



WE CAN'T WAIT FOR FAIR PAY FACTSHEET

WHY AN EXECUTIVE ORDER BANNING RETALIATION AGAINST WORKERS WHO DISCUSS THEIR WAGES IS NEEDED

April 2012

Pay Secrecy and Retaliation

- The Paycheck Fairness Act (S. 797/ H.R. 1519) is a bill that would help close some of the loopholes in the Equal Pay Act of 1963, which have made it less effective over time.
- The bill would take several important steps toward remedying pay discrimination, including prohibiting retaliation against workers who ask about their employers' wage practices or disclose their own wages.
- Workers often remain in the dark about pay discrimination because employers have rules that punish employees for voluntarily sharing wage information with their colleagues. Allowing workers to discuss their salaries without fear of losing their jobs, will help women to know whether or not they are being treated equally.
- In 2009, the Supreme Court of the United States has recognized in *Crawford v. Metro. Gov't of Nashville & Davidson County*, that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."¹
- Last Congress, in January 2009, the House of Representatives overwhelmingly passed the Paycheck Fairness Act with bipartisan support. Unfortunately, on a procedural vote in the Senate, the bill received 58 votes, coming just two votes shy of moving forward, even though a majority of Senators supported the bill.
- Even though Congress seems to be deadlocked on many issues, there are still opportunities to help advance equal pay for women, including Obama Administration actions that support enforcement efforts.
- One such action is a presidential executive order protecting people who work for federal contractors against retaliation for disclosing or asking about their wages. Federal contractors are companies that receive federal taxpayer dollars to do work for the government, providing services in a wide range of industries, from construction to national defense to health care. This executive order would have the critical effect of banning retaliation against the 26 million people in America who work for federal contractors when

trying to determine if they are being paid fairly.² This is only right in workplaces receiving federal dollars.

Why an Executive Order Is Necessary

- Almost 50 years after the passage of the Equal Pay Act of 1963, women still, on average, make only 77 cents for every dollar earned by a man.³ The figures are even more dismal for women of color – in 2010, African-American women only earned approximately 62 cents and Latinas only 54 cents for each dollar earned by a white man.⁴
- However, according to the Institute for Women's Policy Research, nearly half of all workers are either forbidden or strongly discouraged from discussing their pay with colleagues.⁵ Pay secrecy means that there is no way for many women to even know they are being paid less than their male co-workers.
- Take the case of Lilly Ledbetter: because Goodyear prohibited employees from discussing or sharing their wages, she did not know of the discrimination against her until someone slipped her an anonymous note, years after the discrimination began. While the National Labor Relations Act (NLRA) does protect some wage discussions,⁶ its protections are narrow and inadequate. It also doesn't apply to supervisors like Ms. Ledbetter. Had an anti-retaliation law applied to her, Ms. Ledbetter might have discovered the wage discrimination earlier and sought a remedy without fear of punishment.
- This injustice is particularly troubling in today's difficult economy, where approximately 40 percent of women are acting as the primary breadwinners in their households and more than 60% are breadwinners or co-breadwinners.⁷ Especially in this economic climate, we need concrete and immediate action to improve the economic security of working families. Pay equity is critical, not only to families' economic security, but also to the nation's economic recovery.
- Stronger federal protections are needed to prohibit retaliation against all workers who ask about their employers' wage practices or disclose their own wages. That is what the Paycheck Fairness Act would do, if passed.
- Fortunately, President Obama could issue an executive order to help until Congress finally passes the Paycheck Fairness Act.

What an Executive Order Would Do

- For over 70 years, president after president, of both parties, have used the power of executive orders to protect employers who work in companies that contract with the federal government.⁸ Because these companies receive federal funds, Presidents have used executive orders to protect employees from discrimination on the job and to expand other workplace rights. These steps have often led the way for expanded protections for all workers.

