

# Gender Wage Inequality: Is More Legislation the Answer?

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## INTRODUCTION

Gender wage inequality is a pressing issue. In 2015, Patricia Arquette made an impassioned plea for wage equality during her acceptance speech at the Academy Awards.<sup>1</sup> She stated, “To every woman who gave birth, to every taxpayer and citizen of this nation, we have fought for everybody else’s equal rights. It’s time to have wage equality once and for all. And equal rights for women in the United States of America.”<sup>2</sup> The fight does not stop there. In 2016, members of the United States women’s national soccer team filed a federal complaint with the Equal Employment Opportunity Commission alleging they were paid close to 40% less than male players.<sup>3</sup> Furthermore, former President Barack Obama took a stance against wage inequality by proclaiming, “We must carry forward the work of the women who have come before us and ensure our daughters have no limits on their dreams, no obstacles to their achievements, and no remaining ceilings to shatter.”<sup>4</sup>

This Comment examines the unfortunate truth of gender wage inequality, focusing primarily on the California Fair Pay Act—one of the toughest equal pay laws in the United States.<sup>5</sup> Part I examines the gender pay gap and how it is calculated. Part II provides an overview of the different laws aimed at protecting women from wage inequality both at a federal and state level. Part III discusses the negative, unintended consequences that may arise from the California Fair Pay Act by closely examining the plain language of the legislation. Part IV analyzes the underlying factors that contribute to wage inequality between men and women. Finally, Part V concludes with three recommendations on how employers can help eliminate gender wage inequality throughout the United States.

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1. Alex Needham & Rory Carroll, *Patricia Arquette Uses Oscars Speech to Call for Equal Pay for Women*, GUARDIAN (Feb. 22, 2015, 10:51 PM), <http://www.theguardian.com/film/2015/feb/22/patricia-arquette-oscars-speech-equal-pay-women> [https://perma.cc/69QW-UBL2].

2. *Id.*

3. Shirley Leung, *US Soccer Complaint Brings Pay Equity the Spotlight it Deserves*, BOS. GLOBE (Apr. 1, 2016), <https://www.bostonglobe.com/business/2016/03/31/more-than-just-game-female-soccer-players-fight-for-equal-pay-for-women-everywhere/IBcXuPdgK6ZZldSNVcAgRP/story.html>.

4. Barack Obama, Presidential Proclamation, Women’s History Month, 2011 (Feb. 28, 2011), <https://www.whitehouse.gov/the-press-office/2011/02/28/presidential-proclamation-womens-history-month-2011> [https://perma.cc/C5PE-4M9H].

5. Patrick McGreevy & Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 6, 2015, 8:15 PM), <http://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html> [https://perma.cc/QG7R-V6CF].

## I. WHAT IS THE GENDER PAY GAP?

Women contribute vastly to the United States economy, yet they are paid significantly less than men.<sup>6</sup> In 2015, women working full-time in the United States were typically paid just 80% of what men were paid—a gender pay gap of 20%.<sup>7</sup> Statistics show that women are not expected to reach pay equality with men until 2059 when compared to the same rate of change observed between 1960 and 2015.<sup>8</sup> If changes continue at the slower rate seen since 2001, women will unfortunately not reach pay equality with men until 2152.<sup>9</sup>

So, how exactly is the gender pay gap calculated? The gender pay gap is the difference between the median earnings for women and men, usually reported as either the earnings ratio between men and women or as an actual pay gap.<sup>10</sup> In 2015, the median annual earnings for women and men working full-time and year-round in the United States were \$40,742 and \$51,212, respectively—a wage gap of \$10,470 per year in median earnings.<sup>11</sup> Based on those numbers, the annual earnings ratio was 80% ( $\$40,742/\$51,212$ ) and the pay gap was 20% ( $(\$51,212 - \$40,742)/\$51,212$ ).<sup>12</sup>

The gender pay gap has a detrimental impact on many women and their families. For example, 14% of women in the United States ages eighteen to sixty-four were living below the federal poverty line in 2015, compared to 11% of men.<sup>13</sup> Research shows that eliminating the gender pay gap could reduce the poverty rate for working women by 50%.<sup>14</sup> Retired women also receive less income from Social Security than retired men due to the fact that they are paid less during their working years.<sup>15</sup>

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6. See generally AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP (2017), [http://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The-Simple-Truth](http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth) [<https://perma.cc/NE3C-NMKV>] [hereinafter SIMPLE TRUTH].

7. *Id.* at 4 (citing BERNADETTE D. PROCTOR, JESSICA L. SEMEGA & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME AND POVERTY IN THE UNITED STATES: 2015 (2016) [hereinafter U.S. CENSUS BUREAU], <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> [<https://perma.cc/3CNG-9JG7>]).

