The University of the Pacific Law Review

Volume 47 | Issue 3 Article 13

1-1-2016

Chapter 546: Another Step to Ensure Equal Pay Doesn't Wait Another Fifty Years

Hannah Fuetsch

Chapter 546: Another Step to Ensure Equal Pay Doesn't Wait Another Fifty Years

Hannah Fuetsch

Code Section Affected
Labor Code § 1197.5 (amended).
SB 358 (Jackson); 2015 STAT. Ch. 546.

TABLE OF CONTENTS

I. INTRODUCTION

In her 2015 Oscar acceptance speech, Patricia Arquette made an impassioned plea for pay equality: "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."[1] Senator Hannah-Beth Jackson addressed Arquette's speech at a press conference about her equal pay legislation and explained that the speech reached her on a personal level because, "before gray hair," the Senator was one of the women fighting for equal pay.[2] These comments illustrate that wage inequality based on gender is not a new problem; rather, it has been an issue for the past fifty years.[3]

Women comprise more than fifty percent of the United States population,[4] and represent forty-seven percent of the work force.[5] Yet, women in the United States make only seventy-eight percent of what men earn.[6] The wage gap varies across education level, age, and income level; however, in each category, employers pay men more than women.[7] For example, female partners working in the largest law firms in the United States earn eleven percent less than their male counterparts.[8] Notably, women account for only four percent of partners in the top law firms.[9] Employers generally pay white women more money than African American and Hispanic women across almost all education levels.[10] In California, the general female population earns eighty-four percent of a man's salary,[11] African American women earn sixty-four percent, and Latina women earn fifty-

1. Alex Needham & Rory Carroll, *Patricia Arquette Uses Oscars Speech to Call for Equal Pay*, GUARDIAN (Feb. 22, 2015), http://www.theguardian.com/film/2015/feb/22/patricia-arquette-oscars-speech-equal-pay-women (on file with *The University of the Pacific Law Review*).

2. *Press Conference on Equal Pay*, CAL. LEGIS. WOMEN'S CAUCUS (Feb. 24, 2015), http://womenscaucus.legislature.ca.gov/equal-pay (on file with *The University of the Pacific Law Review*).

3. NAT'L WOMEN'S LAW CTR., 50 YEARS & COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING EQUAL PAY 1 (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_equal_pay_report.pdf (on file with *The University of the Pacific Law Review*).

4. *State and County QuickFacts*, U.S. CENSUS BUREAU (June 8, 2015, 12:13 PM), http://quickfacts.census.gov/qfd/states/00000.html (on file with *The University of the Pacific Law Review*).

5. *Women in the Professional Workforce*, DEPT. OF PROF. EMP. AFL-CIO (Feb. 2015), http://dpeaflcio.org/ professionals/professionals-in-the-workplace/women-in-the-professional-and-technical-labor-force/ (on file with *The University of the Pacific Law Review*).

6. *Female-to-Male Earnings Ratio and Median Earnings of Full-Time, Year-Round Workers 15 Years and Older by Sex: 1960 to 2013*, U.S. CENSUS BUREAU (2014), *available at* https://www.census.gov/hhes/www/income/data/incpovhlth/2013/figure2.pdf (on file with *The University of the Pacific Law Review*).

7. NAT'L WOMEN'S LAW CTR., *supra* note 3, at 1–3.

8. AMER. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 6 (2014), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf (on file with *The University of the Pacific Law Review*).

9. *Id.* at 2.

10. AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 14 (2015), *available at* http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/ (on file with *The University of the Pacific Law Review*).

11. NAT'L P'SHIP FOR WOMEN & FAMILIES, CALIFORNIA WOMEN AND THE WAGE GAP 1 (Apr. 2014), *available at* http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/california-women-and-the-wage-gap.pdf (on file with *The University of the Pacific Law Review*).

four percent.[12] Senator Jackson introduced Chapter 546 to narrow this wage gap.[13] This article explains the legal background of the wage gap and analyzes Chapter 546's potential for narrowing the wage gap for California women.[14]

II. LEGAL BACKGROUND

Despite numerous legislative efforts since 1963, the wage gap persists across the country, and the battle for equal pay is ongoing.[15] The wage gap is "the difference in men's and women's median earnings, usually reported as either the earnings ratio between men and women or as an actual pay gap."[16] On average, in the United States, women make twenty-two percent less than men for doing the same work.[17] In California, that figure is fifteen percent.[18]

The federal Equal Pay Act plays a large role in California because courts use federal law to interpret the state's equal pay legislation.[19] However, the federal Equal Pay Act presents many obstacles for plaintiffs because of loopholes in its language.[20] The Civil Rights Act provides another route for victims of wage inequality, but plaintiffs encountered difficulties with its statute of limitation until the Lilly Ledbetter Fair Pay Restoration Act extended the time for plaintiffs to bring discrimination suits under the federal Equal Pay Act.[21] Because courts largely interpret the California Equal Pay Act under the federal Equal Pay Act, plaintiffs seeking equal pay under the California Equal Pay Act face similar barriers as those under the federal Equal Pay Act.[22] This section will address the factors contributing to the wage gap,[23] as well as existing federal and state laws

12. *Id.*

13. *Press Conference on Equal Pay*, *supra* note 2.

14. *See infra* Parts II–IV (describing that current equal pay legislation has created obstacles for plaintiffs seeking equal pay through enforcing their rights under the various Acts).

15. NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT 4 (June 2013), *available at* https://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf (on file with *The University of the Pacific Law Review*) (discussing that although equal pay legislation has made significant progress, there is more work to be done).

16. AAUW, *supra* note 10.

17. *Id.*

18. NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 11, at 1.

19. *See infra* Part II.B (illustrating that California courts rely on federal interpretations of the federal Equal Pay Act to apply California's former Equal Pay Act).

20. *See infra* Parts II.B.1–3 (explaining how the language in the federal Equal Pay Act creates loopholes for employers to discriminatorily pay employees based on gender).

21. *See infra* Part II.C (demonstrating the Civil Rights Act's influence on wage equality); *see also infra* Part II.D (showing that the Lilly Ledbetter Fair Pay Restoration Act extended the statute of limitations for wage inequality actions).

22. *See infra* Part II.E (discussing the barriers plaintiffs encountered under the California Equal Pay Act).

