



THE PAY GAP, THE GLASS CEILING, AND PAY BIAS:

MOVING FORWARD 50 YEARS AFTER THE EQUAL PAY ACT

Prepared for the ABA Section of Labor and Employment Law Annual
Labor and Employment Law Conference 2013*



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I. Introduction

When the Equal Pay Act (“EPA”) became law in 1963, women earned approximately 59 cents for every dollar a man earned.¹ Women today are earning roughly 80 cents on the dollar.² While the past 50 years have seen extraordinary progress for women, the persistence of a 20 percent gender pay gap, coupled with the rapidly growing population of women in the workforce, has caused the government to reinvigorate its efforts to enforce and strengthen pay discrimination laws. While eliminating pay bias is important, focusing heavily on perceived employer bias obscures a much more complex web of factors contributing to the problem of pay differences between men and women.

Indeed, the *pay gap* measures only the difference in average earnings between all men and all women; it is not a proxy for *pay bias*—i.e., the failure to pay women equal pay for equal work.³ The pay gap says nothing about gender disparities within specific professions or positions. It fails to account for differences in chosen profession, education, work patterns, and work experience, among other factors.⁴ The pay gap is also driven in large part by the *glass ceiling*—the barrier keeping qualified women from rising to the upper rungs of the professional ladder.⁵ Women remain significantly underrepresented among the top ranks of business, finance, academia, and government.⁶ Studies consistently show that the

¹ Dep’t of Labor, *Fact Sheet: Closing the Gender Wage Gap*, EQUAL PAY TOOL KIT, <http://www.dol.gov/wb/equal-pay/WH-Equal-Pay-fact-sheet.pdf> (last visited Aug. 30, 2013).

² See, e.g., Ariane Hegewisch & Hannah Liepmann, Inst. for Women’s Policy Research, IWPR #C350a, *The Gender Wage Gap by Occupation* (Apr. 2010), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation>.

³ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-10, GENDER PAY DIFFERENCES: PROGRESS MADE, BUT WOMEN REMAIN OVERREPRESENTED AMONG LOW-WAGE WORKERS 2 (Oct. 2011) (hereafter, GAO 2011 Study).

⁴ Hegewisch & Liepmann, *supra* note 2. See also CONSAD Research Corporation, An Analysis of the Reasons for the Disparity in Wages Between Men and Women, Final Report Prepared for U.S. Dep’t of Labor (Jan. 2009), available at <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf> (hereafter CONSAD Report). See generally National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS, Tables 313-334, available at http://nces.ed.gov/programs/digest/d11/tables_3.asp (last visited Sept. 4, 2013) (reflecting disparities in number of men’s and women’s degrees in various areas of study).

⁵ Fed. Glass Ceiling Comm’n, *A Solid Investment: Making Full Use of the Nation’s Human Capital* (Nov. 1995), available at <http://www.dol.gov/dol/aboutdol/history/reich/reports/ceiling2.pdf>. The term glass ceiling first appeared in a 1984 article in *Adweek* about magazine editor Gay Bryant’s decision to change jobs from editor of *Working Woman* to editor of *Family Circle*. She explained, “Women have reached a certain point -- I call it the glass ceiling. They’re in the top of middle management and they’re stopping and getting stuck. There isn’t enough room for all those women at the top. Some are going into business for themselves. Others are going out and raising families.” Nora Frenkiel, *The Up-and-Comers; Bryant Takes Aim At the Settlers-In*, ADWEEK. (Mar. 1984). The term was ultimately formalized when Title II of the Civil Rights Act of 1991 created a 21-member, bipartisan Federal Glass Ceiling Commission. In its November 1995 report, the Commission defined glass ceiling as “the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements.” Fed. Glass Ceiling Comm’n at 4.

⁶ See, e.g. Bureau of Labor Statistics, *Table 11: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity 2012*, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, <http://www.bls.gov/cps/cpsaat11.pdf> (last visited Aug. 28, 2013). See also Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007) (noting women hold 25 percent of upper-level state governmental positions; 16 percent of congressional seats; less than 25 percent of top academic positions; 2 percent of Fortune 500 CEOs; less than 20 percent of law firm partners; and 16 percent of board directors and corporate officers); Frank Bass, *Shining Shoes May Be Best Way Wall Street Women Outearn Men*, BLOOMBERG (Mar. 16, 2012, 1:01 PM), <http://www.bloomberg.com/news/2012-03-16/shining-shoes-best-way-wall-street-women-outearn-men.html> (one reason women in the financial sector earn less than men is the fact that many work in lower-paying positions—public finance rather than trading, for example); Catalyst, Inc., *Catalyst Quick Take: Women in Management in the United States, 1960-Present*. CATALYST KNOWLEDGE CENTER

concentration of women in low-paying jobs, and occupational selections—the actual position a woman selects within an industry—are two key drivers of the pay gap.⁷ Studies also demonstrate that while women make less money than men, they also work fewer hours each year, have more work interruptions, and spend more time doing unpaid work than their male counterparts. These work patterns, which contribute to lower wages for women, also inhibit women’s rise to highest levels of their professions—particularly given the increasing proportion of high-earning individuals who work 50 hours per week or more.⁸ Tackling the pay gap means understanding the glass ceiling as well.

Instead of a “crack down”⁹ on employers—which presumes that discrimination is the primary cause of the pay gap and the glass ceiling—more time should be spent understanding the problem. This is not to suggest that bias does not exist or diminish the importance of eliminating it. However, it is equally important to recognize that women are making life and occupational decisions based on competing demands for their time and other personal, individualized interests, many of which are industry-specific. Whether these decisions are voluntary “choices” or fueled by implicit or overt bias is extraordinarily difficult to discern and varies greatly from woman to woman, employer to employer, and job to job.

Therefore, solutions cannot fit into a one-size-fits-all mold. Placing blame on employers and focusing narrowly on antidiscrimination legislation ignores a broader problem based on deeply entrenched societal assumptions related to how we collectively define our roles as women and men. However, dictating what roles any given person should play at any given time extends well beyond the purview of legislators, judges, and juries. Addressing the pay gap and the glass ceiling requires engaging in a social dialogue to find innovative and creative solutions to reconcile various important competing interests for employees and businesses alike. A viable solution demands a holistic approach.

II. The History of the EPA and Pay Bias Laws

On June 10, 1963, President Kennedy signed the EPA and pointed to the pay gap as the driving force: “[T]he average woman worker earns only 60 percent of the average wage for men Our economy today depends upon women in the labor force. . . . It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children . . . and for the protection of the family unit.”¹⁰

(Mar. 27, 2013), <http://www.catalyst.org/knowledge/women-management-united-states-1960-present#footnote5og5t98q>.

⁷ See Section IV, *infra*.

⁸ Sylvia Ann Hewlett & Carolyn Buck Lee, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV. (Dec. 2006), <http://hbr.org/2006/12/extreme-jobs-the-dangerous-allure-of-the-70-hour-workweek/ar/1>.

⁹ During his January 27, 2010 State of the Union address, President Obama pledged “to crack down on violations of equal pay laws—so that women get equal pay for an equal day’s work.” The White House Office of the Press Sec’y, *Remarks by the President in the State of the Union Address* (Jan. 27, 2010, 9:11 PM), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

¹⁰ 21 Cong. Q. 978 (1963).

While the EPA was passed in an effort to narrow the pay gap, its focus was targeted at pay differences between men and women doing the same job. As the U.S. Supreme Court explained in *Corning Glass Works v. Brennan*:

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of “many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman, even though his duties are the same.”¹¹

Under the EPA, women have the right to sue their employers for disparate pay for equal work.¹² The EPA also gives the Equal Employment Opportunity Commission (“EEOC”) enforcement authority over EPA violations, whereby the government can initiate directed investigations of employers and pursue claims even if individual workers are reluctant to pursue their rights under the EPA.¹³

To prevail on an EPA claim, a plaintiff must prove that she received unequal pay for performing a job that requires (1) equal skill; (2) equal effort; (3) equal responsibility, and which is (4) performed under equal working conditions to that of a male comparator’s more highly compensated job.¹⁴ In evaluating whether two jobs are equal under the EPA, “equal means substantially equal.”¹⁵ Indeed, Congress chose the word “equal,” not the word “comparable,” in the language of the statute.¹⁶ Accordingly, courts consider whether two positions share a “common core of tasks,” rather than looking superficially at job titles or descriptions.¹⁷ Being similar, or comparable, is not enough; the relevant inquiry is whether work is equal.¹⁸ Employers can defeat an EPA claim by showing that pay disparities are based on seniority, merit, quantity or quality of production or “a factor other than sex.”¹⁹ If the employer proves one of these affirmative defenses, the burden then shifts back to the

¹¹ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), *citing* S. Rep. No. 88-176, at 1 (1963).

¹² 29 U.S.C. § 206(d)(1) (2012).

¹³ 29 U.S.C. §§ 209, 211 (Fair Labor Standards Act provisions authorizing investigations and enforcement of the Equal Pay Act. All functions related to enforcement and administration of 29 U.S.C. § 206(d) (The Equal Pay Act), including but not limited to the functions related to administration and enforcement formerly vested in the Secretary of Labor, Wage and Hour Division of the Department of Labor were transferred to the EEOC by Section 1 of the 1978 Reorg Plan No. 1, 43 Fed. Reg. 19807 (May 9, 1978), 92 Stat. 3781, set out in appendix 1 to Title 5, Government Organization and Employees. *See also* EEOC Regulations at 29 C.F.R. 1620.30 (2013).

¹⁴ 29 U.S.C. § 206(d)(1) (2012).

¹⁵ *See, e.g., Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970); *see also Wheatley v. Wicomico Cnty.*, 390 F.3d 328, 332 (4th Cir. 2004).

¹⁶ *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973); *Waters v. Turner, Wood and Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989); *EEOC v. Madison Community Unit School Dist.*, 818 F.2d 577, 582 (7th Cir. 1987); *Wheatley, supra* note 15, at 333.

¹⁷ *See, e.g., Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006) (“In order to determine whether or not the two jobs are equal, we look to whether the jobs have a common core of tasks, i.e., whether a significant portion of the two jobs is identical.” (internal quotation marks omitted)).

