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Note

The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should be Ousted as a Factor Other than Sex

Torie Abbott Watkins*

INTRODUCTION

It is a story women know all too well. After years of living and working as a school teacher in Arizona,¹ Aileen Rizo decided it was time for a change. She packed up her belongings, quit her job, and moved to sunny California. Due to an impressive resume and years of experience in education, Rizo soon received an offer to be a math consultant in the Fresno County, California public school district.² The Fresno County Office of Education bases employees' salaries on a ten-step system.³ To determine a new

* J.D. Candidate 2019, University of Minnesota. I would like to thank Dean Garry Jenkins, Professor Jon McClanahan Lee, Julia Wolfe, and Trevor Matthews for the time and commitment they each put into transforming this Note every step along the way. Thank you to Amy Conway at Stinson Leonard Street for informing me of the salary history inquiry debate. Thank you to Professor Jessica Clarke for sparking an interest in this topic; this Note would not exist without her perspective on and lessons in employment discrimination. Thank you to Peter Estall, David Hahn, and the staff and editors of *Minnesota Law Review* for their feedback, editing, and contribution. Last, and most important, thank you to my family for their constant support and steadfast love. Shane, you are simply the best. Copyright © 2018 by Torie Abbott Watkins.

1. Aileen Rizo is the real-life story behind this introduction. Her story became the center of the Ninth Circuit Court of Appeals case, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). See Elizabeth Owens, *Educator Says Lawsuit Only Option Left in Fight for Fair Pay*, AM. ASS'N U. WOMEN (Apr. 30, 2013), <https://www.aauw.org/2013/04/30/lawsuit-only-option-fair-pay> (explaining how Rizo found out about the pay discrimination and steps she took to try to remedy the discrimination she faced); see also *infra* Part I.B. (discussing how employers use loopholes in the law to justify pay discrimination).

2. See Joanna L. Grossman, *Discrimination Begets Discrimination: The Ninth Circuit Allows Prior Salary to Justify Paying Women Less than Men for the Same Work*, JUSTIA: VERDICT (May 9, 2017), <https://verdict.justia.com/2017/05/09/discrimination-begets-discrimination-ninth-circuit-allows-prior-salary-justify-paying-women-less-men-work>.

3. See *id.* (explaining the pay system of the Fresno County Office of Education).

hire's "starting step," the school asks employees to provide their most recent salary, a procedure known as a salary history inquiry.⁴ Then the school district subsequently adds five percent to that base salary as an incentive for new hires to make the move.⁵ Assuming the inquiry was standard procedure, Rizo provided the school's human resources department with her previous Arizona-salary.⁶ Even with the standard five percent increase, Rizo's previous salary fell well below step-one on the school district's pay scale.⁷ As a result, the school offered Rizo a salary starting on the first step, which she accepted.⁸

Soon after, Rizo started working for the school district and, generally, enjoyed the work.⁹ Per the school district's standard salary procedure, each year Rizo moved one "step" up the pay ladder.¹⁰ She worked as a math consultant for four years without knowledge of any pay disparity.¹¹ During Rizo's fourth year at Fresno County, the school hired another math consultant.¹² Over lunch one day, the new hire came up in conversation.¹³ Unbe-

4. See Associated Press, *It's Legal to Pay Women Less than Men Based on Past Salaries, Court Rules*, L.A. TIMES (Apr. 27, 2017), <http://www.latimes.com/business/la-fi-women-equal-pay-20170427-story.html> (discussing the Ninth Circuit's ruling on the employment practice of compensating based off of prior salary of the employee).

5. See *id.*

6. See Grossman, *supra* note 2 (discussing Fresno County's "formulaic method for determining the starting salary of a new employee").

7. See *id.* (explaining that Rizo's salary would have fallen below the \$62,133 minimum at step one of the pay scale).

8. See Associated Press, *supra* note 4 (noting that Rizo was paid the minimum a math consultant could earn, \$62,133, plus a \$600 annual stipend because of her master's degree).

9. See Owens, *supra* note 1 (discussing, briefly, Rizo's outlook on her Fresno County employment).

10. See Lizzie Johnson, *SF Proposal Seeks Women's Pay Equity*, S.F. CHRON. (Apr. 4, 2017), <https://www.sfchronicle.com/bayarea/article/SF-proposal-seeks-women-s-pay-equity-11047696.php> (explaining that, at year four of Rizo's Fresno County employment, she was at step four).

11. See *id.*

12. See *id.*

13. Due to the lack of transparency in salary disclosures, women either never find out they are making less money or find out in roundabout ways. Lilly Ledbetter, the subject of the Obama-era Lilly Ledbetter Act, discovered after years of working at Goodyear she was making less than her male counterparts via an anonymous note left in her work locker. For the full story and background behind Ledbetter's personal story, see LILLY LEDBETTER, GRACE AND GRIT: MY FIGHT FOR EQUAL PAY AND FAIRNESS AT GOODYEAR AND BEYOND (2012); see also *infra* Part I.B (discussing how employers use loopholes in the law to discriminate in pay).

knownst to Rizo, instead of starting on step one, the new employee started on step nine with a starting salary \$13,000 more than Rizo's fourth year salary.¹⁴ Rizo had more experience.¹⁵ Rizo was more educated.¹⁶ But her new coworker was a male. And at his last job, he had a higher salary than Rizo.¹⁷ While this may seem like an infrequent or insubstantial problem, in practice, salary history inquiries, such as this one, are routinely being used by employers across the country, continuing a chain of unequal pay for equal work.¹⁸

The Equal Pay Act of 1963 banned sex-based pay discrimination in the workplace, but the current "equal pay for equal work" doctrine allows employers to make employment decisions based on "any other factor other than sex," including an employee's previous salary.¹⁹ Due in part to lower starting salaries for women and lower raises over time, considering a woman's salary history is inherently discriminatory, and thus is substantially responsible for the current gender pay gap. As a result, in the fifty-five years since the Equal Pay Act, there is still a large gender pay gap.²⁰

The gender pay gap is the average difference in earnings between men and women.²¹ In 2017, the gender pay gap was 18.2%.²² This means, for equal work, women made 81.8 cents for

14. See Johnson, *supra* note 10.

15. See *id.*

16. See *id.*

17. See Owens, *supra* note 1 (noting that Fresno County's policy does not consider experience or education, but rather "simply sets salary based on a person's prior pay").

18. See *infra* Part I.C. (discussing how salary history inquiries perpetuate and compound wage differences between women and men).

19. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012) (mandating that an employer must pay equal wages to employees of the opposite sex for equal work).

20. See *Gender Wage Gap*, ORG. FOR ECON. CO-OPERATION & DEV., <https://data.oecd.org/earnwage/gender-wage-gap.htm> (last visited Oct. 31, 2018) (showing an interactive map of the gender wage gap).

21. See *id.* (defining the gender wage gap as "the difference between median earnings of men and women relative to median earnings of men").

22. *Id.*; see also AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 6 (2018) [hereinafter THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP], https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth ("In 2016, median annual earnings in the United States for women and men working full time, year-round, were \$41,554 and \$51,640, respectively . . ."); ANDREW CHAMBERLAIN, GLASS DOOR: DEMYSTIFYING THE GENDER PAY GAP: EVIDENCE FROM GLASSDOOR SALARY DATA 4 (Mar. 2016), <https://www.glassdoor.com/research/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf> ("The U.S. 'adjusted' gender pay gap in Glassdoor salary data has remained essentially unchanged at roughly 4 to 6

every dollar men made.²³ “The pay gap affects women from all backgrounds, at all ages, and of all levels of educational achievement, although earnings and the gap vary depending on a woman’s individual situation.”²⁴ While salary history inquiries do not in themselves cause the current gender pay gap, the inquiries do perpetuate it. In implementing a salary history inquiry, employers use female workers’ lower past salaries as a factor other than sex to base new, future salaries, thus perpetuating the historic pay inequity between male and female workers.²⁵

percent since the late 2000s. Academic research has found that although the male-female pay gap has shrunk dramatically since the 1960s, the rate of convergence has slowed in recent decades—a stagnation that is consistent with Glassdoor pay data.”); Kirsi Bhasin, *What Every Woman Needs to Know About Negotiating a Salary*, HUFFINGTON POST (Mar. 29, 2016), https://www.huffingtonpost.com/kirsi-bhasin/what-everywomen-needs-to_b_9522178.html (“That said I have a cautious fit of optimism, because we’ve really stagnated in terms of gender quality, across multiple metrics, whether that be a pay gap or woman’s representation in the boardrooms. We’ve flat lined in the past 20 to 30 years. I don’t think that progress is by any means inevitable.”).

23. See *Gender Wage Gap*, *supra* note 20.

24. THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP, *supra* note 22, at 10.

The origins of the pay gap are also more complicated than a single cause. Women and men have always participated in the workforce in different ways—and have been treated differently by employers—and though those differences have shrunk over time, they still contribute to women being paid less than men.

Id. at 17.

25. See Motion of Amici Curiae Equal Rights Advocates et al. to File an Amici Curiae Brief in Support of Plaintiff-Appellee’s Petition for Rehearing and Rehearing En Banc at 13, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372), 2017 U.S. 9th Cir. Briefs LEXIS 189, at *23 [hereinafter Brief of Equal Rights Advocates] (“Because women frequently begin their careers earning lower salaries than men, they remain at a stark disadvantage throughout their work lives.”). For a look at the current pay disparity between male and female workers, see Nikki Graf et al., *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR., <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts> (last updated Apr. 9, 2018) (“In 2017, women earned 82% of what men earned”); Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress> (noting that white men out-earn “all groups of women”); U.S. Dep’t of Labor, *Women’s Median Earnings 82 Percent of Men’s in 2016*, BUREAU LAB. STAT.: ECON. DAILY (Mar. 8, 2017), <https://www.bls.gov/opub/ted/2017/womens-median-earnings-82-percent-of-mens-in-2016.htm> (noting that median weekly earnings for men was \$915, while women’s weekly earnings were \$749); U.S. Dep’t of Labor, *Women’s and Men’s Earning by Age in 2016*, BUREAU LAB. STAT.: ECON. DAILY (Aug. 25, 2017), <https://www.bls.gov/opub/ted/2017/womens-and-mens-earnings-by-age-in-2016.htm> (showing the gender pay discrepancy throughout an individual’s lifetime).

When employers make answering salary history inquiries voluntary, women can be put in an even worse situation. Women who leave the salary history question blank make 1.8% less on average than women who decide to answer the question.²⁶ As a result, female prospective employees, and those seeking vertical movement within companies, are put in a perpetual Catch-22: disclose and make less than men, or do not disclose and make less than everyone.²⁷

Salary history inquiries adopt and reinforce past discrimination, continuing a cycle where women make less money than men.²⁸ Breaking this perpetual cycle allows new, well-intentioned actors the ability to make choices that are fair and equal. This Note exposes the dangers of salary history inquiries, and how women suffer from a perpetual pay gap that stems—in part—from those inquiries. While use of a salary history inquiry is neutral on its face, in application, women are disparately impacted by a history of lower wages. Part I outlines the Equal Pay Act and modern “equal pay for equal work” doctrine, and the use of salary history inquiries under the Act’s “any other factor other than sex” exception. Part II discusses current statistics and myths about the gender pay gap, outlines the salary history inquiry circuit split caused by the Act’s grey area, and addresses past federal and state proposals to address that grey area. Part III proposes a legislative solution to ban salary history inquiries and reduce the overall gender pay gap.

26. Megan Leonhardt, *Refusing to Answer this One Job Interview Question Helps Men - but Hurts Women*, MONEY (June 27, 2017), <http://time.com/money/4834777/job-interview-question-past-salary> (“Women who refuse to disclose what they make generally earn 1.8% less than women who do give up the details. If a man refuses to disclose his current salary, however, he gets paid 1.2% more.”); see also Marlene Y. Satter, *Women’s Failure to Disclose Salary History Costs Them*, BENEFITSPRO.COM (June 28, 2017), <http://www.benefitspro.com/2017/06/28/womens-failure-to-disclose-salary-history-costs-th> (reiterating that women who do not “give a salary history when asked earn 1.8 percent less than those who do provide it”).

27. See Satter, *supra* note 26.

28. See Leonhardt, *supra* note 26 (“Advocates argue that when past salary is used to shape compensation at each new job, one discriminatory pay decision leads inevitably to another one—creating a cycle of lower earnings throughout a career.”).

I. PAY DISPARITY BETWEEN MEN AND WOMEN:
TRACING THE HISTORY AND IMPLEMENTATION OF THE
EQUAL PAY ACT

Salary history inquiries allow employers to rely on the over half-century-long gender pay gap to influence hiring and income decisions. Despite federal, state, and local efforts to minimize the gender pay gap, true “equal pay for equal work” remains elusive. Section A outlines the modern “equal pay for equal work” doctrine. Section B explains the Equal Pay Act exceptions, namely the “any other factor other than sex” exception. Section C discusses the use of salary history inquiries in modern employment and how salary history inquiries derive from the “any other factor other than sex” exception.

A. MODERN “EQUAL PAY FOR EQUAL WORK” DOCTRINE

The ongoing journey towards equal pay for women has been a long and complex one. As more women began to enter the work force, a persistent pay gap prompted Congress to pass the Equal Pay Act of 1963.²⁹ While that legislation banned intentional compensation discrimination against women in the workplace, and increased both the number of women in the work force and the amount women were paid, subsequent developments in equal pay law proved necessary. Those developments included more expansive rights for female employees, an enforcement mechanism, and a new timeline requirement.

1. Pre-Equal Pay Act: Pay Disparity Recognition and a Call to Equalize Female Pay

During World War II, women joined the American workforce in larger numbers than ever before.³⁰ Consequently, when the war ended there was a new focus on paying female workers equally.³¹ The first legislative attempt to provide equal pay for

29. See Faith D. Ruderfer, *Sex-Based Wage Discrimination Under Title VII, Equal Pay for Equal Work or Equal Pay for Comparable Work?*, 22 WM. & MARY L. REV. 421, 421–22 (describing Congress’s enactment of the Equal Pay Act).

30. For an in-depth look at women’s evolution into the workforce post-World War II, see *Women and Work After World War II*, PBS AM. EXPERIENCE, www.pbs.org/wgbh/americanexperience/features/tupperware-work (last visited Oct. 31, 2018) (explaining that women did “men’s work” during the war).