8. SIMPLE TRUTH, *supra* note 6, at 4 (analyzing data from U.S. CENSUS BUREAU, *supra* note 7).

9. *Id.*

10. SIMPLE TRUTH, *supra* note 6, at 6.

11. *Id.* (citing U.S. CENSUS BUREAU, *supra* note 7).

12. SIMPLE TRUTH, *supra* note 6, at 6.

13. *Id.* at 4 (citing U.S. CENSUS BUREAU, *supra* note 7).

14. SIMPLE TRUTH, *supra* note 6, at 5 (citing HEIDI HARTMANN, JEFFREY HAYES & JENNIFER CLARK, INST. FOR WOMEN'S POLICY RESEARCH, HOW EQUAL PAY FOR WORKING WOMEN WOULD REDUCE POVERTY AND GROW THE AMERICAN ECONOMY (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C411.pdf> [<https://perma.cc/Q49K-7ZBY>]).

15. SIMPLE TRUTH, *supra* note 6, at 5 (citing JOCELYN FISCHER & JEFF HAYES, INST. FOR WOMEN'S POLICY RESEARCH, THE IMPORTANCE OF SOCIAL SECURITY IN THE INCOMES OF OLDER AMERICANS: DIFFERENCES BY GENDER, AGE, RACE/ETHNICITY, AND MARITAL STATUS (2013),

Finally, many families rely on the wages of women—40% of mothers with children under the age of eighteen are the primary or sole breadwinners for their family.<sup>16</sup> This data provides confirmation that gender wage inequality is prevalent in the workforce and has a negative impact on women throughout the United States.

## II. OVERVIEW OF FEDERAL AND STATE LAWS

### *A. Equal Pay Act of 1963*

In 1963, John F. Kennedy signed the Equal Pay Act into law, which prohibits wage discrimination by employers based solely on sex.<sup>17</sup> This federal law was the first step taken by the United States to achieve workplace equality for women.<sup>18</sup> Section 206(d)(1) of the Equal Pay Act states the following:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex . . . for equal work on jobs . . . which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .<sup>19</sup>

To prevail under the Equal Pay Act, an employee must show that the employer paid unequal wages to employees who performed equal work in the same establishment.<sup>20</sup> The Act also recognizes affirmative defenses.<sup>21</sup> For example, the employer may avoid liability by proving that the different wages are based on seniority, merit, quantity or quality of work production, or any factor that is not related to the employee's sex.<sup>22</sup> California has incorporated similar language in Section 1197.5 of the California Labor Code.<sup>23</sup>

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<https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/D503-ImportanceofSS.pdf> [<https://perma.cc/G4HC-PY2W>].

16. SIMPLE TRUTH, *supra* note 6, at 5 (citing SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS, THEN AND NOW (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf> [<https://perma.cc/S8ND-MMZ8>]).

17. Catherine Yourougou, *An Equal Pay History: The Fight Continues*. . . , NAT'L WOMEN'S L. CTR. (June 10, 2013), <http://www.nwlc.org/our-blog/equal-pay-history-fight-continues> [<https://perma.cc/P4TS-4N6X>].

18. *Id.*

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

20. *Id.*

21. *See id.*

22. *Id.*

23. CAL. LAB. CODE § 1197.5 (West 2017).

*B. Title VII of the Civil Rights Act of 1964*

The following year, Congress enacted Title VII of the Civil Rights Act of 1964, making it “unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”<sup>24</sup> Title VII applies to employers with fifteen or more employees.<sup>25</sup> However, Title VII is much broader than the Equal Pay Act because there is no requirement that the jobs between the employees be substantially equal, nor does Title VII require employees to work in the same establishment.<sup>26</sup> Both Title VII and the Equal Pay Act prohibit retaliation against an employee for opposing employment practices that discriminate based on compensation or for filing a discrimination claim.<sup>27</sup> California has adopted similar language to Title VII, which can be found in the California Fair Employment and Housing Act.<sup>28</sup>

*C. Lilly Ledbetter Fair Pay Act of 2009*

On January 29, 2009, former President Obama signed the Lilly Ledbetter Fair Pay Act to help eliminate gender wage discrimination.<sup>29</sup> The Act states, “[A]n unlawful employment practice occurs . . . when an individual becomes subject to a discriminatory compensation decision . . . , including each time wages, benefits, or other compensation is paid . . . .”<sup>30</sup> Former President Obama announced, “It is fitting that with the very first bill I sign—the Lilly Ledbetter Fair Pay Act—we are upholding one of this nation’s first principles: that we are all created equal and each deserve a chance to pursue our own version of happiness.”<sup>31</sup> The Act overturned the United States Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>32</sup>

The Act is named after Lilly Ledbetter, who filed suit against Goodyear Tire after discovering she was “paid significantly less than her

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24. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964).