23. *See infra* Part II.A (identifying various explanations for the wage gap including pay secrecy, fear of retaliation, work-life balance, and cultural values).

prior to the enactment of Chapter 546 and their effectiveness in closing the wage gap.[24]

A. Why Does the Wage Gap Exist?

Many factors contribute to the wage gap.[25] Pay secrecy is one of the main contributors to its persistence.[26] When employees do not know how much their coworkers earn, they do not know a wage gap exists, much less have the ability to prove it.[27] This secrecy is prevalent in the private sector where sixty-one percent of employers prohibit employees from discussing wages.[28] Additionally, women also accept lower pay out of fear that their employers will retaliate against them for taking action to obtain equal pay.[29] Another important factor is that many women with children choose more flexible hours with lower compensation to achieve a better work-life balance.[30] When women return to work after taking extended family leave, employers often pay them less than male employees with the same job titles.[31]

Some studies suggest the differences between male and female employment strategies explain the wage gap.[32] For instance, men tend to negotiate for higher salaries whereas women are more likely to accept their salaries without negotiation.[33] However, other studies show that women are consistently paid less for equal work regardless of the tactics they use.[34]

Society perpetuates the wage gap because of embedded cultural norms and stereotypes about women.[35] Although women comprise almost half of the work

---

24. *See infra* Parts II.B–E (listing federal and state equal pay legislation and the obstacles they have created for plaintiffs).

25. *See infra* Part II.A (identifying factors that contribute to the wage gap).

26. Ann Friedman, *TAP Talks with Lilly Ledbetter,* AMER. PROSPECT (Apr. 23, 2008), http://prospect.org/article/tap-talks-lilly-ledbetter-0 (on file with *The University of the Pacific Law Review*); *Hearing on SB 358 Before the S. Comm. on Labor & Indus. Relations,* 2016 Leg., 2015-2016 Sess. (Cal. 2015) (Jennifer Reich on behalf of Equal Rights Advocates) (on file with *The University of the Pacific Law Review*).

27. *Id.*

28. AAUW, *supra* note 10, at 17; *Hearing on SB 358, supra* note 26.

29. NAT'L WOMEN'S LAW CTR., *supra* note 3, at 11; *Hearing on SB 358, supra* note 26.

30. Michele Parente, *How Can Women Close the Pay Gap?*, SAN DIEGO UNION TRIB. (May 17, 2015, 6:00 AM), http://www.sandiegouniontribune.com/news/2015/may/17/how-can-women-close-the-pay-gap/ (on file with *The University of the Pacific Law Review*).

31. *Id.*

32. NANCY M. CARTER & CHRISTINE SILVA, THE MYTH OF THE IDEAL WORKER: DOES DOING ALL THE RIGHT THINGS REALLY GET WOMEN AHEAD? 2 (2011), *available at* http://www.catalyst.org/system/files/The_Myth_of_the_Ideal_Worker_Does_Doing_All_the_Right_Things_Really_Get_Women_Ahead.pdf (on file with *The University of the Pacific Law Review*); *See Hearing on SB 358, supra* note 26 (Jennifer Reich explaining that individual choices do not explain why the wage gap exists).

33. *Id*. at 11.

34. *Id*. at 2.

35. NAT'L WOMEN'S LAW CTR., *supra* note 3, at 9.

force, society still characterizes them as caregivers, regardless of whether or not they have children.[36] Cultural norms also place higher value on male work, which affects the amount employers pay women even if they do not intend to engage in overt discrimination.[37]

B. Federal Equal Pay Act

President Kennedy signed the Equal Pay Act of 1963 into law as a part of the Fair Labor Standards Act (FLSA) to address the gap between men and women's earnings.[38] At the time, "the typical woman working full time, year round" in the United States made about fifty-nine cents for every dollar a man earned.[39]

The Equal Pay Act prohibits employers from discriminating against employees based on sex.[40] Specifically, it requires employers to pay employees the same wage when they perform work that "requires equal skill, effort, and responsibility."[41] The Equal Pay Act provides exceptions for unequal pay if the employer demonstrates that it based the pay differential on a merit or seniority system, a quality or quantity of production basis, or any factor that is not sex-based.[42] A seniority system allows an employer to pay workers more based on length of employment.[43] Merit systems provide higher pay for some employees based on consistent periodic evaluations.[44] Quantity or quality production systems reward higher productivity with higher pay, such as commission systems in department stores.[45]

To establish a prima facie case of sex discrimination under the Equal Pay Act, the plaintiff must show the employer pays her less than a colleague of the opposite sex for equal work.[46] The Act imposes a strict liability standard and thus

---

36. *Id*.

37. Barbara F. Reskin & Denise D. Bielby, *A Sociological Perspective on Gender and Career Outcomes*, 19 JOURNAL OF ECONOMIC PERSPECTIVES 71, 73 (2005), *available at* https://www.aeaweb.org/articles.php?doi=10.1257/0895330053148010 (on file with *The University of the Pacific Law Review*); Parente, *supra* note 30.

38. NAT'L EQUAL PAY TASK FORCE, *supra* note 15; *see also* 29 U.S.C. § 206(d)(1) (2007) (demonstrating the Equal Pay Act exists within the FLSA).

39. Abby Lane & Katherine Gallagher Robbins, *The Wage Gap Over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), http://www.nwlc.org/our-blog/wage-gap-over-time (on file with *The University of the Pacific Law Review*).

40. 29 U.S.C. § 206(d)(1) (2007).

41. *Id.*

42. *Id.*

43. EEOC, EEOC COMPLIANCE MANUAL (Dec. 5, 2000) *available at* http://www.eeoc.gov/policy/docs/compensation.html#1.%20Seniority,%20Merit,%20or%20Incentive%20System%20Must%20Be%20Bona%20Fide (on file with *The University of the Pacific Law Review*).

44. *Id.*

45. *Id.*

46. Green v. Par Pools Inc., 111 Cal. App. 4th 620, 626 (4th Dist. 2003).

does not require the plaintiff to show that the employer is intentionally or maliciously paying employees unequal wages.[47] After the plaintiff establishes a prima facie case, the burden of proof shifts to the employer to demonstrate that the unequal pay is justifiable under the Act.[48] As previously discussed, the Equal Pay Act provides four categories of allowable systems to explain unequal pay: a merit evaluation, seniority system, a work quality or quantity production system, or another factor not based on sex.[49] If the employer can provide an acceptable reason for the unequal pay, the burden shifts back to the plaintiff to demonstrate the employer's payroll method is pretext for discrimination.[50] Plaintiffs may pursue a claim for unequal pay within two years of receipt of unequal pay unless the employer intentionally paid employees unequally, in which case, the statute of limitations is three years.[51]

The Equal Employment Opportunity Commission (EEOC) administers and enforces the Equal Pay Act.[52] If an employer violates the Equal Pay Act, the EEOC is responsible for repaying the employee his or her lost wages.[53] The employer cannot reduce the wages of any employees to comply with the Act.[54] From 2000 to 2009, the EEOC investigated 829 charges for pay discrimination and recovered $52 million in damages for victims of wage discrimination.[55] The gender wage gap has persisted despite Equal Pay Act enforcement.[56] In interpreting the Equal Pay Act, courts have worked to define many operative terms of the act, including, "factor other than sex," "same establishment," and "equal work."[57] The judicial interpretations of these terms have created obstacles for plaintiffs enforcing their rights under the Act.[58]

---

47. *See* 29 U.S.C. § 206(d)(1) (2007) (not requiring intent for violations of the Equal Pay Act); *see also* 29 U.S.C. § 216(b) (2008) (only requiring the plaintiff demonstrate unequal wages); Meeks v. Computer Assoc., 15 F.3d 1013, 1019 (11th Cir. 1994) (finding the Equal Pay Act establishes a strict liability standard for unequal pay).