¹⁸ *See id.; Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 923 (7th Cir. 2000) (“proof that the two jobs are of the same (or comparable) value . . . gets the plaintiff nowhere. To succeed under the Equal Pay Act the plaintiff must establish that the positions entail substantially equal tasks, performed under similar conditions.”).

¹⁹ 29 U.S.C. § 206(d)(1).

employee to show that the employer’s proffered reasons for the wage difference are actually a pretext for discrimination.²⁰

Shortly after Congress passed the EPA, it passed Title VII of the Civil Rights Act of 1964, which provides more comprehensive protection against discrimination. It prohibits sex discrimination in hiring, promotion, or “with respect to the compensation, terms, conditions, and privileges of employment”²¹ The law prohibits discrimination in the form of sexual harassment, hostile work environment, and pregnancy discrimination.²² It also forbids employers “to limit, segregate, or classify his employees” in a way that could adversely affect their status at work, or deprive them of employment opportunities.²³ Title VII has a much broader impact on pay discrimination claims because it is not limited to claims of equal pay for “equal work.” Rather, an employee’s Title VII claim can survive even when no member of the opposite sex holds an equal but higher paying job, provided that the pay differential is not attributable to seniority, merit, quantity or quality of production, or “any other factor other than sex.”²⁴ However, Congress did incorporate into Title VII the affirmative defenses available under Section 206(d) of the EPA.²⁵

Executive Order 11246 also prohibits discrimination by any company with a federal contract or subcontract exceeding \$10,000. EO 11246 requires contractors to take affirmative steps to ensure equal employment opportunity and establishes rigorous record keeping requirements about employment actions.²⁶ The Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”), which administers EO 11246, also investigates employers pursuant to Title VII—which means OFCCP audits are not limited by the scope of the EPA.²⁷

²⁰ See *Ryduchowski v. Port Authority of New York and New Jersey*, 203 F.3d 135, 142 (2d Cir. 2000).

²¹ 42 U.S.C. § 2000e-2(a)(1) (2012).

²² 42 U.S.C. § 2000e, et seq. (2012).

²³ 42 U.S.C. § 2000e-2(a)(2) (2012).

²⁴ *Washington Cnty. v. Gunther*, 452 U.S. 161, 168 (1981). Plaintiffs’ counsel are also interested in asserting disparate impact claims under Title VII for alleged discriminatory compensation decisions that are made pursuant to company policies and/or practices that adversely impact women and are not job related. They argue that compensation decisions are “personnel selection procedures” that must be developed with the principles of job relatedness and validity, as set forth by the Society for Industrial and Organizational Psychology (“SIOP”). See SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, INC., PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES at 3 (4th ed. 2003) (“Selection procedures refer to any procedure...used to make a personnel decision” which includes “employment-related decisions to...compensate.”) Plaintiffs’ counsel further argue that even if such compensation systems are valid and job related, the SIOP Principles suggest that employers should “search for alternate procedures...that are substantially equally valid and reduce subgroup differences.” *Id.* at 50.

²⁵ 42 U.S.C. § 2000e-2(h) (2012).

²⁶ Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965), 12935 3 C.F.R. 339 (1964-1965).

²⁷ OFCCP DIR 2013-03 (Feb. 28, 2013), available at <http://www.dol.gov/ofccp/regs/compliance/directives/Dir307508c.pdf>.

III. The Government “Crackdown”²⁸ to Address the Pay Gap

A. Focus on Bias

President Obama ran for election in 2008, in part, on a promise to substantially strengthen the nation’s existing antidiscrimination laws regarding pay bias against women to further narrow the pay gap. He partially delivered on that promise when in 2009 he signed into law, as his first piece of legislation, the Lilly Ledbetter Fair Pay Act amending Title VII.²⁹ However, subsequent efforts at enacting additional antidiscrimination pay legislation stalled. Notably, the Paycheck Fairness Act (“PFA”)—a proposed amendment to the EPA—fell just two votes short of the sixty required to proceed on a cloture vote in the Senate.³⁰ The Obama Administration then shifted its efforts to more aggressive enforcement of existing pay discrimination laws and regulations by pushing federal agencies to dramatically step up their class and “systemic discrimination” enforcement efforts.³¹

To harness existing laws, the President created the National Equal Pay Task Force (“Task Force”) in February 2010 and tasked it with coordinating efforts of the EEOC, Department of Justice (“DOJ”), Department of Labor (“DOL”), and Office of Personnel Management (“OPM”).³²

The White House issued its most recent Task Force report in June 2013. The report, titled *Fifty Years After the Equal Pay Act*, provides a broad overview of pay issues, including the pay gap and pay bias.³³ The report includes a lengthy discussion of the economics, politics, and demographics surrounding pay issues in the workplace.³⁴ In discussing “the way forward,” the report focuses heavily on the assumption that discrimination is the primary driver of the remaining pay gap. It reiterates the government’s determination to better enforce existing civil rights laws, in part through encouraging the EEOC, OFCCP, and the DOJ to collaborate on enforcement work, and by collecting employee data in an effort to expose alleged discrimination. The report also reaffirms a pledge President Obama took before taking office to pass the PFA, purportedly to “address the current loopholes in existing law” and “strengthen remedies for pay discrimination.”³⁵ In addition, the report highlights the need to “break down discriminatory barriers that exclude women from traditionally male-

²⁸ See Mona Sutphen, *Putting Washington at the Service of the Middle Class*, THE WHITE HOUSE RURAL COUNCIL (Jan. 27, 2010, 10:23 PM), <http://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class> (“We’re going to crack down on violations of equal pay laws—so that women get equal pay for an equal day’s work.”).

²⁹ Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

³⁰ Govtrack.us, S. 3772 (111th Congress, 2009-2010): Paycheck Fairness Act, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s3772>. (last visited Aug. 28, 2013).

³¹ See Nat’l Equal Pay Task Force, EQUAL PAY TASK FORCE ACCOMPLISHMENTS: FIGHTING FOR FAIR PAY IN THE WORKPLACE (April 2012), available at http://m.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf.

³² *Id.*

³³ See generally The White House Report, White House National Equal Pay Task Force, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESS THE PAST, TAKING STOCK OF THE FUTURE 5-23 (June 2013), available at http://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf.

³⁴ See generally Nat’l Equal Pay Task Force, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESS THE PAST, TAKING STOCK OF THE FUTURE 5-23 (June 2013), available at http://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf.

³⁵ *Id.* at 34.

dominated occupations, which pay more than traditionally female occupations.”³⁶ Finally, the report briefly mentions the need to address “the problem of discrimination based on stereotypes about the proper role of women and mothers.”³⁷ Employer bias is the common, almost exclusive theme of the report.

B. The Results of the Government’s Enforcement Efforts Suggest Factors Other Than Bias Are at Play

The government’s theme, however, is somewhat inconsistent with the results of the EEOC’s efforts to find and eliminate pay bias since 1978 when the EEOC was granted authority to be the federal government’s lead agency for enforcing the country’s federal antidiscrimination laws. In the first decade after the EPA was passed in 1963, there was substantial enforcement by the DOL’s Wage & Hour Division.³⁸ However, since the EEOC began enforcing the EPA, there has been virtually no significant government litigation or findings of employer bias under the EPA. During the 25 year period from 1985 to 2010, there are no reported cases arising out of EPA-directed investigations by the EEOC resulting in a decision on the merits.³⁹

The government’s efforts and results since the White House established the Task Force in January 2010 show a similar lack of enforcement under the EPA. According to the 2013 Task Force report, the EEOC recovered “over \$78 million in relief for victims of sex based wage discrimination through administrative enforcement.”⁴⁰ The report offers no other detail. It fails to explain whether the relief addressed actual pay bias—that is, unequal pay for equal work based on an employee’s gender—or other more nuanced forms of discrimination, since it fails to identify which statutes were allegedly violated (e.g., EPA, Title VII, ADEA or ADAAA).

Further inquiry to the EEOC suggests that its recent administrative enforcement efforts were not based on the EPA. In response to a FOIA request filed by the authors on November 29, 2012 regarding the EEOC’s pursuit of EPA matters, the EEOC responded with a series of charts, reprinted below. The first three charts report on individual charges filed under the EPA only, Title VII only, and charges where an EPA charge included another statute, e.g., EPA and Title VII. Only a small percentage of the pay charges resulted in an EEOC cause finding and even fewer were resolved or litigated. Perhaps of greater import, given the focus and assumptions about employer bias by the Equal Pay Task Force, is EEOC’s own enforcement efforts in pursuing directed investigations as described in the

³⁶ *Id.*

³⁷ *Id.* at 35.

³⁸ See Albert H. Ross & Frank V. McDermott, Jr., *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. L. REV. 1, 10 (1974), available at <http://lawdigitalcommons.bc.edu/bclr/vol16/iss1/1>.

³⁹ See Maurice Wexler, et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. 1 349, 383 (2009-2010).

⁴⁰ See Nat’l Equal Pay Task Force, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESS THE PAST, TAKING STOCK OF THE FUTURE 33 (June 2013), available at http://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf. This seems insubstantial for these years of efforts by the EEOC since the Task Force was created.

last chart. According to the EEOC, it has increased its directed investigations in the past two years (a total of 26) but has found cause only once.

