.¹³⁸

Though Washington and California have very similar equal pay laws, there is one major difference: since 2020, California requires mandatory pay reporting for certain employers. The purpose of this law is to determine what is perpetuating the gender wage gap within California even though pay discrimination based on gender is illegal.¹³⁹ Though the exact impact of

¹³² *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/6SPD-35M2>] (last visited Oct. 28, 2021) (An EEO-1 report is “a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by race/ethnicity, sex and job categories”).

¹³³ Carter, *supra* note 128 (This law went into effect on January 1, 2021, so the first reports were required to be filed on March 31, 2021.).

¹³⁴ NAT’L WOMEN’S L. CTR., *supra* note 97.

¹³⁵ STATE RANKINGS, *supra* note 31.

¹³⁶ See WASH. REV. CODE § 49.58; CAL. LAB. CODE § 1197.5.

¹³⁷ WASH. REV. CODE § 49.58.202(3); CAL. LAB. CODE § 1197.5(a)(1).

¹³⁸ WASH. REV. CODE § 49.58.040; CAL. LAB. CODE § 432.3

¹³⁹ S.B. 973, Section 1(f) (2020).

California's mandatory pay reporting law is not known yet because it is so new, California's enactment of the law shows a willingness to seek out new mechanisms to close the gender wage gap. Washington would similarly benefit by adopting legislation that requires mandatory wage disclosure to uncover the unknown causes of the wage gap.

B. Case Study Comparison: Iceland

According to the World Economic Forum (WEF), Iceland has the narrowest gender wage gap in the world, with women earning about eighty-nine percent of what men earn.¹⁴⁰ Not only does Iceland have the narrowest gender wage gap, but 2021 also marked the twelfth consecutive year that it had the narrowest gap internationally.¹⁴¹ Additionally, the WEF has rated Iceland the most gender-equal country in the world for over a decade now.¹⁴² The WEF's Global Gender Gap Index measures gender-based gaps in four categories: economic participation and opportunity, educational attainment, health and survival, and political empowerment.¹⁴³ The WEF ranked Iceland the most gender-equal country because of Iceland's "strong performance in all four of the index's gauges."¹⁴⁴ Notably, pay equity continues to be an issue in Iceland; however, it has a strong record for passing legislation and policies to narrow the gender wage gap.¹⁴⁵

¹⁴⁰ WORLD ECON. F., *supra* note 105, at 5.

¹⁴¹ *Id.*

¹⁴² See Jon Henley, *Equality Won't Happen By Itself: How Iceland Got Tough on Gender Pay Gap*, GUARDIAN (Feb. 20, 2018), <https://www.theguardian.com/world/2018/feb/20/iceland-equal-pay-law-gender-gap-women-jobs-equality> [<https://perma.cc/6G85-ND8F>].

¹⁴³ WORLD ECON. F., *supra* note 105, at 5.

¹⁴⁴ Emma Carlton, *These are the Top 10 Countries for Women's Rights and Opportunities*, WORLD ECON. F. (Mar. 31, 2021), <https://www.weforum.org/agenda/2021/03/best-countries-women-s-rights-gender-gap/> [<https://perma.cc/V6XT-XBA6>].

¹⁴⁵ See generally Henley, *supra* note 142.

Iceland passed its first piece of equal pay legislation in 1961.¹⁴⁶ This law mandated equal pay between men and women.¹⁴⁷ Then, in 2008, Iceland introduced gender quotas “for governmental committees, councils and boards of public companies.”¹⁴⁸ In 2010, Iceland amended the Acts on Public Limited Companies and Private Limited Companies to require “companies with more than fifty employees to have both women and men on their company boards or a minimum of forty percent of either women or men.”¹⁴⁹ These various forms of legislation demonstrate Iceland’s commitment to closing the gender wage gap and implementing mechanisms to promote, value, and support women in the workforce.

In a further effort to combat the gender wage gap, Iceland became the first country in the world to legally enforce equal pay with targeted legislation: the Equal Pay Standard.¹⁵⁰ This legislation is different than equal pay legislation in other countries, like the United States, because it requires employers to prove they are paying employees equally, rather than requiring employees to prove they have been discriminated against.¹⁵¹ In 2017, Iceland passed the Equal Pay Standard, which requires public and private entities with twenty-five or more employees to demonstrate that they pay men and

¹⁴⁶ *Looking for Information About Equal Pay in Iceland? All About the Equal Pay Standard*, KVENRÉTTINDAFÉLAG ISLANDS (Apr. 1, 2018), <https://kvenrettindafelag.is/en/looking-for-information-about-equal-pay-in-iceland-all-about-the-equal-pay-standard/> [<https://perma.cc/L7MH-BMZC>].