48. *Green*, 111 Cal. App. 4th at 626.

49. *Id.* at 633.

50. *Id.* at 625.

51. 29 U.S.C. § 255(a) (1974). Since the Equal Pay Act is part of the FLSA, the statute of limitations is found within the FLSA. *Id.*

52. Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (1978), *reprinted in* 92 Stat. 3781 (1978) (transferring enforcement and administration of the Equal Pay Act to the EEOC).

53. 29 U.S.C. § 216(b) (2008).

54. 29 U.S.C. § 206(d)(1) (2007).

55. NAT'L EQUAL PAY TASK FORCE, *supra* note 15, at 22.

56. *Id.* at 23.

57. *See infra* Parts II.B.1–3 (explaining how courts interpret factor other than sex).

58. *See infra* Parts II.B.1–3 (identifying obstacles created by the federal Equal Pay Act).

1. Factor Other than Sex

An employer's affirmative defense to an Equal Pay Act violation is to argue that any inequality in pay is based on a factor other than sex.[59] This exception "prevents the employer from relying on a compensation differential that is merely a pretext for sex discrimination—e.g., determining salaries on the basis of an employee's height or weight, when those factors have no relevance to the job at issue."[60] Plaintiffs in many cases are unable to provide sufficient evidence demonstrating pretext when employers list factors other than sex as a reason for unequal pay, and, as such, many plaintiffs are barred from relief.[61]

2. Same Establishment Requirement

Employees encounter further obstacles when suing for unequal pay because the statute requires plaintiffs to show that their employers are paying other employees in the same establishment more for equal work.[62] The "same establishment" language requires the employees being compared have to work in the same physical building.[63] Therefore, every "physically separate place of business" is its own establishment.[64] The EEOC applies the "same establishment" requirement more broadly in some situations.[65] In unusual circumstances, "two or more distinct physical portions of a business enterprise" may be treated as a single establishment.[66] For example, "a central administrative unit" may control aspects of hiring, setting wages, and assigning duties, in which case it would be more appropriate to consider separate physical locations as a single

59. 29 U.S.C. § 206(d)(1) (2007).

60. Engelmann v. Nat'l Broad. Co., Inc., No. 94 CIV 5616 (MBM), 1996 WL 76107, at *7 (S.D.N.Y. Feb. 22, 1996).

61. *See* Green v. Par Pools Inc., 111 Cal. App. 4th 620, 626 (4th Dist. 2003) (finding plaintiff could not show pretext when employer's justification for unequal pay was due to male employee having more experience); Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1077 (9th Cir. 1999) (concluding that plaintiff could not show pretext when male colleague had greater qualifications than she did); Irby v. Bittick, 44 F.3d 949, 955–56 (11th Cir. 1995) (holding that both prior salary and experience were "factors other than sex" that barred plaintiff's discrimination claim); *see also Closing the "Factor Other Than Sex" Loophole in the Equal Pay Act*, NAT'L WOMEN'S L. CTR. (Apr. 12, 2011), *available at* http://www.nwlc.org/resource/closing-factor-other-sex-loophole-equal-pay-act [hereinafter *Factor Other Than Sex*] (on file with *The University of the Pacific Law Review*) ("Some courts have interpreted the "factor other than sex" defense to permit employers to pay discriminatory wages for a limitless number of reasons.").

62. *See* Renstrom v. Nash Finch Co., 787 F. Supp. 2d 961, 967 (D. Minn. 2011) (deciding two distribution centers run by a central company were two separate establishments); *Factor Other Than Sex*, *supra* note 61 (explaining the numerous factors employers can list as a "factor other than sex").

63. 29 C.F.R. § 1620.9(a) (2015).

64. *Id.*

65. *See* 29 C.F.R. § 1620.9(b) (2015) (listing several scenarios that the EEOC considers a "single establishment").

66. *Id*.

establishment.[67] Without these "unusual circumstances," courts will not find "physically separate place[s] of business" to be the same establishment.[68]

Broader application of the same establishment requirement provided support for a wage discrimination suit against a school district that paid male janitors more than female janitors.[69] The court held that the school district operated as a single establishment because it operated as a single administrative unit that controlled all aspects of the school district's business like hiring, firing, and setting wages.[70] A broad application of the same establishment requirement helped the plaintiffs in this case, but not in others.[71] Some courts have declined to apply the broad interpretation even while recognizing that labor has changed since 1963 and that public policy probably requires a change in the definition of same establishment.[72]

3. Equal Work

Plaintiffs have also encountered challenges as courts struggle to find a comprehensive definition of equal work.[73] Courts must determine "whether the jobs in question are sufficiently related and sufficiently similar in skill, effort, responsibility, and working conditions, as to be substantially equal."[74] Work is substantially equal when employees utilize different machines in carrying out the same duties,[75] employees have different job titles but perform the same duties,[76] and female employees temporarily replace male employees in their job positions.[77] Courts have found work was not substantially equal when higher-paid employees performed additional, substantial duties;[78] and, in another situation, a

67. *Id*.

68. *Id*.

69. Brennan v. Goose Greek Consol. Indep. Sch. Dist., 519 F.2d 53, 56 (5th Cir. 1975).

70. *Id.*

71. *See id.* (applying the broad interpretation of the same establishment requirement allowed plaintiffs to meet their prima facie case); *see also* Renstrom v. Nash Finch Co., 787 F. Supp. 2d 961, 967 (D. Minn. 2011) (holding plaintiffs were unable to meet their burden of proof because the court refused to apply the broad interpretation of the same establishment requirement).

72. *Renstrom*, 787 F. Supp. 2d at 967.

73. *Press Conference on Equal Pay, supra* note 2.

74. Thompson v. Sawyer, 678 F.2d 257, 274 (D.C. Cir. 1982).

75. *Id.*

76. Goodrich v. Int'l Broth. of Elec. Workers, AFL-CIO, 712 F.2d 1488, 1493–94 (D.C. Cir. 1983) (finding that regardless of title, it is the content of the work which will determine whether work is substantially equal).

77. *See* Marshall v. Sch. Bd., Hermitage Sch. Dist., 599 F.2d 1220, 1222 (3rd Cir. 1979) (finding female employees who temporarily replaced male employees should have been paid the same wages the male employees would have made had they performed the work).