25. 42 U.S.C. § 2000e(b) (2012).

26. *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 30, 2017), <http://www.eeoc.gov/eeoc/publications/fs-epa.cfm> [<https://perma.cc/HHK6-4BHZ>].

27. *Id.*

28. CAL. GOV’T CODE § 12940 (West 2016).

29. *Resources: Lilly Ledbetter Fair Pay Act*, NAT’L WOMEN’S L. CTR., <http://nwc.org/resources/lilly-ledbetter-fair-pay-act/> [<https://perma.cc/V4VA-6G38>].

30. Lilly Ledbetter Fair Pay Act of 2009 § 3(A), Pub. Law No. 111-2, 123 Stat. 5, 5–6 (2009).

31. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

32. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

male counterparts.”<sup>33</sup> In that case, “the Supreme Court ruled that employers could not be sued for an unlawful practice more than 180 days after the initial alleged discrimination had occurred.”<sup>34</sup> However, Ms. Ledbetter did not discover she “was being discriminated against until long after the 180-day statute of limitations had expired.”<sup>35</sup> The Lilly Ledbetter Act amended Title VII so that the statute of limitations for filing a wage discrimination lawsuit resets with each new paycheck affected by discriminatory action.<sup>36</sup> Similarly, the California Supreme Court has adopted the “continuing violation” doctrine that extends the statute of limitations for wage discrimination claims filed under the California Fair Employment and Housing Act.<sup>37</sup>

#### D. California Fair Pay Act

Governor Jerry Brown signed the California Fair Pay Act into law, which amended Section 1197.5 of the California Labor Code relating to private employment.<sup>38</sup> The Act is intended to increase the requirements for wage equality and transparency and is deemed one of the strictest equal pay laws in the United States.<sup>39</sup> Governor Brown proclaimed, “The inequities that have plagued [California] and have burdened women forever are slowly being resolved with this kind of bill.”<sup>40</sup> The Act became effective on January 1, 2016.<sup>41</sup>

The California Fair Pay Act goes a step further than Section 1197.5 of the California Labor Code.<sup>42</sup> The Act requires equal pay for “substantially similar work” rather than “equal work” as required in the California Labor Code.<sup>43</sup> In particular, the California Fair Pay Act prohibits an employer from paying employees of the opposite gender

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33. JOINT ECON. COMM., U.S. CONG., GENDER PAY INEQUALITY: CONSEQUENCES FOR WOMEN, FAMILIES AND THE ECONOMY 25 (2016), [https://www.jec.senate.gov/public/\\_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality----us-congress-joint-economic-committee.pdf](https://www.jec.senate.gov/public/_cache/files/0779dc2f-4a4e-4386-b847-9ae919735acc/gender-pay-inequality----us-congress-joint-economic-committee.pdf) [<https://perma.cc/2366-Y3ZR>].

34. *Id.*

35. *Id.* at 26.

36. *Id.*

37. *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 190 (Cal. 2001).

38. California Fair Pay Act, CAL. LAB. CODE § 1197.5 (2015); Mark E. Terman & Shavaun Adams Taylor, *Strict New California Fair Pay Act Will Become Effective January 1, 2016*, NAT'L L. REV. (Oct. 12, 2015), <http://www.natlawreview.com/article/strict-new-california-fair-pay-act-will-become-effective-january-1-2016> [<https://perma.cc/Z3KQ-RXVZ>].

39. Terman & Taylor, *supra* note 38.

40. McGreevy & Megerian, *supra* note 5.

41. Kathryn Higgins, *California Fair Pay Act Poses New Compliance Challenges*, GLOBAL LEGAL POST (Jan. 6, 2016, 9:06 AM), <http://www.globallegalpost.com/corporate-counsel/california-fair-pay-act-poses-new-compliance-challenges-6770161/> [<https://perma.cc/BD3N-8NT3>].