Equal Employment Opportunity Commission EEOC Receipts FY2009-FY2012

Total Charges Alleging EPA				
	FY2009	FY2010	FY2011	FY2012
Total Receipts	999	1,124	972	1,150
Cause	72	105	67	39
Settlement	27	43	17	8
Sent to Litigation	22	11	13	2

Total Charges under Title VII Alleging Wages on the Basis of Gender				
	FY2009	FY2010	FY2011	FY2012
Total Receipts	2,474	2,467	2,333	4,091
Cause	152	132	148	56
Settlement	46	31	22	14
Sent to Litigation	38	22	26	4

Combined EPA& Title VII/Gender/Wages				
	FY2009	FY2010	FY2011	FY2012
Total Receipts	2,679	2,726	2,544	4,300
Cause	164	178	159	72
Settlement	53	59	26	19
Sent to Litigation	99	100	82	34

Equal Employment Opportunity Commission EEOC Charge Receipts FY2009-FY2012

Directed EPA Investigations Breakdown by Fiscal Year

	FY2009	FY2010	FY2011	FY2012
Total Receipts	2	1	11	15
Cause				1
Settlement				
Sent to Litigation				1

The White House report offers slightly more detail on OFCCP's enforcement results. During the same period (January 2010 through March 2013), OFCCP "reviewed the pay practices of over 14,000 business . . . and *closed more than 80* compliance evaluations with

financial settlements remedying pay discrimination on the basis of gender and race.”⁴¹ Put differently, despite having the authority to audit government contractors based on the much broader prohibitions of Title VII, OFCCP found pay bias in less than one percent of the contractor compliance reviews it has conducted since creation of the President’s National Equal Pay Task Force.

Thus, despite a strong push from the President, the results of the Task Force agencies in the past three years do not reveal the number of violations that one would expect if employer pay bias were currently the overwhelming driving force behind the gender pay gap in the American workplace. This is not to say that there is no pay bias. But it at least suggests that the pay gap warrants a look at other potential causes.⁴²

IV. Understanding the Complex Factors Contributing to the Pay Gap and the Glass Ceiling

Studies from around the world by neutral, independent sources consistently show that occupational choice, work patterns, demographic characteristics, and other social factors bear significantly on the pay gap and the glass ceiling.

A. Studies Reflect That Women’s Decision Making Plays a Key Role and the Impact of Bias Is Unclear

The U.S. General Accounting Office (“GAO”) has conducted various studies over the past decade highlighting several factors contributing to the pay gap. A 2003 study concluded that differences in work patterns between men and women are key factors accounting for the earnings difference.⁴³ The study reported that women had, on average, 12 years of work experience while men had 16 years.⁴⁴ It found further that women worked 472 fewer hours every year than men.⁴⁵ A larger proportion of women worked part-time, and women spent three times more time out of the workforce each year than men.⁴⁶ Additional significant factors included occupational choice, job tenure, and demographic characteristics including marital status.⁴⁷ Because the study relied on broad job categories that fail to capture the many differently compensated positions within a particular occupation—a surgeon

⁴¹ *Id.* at 33 (emphasis added).

⁴² It bears mentioning that in the EEOC’s initial draft of its Strategic Enforcement Plan (“SEP”) for 2012-2016, which it released in September 2012, equal pay did not make the EEOC’s list of five national priorities. *See* U.S. Equal Emp’t Opportunity Comm’n, *Draft Strategic Plan For Fiscal Years 2012 – 2016*, http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16_DRAFT.cfm (last visited Aug. 28, 2013). Not until the EEOC released the final version of the SEP in December 2012 did equal pay become the sixth priority. U.S. Equal Emp’t Opportunity Comm’n, *Strategic Enforcement Plan FY 2013 – 2016*, <http://www.eeoc.gov/eeoc/plan/sep.cfm> (last visited Aug. 28, 2013).

⁴³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 04-35, WOMEN’S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN’S AND WOMEN’S EARNINGS 10 (Oct. 2003) (hereafter, 2003 GAO Study).

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 13.

⁴⁷ *Id.* at 10.

compared with a family physician, for example—the GAO was not able to quantify the impact of those individual choices.⁴⁸

Ultimately, while the study highlighted many observable, quantifiable differences between men and women in the workplace that contribute significantly to the pay gap, it acknowledged that there were “inherent limitations in the survey data and in statistical analysis.”⁴⁹ Thus, a portion of the pay gap cannot be explained, particularly the extent to which discrimination plays a role.⁵⁰ The study emphasized that it is difficult to evaluate this unexplained portion “without a full understanding of what contributes to this difference.”⁵¹ For instance, “some women trade off advancement or higher earnings for a job that offers flexibility to manage work and family responsibilities.”⁵² It is possible that “an earnings difference may result from discrimination in the workplace or subtler discrimination about what types of career or job choices women can make.”⁵³ However, “it is difficult, and in some cases may be impossible, to precisely measure and quantify individual decisions and possible discrimination.”⁵⁴ And, “[b]ecause these factors are not readily measurable, interpreting any remaining earnings difference is problematic.”⁵⁵

The 2010 GAO study further highlights the individualized nature of the inquiry behind the pay gap for professional workers. The study, which focused on data for management-level workers from 2000 through 2007, reported that while female managers earned less than their male counterparts, they were also younger, less educated, and more likely to work part-time.⁵⁶ The study did not take into account a manager’s level of responsibility or years of experience,⁵⁷ nor did it appear to consider starting salary, or time out of the workforce. The GAO also employed a broad definition of manager, including, for example, chief executives and parking garage managers within the same category.⁵⁸ The GAO explained that its analysis “neither confirms nor refutes the presence of discriminatory practices.”⁵⁹

The following year, the GAO published a similar study focusing on low-wage earners. The GAO reported that low-earning women received, on average, 86 percent of what their male counterparts received.⁶⁰ Like the 2003 study, the 2011 report noted the significance of occupational choice, education, marriage, children, and hours worked per year in the wage gap between men and women.⁶¹ In particular, single women with children had among the

⁴⁸ *Id.* at 54-55.

⁴⁹ *Id.* at 3, 16.

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-892R, WOMEN IN MANAGEMENT: ANALYSIS OF FEMALE MANAGERS’ REPRESENTATION, CHARACTERISTICS, AND PAY 10 (Sept. 20, 2010) (hereafter, GAO 2010 Study).

⁵⁷ *Id.* at 29.

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 4.

⁶⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-10, GENDER PAY DIFFERENCES: PROGRESS MADE, BUT WOMEN REMAIN OVERREPRESENTED AMONG LOW-WAGE WORKERS 5 (Oct. 2011) (hereafter, GAO 2011 Study).

⁶¹ *Id.*

lowest incomes of any group studied.⁶² The study did not consider the impact of work experience on pay, nor did it analyze wages within specific occupations.⁶³ As in its prior studies, the GAO noted that its analysis “cannot determine whether differences in pay were due to worker choice or discrimination.”⁶⁴

Echoing many of the GAO’s findings, a 2009 CONSAD Research Corporation report concluded that many of the factors that contribute to the gender wage gap “relate to differences in the choices and behavior of women and men in balancing their work, personal, and family lives.”⁶⁵ However, “[i]t is not possible to produce a reliable quantitative estimate of the aggregate portion of the raw gender wage gap for which the explanatory factors that have been identified account.”⁶⁶ This, again, reinforces the conclusion that the impact of discrimination on the pay gap remains unexplained.⁶⁷

Despite this uncertainty, the National Equal Pay Task Force’s June 2013 report assumes that the unexplained portion of the gap must be attributable to employer bias. The report acknowledges that there is “[a] widely debated contention about the pay gap” suggesting that “it is attributable to women’s choices to put family ahead of work.”⁶⁸ But it quickly dismisses this contention: “Regardless of whether work hours could explain some portion of the wage gap,” the gap “exists for women working full time as well as part time, and begins when women are first employed, which is often well before they have children.”⁶⁹ Furthermore, research “shows there is a ‘motherhood penalty’ for female workers with children, stemming from stereotypes and biases about working mothers.”⁷⁰ But even the research studies relied upon by the Task Force recognize that the data is inherently limited because it does not measure how much of the pay gap is due to bias versus other contributing factors.

Consider, for instance, the 2012 study conducted by the American Association of University Women (AAUW), which found that just one year after graduating from college, women working full-time already earn less than their male counterparts.⁷¹ The study explains that several of the same factors described in the GAO and OECD studies above contribute to the early pay gap, including college major, number of hours worked, and occupational selection.⁷² After controlling for these factors, the study found a remaining seven percent gap that is “unexplained.”⁷³ Consistent with the GAO and OECD studies, this study also

⁶² *Id.* at 10.

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 4.

⁶⁵ CONSAD Report, *supra* note 4, at 15.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Nat’l Equal Pay Task Force, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESS THE PAST, TAKING STOCK OF THE FUTURE 28 (June 2013), *supra* note 34.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Judy Goldberg Dey & Catherine Hill, Am. Assoc. of Univ. Women Educ. Found., BEHIND THE PAY GAP 1 (2007) available at <http://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf>.

⁷² *Id.* at 1-2.

⁷³ *Id.* at 2.

reports that “[s]ince discrimination is difficult to measure directly—and other factors may be at play—we do not know how much of the unexplained gap is due to discrimination.”⁷⁴ The authors speculate that “because gender discrimination is so common, it is probably responsible for at least part of it.”⁷⁵ But they have no specific evidence to accurately quantify the extent to which bias plays a role. Indeed, the study goes on to provide other possible explanations, such as women’s willingness and ability to negotiate their salaries. As explained in the book *Women Don’t Ask* by Linda Babcock and Sara Laschever, “women expect less, see the world as having fewer negotiable opportunities, and see themselves as acting for what they care about as opposed to acting for pay.”⁷⁶ Unfortunately, these tendencies “tend to minimize women’s pay.”⁷⁷ The AAUW, therefore, emphasizes the importance of teaching women how to negotiate in addition to addressing potential bias.⁷⁸ The 2013 Task Force report, however, makes no mention of women’s negotiating skills as a potential cause of the gap.

In the “motherhood penalty” study cited in the Task Force report, the authors also could not quantify the impact of bias on the pay gap. Rather, they explained that it is difficult to evaluate the impact that productivity (as opposed to bias) has on pay because “it is inherently problematic to fully specify what makes someone a good or productive employee.”⁷⁹ For instance, even if one compares the wages of two attorneys who billed the same number of hours, we could not know whether a wage disparity is due to bias or some other unmeasured form of productivity.⁸⁰ The authors attempted to control for this uncertainty by asking paid undergraduate volunteers to assess two fictitious same-gender job candidates who had the same qualifications and differed only by parental status (one of the resumes reflected that the applicant participated with the school PTA).⁸¹ The study showed that evaluators recommended paying mothers less than nonmothers, but they did not impose the same pay penalty on fathers.⁸² The authors conclude that “this study suggests that cultural beliefs about the tension between the motherhood and ideal worker’ roles may play a part in reproducing this pattern of inequality.”⁸³ However, they recognize that “this design cannot rule out the possibility that productivity differences account for part of the wage penalty that has been shown to exist.”⁸⁴ “Many factors are certainly responsible” for the persistence of the pay gap and the glass ceiling, and the “magnitude of the effect” of the motherhood penalty “likely varies with the job type.”⁸⁵

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ *Id.* at 31.

