

EMPLOYMENT

FACT SHEET

How the Equal Pay for Equal Work Act and the Wage Disclosure and Discussion Protection Act Would Strengthen Maryland's Equal Pay Law

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Pay discrimination remains a persistent problem in the workforce. In Maryland, on average, women earn about 85.5 cents for every dollar earned by men.¹ African American women in Maryland earn only 69.7 cents for every dollar earned by men, and the gap is even larger for Maryland's Hispanic women, who earn only 46.6 cents for every dollar earned by men.² SB 424, the Equal Pay for Equal Work Act, and SB 425, the Wage Discrimination and Discussion Protection Act, would strengthen Maryland's equal pay law and provide workers with the tools they need to combat pay discrimination and close the wage gap.

The Wage Gap Continues to Plague Working Families in Maryland and Across the Country

Although Congress passed the Equal Pay Act more than fifty years ago and Maryland passed its Equal Pay Act nearly 25 years ago, women workers continue to face significant pay disparities:³

- In 2013, Maryland women's median earnings were only \$50,211, in comparison to median earnings for men of \$58,746. That is a difference of a whopping \$8,535. Put another way, that is equal to nearly ten months of rent and utilities or nearly two years of health care contributions.⁴

- In the United States overall, women still typically earn only about 78 cents for every dollar earned by men – and women of color fare worse.⁵ African American women earn just 64 cents, and Hispanic women earn only 56 cents, to every dollar earned by a white, non-Hispanic man.⁶

- The 14.5 cent wage gap that Maryland women face, while smaller than the national average, still significantly diminishes their earning power.

- Ten percent of women in Maryland live in poverty, with higher rates for women of color, including a 14 percent rate for African American women and a 15 percent rate for Hispanic women.⁷

- Nationally, the wage gap for a typical woman translates into \$10,876 less in median annual earnings, leaving women and their families shortchanged.⁸ For African American women, the gap translates to an annual loss of \$19,399, and \$23,279 per year for Hispanic women.⁹

- Over the course of a woman's career who works full-time, year round, she typically loses \$435,049 in a 40-year period due to the wage gap.¹⁰ A woman would have to work more than eleven years longer to make up this gap.¹¹



Pay Discrimination Claims Are All Too Common in Maryland

- In January of 2015 the Applied Physics Laboratory at Johns Hopkins University settled a complaint brought by two women workers which included allegations of pay discrimination based on sex. Investigators from the Office of Federal Contract Compliance Programs, which handled the case, concluded that both women workers were paid less than their male counterparts. The two employees will receive \$359,253 in back pay and damages.¹²
- In September of 2013, Worcester County, Maryland resolved a lawsuit with the Equal Employment Opportunity Commission for multiple counts of pay discrimination against female retail clerks in county-run liquor stores. The EEOC found that the County was paying the women less wages than the male clerks, even though they were doing substantially equal work under similar conditions. Pursuant to the settlement, the County paid \$60,000 to three women and entered into a three-year consent decree.¹³
- In 2000, Baltimore Cable Access Corporation paid \$45,000 to settle a lawsuit with the Equal Employment Opportunity Commission for pay discrimination. The EEOC found that the company fired its first executive director after she complained that she was receiving far less pay than her male counterparts, and subsequently compensated her male successor at a far higher salary for performing the same job.¹⁴

With More Families Relying on Women's Income than Ever Before, Women Cannot Afford Unequal Pay

Women's income is critical to families' economic security, but unequal pay means that women are taking home less than their fair share:

- Nearly 65 percent of Maryland women over the age of 16 are in the labor force, and 60 percent are employed.¹⁵
- Nationally, working mothers are primary breadwinners in 41 percent of families with children, and they are co-breadwinners—bringing in between 25 percent and 50 percent of family earnings—in another 22 percent of these families.¹⁶

- For families in the bottom 20 percent of the income distribution, nearly 70 percent of working women are either the primary breadwinner or share that responsibility equally with their partners.¹⁷