¹⁴⁷ *Id.*

¹⁴⁸ *Iceland, EQUAL PAY INT’L COAL.*, <https://www.equalpayinternationalcoalition.org/members/iceland/> [<https://perma.cc/8AY6-VQQA>].

¹⁴⁹ *Id.*

¹⁵⁰ Henley, *supra* note 142.

¹⁵¹ See Ines Wagner, *How Iceland Is Closing the Gender Wage Gap*, HARV. BUS. REV. (Jan. 8, 2021), <https://hbr.org/2021/01/how-iceland-is-closing-the-gender-wage-gap> [<https://perma.cc/3QX6-P3CU>].

women fairly and without gender discrimination.¹⁵² The Equal Pay Standard “requires companies to prove that they are paying men and women equally, by obtaining a pay certification.”¹⁵³ If a company fails to do this, it will incur daily fines.¹⁵⁴ The Equal Pay Standard shifts the burden from the employee to prove discrimination to the employer to prove pay practices are fair; this relieves the employee from having to prove that they were discriminated against, which can be difficult to discover and adequately prove, and ensures that companies are adhering to equal pay laws.¹⁵⁵ This standard works by requiring an employer to “determine which work tasks each position entails and then assign a value,” meaning that an employer must base an employee’s salary on their position and not the individual characteristics of the person doing the work.¹⁵⁶ Though the standard requires employers to fix a salary to certain types of work, there is “room for upward adjustment, for example if a worker adds extra value to the work.”¹⁵⁷ In enacting the Equal Pay Standard, Iceland is able to enforce its equal pay laws effectively by requiring employers to prove that are equally paying their employees based on job skill and performance, regardless of gender.¹⁵⁸

While Washington and Iceland both outlaw gender discrimination in pay practices, this is largely the only similarity between equal pay legislation in Washington and Iceland. Living up to its name of being the most gender equal country in the world, Iceland has pursued much more aggressive

¹⁵² Camila Domonoske, *Companies in Iceland Now Required to Demonstrate They Pay Men, Women Fairly*, NPR (Jan. 3, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/03/575403863/companies-in-iceland-now-required-to-demonstrate-they-pay-men-women-fairly> [<https://perma.cc/7TCN-MKL4>].

¹⁵³ KVENRÉTTINDAFÉLAG ISLANDS, *supra* note 146.

¹⁵⁴ Domonoske, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Morgan, *supra* note 15, at 441; *see generally* Domonoske, *supra* note 152.

¹⁵⁸ Morgan, *supra* note 15, at 441; Domonoske, *supra* note 152.

legislation to combat the gender wage gap than Washington has. Though both states have strong equal pay protections, Iceland's laws, like the Equal Pay Standard and gender quotas, have likely contributed significantly to its narrower wage gap. Iceland's Equal Pay Standard has created a system of transparency in pay, which, in return, has aided in narrowing its gender wage gap and successfully enforcing equal pay laws.¹⁵⁹

Washington's current legislation is not doing enough to close the gap; therefore, Washington must implement additional legislative tools that are proving to be successful. Because pay transparency, though a new tool, has initially proved to be effective in Iceland, Washington must adopt pay transparency legislation to address and narrow its persistent gap.

C. Proposed Legislation for Washington State

As long as a portion of the wage gap remains unexplained, it will be difficult to close completely. Therefore, it is important to implement mechanisms and legislation that uncover unknown contributing factors and general wage practices so the gap can be narrowed and eventually closed. Once all contributing factors to the gap are discovered, lawmakers can implement targeted legislation, policies, and mechanisms that incrementally close the remaining wage gap.