⁷⁷ *Id.*

⁷⁸ *Id.* at 31-32.

⁷⁹ Shelly J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 5, 1300. (March 2007), available at <http://gender.stanford.edu/sites/default/files/motherhood-penalty.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.* at 1309-13.

⁸² *Id.*

⁸³ *Id.* at 1333.

⁸⁴ *Id.* at 1300.

⁸⁵ *Id.* at 1333.

The fundamental weakness with the pay gap studies conducted to date, including those of advocacy groups, is that they look at either large, aggregated groups of employees or fictional job applicants in hypothetical settings. There is no real-world “study” that looks at actual workers in the same job at the same employer.⁸⁶ This makes it extremely difficult, if not impossible, to understand the various individualized reasons why any given employee is paid more than another. If we are ever to truly understand the extent to which employer bias contributes to the pay gap, it will require carefully identifying proper comparator pools (those who perform equal work under similar working conditions for the same employer) and accounting for any legitimate factors that may explain pay disparities (e.g., education and experience, performance ratings and rankings, etc.). Ironically, the most individualized (albeit not perfect) evidence we have to date has been collected and analyzed by the OFCCP in its compliance reviews. And, as discussed above, in the past three years, OFCCP found pay bias in less than one percent of the government contractors it reviewed.

B. Women’s Roles as Primary Caregivers Impact the Pay Gap

The studies above only begin to scratch the surface of the complex factors at play in a society still grappling with what role women can, should, and want to play at home and at work. Women have seen extraordinary change in a very short period of time. At the beginning of the 20th century, women constituted only about 18 percent of the total labor force in the United States.⁸⁷ Thanks in large part to the EPA, Title VII, and other similar efforts, women are now half of all U.S. workers, and mothers are the primary or co-bread winners in nearly two-thirds of American families.⁸⁸ Societal expectations for women, however, have not caught up as quickly. As women’s opportunities (and time commitments) in the workforce have increased, women have not been offered equal relief from their time commitments at home.

A 2010 study of the pay gap in Canada, conducted by Canada’s Parliamentary Information and Research Service, noted that even when men and women spend the same amount of time doing paid work, women spend an average of two hours more per day than men doing unpaid work.⁸⁹ This inequality in household responsibility impacts women’s wages in several ways, including reduced hours in the workplace, reduced mobility, interruptions in women’s time in the workforce, and higher focus on family-friendly workplace amenities that can lead to lower wages.⁹⁰ In addition to recognizing the persistence of gender-based expectations surrounding work and children, the study reported that differences in job characteristics—

⁸⁶ See Nat’l Equal Pay Task Force, *supra* note 34. By contract, OFCCP’s 14,000 audits generally involved investigations of the same or similar jobs at a single contractor’s establishment.

⁸⁷ ECONOMIC REPORT OF THE PRESIDENT, 1973, at 91, Table 21 (1973), available at http://www.presidency.ucsb.edu/economic_reports/1973.pdf

⁸⁸ Heather Boushey & Ann O’Leary, *Executive Summary*, The Shriver Report, <http://www.shriverreport.com/awn/execSum.php> (last visited Aug. 29, 2013).

⁸⁹ Julie Cool, Parliamentary Information and Research Service, Library of Parliament, Pub. No. 2010-30-E, BACKGROUND PAPER: WAGE GAP BETWEEN WOMEN AND MEN 7, 9 (July 29, 2010), <http://www.parl.gc.ca/content/lop/researchpublications/2010-30-e.pdf> (“two central factors that contribute to the gender wage gap are the concentration of women in a small number of lower-paying jobs, and the fact that women are more likely than men to make accommodations to balance paid and unpaid work.”) (hereafter, “Library of Parliament Study”).

⁹⁰ *Id.* at 13 (citing Morley Gunderson, “*Viewpoint: Male-Female Wage Differentials: How Can That Be?*” 39 Can. J. of Econ. 1-21 (Feb. 2006).

industry, size of the work establishment, and kind of work, for example—also impact the wage differential between men and women.⁹¹

A 2010 multi-country study by the Organisation for Economic Co-operation and Development (OECD) also evaluated the impact of women’s role outside the workplace on their wages.⁹² The study reported that women spend approximately twice as much time caring for children than men, and that men in the United States spent nearly 40 more minutes every day on leisure than women.⁹³ Consistent with other studies, the OECD reported that women also spend less time in the workplace than men, and that they are more likely to work in lower-wage occupations.⁹⁴

The OECD study reflects that the United States lags far behind other OECD countries in everything from public childcare support to days of paid leave.⁹⁵ The United States devotes less money to family benefits, including tax breaks, services, and cash, than 22 of the 30 countries studied.⁹⁶ It also devotes less to childcare and early education services than other countries, while childcare spending for American families represents 19 percent of household income, compared to an average of 13 percent among all OECD countries.⁹⁷ Parental leave in the United States also falls short of the policies in most OECD countries. The United States is one of only two countries studied to offer no financial support whatsoever during a protective leave period, and the United States offers less protected maternity time than 22 of the 30 countries studied.⁹⁸ Unlike 25 OECD countries, the United States does not offer any parental leave, which is protected leave for parents in addition to maternity and paternity leave.⁹⁹ The United States also ranks last in the number of days of annual paid leave provided to workers.¹⁰⁰

⁹¹ *Id.* at 8.

⁹² OECD Social Policy Division, *Gender Brief* (March 2010), <http://www.oecd.org/els/family/44720649.pdf> (hereafter OECD Study).

⁹³ *Id.* at 15-16.

⁹⁴ *Id.* at 12-13.

⁹⁵ *Id.* at 18.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 19, 21. Childcare and early childhood education spending in the US represents 0.35 percent of GDP, compared to an average among OECD countries of 0.6 percent, and a high in Nordic countries of over one percent of GDP.

⁹⁸ *Id.* at 22.

⁹⁹ *Id.* at 23.

¹⁰⁰ *Id.* at 24.

C. “Executive Feminists” Have Sparked a New Dialogue to Further Understand Pay Disparities and Crack the Glass Ceiling¹⁰¹

Given what appears to be a plateau in progress to close the pay gap and break the glass ceiling, “a new wave of executive feminism has emerged aimed squarely at the highest levels of the professional world.”¹⁰² Highly successful women like Facebook Chief Operating Officer, Sheryl Sandberg, and Princeton Professor, Anne-Marie Slaughter, have reignited a lively global debate that provides further insight into the many complex factors that contribute to the pay gap and the glass ceiling.

The views of these “executive feminists” vary in many respects. However, most acknowledge in some fashion that women are at a new crossroads because their expected role outside of work has not changed as dramatically as their role inside the workplace. Valerie Jarrett, Senior Advisor to President Barack Obama and Chair of the White House Council on Women and Girls, recently spoke on this issue at The Huffington Post’s women’s conference, “The Third Metric: Redefining Success Beyond Money & Power.”¹⁰³ She explained that the goal of the women before us, “the people who broke glass ceilings and the ones that demonstrated and litigated and everything,” was not to allow women to “be able to compete with men *and* do everything that women traditionally did.” Rather, “[t]hey were really fighting for us to make our own choices.” Nevertheless, women are now confronted with what author Courtney Martin has termed the “Superwoman Mystique.”¹⁰⁴ There is a “generation of girls” who were “told that they could be anything, but heard that they had to be everything.”¹⁰⁵

At the same time, the demands both in the home and at work have increased substantially, leading to an ever more unsustainable model. “Helicopter parenting,” also known as “concerted cultivation,” has become a model of good parenting.¹⁰⁶ Parents are “expected to develop every nascent talent in their children to assuage their fear of failing in a winner-take-

¹⁰¹ In focusing on the “executive feminism” dialogue, the authors do not intend to suggest that the pay gap is limited to this segment of the American workforce, or that the issues faced by high-level professionals are necessarily the same as those faced by women in low-wage occupations. As the GAO 2011 Study (*supra* note 60) explains, low-earning women also earn 14% less on average than their male counterparts. However, because the glass ceiling is so closely intertwined with the pay gap, perspectives from women at the top are highly relevant to the discussion. Sheryl Sandberg acknowledges in her book that her perspective will generally “be most relevant to women fortunate enough to have choices about how much and when and where to work.” However, many of the concepts “apply to situations that women face in every workplace, within every community, and in every home.” Moreover, “adding more female voices at the highest levels...will expand opportunities and extend fairer treatment to all.” SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 9-10 (2013).

¹⁰² Joan C. Williams and Rachel W. Dempsey, *The Rise of Executive Feminism*, HARV. BUS. REV.: HBR BLOG NETWORK (Mar. 28, 2013, 11:58 a.m.), http://blogs.hbr.org/cs/2013/03/the_rise_of_executive_feminism.html.

¹⁰³ Margaret W. Johnson, *Women And Success: 26 Things Every Woman Should Know*, HUFF POST THE THIRD METRIC (June 11, 2013, 11:51 AM), http://www.huffingtonpost.com/2013/06/07/26-things-every-woman-should-know-about-success_n_3404523.html.

¹⁰⁴ Courtney E. Martin, Op. Ed., *Confront the Superwoman Mystique*, N.Y. TIMES (Feb. 18, 2013, 9:01 PM), <http://www.nytimes.com/roomfordebate/2013/02/18/what-should-feminists-focus-on-next/confront-the-superwoman-mystique>.

¹⁰⁵ *Id.* See also SANDBERG, *supra* note 101, at 15 (“The workplace did not evolve to give us the flexibility we needed to fulfill our responsibilities at home. We anticipated none of this. We were caught by surprise.”).