- Such an executive order would ban federal contracting employers from discriminating or retaliating against employees because they asked about, discussed or disclosed wages.
- There are approximately 26 million workers employed by federal contractors, which is nearly 22 percent of the civilian workforce. While federal legislation is still needed to protect employees in all workplaces, this is an important first step that will reach over 20 percent of the civilian workforce.
- Of course, like the Paycheck Fairness Act, an executive order could include basic exceptions, such as employees who have access to wage information of other employees as a part of their essential job functions.⁹

Support for Banning Retaliation

- Overwhelming majorities of Americans support federal policies that give women more tools to get fair pay in the workplace, including majorities of self-identified Republicans, Democrats, and Independents.¹⁰ Signing an executive order allowing workers in federally funded workplaces to discuss their salaries without fear of losing their jobs, will give women an important tool to help determine whether or not they are being treated equally.
- In addition to some protections under the NLRA, six states also ban retaliation for wage disclosure: California, Illinois, Michigan, Maine, Colorado, and Vermont.¹¹ According to the U.S. Census Bureau, these states together comprise approximately 21.76% of the entire U.S. population – therefore, approximately 1 in 5 Americans have state anti-retaliation protections for wage disclosure.¹² The experiences of these states should be instructive as support for an executive order since some of these laws have been in effect for decades,¹³ apply to millions of workers, and have not prevented these states from competing economically.
- In fact, the U.S. Women's Chamber of Commerce has endorsed the anti-retaliation provisions of the Paycheck Fairness Act.¹⁴ Since women-owned businesses pay fairly, requiring other businesses to pay fairly will help level the playing field for competition.

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ENDNOTES:

¹ *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

² See OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), *Facts on Executive Order 11246 — Affirmative Action*, U.S. DEP'T OF LABOR, Jan. 4, 2002, <http://www.dol.gov/ofccp/regs/compliance/aa.htm>.

³ NAT'L WOMEN'S LAW CTR., FACT SHEET, CLOSING THE WAGE GAP IS ESPECIALLY IMPORTANT FOR WOMEN OF COLOR IN DIFFICULT TIMES 1 (Apr. 2012), available at <http://www.nwlc.org/sites/default/files/pdfs/womenofcolorfactsheet.pdf>.

⁴ *Id.*

⁵ FACT SHEET, INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (June 2011) available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

⁶ 29 U.S.C. §§151-169 (1970).

⁷ Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT: A WOMEN'S NATION CHANGES EVERYTHING 32 (2009), available at <http://www.americanprogress.org/issues/2009/10/pdf/awn/chapters/economy.pdf>.

⁸ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), *History of Executive Order 11246*, U.S. DEP'T OF LABOR, http://www.dol.gov/ofccp/about/History_EO11246.htm.

⁹ Paycheck Fairness Act, S. 797, 112th Cong. § 3(b)(2) (2011).

¹⁰ Paycheck Fairness Act Coalition, National Polling Research on the Paycheck Fairness Act (conducted May 21-24, 2010 by Lake Research Partners with a sample of 932 registered voters), available at http://www.aclu.org/files/assets/PFA_Poll_Data_Colored_Graphs.pdf.

¹¹ See e.g., CAL. LAB. CODE § 232 (2012); 820 ILL. COMP. STAT. 112/10(b) (2012); MICH. COMP. LAWS ANN. § 408.483a (2012); ME. REV. STATE. ANN. tit. 26, § 628; COLO. REV. STAT. ANN. § 24-34-402 (2012); VT. STAT. ANN. tit. 21, § 495(a)(8)(B)(i-iii) (2012).

¹² U.S. CENSUS BUREAU, POPULATION ESTIMATES, STATE TOTALS, VINTAGE 2009, (Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009), available at <http://www.census.gov/popest/data/state/totals/2009/index.html>.

¹³ See e.g., CAL. LAB. CODE § 232 (2012) (originally enacted in 1984); MICH. COMP. LAWS ANN. § 408.483a (2012) (originally enacted in 1982).

¹⁴ Letter from Margot Dorfman, CEO, U.S. Women's Chamber of Commerce to Members of the House of Representatives (Jan. 6, 2009) available at http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/USWCC_PFA_Ledbetter_Letter_1_6_09.pdf.