31. *Stanley, Winifred Claire*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, history.house.gov/People/Detail/22127 (last visited Oct. 30, 2018) (explaining that Stanley was the “first Member of Congress to introduce an equal pay for equal work bill”); see also *Miss Stanley Backs Bill and Plank on Equal Pay*, N.Y. TIMES, June 20, 1944, at 22 (“Equal pay for men and women

women came from Congresswoman Winifred Stanley in 1944.³² House Resolution 5056 proposed “to make it an unfair labor practice to discriminate against any employee, in the rate of compensation paid, on account of sex.”³³

Though her bill was unsuccessful, year after year, equal pay bills were proposed. But year after year, those bills failed to pass. Despite Congresswoman Stanley’s early push, at least as late as 1958, local newspapers ran help wanted ads differentiating between “Male Help” and “Female Help.”³⁴ It was not until 1963 that federal legislation was finally enacted with the intent to bridge the gap between male and female workers’ wages.³⁵

2. Equal Pay Act of 1963

In 1963, the average male employee made \$28,684.³⁶ That same year, the average female employee made \$16,908—\$11,776 less annually, roughly fifty-nine percent of the average male employee.³⁷ After twenty years of unsuccessful equal pay bills, the Equal Pay Act of 1963’s enactment signaled the first real victory for the equal pay movement.³⁸ Signed into law by President John F. Kennedy, the Equal Pay Act amended the Fair Labor Standards Act with hopes of eliminating the pay disparity between men and women.³⁹ The statute states: “No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages

when the work is the same was proposed in a bill offered today by Representative Winifred Stanley . . .”).

32. *Miss Stanley Backs Bill and Plank on Equal Pay*, *supra* note 31.

33. Prohibiting Discrimination in Pay on Account of Sex, H.R.J. Res. 5056, 78th Cong. (1944).

34. *Want Ads*, STATE, June 1, 1958, at 8D. In addition to differentiating between male and female workers, the ads also routinely separated jobs based on race and marital status. *See id.* (listing an ad for a “male colored cook”).

35. Kelly A. Jeanetta, *Equal Pay for Equal Work*, HENNEPIN LAW., Mar. 2013, at 18 (noting that President John F. Kennedy signed the Equal Pay Act into law June 10, 1963).

36. *See, e.g., The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, NAT’L COMMITTEE ON PAY EQUITY, <https://www.pay-equity.org/info-time.html> (last updated Sept. 2018).

37. *Id.*

38. *See, e.g., NAT’L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE* 4 (2013) (“The Equal Pay Act of 1963 was the first in a series of major federal and state laws that had a profound effect on job opportunities and earnings for women . . .”); Ruderfer, *supra* note 29, at 421–22 (outlining the congressional steps in remedying sex-based wage discrimination).

39. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex”⁴⁰

Almost immediately, the Equal Pay Act began transforming women’s place in the work force.⁴¹ In the five decades since, the female workforce has grown in number from 14.8 million in 1967, just four years after the Act, to 43.2 million in 2009.⁴² In fact, the number of women in the workforce has increased so dramatically since enactment of the Act that the number of women in the workforce nearly equals the number of men. The year of the Act’s passage, women constituted 34.4% of the labor force.⁴³ In 2016, women made up 46.8% of the labor force.⁴⁴ Additionally, the gender pay gap was cut in half during that same time, shifting from 41.1% in 1963 to 18.2% in 2017.⁴⁵

40. *Id.* In drafting the Equal Pay Act, Congress also provided a Declaration of Purpose listing various negative consequences associated with lower wages for women:

The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.

Id.

41. See *Women in the Labor Force in 2010*, U.S. DEP’T LAB.: WOMEN’S BUREAU, <https://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited Oct. 31, 2018) (noting that women make up forty-seven percent of the U.S. workforce); see also AM. BAR ASS’N YOUNG LAWYERS DIV., WAGE GAP: ISSUES WITH EQUAL PAY (2017), https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/meetings/2017/Midyear/materials/bridging_the_gap.authcheckdam.pdf (showing the rate of progress of women’s median annual earnings as compared to men’s median annual earnings since 1960).

42. U.S. CENSUS BUREAU, WOMEN IN THE WORKFORCE, https://www.census.gov/newsroom/pdf/women_workforce_slides.pdf.

43. *Women in the Labor Force*, U.S. DEP’T LAB., https://www.dol.gov/wb/stats/NEWSTATS/facts/women_lf.htm#one (last visited Oct. 31, 2018).

44. *Id.*

45. *Gender Wage Gap*, *supra* note 20; see also, e.g., PEW RESEARCH CTR., ON PAY GAP, MILLENNIAL WOMEN NEAR PARITY—FOR NOW 4 (2013) [hereinafter ON PAY GAP] (“In 2012, the median hourly wage for women, full-time and part-time workers combined, was 84% as much as men In 1980, the gap had been much wider: the median hourly wage for women was 64% as much as men”); U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2016 (Aug. 2017) [hereinafter HIGHLIGHTS], <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf> (highlighting the pay gap from 1979–2016); *The Wage Gap over Time; In Real Dollars, Women See a Continuing Gap*, *supra* note 36 (providing yearly pay disparity statistics from 1960–2015).

3. The Equal Pay Act Today

The Equal Pay Act's passage outlawed, for the first time, facially discriminatory wage policies against women in the workforce. But a lot has changed since 1963. While the Act itself brought about huge changes for female workers,⁴⁶ over the years, it was advanced by additional equal pay initiatives that built upon the Act's core mission. Specifically: subsequent legislation was enacted, broadening the rights of female employees;⁴⁷ the Act received more enforcement power with the creation of an enforcement and compliance agency, the U.S. Equal Employment Opportunity Commission (EEOC);⁴⁸ and a new "paycheck rule" was adopted that gave more women access to bring Equal Pay Act suits, making the Act the most easily accessible remedy for female employees facing workplace pay discrimination.⁴⁹

Since the Equal Pay Act, Congress has routinely used its lawmaking power to adapt to the changing modern employment landscape.⁵⁰ Shortly after the Equal Pay Act's enactment, additional pieces of legislation were enacted that advanced the rights of female workers. The first came the following year: Title VII of the Civil Rights Act of 1964 (Title VII). Title VII banned all types of sex-based workplace discrimination, not only wage discrimination.⁵¹ Second, Title IX of the Education Amendments prohibited sex discrimination in education.⁵² The third, the Pregnancy Discrimination Act, passed in 1978, made it unlawful to discrim-

46. See *supra* notes 41–45 and accompanying text (discussing the rise of women in the workforce).

47. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–88); Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e).

48. *The Equal Pay Act of 1963*, EEOC, <https://www.eeoc.gov/laws/statutes/epa.cfm> (last visited Oct. 31, 2018) (noting that the Equal Employment Opportunity Commission administers and enforces the Equal Pay Act of 1963).

49. Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act), 42 U.S.C. § 2000e-5(e)(3)(A) (2012).

50. See *generally* U.S. CONST. art. I, § 8 (giving Congress the power to make all laws).

51. Title VII banned all types of sex-based workplace discrimination, not only wage discrimination. See 42 U.S.C. § 2000e. For a thorough comparison of the Equal Pay Act and Title VII, see *The Equal Pay Act: Equal Pay for Women*, Nolo, <https://www.nolo.com/legal-encyclopedia/equal-pay-act-women-30153.html> (last visited Oct. 31, 2018).

52. See Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).

inate because of pregnancy, childbirth, or related medical conditions.⁵³

Additionally, the EEOC, the agency responsible for enforcing the Equal Pay Act, was created to aid in the Act's implementation and enforcement.⁵⁴ The EEOC was created a year after the Equal Pay Act was passed, as part of Title VII.⁵⁵ Generally, the EEOC has the "power to receive, investigate, and conciliate complaints where it [finds] reasonable cause to believe that discrimination ha[s] occurred."⁵⁶ Accordingly, the EEOC acts not only as a place for women to report wage discrimination, but also as an investigative and compliance entity to hold employers accountable, giving the Equal Pay Act more enforcement power.⁵⁷

Another improvement to the equal pay movement came by modifying the originally stringent six-month filing deadline women faced in compensation discrimination claims.⁵⁸ A female employee wishing to file a charge of compensation discrimination is required to do so "within 180 calendar days from the day the discrimination took place."⁵⁹ Historically, the secrecy involved in personal wages often prevented women from bringing compensation discrimination claims in time. Due to the lack of workplace transparency regarding salaries, women rarely know the compensation received by their male counterparts for the same, or similar, work. And, when women realize the disparity, often the six-month filing deadline has long since passed.⁶⁰

53. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012). For a detailed discussion of the Pregnancy Discrimination Act, see Jeanette R. Blair, *Pregnancy Discrimination*, 2 GEO. J. GENDER & L. 595, 597–612 (2001).

54. *The Equal Pay Act of 1963*, *supra* note 48 (noting that the EEOC administers and enforces the Equal Pay Act of 1963).

55. *Pre 1965: Events Leading to the Creation of the EEOC*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Oct. 31, 2018) ("EEOC was created in the historic Civil Rights Act of 1964.").

56. *Id.*

57. *See id.* ("[T]he decades since 1964 have seen a steady, growing emergence of EEOC as the lead enforcement agency in the area of workplace discrimination . . .").

58. *See, e.g.*, Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle*, 16 WM. & MARY J. WOMEN & L. 1, 1–5 (2009) (explaining that the Lilly Ledbetter Act "extended the time allowed for an employee to bring a claim").

59. *Time Limits for Filing a Charge*, EEOC, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Oct. 31, 2018).

60. *See Zisk, supra* note 58, at 1 (explaining that if an employee filed "a charge of discrimination six months and one day from the date on which the discrimination occurred," it would be too late).

On January 29, 2009, President Barack Obama signed his first piece of legislation into law—the Lilly Ledbetter Fair Pay Act of 2009.⁶¹ The Act created the “Paycheck Rule” for the filing timelines in compensation discrimination claims, overruling the Supreme Court’s holding in *Ledbetter v. Goodyear Tire & Rubber Co.*⁶²

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter. . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including *each time wages, benefits, or other compensation is paid*, resulting in whole or in part from such a decision or other practice.⁶³

As a result, an unlawful employment practice, and thus “the day the discrimination took place” for EEOC charge purposes,⁶⁴ is renewed with each paycheck. This allows female employees previously subjected to years of hidden compensation discrimination to bring timely claims against their employers.⁶⁵ The Equal Pay Act, and each of these subsequent changes—Title VII, Title IX, the Pregnancy Discrimination Act, the EEOC, and the Lilly Ledbetter Act—form today’s “equal pay for equal work” statutory framework.

Following the Equal Pay Act’s lead, legislation such as Title VII and the Pregnancy Discrimination Act has broadened the rights of female workers and given the Act power through the

61. Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A) (2012); *see also* Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), <https://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>. After nineteen years of working at Goodyear, Lilly Ledbetter was unaware that she was paid less than her similarly situated male coworkers. Ledbetter worked at Goodyear Tire & Rubber Company from 1979 until 1998. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623 (2007), *superseded by statute*, Ledbetter Fair Pay Act of 2009, Pub. L. No. 11-2, 125 Stat. 5–7 (2009). In 1998, an anonymous note was left addressed to Ledbetter, alleging male employees at Goodyear were paid thousands more annually than Ledbetter. *See LEDBETTER*, *supra* note 13, at 145. Ledbetter later filed an initial charge with the EEOC. Despite her attempts, nineteen years had passed—Ledbetter was far from the six-month filing deadline. *Id.* at 206 (noting that, in 2006, the Supreme Court of the United States had agreed to hear Ledbetter’s case).

62. Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A); *see also Ledbetter*, 550 U.S. at 621 (“[A] pay-setting decision is a discrete act that occurs at a particular point in time We therefore affirm the judgment of the Court of Appeals.”).

63. Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added).

64. *See Time Limits for Filing a Charge*, *supra* note 59.

65. *See* Hernaldo J. Baltodano & David Martinez, *Determining the Reach of the Lilly Ledbetter Fair Pay Act*, L.A. LAW., 21 (June 2010); *see also Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting) (“Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials.”).

EEOC's creation.⁶⁶ Today, due to the Lilly Ledbetter Act, women are no longer barred from bringing claims after years of secret compensation discrimination,⁶⁷ opening the door for an increase in claims and more deterrence for employers.⁶⁸ Even with such progress, the Act has far from accomplished the pay equality Congress intended.⁶⁹

B. THE "ANY OTHER FACTOR OTHER THAN SEX" EXCEPTION

The Equal Pay Act's failure, in large part, is due to the malleable "any other factor other than sex" exception, which opens the door for salary history inquiries.⁷⁰ Written into the Equal Pay Act are four exceptions, or affirmative defenses.⁷¹ Consequently, employers attempt to bypass the Act by using and abusing these exceptions. The fourth exception, the "any other factor other than sex" exception, is the most malleable in comparison to the three other more objective exceptions.

The Equal Pay Act allows employers to engage in *unequal* pay for equal work when the decision to do so is made pursuant

66. See *Pre 1965: Events Leading to the Creation of the EEOC*, *supra* note 55.

67. It is important to note, however, that when filing an EEOC discrimination in a compensation charge under the Lilly Ledbetter Act, an employee can only recover two years' worth of damages. See Baltodano & Martinez, *supra* note 65, at 21 (noting that employees may sue and "recover two years of back pay for discrimination").

68. See *The Lilly Ledbetter Fair Pay Act Five Years Later—A Law that Works*, NAT'L WOMEN'S L. CTR. (Jan. 2014), https://nwlc.org/wp-content/uploads/2015/08/lilly_ledbetters_legacy_five_years_later.pdf ("[T]he Ledbetter Act restored the ability of workers in all occupations and parts of the country to seek to vindicate their rights against pay discrimination.").

69. See Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a), 77 Stat. 56, 56 (Congress's Declaration of Purpose in the Equal Pay Act).

70. See *infra* Part II.B.; see also Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A) (2012); Liz Brody, *The Big Salary Reveal: 12 Real People Discover What the Pay Gap Looks Like*, GLAMOUR (Feb. 7, 2017), <https://www.glamour.com/story/12-real-people-discover-what-the-pay-gap-looks-like> ("For a woman earning today's average wage, it would result in \$59,000 in lost income over the course of her career—not to mention lower retirement and Social Security benefits."). *But see* Katie Putnam, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 687 (2009) (examining the Supreme Court decision in *Ledbetter v. Goodyear* and subsequent legislation).

71. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

to one of the Act's exceptions.⁷² As written, the Act has four explicit exceptions.⁷³ The first three exceptions—a bona fide seniority system, a bona fide merit system, or a system which measures earnings by quantity or quality of production⁷⁴—are relatively unambiguous, limited, objective exceptions. The Act's fourth exception—"a differential based on *any other factor other than sex*"—is more open-ended, and thus, open for interpretation, and exploitation.⁷⁵

Each of these exceptions acts as an affirmative defense to a charge of compensation discrimination. The first three affirmative defenses are narrow and objective: "employers must prove the existence of a system with objective standards and must show that the system was applied in a non-discriminatory manner."⁷⁶

The "any other factor other than sex" exception, however, is commonly referred to as a "catchall defense,"⁷⁷ or, perhaps more accurately, the "Any Reason Under the Sun" defense.⁷⁸ By adding this fourth defense, Congress inserted a "broad general exception" and "did not limit the exception to job-evaluation systems."⁷⁹ Because it is such an open-ended exception, employers

72. *Id.* ("No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor other than sex*" (emphasis added)).

73. *Id.*

74. *See id.*

75. *Id.* (emphasis added); *see also* Edward J. Gaffney, Jr., *Factors Other than Sex: The Catchall Exception to the Equal Pay Act*, 3 COOLEY L. REV. 75, 75 (1985) ("By far the most problematic and litigated exception to the Equal Pay Act is the fourth or catchall exception.").

76. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 57 (2010) ("Courts have recognized that permitting a defense to pay disparities based on assertions of 'merit' and 'performance,' 'if not strictly construed against the employer, could easily swallow the rule.'").

77. Victoria Lazar, *Not Any Factor Other than Sex: A Proper Limit to Defending the Equal Pay Act*, 1989 U. CHI. LEGAL F. 309, 311 (1989) (noting, for example, that courts have disallowed "differences in pay based on participation in training . . . when the programs were not readily available to employees of both sexes").

78. Eisenberg, *supra* note 76, at 53–60. For a list of employer schemes the Courts have had to strike down under the guise of factors "other than sex," *see* Lazar, *supra* note 77, at 319–21.

79. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 877 (9th Cir. 1982) (quoting H.R. REP. NO. 88-309, at 3 (1963), *as reprinted in* 1963 U.S.C.A.N. 687, 689) (reversing lower court decision finding employer violated the Equal Pay Act in computing wages), *overruled by* *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).

cite the “any other factor other than sex” exception more than the other three exceptions combined.⁸⁰

The employer does not have to have a good reason for its actions; the reason just cannot be an employee’s sex.⁸¹ Therefore, as it stands, the “any other factor other than sex” exception can include all kinds of employment practices that result in unequal treatment so long as such treatment is facially unintentionally discriminatory.⁸²

C. SALARY HISTORY INQUIRIES

Due to the prevalence of salary history inquiries, their legality makes up a large portion of today’s “factor[s] other than sex” case law.⁸³ As efforts to minimize the pay gap have been introduced, employers have relied increasingly on the “any other factor other than sex” exception as a loophole to Equal Pay Act compliance.⁸⁴ Employers argue that salary history inquiries fit into the “any other factor other than sex” framework because the inquiry involved prior salary rather than sex.⁸⁵ Employers’ reliance on salary history, in practice, however, results in female

80. Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act’s Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS., 225, 233 (1994).

81. See MARCIA S. COHEN, THE ESCAPE CLAUSE: HOW U.S. EQUAL PAY LAW HAS FAILED WOMEN AND WHY SOME SUGGESTIONS FOR THE FUTURE, MILLENNIA 2015 (2012), http://www.millennia2015.org/files/files/M15_Docs_Collaborations/Millennia2015_Midis_Millennia2015_13_09_2012_Marcia_Cohen_Escape_clause_2013_04_02.pdf (explaining how the “any other factor other than sex” exception swallows the Equal Pay Act).

82. See *Kouba*, 691 F.2d at 876 (“The Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives We have found no authority giving guidance on the proper judicial inquiry absent direct evidence of discriminatory intent.”).

83. Courts struggle to decide how salary history fits into the “any other factor other than sex” defense. The current circuit split on the issue is discussed in subsequent sections. See *infra* Part II.A.; see also Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 176–78 (2011) (“Of the market excuses, prior salary has appeared most frequently in the case law.”).

84. See Naomi Schoenbaum, *It’s Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 HARV. J.L. & GENDER 99, 99 (2007) (“[H]iring discrimination persists: studies show that people of color and women continue to fare worse in the hiring process than equally qualified white men”).

85. See Gaffney, *supra* note 75, at 78–82 (describing how employers use training programs to fit discrimination into the “any other factor other than sex” framework).

workers taking home a smaller paycheck than male workers doing the same work.⁸⁶

Today, nearly half of all job applicants are asked to provide new employers with past salary amounts.⁸⁷ At first glance, it is appealing to believe that prior salaries are a fairly easy, objective way to evaluate a prospective employee's past performance and determine what a company should pay an employee. However, while facially neutral, the use of salary histories has a disparate impact on female workers.⁸⁸ One need only look at the historical wage difference between men and women to ascertain how this disparate impact is perpetuated and compounded. Historically, women have suffered from (at least) a 20 cent per dollar difference in pay from men for doing the same work.⁸⁹ As female employees move from job to job, reliance on prior salary to calculate a new salary means women continue to be subjected to decades-old pay inequality undermining the "equal pay for equal work" concept.⁹⁰

Generally, federal agencies and state governments recognize the potential (implicit or explicit) discrimination resulting from salary history inquiries. The EEOC advises against basing a new salary on only a prior salary,⁹¹ and various cities and states have enacted legislation to ban the use of salary history

86. See Leonhardt, *supra* note 26 ("Advocates argue that when past salary is used to shape compensation at each new job, one discriminatory pay decision leads inevitably to another one . . .").

87. PayScale, *PayScale Research Shows Many Employers Still Ask About Salary History but Refusing to Answer Has Different Outcomes for Candidates Depending on Gender*, MARKETWIRED (June 27, 2017), www.marketwired.com/press-release/payscale-research-shows-many-employers-still-ask-about-salary-history-but-refusing-answer-2223898.htm (estimating forty-three percent of job applicants are asked to provide salary history).

88. Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1100–10 (1989) ("Factors that may have originated in sex-based biases, but for which a compelling case of industry reliance can be made, are 'suspect' under the defense and may justify a pay disparity between the sexes temporarily if a business reason is advanced by an employer for relying on the factor. The nondiscriminatory use of a previous employer's salary in wage-setting is one example of a 'suspect' factor.").

89. See *supra* note 22 and accompanying text.

90. See Leonhardt, *supra* note 26.

91. *Pay Tips*, EEOC, https://www.eeoc.gov/employers/smallbusiness/checklists/pay_tips.cfm (last visited Oct. 31, 2018) ("Avoid basing pay solely on factors that may be discriminatory, such as prior salary.").

in determining new salaries.⁹² In the last year, over twenty different state and local governments proposed bills that either eliminate or limit salary history inquiries.⁹³

Despite external discouragement, employers continue asking new employees to provide their salary history, a number that is based on a pay disparity that has existed—and continues to exist—in our country for the last sixty years. Employers use salary history inquiries in various ways. Salary histories can be used to screen applicants out who are out of an employer's salary league, or aid in salary negotiations.⁹⁴ Employers also argue that salary history is a valuable tool in assessing realistic salaries and is a more efficient way to make employment decisions.⁹⁵

Most often, however, salary history inquiries are used to determine a new employee's starting salary.⁹⁶ A 2018 survey showed that eighty-four percent of employers rely on salary history "a great deal" or "a moderate amount" when assessing a potential candidate's salary expectations.⁹⁷ Furthermore, eighty percent of employers surveyed reported that hiring managers and recruiters rely on salary history "a great deal" or "a moderate amount" when determining an offer that is acceptable to a potential candidate.⁹⁸ These numbers remain fairly consistent across organizations regardless of the organization's size.⁹⁹ Con-

92. See *infra* Part II.B.2 (laying out the states that have introduced legislation that would ban use of salary history inquiries).

93. See Brief of Equal Rights Advocates, *supra* note 25, at 14 ("In this year alone, legislation has been introduced in twenty-one states and localities that would ban and/or limit employer inquiry into prior salary.").

94. For a discussion on how salary histories are used in the modern workplace, see NAT'L WOMEN'S LAW CTR., WORKPLACE JUSTICE: ASKING FOR SALARY HISTORY PERPETUATED PAY DISCRIMINATION FROM JOB TO JOB 1 (June 2017).

95. See Ali Biro, *Emerging Pay Equity Laws: What You Need to Know and How You Can Prepare*, LYMAN DORAN, <https://www.lymandoran.com/news/salary-history> (last visited Oct. 31, 2018).

96. WORLD AT WORK, QUICK SURVEY ON SALARY HISTORY BANS (U.S.) 9 (2018), <https://www.worldatwork.org/dA/9abc8ad414/salary-history-bans.PDF>.

97. *Id.* at 9. Survey responders came from the private sector, both publicly and privately traded, government and the public sector, and nonprofit organizations. See *id.* at 15. Within each sector, various industries were represented in the data. See *id.* at 17.

98. *Id.* at 9.

99. *Id.* at 11. Organizations with fewer than 500 employees and organizations with 10,000 or more employees both reported that hiring managers and recruiters rely on salary history "a great deal" or "a moderate amount" when determining an offer that is acceptable to a potential candidate eighty percent of the time. Seventy-seven percent of organizations with 500 to 2499 employees reported "a great deal" or "a moderate amount" of reliance on salary history

trarily, only ten percent of employers reported that salary history is “not at all” used when determining a potential candidate’s offer.¹⁰⁰ It is this continued use of salary history inquiries that substantiates the need for additional equal pay legislation to remedy this specific problem.¹⁰¹

For more than half a century, the Equal Pay Act has paved the way for female pay equality in the workplace. The Act helped increase the number of female workers and the pay those workers took home.¹⁰² The Act also paved the way for additional legislation that helped women at work, at school, and in court.¹⁰³ As much change as the Act allowed, the Act’s effect was dampened by its pliable “any other factor other than sex” exception.¹⁰⁴ Using the “any other factor other than sex” exception, employers have defended the use of prior salary in making employment and compensation decisions.¹⁰⁵ This exception has resulted in some employers’ implementing salary history inquiries under the guise of a factor other than sex.¹⁰⁶ In turn, female employees are subjected to a perpetual cycle of compounding gender pay inequality.¹⁰⁷

when determining an offer that is acceptable to a potential candidate, while eighty-one percent of organizations with 2500 to 9999 employees reported such reliance. *See also id.* at 11 (depicting the reliance employers have on salary history when assessing a potential candidate’s salary expectations by organization size).

100. *Id.* at 9.

101. For the proposed solution, *see infra* Part III. *See generally Strengthening the Middle Class: Ensuring Equal Pay for Women: Hearing Before the Comm. on Educ. & Labor*, 110th Cong. 28–35 (2007) (statement of Heather Boushey, Senior Economist, Center for Economic and Policy Research) (discussing the benefits of the Equal Pay Act and the pay disparity that remains in the American workplace).

102. *See id.* at 30 (statement of Heather Boushey) (showing the ratio of earnings increased in the 1980s).

103. *See id.* at 14 (statement of Rep. Rosa DeLauro) (explaining that the Paycheck Fairness Act is designed to help enforce the laws written in the Equal Pay Act).

104. *See, e.g., Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) (allowing salary history to be a defense against applying the Equal Pay Act).

105. *See, e.g., Irby v. Bittick*, 44 F.3d 949, 954–55 (11th Cir. 1995) (arguing that even though the plaintiff was doing essentially the same work as her male coworkers, a lesser salary is justified because of her salary history).

106. *See, e.g., id.* at 955.

107. *Id.* (“If prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.”).

II. THE EQUAL PAY ACT'S GRAY AREA IN PRACTICE: THE GENDER PAY GAP, SALARY HISTORY CIRCUIT SPLIT, AND FAILED LEGISLATION

As discussed in Part I, the Equal Pay Act has accomplished a lot for women in the workplace. But legislation passed fifty years ago does not adequately address the issues women face today.¹⁰⁸ Women make less than men, and they have since the Department of Labor began recording income statistics.¹⁰⁹ Various factors contribute to the gender pay gap, but “a job is worth x dollars to do it right, no matter who does it. . . . And the employer decides whom to hire and how much to pay.”¹¹⁰ Even after accounting for such facts, a portion of the gender pay gap is unaccounted for. As women move from job to job, they are followed by the repercussions of a lower prior salary every time an employer asks, “how much did you make at your last job?” As the current circuit split and recent legislative initiatives show, the next big push in combatting the gender pay gap involves definitively defining where salary history inquiries fit into the Equal Pay Act’s framework.

Section A addresses the current salary history inquiry circuit split between the Seventh and Eighth Circuits and Tenth and Eleventh Circuits. In April 2018, that split grew deeper; the en banc Ninth Circuit handed salary history inquiry ban advocates a hard-fought victory via the long-awaited *Rizo v. Yovino* decision.¹¹¹ Section B addresses proposed solutions to the salary history inquiry problem, the Paycheck Fairness Act of 2017, and the success state and local governments have had in enacting salary history inquiry bans. Section C describes the impact a sal-

108. See *Women in the Workplace: Then Vs. Now*, HUM. RESOURCES MBA, <https://www.humanresourcesmba.net/women-in-the-workplace> (last visited Oct. 31, 2018) (showing women make seventy-seven cents for every dollar men make).

109. See, e.g., *Facts Over Time*, U.S. DEP’T LAB., <https://www.dol.gov/wb/stats/NEWSTATS/facts.htm> (last updated Oct. 2017) (showing in 1960, the median annual earnings for men was \$38,084, while only \$23,107 for women, and in 2016, the gap has closed slightly but men make \$51,640 on average while women are only making \$41,554).

110. See Nick Corcodilos, *Ask the Headhunter: Women Don’t Cause the Pay Gap. Employers Do*, PBS NEWS HOUR (Apr. 12, 2016), <https://www.pbs.org/newshour/economy/ask-the-headhunter/ask-the-headhunter-women-dont-cause-the-pay-gap-employers-do> (“Let’s get over it: Women who do the same work as men aren’t the problem. Employers who pay unfairly are. . .”).

111. *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (holding “prior salary alone or in combination with other factors cannot justify a wage differential”).

ary history inquiry ban could have on the gender pay gap by addressing various factors that contribute to the gender pay gap and explaining why the unexplained portion of the gender pay gap is enough to warrant a federal ban on salary history inquiries.