Wage disclosure and transparency would make vital data and information available to employees so they can determine if they are fairly compensated. Washington state's legislature should pass a mandatory wage disclosure law for employers, public and private, with 100 or more employees. This law, like those in California and Iceland, would require a covered employer to disclose wage information both internally among its employees and externally with a state agency, such as the Washington State Department of Labor and Industries, on an annual basis. An employer's annual pay data

¹⁵⁹ See generally Wagner, *supra* note 151.

report should include the number of employees by race, ethnicity, parental status, and gender; each employee’s job title; and each employee’s salary. This report should not disclose an employee’s personal information, such as their name, address, or phone number. Leaving personal information out of the report protects employee privacy while still collecting valuable pay data.

Like California, Washington’s mandatory wage disclosure law should initially cover only employers with 100 or more employees for feasibility and resource availability reasons.¹⁶⁰ By requiring large employers to disclose their pay practices, California “sought to encourage these employers to self-assess pay disparities.”¹⁶¹ Following a similar policy, Washington’s wage reporting law should also cover employers with 100 or more employees. If it implemented a mandatory pay reporting law initially only covering larger employers, Washington would be able to assess the effectiveness of this law in addressing the gender wage gap without over burdening smaller employers who might not have the resources to institute pay reporting as easily as larger employers. If the pay data reporting proves to be successful, Washington could amend the law to gradually include smaller employers in the state, which would eventually ensure every working individual in the state receives equal compensation.

Mandatory wage disclosure would “enhance all efforts to close the gender wage gap” including transparency around employers’ pay practices.¹⁶² By increasing pay transparency, a mandatory wage disclosure law would shine a light on “what factors could stall career advancements of women” and what factors continue to stall the wage gap from closing completely. When pay

¹⁶⁰ CAL. GOV’T CODE § 12999(a).

¹⁶¹ *Pay Data Reporting: Frequently Asked Questions*, CA DEP’T OF FAIR EMP. AND HOUS. (last visited Nov. 28, 2021) <https://calcivilrights.ca.gov/paydatareporting/faqs/> [<https://perma.cc/456Q-8277>].

¹⁶² Kulow *supra* note 61, at 427.

practices are kept secret, employers’ “unconscious bias can...infiltrate salary decisions.”¹⁶³ With increased pay transparency, employers are forced to justify every employee’s salary, which then deters bias in pay.¹⁶⁴ When pay practices are objective and based on job performance and experience, employees are better protected and valued. Mandatory wage disclosure and increased pay transparency are necessary tools for better understanding the gender wage gap and eventually closing it.¹⁶⁵

Currently, only two U.S. states have enacted mandatory wage reporting laws, California and Illinois.¹⁶⁶ California’s law, outlined above, was passed in September of 2020.¹⁶⁷ Illinois’s law, which requires employers to both disclose pay data and receive an equal pay registration certificate, was passed in March 2021 and will go into effect in January 2023.¹⁶⁸ Because both of these reporting laws are so new, there is little to no data available to demonstrate the effectiveness of pay transparency legislation. However, the fact that states are beginning to enact pay transparency legislation demonstrates a growing government interest in narrowing the wage gap and a willingness to take action to address it. Clearly, mandatory wage disclosure is emerging as a legitimate tool to achieve pay equity.

¹⁶³ Kim Elsesser, *Pay Transparency Is the Solution to the Pay Gap: Here’s One Company’s Success Story*, FORBES (Sept. 5, 2018), <https://www.forbes.com/sites/kimelsesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/?sh=3fd7c9e85010> [<https://perma.cc/F6AK-6HT7>].

¹⁶⁴ *Id.*

¹⁶⁵ See Morgan, *supra* note 15, at 442–43.

¹⁶⁶ Carter, *supra* note 128.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; Brandon Dixon & Annette Tyman, *Illinois Equal Pay Reporting Obligations Are Here for Many Illinois Employers*, JDSUPRA (Jan. 27, 2022), <https://www.jdsupra.com/legalnews/illinois-equal-pay-reporting-8847127/> [<https://perma.cc/V2BE-TGPV>].