Women Continue to Face Barriers to Entering Higher-Paying, Nontraditional Jobs

Isolation, active discouragement, harassment, outright exclusion, and lack of information about alternative job options are all barriers to women's entry into higher-wage jobs that are nontraditional for their gender:¹⁸

Maryland Employer Recently Settled Hiring and Pay Discrimination Case in Nontraditional Employment

In a recent case in Maryland, ACM Services paid \$415,000 to settle a lawsuit brought by the EEOC for refusing to hire women applicants and black applicants as field laborers. Two women who, despite ACM's allegedly discriminatory hiring practices, managed to get jobs with the company were allegedly subject to harassment on the job and terminated when they complained about the harassment.¹⁹

- Of the 25 detailed occupations with the highest median weekly earnings for full-time workers, only two are majority female.²⁰
- In contrast, five of the highest-wage occupations are over 90 percent male.²¹ These occupations all have median weekly earnings for full-time workers above \$1,350—or typical annual salaries over \$70,000 for someone who works year-round.²²

Women Continue to be Overrepresented in Low-Wage Jobs

Not only do women face significant barriers to entering higher-wage, nontraditional jobs, they continue to be concentrated in low-paying jobs:

- In Maryland, women make up nearly 70 percent of the low-wage workforce, as compared to nearly 50 percent of the workforce overall.²³ And six in ten of the lowest-paid workers—those earning the minimum wage or less—are women.²⁴

- Nationally, women make up two-thirds of the low-wage workforce, and half of women in low-wage jobs are women of color.²⁵
- Women make up two-thirds of those paid the minimum wage or less.²⁶
- Women of color are also disproportionately represented among female minimum wage workers: African-American women were just under 13 percent and Hispanic women were just under 14 percent of all employed women in 2012,²⁷ but more than 15 percent of women paid the minimum wage were African American and more than 18 percent were Hispanic.²⁸

LGBT Workers Face Significant Pay Discrimination

Members of the LGBT community experience a significant wage gap and discrimination:

- A recent meta-analysis of twelve studies found that gay and bisexual men earn 10 percent to 32 percent less than heterosexual men with similar qualification, even controlling for education, race, occupation, and years of work experience.²⁹
- Lesbian women still earn less than men, regardless of their sexual orientation.³⁰ Women in same-sex couples have a median personal income of \$38,000, compared to \$47,000 for men in same-sex couples and \$48,000 for men in different-sex couples.³¹
- Studies suggest the earnings of transgender women workers fall by nearly a third following transition.³²
- Nearly half of transgender workers say they have been fired, denied a promotion, or not gotten a job because of their gender identity.³³
- Transgender Americans are four times more likely to have a household income under \$10,000 per year than the population as a whole (15% vs. 4%). This is true despite the finding that 87% of transgender people have completed at least some college and 47% have obtained a college or graduate degree – rates that are much higher than those for the general population.

The Maryland Equal Pay for Equal Work Act and the Wage Disclosure and Discussion Protection Act Would Strengthen Maryland's Current Equal Pay Law and Give Women the Tools They Need to Fight for Equality and Hold Employers Accountable for Discrimination

- SB 424 and SB 425 Provide Crucial Protections for Women to Discuss their Wages without Fear of Retaliation*

One of the reasons that pay discrimination is so difficult to root out is that the majority of employers have policies and practices that prohibit or discourage workers from discussing or inquiring about pay. According to the Institute for Women's Policy Research, half of all workers, including 61 percent of private-sector employees, report that discussing or inquiring about their wages is either directly prohibited or discouraged by their employer.³⁴ In contrast, when workers are able to discover pay disparities, they can take steps to address them, and employers are more likely to proactively identify and remedy discrimination, reducing the need for costly litigation.