A. CIRCUIT COURTS DIVIDED ON SALARY HISTORY INQUIRIES

Female employees have taken their salary history grievances to the courts, but the courts have not applied the Equal Pay Act and its exceptions consistently. The point of contention between the circuits is how narrowly, or broadly, Congress intended the “any other factor other than sex” exception to be. In answering whether salary history constitutes a factor other than sex, three approaches have emerged—the “yes” approach, the “sometimes-plus” approach, and the “no” approach.¹¹²

Between 1995 and 2005, four circuits weighed in on salary history inquiries—two found salary history is a lawful factor other than sex, and two held employment decisions based on salary history *alone* violates the Equal Pay Act—resulting in a circuit split.¹¹³ It was not until 2018 that a circuit, the Ninth Circuit, definitively held that the use of salary history in making employment and salary decisions is not a factor other than sex.¹¹⁴ Accordingly, our federal courts are interpreting the Equal Pay Act, and how salary history inquiries fit into the equation, differently.

1. The Seventh and Eighth Circuits View Salary History as a Factor Other than Sex

The Seventh and Eighth Circuits have both addressed whether, and how, prior salaries fit into the “any other factor other than sex exception.”¹¹⁵ In both instances, the courts found

112. See, e.g., *id.* (viewing salary history with any other factors as an Equal Pay Act violation); *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) (viewing salary history as a “factor other than sex”); *Irby v. Bittick*, 44 F.3d 949, 959 (11th Cir. 1995) (viewing salary history alone as an Equal Pay Act violation).

113. Compare *Wernsing*, 427 F.3d at 468, and *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003), with *Angove v. Williams-Sonoma, Inc.*, 70 F. App’x 500, 508 (10th Cir. 2003), and *Irby*, 44 F.3d at 959.

114. *Rizo*, 887 F.3d at 457 (“[W]e conclude that prior salary does not constitute a ‘factor other than sex’ . . .”).

115. See, e.g., *Wernsing*, 427 F.3d at 468; *Taylor*, 321 F.3d at 718.

that salary history inquiries fell squarely within a broad interpretation of the exception.¹¹⁶

In *Wernsing v. Department of Human Services*, Jenny Wernsing asked the Seventh Circuit to invalidate the Illinois State Department's procedures for setting lateral hires' new salaries.¹¹⁷ After accepting a position as an Internal Security Investigator II in the department's Office of the Inspector General, Wernsing's starting monthly salary was \$2,478.¹¹⁸ That number was calculated using Wernsing's prior monthly salary of \$1,935 at the Southern Illinois Enforcement Group.¹¹⁹ Because lateral employees had varying prior salaries, the department had no uniform starting salary.¹²⁰ Consequently, Charles Bingaman, hired contemporaneously with Wernsing, received a higher starting monthly salary of \$3,739 based on his prior salary.¹²¹ The court acknowledged that "Wernsing and Bingaman do the same work but at substantially different pay as a result of this process for determining initial salaries."¹²² Despite Wernsing making less than Bingaman, her percentage pay increase was higher (thirty percent to Bingaman's ten percent).¹²³

As the Seventh Circuit saw it, Congress intended the "any other factor other than sex" exception to be read broadly.¹²⁴ "The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason."¹²⁵ Judge Easterbrook, writing for the majority, stated: "Congress has not authorized federal judges to serve as personnel managers for America's employers."¹²⁶ Ultimately, the Seventh Circuit ruled that the "common personnel-management practice" of calculating pay based on past salary was not a violation of the Equal Pay Act.¹²⁷

116. See *Wernsing*, 427 F.3d at 468 (holding the agency did not discriminate based on sex by offering lateral employees a salary equal to or more than previous salary); *Taylor*, 321 F.3d at 715–16 (holding employer's "any other factor other than sex" affirmative defense sufficient).

117. *Wernsing*, 427 F.3d at 467.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 467.

123. *Id.* at 471.

124. *Id.* at 470 (explaining the exception "need not be 'related to the requirements of the particular position in question,' nor must it even be business-related . . ." (internal citation omitted)).

125. *Id.* at 468.

126. *Id.*

127. *Id.* at 467, 471 (stating that the court will not assume pay differences

Likewise, the Eighth Circuit found in *Taylor v. White* that unequal pay for identical work under identical conditions is lawful when based on a “salary retention policy.”¹²⁸ Esther Taylor was a civilian employee at the Army’s Pine Bluff, Arkansas Arsenal.¹²⁹ At one point during her tenure at the Arsenal, Taylor worked alongside two male employees, Theodis Thornton and Willie Early, and one female employee, Linda Jones.¹³⁰ The four employees “performed identical work under identical conditions.”¹³¹ Despite this, the male employees were placed at a higher pay scale than the women and, thus, made more money for doing the same job.¹³²

The Army argued that the pay difference was based not on sex, but on the organization’s prior salary inquiry implemented through the arsenal’s salary retention policy.¹³³ Citing the Equal Pay Act’s legislative history in support of a broad interpretation of the catch-all “any other factor other than sex” exception, the court ruled that the pay differential was based on the salary retention policy and such a policy constituted a factor falling within the Act’s affirmative defense.¹³⁴

Wernsing and *Taylor* comprise one position in the ongoing debate surrounding the use of prior salary in new salary calculations—a broad interpretation of the “any other factor other than sex” exception.

2. The Tenth and Eleventh Circuits Hold Reliance on Salary History Inquiries Alone Constitutes an Equal Pay Act Violation

The Seventh and Eighth Circuits face direct opposition in the Tenth and Eleventh Circuits.¹³⁵ While two circuits wholly

are discriminatory and plaintiffs must provide evidence that the pay differences are discriminatory).

128. See *Taylor v. White*, 321 F.3d 710, 713–16 (“Notwithstanding these different classifications and salaries, it is undisputed that during at a least a portion of their time together under the MIDAS program, Taylor, Jones, Thornton, and Early performed identical work under identical conditions.”).

129. *Id.* at 712.

130. *Id.*

131. *Id.* at 713 (stating the four employees had to go through the same experiences and training).

132. *Id.* at 713–14 (describing how women previously had a lower job classification than the men in the same position, which resulted in a lower salary).

133. *Id.* at 721.

134. *Id.* at 717–18 (“On its face, the [Equal Pay Act] does not suggest any limitations to the broad catch-all ‘factor other than sex’ affirmative defense.”).

135. See *Angove v. Williams-Sonoma, Inc.*, 70 F. App’x 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 956–57 (11th Cir. 1995); see also *Glenn v.*

view salary history as a factor other than sex,¹³⁶ two circuits hold that salary history *alone* does not constitute a lawful factor other than sex.¹³⁷ The Tenth and Eleventh Circuits adopted a narrower interpretation of the “any other factor other than sex” exception. The Tenth and Eleventh Circuits hold that salary history is not a lawful factor other than sex when prior salary *alone* is the basis for employment and salary decisions.¹³⁸ Nonetheless, the Circuits adopted a “sometimes-plus” approach, meaning that prior salary, plus something else, can constitute a lawful factor other than sex.¹³⁹ For that reason, Tenth and Eleventh Circuits maintain that reliance on prior salary does not *necessarily* violate the Equal Pay Act when paired with an additional factor other than sex, namely, experience.¹⁴⁰

In *Irby v. Bittick*, Barbara Irby sued Monroe County, Georgia and John Bittick, the Sheriff of Monroe County in his official capacity as sheriff.¹⁴¹ During her time as a criminal investigator for the county, two city appointed investigators, Robert Jones and Ronald Evans, started working as county investigators.¹⁴² In switching over from city positions to county positions, the two male investigators were given an initial base salary equal to the sum of their city base salary plus overtime (\$23,987.50 in 1989; \$27,868.10 in 1993)¹⁴³—a substantially higher amount than Irby (\$15,757.00 in 1989; \$18,519.80 in 1993).¹⁴⁴ In evaluating Irby’s claim, the court examined the Equal Pay Act’s “any other factor other than sex” exception.¹⁴⁵ The court held the county “cannot defend paying Jones and Evans more than Irby simply because of the pay schedule of Jones and Evans’s previous employer.”¹⁴⁶

Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988) (prohibiting the sole use of prior salary to make employment decisions).

136. See *supra* Part II.A.1.

137. See *Angove*, 70 F. App’x at 508; *Irby*, 44 F.3d at 956–57.

138. *Angove*, 70 F. App’x at 508; *Irby*, 44 F.3d at 956–57.

139. *Angove*, 70 F. App’x at 508; *Irby*, 44 F.3d at 956–57.

140. *Angove*, 70 F. App’x at 508; *Irby*, 44 F.3d at 957.

141. *Irby*, 44 F.3d at 949.

142. *Id.* at 953.

143. *Id.*

144. *Id.*

145. *Id.* at 955 (“In the past, we have found that such factors include ‘unique characteristics of the same job; . . . an individual’s *experience*, training or ability; or . . . special exigent circumstances connected with the business.” (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988))).

146. *Id.* at 955.

Ultimately, the Eleventh Circuit held that “an Equal Pay Act defendant *may* successfully raise the affirmative defense of ‘any other factor other than sex’ if he proves that he relied on prior salary *and* experience in setting a ‘new’ employee’s salary. . . .” as was done in this case.¹⁴⁷ The Circuit continued, however, “that salary history *alone*, in this case, would not be sufficient to warrant a pay differential” because “if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.”¹⁴⁸

Similarly, in a reverse pay discrimination suit,¹⁴⁹ the Tenth Circuit in *Angove v. Williams-Sonoma, Inc.* acknowledged prior salary *alone* does not constitute a factor other than sex and, thus, does not warrant the Act’s exception.¹⁵⁰ The plaintiff, Angove, worked at Williams-Sonoma from 1991 until his termination in 2000.¹⁵¹ During his time at Williams-Sonoma, Angove worked as a sales associate, then was promoted to store manager at two different store locations.¹⁵² After his termination, Angove filed suit against his prior employer alleging that Williams-Sonoma’s pay scale violated the Equal Pay Act.¹⁵³ Key to his claim was fellow store manager, MacKenna.¹⁵⁴ MacKenna made \$12,000 more annually than Angove due to the company’s decision to match MacKenna’s previous salary.¹⁵⁵

147. *Id.* (emphasis added).

148. *Id.*

We have consistently held that ‘prior salary alone cannot justify pay disparity’ under the EPA. . . . Appellees cannot defend paying Jones and Evans more than Irby simply because of the pay schedule of Jones and Evans’s previous employer. Therefore, we reject appellees’ reliance on prior salary as a separate justification for the pay differential.

Id. at 955.

149. A “reverse discrimination” suit is a case in which the plaintiff is a member of a racial majority. See *Employment Law—Hague v. Thompson Distribution Co.: Proving a Prima Facie Case of Reverse Discrimination*, 30 AM. J. TRIAL ADVOC. 453, 453 (2006). From that same token, a “reverse pay discrimination” suit is that in which the plaintiff is a male employee. See Suzanne E. Eckes & Robert K. Toutkoushian, *Legal Issues and Statistical Approaches to Reverse Pay Discrimination in Higher Education*, 47 RES. HIGHER EDUC. 957, 958 (2006).

150. *Angove v. Williams-Sonoma, Inc.*, 70 F. App’x 500, 508 (10th Cir. 2003) (stating that combining the factor of prior salary with another factor, such as experience, is a valid reason for an exemption under the Equal Pay Act).

151. *Id.* at 502–03.

152. *Id.* at 502.

153. *Id.* at 504.

154. *Id.* at 507–08 (arguing that the district court was wrong to justify MacKenna’s pay differential based on prior salary).

155. *Id.* at 507.

Citing and adopting *Irby*, the Tenth Circuit acknowledged the Equal Pay Act does not allow an employer to rely “solely upon a prior salary to justify pay disparity.”¹⁵⁶ But while MacKenna’s salary was based partially on salary history, various factors contributed to the pay decision including experience and community ties.¹⁵⁷ In light of the use of various factors to determine MacKenna’s pay, the court ruled Williams-Sonoma’s policy did not violate the Equal Pay Act.¹⁵⁸

The Tenth and Eleventh Circuits have adopted a narrow interpretation of the “any other factor other than sex” exception. While not foreclosing use of salary history outright, the two circuits have found that the use of salary history, when salary history is used alone, does not constitute a factor other than sex.

3. *Rizo v. Yovino*—A Circuit Faced the Circuit Split and Widened the Divide

Recently, the salary history inquiry topic was thrown into the spotlight again with the Ninth Circuit case, *Rizo v. Yovino*.¹⁵⁹ In 2017, the Ninth Circuit became the fifth circuit to enter the salary history arena when Aileen Rizo sued Fresno County for basing her new math consultant salary on her prior salary, a decision that caused Rizo to make \$13,000 less annually than her less-senior male counterpart.¹⁶⁰

In moving for summary judgment, Fresno County conceded Rizo was paid less than the male employee for the same work.¹⁶¹ As an affirmative defense, the school district argued the differential was based a factor other than sex—prior salary.¹⁶² The District Court disagreed,¹⁶³ but was reversed on appeal by a

156. *Id.* at 508.

157. *Id.*

158. *Id.* (finding that the affirmative defense to the Equal Pay Act is invoked when pay decisions are based on prior salary, qualifications, and experience).

159. 887 F.3d 453 (9th Cir. 2018).

160. *Rizo v. Yovino*, No. 1:14-cv-0423-MJS, 2015 WL 9260587, at *13 (E.D. Cal. Dec. 18, 2015), *vacated and remanded*, 854 F.3d 1161 (9th Cir. 2017), *reh’g en banc granted*, 869 F.3d 1004, 1004 (9th Cir. 2017) (holding the plaintiff was lawfully paid less than comparable male employees because the pay difference was “based on any other factor other than sex”); Mackenzie Mays, *Fresno Woman Wins Major Court Decision in Her Quest for Equal Pay for Equal Work*, FRESNO BEE (Apr. 9, 2018), <https://www.fresnobee.com/news/local/article208373549.html>. This is the hypothetical discussed in this Article’s Introduction. For a thorough look at this case’s facts, see *supra* Introduction.

161. *Rizo*, 2015 WL 9260587, at *6.

162. *Id.* at *7.