42. Terman & Taylor, *supra* note 38.

43. *Id.*

lower wages for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”<sup>44</sup> Additionally, the Act removes the “same establishment” requirement in the California Labor Code—employees may now bring a claim based on employee wage rates in other facilities and other job categories.<sup>45</sup>

Furthermore, the California Fair Pay Act increases the burden on employers who raise the “other factor” affirmative defense mentioned in the California Labor Code.<sup>46</sup> The employer must now prove the wage differential is based on a “bona fide factor other than sex, such as education, training, or experience.”<sup>47</sup> To do so, the employer is required to show that the factor is not the result of a gender-based differential in compensation, is related to the position, and is consistent with business necessity.<sup>48</sup> The burden then shifts back to the employee to show that there is some less discriminatory alternative that would serve the same business purpose without producing a wage differential.<sup>49</sup>

There are additional provisions of the California Fair Pay Act worth addressing. The Act seeks to decrease pay secrecy by prohibiting employers from enacting policies that prohibit employees from discussing wages with other employees, in the hope of increasing wage transparency.<sup>50</sup> The California Fair Pay Act also allows employees to recover wages and interest, plus an equal amount as liquidated damages, and attorney fees.<sup>51</sup> Moreover, the Act “prohibits discharge, discrimination[,] and retaliation of employees for asserting rights under the Act and permits a civil action seeking reinstatement, reimbursement for lost wages and interest, an equal amount as liquidated damages, lost benefits, and other equitable relief.”<sup>52</sup>

The state legislature has amended the California Fair Pay Act twice since its enactment. First, Senate Bill 1063 amended the Act to cover race and ethnicity.<sup>53</sup> And second, Assembly Bill 1676 amended the Act to prohibit wage differentials based solely on prior salary.<sup>54</sup> Both amendments came into effect January 1, 2017.<sup>55</sup> Assemblywoman Nora

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Sen. Bill 1063, Ch. 866, 2015–2016 Reg. Sess. (Cal. 2016).

54. Assem. Bill 1676, Ch. 856, 2015–2016 Reg. Sess. (Cal. 2016).

55. *Id.*; *see supra* note 53.

Campos, a major proponent of the bill stated, “When employers rely on prior salaries to set wages, they are often perpetuating unfair wage disparities in the job market, particularly for women and people of color.”<sup>56</sup> Employees will need to be paid what their position is worth, not what they take based on prior salary level.

### III. LEGAL EFFECTS OF THE CALIFORNIA FAIR PAY ACT

Will gender wage inequality be minimized or, better yet, eliminated now that the California Fair Pay Act has been enacted? Many scholars have examined the plain language of the Act to determine whether it will adequately prevent gender wage inequality throughout California.<sup>57</sup> Below is a closer examination of the language and unintended consequences that may result from the increase in legislation.

#### A. Adding Substantially Similar Work

As mentioned, the California Fair Pay Act requires equal pay for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”<sup>58</sup> This language is vague and ambiguous. California’s Division of Labor Standards Enforcement has attempted to clarify what “substantially similar work” means.<sup>59</sup> It defines “substantially similar work” to mean “work that is *mostly similar* in skill, effort, responsibility, and performed under similar working conditions.”<sup>60</sup> The Division of Labor Standards Enforcement further states:

Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job.

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56. *State and Local Roundup: Salary Focus of New Pay Equity Measures; California Passes Portable Retirement Law*, HR POL’Y ASS’N (Oct. 7, 2016), <http://www.hrpolicy.org/news/story/state-and-local-roundup-salary-focus-of-new-pay-equity-measures-california-passes-portable-retirement-law-12073> [https://perma.cc/6E6S-ZSQF].

57. *See, e.g.*, Allan G. King, *Potential Problems with the California Fair Pay Act*, LAW 360 (Oct. 8, 2015, 11:42 AM), <http://www.law360.com/articles/712208/potential-problems-with-the-california-fair-pay-act> [https://perma.cc/VU2W-SLA6] [hereinafter *Potential Problems*]; *see also* Sarah Ketterer, *The ‘Wage Gap’ Myth that Won’t Die*, WALL ST. J. (Sept. 30, 2015, 7:06 PM), <http://www.wsj.com/articles/the-wage-gap-myth-that-wont-die-1443654408>; Jennifer Brown Shaw & Julia C. Melnicoe, *Making Equal Pay More Equal?*, DAILY RECORDER (Oct. 2, 2015), <http://www.shawvalenza.com/pubs/Equal%20Pay%20Equal.PDF> [https://perma.cc/CU9E-9UHQ].

58. *See* Terman & Taylor, *supra* note 38.

59. STATE OF CAL. DEP’T OF INDUS. RELATIONS, CALIFORNIA EQUAL PAY ACT: FREQUENTLY ASKED QUESTIONS (Apr. 2016), [http://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm) [https://perma.cc/S2UG-RTDL].

60. *Id.* (emphasis added).

Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.<sup>61</sup>

The definitions provided by California's Division of Labor Standards Enforcement are very employee-focused and leave many questions unanswered from the perspective of the employer.