In the public sector, where pay secrecy rules are uncommon, only about 14 percent of employees report that discussing their wages is either prohibited or discouraged.³⁵ The gender-based wage gap for all full-time workers, based on median earnings, is about 23 percent,³⁶ but in the federal government, where pay rates are publically available,³⁷ the gender-based wage gap is 11 percent.³⁸

SB 424 and SB 425 provide important protections for workers to inquire about, discuss, and disclose their wages—including asking the employer to provide a reason for the employee's wages—without fear of retaliation. By enacting this protection, Maryland would join both the federal government³⁹ and the growing chorus of states—including California, Colorado, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, and Vermont—that have enacted protections for workers to discuss their wages without fear of retaliation.

ii. *SB 424 Removes Barriers for Women to Entry into Higher Paying Jobs*

Addressing occupational segregation is crucial to closing the wage gap. Importantly, because SB 424 prohibits employers from discriminating between employees in any occupation by providing less favorable employment opportunities based on sex or gender identity, SB 424 ensures that all workers will have equal access to opportunities that advance their career and their paychecks, and will help bring an end to occupational segregation.

iii. *SB 424 Includes an Important Update to Maryland's Equal Pay law by Including "Gender Identity" as a Protected Category*

Like discrimination on the basis of sex, discrimination on the basis of gender identity and sexual orientation often rests on gender stereotypes about supposedly "normal" or appropriate behavior for women and men. Sex discrimination, sexual orientation discrimination, and gender identity discrimination often take the form of punishing or burdening individuals who fail to conform to gender stereotypes.

Fewer than half of the states have prohibited gender identity discrimination in employment.⁴⁰ Maryland is one of those states, after passing the Fairness for All Marylanders Act in 2014⁴¹ to codify protections for employees against discrimination based gender identity.⁴² SB 424 aligns with recent Maryland law by amending its pay discrimination law to include protections for workers who are discriminated against in pay based on gender identity. The Act could be further strengthened by including protections against pay discrimination for workers based on sexual orientation, race, color, religion, ancestry, national origin, age, disability, marital status and genetic information.

iv. *SB 424 Closes an Important Loophole in Employer Defenses for Pay Discrimination*

As has been the case under the federal Equal Pay Act, some courts have interpreted the defenses to equal pay claims brought under state laws, including the Maryland Equal Pay Law—so broadly that they have allowed employers to flout these laws and continue paying women less.⁴³

How One Maryland Court Widened the Judicially Created Loophole in the BFOQ Defense

In Glunt v. GES Exposition Services, Inc., a Maryland woman sued her former employer for pay discrimination in violation of the Maryland Equal Pay Act, the federal Equal Pay Act, and Title VII.⁴⁴ Glunt alleged that she was paid less than three of her male coworkers for substantially equal work and sued the company. The district court held that it was likely that Glunt was indeed being paid less for substantially equal work.⁴⁵ But the court ruled against her, accepting the employer's "factor other than sex" defense which relied in part on evidence that the company offered one of her male coworkers a higher starting salary "in order to induce" him "to accept the employer's offer over competing offers."

SB 424 amends Maryland law to close that "factor other than sex" loophole by spelling out that the factor cannot be based on or derived from a gender-based differential in compensation, and that the factor must be job-related with respect to the position and consistent with a business necessity. By closing this judicially created loophole in our equal pay laws, SB 424 ensures that employers can no longer rely on compensation differentials that are merely a pretext for discrimination.

Conclusion

Maryland has a proud history of taking steps to make the promise of equal pay for equal work a reality for Maryland's workforce. From enactment of the Equal Pay for Equal Work law in 1991,⁴⁶ to the Labor and Employment – Equal Pay Commission law establishing a commission on equal pay in Maryland in 2005, to the Lilly Ledbetter Fair Pay Act in 2009,⁴⁷ Maryland has recognized the importance of strong legal protections from pay discrimination. SB 424, the Equal Pay for Equal Work Act and SB 425, the Wage Disclosure and Discussion Protection Act are the next important steps to strengthen Maryland's Equal Pay Act, and give women the tools they need to fight back against pay discrimination.

¹ Nat'l Women's Law Ctr., *The Wage Gap, State by State*, <http://www.nwlc.org/wage-gap-state-state>.

² *Id.*

³ 29 U.S.C. § 206(d)(1); Md. Code Ann., Lab. & Empl. § 3-304 (West).

