

COMBATING PUNITIVE PAY SECRECY POLICIES

Nearly fifty years after President Kennedy signed the Equal Pay Act into law, women working full time are paid just 77 cents on the dollar compared to their male counterparts. All too often, wage disparities 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. Moreover, the few laws that protect employees from such retaliation are full of loopholes that have allowed the unfortunate practice of penalizing employees who discuss their wages to flourish. As a result, workers are paid unfair wages for years prior to discovering pay disparities, if they are discovered at all. To ensure that employees are able to learn about wage disparities and evaluate whether they are experiencing wage discrimination, the Paycheck Fairness Act would prohibit employers from punishing employees for sharing salary information with their coworkers.

Pay Secrecy and Confidentiality Policies Are Prevalent in Many Private-sector Workplaces

Many workplaces have official policies requiring employees to keep the amount they are paid secret and banning them from sharing this information with their coworkers. A 2010 study by the Institute for Women’s Policy Research found that 19 percent of employees work in settings with formal policies against discussing salary information and/or where workers can be punished for discussing their salaries.¹ Even in workplaces without formal pay secrecy policies, managers still discourage employees from disclosing their wages to their coworkers – the same study found that 31 percent of workers said this was the case.² Indeed, 61 percent of private-sector workers surveyed reported that discussing their wages is either prohibited or discouraged.³

As the Supreme Court has recognized, the “[f]ear of retaliation is the leading reason” why many victims of pay and other discrimination “stay silent.”⁴ 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. Fear of retaliation only exacerbates the many hurdles employees face in gathering information that would suggest they’ve experienced wage discrimination. In fact, in many instances, workers learn of egregious pay discrimination only by accident.⁵

Existing Laws Fail to Adequately Protect Workers against Retaliation

The National Labor Relations Act⁶ (NLRA) bars employers from “interfer[ing] with, restrain[ing], or coerc[ing]”⁷ employees who engage in protected conduct, defined as “concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection.”⁸ 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 protected labor practices.⁹

Despite the NLRA’s protections, a number of loopholes have led employers to commonly adopt pay secrecy policies, including those that are punitive. *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.¹⁰ Courts have interpreted this provision broadly, allowing, for example, prohibitions on any discussion of wages during working time¹¹ and on employees’ distribution of wage information compiled by the company.¹²

Second, the NLRA only protects a fairly narrow group of employees. It does not protect supervisors, a group which is defined broadly as “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.”¹³ This means that a manager would have no means of objecting to a policy that prevented her from ever learning about gender-based pay disparities. *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁴ illustrates that point. Lilly Ledbetter was one of the few female supervisors at the Goodyear plant in Gadsden, Alabama, and worked there for close to two decades. She faced sexual harassment at the plant and was told by her boss that he didn’t think a woman should be working there. Her co-workers bragged about their overtime pay, but Goodyear did not allow its employees to discuss their wages.

Because she was a “supervisor,” the NLRA would not have prevented Goodyear from firing or disciplining Ms. Ledbetter if she had asked her coworkers about their salaries. 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. Moreover, the NLRB has limited its jurisdiction in ways that go well beyond the limits of the Equal Pay Act, and, for example, excludes public sector workers.

Third, the remedies available under the NLRA are extremely limited and failed 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. And the frequent use of formal and informal penalties for violating pay secrecy policies illustrates that the NLRA does not effectively deter the widespread use of such policies.

Moreover, the NLRB’s cumbersome procedure for NLRA complaints is lengthy, burdensome, and potentially expensive, further discouraging workers from seeking to enforce their rights. Workers must bring complaints to the NLRB within six months of when they knew or should reasonably have known of the unfair policy.²³ The NLRB’s large backlog – which will likely grow even longer due to upcoming budget cuts²⁴ – causes serious delays before decisions are reached.

The Paycheck Fairness Act Would Ban Retaliation Against Employees Who Violate Pay Secrecy Policies

The Paycheck Fairness Act would establish a bright-line rule banning retaliation against workers 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.²⁵ These clear rules would provide workers much needed certainty that their livelihoods will not be at stake if they discuss their wages.

¹ Institute for Women's Policy Research, Press Release, Nov. 16, 2010 (*available at* http://www.iwpr.org/pdf/PressRelease_PaySecrecy_16Nov2010.pdf).

² *Id.*

³ *Id.*

⁴ *Crawford v. Metro. Gov't of Nashville & Davidson County*, ___ U.S. ___, 129 S. Ct. 846, 852 (2009).

⁵ *E.g.*, *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (plaintiff learned of a pay disparity when a printout listing her own and co-workers' 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) (plaintiff discovered a pay disparity when her salary and the salaries of other department heads were published in the newspaper).

⁶ 29 U.S.C. § 151-169 (1970).

⁷ *Id.* at § 158(a).

⁸ *Id.* at § 157.

⁹ *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); *Campbell Electric Co. & Local Union 153*, 340 N.L.R.B. 825, 2003 WL 22295365, at **18 (2003); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

¹⁰ *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).

¹¹ *See Vanguard Tours, Inc.*, 981 F.2d at 67; *Jeannette Corp.*, 532 F.2d at 919.

¹² *International Business Machines Corp.*, 265 N.L.R.B. 638 (1982).

¹³ 29 U.S.C. § 152.

¹⁴ 548 U.S. 903 (2006).

¹⁵ *NLRB v. Yeshiva University*, 444 U.S. 672 (1994).

¹⁶ *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 577-78 (1994).

¹⁷ *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964).

¹⁸ *NLRB v. Fla. Agric. Supply Co., Div. of Plymouth Cordage Co.*, 328 F.2d 989 (5th Cir. 1964).

¹⁹ *NLRB v. Medina County 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 is available, the average back pay award was just \$5205. 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).

²² *H.K. Porter Co. v. NLRBI*, 397 U.S. 99 (1970)

²³ *In re Cab Assoc. & Bldg. Material Teamsters, Local 282.*, 340 N.L.R.B. 1391, 1392 (2003).

²⁴ Ryan Grim, *NLRB: White House Muzzled Us in Budget Debate*, HUFFINGTON POST, Mar. 9, 2011, <http://www.huffingtonpost.com/2011/03/09/nlr-white-house-muzzled- n 833354.html>.

²⁵ *Id.*