Although the Division of Labor Standards Enforcement has attempted to provide clarification, employers will likely have a difficult time determining what a jury will regard as "substantially similar work." For example, one job may be highly demanding in terms of technical skill but lack supervisory responsibilities; yet another job may require less technical skill but require an increase in supervisory responsibilities.<sup>62</sup> Are these jobs "substantially similar"? Under the California Fair Pay Act, employers will presumably have to pay both employees the same amount in compensation. Furthermore, this requirement will place a heavy burden on employers to demonstrate that their wages are comparable between related jobs. This may be difficult, if not impossible, for employers to demonstrate. The "substantially similar work" requirement will produce unpredictability, conflicting rulings, and more litigation.<sup>63</sup>

#### *B. Eliminating Same Establishment*

The California Labor Code previously required employers to show equal pay within the "same establishment."<sup>64</sup> As mentioned, the California Fair Pay Act completely removed this requirement, making it easier for employees to bring an equal pay claim.<sup>65</sup> However, this removal may result in employers being required to pay equally between employees in vastly different labor markets.<sup>66</sup> The legislation failed to take into account that the cost-of-living varies throughout the state of California. For example, a female employed as a software engineer in Chico, California may be paid less in compensation than a male software engineer employed by the same company located in Los Angeles, California.<sup>67</sup> The cost-of-living is likely much higher in Los Angeles than Chico. Nonetheless, it is unclear whether the courts will construe the California Fair Pay Act to mandate these labor market distortions.<sup>68</sup> Once again, the removal of this

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61. *Id.*

62. *See Potential Problems, supra* note 57.

63. *See id.*

64. *See Terman & Taylor, supra* note 38.

65. *See id.*

66. *Potential Problems, supra* note 57.

67. *See also id.*

68. *See id.*

“same establishment” requirement will lead to unpredictability and conflicting rulings in the courtroom.<sup>69</sup>

Richard Epstein, a professor at New York University Law School, explains that “the [California] Fair Pay Act adopts an administrative quagmire that makes it possible for dissatisfied employees to compare wages not only within firms, but also across different firms, where the comparisons are much more elusive, because prevailing wages and market conditions vary widely across the state.”<sup>70</sup> Epstein also explains that the California Fair Pay Act does not contain a provision allowing a successful employer to recover attorney fees from either the employee or the Division of Labor Standards Enforcement.<sup>71</sup> As a result, employers may be more likely to transfer work out of the state primarily to avoid violating, or even simply litigating, the California Fair Pay Act.<sup>72</sup>

### C. *Bona Fide Factors Other Than Sex*

The California Fair Pay Act requires employers to prove that a wage differential between employees is based on a “bona fide factor other than sex, such as education, training, or experience.”<sup>73</sup> Employers are required to show that the factor is not the result of a gender-based differential in compensation, is job-related to the position, and is consistent with a business necessity.<sup>74</sup> Unfortunately, California’s Division of Labor Standards Enforcement has failed to explain what a factor based on or derived from a sex-based differential means.<sup>75</sup> This will require employers to ensure that every penny of wage differential between employees is attributable to bona-fide differences in education, training, experience, and so on.<sup>76</sup> This is a heavy burden for employers, especially those employers who already have a substantial regulatory compliance budget.<sup>77</sup> The truth is that money would be better spent hiring more female employees or raising wages, specifically those wages of women, rather than justifying every penny of wage differential between employees.<sup>78</sup>

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69. *See Potential Problems*, *supra* note 57.

70. Richard A. Epstein, *Rethinking “Gender Discrimination” at Work*, HOOVER INST. (Oct. 5, 2015), <http://www.hoover.org/research/rethinking-gender-discrimination-work> [<https://perma.cc/WB7S-U67Y>].

71. *Id.*

72. *Id.*

73. *See Terman & Taylor*, *supra* note 38.

74. *See id.*

75. State of Cal. Dep’t of Indus. Relations, *supra* note 59.

76. Ketterer, *supra* note 57.

77. *Id.*

78. *Id.*

#### D. Prohibiting Retaliation

Finally, the California Fair Pay Act prohibits retaliation against employees who ask about or discuss wages with other employees.<sup>79</sup> However, this prohibition does not add anything to existing law because the California Labor Code and the California Fair Employment and Housing Act already prohibits this type of retaliation.<sup>80</sup> The National Labor Relations Act also prohibits adverse action against employees who discuss their wages.<sup>81</sup> The California Fair Pay Act adds another layer of confusion to the already existing laws.