163. *Id.* at *11.

three-judge Ninth Circuit panel.¹⁶⁴ The panel ruled that prior salary can justify pay differentials between male and female employees so long as an employer provides “business reasons”—a burden the court believed Fresno County met.¹⁶⁵

After the decision was announced, however, the Ninth Circuit voted to vacate the panel’s decision by taking the case en banc.¹⁶⁶ The Ninth Circuit judges concentrated on the problems associated with the use of salary history inquiry in pay determinations, particularly the cycle of using past gender pay discrimination to perpetuate future gender pay inequality.¹⁶⁷

Ultimately, the Ninth Circuit went further than the Tenth and Eleventh Circuits and “conclude[d], unhesitatingly, that ‘any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.”¹⁶⁸ Calling the wage gap “an embarrassing reality of our economy,” the court held “that prior salary alone or in combination with other factors cannot justify a wage differential.”¹⁶⁹ Relying on the text, history, and purpose of the Equal Pay Act, the court explained that to validate the use of salary history would be “to allow employers to capitalize on the persistence of the wage gap and perpetuate

164. *Rizo*, 854 F.3d at 1167.

165. Fresno County offered four business reasons for using prior salary: (1) the policy is objective, in the sense that no subjective opinions as to the new employee’s value enters into the starting-salary calculus; (2) the policy encourages candidates to leave their current jobs for jobs at the County, because they will always receive a 5% pay increase over their current salary; (3) the policy prevents favoritism and ensures consistency in application; and (4) the policy is a judicious use of taxpayer dollars.

Id. at 1165.

166. See *Rizo*, 869 F.3d at 1004 (deciding the case will be reheard en banc). See generally Oral Argument, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), No. 16-15372, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012817; *Rizo*, 887 F.3d at 456 (detailing the en banc *Rizo v. Yovino* case).

167. Oral Argument at 25:30, *Rizo*, 887 F.3d 453 (No. 16-15372), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012817. Referring to the “any other factor other than sex” exception, Judge Morgan Christen said “any doesn’t mean any. Then if we were to construe it that way, as the Seventh Circuit does, the exception could swallow the rule. And certainly, the purpose of the Act.” *Id.* at 4:41.

168. *Rizo*, 887 F.3d at 460.

169. *Id.* at 456. “Salaries speak louder than words, however. Although the [Equal Pay] Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy.” *Id.*

that gap *ad infinitum*.”¹⁷⁰ Now with binding precedent banning the use of salary history in the Ninth Circuit, the divide between the circuits has grown even wider and more polarizing.¹⁷¹

Something more than the current Equal Pay Act language is needed to remedy the discrepancy. The salary history inquiry circuit split shows that current legislation is failing to address the discriminatory effects of salary history inquiries. Without legislative intervention, employers and employees will continue to face patchwork compliance and expectation problems.¹⁷²

B. THE LEGISLATIVE PUSH: BANNING SALARY HISTORY INQUIRIES

The Equal Pay Act has left courts divided on the salary history inquiry problem. Consequently, employers are without guidance at the expense of female employees.¹⁷³ Over the last half century, the pay gap has virtually been cut in half.¹⁷⁴ However, under the given trajectory, the pay gap will not be closed until 2059.¹⁷⁵ In view of that, there is still a long way to go.¹⁷⁶

The current salary history inquiry circuit split centers on the correct interpretation of Congress’s intent in passing the

170. *Id.* at 456–57.

171. For a look at the impact this decision has in the Ninth Circuit’s jurisdiction, see Alexia Fernandez Campbell, *9th Circuit: You Can’t Pay Women Less than Men Just Because They Made Less at Their Last Job*, VOX (Apr. 10, 2018), <https://www.vox.com/2018/4/10/17219158/equal-pay-day-2018> (arguing the decision will make it harder for judges in the Ninth Circuit to dismiss gender pay discrimination lawsuits).

172. Today, the Seventh and Eighth Circuits maintain that salary history inquiries lawfully fit within a broad interpretation of the Equal Pay Act’s “any other factor other than sex” exception. *See supra* Part II.A.1.

173. The Court is used to enforcing the law, and if Congress is unhappy with the Court’s result, Congress can act. *Id.*

174. *See* HIGHLIGHTS, *supra* note 45, at 2 (showing that women’s earnings as a percentage of men’s earnings rose from approximately sixty-two percent in 1979 to eighty-two percent in 2016).

175. *See* JESSICA MILLI ET AL., THE IMPACT OF EQUAL PAY ON POVERTY AND THE ECONOMY 1 (Apr. 2017) <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf>. Women of color fare even worse. Under the current legislation, black women would not reach pay equality until 2124, and Hispanic women until 2248. *Id.*

176. Anne Kim, *The Equal Pay Act—Powerful but Not Enough*, PROGRESSIVE POL’Y INST. (June 14, 2013), <https://www.progressivepolicy.org/issues/economy/the-equal-pay-act-powerful-but-not-enough> (“The Equal Pay Act remains a remedy of last and powerful resort, but the changing needs of women workers now go far beyond its original mission. Helping women succeed—including by closing the pay gap for good—will demand a much more comprehensive agenda to transform the American workplace.”).

Equal Pay Act.¹⁷⁷ To solve this problem, the Paycheck Fairness Act has been introduced in each new Congress over the past two decades but has not passed.¹⁷⁸ In the absence of enacted federal legislation, however, states and local governments have passed their own salary history inquiry bans.¹⁷⁹

1. The Paycheck Fairness Act of 2017

Salary history inquiry case law has placed ever-growing pressure on the Congress to define the parameters of the Equal Pay Act's "any other factor other than sex" exception, and to decide whether that exception includes salary history inquiries. To squarely answer this question, year after year, members of Congress have proposed has proposed the Paycheck Fairness Act,¹⁸⁰ an expansive piece of legislation that amends the Equal Pay Act and, in part, calls for a salary history inquiry ban.

Even before states and cities began passing legislation, Congress dabbled in the salary history landscape. Since 1997, the Paycheck Fairness Act has annually been proposed.¹⁸¹ Throughout the years, the Act has proposed different ways of closing the gender pay gap. For example, in 2005, Hillary Rodham Clinton, then-Senator of New York, proposed a version of the Paycheck Fairness Act that would educate women on how to negotiate wages and implement anti-retaliation provisions.¹⁸² Though it has yet to be passed, the Paycheck Fairness Act was most recently proposed in April 2017 during the current 115th Congress.¹⁸³

Most applicable is Section 10 of the Paycheck Fairness Act which creates a blanket ban on the use of salary history in determining salary.¹⁸⁴ The proposed section is titled: Requirements and Prohibitions Relating to Wage, Salary, and Benefit History, and reads:

It shall be an unlawful practice for an employer to—rely on the wage history of a prospective employee. . . in considering the prospective em-

177. See *supra* Part II.A.

178. Lydia Wheeler, *Dems Press for Paycheck Fairness Bill on Equal Pay Day*, HILL (Apr. 4, 2017), <https://thehill.com/regulation/finance/327225-dems-press-for-paycheck-fairness-bill-on-equal-pay-day>.

179. See *infra* Part II.B.2.

180. Paycheck Fairness Act of 2017, H.R. 1869, 115th Cong. (2017).

181. See Wheeler, *supra* note 178; see, e.g., H.R. 2023, 105th Cong. (1997).

182. S. 841, 109th Cong. (2005).

183. H.R. 1869.

184. Paycheck Fairness Act of 2017, S. 819, 115th. Cong. § 10 (2017).

ployee for employment . . . in determining the wages for such prospective employee. . . [and in] seek[ing] from a prospective employee or any current or former employer the wage history of the prospective employee. . . .”¹⁸⁵

Section 10 prohibits three actions. One, it prohibits employers from relying on salary history when determining whether to hire a prospective employee.¹⁸⁶ Two, it prohibits employers from determining a prospective employee’s salary based on salary history.¹⁸⁷ Three, it prohibits employers from requesting prior salary from a prospective employee, or a prospective employee’s past employers.¹⁸⁸ Section 10 also allows a prospective employee to voluntarily provide wage history after an employment offer is made “to support a wage higher than the wage offered by the employer.”¹⁸⁹

The Act also contains an anti-retaliation provision, proscribing a penalty for violating the Act.¹⁹⁰ Additionally, the Act includes a definition section defining “wage history” as “the wages paid to the prospective employee by the prospective employee’s current employer or previous employer.”¹⁹¹

Several aspects of the Paycheck Fairness Act’s proposed language make it appealing. First, the Paycheck Fairness Act sets parameters around the catch-all “any other factor other than sex” affirmative defense.¹⁹² Second, Section 10 of the Act is nar-

185. *Id.* In addition to the Paycheck Fairness Act, other equal pay legislation has also been proposed, though not passed. One of the more promising pieces of legislation, Pay Equity for All Act of 2017, focuses solely on salary history and anti-retaliation. H.R. 2418, 115th Cong. (2017). While the two texts are similar (and in some portions, can be used interchangeably), the Paycheck Fairness Act is more thorough. However, the two pieces of proposed legislation have the same purpose and both would be acceptable ways to federally ban the use of salary history inquiries. *Id.*

186. S. 819 § 10.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* (authorizing monetary penalties of \$5000 for the first offense plus special damages up to \$10,000 and attorney fees).

191. *Id.*

192. For a discussion about the judiciary expanding the factors other than sex affirmative defense, see NAT’L WOMEN’S LAW CTR., PAYCHECK FAIRNESS: CLOSING THE “FACTOR OTHER THAN SEX” GAP IN EQUAL PAY ACT 3–4 (July 2009), <https://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf>, stating the factor must be a “bona fide factor . . . that is not based upon or derived from a sex-based differential,” a job-related, and a business necessity.

row and specific in that it concentrates solely on salary history.¹⁹³ Third, the Act provides a penalty,¹⁹⁴ thus giving employees an avenue for recovery and employers a reason to follow the law.¹⁹⁵ Last, it does not prohibit a prospective *employee* from providing prior salary to receive a higher salary, therefore, circumventing any First Amendment issues and maintaining employees' leverage in negotiation stages.¹⁹⁶

Despite two decades of effort, there is still no federal law banning the use and reliance on prior salary in employment and compensation decisions.

2. Salary History Inquiries Ban Case Study—State and Local Governments

Following decades of inaction on Congress's behalf, states and local governments have passed their own legislation. In total, twenty-three states and the District of Columbia have introduced legislation to ban the use of salary history inquiries.¹⁹⁷ California,¹⁹⁸ Massachusetts,¹⁹⁹ Delaware,²⁰⁰ Oregon,²⁰¹ and Vermont,²⁰² were among the first states to pass state-wide legislation banning the use of salary history inquiries.²⁰³ Two state governors, New York²⁰⁴ and New Jersey,²⁰⁵ banned salary history inquiries in the state agencies via executive orders. Additionally, Hawaii has a statewide salary history inquiry ban set

193. S. 819 § 10.

194. The penalty for violating the Paycheck Fairness Act's salary history ban is a \$5000 civil penalty increased by an additional \$1000 for each subsequent offense, not to exceed \$10,000. *Id.* Additionally, the employer is "liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed \$10,000 plus attorneys' fees, and shall be subject to such injunctive relief as may be appropriate." *Id.*

195. See GARY R. SINISCALCO, DEVELOPMENTS IN EQUAL PAY LAW: THE LILLY LEDBETTER ACT AND BEYOND, A.B.A. NAT'L CONF. ON EQUAL EMP. L., 17–18 (Mar. 2010), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_007.authcheckdam.pdf.

196. *Id.*

197. See Brief of Equal Rights Advocates, *supra* note 25, at E2–E6.

198. CAL. LAB. CODE § 432.3 (West 2018).

199. MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2018).

200. DEL. CODE ANN. tit. 19, § 709B (2017).

201. OR. REV. STAT. § 659A.357 (2017).

202. VT. STAT. ANN. tit. 21, § 495m (2018).

203. See Kelly Dougherty, *Equal Pay and Salary History Inquiries: Burning Questions Answered*, CERIDIAN (July 17, 2017), <https://www.ceridian.com/blog/equal-pay-salary-history-inquiries-answers>.

204. Exec. Order No. 161, 9 NYCRR 8.161 (2017).

205. Exec. Order No. 1, N.J. ADMIN. CODE. (2018).

to go into effect.²⁰⁶ Likewise, cities, such as New York City²⁰⁷ and Philadelphia,²⁰⁸ have passed city ordinances banning employers' reliance on salary history.

The biggest problem with these state and local bans is patchwork state and local compliance. By leaving the salary history inquiry ban power to state and local governments, businesses and organizations are forced to cipher through patchwork legislation and requirements. This problem is two-fold. There will inevitably be states that do not pass such legislation—to date only nine have passed or implemented salary history inquiry bans.²⁰⁹ Businesses—particularly large, interstate companies—have ties not just in Massachusetts and Oregon, states with widespread and aggressive salary history bans, but also states with no salary history inquiry legislation.²¹⁰ Two states, Michigan²¹¹ and Wisconsin,²¹² have gone as far as to ban salary history inquiry bans. This leaves a vast number of American workers without a salary history ban safety guard.

Additionally, compliance within multistate companies and organizations becomes a challenge. Businesses are left to decide which states to comply with, what restrictions apply to them, and how to navigate compliance within a multistate, multi-ban company. Research suggests businesses are already divided on how to handle this issue. When surveyed, fewer than half (forty-six percent) said they would comply with their *most stringent* business operation location.²¹³ Additionally, only thirty-two per-

206. HAW. REV. STAT. ANN. § 378–2.3 (West 2018).

207. See, e.g., *Salary History Questions During Hiring Proces Are Illegal in NYC*, NYC COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/salary-history.page> (last visited Oct. 31, 2018) (informing citizens that it is illegal for employers to ask applicants about salary history).

208. See, e.g., Martha Keon & William J. Simmons, *Philadelphia Adopts Regulations Clarifying the Still-Stayed Ordinance Banning Salary History Inquiries*, LITTLER (Oct. 24, 2017), <https://www.littler.com/publication-press/publication/philadelphia-adopts-regulations-clarifying-still-stayed-ordinance> (stating the ordinance prohibits employers from asking prospective employees about prior salary).

209. See *supra* notes 198–206 and accompanying text; 2018 Conn. Pub. Acts 18-8 Reg. Sess.

210. For a comprehensive look at each state's individual gender pay gap, see Kate Nielson, *The Gender Pay Gap by State: An Interactive Map*, AM. ASS'N U. WOMEN, <https://www.aauw.org/resource/gender-pay-gap-by-state-and-congressional-district> (last visited Oct. 30, 2018).

211. MICH. COMP. LAWS § 123.1384 (2018).

212. WIS. STAT. § 103.36 (2018).

213. See Jena McGregor, *Those Bans on Asking About Salary History? Most*

cent said they would comply with *each* jurisdictions' different requirements.²¹⁴ This problem is further complicated when states enact bans to salary history bans, leaving companies with employees in Oregon and Wisconsin, or Massachusetts and Michigan, to simultaneously ban salary history inquiries while also banning salary history inquiry bans. As a result, companies are faced with an unworkable patchwork of legislation and may only comply with one state's law, if any.

