



WORKPLACE JUSTICE

COMBATING PUNITIVE PAY SECRECY POLICIES

More than 55 years after President Kennedy signed the Equal Pay Act into law, a woman working full time year-round is paid just 80 cents on the dollar compared to her male counterpart.¹ And the wage gap is even worse for women of color: for every dollar paid to white, non-Hispanic men, Black women are paid only 61 cents, Native women 58 cents, and Latinas 53 cents.² All too often, wage disparities in the same workplace go undetected because employers maintain policies that punish employees who voluntarily share salary information with their coworkers. When employees fear retaliation, there is a serious “chilling effect” on any conversations about wages. Even if employees do discover pay disparities, they may feel powerless to address them because they fear retaliation for violating the pay secrecy policy.

Employees need robust legal protections, so they can talk about how much they make without fear of retaliation from their employer. Eighteen states and the District of Columbia now have explicit protections for workers who talk about their pay.³ But while federal laws offer some protection from such retaliation, they are full of loopholes that have allowed pay secrecy policies to flourish. The Paycheck Fairness Act would ensure that all employees enjoy robust protections for talking about their pay, by prohibiting employers from punishing employees for sharing pay information with their coworkers, and clarifying that employees cannot contract away or waive their rights to discuss and disclose pay.

Pay Secrecy Policies Are Common in Private-Sector Workplaces

Many workplaces require employees to keep the amount they are paid secret and ban or discourage employees from disclosing their pay to their coworkers. A 2017 study found that 25 percent of private sector workers work in settings that formally prohibit them from discussing wages and salaries, and

another 41 percent report that discussion of wage and salary information is discouraged in their workplace.⁴ That means about 65 percent of workers in the private sector nationally are unable to discuss their wages without fear of retaliation.

As the Supreme Court has recognized, the “[f]ear of retaliation is the leading reason” why many victims of discrimination “stay silent.”⁵ Workers who violate formal pay secrecy policies (or ignore their managers’ informal admonitions) face potential retaliation, including the prospect of being fired, demoted, or passed over for raises and promotions. In fact, in many instances, workers learn of egregious pay discrimination only by accident.⁶ Fear of retaliation only exacerbates the many hurdles employees face in challenging discrimination.

Federal Law Fails to Adequately Protect Workers Against Retaliation

The National Labor Relations Act (NLRA)⁷ bars employers from “interfer[ing] with, restrain[ing], or coerc[ing]”⁸ employees who engage in protected conduct, defined as “concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection.”⁹ Courts and the National Labor Relations Board (NLRB) have found that conversations about wages are necessary for collective bargaining or other mutual aid or protection and that rules that ensure that employees can never talk about their wages can be unfair labor practices because they can inhibit these protected labor practices.¹⁰ Despite the NLRA’s critical protections for working people seeking to act together to improve their workplaces, a number of loopholes have led employers to commonly adopt pay secrecy policies despite the NLRA’s requirements.

First, the NLRA permits employers to institute policies that interfere with conduct protected by the NLRA if there is a “legitimate and substantial business justification” for doing so.¹¹ Courts have interpreted this provision broadly, allowing, for example, prohibitions on any discussion of wages during working time¹² and on employees’ distribution of wage information compiled by the company.¹³



Second, the NLRA only protects a fairly narrow group of employees. It does not protect supervisors, a group that is defined broadly as including “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . [if the foregoing] requires the use of independent judgment.”¹⁴ This means that a manager would have no NLRA protection if she objected to a policy that prevented her from ever learning about gender-based pay disparities. Some courts have also held that university faculty,¹⁵ nurses,¹⁶ bus line dispatchers,¹⁷ supervisors who work only seasonally,¹⁸ sports editors,¹⁹ and a wide range of other employees are supervisors. In addition, the NLRA does not protect public sector workers, domestic workers, agricultural workers, and workers employed by railroads or airlines.

Third, the remedies available under the NLRA are extremely limited and fail to effectively deter employers from adopting pay secrecy policies that penalize workers. Even if a worker qualifies for NLRA protection and shows that he or she was retaliated against illegally because of a policy that constitutes an unfair labor practice, the only remedies are reinstatement, limited back pay,²⁰ and an order that the employer rescind its policy.²¹ No damages are available²² to fully compensate workers for the harm they may have suffered as a result of being punished for discussing their wages. If an employee is retaliated against in a way that does not affect pay (such as by being transferred to an undesirable shift) or is terminated and quickly finds another job paying as much, the employer will be liable for little or no back pay. The limited remedies under the NLRA prevent it from serving as an effective deterrent to the widespread use of pay secrecy policies.