78. *Goodrich*, 712 F.2d 1488, at 1493–94 (finding that in certain situations additional duties may constitute unequal work).

court found work was not substantially equal when one class of workers performed heavy duty cleaning duties two to three hours a week and the other class of workers did not.[79]

C. Civil Rights Act

The Civil Rights Act of 1964 provides employees additional protection from discrimination because of their "race, color, religion, [or] sex."[80] The Civil Rights Act prohibits employers from firing employees for discriminatory reasons, segregating or classifying employees based on one of the previously mentioned factors, or discriminatorily refusing to hire prospective employees.[81] Employers cannot segregate, classify, or limit employees based on these factors in a way that creates a disparate impact on employment opportunities.[82] Under the Civil Rights Act, a plaintiff must first file a complaint with the EEOC and exhaust administrative remedies prior to seeking a judicial remedy.[83] Courts struggled to interpret the Equal Pay Act and Civil Rights Act together because Senator Wallace Bennett added an amendment to the Civil Rights Act immediately before Congress enacted it.[84] The Bennett Amendment states that it is lawful for employers to have sex-based wage differentials "if such differentiation is authorized by the provisions of section 206(d) of Title 29,"[85] which lists the categories employers can use to explain unequal pay.[86]

International Union of Electrical Radio and Mach. Workers v. Westinghouse demonstrates how courts struggled to address the Bennett Amendment.[87] In *Westinghouse*, the plaintiffs claimed their employer used a classification system that discriminated against female employees because the company separated types of work by "male jobs" and "female jobs," assigned each category value points, and then based salaries on those points.[88] The court had to decide whether to broadly or narrowly interpret the Bennett Amendment based on the words "is authorized by."[89] If broadly interpreted, the court would incorporate the same

79. Marshall v. Bldg. Maint. Corp., 587 F.2d 567, 570–71 (2nd Cir. 1978).

80. 42 U.S.C. § 2000e-2(a)(1) (2015).

81. *Id.*

82. § 2000e-2(a)(2).

83. Demissie v. Starbucks Corporate Office and Headquarters, 19 F. Supp. 3d 321, 324 (D.D.C. 2014).

84. Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099 (3rd Cir. 1980).

85. *Id.*; 29 U.S.C. § 206(d)(1) (2007).

86. 631 F.2d at 1099.

87. *See id.* (identifying the various meanings the Bennett Amendment could have and what their implications would be).

88. *Id.* at 1097. The Equal Pay Act does not prohibit classification systems that produce discriminatory wages, but the Civil Rights Act does. *Id.*

89. *Id*.

requirements found in the Equal Pay Act while also allowing protection against discriminatory classification systems.[90] However, a narrow interpretation would confine the Civil Rights Act to the limitations of the Equal Pay Act.[91] The court found that the Civil Rights Act incorporated the Equal Pay Act because The Civil Rights Act protects people from a broad range of discrimination including religion, race, and national origin.[92] Consequently, it was logical for the Civil Rights Act to protect against sex discrimination as well.[93] Thus, the Civil Rights Act helped expand protection for employees by prohibiting discriminatory employment practices outside the scope of the Equal Pay Act, but that result in wage discrimination.[94]

The Civil Rights Act also protects employees by making it unlawful for employers to require one gender to pay more for health insurance or retirement fees than the other gender based on common gender-related characteristics like lifespan.[95] Though the Civil Rights Act expanded protection against discriminatory business practices like classification systems, it is still difficult for employees to enforce their rights under the Equal Pay Act.[96]

D. Lilly Ledbetter Fair Pay Restoration Act

For many years, courts imposed a very short statute of limitation requirement under the Equal Pay Act, thereby disadvantaging plaintiffs.[97] For example, in 1998, Lilly Ledbetter sued her employer, Goodyear Tire, for unequal pay under the Civil Rights Act.[98] Ledbetter alleged unfair evaluations prevented her from making as much money as her male colleagues.[99] Because Ledbetter's employer had a policy prohibiting wage discussion between employees, as many employers do, Ledbetter was unaware she made less than her male colleagues until she received an anonymous letter explaining the pay differences.[100] The Supreme Court barred Ledbetter's claim because the Court characterized Goodyear's discrimination as a systematic business practice, which meant Ledbetter only had 180 days after the first discriminatory pay check to file a complaint with the

90. *Id.* at 1103.

91. *Id.* at 1102.

92. *Id.* at 1107.

93. *Id.*

94. *Id.*

95. City of L.A., Dep't. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978).

96. *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 642 (2007) (holding the statute of limitations barred plaintiff's claim for gender discrimination).

97. *See infra* Part II.D (describing the negative effects of the short statute of limitations).

98. *Ledbetter*, 550 U.S. at 618.

99. *Id.* at 622.

100. Friedman, *supra* note 26.

EEOC.[101] This decision severely restricted the time period for employees to bring claims for sex discrimination under the Civil Rights Act.[102]

In response to the Court's ruling in *Ledbetter*, President Obama signed The Lilly Ledbetter Fair Pay Restoration Act (LLFPRA) into law in 2009.[103] The LLFPRA extends the time during which employees can bring sex discrimination claims by providing that each paycheck with a discriminatory wage is a separate violation of both the Equal Pay Act and the Civil Rights Act.[104] This LLFPRA restarts the 180-day statute of limitations with every discriminatory paycheck.[105]

E. Prior California Law

In 1949, California passed and enacted its own version of the Equal Pay Act (CEPA), which was last amended in 1985.[106] CEPA prohibits employers from discrimination against employees who work in the same establishment and perform work that "requires equal skill, effort, and responsibility."[107] CEPA also provides exceptions for pay differentials when the unequal pay is due to a seniority or merit system, a system based on quality or quantity of production, or any other factor independent from sex.[108] To bring a cause of action, the statute of limitations is two years after the incident occurs, or three years after the incident if the violation is willful.[109] CEPA does not prohibit retaliatory action against an employee who pursues equal pay through its provisions.[110] Because of the similarities between the CEPA and the federal Equal Pay Act, courts often rely on interpretations of the federal statute to analyze cases brought under CEPA.[111] Consequently, employees face the same barriers to recovery as they do through the federal Equal Pay Act.[112]

---

101. *Ledbetter*, 550 U.S. at 642. *See* 42 U.S.C. § 2000e-5(e)(1) (2009) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge.").

102. *Ledbetter*, 550 U.S. at 618.

103. Barack Obama, President of the U.S., Remarks at Lilly Ledbetter Fair Pay Restoration Act Signing (Jan. 29, 2009), *available at* http://whitehouse.gov/the-press-office/remarks-president-barack-obama-lilly-ledbetter-fair-pay-restoration-act-bill-signing [hereinafter Obama] (on file with *The University of the Pacific Law Review*).

104. 42 U.S.C. § 2000e-5 (2009).