In addition to governmental efforts, there are private companies that have already instituted pay transparency policies. Verve, a tech company based in the United Kingdom, implemented a pay transparency policy in 2018.¹⁶⁹ This policy gave every employee access to pay information for every person within the organization, including the CEO.¹⁷⁰ Verve's pay transparency policy revealed that it was using objective factors, such as performance, to determine salary.¹⁷¹ This policy has also helped Verve to attract and maintain a diverse workforce; about fifty percent of its workforce is female.¹⁷² More people are attracted to work at a company like Verve because pay transparency gives employees and potential employees proof that the company provides fair compensation.¹⁷³

When there is transparency in pay, employees can assess whether their pay is based on factors like job performance and responsibility or illegally based on some form of discrimination. However, if an employee does not have access to information regarding the salaries of other similarly employed individuals, this employee may never discover that they are being unequally paid and will not have the negotiating power to get the wage they deserve. This lack of information and transparency perpetuates the gender wage gap. With mandatory wage reporting, employees who are facing gender pay discrimination would gain access to the necessary information to assess their salaries and seek equal pay remedies if their employer is violating equal pay laws. Transparency in pay would allow Washington state to better enforce its equal pay laws because the state would have access to vital data to determine when an employer is unequally paying employees.

¹⁶⁹ Elsesser, *supra* note 163.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See generally id.*

Another benefit to pay transparency is that it provides comprehensive data to employers regarding their own pay practices. Employers may not be aware that their pay practices are contributing to the gender wage gap because they are not routinely assessing their pay practice data for every employee. Mandatory wage reporting would illuminate discriminatory pay practices for employers.¹⁷⁴ In response, employers would be able to institute policies that promote equal pay among their employees. Employers would be motivated to change their pay practices to promote pay equity because employees are more satisfied with their job when they know they are being paid equally and equitably, which translates to an increase in employee retention for employers.¹⁷⁵ Pay transparency would also act to deter employers from discriminating in pay because the pay practices will be made available to all employees and the state.¹⁷⁶

An employer's mandatory wage report must be disclosed both internally to the company or organization and externally to the Washington State Department of Labor and Industries (L&I). First, these wage reports must be disclosed internally because it would quickly ensure that employees are directly provided with this wage information. If an employer was only required to disclose externally to the state, they could perpetuate pay secrecy by essentially hiding their pay reports or making it difficult for an employee to access the pay report information. Through internal disclosure, employers

¹⁷⁴ See Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html> [<https://perma.cc/A2JQ-Y7LE>].

¹⁷⁵ *The Benefits and Downsides of Pay Transparency*, DAILY SUNDIAL (Oct. 1, 2021), <https://sundial.csun.edu/165795/sundialbrandstudio/independent-legal-guide/the-benefits-and-downsides-of-pay-transparency/> [<https://perma.cc/TQT9-BTN7>].

¹⁷⁶ Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1065 (2012).

would be directly contributing to the narrowing of the gender wage gap by arming their employees with vital wage information. This internal report should be distributed on an annual basis so employees are continuously given up-to-date wage information and can assess whether their salary is equal when compared to fellow employees and accurately reflects their contributions as an employee.

Internal reporting would not only be beneficial to employees but also to the employer. Assembling salary and wage information on a company or organization-wide basis would give vital information to employers about how they are setting their employees' wages and whether they are engaging in discriminatory wage practices. Employers who may be unaware that they are engaging in discriminatory wage practices would be able to remedy their practices and promote pay equity among all their employees.

Transparency in pay would allow Washington state to better enforce its equal pay laws. The Washington State Department of Labor and Industries (L&I) would monitor covered employers annually to ensure that these employers are complying with mandatory internal disclosure and are accurately disseminating wage information to their employees. If an employer is not complying with mandatory internal disclosure, L&I would be able to quickly uncover the noncompliance and institute a remedy to ensure the employer complies moving forward.¹⁷⁷

Second, mandatory external reporting to the Washington State Department of Labor and Industries is necessary because the state would be equipped with information about pay practices across the state. Washington would then have access to vital information to analyze and determine what factors are contributing to the perpetuation of the gender wage gap. Once such factors

¹⁷⁷ See generally WASH. STATE DEPT. OF LAB. & INDUS., EQUAL PAY AND OPPORTUNITIES ACT (RCW 49.58) – EMPLOYER'S GUIDE 6–7, <https://lni.wa.gov/forms-publications/F700-216-000.pdf> [<https://perma.cc/SB3P-XJ94>].

are discovered, Washington's legislature could develop and implement more policies and laws that would effectively target the underlying issues contributing to the wage gap, which could eventually result in the closing of Washington's gender wage gap.