Moreover, the procedure for bringing NLRA complaints is lengthy, burdensome, and potentially expensive, further discouraging workers from seeking to enforce their rights.

In addition to the NLRA, Title VII and the Equal Pay Act prohibit employers from retaliating against employees because they raise concerns about pay discrimination on the basis of sex or potential pay discrimination on the basis of sex.²³ The EEOC has advised that talking to coworkers specifically to gain information to challenge suspected pay discrimination is also protected.²⁴ However, these laws have not been interpreted to provide protection against retaliation for employees who discover pay discrimination accidentally, through casual conversation, in violation of pay secrecy policies.

Lilly Ledbetter’s Story

Lilly Ledbetter’s story demonstrates how the culture of secrecy around pay allows pay discrimination to persist for years, unchecked, and the difficulties workers face in successfully challenging and being made whole for pay discrimination under our current laws. Lilly worked as one of the few female supervisors at a Goodyear plant in Alabama. Goodyear did not allow its employees to discuss their wages. As a result, Lilly worked at Goodyear for 19 years before discovering that she was being paid less than her male counterparts, thanks to an anonymous note.²⁵ Because she was a “supervisor,” the NLRA would not have prevented Goodyear from firing or disciplining her if she had asked her coworkers about their salaries. Her Title VII lawsuit for pay discrimination went all the way to the Supreme Court. But because she had not brought her pay discrimination claim 19 years before, when she was first paid less than the men, the Court decided it was too late for her to file a claim, and she lost.²⁶ Congress promptly responded by passing the Lilly Ledbetter Fair Pay Act of 2009 which clarified that each new discriminatory paycheck is a renewed opportunity for victims of pay discrimination to file a claim.

While the Ledbetter Act was a necessary and important victory, it simply restored the law to the status quo that existed before the Supreme Court’s decision. It did not address the significant deficiencies in our equal pay laws, including the lack of a prohibition on pay secrecy policies.

Protecting Employees Who Share Pay Information

Protecting employees from retaliation for discussing pay has become a growing trend. States and localities across the country have passed laws and adopted executive orders that protect working people from retaliation for discussing wages and salaries with coworkers. So far, eighteen states and the District of Columbia have enacted provisions to stop employers from retaliating against employees who discuss their wages with each other.²⁷

In addition, pursuant to Executive Order 13665, issued by President Obama in 2014, federal contractors are prohibited from discriminating against employees and job applicants who inquire about, discuss, or disclose either their own or others’ compensation.²⁸



These protections provide much needed sunlight to help root out discriminatory pay practices in three ways. First, a culture of transparency allows female workers to learn what their male counterparts earn. By making employees aware of salary discrepancies, access to information allows women to call out unfair wage disparities. Second, without wage secrecy to hide behind, these protections create incentives for employers to proactively identify, investigate, and remedy policies that lead to discriminatory pay discrepancies. Third, studies have shown that when workers can talk about what they earn and believe that they are being compensated fairly, worker satisfaction, morale, and productivity improve.²⁹ Because pay transparency is a crucial stepping stone to closing the wage gap, allowing women to discover and work with the employer to rectify pay discrimination, these protections mark important progress for women workers.

Expanding Protections for All Workers with the Paycheck Fairness Act

While it is heartening to see steps to strengthen protections against punitive pay secrecy, protections for employee of federal contractors and employees in some states are not enough. Every person in this country—especially the Black women, Latinas, and Native women who experience

exceptionally large race and gender wage gaps—deserves robust, baseline protection from retaliation for talking about their pay. The Paycheck Fairness Act would provide this protection.³⁰

The Paycheck Fairness Act would establish a bright-line rule banning retaliation against employees who discuss their wages. This change in the law would greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination. The protection would apply to all employees covered by the Equal Pay Act's ban against pay discrimination, including supervisors. And workers who believe they have faced retaliation would have options and remedies beyond those available under the NLRA, including full compensation for any injury caused by retaliation. These clear rules would provide workers with much needed certainty that their livelihoods will not be at stake if they talk about their pay.

Employees have a compelling need for protection from retaliation for sharing wage information with coworkers. This protection will empower workers to combat gender wage gaps and other discriminatory wage gaps, and enhance enforcement of pay discrimination laws.

1 NATIONAL WOMEN'S LAW CENTER (NWLC), THE WAGE GAP: THE WHO, HOW, WHY AND WHAT TO DO (Oct. 19, 2018) <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.