⁴ The median housing costs for renters were \$850 per month in 2013. See Rent and Utilities - U.S. Census Bureau, *American Housing Survey: 2013*, Table C-10-AO. Housing Costs—All Occupied Units, available at <http://www.census.gov/programs-surveys/ahs/> (last visited Mar. 3, 2015). The average employee contribution for employer-based family coverage is \$4,421 annually or \$368 per month. See Health Insurance Premiums - U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality, *Medical Expenditure Panel Survey: 2013*, Table II.D.2 (2013) Average total employee contribution (in dollars) per enrolled employee for family coverage at private-sector establishments that offer health insurance by firm size and State: United States, 2013, available at http://meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/state/series_2/2013/tiid2.htm.

⁵ Nat'l Women's Law Ctr., *The Wage Gap is Stagnant for Nearly a Decade* (Sept. 2014), available at http://www.nwlc.org/sites/default/files/pdfs/fact_sheet_wage_gap_is_stagnant_2013.pdf.

⁶ *Id.*

⁷ Nat'l Women's Law Ctr., *Women and Poverty, State by State* (Sept. 25, 2013), <http://www.nwlc.org/resource/women-and-poverty-state-state>.

⁸ Nat'l Women's Law Ctr., *The Wage Gap is Stagnant for Nearly a Decade* (Sept. 2014), available at http://www.nwlc.org/sites/default/files/pdfs/fact_sheet_wage_gap_is_stagnant_2013.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² OFCCP JOHNS HOPKINS UNIVERSITY'S APPLIED PHYSICS LABORATORY SETTLES RACE AND SEX DISCRIMINATION CASE WITH US LABOR DEPARTMENT, USDL 14-2299, 2015 WL 270272.

¹³ WORCESTER COUNTY WILL PAY \$60,000 TO RESOLVE EEOC PAY DISCRIMINATION LAWSUIT, 2013 WL 4714245.

¹⁴ EEOC SETTLES SUIT AGAINST PUBLIC ACCESS TV CORP. FOR PAY DISCRIMINATION AND RETALIATION, 2000 WL 33729122.

¹⁵ NWLC calculations based on U.S. Census Bureau, *American Community Survey 2013*, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_DP03&prodType=table.

¹⁶ The share of mothers who are breadwinners or co-breadwinners has increased from 27.5 percent in 1967 to 63.3 percent in 2012. SARAH JANE GYLYNN, CENTER FOR AMERICAN PROGRESS, *BREADWINNING MOTHERS, THEN AND NOW 6* (June 2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf>.

¹⁷ *Id.* at 3.

¹⁸ Advisory Comm. on Occupational Safety & Health, U.S. Dep't of Labor, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection* (June 1999), available at <http://www.osha.gov/doc/acscsh/haswicfor-mal.html> (explaining that continued isolation, sexual discrimination, and harassment created a hostile environment and affected the safety of construction worksites); see also Phyllis Kernoff Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-collar Occupations*, 25 Sex Roles: J. Res. 63, 76 (1991) (explaining that women in nontraditional occupations face high levels of sexual harassment and sex discrimination, which is particularly problematic because skills in these occupations "usually are acquired during apprenticeships or on the job, and are dependent on help and support from coworkers").

¹⁹ *Maryland Firm to Pay \$415K to Settle EEOC Discrimination Suit*, INSURANCE JOURNAL (Nov. 18, 2014), available at <http://www.insurancejournal.com/news/east/2014/11/18/347364.htm>.

²⁰ NAT'L WOMEN'S LAW CTR., *50 YEARS AND COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY 5* (2014), available at http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_equal_pay_report.pdf.

²¹ *Id.*

²² *Id.*

²³ Nat'l Women's Law Ctr., *Women in the Low-Wage Workforce by State* (Jul. 20, 2014), available at http://www.nwlc.org/sites/default/files/pdfs/pv_fs_low_wage_state_tables.pdf.

²⁴ Nat'l Women's Law Ctr., *Women and the Minimum Wage, State by State* (Jan. 5, 2015), <http://www.nwlc.org/resource/women-and-minimum-wage-state-state>.