By granting L&I the power to monitor internal and external reporting under the wage reporting legislation, Washington would be able to better ensure little to no data or information is missed and equal pay laws are properly enforced. One of the challenges to federal equal legislation that the National Equal Pay Taskforce uncovered was that three federal agencies enforced the legislation and were not coordinating with each other.¹⁷⁸ This problem would be less likely to occur in Washington if one agency is charged with enforcement because all the wage reporting data would be held by this agency. This would ensure and enforce compliance, which would increase the ability to successfully enforce Washington's equal pay legislation.

IV. CRITIQUES

This section will outline and respond to possible critiques to both the general issue of the gender wage gap as well as the solution for Washington to adopt pay transparency legislation. It will address each critique and explain how and why mandatory wage disclosure is an effective and necessary tool to close the gender wage gap.

The first critique against Washington adopting pay transparency legislation would be that the gender wage gap does not exist or is not a real issue, and therefore, this legislation is burdensome on employers and is unnecessary.¹⁷⁹ A survey from 2019 estimates that forty-six percent of men

¹⁷⁸ NAT'L EQUAL PAY TASKFORCE, *supra* note 53.

¹⁷⁹ See generally Kerri Anne Renzulli, *46% of American Men Think the Gender Pay Gap is 'Made Up to Serve a Political Purpose,'* CNBC MAKE IT

and thirty percent of women in the United States believe that the gender wage gap is not a legitimate issue and “has been ‘made up to serve a political purpose.’”¹⁸⁰ When people do not believe the gender wage gap is real or a serious issue, implementing more laws to address the issue would seem redundant and unnecessary.

Though a significant amount of people in the United States do not believe the gender wage gap is a serious issue, extensive empirical data consistently shows that a gender wage gap does exist.¹⁸¹ The misconception about the gender wage gap’s existence, in part, comes from a misunderstanding about how the wage gap works and what exactly is perpetuating it.¹⁸² For example, some people believe that the gender wage gap is just about gender discrimination. While others believe it has nothing to do with gender discrimination and is instead caused by women choosing lower paying careers or working fewer hours than men.¹⁸³ However, the gender wage gap is much more complex than being attributable to one single cause.¹⁸⁴

Pay transparency legislation in Washington would help alleviate confusion about or disbelief in the gender wage gap because employers would have to release pay practices to both their employees and to the state, which would be public. By requiring pay transparency, Washington would be illuminating pay practices that are not equal and would have concrete data on what factors are contributing to the wage gap. With more information available,

(Apr. 4, 2019), <https://www.cnn.com/2019/04/04/46percent-of-american-men-think-the-gender-pay-gap-is-made-up.html> [https://perma.cc/8U75-GALT].

¹⁸⁰ *Id.*

¹⁸¹ See GOULD ET AL., *supra* note 12.

¹⁸² Renzulli, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ Torie Abbot Watkins, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should be Ousted as a Factor Other Than Sex*, 103 MINN. L. REV. 1041, 1058 (2018).

Washington State would be able to both narrow and eventually close the wage gap and educate its citizens on the reality of the wage gap in the state.

A second critique, related to the above, is that if a gender wage gap does exist, it is due to the personal choice of individual employees and not due to discrimination.¹⁸⁵ Therefore, more legislation is not necessary. An example of this personal choice is that some women choose to step away from their careers to start families.¹⁸⁶ The main argument is that a natural consequence of leaving the workforce to have children is the loss in pay and/or opportunity to advance in one's career.¹⁸⁷ Though having children is a personal choice, it is one that society has disproportionately burdened women with as the default caregivers and one that continues to contribute to the wage gap.¹⁸⁸ Women who decide to have children often face the "motherhood penalty," which means that hiring managers are more likely to hire non-mothers than mothers, and even if they do hire a mother, they offer her a lower salary than non-mothers.¹⁸⁹ In contrast, men who decide to have children often receive higher wages, which is referred to as the "fatherhood bonus."¹⁹⁰ The dichotomy between the motherhood penalty and the fatherhood bonus reflects outdated ideas that men are providing for their families so they will not be flakey while women who have children will be distracted and less productive in the

¹⁸⁵ Renzulli, *supra* note 179.

¹⁸⁶ NAT'L ORG. FOR WOMEN, *The Gender Pay Gap – Myth vs. Fact*, <https://now.org/resource/the-gender-pay-gap-myth-vs-fact/> [<https://perma.cc/JB3B-Y9YY>].