### IV. FACTORS CONTRIBUTING TO THE GENDER PAY GAP

The California Fair Pay Act can result in unintended consequences that would be detrimental to both employers and female employees. To fully understand what is necessary to eliminate the wage inequality between men and women, an examination of the factors that contribute to this disparity is necessary. These factors are extremely complex.<sup>82</sup> In fact, the U.S. Bureau of Labor Statistics has explicitly noted that its analysis of wages by gender does “not control for many factors that can be significant in explaining earning differences.”<sup>83</sup> Regardless of the complexity, many economists have attempted to distinguish the most important factors that contribute to wage inequality throughout the United States.<sup>84</sup>

#### A. Inflexible Hours

Claudia Goldin, an economist at Harvard University, has attempted to uncover potential factors behind gender wage inequality.<sup>85</sup> She concluded the inequality is influenced by a single factor—the ability to

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79. See Terman & Taylor, *supra* note 38.

80. Shaw & Melnicoe, *supra* note 57.

81. See *id.*; National Labor Relations Act 29 U.S.C. §§ 151–69 (2012).

82. Vauhini Vara, *How California’s Fair Pay Act Will Help Women*, NEW YORKER (Oct. 7, 2015), <http://www.newyorker.com/business/currency/how-californias-fair-pay-act-will-help-women> [<https://perma.cc/5FPW-YTX6>].

83. U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2013 1 (2014), <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf> [<https://perma.cc/ZS6G-T6LN>].

84. *Id.*; see also Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* (The National Bureau of Economic Research, Working Paper No. 21913, Jan. 2016), <http://www.nber.org/papers/w21913> [<https://perma.cc/4R9N-8WUK>] [hereinafter *Extent, Trends, and Explanations*]; FRANCINE D. BLAU & LAWRENCE M. KAHN, ACADEMY OF MGMT. PERSPECTIVES, THE GENDER PAY GAP: HAVE WOMEN GONE AS FAR AS THEY CAN? 7–23 (2007), [http://web.stanford.edu/group/scspi/\\_media/pdf/key\\_issues/gender\\_research.pdf](http://web.stanford.edu/group/scspi/_media/pdf/key_issues/gender_research.pdf) [<https://perma.cc/F2M3-X9QP>] [hereinafter THE GENDER PAY GAP]; CLAUDIA GOLDIN, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091 (2014) [hereinafter GENDER CONVERGENCE].

85. GENDER CONVERGENCE, *supra* note 84.

work long and inflexible hours.<sup>86</sup> In other words, an employer is more willing to compensate an employee who can work long and inflexible hours over an employee who is unable to do so. Unfortunately, those employees are likelier to be men than women.<sup>87</sup> Goldin states:

The solution does not have to involve government intervention and it does not depend on the improvement of women's bargaining skills or heightened will to compete. Nor must men become more responsible in the home (although that would greatly help). What is needed are changes in how jobs are structured and remunerated, enhancing the flexibility of work schedules.<sup>88</sup>

Goldin suggests a change in the structure of the workforce. Employers should give employees more autonomy, encourage more flexibility in work schedules, discover ways to substitute for workers on irregular schedules, and reward work no matter when it is performed.<sup>89</sup> However, the California Fair Pay Act does nothing of the such.

*B. Occupational/Industrial Differences, Lack of Work Experience, and Unexplained Drivers*

Francine Blau and Lawrence Kahn, two economists at Cornell University, released a report in January 2016 quantifying the factors that contributed to wage inequality between men and women.<sup>90</sup> They found that differences between occupation and industry play an important role in the gender wage inequality.<sup>91</sup> Blau and Kahn concluded that occupational differences make up 32.9% of the wage disparity and industrial differences account for 17.6% of the wage disparity.<sup>92</sup> For example, men are more likely to work blue-collar jobs and to work in mining, construction, or durable manufacturing; women, on the other hand, are more likely to be in clerical or professional jobs and to work in the service industry.<sup>93</sup> Unfortunately, the jobs occupied mostly by women tend to pay less than those occupied mostly by men.<sup>94</sup>

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86. *Id.* at 1092.

87. *Id.*

88. CLAUDIA GOLDIN, *How to Achieve Gender Equality*, MILKEN INST. REV., Third Quarter 2015, at 24, 26.

89. Derek Thompson, *How to End the Gender Pay Gap Once and for All*, ATLANTIC (Mar. 4, 2014), <http://www.theatlantic.com/business/archive/2014/03/how-to-end-the-gender-pay-gap-once-and-for-all/284208/> [<https://perma.cc/NTE6-C3G7>].

90. *Extent, Trends, and Explanations*, *supra* note 84.

91. *Id.* at 11.

92. *Id.* at 72.