²⁵ Nat'l Women's Law Ctr., *Underpaid & Overloaded: Women in Low Wage Jobs 1-2* (2014), available at http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_lowwagereport2014.pdf.

²⁶ Nat'l Women's Law Ctr., *Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage* (Oct. 2014), available at http://www.nwlc.org/sites/default/files/pdfs/fair_pay_for_women_requires_increasing_the_minimum_wage_and_tipped_minimum_wage_october_2014.pdf.

²⁷ See 50 YEARS AND COUNTING, *supra* note 20, at n. 69.

²⁸ See 50 YEARS AND COUNTING, *supra* note 20, at n. 70.

²⁹ M.V. LEE BADGETT, HOLNING LAU, BRAD SEARS, DEBORAH HO, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER AND IDENTITY DISCRIMINATION, THE WILLIAMS INSTITUTE 3 (Jun. 2007) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>.

³⁰ *Id.* at 14.

³¹ GARY J. GATES, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY 2005-2011, THE WILLIAMS INSTITUTE, (Feb. 2013) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>. Figures only include people in labor force. Due to data limitations, they do not include lesbian or gay individuals who are not part of a couple. These figures are median annual personal income for all workers in the labor force – these figures differ from the median annual earnings for full-time, year-round workers reported for the wage gap and are not directly comparable.

³² Kristen Schilt and Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. OF ECON. ANALYSIS & POLICY 1 (Sept. 2008).

³³ Crosby Burns and Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (May 2011), available at https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/workplace_discrimination.pdf.

³⁴ INST. FOR WOMEN'S POLICY RESEARCH, *PAY SECRECY AND WAGE DISCRIMINATION* (2014), available at http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that overall, 51 percent of female employees and 47 percent of male employees report that their employers either prohibit or discourage the discussion of wages, and that in the private sector that number increases to 60 percent of male employees and 62 percent of female employees).

³⁵ See PAY SECRECY AND WAGE DISCRIMINATION, *supra* note 34 (showing that 11 percent of male employees in the public sector and 18 percent of female employees in the public sector report that wage discussion is prohibited or discouraged).

³⁶ Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1063 (2012).

³⁷ *Id.*

³⁸ U.S. Gov't Accountability Office, GAO-09-279, *Women's Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education, and Experience Diminish 3* (2009), available at <http://www.gao.gov/assets/290/287375.pdf>.

³⁹ On September 17, 2014, in implementing President Obama's Executive Order to eliminate pay secrecy policies in federal contracts, the Office of Federal Contract Compliance Programs in the Department of Labor issued a Notice of Proposed Rulemaking affecting about 28 million employees of federal contractors. See *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 79 Fed. Reg. 55712 (proposed Sept. 17, 2014) (to be codified at 41 C.F.R. pt. 60-1).

⁴⁰ See Movement Advance Project, *Non-Discrimination Laws*, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb. 26, 2015).

⁴¹ Fairness For All Marylanders Act of 2014, 2014 Maryland Laws Ch. 474 (S.B. 212).

⁴² Md. Code Ann., State Gov't § 20-606 (West).

⁴³ For example, some courts have abandoned any effort to determine whether the employer's purported "factor other than sex" is in any way related to the qualifications, skills, or experience needed to perform the job, while other courts have read the defense so literally as to not even question whether the factor is legitimate so long as it is explicitly based on sex. See, e.g., *Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847 (D. Md. 2000) (in which the district court found that a woman was likely being paid less for substantially equal work compared to male colleagues, but that hiring a male employee at a higher starting salary in order to lure him from a competitor constituted a gender-neutral "factor other than sex" that explained the pay differential); *Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 U.S. Dist. LEXIS 18435, at *13 (S.D.N.Y. Mar. 8, 2007) (in which a federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer," and emphasized that "[s]alary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as a 'factor other than sex.'").

⁴⁴ *Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847 (D. Md. 2000).

⁴⁵ *Id.* at 858-59.

⁴⁶ Md. Code Ann., Lab. & Empl. § 3-304 (West).

⁴⁷ Md. Code Ann., State Gov't § 20-607 (West).