¹⁰⁶ Joan Williams, Mary Blair-Loy & Jennifer Berdahl, *The Flexibility Stigma: Work Devotion vs. Family Devotion*, ROTMAN MAGAZINE (Winter 2013), <http://worklifelaw.org/wp-content/uploads/2012/12/TheFlexibilityStigma.pdf>.

all society, where the alternative to a high-paying job, increasingly, is a low-paid, dead-end one.”¹⁰⁷

This fear of scarcity in the job market has also led to extraordinary demands at work. Successful professionals have begun working harder than ever, particularly at the top of the wage-earning bracket. One 2006 study¹⁰⁸ revealed that “62% of high-earning individuals work more than 50 hours a week, 35% work more than 60 hours a week, and 10% work more than 80 hours a week.”¹⁰⁹ The hours of those in “extreme jobs” (which the author defined as “a designation based on responsibilities and other attributes beyond pay”) are more taxing, with 56 percent working 70 hours or more a week, and 9 percent working 100 hours or more.¹¹⁰

Significant numbers of women with children are unwilling to maintain such demanding hours: only 9 percent of mothers aged 25 to 44 with children spend more than 50 hours per week working outside the home.¹¹¹ Professor Joan Williams, Founding Director of the Center of WorkLife Law at the University of California, Hastings College of the Law, views the “long hours problem” as a “key reason” for stunted progress: “We can’t get mothers to work more hours. We’ve tried, and failed, for forty years. Mothers won’t bite for a simple reason: if they work 55 hours a week, they will leave home at, say 8:30 and return at 8:30 every day of the workweek, assuming an average commute time. Most moms have this one little hang-up: they want to see their children awake.”¹¹²

As a result, women’s interest in the workforce has *waned*. Between 1994 and 2004, Americans’ preference for the stay-at-home mother model increased from 34 to 40 percent. Between 1997 and 2007, working mothers’ interest in reducing their schedule to part-time rose from 48 to 60 percent. During the same time period, the number of stay-at-home mothers who said they would prefer to work full-time decreased from 25 to 16 percent.¹¹³

Against this backdrop, it is not surprising that even talented and ambitious women are pushing back on what they perceived was a “superwoman” model and are making choices that do not involve tackling both of these realms and “doing it all.” Jarrett’s personal account (which she shared in her commencement speech to the Class of 2013 at Wellesley) brings the issue to life:¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ Sylvia Ann Hewlett & Carolyn Buck Lee *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV.: THE MAGAZINE (Dec. 2006), available at <http://hbr.org/2006/12/extreme-jobs-the-dangerous-allure-of-the-70-hour-workweek/ar/1>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Joan C. Williams, *Why Men Work So Many Hours*, HARV. BUS. REV.: HBR BLOG NETWORK (May 29, 2013, 9:00 AM), <http://blogs.hbr.org/cs/2013/05/why-men-work-so-many-hours.html>.

¹¹² *Id.*

¹¹³ Stephanie Coontz, Op. Ed., *Why Gender Equity Stalled*, N.Y. TIMES, Feb. 16, 2013, <http://www.nytimes.com/2013/02/17/opinion/sunday/why-gender-equality-stalled.html?pagewanted=all>.

¹¹⁴ Valerie B. Jarrett, *Wellesley’s Commencement Address on May 31, 2013*, Wellesley College Commencement Address (May 31, 2013), <http://www.wellesley.edu/events/commencement/commencementspeakers/commenceaddress>.

I spent my 20s and early 30s taking great pride in trying to be super woman. Proving to both myself, and others, that I could do everything. Most days I felt like I was barely holding on by my fingertips, in fear of dropping one of the thousands of balls I was juggling at once. I rarely made time for casual meals, or movies, with my friends. I barely ever exercised (and it showed), or curled up on the couch to read a mystery story—all my favorite ways of relaxing while I was in college. Multi-tasking became the norm—not even relaxing during rare vacations or taking a moment to just catch my breath.

That mindset caused me stress, anxiety, and guilt, and I often felt I was not doing anything particularly well.

Princeton Professor Anne-Marie Slaughter, who has become well known for her article “Why Women Still Can’t Have it All”¹¹⁵ published in *The Atlantic*, has defined this phenomenon as the “tipping point,” where “what was once a manageable and enjoyable work-family balance can no longer be sustained—regardless of ambition, confidence or even an equal partner.”¹¹⁶

The statistics demonstrate that many professional women at the highest (and best paid) rungs of the corporate ladder have either confronted the tipping point or have a fear of confronting it if they enter the workforce at full steam. Over the past two decades, women have demonstrated increased interest in the stay-at-home mother model and part-time scheduling—the very work patterns studies highlight as significant causes of the pay gap.¹¹⁷

D. The “Ideal Worker” Model

According to Professor Joan Williams, solving the glass ceiling and the pay gap is a matter of challenging our collective corporate identity. Although the laws have created a significant shift that opens up doors for women in the workplace, the definition of the “ideal worker” in today’s workplace is increasingly focused on long hours and “an uncompromising commitment to the office.” Work devotion is tied closely with elite status. “I am slammed” is a socially acceptable way of saying “I am important.”¹¹⁸

This social phenomenon has developed even though there are numerous studies that show that long hours do not necessarily enhance the bottom line or equate to success. Many hard-charging employees enable themselves to work long hours by getting by on less sleep. But, research shows that even a moderate level of fatigue has the same or greater impact on performance than alcohol intoxication.¹¹⁹ In one sleep study involving 4,200 employees at four companies, researchers estimated that lost productivity due to poor sleep cost the

¹¹⁵ Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (July/Aug 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

¹¹⁶ Anne-Marie Slaughter, *Yes You Can: Sheryl Sandberg's 'Lean In'*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/2013/03/10/books/review/sheryl-sandbergs-lean-in.html?pagewanted=all&r=1&>.

¹¹⁷ Coontz, *supra* note 113.

¹¹⁸ Joan C. Williams, *supra* note 111.

¹¹⁹ Julia Kirby, *Change the World and Get to Bed by 10:00*, HARV. BUS. REV.: HBR BLOG NETWORK (May 13, 2013, 9:00 AM), <http://blogs.hbr.org/hbr/hbreditors/2013/05/change-the-world-and-get-to-be.html>.

companies \$3,156 per employee with insomnia and roughly \$2,500 for those with less severe sleep deficits.¹²⁰ This ultimately costs the four companies a total of about \$54 million a year.¹²¹ These numbers do not factor in absenteeism, which is greater among those who sleep less.¹²² Another recent study estimates that lack of sleep drains more than \$63 billion from the nation's economy each year.¹²³ This is one compelling reason why self-professed “sleep evangelist” and women’s advocate Arianna Huffington encourages women to “sleep their way to the top” and to not fall victim to the “mistaken, and costly, belief that success results from the amount of time we put into work, instead of the kind of time we put into work.”¹²⁴

Extreme work also costs employers when burnout occurs. In the 2006 “extreme job” study mentioned earlier, half of the extreme jobholders responded that they would not want to continue at such a pace for more than a year, and many reported that they were likely to leave their job within two years, particularly among the younger generation. This leads to a succession planning problem if younger professionals stop striving for top jobs.¹²⁵

Other studies have demonstrated that employers who focus more on results than time invested have benefitted from such programs. For instance, as reported in “Sleeping With Your Smartphone,”¹²⁶ by Harvard Business School Professor Leslie Perlow, the Boston Consulting Group developed a successful program to offer its employees predictable time off every week. While the program required a significant change in culture for its management and its consultants who otherwise worked 24/7, team members now work more collaboratively and support each other’s needs, which has positively impacted the bottom line. Other companies have adopted “Results Only Work Environments” (“ROWE”), which give employees the flexibility to decide when, where, and how they work, as long as they get their work done. Rigorous studies have demonstrated that ROWE reduces turnover, interruptions at work, and unproductive time at work, and increases employees’ sense of job involvement.¹²⁷

Notwithstanding powerful evidence that employees can work less and be more productive, the ideal-worker model persists. According to Professor Williams, the problem is that “ideal worker” is deeply entrenched in our culture and has become synonymous with “real man.”¹²⁸ In an age where technology is rapidly replacing jobs requiring heavy lifting and physical labor, working long hours has become a “heroic activity” and a “manly test of physical

¹²⁰ Patrick J. Skerrett, Sleep Deprivation’s True Workplace Costs, HARV. BUS. REV.: HBR BLOG NETWORK (Jan. 12, 2011, 10:25 AM), <http://blogs.hbr.org/your-health-at-work/2011/01/sleep-deprivations-true-workpl.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Amanda MacMillan, *Insomnia Costs U.S. \$63 billion Annually in Lost Productivity*, CNN HEALTH (Sept. 1, 2011), <http://www.cnn.com/2011/09/01/health/insomnia-cost-productivity>.

¹²⁴ Arianna Huffington, *Why we all Need More Sleep*, THE TELEGRAPH (Jan. 28, 2013, 9:45 AM), <http://www.telegraph.co.uk/lifestyle/9823934/Why-we-all-need-more-sleep.html>.

¹²⁵ SYLVIA ANN HEWLETT & CAROLYN BUCK LEE, *supra* note 108.

¹²⁶ LESLIE A. PERLOW, *SLEEPING WITH YOUR SMARTPHONE: HOW TO BREAK THE 24/7 HABIT AND CHANGE THE WAY YOU WORK* (2012).

¹²⁷ JOAN C. WILLIAMS, *supra* note 111.

¹²⁸ *Id.*

endurance,” which “involves displaying one’s exhaustion, physically and verbally, in order to convey the depth of one’s commitment, stamina, and virility.”¹²⁹ Based on the way the world used to operate, it is easy to assume that the more one physically commits to the job, the more one produces (*e.g.*, the more trees you chop, the more wood you have). Thus, even though working long hours does not actually equate to productivity, the long-hours metric provides a quantifiable sense of accomplishment and defines a worker’s identity.