93. THE GENDER PAY GAP, *supra* note 84, at 11.

94. *Id.*

Moreover, Blau and Kahn found additional factors that contributed to gender wage inequality, such as women having less work experience than men, accounting for 14.1% of the wage disparity.<sup>95</sup> Women are more likely to leave the workforce after having children, which subsequently decreases their on-the-job experience.<sup>96</sup> Nonetheless, 38% of the gap remains unexplained.<sup>97</sup> This percentage could be the result of discrimination, women tending to work fewer hours than men, women being likelier to take time off while raising children, or a combination of the three.<sup>98</sup> Gender wage inequality may involve more complex factors than, for instance, discrimination on the part of employers. Therefore, imposing undue burdens on employers, as does the California Fair Pay Act, may not be an effective solution.

### *C. Psychological Traits, Socio-Cultural Norms, and Discrimination*

Mario Macis, an economist at Johns Hopkins University, has also examined factors that contribute to gender wage inequality. His research suggests that factors such as education, occupation, and industry explain only part of the wage inequality between men and women.<sup>99</sup> Gender differences in psychological traits also play a role in the wage inequality between men and women.<sup>100</sup> “For example, evidence suggests that women may be more risk-averse and less willing to negotiate and compete than men, which could explain both women’s lower wages and their underrepresentation in top positions in organizations.”<sup>101</sup> In addition to psychological traits, Macis has found that socio-cultural norms and dynamics (e.g., norms that traditionally assign women and men different roles in the household and society), as well as discrimination contribute to gender wage inequality.<sup>102</sup> Although the California Fair Pay Act may decrease discrimination in the workplace, it does not address psychological traits and socio-cultural norms.

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95. *Extent, Trends, and Explanations*, *supra* note 84, at 72.

96. *Id.* at 19.

97. *Id.* at 72.

98. *Id.* at 1.

99. Mario Macis, *Gender Differences in Wages and Leadership: Gender Gaps in Wages and Leadership Positions are Large—Why, and What can be Done About it?*, IZA WORLD OF LAB. 9 (Jan. 2017), <http://wol.iza.org/uploads/articles/323/pdfs/gender-differences-in-wages-and-leadership.pdf> [<https://perma.cc/5KUU-SSJX>].

100. *Id.*

101. *Id.* at 8.

102. *Id.* at 9.

## V. RECOMMENDATIONS

New legislation, such as the California Fair Pay Act, is not the answer. The Act will create unintended consequences that could be detrimental to both women and employers in the workplace.<sup>103</sup> In fact, employers may be reluctant to hire female employees because they fear being deemed liable under the California Fair Pay Act. Employers may also take their business outside of California to avoid the possibility of violating the Act. Finally, the drawback with legislating equal pay is that “it puts the onus on female employees to bring lawsuits showing that they have been discriminated against.”<sup>104</sup> Rather than encouraging new legislation, employers should take it upon themselves to establish new policies within the workplace. Below are proposed recommendations that will better eliminate gender wage inequality in California, as well as throughout the United States.

*A. Promotional Opportunities*

Research shows that female employees are less likely to get promoted than male employees—for every 100 women promoted, 130 men are promoted.<sup>105</sup> As a result, women may continue to wait for another promotion or perhaps seek employment elsewhere because they have become discouraged by the lack of promotional opportunities at their current workplace. If women seek employment elsewhere, they may have to spend multiple years establishing themselves at their new workplace before they are given another opportunity for a promotion. The battle to obtain a promotion is exhausting and could result in talented women leaving the workforce altogether because of the unfair struggle to keep up with their male counterparts.

To address this issue, employers should place more female employees in leadership roles, specifically in the role of management. Having an equal number of men and women in management roles will likely decrease or perhaps eliminate gender wage inequality throughout the workplace because the promotional decisions will no longer be made exclusively by men. The likelihood of female employees being promoted will increase because they will finally have the support and encouragement needed at the management level. Furthermore, women who hold leadership positions will have a louder voice and will be able to speak up

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103. *See supra* Part III.

104. Bourree Lam, *How Do We Close the Wage Gap in the U.S.?*, ATLANTIC (Mar. 8, 2016), <https://www.theatlantic.com/business/archive/2016/03/equal-pay/472407/> [https://perma.cc/MR9R-RJPW].

105. LEANIN.ORG & MCKINSEY AND CO., WOMEN IN THE WORKPLACE 2016, <https://womenintheworkplace.com/> [https://perma.cc/BM46-B777].

against gender wage inequality. Promoting more female employees to leadership positions will create a positive effect throughout the workplace and increase the retention of female employees.