¹⁸⁷ Joan R. Kahn, et al., *The Motherhood Penalty at Midlife: Long-Term Effects of Children on Women's Careers*, J. MARRIAGE AND FAM. (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4041155/> [<https://perma.cc/GQ9Y-QDYM>].

¹⁸⁸ *Id.*

¹⁸⁹ Miller & Vagins, *supra* note 9, at 16.

¹⁹⁰ *Id.*

workforce.¹⁹¹ So while motherhood is a choice—a choice that society highly values and one that has nothing to do with wages—mothers face a disproportionate impact in pay and their career advancements when they have children.

Pay transparency would aid in addressing the disproportionate impact on pay when women decide to become mothers. Mandatory wage reporting would highlight the fact that women face a “motherhood penalty.” When a woman becomes a mother, her ability to be a productive member of the workforce does not automatically disappear, and her wages should not reflect this notion. By requiring pay transparency, employers would be able to analyze their payment practices and obtain a comprehensive view of how a woman’s transition to motherhood impacts her pay. With this information, employers would be able to create policies to mitigate any negative impact on a woman’s pay due to motherhood. Policies could include creating more substantial maternity leave benefits to support mothers while they spend time away from work, allowing for flexible work schedules so women can both pursue a career and support their families as caretakers, and instituting paternity leave and encouraging men to also take time away from their careers to support their families.

Another personal choice often cited to account for women earning less than men is that women simply pick lower paying jobs. For example, women dominate professions like teaching and social work, which are professions that tend to have lower salaries.¹⁹² While it is true that women dominate low-paying industries, this fact reflects society’s undervaluing of women’s work rather than strictly reflecting a woman’s choice to pursue a lower paying

¹⁹¹ See Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus*, N.Y. TIMES (Sept. 6, 2014), <https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html> [<https://perma.cc/3MBJ-F35R>].

¹⁹² *Id.*

career. This is evident in the fact that when women enter certain professions in large numbers, the salary for that profession drops even when “controlling for education, work, experience, skills, race, and geography.”¹⁹³ For example, in 1950, biologists were mostly men; however, by 2000, this profession was dominated by women, and the salary decreased by about eighteen percent.¹⁹⁴ So even when women choose to enter male-dominated, higher paying careers, their work is undervalued, and they still suffer from unequal pay. Mandatory pay transparency would help to address this undervaluing of women’s work because it would allow employees and employers to assess when the work of a woman is arbitrarily undervalued simply because she is a woman and remedy the inequity by compensating her based on objective factors that reflect her contributions as an employee.

A third critique against pay transparency legislation is that pay discrimination is already illegal federally and in Washington, so more legislation is not necessary.¹⁹⁵ However, just because something is illegal does not mean that the issue is completely solved or that further efforts to address it are moot. Existing equal pay laws on both the national and state levels have contributed to a narrowing of the pay gap. However, the gender wage gap persists, and current legislation has failed to completely close the gap.¹⁹⁶ Because there is still a gap despite unequal pay being illegal, Washington must implement additional legislative tools, such as mandatory

¹⁹³ *Id.*

¹⁹⁴ Bornstein, *supra* note 23.

¹⁹⁵ See generally Eleanor Mueller, *Senate Republicans Block Bill Targeting Gender Pay Gap*, POLITICO (June 8, 2021), <https://www.politico.com/news/2021/06/08/gender-pay-gap-senate-republicans-492316> [<https://perma.cc/SX39-ZCQA>] (This bill was the Paycheck Fairness Act which would have required employers to prove they pay men and women equally for similar work).

¹⁹⁶ See NAT’L WOMEN’S L. CTR., *Progress in the States for Equal Pay* (Nov. 2020), <https://nwlc.org/wp-content/uploads/2019/12/State-Equal-Pay-Laws-2020-11.13.pdf> [<https://perma.cc/FRS5-JGFS>].

pay transparency, to uncover the factors that continue to keep the gender wage gap from closing. To effectively address the complex issue that is the gender wage gap, Washington must have all the information possible that will aid it in efforts to close the gap and effectively enforce its equal pay legislation. Simply outlawing discrimination in pay is not enough anymore; Washington must take a step further to finally close the remaining gap.