2 *Id.*

3 See U.S. DEP'T OF LABOR, WOMEN'S BUREAU, EQUAL PAY AND PAY TRANSPARENCY PROTECTIONS, https://www.dol.gov/wb/EqualPay/equalpay_txt.htm (last visited Feb. 7, 2018); NWLC, PROGRESS IN THE STATES FOR EQUAL PAY (Jun. 2018), <https://nwlc.org/resources/progress-in-the-states-for-equal-pay/>; Emily Werth, NWLC, *Proposed Department of Labor Rule Will Shed Light on Federal Contractor Pay Practices, Help to Uncover Discrimination*, (Aug. 7, 2014), <http://www.nwlc.org/our-blog/proposed-department-labor-rule-will-shed-light-federal-contractor-pay-practices-help-uncover>.

4 Institute for Women's Policy Research (IWPR), PRIVATE SECTOR WORKERS LACK PAY TRANSPARENCY: PAY SECRECY MAY REDUCE WOMEN'S BARGAINING POWER AND CONTRIBUTE TO GENDER WAGE GAP (Dec. 2017), <https://iwpr.org/wp-content/uploads/2017/12/Q068-Pay-Secrecy.pdf>.

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

6 *E.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J. dissenting) (in which plaintiff discovered pay disparity from an anonymous note), *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (in which the plaintiff learned of a pay disparity when a printout listing her own and coworkers' salaries mysteriously appeared on her desk); *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (in which the plaintiff discovered a pay disparity when her salary and the salaries of other department heads were published in the newspaper).

7 29 U.S.C. §§ 151-169 (2019).

8 *Id.* § 158(a).

9 *Id.* § 157.

10 *Flex Frac Logistics, L.L.C. v. N.L.R.B.*, 746 F.3d 205, 208 (5th Cir. 2014) (“A ‘workplace rule that forb[ids] the discussion of confidential wage information between employees ... patently violate[s] section 8(a)(1)[of the NLRA].”)(internal citations omitted); *N.L.R.B. v. Inter-Disciplinary Advantage, Inc.*, 312 F. App'x 737, 744 (6th Cir. 2008); *Campbell Elec. Co. & Local Union 153*, 340 N.L.R.B. 825, 836 (2003); *NLRB v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510-11(8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d. Cir. 1992); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976).

11 See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

12 See *Vanguard Tours, Inc.*, 981 F.2d at 67; *Jeannette Corp.*, 532 F.2d at 919.

13 *Int'l Bus. Mach. Corp.*, 265 N.L.R.B. 638, 638 (1982).



- 14 29 U.S.C. § 152 (2019).
- 15 *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1994).
- 16 *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 577-78 (1994).
- 17 *E. Greyhound Lines v. NLRB*, 337 F.2d 84, 86 (6th Cir. 1964).
- 18 *NLRB v. Fla. Agric. Supply Co., Div. of Plymouth Cordage Co.*, 328 F.2d 989, 991 (5th Cir. 1964).
- 19 *NLRB v. Medina Cnty. Publ'ns, Inc.*, 735 F.2d 199 (6th Cir. 1984).
- 20 Robert M. Worster, III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1076 (2004).
- 21 Employees who have been retaliated against have a duty to mitigate the harm by immediately seeking alternative employment, and the average back pay award is very small. In 2009, the most recent year for which data are available, the average back pay award was just \$5,205. NWLC calculation: in 2009, 14,825 employees were receiving back pay from employers and employers paid \$75,754,271 in back pay. 100 NLRB ANN. REP. 100 (2009). The National Labor Relations Board discontinued production of its Annual Report as of 2009: <https://www.nlrb.gov/reports/nlrb-performance-reports/annual-reports>.
- 22 *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).
- 23 See Equal Employment Opportunity Commission, EEOC Enforcement Guidance on Retaliation and Related Issues (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#f._Inquiries In addition, workplace civil rights laws protect employees from retaliation for complaining about pay discrimination on the basis of race, national origin, religion, age, or disability. *Id.*
- 24 *Id.*
- 25 Lilly Ledbetter, *Lilly Ledbetter: My #metoo moment*, New York Times (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/opinion/lilly-ledbetter-metoo-equal-pay.html>.
- 26 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J. dissenting).
- 27 NWLC, PROGRESS IN THE STATES FOR EQUAL PAY (Jun. 2018), <https://nwlc.org/resources/progress-in-the-states-for-equal-pay/>.
- 28 Dep't of Labor, OFCCP Final Rule, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 41 C.F.R. § 60-1 (2015). DEP'T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54934 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.
- 29 Courtney Seiter, "The Counterintuitive Science of Why Transparent Pay Works," Fastcompany.com, (Feb. 26, 2016), <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->
- 30 NWLC, HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT, (Jan. 23, 2019), <https://nwlc.org/resources/how-the-paycheck-fairness-act-will-strengthen-the-equal-pay-act/>.