Both women and men are measured by the long-hours metric. However, women do not always reap similar rewards because the long-hours model is “incompatible with ideals surrounding what it means to be a ‘good mother’—attentive, at home, always available to her children.”¹³⁰ This is not because Americans do not support more active roles for women in the workplace; a large majority of Americans consider women’s more active roles to be a positive change.¹³¹ Most Americans also believe that sharing responsibilities in a marriage is more satisfying than a more traditional marriage with a male breadwinner. Studies reflect that a large majority of men want to share in caregiving responsibilities and allow women to take advantage of the opportunities their employers give them.¹³² And, both women and men overwhelmingly value being a good parent and having a successful marriage over having a successful career.¹³³ However, “[w]hen family and work obligations collide, mothers remain much more likely than fathers to cut back or drop out of work.”¹³⁴

This problem runs deep, and resolving it is not simply a matter of legislating flexibility for both male and female caregivers. Indeed, flexibility laws passed in other countries have not necessarily brought them closer to bridging the gap. “Even in countries with the longest leave policies, fathers still work considerably longer hours than mothers. Unsurprisingly, they also earn more money and move higher up the career ladder.”¹³⁵ In an effort to resolve this issue, Sweden has gone so far as to introduce a “gender equality bonus,” which provides

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *The Generation Gap and the 2012 Election*, PEW RESEARCH CENTER (Nov. 3, 2011), <http://www.people-press.org/2011/11/03/about-the-surveys-13>.

¹³² A 2011 study by the Center for Work and Family at Boston College found that 65 percent of the fathers they interviewed felt that mothers and fathers should provide equal amounts of caregiving for their children. Brad Harrington, Fred Van Deusen & Beth Humberd, *The New Dad: Caring, Committed and Conflicted*, Boston College Center for Work & Family (2011), <http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf>. A 2010 Pew poll revealed that 72 percent of both women and men ages 18 to 29 believe that the best marriage is one in which husband and wife share work and care-giving. Pew Research Center’s Social and Demographic Trends Project, *The Decline of Marriage And Rise of New Families*, PEW RESEARCH CENTER (Nov. 11, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2>. A similar study conducted by New York University sociologist Kathleen Gerson reflected that 80 percent of the women and 70 percent of the men wanted a 50/50 share of breadwinning and caregiving. Stephanie Coontz, *supra* note 113.

¹³³ Pew Research Center’s Social and Demographic Trends Project, *A Gender Reversal on Career Aspirations*, PEW RESEARCH CENTER (April 19, 2012), <http://www.pewsocialtrends.org/2012/04/19/a-gender-reversal-on-career-aspirations/>.

¹³⁴ Coontz, *supra* note 113.

¹³⁵ Kay Hymowitz, *Think Again: Working Women: Why American women are better off than the lean-inners and have-it-allers realize*, FOREIGN POLICY (July/August 2013), http://www.foreignpolicy.com/articles/2013/06/24/think_again_working_women?print=yes&hidecomments=yes&page=full.

more money to a couple the more they share their parental leave time.¹³⁶ Even this had no impact: in 2011, women still used 76 percent of the shared parental leave.¹³⁷

Thus, the goal that has emerged among the new wave of “executive feminists” is increasingly focused on challenging today’s ideal-worker model and redefining success for men and women.

V. Bridging the Gap Requires a Social Dialogue on Shifting Culture

Nearly 20 years ago, the 21-member bipartisan Federal Glass Ceiling Commission¹³⁸ issued a report making recommendations on ways to dismantle the glass ceiling.¹³⁹ At the outset, the recommendations point out that “[b]usiness does not operate in a vacuum. It reflects the attitudes and conditions of society as a whole, and other segments of society must also contribute to ending the glass ceiling.”¹⁴⁰ As Professor Williams explains, “[l]awsuits are often the first steps toward cultural change. They crystallize questions in uncomfortable ways that society often would rather avoid.”¹⁴¹ But, “[w]hat we ultimately need is a shift in culture surrounding gender roles and what it means to be a committed and productive worker.”¹⁴²

It may be tempting to force employers to drive this shift in culture through litigation and new legislation. However, defining gender roles and who is “committed” and “productive” for any given business is not a question that legislators, judges, or juries can answer effectively. In the recent case brought by the EEOC against Bloomberg L.P., Judge Loretta Preska took great care in addressing this very issue.¹⁴³ The EEOC alleged that Bloomberg engaged in discrimination because it reduced pregnant women’s or mothers’ pay, demoted them in title or in number of direct reports, reduced their responsibilities, excluded them from management meetings, and subjected them to stereotypes about female caregivers. After analyzing the EEOC’s evidence, which was ultimately purely anecdotal, the judge concluded that “[a]t bottom, the EEOC’s theory of this case is about so-called “work-life balance.”¹⁴⁴ The judge then explained that there is a “free-market employment system we embrace in the United States, particularly for competitive, highly paid managerial posts,” and “it is not the Court’s role to engage in policy debates” about this system:

The law does not require companies to ignore or stop valuing ultimate dedication, however unhealthy that may be for family life. [citation omitted] Whether an individual in any family wishes to make that commitment is an intensely personal decision that must account for the tradeoffs involved, and

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ The Commission was created by Title II of the Civil Rights Act of 1991.

¹³⁹ Fed. Glass Ceiling Comm’n, *supra* note 5.

¹⁴⁰ *Id.*

¹⁴¹ Joan C. Williams and Anne-Marie Slaughter, *Family well-being tied to men’s work lives*, SFGATE (Sept. 1, 2012, 4:32 PM), <http://www.sfgate.com/opinion/article/Family-well-being-tied-to-men-s-work-lives-3833671.php>.

¹⁴² *Id.*

¹⁴³ *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011).

¹⁴⁴ *Id.* at 485.

it is not the role of the courts to dictate a healthy balance for all. Nor is it the role of the courts to tell businesses what attributes they must value in their employees as they make pay and promotion decisions. Choices are available—and the Court acknowledges that the individual’s decisions are among the most difficult that anyone must make. The women involved in the allegations here are talented, well-educated, motivated individuals working in highly paid jobs. To attain the success they enjoy, much is expected of them at work, but they have options (unlike many others).¹⁴⁵

For better or worse, some people like to and *choose* to work hard. In the “extreme job” study mentioned earlier, an overwhelming majority (66%) said they love their jobs.¹⁴⁶ “Far from seeing themselves as workaholics in need of rescuing, extreme workers wear their commitments like badges of honor.”¹⁴⁷ Most admitted that “the pressure and the pace are self-inflicted—a function of a type A personality.”¹⁴⁸ In the spirit of encouraging equal opportunity and allowing people the right to make their own employment choices, it would be hard to justify having a judge or a jury dictate whose employment choices are the right ones, even if some believe that extreme workers are delusional.

VI. Will New Equal Pay Legislation Narrow the Gap?

The National Equal Pay Task Force’s June 2013 report continues its plea to Congress to “do its part by passing the Paycheck Fairness Act.”¹⁴⁹ Proponents of the PFA suggest that the current “factor other than sex” defense “excuses far too much pay inequality” and “accepts virtually any superficially gender-neutral explanation for paying women less.”¹⁵⁰ The new law would shift the burden to employers to prove that the factor other than sex: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.¹⁵¹ Furthermore, the defense would not apply if the employee can convince the fact-finder that “an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.”¹⁵²

A. The PFA Imposes Significant Burdens on Employers to Defend Individualized Compensation Decisions

Proponents of the new law point out that the standard proposed in the PFA mirrors Title VII’s “disparate impact” framework, which also requires employers to show job-

¹⁴⁵ *EEOC v. Bloomberg L.P.*, *supra* note 143, at 485-86.

¹⁴⁶ Sylvia Ann Hewlett & Carolyn Buck Luce, *supra* note 108.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The White House Report, White House National Equal Pay Task Force, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESS THE PAST, TAKING STOCK OF THE FUTURE 8 (June 2013), *supra* note 34.

¹⁵⁰ *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010) (statement of Deborah L. Brake, Professor of Law, University of Pittsburgh, available at <http://help.senate.gov/imo/media/doc/brake.pdf>).

¹⁵¹ Paycheck Fairness Act of 2013, S.84, 113th Cong. (2013).

¹⁵² *Id.*

relatedness and business necessity.¹⁵³ However, important components of Title VII disparate impact framework make it very different from the EPA. Under Title VII, a disparate impact claim involves facially neutral employment practices that have the unintended consequence of impacting one group more harshly than another. As with the EPA, a Title VII plaintiff alleging disparate impact need not prove intent. However, Title VII balances the scales in disparate impact cases by allowing for only equitable relief and requiring employees to *specify* an employer practice giving rise to the alleged wage disparity.¹⁵⁴ This is likely why the current EPA gives employers more room to defend nondiscriminatory compensation decisions that are based on holistic, albeit indefinable, analyses of employees' worth. While the circuits so far have split on whether the "factor other than sex" must have a "business purpose," they have universally granted employers some reasonable business leeway to present their own rationales without questioning from less business-savvy judges or juries.¹⁵⁵

The PFA also exposes employers to the possibility of unlimited damage awards. Unlike under Title VII, compensatory and punitive damages under the proposed EPA amendments are not restricted or capped, nor are they limited to cases in which employees prove intentional discrimination. Indeed, as discussed above, plaintiffs could recover compensatory and punitive damages on claims for which they could not even recover equitable relief under Title VII. The only protection employers would have against excessive compensatory and punitive damages is the Fourteenth Amendment's due process protection, which lacks clear guidelines on the contours of "excessive," unconstitutional remedies.¹⁵⁶

As the Supreme Court previously warned in *Watson v. Fort Worth Bank & Trust*, imposing too great a burden on employers to defend employment decisions could have an unintended "chilling effect" on "legitimate business practices" and put "undue pressure" on employers to adopt "inappropriate prophylactic measures."¹⁵⁷ The standard set forth in the PFA may cause employers to micromanage personnel decisions, and rely too heavily on objective criteria—such as hours worked—which could further reinforce the ideal worker myth. Individualized, subjective, discretionary decisions, though potentially vulnerable to implicit biases about women's productivity and commitment¹⁵⁸, are necessary features of employee evaluation. Indeed, if we are to move away from arguably flawed objective measures of productivity like the long hours metric, it will become increasingly important to evaluate a wider array of nuanced factors based on the varied needs and interests of the particular business in question, which may be difficult for employers to articulate and quantify when faced with a lawsuit.