105. *Id.*

106. CAL. LAB. CODE § 1197.5(a) (West 2015).

107. *Id.*

108. *Id.*

109. *Id.* § 1197.5(h).

110. *Id.*

111. *See* Green v. Par Pools Inc., 111 Cal. App. 4th 620, 623 (2003) (finding that because the California Equal Pay Act and the Equal Pay Act of 1963 are "nearly identical," courts will "rely on federal authorities construing the federal statute").

112. *See supra* Part II.A (identifying problems plaintiffs faced under the Equal Pay Act).

In 1980, the legislature enacted the California Fair Employment and Housing Act (FEHA) to protect people from employer discrimination "because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person."[113] Though FEHA protects against gender and sex discrimination in the workplace, it does not explicitly prohibit wage discrimination.[114]

In *Hall v. County of Los Angeles*, Danna Hall brought a class action lawsuit on behalf of 200 female attorneys under FEHA and CEPA for wage discrimination resulting from disparate impact through job classifications.[115] Los Angeles County hired Hall to provide legal services in the juvenile court because the existing attorneys were over-burdened.[116] The county paid these new hires less than another tier of employees, even though both tiers performed equal work.[117] The court required Hall to show the "County chose the particular policy because of its effect on members of a protected class, not just that the County was aware that a given policy would lead to adverse consequences for a given group."[118] The court held Hall failed to meet her burden of proof because she could not show her employer intentionally discriminated against women.[119]

III. CHAPTER 546

Senator Jackson introduced Chapter 546 to clarify existing legislation addressing the wage gap.[120] Chapter 546 removes the requirement in the CEPA that workers who are paid more than the plaintiff work in the same establishment.[121] Chapter 546 requires equal pay for employees performing substantially similar work unless an employer demonstrates the wage differential is due to a payroll system based on seniority or merit, a quality or quantity production basis, or another factor aside from sex that qualifies as a business necessity.[122] The burden of proof rests with employers to demonstrate that wage differentials have a basis aside from sex.[123]

113. CAL. GOV'T CODE § 12940(a) (West 2015).
114. *Id.*
115. Hall v. L.A., 148 Cal. App. 4th 318, 321 (2007).
116. *Id.* at 320–21.
117. *Id.* at 322–23.
118. *Id.* at 326–27.
119. *Id.* at 327.
120. *Press Conference on Equal Pay, supra* note 2.
121. CAL. LAB. CODE § 1197.5(a)(1) (amended by Chapter 546).
122. § 1197.5(a)(1)(A)–(D) (amended by Chapter 546).
123. *Id.*

Chapter 546 defines business necessity as "an overriding legitimate business purpose."[124] If an employer demonstrates that the wage differential is due to a factor that meets the business necessity requirement, the burden shifts back to the employee to demonstrate that there is another business practice that could fulfill the same business need without resulting in a wage differential.[125]

An employer cannot retaliate against or fire employees for attempting to exercise their rights under Chapter 546.[126] Furthermore, an employer cannot bar employees from disclosing or discussing their wages.[127] Chapter 546 imposes a one-year statute of limitations specific to the provisions regarding employer retaliation.[128] The statute of limitations to bring a claim for wage discrimination is two years, and for intentional discrimination, is three years.[129]

IV. ANALYSIS

Senator Jackson introduced Chapter 546 with the intent to close the wage gap for women, but more specifically, reduce the wage gap for Hispanic and African American women.[130] The following sections will analyze the effect of Chapter 546 on both of those groups and determine whether Chapter 546 will achieve its goal.[131]

A. Elimination of the Same Establishment Requirement

Proponents of Chapter 546 insist it will make it easier for plaintiffs to bring suits against employers for discriminatory pay by changing the wording of the original CEPA to eliminate the loopholes the old language created.[132] For instance, Chapter 546 eliminates the same establishment requirement, which previously made it difficult for plaintiffs to demonstrate a prima facie case when colleagues worked in physically separate locations.[133] Employees now have the ability to challenge employers for sex discrimination when a higher paid

---

124. § 1197.5(a)(1)(D) (amended by Chapter 546).

125. *Id.*

126. § 1197.5(j)(1) (amended by Chapter 546).

127. *Id.*

128. *Id.*

129. § 1197.5(a)(3)(h) (amended by Chapter 546).

130. *Press Conference on Equal Pay*, *supra* note 2.

131. *See infra* Parts IV.1–2 (analyzing Chapter 546's effect on the female population, but specifically Chapter 546's effect on female minority groups).

132. Halima Kazem, *California Equal Pay Bill Shields Women from Retaliation for Discussing Wages*, GUARDIAN (Apr. 21, 2015 10:59 AM), http://www.theguardian.com/us-news/2015/apr/21/california-fair-pay-act-wage-gap-women-men (on file with *The University of the Pacific Law Review*); *Hearing on SB 358, supra* note 26.

133. *Id.*

colleague works in a different "physical place of business," but still performs substantially similar work.[134] With this change, plaintiff Lannie Staniford, who was previously barred from bringing a suit because her better-paid male colleague worked in Fresno while she worked in San Francisco, would be able to challenge her employer for paying him more even though the two employees worked in different cities.[135] Therefore, Chapter 546 broadens the class of employees to whom workers may compare their salaries beyond the class specified under federal law.[136]

B. Business Necessity Requirement for Factors Other Than Sex

Prior to Chapter 546, CEPA allowed employers to provide any factor not based on sex to justify equal pay.[137] Now, CEPA will require employers to ensure that this factor is consistent with a business necessity.[138] The business necessity requirement may create a higher burden on employers who discriminate because they will be hard pressed to come up with factors based on business necessities that will justify paying employees unequally based on gender.[139] However, the business necessity requirement may not change how courts adjudicate wage discrimination cases in California.[140] California state courts use interpretations of the Federal Equal Pay Act to interpret CEPA.[141] The Ninth Circuit Court of Appeals already requires employers to provide a business-related explanation when they use the "factor other than sex" justification.[142] If this language change were made in a state that does not currently require a business-related explanation for factors other than sex, the change would have had a much greater effect on a plaintiff's ability to establish an employer is engaging in wage discrimination.[143]

---

134. *Id.*

135. *Id.*

136. *See supra* Part IV.A (explaining how Chapter 546 eliminates the same establishment requirement).

137. *See supra* Part II.B.1 (demonstrating that the "factor other than sex" requirement allowed employers to identify any factor to justify unequal pay); *Hearing on SB 358, supra* note 26 (Jennifer Reich giving examples of cases where the same establishment requirement barred plaintiffs from relief).

138. Kazem, *supra* note 13.

139. *Id.; see Hearing on SB 358 supra,* note 26 (California Chamber of Commerce identifying concerns regarding an employer's ability to name a factor other than sex and expressing concern that this standard is too high).

140. *See infra* Part IV.B (explaining that courts in the Ninth Circuit already require the "factor other than sex" be a business necessity).