A federal law would prevent a patchwork of inconsistent state and local laws. While states and cities passing salary history bans is admirable, and a huge step for equal pay, their shortcomings suggest that federal legislation is needed to remedy unequal pay, enforce violations, and ensure the judicial system correctly applies the law.

C. A FEDERAL SALARY HISTORY INQUIRY BAN'S POTENTIAL IMPACT ON THE GENDER PAY GAP

Due to the prominence of salary history inquiries in modern employment and the relatively stagnant gender pay gap, there is growing consensus that new equal pay legislation is needed.²¹⁵ "The rationale underlying salary history bills is that pay inequities are perpetuated when current pay is based on past employer decisions that *could have been* discriminatory."²¹⁶ To circumvent the idea that past employer decisions were in fact discriminatory, gender pay gap challengers point to various factors—job segregation, education, negotiation, and family obligations—to dilute the overall gap and challenge the need for a new salary history inquiry ban.²¹⁷ But the numbers tell a different story.²¹⁸

Employers Don't Think They'll Work, WASH. POST (Nov. 16, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/11/16/those-bans-on-asking-about-salary-history-most-employers-dont-think-theyll-work>.

214. *Id.*

215. *Supra* Part 1.C.

216. See Ilyse Schuman & Michael J. Lotito, *Mid-Year Roundup: Equal Pay and Related Bills Command Attention in 2017*, LITTLER WORKPLACE POL'Y INST. (July 5, 2017), https://www.littler.com/files/2017_7_wpi_insight_mid-year_roundup_equal_pay_and_related_bills_command_attention_in_2017.pdf (emphasis added).

217. Compare CHAMBERLAIN, *supra* note 22, at 2, 4 ("[T]he data show that while overt forms of bias may be a partial cause of the gender pay gap, they are not likely the *main* driver. Instead, *occupation and industry sorting* of men and women into systematically different jobs is the main cause."), with Corcodilos, *supra* note 110 ("Too often women get paid less for doing the same jobs as men . . . the real reason is obvious to any forthright business person: *Employers pay women less, because they can get away with it.*").

218. See MILLI ET AL., *supra* note 175, at 1 ("Nearly 60 percent of women

1. Addressing Equal Pay Counterarguments: Explaining Away the Gender Pay Gap Using So-Called Business Factors

It is true that the gender pay gap is caused by various factors, and there are a variety of buckets the gender pay disparity can fall into.²¹⁹ The first bucket is job segregation and occupation choice.²²⁰ The second is quasi-legitimate, business-related factors. This includes education differences, family ties, and unsuccessful (or lacking) negotiations.²²¹ Even after accounting for each of these factors, there is a portion of the gender pay gap that can be attributed to nothing other than discrimination, ei-

would earn more if working women were paid the same as men of the same age with similar education and hours of work.”); U.S. DEP’T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 55 (2010), <https://www.bls.gov/cps/wlf-databook2010.htm> (listing the occupations with largest pay gaps); *see, e.g.*, Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7, 10 (2007) (“[E]ven controlling for experience and whatever other qualifications can readily be measured, there tends to be a pay difference between men and women that is not explained and is potentially due to discrimination.”); Trond Petersen & Laurie A. Morgan, *Separate and Unequal: Occupation-Establishment Sex Segregation and the Gender Wage Gap*, 101 AM. J. SOC. 329, 343–45 (1995) (explaining survey results still show an average of a 1.7% disparity in wages even when controlling for both occupation and establishment).

219. *See* HEIDI HARTMANN ET AL., INST. FOR WOMEN’S POLICY RESEARCH FIVE WAYS TO WIN AN ARGUMENT ABOUT THE GENDER WAGE GAP 3 (2017), https://iwpr.org/wp-content/uploads/2016/09/GWG-Talking-Points_2017.pdf (“[W]hen factors such as occupation and parental or marital status are used as control variables in statistical models aiming to explain what ‘causes’ [*sic*] the wage gap, the size of that gap is reduced, and what is left unexplained is generally thought to possibly be the result of discrimination. But it is just as likely that discrimination affects these ‘control’ variables as well as the size of the remaining gap.”); Lisa Nagele-Piazza, *Addressing the Gender Wage Gap and Pay Transparency*, SOC’Y FOR HUM. RESOURCE MGMT. (Mar. 15, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/addressing-the-gender-wage-gap-and-pay-transparency.aspx>; Jessica Schieder & Elise Gould, “Women’s Work” and the Gender Pay Gap, ECON. POL’Y INST. (July 20, 2016), <http://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/#epi-toc-7> (“However, these factors—particularly occupational differences between women and men—are themselves affected by gender bias. Serious attempts to understand the gender wage gap should not include shifting the blame to women for not earning more.”).

220. *See infra* Part II.C.1.a.

221. These factors do contribute to the pay gap, however, not as much as many people think. As a result, while things such as education and family *do* affect the pay gap, their presence does not warrant doing nothing to address ever-present pay disparity. *See infra* Part II.C.1.b.–d.

ther intentional or unintentional, against women in the workplace.²²² This remaining bucket is commonly referred to as an unexplained portion of the gender pay gap. This unexplained portion of the gap is the part of the gap that a salary history inquiry ban can specifically target.

a. Job Segregation and Self-Selection Account for Only a Shrinking Portion of the Modern Gender Pay Gap

In almost every occupation, women suffer from within-job pay disparity, meaning that within the job a woman is currently working, a male within the same job is making more, despite doing the same work.²²³ Historically, women worked largely in lower paid, less skilled occupations, while male employees were employed in the higher paying, more specialized jobs.²²⁴ Consequently, the average income for women was inherently lower than men due to this gender occupation segregation.²²⁵ Since the

222. See CHRISTIANNE CORBETT & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN, GRADUATING TO A PAY GAP 2–3 (2012), <https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf> (“The increasing numbers of claims filed with the [EEOC] and the millions of dollars employers pay annually in awards, settlements, and other legal fees make clear that gender discrimination remains a serious problem in American workplaces.”).

223. The degree of impact job choice has on the gender pay gap, however, varies. Some argue that at least half of the gender pay gap, or approximately ten cents of the roughly twenty-cent total can be attributed to gender occupation segregation alone. However, after diving into the numbers, that estimate is not as accurate as it seems. See, e.g., SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, EXPLAINING THE GENDER WAGE GAP (May 19, 2014), <https://www.americanprogress.org/issues/economy/reports/2014/05/19/90039/explaining-the-gender-wage-gap> (“One of the largest driving factors of the gender wage gap is the fact that men and women, on average, work in different industries and occupations; this accounts for up to 49.3 percent of the wage gap, according to some estimates.”); Jacqueline Thorpe, *Rise of the Tech Bros Means Gender Pay Gap May Only Widen*, BLOOMBERG (Sept. 22, 2017), <https://www.bloomberg.com/news/articles/2017-09-22/rise-of-the-tech-bros-means-gender-pay-gap-may-only-widen>; Amy X. Wang, *The Insidious Gender Pay Gap in the Office Actually Begins at the University*, QUARTZ (Apr. 20, 2017), <https://qz.com/964216/the-insidious-gender-pay-gap-in-the-office-actually-begins-at-university-new-research-from-glassdoor-says> (“[M]en and women tend to end up on different career tracks, resulting in an 11.5% gender pay gap on average.”).

224. See Max Galka, *A Visual History of Gender and Jobs in the US*, WORLD ECON. F. (Mar. 31, 2016), <https://www.weforum.org/agenda/2016/03/a-visual-history-of-gender-and-employment> (illustrating the different percentage of males and females in certain industries from 1960–2014).

225. See U.S. CENSUS BUREAU, MONEY INCOME IN 1973 OF FAMILIES AND PERSONS IN THE UNITED STATES 14 (Jan. 1975), <https://www2.census.gov/prod2/popscan/p60-097.pdf> (“Table G. Number, Percent Distribution, and Median Earnings in 1967 to 1973 of Civilians 14 Years Old and Over With Earnings, by

Equal Pay Act's enactment, however, occupation gender segregation has substantially decreased.²²⁶ Women are no longer expected to work only in manufacturing²²⁷ and administrative roles.²²⁸ Women have surpassed men in various "high-paying management, professional, and related occupations."²²⁹ In fact, women now constitute a majority of accountants, medical scientists, and physical therapists.²³⁰

As women continue to enter male dominated, higher paying occupations, the gender pay gap follows.²³¹ Take, for example,

Work Experience, Race, and Sex.”).

226. See THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP, *supra* note 22, at 17 (“Occupational gender segregation has decreased over the last 40 years, largely due to women moving into formerly male-dominated jobs, especially during the 1970s and 1980s, and to faster growth of more evenly mixed-gender occupations in the 1990s. But integration has stalled since the early 2000s.” (internal citation omitted)).

227. See U.S. BUREAU OF LABOR STATISTICS, WOMEN AT WORK 10 (Mar. 2011), https://www.bls.gov/spotlight/2011/women/pdf/women_bls_spotlight.pdf (demonstrating the shift in jobs women take as a whole).

228. See Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 795–96 (2017) (showing that women are no longer concentrated in administrative jobs).

229. See *Women in the Labor Force in 2010*, *supra* note 41 (“Women are projected to account for 51 percent of the increase in total labor force growth between 2008 and 2018. . . . The largest percentage of employed women (40.6 percent) worked in management, professional, and related occupations; 32.0 percent worked in sales and office occupations; 21.3 percent in service occupations; 5.2 percent in production, transportation, and material moving occupations; and 0.9 percent in natural resources, construction, and maintenance occupations.”).

230. *In-Demand, Higher-Paying Occupations (2010-2020)*, U.S. DEP’T LAB., <https://www.dol.gov/wb/stats/idoccupations.htm> (last visited Oct. 31, 2018). This is only an example of today’s current female-majority fields. For a complete list, see *id.* Women also increased substantially in three particular industries: technical writers (thirty-six percent in 1985 to fifty-eight percent in 2015), pharmacists (seventeen percent in 1985 to fifty-seven percent in 2015), and chemists (twenty-one percent in 1985 to thirty-six percent in 2015). DEP’T FOR PROF’L EMPS., AFL-CIO, PROFESSIONAL WOMEN: A GENDERED LOOK AT INEQUALITY IN THE U.S. WORKFORCE 2 (2017), <http://dpeaflcio.org/wp-content/uploads/Professional-Women-February-2017.pdf>.

231. See Emily Crockett, *The Gender Wage Gap Isn’t About Women’s Choices. It’s About How We Value Their Work.*, VOX (Aug. 23, 2016), <https://www.vox.com/2016/4/12/11410270/equal-pay-day-2016-womens-choices-wage-gap> (“[O]ut of the 119 occupations that we have full-time weekly earnings data for, women face at least a 5 percent wage gap in 111 of them.”); see also Jeff Kauffman, *The 10 Industries with the Biggest Gender Pay Gaps*, FORBES (Dec. 6, 2017), <https://www.forbes.com/sites/jeffkauffman/2016/12/06/the-10-industries-with-the-biggest-gender-pay-gaps/#194e9e3651d4>. Not only do women face a pay gap in male dominated fields, but also in female dominated fields. For example, women dominate the healthcare and social assistance industry, making up eighty percent of the industry’s total workforce. See THE SIMPLE TRUTH

five previously male-dominated industries, that also represent five of the highest paid occupations for women—physicians and surgeons (thirty-six percent pay gap), dentists (twenty-four percent pay gap), lawyers (twenty-one percent pay gap), chief executives (twenty-four percent pay gap), and economists (twenty-four percent pay gap).²³² Each of these careers almost mirror, and, in most cases have far greater gender pay gaps than, the nationwide gender pay gap average. Consequently, merely arguing that women need to be Chief Executive Officers to reach pay equality is not an actual answer.²³³

b. Getting More Educated Only Widens the Pay Gap

Lower education, or lack of education, among women has also contributed to the gender pay gap.²³⁴ Education has long been hailed as the “great equalizer.”²³⁵ In 1964, just a year after the Equal Pay Act became law, only 6.8% of females had college degrees, about half as many as men that same year.²³⁶ Today,

ABOUT THE GENDER PAY GAP, *supra* note 22 (finding three occupations with forty-five to fifty-five percent female workers: food service managers, designers, and financial managers with listed pay gaps of twenty-six, twenty-seven, and thirty-one percent respectively).

232. Paul Overberg & Janet Adamy, *What’s Your Pay Gap?*, WALL ST. J. (May 17, 2016), <http://graphics.wsj.com/gender-pay-gap>. Even more surprising, the pay gap is at its widest (sixty-nine to seventy-four percent) in jobs where women make up forty-five to fifty-five percent of the overall employee population. *Id.*

233. In fact, whether it be a male-dominated or a female-dominated field, women make less than men. The one exception is lower paid and less skilled occupations. In these fields, female workers still make less than male workers. However, the pay gap is a lower percentage in lower paid occupations. *See id.*

234. *See* Francine D. Blau & Lawrence M. Kahn, *Why Do Women Continue to Make Less than Men?*, ECONOFACT (Sept. 22, 2017), <https://econofact.org/why-do-women-continue-to-make-less-than-men> (“In 1980 the fact that women lagged behind men in education and experience accounted for 27 percent of gender wage differences, by 2010 differences in education and experience only accounted for about 8 percent of the—much smaller—wage gap.”).

235. *See, e.g.*, Roslin Growe & Paula S. Montgomery, *Educational Equity in America: Is Education the Great Equalizer?*, 25 PROF. EDUCATOR 23, 28 (2003) <https://files.eric.ed.gov/fulltext/EJ842412.pdf> (describing equity in education as being key to achievement); Michael Benson, *The Great Equalizer*, HUFFINGTON POST (Sept. 8, 2017), https://www.huffingtonpost.com/entry/the-great-equalizer_us_59b2f673e4b0c50640cd6722. The validity of education as an equalizer is not without critics. *See, e.g.*, David Rhode et al., *The Decline of the “Great Equalizer”*, ATLANTIC (Dec. 19, 2012), <https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455> (criticizing the notion of education as the “great equalizer”).