A fourth critique against pay transparency legislation is that it will create jealousy and unnecessary competition between employees.¹⁹⁷ This argument acknowledges that pay transparency reveals discrimination, which in turn creates pressure to remedy the discrimination. However, the critique ultimately asserts that pay transparency is dangerous and not an appropriate solution to eliminate pay inequality.¹⁹⁸ The dangers that this argument points to are twofold. First, employees who perceive their wages as being unfair, even if their wages are in fact fair, reduce their productivity.¹⁹⁹ When employees do not know the wages of their peers and co-workers, they often perceive their work performance to be better than it is.²⁰⁰ So when these employees discover the wages of their peers, they may view their wages as an inadequate valuation of their performance and may decrease their productivity as a result.²⁰¹ Second, employees who learn that they are underpaid can become “dissatisfied with their employer and [are] more likely to depart.”²⁰²

¹⁹⁷ Samantha Cooney, *Should You Share Your Salary with Co-Workers? Here's What Experts Say*, TIME (Aug. 14, 2018), <https://time.com/5353848/salary-pay-transparency-work/> [<https://perma.cc/9DZM-QLNB>].

¹⁹⁸ Todd Zenger, *The Case Against Pay Transparency*, HARV. BUS. REV. (Sept. 30, 2016), <https://hbr.org/2016/09/the-case-against-pay-transparency> [<https://perma.cc/T3VS-YHDT>].

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

Though these “dangers” with pay transparency could be very real consequences, the benefits of pay transparency are greater. Pay transparency promotes a more equal and equitable work environment that, in the end, will benefit all employees. As discussed above, the U.K.-based company Verve has shown that these “dangers” should not deter the implementation of pay transparency laws and policies. When Verve implemented its pay transparency policy, which both employees and leadership were in favor of, it did not suffer a loss of employees.²⁰³ Verve did encounter some employees who needed an explanation as to why their salary was significantly less than other employees.²⁰⁴ However, Verve was able to give rational explanations to account for the pay differences because of its use of objective data in determining salaries.²⁰⁵ Verve’s successful implementation of a pay transparency policy illustrates that the so-called dangers of pay transparency are not as prevalent or pervasive as they are argued to be. Further, an employer that is compelled to disclose pay data that does not engage in objective salary determinations will be motivated to adjust accordingly, benefiting employees.

A final critique against pay transparency is that there is not enough data available to prove that it will be an effective tool in closing the residual gender wage gap.²⁰⁶ Few companies have pay transparency policies, so it is difficult to know the widespread effect.²⁰⁷ While it is true that pay transparency laws and policies are not yet pervasive, they have all proved to be successful where implemented.²⁰⁸ For example, Iceland implemented the

²⁰³ Elsesser, *supra* note 163.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ I did not find this critique in my research. It is a critique to mandatory wage transparency that I anticipated on my own because this tool is relatively new and widespread data on its effectiveness has not yet been collected.

²⁰⁷ Cooney, *supra* note 197.

²⁰⁸ *See generally id.*

Equal Pay Standard, which is a form of pay transparency legislation, in 2018 and it has seen positive results reflected in a narrowing gender wage gap. Current legislation has only narrowed the gender wage gap to a certain point and has failed to completely close it. Other tools, mechanisms, and policies must be explored and implemented to at the very least attempt to narrow the gap further. Though pay transparency has not been extensively studied or implemented, it is a promising tool for moving forward in the fight for equal pay.

V. CONCLUSION

The gender wage gap has a long history, and both the United States and individual states, like Washington, have made some progress in narrowing the gap. Though meaningful efforts have been made to narrow the gender wage gap, these efforts have failed in completely closing the gap and in ensuring women are fairly compensated for their work. The gender wage largely persists, even though unequal pay is illegal, because factors contributing to the remaining gap are currently unknown and unexplained. Washington State, though a fairly progressive state, ranks lower than the national gender wage gap average. Because the current federal legislation along with Washington's state legislation has not completely closed the wage gap, Washington must adopt mandatory wage reporting for employers with 100 more employees. By requiring pay transparency, Washington would be able to uncover what factors are currently contributing to the residual gender wage gap. Once the factors contributing to Washington's gender wage gap are discovered, Washington State, as well as individual employers, will be better informed to implement more laws and policies that will ensure equal pay for every Washingtonian.