141. *See supra* Part II.E (demonstrating that California state courts rely on federal court interpretations of the federal Equal Pay Act to interpret CEPA).

142. Wachter-Young v. Ohio Cas. Group, 236 F. Supp. 2d 1157, 1164 (9th Cir. 2002).

143. Wernsing v. Dep't. of Human Services, 427 F.3d 466, 470 (7th Cir. 2005).

Though Chapter 546 is not changing the standard for the "factor other than sex" justification in California, it provides a backup plan should the Supreme Court of the United States decide the issue differently than the Ninth Circuit, since there is currently a circuit split.[144] If the Supreme Court agrees with the Seventh Circuit Court of Appeals, Chapter 546 would ensure California employers still have the burden to demonstrate the "factor other than sex" is a business necessity.[145]

Some employers use salary matching as a justification for unequal pay, claiming it is a "factor other than sex."[146] With salary matching, employers offer to pay new employees the same or more than they made at their previous positions.[147] Salary matching often perpetuates unequal pay because employers cannot ascertain whether the employee's previous pay was a result of gender discrimination.[148] If plaintiffs can demonstrate another business method that could produce the same result without the wage differential, Chapter 546 could remedy this cycle of unequal pay.[149]

The Ninth Circuit not only already provides plaintiffs with the opportunity to prove that the payment method is a pretext, but its courts also allow employers to claim that salary matching is a legitimate business reason for unequal pay.[150] In order to overcome the employer's defense, a plaintiff would have to prove an alternative business practice that would produce the same result as salary matching without causing unequal pay.[151]

The Governor recently vetoed AB 1017, which Assembly Member Nora Campos introduced to narrow the wage gap.[152] AB 1017 sought to prohibit employers from asking new employees about their previous salaries.[153] In the Governor's veto message, he acknowledged that he signed Chapter 546 and that it is necessary to give Chapter 546 the chance to effectuate change before

144. *See infra* Part IV.B (showing that if the Supreme Court did not find a business necessity was required for the factor other than sex reason for unequal pay, Chapter 546 would provide California citizens with state legislation that did include this requirement).

145. *See supra* Part III (explaining that Chapter 546 requires a factor other than sex be a business necessity).

146. *Factor Other Than Sex*, *supra* note 61.

147. *Id.*

148. *Id.; see Hearing on SB 358, supra* note 26.

149. CAL. LAB. CODE § 1197.5(a)(1)(A)-(D) (amended by Chapter 546). *See* Kazem, *supra* note 139 (describing the plaintiff's ability to provide an alternative business practice that wouldn't create a wage differential).

150. Wachter-Young v. Ohio Cas. Group, 236 F. Supp. 2d 1157, 1164–65 (9th Cir. 2002).

151. Kazem, *supra* note 132.

152. Press Release, Assistant Democratic Leader Nora Campos, The California Senate Agrees, Equal Pay Matters (Sept. 1, 2015), http://asmdc.org/members/a27/news-room/press-releases/the-california-senate-agrees-equal-pay-matters (on file with *The University of the Pacific Law Review*).

153. *Id.*

enacting more legislation.[154] However, Chapter 546 does not address the specific issue that AB 1017 would have.[155] Under Chapter 546, an employer can still ask a new employee what her salary was at her last job.[156] Some employers argue that obtaining this information is crucial to staying competitive, assessing the market rate, and other purposes.[157] The problem is that hiring practices like salary matching often perpetuate the wage gap because many women were already paid less than their male counterparts at their previous jobs.[158] Because AB 1017 and Chapter 546 address the wage gap on different levels and for different contributing factors, the legislature should put the same bill forward next year.[159]

C. Substantially Similar Work Standard

Chapter 546 also seeks to close the "equal work" standard loophole by replacing it with a "substantially similar work" standard.[160] Supporters of Chapter 546 explain that by changing the "equal work" standard to "substantially similar work," plaintiffs will increase their ability to enforce their rights.[161] However, all of the circuit courts that have considered the issue already interpret equal work under the federal Equal Pay Act to mean "substantially equal."[162]

In *Corning Glass Works v. Brennan*, the Supreme Court noted that Congress intended for the meaning of "equal work" to include factors like "skill, effort, responsibility, and working conditions."[163] Since California courts use federal law to interpret CEPA, it is likely that state courts would find "substantially similar work" equivalent to "substantially equal" under the federal Equal Pay Act.[164] For example, like California's, Illinois' Equal Pay Act requires equal pay for the "same or substantially similar work."[165] In both California and Illinois, most wage discrimination claims are brought under both the state and federal equal pay acts;

---

154. GOVERNOR EDMUND G. BROWN JR., VETO MESSAGE AB 1017 (2015).

155. *Hearing on AB 1017 Before the S. Comm. on Labor & Indus. Relations,* 2016 Leg., 2015-2016 Sess. (Cal. 2015) (Jennifer Reich discussing the ways AB 1017 complements Chapter 546).

156. *See Hearing on SB 358, supra* note 26 (Jennifer Reich).

157. *See Hearing on AB 1017*, *supra* note 155 (Senator Jeff Stone expressing employer concerns).

158. *See Hearing on AB 1017*, *supra* note 155 (Jennifer Reich); *See Hearing on SB 358*, *supra* note 26 (Jennifer Reich demonstrating that practices like salary matching may not be intentionally discriminatory but nonetheless have a discriminatory impact).

159. *See Hearing on AB 1017*, *supra* note 155 (Jennifer Reich explaining how salary matching leads to the wage gap).

160. *Press Conference on Equal Pay, supra* note 2; *Hearing on SB 358*, *supra* note 26

161. Kazem, *supra* note 132; *See Hearing on SB 358*, *supra* note 26.

162. *See* Thompson v. Sawyer, 678 F.2d 257, 272 (D.C. Cir. 1982) (explaining that all circuit courts to consider the issue interpret equal work as substantially similar work, except for the First Circuit who has yet to decide the issue).

163. 417 U.S. 188, 201 (1974).

164. *See infra* Part IV.C (explaining how another court applies the substantially similar work standard).