### *B. Performance Evaluations*

Employers should aim to provide timely and effective performance evaluations to all employees. In doing so, female employees will have an opportunity to discuss any concerns they have regarding promotional opportunities and compensation within their workplace. Women will also be able to discuss their career goals with the evaluators and how the company can put their talents to the best use. In addition, performance evaluations provide employees with the ability to track their progress and compare feedback received by other evaluators. Consequently, female employees will become better aware of whether their employer is providing them with equal access to promotional and developmental opportunities. On the other hand, from the perspective of the employer, having detailed documentation of performance evaluations may be a defense in gender wage discrimination lawsuits.

However, employers must be cautious that evaluators are not biased against female employees. Employers should utilize a wide variety of evaluators in the review process to gain a complete picture of the employee's performance with less chance for bias. Moreover, employers should include more female evaluators in the review process to help identify and prevent gender bias. In doing so, female employees may feel more comfortable addressing any gender wage inequality simply knowing that another female is on the other side of the table. After receiving feedback, female employees may also be encouraged to reach out to those female evaluators for professional development advice. Therefore, employers should establish a policy that requires timely and effective performance reviews with equal representation from men and women.

### *C. Flexibility*

Another problem is the lack of flexibility for female employees, especially for those who have young children at home. Research shows that women are significantly more likely than men to leave the workforce or reduce their hours to care for children.<sup>106</sup> In fact, according to the American Association of University Women, 23% of mothers were out of the workforce and 17% were employed part-time within ten years after

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106. Kim Parker, *Despite Progress, Women Still Bear Heavier Load than Men in Balancing Work and Family*, PEW RES. CTR. (Mar. 10, 2015), <http://www.pewresearch.org/fact-tank/2015/03/10/women-still-bear-heavier-load-than-men-balancing-work-family/> [<https://perma.cc/PQ3Y-B7NQ>].

graduating from college.<sup>107</sup> In contrast, only 1% of fathers were out of the workforce and only 2% were employed part-time.<sup>108</sup> Unfortunately, stepping out of the labor force even temporarily has a significant impact on the earning potential of women.

Flexibility is a necessity for many female employees. However, women may be viewed as inferior employees if, for example, they occasionally leave work early to take their children to doctor appointments or go on a three-month maternity leave. Female employees may fear that taking care of family obligations will result in missed opportunities or fewer promotions, or perhaps negatively impact their performance reviews. Therefore, skilled women may choose to leave their current workplace because of the lack of flexibility, ultimately costing the employer time and money in hiring a new employee. Women tend to gravitate toward jobs that offer greater flexibility than those chosen by men; however, those jobs typically pay less.<sup>109</sup>

Modern technology can promote flexibility in the workplace. Women can work remotely and constantly stay connected with other employees by using technology, such as wireless internet, video conferencing, and VPN networks. Employers should utilize this effective technology to provide women with the flexibility needed to tend to family obligations and pursue a career simultaneously. Employers also should be cautious that, if employees do utilize this arrangement, doing so would not negatively impact their performance reviews or result in fewer promotional opportunities. It is important that employers view this flexible work arrangement as an accepted policy throughout the workplace.

#### CONCLUSION

There are a variety of federal and state laws aimed at eliminating gender wage inequality.<sup>110</sup> However, the California Fair Pay Act does not add much to the existing law and may have unintended consequences.<sup>111</sup> Rather than encouraging new legislation, employers should implement the recommendations advocated for in this Comment to better protect female

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107. SIMPLE TRUTH, *supra* note 6, at 19 (citing Judy Goldberg Dey & Catherine Hill, *Behind the Pay Gap*, AAUW EDUC. FOUND. (2007), <https://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> [<https://perma.cc/SU3F-MGYL>]).

108. SIMPLE TRUTH, *supra* note 6, at 19 (citing Judy Goldberg Dey & Catherine Hill, *Behind the Pay Gap*, AAUW EDUC. FOUND. (2007), <https://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> [<https://perma.cc/SU3F-MGYL>]).

109. Maria Canon & Limor Golan, *Gender Pay Gap May Be Linked To Flexible and Irregular Hours*, REGIONAL ECONOMIST, July 2016, at 10.

110. *See supra* Part II.

111. *See supra* Part III.

employees from gender wage inequality.<sup>112</sup> Employers should place more women in management positions so other female employees have the support needed when seeking promotional opportunities.<sup>113</sup> Employers should also ensure they are providing their employees with timely and effective performance reviews so female employees know their expectations and whether they are meeting them.<sup>114</sup> Finally, and most importantly, employers should provide flexible work arrangements so female employees can work remotely if needed.<sup>115</sup>

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112. *See supra* Part V.

113. *See id.*

114. *See id.*

115. *See id.*