236. *See Percentage of the U.S. Population Who Have Completed Four Years of College or More from 1940 to 2017, by Gender*, STATISTA, <https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by>

there is no longer unequal education between the sexes. Women have not only caught up to men in the amount of education received and achieved, but today more women earn postgraduate degrees than men do.²³⁷ Women, however, graduate *into* a pay gap: within a year after graduation, women already earn almost twenty percent less than male counterparts.²³⁸ While education has long seemed to be the answer for closing the gap pay, “[a]t every level of academic achievement, women’s median earnings are less than men’s median earnings.”²³⁹

Incredibly, while it is undeniable that a higher education leads to higher income,²⁴⁰ it is equally plain that the higher the degree, the higher the pay gap.²⁴¹ In line with the national average, women with less than a high school diploma make 80.4% as much as men with less than a high school diploma.²⁴² Women with a high school diploma make 77.2% as much as similarly situated men.²⁴³ Women with some college and/or an associate degree make 75.2% as much as male counterparts.²⁴⁴ Further, women with a Bachelor’s degree and higher make 74.9% of men with a Bachelor’s degree and higher.²⁴⁵ Under such wage regime, the *less* educated a woman is, the *less* she suffers from the gender

-gender (last visited Oct. 9, 2018). Compare the 6.8% of females with college degrees in 1964, to the 11.7% of males with college degrees that same year. *Id.*

237. ANTOINETTE FLORES, CTR. FOR AM. PROGRESS, THE BIG DIFFERENCE BETWEEN WOMEN AND MEN’S EARNINGS AFTER COLLEGE 1, 3 (2016) <https://cdn.americanprogress.org/wp-content/uploads/2016/09/06111119/HigherEdWageGap.pdf> (“Across both public and private nonprofit four-year colleges, men’s earnings at the six-year mark are approximately \$4,000 higher per year than women’s at 10 years.”).

238. See CORBETT & HILL, *supra* note 222, at 13.

239. See THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP, *supra* note 22, at 13 (emphasis added).

240. See CORBETT & HILL, *supra* note 222, at 19 (“In 2009, among full-time workers, women with a bachelor’s degree typically earned 161 percent of what women with just a high school degree earned, up from 153 percent in 1990.”).

241. See ANTHONY P. CARNEVALE ET AL., GEORGETOWN CTR. ON EDUC. & THE WORKFORCE, WOMEN CAN’T WIN 11 (2018), https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Women_FR_Web.pdf.

242. U.S. DEP’T OF LABOR, ISSUE BRIEF: WOMEN’S EARNINGS AND THE WAGE GAP 18, https://www.dol.gov/wb/resources/Womens_Earnings_and_the_Wage_Gap_17.pdf.

243. See *id.*

244. See *id.*

245. See *id.*

pay gap. As a result, it makes little sense to argue that the gender pay gap is the result of lack of, or unequal, education.²⁴⁶ Indeed, as far as the gender pay gap is concerned, the “great equalizer” can often be a misnomer, and is a flawed position.²⁴⁷

c. Negotiating Helps Men, but Hurts Women

The inability of women to negotiate is another common dismissal of the gender pay gap. It is true that women are less likely than men to negotiate for a higher salary.²⁴⁸ But research suggests that salary negotiations help male applicants and employees but hurt similarly situated females.²⁴⁹

One of the key reasons for disparity in negotiations is sex stereotyping.²⁵⁰ Women in the workplace, particularly in historically male-dominated industries, are routinely put into a lose-lose situation.²⁵¹ “Women are expected to *act* like a woman, but to be successful must also exhibit qualities that are historically

246. See, e.g., CHAMBERLAIN, *supra* note 22, at 3 (finding that the gender gap in education—along with age and experience, or what economists call “human capital”—explains only fourteen to twenty-six percent of the gender pay gap). But see Jane Farrell & Sarah Jane Glynn, *What Causes the Gender Wage Gap?*, CTR. FOR AM. PROGRESS (Apr. 9, 2013), <https://www.americanprogress.org/issues/economy/news/2013/04/09/59658/what-causes-the-gender-wage-gap> (suggesting that educational attainment actually eases 6.7% of the gender wage gap).

247. See Elise Gould & Teresa Kroger, *Women Can't Educate Their Way Out of the Gender Wage Gap*, ECON. POL'Y INST. (Mar. 6, 2017), <http://www.epi.org/publication/women-cant-educate-their-way-out-of-the-gender-wage-gap> (“[W]omen who hold advanced degrees are paid even less than men with bachelor's degrees.”).

248. For a look at a large-scale study on why women are less likely to engage in salary negotiations, see generally Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large-Scale Natural Field Experiment*, 61 MGMT. SCI. 2016 (2015).

249. *Id.*

250. Sex stereotyping came to the forefront with *Price Waterhouse v. Hopkins*, a case involving a female accountant's inability to make partner at the Price Waterhouse accounting firm. 490 U.S. 228, 231 (1989). After initially being waitlisted for a partnership position, Ann Hopkins was told she “should walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” to increase her chances of being promoted. *Id.* at 235. Consequently, recognizing sex stereotyping as exhibited by telling women to behave and dress a feminine way, was a version of sex discrimination, the Court found Price Waterhouse had unlawfully discriminated against Hopkins because of her sex. *Id.* at 258.

251. See CORBETT & HILL, *supra* note 222, at 32 (“Women are still expected to be ‘nice,’ and women who negotiate for a higher salary can be perceived negatively.” (citations omitted)).

masculine.”²⁵² Traits commonly associated with negotiations—demandingness, advantageousness, aggressiveness—are begrudgingly, universally considered masculine traits.²⁵³ After engaging in aggressive salary negotiation, women are faced with negative social bias.²⁵⁴ As a result, men exhibiting such masculine traits are more successful in negotiations for higher salaries, while women are not only unsuccessful, but also face social ostracizing—a tradeoff that is often not worth it.²⁵⁵ The cost-benefit analysis women must do before deciding whether to negotiate may prevent them from receiving the same benefits a similarly situated man would.

d. Women Working Fewer Hours due to Family Obligations

Opponents of equal pay legislation often assume women work fewer hours than men, whether that be the result of raising a family or choosing to work a part-time schedule. In fact, some argue as much as ten cents, or half, of the twenty-cent gender pay gap can be explained away by women spending less time in the work force to spend more time at home.²⁵⁶

252. See Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 86 (2006) (“Within the U.S., as the proportion of women in the workplace has grown and the gender segregation of occupations has declined, women have come to identify more with masculine personality traits and society has come to view women of today and tomorrow as more masculine than women of the past. Nevertheless, women are still expected to fulfill prescriptions of feminine niceness (e.g., warmth, kindness, sensitivity to the needs of others), which are emblematic of their subordinate status and therefore not fully compatible with all aspects of the masculine personality type.” (citations omitted)).

253. See *id.* at 85 (“Society rewards and reinforces different types of behavior for men and women, and it is not always good advice for women to act more like men in order to claim the same resources and privileges.” (citations omitted)).

254. See *id.* For a discussion about how the female versus male network interact to inhibit female negotiation, see the analysis of men’s and women’s negotiation results in Herminia Ibarra, *Personal Networks of Women and Minorities in Management: A Conceptual Framework*, 18 ACAD. MGMT. REV. 56, 64 (1993) (“When a person’s contacts are mutually interconnected, they cannot be played off each other in negotiations, and the person also is not able to broker relations between these contacts.”).

255. See Bowles et al., *supra* note 252, at 100 (“[T]he social costs of engaging in certain negotiating behaviors may not outweigh the economic benefits.” (citations omitted)); see also Hannah Riley Bowles, *Why Women Don’t Negotiate Their Job Offers*, HARV. BUS. REV., June 19, 2014, <https://hbr.org/2014/06/why-women-dont-negotiate-their-job-offers> (referring to the behavior as “the ‘social cost’ of negotiation”).

256. See FLORES, *supra* note 237, at 4; see also Tim Worstall, *The Gender Pay Gap Is the Result of Being a Parent, not Discrimination*, FORBES (Oct. 1,

There is *some* merit to that argument. In 2016, men working full-time worked on average thirty-six minutes a day longer than women working full-time.²⁵⁷ That statistic overlooks that when women do clock in as many hours as men, the pay gap is virtually unchanged.²⁵⁸ While on average men do work half an hour longer than women, that adds an unnecessary number into the equation. The gender pay gap is more accurately evaluated by comparing women and men working the same hours. Women working forty hours a week make eighty-four percent what men working forty hours a week make.²⁵⁹ And the pay gap only widens with an increase in hours. Women working forty-five hours a week make eighty-two percent what men working forty-five hours a week make.²⁶⁰ Thus, it is difficult to claim that the amount of time at work accounts for a large enough portion on the gender pay gap to justify inaction in the legislative sphere.

Each of these factors—gender occupation segregation, education, lack of negotiation, and family obligations—affect the gender pay gap to some extent. Estimates suggest that job segregation and occupation choice account for half of the pay gap, or ten cents of the almost twenty cent gap.²⁶¹ Other factors—lack of negotiation, fewer hours, and location—account for an additional portion;²⁶² that leaves a seven-cent portion of the gender pay gap unaccounted for.²⁶³

2015, 11:42 AM), <https://www.forbes.com/sites/timworstall/2015/10/01/the-gender-pay-gap-is-the-result-of-being-a-parent-not-discrimination/#6a8ab3e0ac7f> (asserting that women becoming parents is the basis of the pay gap).

257. See BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, AMERICAN TIME USE SURVEY—2017 RESULTS 2 (2017), <https://www.bls.gov/news.release/pdf/atus.pdf> (finding, among full-time workers, men work on average 8.4 hours daily and women work 7.9 hours daily).

258. See CORBETT & HILL, *supra* note 222, at 2.

259. See *id.* (“When we compare the earnings of men and women who reported working the same number of hours, men earned more than women did. For example, among those who reported working 40 hours per week, women earned 84 percent of what men earned.”).

260. See *id.* (“Among those who reported working 45 hours per week, women’s earnings were 82 percent of men’s.”).

261. See HIGHLIGHTS, *supra* note 45; ON PAY GAP, *supra* note 45, at 4; *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, *supra* note 36.

262. See CORBETT & HILL, *supra* note 222, at 2–3.

263. See generally Bourree Lam, *What Gender Pay-Gap Statistics Aren’t Capturing*, ATLANTIC (July 27, 2016), <https://www.theatlantic.com/business/archive/2016/07/paygap-discrimination/492965> (“[T]he striking thing is that even after adjusting for so many factors, there’s still a statistically significant pay gap. (Pay-gap skeptics often note that the gap shrinks after taking these

These factors, however, have little weight for today's trauma surgeon with two children, the recently graduated twenty-two-year-old business major, or the single, childless teacher who equal their similarly situated male colleagues in all but their paycheck. Due to reliance on past salary, a lower past pay ingrained in our national gender pay gap then follows them, from job to job, decade after decade, for no good reason.

2. The "Unexplained" Gender Pay Gap

Having addressed factors that may reduce, but not eliminate the gender pay gap, there remains a portion of the gender pay gap that is unexplained. A salary history inquiry ban could, at the very least, decrease the unexplained portion of the gap.

A salary history inquiry ban's full effect on the gender pay gap is hard to estimate. The unexplained pay gap presents the best estimate. As explained above, unexplained means exactly that: there is no explanation aside from bias and discrimination (either implicit or explicit, past or present) that accounts for men making more than women.²⁶⁴ On average, the "unexplained" portion of the modern gender pay gap constitutes approximately one-third of the overall gender pay gap.²⁶⁵ In simpler terms, if a

factors into account, but it's supposed to—those statistical adjustments were intended to create a more definitive, standardized measurement.) The fact that a gap remains at all after such adjustments shows that the problem defies any simple explanation.”)

264. See, e.g., Lisa M. Maatz, *The Awful Truth Behind the Gender Pay Gap*, FORBES (Apr. 7, 2014), <https://www.forbes.com/sites/forbeswomanfiles/2014/04/07/the-awful-truth-of-the-gender-pay-gap-it-gets-worse-as-women-age/#4fb743801ed4> (“Unbelievably, some folks respond to this research by saying that 7% is too small to worry about. If it's so small, I suppose these folks would happily give up 7% of their own salaries? Didn't think so. Plus, for the women on the short end of this salary stick, the gap is not 'just' 7%.”); Giannina Vaccaro, *How to Reduce the Unexplained Gender Wage Gap? Evidence from a Regression Discontinuity Design*, SOC'Y LAB. ECONOMISTS 23 (2015), <http://www.sole-jole.org/16275.pdf> (attempting to reduce the unexplained wage gap); Valentina Zarya, *Here's Why Economists Still Can't Fully Explain the Gender Pay Gap*, FORTUNE (Mar. 23, 2016), <http://fortune.com/2016/03/23/unexplained-wage-gap> (arguing that the unexplained wage gap is due to bias).

265. See, e.g., CORBETT & HILL, *supra* note 222, at 2; Gary Siniscalco et al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 A.B.A. J. LAB. & EMP. 395, 404–09 (2014) (suggesting that the unexplained portion of the gap is one third of the total pay gap); Zarya, *supra* note 264. *But see* CHAMBERLAIN, *supra* note 22, at 3 (stating that the portion of the pay gap in the United States that is unexplained is thirty-three percent); *The State of the Gender Pay Gap 2018*, PAYSACLE, <https://www.payscale.com/>

male makes one dollar, and a female employee makes eighty cents, the gender pay gap constitutes twenty cents. Seven cents of that gap is unexplained.²⁶⁶

The unexplained portion of the gender pay gap is the primary target of a salary history inquiry ban.²⁶⁷ Since it is unaccounted for, the unexplained portion of the gap is the easiest portion of the overall gender pay gap to reduce, or eliminate. Because a salary history inquiry ban functions to rid new salaries of past discrimination, it is reasonable to assume that such a ban could combat this particular portion of the gender pay gap.

III. A SOLUTION TO JUMPSTART CLOSURE OF THE GENDER PAY GAP: BANNING SALARY HISTORY INQUIRIES

Under the guise of the Equal Pay Act's "any other factor other than sex" exception, employers routinely use salary history to make employment decisions and determine an employee's new salary. As a result, females workers, historically subject to sex-based compensation discrimination, are put in a perpetual and compounding gender pay gap cycle. With no definitive answer from the courts, Congress and state legislatures have tried to settle the issue by banning salary history inquiries.²⁶⁸ Since no legislation has been enacted by Congress, various states and local jurisdictions can act as a guide for a federal salary history inquiry ban.

Section A proposes statutory language banning salary history inquiries—text that can stand on its own, or be combined with other provisions to create a more expansive legislative solution—and concludes by rebutting arguments against a ban on salary history inquiries and explains what this legislation will mean for employers.

data-packages/gender-pay-gap (last visited Oct. 31, 2018) (arguing the unexplained pay gap is actually two percent).