165. 820 ILL. COMP. STAT. 112/10 (West 2004).

in fact, only Illinois has a case that has been tried under the state's Equal Pay Act without the federal Equal Pay Act.[166] As a result, courts construe state claims in accordance with federal law, which means they interpret "substantially similar work" as being equivalent to "substantially equal."[167] If a plaintiff brought a claim only under California or Illinois law, it is still likely that the courts would use the same factors federal courts do to determine if work is substantially equal.[168] As evidenced by the only reported case in Illinois in which the plaintiff brought a claim for wage discrimination under Illinois law alone, the court used the employees' duties and responsibilities to determine whether their work was "substantially similar."[169] The analysis of the Illinois court parallels the analysis a court would take in a federal wage discrimination claim.[170] It therefore seems likely that courts will interpret Chapter 546's "substantially similar" standard in line with the construction of the federal "equal work" standard.[171] Consequently, it is unlikely that changing the term "equal work" to "substantially similar work" will alter the outcome of California wage discrimination claims.[172]

Overall, this linguistic change does not indicate an overwhelmingly clear change in a plaintiff's ability to establish a prima facie case for wage discrimination based on gender.[173]

D. Chapter 546 and Minority Women

Though proponents argue that Chapter 546 will benefit minority women more than white women,[174] Chapter 546 provides no racial minority-specific benefits.[175] While Chapter 546 may make it a little easier for women to bring successful claims under CEPA, employment litigation is expensive.[176] Since minority women generally earn less than white women,[177] minority women will

166. Illinois Dep't. of Labor v. 2000 W. Madison Liquor Corp., 394 Ill. App. 3d 813, 818–19 (2009).

167. *See id.* (interpreting substantially similar work in the same way "substantially equal" is interpreted).

168. *See id.* (using similar factors as federal courts to identify substantially equal work).

169. *Id.*

170. *See supra* Part IV.C (explaining how federal courts analyze the equal work standard).

171. *See id.* (demonstrating the similarity between Illinois's equal pay legislation and Chapter 546).

172. *See id.* (assessing the impact of changing the words 'equal work" to "substantially similar work").

173. *See infra* Part IV.A (analyzing Chapter 546's changes and explaining they will not make a plaintiff's case easier or more successful); *See Hearing on SB 358*, *supra* note 26 (Jennifer Reich explaining that Chapter 546 codifies language that the Supreme Court of the United States already uses).

174. *Press Conference on Equal Pay, supra* note 2.

175. *See* CAL. LAB. CODE § 1197.5 (amended by Chapter 546) (not mentioning racial minorities).

176. *Employment Litigation and Dispute Resolution*, DEP'T OF LABOR, *available at* http://www.dol.gov/_sec/media/reports/dunlop/section4.htm [hereinafter DEP'T OF LABOR] (on file with *The University of the Pacific Law Review*).

177. AAUW, *supra* note 10, at 10.

be less able to afford litigating employment claims.[178] It is therefore unlikely that Chapter 546 will level the playing field between men and minority women.[179] While creating a statute that solely promotes wage equality amongst minority women may be difficult due to equal protection concerns,[180] California legislators have expressed their intentions to continue to draft legislation that supports reducing the wage gap for minority women.[181] Thus, Chapter 546 may not be the solution to minority women's fight for wage equality, but California is taking steps to reach this goal.[182]

E. Increased Litigation

Opponents of eliminating the "same establishment" requirement warn that it could lead to an upsurge of litigation and employee unionizing.[183] Employment litigation is expensive because "for every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims."[184] Employers have to pay lawyers not only to directly handle litigation, but also to design preventative practices to avoid potential lawsuits with employees.[185] These issues create significant costs for employers and can force them to pay employees less in order to balance their resources.[186] Because Chapter 546 will likely increase litigation, at least initially, employers could incur costs that may result in lower wages or fewer jobs.[187]

Though some employees may benefit from the increased litigation Chapter 546's enactment brings about, others may not.[188] Lawsuits are not only expensive for employees, but also stressful, disappointing, time consuming, and

178. *See* DEP'T OF LABOR, *supra* note 176 (finding that employment litigation is expensive); *see also* AAUW, *supra* note 10, at 7 (describing African American and Hispanic women as more likely to be poor than white women).

179. *See supra* Part IV.C (explaining why Chapter 546 does not specifically help minority women).

180. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (explaining that admissions practices at universities which draw racial distinctions are subject to strict judicial scrutiny).

181. *Press Conference on Equal Pay*, *supra* note 2.

182. *Id.*

183. *See* Frank Van Dusen, *Lilly Ledbetter Law May Create Recordkeeping Headache for Employers*, MILLER NASH GRAHAM & DUNN (Feb. 3, 2009), http://www.millernash.com/lilly-ledbetter-law-may-create-recordkeeping-headache-for-employers-02-03-2009/ (on file with *The University of the Pacific Law Review*) (analyzing removing the same establishment in the context of the Paycheck Fairness Act). *See also Hearing on SB 358*, *supra* note 26 (California Chamber of Commerce expressed concern about increasing litigation).

184. *See* DEP'T OF LABOR, *supra* note 176 (explaining the costs and effects of litigation on employers and employees).

185. *Id.*

186. *Id.*

187. *Id.*; *see Hearing on SB 358*, *supra* note 26 (Senator Jeff Stone discussing the concerns regarding increased litigation).

188. DEP'T OF LABOR, *supra* note 176.

embarrassing.[189] Discrimination cases can also take years to get to trial.[190] In the meantime, employees often must expose their personal lives to investigation.[191]

Aside from the costs employers and employees incur, employment litigation caused by stricter standards in equal pay legislation like Chapter 546 may negatively impact the economy and business practices in California and the rest of the United States.[192] The more money businesses spend to defend and prevent discrimination litigation, the less money they can invest in their own products, research, and employees.[193] In order to avoid some of employment litigation's harsh consequences, the EEOC encourages alternative dispute resolution prior to commencing lawsuits.[194] Senator Hanna-Beth Jackson squarely responded to concerns of increased litigation: "If we need to have some litigation that is finally going to open up a path that has been closed to women for years, to set the direction for businesses to follow, that's not a bad thing."[195]

F. Wage Disclosure

Chapter 546 concerns employers because it prohibits employers from forbidding employees to discuss their wages.[196] However, Chapter 546 does not require employers to publish employees' wages.[197] Furthermore, even though Chapter 546 gives employees the ability to disclose and discuss wages, most employees typically refrain from discussing wages due to discomfort.[198]

---

189. *Id.*; *see Hearing on SB 358*, *supra* note 26 (Aileen Rizo, a current plaintiff in a wage discrimination lawsuit, discussing the difficulties she's experienced under current equal pay legislation).

190. DEP'T OF LABOR, *supra* note 176.

191. *Id.*

192. *Litigation Protects and Ruins Businesses: Litigation Impact on Cost, Valuation . . . Social Media . . . Outlook for Litigations—2013*, BIZSHIFTS-TRENDS (Feb. 7, 2013), http://bizshifts-trends.com/2013/02/07/litigation-protects-and-ruins-businesses-litigation-strategies-and-impact-on-cost-valuation-social-media-outlook-for-litigations-2013/ (on file with *The University of the Pacific Law Review*).

193. *Id.*

194. *See* DEP'T OF LABOR, *supra* note 176 (describing the benefits of in-house ADR systems over litigation).

195. *See Hearing on SB 358*, *supra* note 26.

196. CAL. LAB. CODE § 1197.5(j)(1) (as amended by Chapter 546); s*ee Hearing on SB 358*, *supra* note 26 (Senator Stone identifying employer concerns regarding wage disclosure).