¹⁵³ See *A Fair Share for All: Pay Equity in the New American Workplace: Hearing Before the Sen. Comm. on Health, Education, Labor and Pensions*, 111th Congress (2010), *supra* note 150.

¹⁵⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); see also *Spaulding v. Univ. of Washington*, 740 F. 2d 686, 708-9 (9th Cir. 1984).

¹⁵⁵ See H.R. Rep. No. 110-73, at 25 (2008).

¹⁵⁶ See *State Farm v. Campbell*, 538 U.S. 408, 425 (2003).

¹⁵⁷ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988).

¹⁵⁸ Although beyond the scope of this paper, it is worth mentioning that a recent meta-analysis published in the *Journal of Personality and Social Psychology* challenges the notion that implicit bias leads to explicit discriminatory decision making. Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard, and Philip E. Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of LAT Criterion Studies*, 105 J. PERS. & SOC. PSYCH. 171 (2013).

In addition, the heightened standard under the PFA may stifle the very dialogue between employers and employees that is necessary to challenge the ideal-worker model. Facebook COO Sheryl Sandberg observes in her book, *Lean In*, that some women are so fearful of the ideal-worker model that they choose to “leave before they leave.”¹⁵⁹ They opt out of the leadership pipeline before they even get married and have children because they assume that they will not be able to combine work and family successfully. Since there is no open dialogue about how to fit within the ideal-worker model, women assume the worst. Sandberg says that she tackles this issue head-on by asking her female employees about their work/family choices: “Are you worried about taking this on because you’re considering having a baby sometime soon?”¹⁶⁰ But, as even Sandberg admits, this question would “give most employment lawyers a heart attack.”¹⁶¹ Even a well-intentioned discussion by an employer about gender while discussing pay issues could be misinterpreted and cited by an employee as evidence that her pay disparity was not due to “a factor other than sex.” Faced with increased litigation exposure under the PFA, employers may be even more fearful of engaging in dialogue that otherwise has the potential to identify valid concerns and propose meaningful solutions.

B. Even if Amended, the EPA Offers Limited Relief to Women at the Top

Notably, the PFA does not amend the EPA’s “equal work” standard, which is perhaps the most limiting feature of the law when it comes to the glass ceiling. When workers pass through the glass ceiling, and move into upper-level professional or leadership roles, two jobs are rarely, if ever, “equal” for the purposes of the Equal Pay Act.¹⁶² Not surprisingly, then, many courts have recognized that the EPA is the wrong vehicle for litigating over wage disparities among high-level professionals and executives.¹⁶³

Because high-level professional and executive positions are not “equal” to each other, EPA claims arising from pay disparities at the top often rest implicitly on a long discredited theory of comparable worth, which holds that wages ought to be set by a position’s intrinsic worth, rather than market conditions. In 1979, the Ninth Circuit held that even where two jobs require equal skill, the EPA does not require equal pay if the positions are unique.¹⁶⁴ On

¹⁵⁹ SANDBERG, *supra* note 101, at 93.

¹⁶⁰ *Id.* at 95.

¹⁶¹ *Id.*

¹⁶² See, e.g., *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007); see also *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F. Supp. 2d 853, 857 (W.D. Tex. Apr. 11, 2002) (“the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims.”); *Cohen v. Bank of New York Mellon*, No. 1:11-cv-00456-RA (S.D.N.Y. filed Jan. 21, 2011) (defense verdict in favor of employer in EPA case).

¹⁶³ Plaintiffs have also acknowledged the difficulties of litigating these issues for high-level professionals. Consider, for instance, a recent case against Bank of America and Merrill Lynch alleging equal pay and discrimination claims under the EPA, Title VII, and related state laws. Plaintiffs are now seeking preliminary approval for a settlement amount that equates to roughly \$8,000 per class member. This is only a fraction of what they could recover if their claims were successful, given that the class members are highly paid Financial Advisors and the class period extends over seven years. Nevertheless, Plaintiffs believe that, “[w]eighing the benefits of the settlement against the risks associated with proceeding in the litigation, the settlement is more than reasonable.” They recognize that “they would face significant legal, factual, and procedural obstacles to recovering damages on their claims.” Mot. For Prelim. Approval of Class Action Settlement at 16-17, *Calibuso, et al. v. Bank of Am. Corp., et al.*, No. 10 Civ. 1413 (PKC)(AKI)(E.D.N.Y. Sept. 6, 2013), ECF No. 154.

¹⁶⁴ *Gunther v. Cnty. of Washington*, 623 F.2d 1303, 1308, 1311 (9th Cir. 1979), *aff’d*, 452 U.S. 161 (1981).

appeal, the Supreme Court in a 5-4 decision acknowledged the broader reach of Title VII compared to the Equal Pay Act in addressing pay bias.¹⁶⁵

More recently, the Seventh Circuit recognized that when plaintiffs use the EPA to challenge compensation of heterogeneous, high-level jobs, an equal pay claim “is in danger of being transmogrified into a suit seeking comparable pay.”¹⁶⁶ Courts have rejected this “comparable worth” theory and its necessary implication that courts, rather than markets, must determine the proper wage for a particular job.¹⁶⁷

Because the EPA is concerned with actual work that is equal, not similar, even when many positions share a similar title—attorney, for example—the EPA is the wrong tool for challenging remuneration of one professional over another.¹⁶⁸ The Seventh Circuit has explained that the “proper domain” of EPA claims “consists of standardized jobs in which a man is paid significantly more than a woman (or anything more, if the jobs are truly identical) and there are no skill differences.”¹⁶⁹ The EPA is ill-suited for non-standardized, high-level jobs, because such positions do not, almost by definition, require equal skill, effort, and responsibility, performed under equal working conditions.¹⁷⁰

For example, the Fourth Circuit considered claims from two female county program directors who sought to establish an EPA violation based on the gender pay disparity across all director-level professionals in a county.¹⁷¹ The plaintiffs argued that their employer violated the EPA despite differences in job classifications, qualifications, and responsibilities among the differently compensated director positions.¹⁷² The court characterized the case as a “classic example of how one can have the same title and the same general duties as another employee, and still not meet two textual touchstones of the EPA – equal skills and equal responsibilities.”¹⁷³ The Fourth Circuit rejected the prospect that “employees with the same titles and only the most general similar responsibilities must be considered ‘equal’ under the EPA,” and affirmed the trial court’s judgment as a matter of law accordingly.¹⁷⁴

The Southern District of New York also rejected an EPA claim premised on differences in pay among professionals with the same job title.¹⁷⁵ The EEOC alleged that female Port

¹⁶⁵ *Washington Cty. v. Gunther*, 452 U.S. 161, 178-80 (1981).

¹⁶⁶ *Sims-Fingers*, *supra* note 162.

¹⁶⁷ See, e.g., *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 718-20 (7th Cir. 1986) (citing *Spaulding v. Univ. of Washington*, 740 F.2d 686, 707-07 (9th Cir. 1984); *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir. 1980); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977)). See also *EEOC v. Madison Cmty. Unit School Dist. No. 12*, 818 F.2d 577, 582 (7th Cir. 1986) (“it is plain that Congress did not want to enact comparable worth as part of the Equal Pay Act of 1964 [sic.]”); *Gunther*, *supra* note 164, at 1311 (“[The EPA] does not apply, for instance, where the plaintiff is performing comparable (but not substantially equal) work, or where a position held by the plaintiff is unique”).

¹⁶⁸ See, e.g., *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 333 (4th Cir. 2007) (rejecting the possibility that the EPA requires uniform salaries for similarly labeled positions for which the market demand and required skills vary).

¹⁶⁹ *Sims-Fingers*, *supra* note 162, at 771-72.

¹⁷⁰ See *id.*

¹⁷¹ *Wheatley*, *supra* note 168, at 332.

¹⁷² *Id.* at 332, 334.

¹⁷³ *Id.* at 332.

¹⁷⁴ *Id.* at 332-33.

¹⁷⁵ *EEOC v. Port Auth. of N.Y. & N.J.*, No. 10 Civ. 7462 (NBE), 2012 U.S. Dist. LEXIS 69307 at *13 (S.D.N.Y. May 16, 2012).

Authority attorneys were paid less than male colleagues despite performing equal work.¹⁷⁶ Despite a three year investigation, the EEOC relied primarily on attorneys' job titles, along with broad generalities about attorneys' skills and training, to support their allegations that women were being underpaid for equal work in violation of the EPA.¹⁷⁷ Finding that this was "simply not a sufficient basis in which to premise an EPA claim," the court granted the Port Authority's motion for judgment on the pleadings.¹⁷⁸ The Seventh Circuit reached a similar conclusion evaluating claims by a city park manager.¹⁷⁹ In seeking to establish EPA violations, a plaintiff compared herself to managers overseeing parks that were more complex, both in terms of size and services offered.¹⁸⁰ Because the manager positions were nonstandard, requiring different skills and different levels of responsibility, the court affirmed dismissal of plaintiff's complaint.¹⁸¹

Other courts have reached the same conclusion. In evaluating an EPA claim of Senior Vice Presidents of Finance at an insurance firm, a Texas District Court found that "the practical realities of hiring and compensating high-level executives deal a fatal blow to Equal Pay Act claims."¹⁸² The Court recognized the complexity of remuneration decisions for high-level executives and concluded that "[r]equiring Defendant and other companies to either pay senior executives the same amount or to come to court to justify their failure to do so is simply beyond the pale."¹⁸³

A Wisconsin District Court similarly found that despite sharing some similarities, the differences between a city's Treasurer and its Comptroller precluded the plaintiff's EPA claim.¹⁸⁴ The district court granted that both officials led city departments and managed city finances.¹⁸⁵ However, the roles were "comparable, 'counterpart' positions," not equal positions, which is not enough to prevail on an EPA claim.¹⁸⁶

These cases illustrate that at the highest levels of any profession (where women remain underrepresented), job positions do not share a "common core of tasks;" one key leadership position does not require work "equal" to another.