266. The twenty-cent gender pay gap was used for simplicity. The 2017 gender pay gap was 18.2 cents. See *Gender Wage Gap*, *supra* note 20. One third of 18.2 cents rounds to approximately 6.1 cents.

267. For a breakdown of *why* a gap around five cents still matters a great deal, see Alicia Adamczyk, *6 Excuses for the Gender Pay Gap You Can Stop Using*, TIME (Apr. 12, 2016), <http://time.com/money/4285843/gender-pay-gap-excuses-wrong>.

268. See *supra* Part II.B.

A. A PROPOSED FEDERAL SALARY HISTORY INQUIRY BAN

This proposed federal salary history inquiry ban is the first building block towards true equal pay legislation. While more expansive legislation is possible, a specific ban on salary history will remedy a current, pressing equal pay issue, put momentum back into the Equal Pay Act, and open the door for more legislation to remedy different problems and new employment trends as needed. This new legislation will resurge momentum into closing a gender pay gap that has been virtually stagnant for a generation. This one piece of legislation alone will help combat the impact salary history inquiries impose on women and, thus, will work to reduce the gender pay gap.

Section 10 of the Paycheck Fairness Act is a good starting point for a federal salary history inquiry ban. However, there are modifications that will remedy some of the problems associated with the Paycheck Fairness Act in its current iteration, namely, its expansive nature and inability to pass Congress.²⁶⁹ The proposed legislation this Note suggests reads:

It shall be an unlawful practice for an employer to rely on a prospective employee's prior salary (1) in considering the prospective employee for employment, (2) in determining the wages for such prospective employee, and (3) in seeking from a prospective employee, or any current or former employer of the prospective employee, the salary history of the prospective employee.²⁷⁰

Enacting this modified and simplified version of Section 10 of the Paycheck Fairness Act is the best way to combat salary history inquiries because the language is clear, the purpose is specific, and the implementation is easy for employers. The pushback to this proposal, however, is two-fold.

B. AN EFFECTIVE MIDDLE OF THE ROAD

There will inevitably be those who believe the Paycheck Fairness Act should be adopted, now, in its entirety. At the same time, there is likely an argument that this legislation would cost taxpayer money and encroach on an employer's ability to make its own decision. However, there are three reasons this proposed

269. For an analysis as to why such modifications to the Paycheck Fairness Act are necessary, see *supra* Part II.B.1.

270. *Cf.* Paycheck Fairness Act, S. 819, 115th Cong. § 10 (2017). Notice this proposed legislation is strikingly similar to Section 10 of the Proposed Fairness Act. The proposed language, however, is modified and simplified for the reasons discussed *infra* Part III.1–3. Most notably, the proposed language is much shorter. It takes three paragraphs and condenses the language into a three-prong prohibition.

language is superior to the current Proposed Fairness Act: (1) the proposed language is clearer, (2) the proposed language is narrow and specific, and (3) the proposed language is easy for employers to implement, allowing employers to reap the benefits of a better, clearer system.

1. Clear Language: Problems with Continuing to Pursue the Vague Statutory Language of the Paycheck Fairness Act

Equal pay commentators campaign for passage of the Paycheck Fairness Act as a whole, rather than only adopting a salary history ban.²⁷¹ The Paycheck Fairness Act takes a different, more convoluted approach. The Paycheck Fairness Acts proposes language amending the Equal Pay Act by striking “any other factor other than sex” and inserting “a bona fide factor other than sex, such as education, training, or experience.”²⁷²

Testifying before the U.S. Senate, equal pay scholar Professor Deborah Thompson Eisenberg called this portion “the most important provision of the Paycheck Fairness Act.”²⁷³ The problem with this approach, however, is the expansive view the courts have given, and continue to give, the Equal Pay Act’s affirmative defenses.²⁷⁴ By using a non-exhaustive list at the end of the exceptions, equal pay advocates leave open the possibility that a court may once again expand the view of the exception.

Amending the language of the “any other factor other than sex” exception would introduce a new definition in need of interpretation. Contrarily, a plain language salary history inquiry ban explicitly responds to courts and eliminates any need for interpretation, in so far as the use of salary history is concerned. The plain language of the statute prohibits the use of prior salary to make hiring or salary decisions. Thus this new, narrow legislation is simple and easy to implement. Additionally, the ban allows well-intentioned actors to make fair and equal salary choices, and prohibits ill-intentioned actors from relying on past discrimination to undercut women’s salaries.

271. *Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act: Hearing on S. 84 Before the S. Comm. on Health, Educ., Labor, & Pension*, 113th Cong. 2–3 (2014) [hereinafter *Access to Justice*] (statement of Sen. Lamar Alexander).

272. S. 819 § 3.

273. *Access to Justice*, *supra* note 271 at 11–14 (statement of Deborah Thompson Eisenberg, Associate Professor of Law, University of Maryland Francis King Cary School of Law).

274. *See supra* Part I.B.

2. Narrow Ban: Following State Salary History Bans' Narrow Example Suggests Favorable Outcome

As previously discussed, for over twenty years Congress failed to pass various iterations of the Paycheck Fairness Act.²⁷⁵ State and local governments have been more successful in enacting salary history inquiry bans.²⁷⁶ One possible reason states have been more successful in passing legislation is that state legislation banning salary history inquiries is generally narrowly focused.²⁷⁷ State and local salary history bans are focused solely on one issue, the use of salary history.²⁷⁸ Contrarily, the Paycheck Fairness Act attempts to combat numerous issues.²⁷⁹ But states have managed to do one thing the federal government has not: pass a salary history ban.

In advocating for the expansive Paycheck Fairness Act, Professors Nicole B. Porter and Jessica R. Vartanian argue that the Act as a whole is already focused narrowly enough on gender and pay.²⁸⁰ Professors Porter and Vartanian acknowledge “change can be accomplished with regard to pay decisions easier than for all other employment decisions . . . [and] pay equality has the potential to lead to other types of workplace equality.”²⁸¹

Today’s proposed Paycheck Fairness Act, however, does far more than regulate pay decisions. In addition to amending the “any other factor other than sex” defense and banning salary history inquiries, the Paycheck Fairness Act also creates EEOC compliance training programs,²⁸² negotiation training for women,²⁸³ a national pay equality workplace award,²⁸⁴ and research, education and outreach initiatives, totaling a \$15,000,000 appropriation price tag.²⁸⁵ Consequently, the entirety of the Paycheck Fairness Act would be more challenging to pass, as is shown by almost two decades of inaction. A narrow salary history inquiry ban copies the successful state and local model, increasing the overall likelihood of passage.

275. *See supra* Part II.B.1.

276. *See supra* Part II.B.2.

277. *See supra* notes 198–201.

278. *See supra* notes 198–201.

279. *See supra* notes 198–201.

280. Porter & Vartanian, *supra* note 83, at 205–11.

281. *Id.* at 206.

282. Paycheck Fairness Act, S. 819, 115th. Cong. § 4 (2017).

283. *Id.* § 5.

284. *Id.* § 7.

285. *Id.* § 6.

Section 10 of the Paycheck Fairness Act bans salary history inquiries and salary history inquiries alone.²⁸⁶ As employment practices change, there may arise a need for additional changes to the Equal Pay Act. Each of these additional provisions serves the purpose of closing the gender pay gap. However, by focusing on salary history inquiries bans first, the legislation can end the perpetual cycle of unequal pay based on past discrimination, provide a proof of concept for future equal pay efforts, and present Congress with a narrower piece of legislation that that which has been proposed to no avail for over twenty years.

3. Easy to Implement: A Few Thoughts on Employers, Costs, and Salary History Bans

Due to its narrow scope and simple language, the proposed legislation can be implemented by employers with ease. In their Article, Professors Porter and Vartanian also address employers' likely pushback to salary history inquiry bans, which some employers view as another piece of equal pay legislation in an already complex area.²⁸⁷ Research from WorldatWork confirms that "fear of complication" is one hindrance for employers that have yet to implement a salary history ban.²⁸⁸ When surveyed, 46% of employers with salary history bans already in place reported implementing a salary history ban was "very simple" or "extremely simple."²⁸⁹ On the other hand, only 36% of organizations without a salary history ban in place thought implementing such a ban would be "very simple" or "extremely simple."²⁹⁰ In practice, a salary history inquiry ban simplifies the salary equation by removing a variable: the candidate. Employers are left to quantify the position using market rates, location, and pay ranges.²⁹¹

286. *Id.* § 10.

287. See Porter & Vartanian, *supra* note 83, at 205–11.

288. WORLD AT WORK, *supra* note 96, at 2.

289. *Id.* at 13.

290. *Id.*

291. Roy Maurer, *Employers Split on Asking About Salary History*, SOC'Y FOR HUM. RESOURCE MGMT. (Apr. 2, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employers-split-asking-salary-history.aspx>. World at Work director of executive compensation strategy, Sue Holloway, explained "[t]he idea of having to craft a total rewards offer without salary-history information can be daunting to some managers and employers . . . But when hiring managers and recruiters are educated and given reliable compensation data on market rates and pay ranges, the need for a candidate's salary history diminishes." *Id.*

While fear of difficulty in implementing a salary history ban is to blame for some employers' apprehension, the costs associated with the ban present another stumbling block. There are likely upfront costs associated with salary history bans on a national stage,²⁹² although this legislation could total far less than the Paycheck Fairness Act's \$15 million price due to the proposed legislation's smaller scope.²⁹³ Despite any potential costs associated with implementing a federal salary history inquiry ban, current unequal pay has vast negative effects on the United States.²⁹⁴ Reducing the gender pay gap would ultimately grow the country's economy.²⁹⁵ In fact, true equal pay would add a reported \$512.6 billion of additional income into the U.S. economy.²⁹⁶

Aside from the money added into the economy, equal pay is also good for business. When employers take proactive steps to minimize the gender pay gap in their respective organizations, employees report increased productivity and higher morale.²⁹⁷ Additionally, employers experience improved retention rates,²⁹⁸

292. Determining the exact cost of a federal salary history inquiry ban is outside of the scope of this Note. However, due to the fact more expansive legislation in this area apportions funds, it is reasonable to assume there is *some* cost to implementing such a ban. See Paycheck Fairness Act, S. 819, 115th Cong. § 11 (2017). *But see* Martha T. Moore, *These States Are Banning Questions About Salary History to Help Close the Pay Gap*, HUFFINGTON POST (June 26, 2018), https://www.huffingtonpost.com/entry/whats-your-current-salary-none-of-your-business_us_5b3100f2e4b00b9b51c4215e (quoting Andrea Johnson, senior counsel for state policy at the National Women's Law Center, stating salary history bans incur no public costs).

293. S. 819 § 11.

294. For a discussion on how unequal pay negatively affects the economy, see Kate Bahn, *The Value of Equal Pay to the U.S. Economy*, CTR. FOR AM. PROGRESS (Apr. 3, 2017), <https://www.americanprogress.org/issues/women/news/2017/04/03/429810/value-equal-pay-u-s-economy/> ("But it isn't just women's individual bottom lines that suffer: The [*sic*] gender wage gap is also a drag on the U.S. economy, and closing the gap should be a top priority of any economic policy agenda that seeks to strengthen and grow the economy."). For a list of common questions about how female pay equality would affect the income of male employees, see *What Are Common Arguments Against Pay Equity and How Can the Union Respond?*, AFSCME, <https://www.afscme.org/members/education-and-trainings/education-resources/were-worth-it/what-are-common-arguments-against-pay-equity-and-how-can-the-union-respond> (last visited Oct. 30, 2018).

295. *What Are Common Arguments Against Pay Equity and How Can the Union Respond?*, *supra* note 294.

296. See MILLI ET AL., *supra* note 175, at 2. In comparison, \$512.6 billion represents 2.8% of the U.S.'s 2016 gross domestic product, or GDP. *Id.*

297. See CORBETT & HILL, *supra* note 222, at vii.

298. See Rohma Abbas, *Why Should Employers Care About the Gender Gap?*,

better recruiting,²⁹⁹ and improved overall workplace performance.³⁰⁰ Thus, while there are upfront costs on the payroll each week, there are vast business and economic benefits associated with equal pay.

Salary history inquiries continue a cycle where women make less money than men based on past discrimination. Enacting a simple salary history inquiry ban alone would take what the states have done individually and implement that nationally. The ban could remedy the specific problem of salary history, be easy for employers to implement, target the unexplained portion of the gender pay gap, thrust momentum back into the equal pay legislative agenda, and open the door for future, more expansive legislation satisfying Equal Pay advocates.

CONCLUSION

Over fifty years ago, President Kennedy signed the first substantial equal pay initiative into law. Since its inception, the Equal Pay Act banned intentional gender-based compensation discrimination in the workplace. But a lot has changed since 1963. Today, women nearly match the number of men in the work force. Women are now more educated than men. Women have pushed, and continue to push, themselves into historically gender-segregated occupations. Despite this progress, women also face inevitable hurdles—many of which are not adequately accommodated for in the workplace or the paycheck.

One key example is the use of salary history to determine pay for newly promoted and newly hired female employees. This Note proposes federal legislation to amend the Equal Pay Act by explicitly banning the use of salary history inquiries to determine salaries for new hires or recently promoted individuals. By relying on past salary history, employers inevitably rely on past discrimination. This proposed legislation breaks the link between past discrimination and current and future pay, and gives women the chance to start a new job with a salary on a level playing field.

As inconspicuous as salary history inquiries seem, relying on salary history to make hiring and wage decisions cost women

WORKABLE (Apr. 26, 2017), <https://resources.workable.com/blog/gender-pay-gap>; Jen Hubley Luckwaldt, *Why Your Employer Should Care About Gender Pay Equity*, Payscale (Dec. 7, 2016), <https://www.payscale.com/career-news/2016/12/why-your-employer-should-care-about-gender-pay-equity>.

299. See Abbas, *supra* note 298.

300. See *id.*

money. Salary history can be based on any number of practices, intentionally or unintentionally discriminatory, that cause female workers to be paid less than male workers. A ban on salary history inquiries breaks the link in the chain between past systemic gender pay issues and allows employers to base decisions on bona fide occupational qualifications.

This proposed ban benefits employers in various ways. It is narrow enough to implement easily, cheaply, and quickly without some of the added costs and potential uncertainty associated with more expansive legislation. It also gives well-intentioned employers the opportunity to publicize compliance with the law and show an effort to reduce the gender pay gap. While equal pay advocates desire more comprehensive legislation, this proposed ban addresses a pressing obstacle in the way of equal pay, has a higher likelihood of passing Congress, and will be a case study for future legislation aimed at reducing, and eventually eliminating, the gender pay gap.