197. *See id.* (preventing employers from prohibiting wage discussion but not mandating wage disclosure); *see Hearing on SB 358*, *supra* note 26 (Jennifer Reich explaining that Chapter 546 does not require wage disclosure).

198. Jacquelyn Smith, *How to Handle Uncomfortable Salary Discussions at Work*, FORBES (Apr. 12, 2013 3:15 PM), http://www.forbes.com/sites/jacquelynsmith/2013/04/12/how-to-handle-uncomfortable-salary-discussions-at-work/ (on file with *The University of the Pacific Law Review*); *see Hearing on SB 358*, *supra* note 26 (Jennifer Reich describing women's fear of retaliation for inquiring about wages).

If Chapter 546 could legally mandate wage disclosure,[199] such disclosure would likely further narrow the wage gap.[200] In Washington D.C., women make ninety percent of men's salaries, which is the closest male to female earnings ratio in the country.[201] There is a low wage gap because the federal government employs a majority of the population in Washington D.C. and requires employee wage information disclosure.[202] Not only does mandated wage disclosure make employees aware of their wages in comparison with coworkers,[203] but pay transparency also gives employers the opportunity to become aware of pay inequality before employees pursue litigation.[204] Because unequal pay can often result from subconscious stereotypes, bias, and negative cultural values regarding women,[205] mandated wage disclosure would force employers to directly confront their pay systems and eliminate unconscious biases.[206] Although Chapter 546 does not, and arguably no bill can, mandate wage disclosure, the California legislature is working to provide legislation that will decrease pay secrecy in the workplace.[207]

G. Chapter 546 Does Not Solve the Wage Gap

Based on the changes Chapter 546 makes to CEPA, it is unlikely Chapter 546 will substantially reduce the wage gap in California.[208] While it is likely that Chapter 546 will increase discrimination litigation,[209] which may in turn make employers and the public more aware of the wage gap, the lack of significant changes to CEPA will probably not affect the outcome of wage discrimination

199. *See* Cal. Const. art. 1, § 1 (West 1974) (stating that all citizens enjoy a right to privacy which implies that mandatory wage disclosure is not legal).

200. *See infra* Part IV.F (mandatory wage disclosure produces lower wage gap rates among men and women).

201. Juliet Eilperin, *On Equal Pay, D.C. Comes Out On Top*, WASH. POST (Apr. 9, 2013), http://www.washingtonpost.com/news/the-fix/wp/2013/04/09/on-equal-pay-d-c-comes-out-on-top/ (on file with *The University of the Pacific Law Review*).

202. *Id.*; *see Hearing on SB 358*, *supra* note 26.

203. Elperin, *supra* note 201; *see Hearing on SB 358*, *supra* note 26 (Jennifer Reich explaining that more information is always ideal and helps women narrow the wage gap).

204. *See* Chris Joseph, *What Are the Benefits of Equal Pay for Women & Men?*, CHRON (2015), http://smallbusiness.chron.com/benefits-equal-pay-women-men-11771.html (on file with *The University of the Pacific Law Review*).

205. *See supra* Part II.A (describing the factors causing the wage gap).

206. *See* Joseph, *supra* note 197 (explaining that employers would be aware of discriminatory pay wages if they were confronted with employee salaries).

207. Press Release, *supra* note 150.

208. *See supra* Part IV.A–B (analyzing Chapter 546's impact on CEPA litigation).

209. *Supra* Part IV.A.

cases.[210] Although plaintiffs may not have the successes that some predict, there is great value in codifying strong equal pay legislation.[211] Laws are the foundation for equal rights; they provide remedies for victims of prejudice and they set a cultural tone for how the nation views discrimination.[212] Cultural practices have a strong connection to the codified laws in a state.[213] Laws greatly impact women in our society, especially when laws disadvantage them.[214] Therefore, although Chapter 546 may not have an overwhelming impact on plaintiff actions in civil suits, the chaptering of this legislation will likely be a strong starting point.[215] In moving forward, the California legislature should push for legislation like AB 1017, which prohibits employers from basing employee salary on prior income, and should work to find solutions to pay secrecy so that employees are informed and able to enforce their rights under Chapter 546.[216]

V. CONCLUSION

When he signed the Equal Pay Act of 1963, President Kennedy stated it would bring awareness to "the unconscionable practice of paying female employees less wages than male employees for the same job."[217] Forty-six years later, President Barack Obama characterized the Lilly Ledbetter Fair Pay Restoration Act as "only the beginning," in the fight to ensure equal pay so that "our daughters have the same rights, the same chances, and the same freedom to pursue their dreams as our sons."[218] The fact that two presidents, separated by almost five decades, have made the same call for equal pay demonstrates the need for stronger legislation.[219]

Prior to Chapter 546, plaintiffs rarely brought cases only under California's Equal Pay Act,[220] but now that the legislature enacted Chapter 546, state actions

---

210. *See* Eilperin, *supra* note 201 (describing equal pay legislation as a means to bring awareness to unequal pay); *Hearing on SB 358*, *supra* note 26 (Senator Jackson discussing the positive effects of equal pay legislation).

211. Patricia McGee Crotty, *Legislating Equality*, 10 INT'L J.L. POL'Y & FAM. 317, 318 (1996).

212. Litigation Protects and Ruins Businesses, supra note 186.

213. Crotty, *supra* note 211.

214. *Id.*

215. *See id.* at 138–39 (explaining that equality laws influence culture in a positive way).

216. *See supra* Part II.A (explaining the impact of pay secrecy on the wage gap); *supra* Part IV.B (identifying why AB 1017 should be enacted in the future).

217. John Woolley & Gerhard Peters, *John F. Kennedy: Remarks Upon Signing the Equal Pay Act*, AMER. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=9267 (last visited Apr. 16, 2016) (on file with *The University of the Pacific Law Review*).

218. Obama, *supra* note 103.

219. *See* text accompanying note 38 (discussing President Kennedy's signing of the Federal Equal Pay Act); *see also* text accompanying note 104 (discussing President Obama's signing of LLFPRA).

220. *See supra* Part II.C–E (describing other means for employees to bring claims against employers).

are more feasible and may open the door for more plaintiffs.[221] Though the language in Chapter 546 will not affect how courts apply the law, its enactment is an extremely important step in the journey to wage equality because it raises awareness for business owners, employees, and society as a whole.[222] Laws like Chapter 546 that promote equality become a part of the United States culture.[223] Echoing Presidents Kennedy and Obama, the fight for wage equality is not over and more needs to be done, but Chapter 546 is a step in the right direction.[224]

221. *See supra* Part IV (explaining the changes brought by Chapter 546 lowers the burden on employees who wish to file a claim against their employer).

222. *Id.*

223. *Id.*

224. *Id.*