As a result, Title VII has proven to be much stronger than the EPA where evidence of gender pay and promotion discrimination exists. Consider, for example a recent case against Novartis Pharmaceuticals Corp. For 10 years, *Working Mother* magazine ranked Novartis as a

¹⁷⁶ *Id.* at *3-4.

¹⁷⁷ *Id.* at *12-14, 19.

¹⁷⁸ *Id.* at *15, *19.

¹⁷⁹ See *Sims-Fingers*, *supra* note 162, at 770.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 772.

¹⁸² *Georgen-Saad*, *supra* note 162, at 857.

¹⁸³ *Id.* at 857.

¹⁸⁴ *Campana v. City of Greenfield*, 164 F. Supp. 2d 1078, 1090-91 (E.D. Wis. 2001), *aff'd*, 38 F. App'x. 339 (7th Cir. 2002).

¹⁸⁵ *Id.* at 1090.

¹⁸⁶ *Id.* (showing positions are comparable "gets the plaintiff in an Equal Pay Act case nowhere." (citing *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 923 (7th Cir. 2000))).

“Top 100” company for women.¹⁸⁷ But in 2004 a class of employees sued the company under Title VII for promotion discrimination, sexual harassment, pregnancy discrimination, and retaliation.¹⁸⁸

The plaintiffs alleged that Novartis managers were hostile to mothers and pregnant women. Managers allegedly penalized women for using flex-time and taking maternity leave and failed to promote mothers and women who might become pregnant.¹⁸⁹ After a six-week trial, the jury awarded \$250 million for disparate impact and pattern and practice discrimination—the largest ever jury verdict in an employment discrimination case.¹⁹⁰ Two months later, the parties reached a settlement valued at \$175 million.¹⁹¹ The settlement included significant monetary relief for the class, as well as agreement by the company to make substantial programmatic changes, including updates to internal policies and retention of specialists to analyze the company’s employment practices going forward.¹⁹²

The following year, financial advisors employed by a Wachovia Securities subsidiary reached a multimillion dollar settlement with Wells Fargo Advisors for employment discrimination.¹⁹³ In 2009, three female financial advisors brought claims under Title VII, alleging that the company systematically denied equal employment opportunities to women, prevented them from advancing to prestigious roles within the firm, and retaliated against them for complaining about disparate treatment.¹⁹⁴ They sought compensatory, punitive, and liquidated damages, as well as injunctive relief to prevent the company from engaging in practices in violation of Title VII in the future.¹⁹⁵ In 2011, the district court approved a \$32 million settlement.¹⁹⁶

Also in 2011, the OFCCP applied Title VII principles in reaching a quarter-million-dollar settlement with AstraZeneca, LP for alleged violations of Executive Order 11246.¹⁹⁷ The settlement resolved claims that the pharmaceutical company paid female sales representatives in a Philadelphia facility an average of \$1,700 less than their male

¹⁸⁷ Duff Wilson, *Novartis Bias Suit to Begin*, N.Y. TIMES, April 6, 2010, <http://www.nytimes.com/2010/04/07/business/07gender.html? r=0> (“[Counsel for Novartis] noted that Novartis had been cited by Working Mother magazine as one of the 100 best companies in the nation for 10 years in a row, through 2009.”).

¹⁸⁸ Fourth Amended Complaint at 91-95, *Velez v. Novartis Corp.*, No 1:04-cv-09194 (S.D.N.Y. March 3, 2003).

¹⁸⁹ *Id.*

¹⁹⁰ David Glovin & Patricia Hurtado, *Novartis Faces \$250 Million in Sex Discrimination Damages*, BLOOMBERG (May 19, 2010, 6:34 PM), <http://www.bloomberg.com/news/2010-05-19/novartis-must-pay-250-million-in-punitive-damages-after-losing-bias-case.html>.

¹⁹¹ See, e.g., Bob Van Voris, *Novartis Reaches \$152.5 Million Sex-Bias Settlement*, BLOOMBERG (July 14, 2010, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071405346.html>.

¹⁹² *Velez v. Novartis Corp.*, No 1:04-cv-09194, 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010) (decision approving class action settlement).

¹⁹³ Tom Schoenberg, *Wells Fargo Agrees To Pay \$32 Million To Settle Bias Lawsuit*, BLOOMBERG (June 8, 2011, 4:00 PM), <http://www.bloomberg.com/news/2011-06-08/wells-fargo-agrees-to-pay-32-million-to-settle-bias-lawsuit.html>.

¹⁹⁴ Complaint, *Carter v. Wells Fargo Advisors, LLC*, 1:09-cv-01752 (CKK) (D.D.C. Sept. 15, 2009). Plaintiffs also brought claims under the ADEA and Maryland state law.

¹⁹⁵ *Id.* at 25.

¹⁹⁶ Tom Schoenberg, *Wells Fargo Agrees To Pay \$32 Million To Settle Bias Lawsuit*, BLOOMBERG (June 8, 2011, 4:00 PM), <http://www.bloomberg.com/news/2011-06-08/wells-fargo-agrees-to-pay-32-million-to-settle-bias-lawsuit.html>.

¹⁹⁷ News Release, U.S. Dep’t of Labor, Release No. 11-0829-PHI, Pharmaceutical giant AstraZeneca agrees to pay \$250,000 to settle sex discrimination lawsuit brought by US Labor Department (June 6, 2011), <http://www.dol.gov/opa/media/press/ofccp/OFCCP20110829.htm>.

colleagues.¹⁹⁸ In addition to the monetary settlement, AstraZenica entered into a consent decree with the Department of Labor, which included a requirement for the company to update its affirmative action plan and undertake significant statistical analysis of employment practices, among other requirements.¹⁹⁹

C. The Fair Pay Act and “Comparable Worth”

Some equal pay advocates have suggested that the “equal work” standard under the EPA should be amended to embrace the “comparable worth” theory. The Fair Pay Act (“FPA”), which has been introduced (but never passed) in every congressional session since 1995, would go further than the EPA to require employers to provide equal pay for men and women not only in the same jobs, but also “comparable” jobs—i.e., those that “may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”²⁰⁰ When introducing the FPA in the House of Representatives on January 29, 2013, Rep. Eleanor Holmes Norton explained:

The FPA requires that if men and women are doing comparable work, they are to be paid comparable wages. If a woman, for example, is an emergency services operator, a female-dominated profession, she should not be paid less than a fire dispatcher, a male-dominated profession, simply because each of these jobs has been dominated by one sex. If a woman is a social worker, a traditionally female occupation, she should not earn less than a probation officer, a traditionally male job, simply because of the gender associated with each of these jobs.²⁰¹

This would appear to address the component of the pay gap that is attributable to job steering. But, it suffers from the same flaws as the PFA insofar as it gives judges and juries control over the intensely personal, individualized, and complex economic factors that determine what any given job is “worth” for any given employee or employer at any given time.

VII. Alternative Government Initiatives Could Impact Known Causes of the Pay Gap

Highlighting the fact that the pay gap is about much more than pay bias does not undermine the importance of antidiscrimination law in safeguarding the rights of workers. However, it does reflect significant deficiencies in the government’s proposed solutions. Indeed, there are various additional initiatives that the government could initiate now that would directly impact known factors that impact the pay gap.

¹⁹⁸ *OFCCP v. AstraZenica LP*, 2010-OFC-00005, Consent Decree and Order (Dep’t of Labor, June 2, 2011), available at <http://www.dcciconsult.com/alert/astrazeneca.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ Fair Pay Act of 2013, H.R. 438, 113th Cong. (2013).

²⁰¹ 159 CONG. REC. E73 (daily ed. Jan. 29, 2013) (extension of remarks of Rep. Eleanor Holmes Norton introducing Fair Pay Act of 2013), available at <http://www.gpo.gov/fdsys/pkg/CREC-2013-01-29/pdf/CREC-2013-01-29-pt1-PgE73-2.pdf>.

For instance, the government could help women with the caregiving gap by giving them more options. As reflected by the 2010 OECD study, the United States offers far less childcare support and parental leave benefits than other OECD countries.²⁰²

The government could also improve its training efforts to reduce gender segregation in jobs. A recent analysis conducted by the Institute for Women’s Policy Research suggests that one key government training program may actually be reinforcing gender segregation and the pay gap.²⁰³ More than two million Americans receive Workforce Investment Act (“WIA”)-funded services by the government each year.²⁰⁴ But a disproportionate number of women receive training services for “sales and clerical” or “service” jobs, while a disproportionate number of men receive training in “installation, repair, production, transportation, or material moving” or “farming, fishing, forestry, construction and extraction skills.”²⁰⁵ Unfortunately, the traditionally male roles tend to earn a significantly higher wage.²⁰⁶ The IWPR concludes that “[m]ore proactive career counseling may encourage women’s entry into higher earning, high-demand fields, and significantly enhance their chances of reaching economic self-sufficiency.”²⁰⁷

The government could also offer negotiation skills training for girls and women. PFA advocates have recognized the importance of offering negotiation skills training for women, and they have included a provision in the PFA to implement a training program.²⁰⁸ But Congress need not wait to pass the PFA to incorporate a proactive measure like training into their go-forward plan.

VIII. Conclusion

Ultimately, instead of focusing so much time on “cracking down” on employers, men and women would be better served if the Administration encouraged social, political, and economic dialogue to better understand the reasons behind the pay gap and develop programs to address the more complex causes. It is possible that progress has stalled not because discrimination laws are ineffective (indeed, most would agree that we have come quite far), but because they address a small part of the issue. Only with a more well-rounded and open-minded perspective can we begin to discuss practical and innovative solutions to take us into the next 50 years and beyond.

²⁰² OECD Study, *supra* note 92, at 18-24.

²⁰³ Inst. for Women’s Policy Research, IWPR #Q012, *Workforce Investment System Reinforces Occupational Gender Segregation and the Gender Wage Gap* (June 2013), available at <http://www.iwpr.org/publications/pubs/workforce-investment-system-reinforces-occupational-gender-segregation-and-the-gender-wage-gap/> at download/file.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Paycheck Fairness Act of 2013, S.84, 113th Cong. (2013).