

# EMPLOYMENT

## FACT SHEET

### Combating Punitive Pay Secrecy Policies

September 2015

*Nearly fifty years after President Kennedy signed the Equal Pay Act into law, a woman working full time year-round is paid just 78 cents on the dollar compared to her male counterpart.<sup>1</sup> 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 federal law that protects some employees from such retaliation is full of loopholes that have allowed the unfortunate practice of penalizing employees who discuss their wages to flourish. As a result, workers can be paid unfair wages for years prior to discovering pay disparities, if they discover them at all. Even if they do discover disparities, they may feel powerless to address them because they fear retaliation for violating the pay secrecy policy. Twelve states now have explicit protections for workers who talk about their pay.<sup>2</sup> And the Department of Labor released a new rule that bans employers who have contact with the federal government from maintaining punitive pay secrecy policies.*

#### 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. These “pay secrecy” policies ban employees from sharing their pay with their coworkers. A recent study by the Institute for Women’s Policy Research found that over 60% of private-sector employees work in settings that formally prohibit or discourage discussing salary information.<sup>3</sup>

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.”<sup>4</sup> 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 have experienced wage discrimination. In fact, in many instances, workers learn of egregious pay discrimination only by accident.<sup>5</sup>

#### Federal Law Fails to Adequately Protect Workers Against Retaliation

The National Labor Relations Act (NLRA)<sup>6</sup> bars employers from “interfer[ing] with, restrain[ing], or coerc[ing]”<sup>7</sup> employees who engage in protected conduct, defined as “concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection.”<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> Courts have interpreted this provision broadly, allowing, for example, prohibitions on any discussion of wages during working time<sup>11</sup> and on employees’ distribution of wage information compiled by the company.<sup>12</sup>

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.”<sup>13</sup> 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.*<sup>14</sup> 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 sex discrimination at the plant and was told by her boss that he did not think a woman should be working there. Goodyear did not allow its employees to discuss their wages, and Ms. Ledbetter did not learn that she was being paid less than all her male colleagues until she received an anonymous note sharing this information after she had worked at the plant for many years.

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,<sup>15</sup> nurses,<sup>16</sup> bus line dispatchers,<sup>17</sup> supervisors who work only seasonally,<sup>18</sup> sports editors,<sup>19</sup> and a wide range of other employees are supervisors. Moreover, the NLRB has limited jurisdiction; for example, public sector workers are excluded from its protection.

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,<sup>20</sup> and an order that the employer rescind its policy.<sup>21</sup> No damages are available<sup>22</sup> to fully compensate workers for the harm

they may have suffered as a result of being punished for discussing their wages. If an employee quickly finds another job paying as much, the employer will be liable for little or no back pay. 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 procedure for bringing 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.<sup>23</sup> The NLRB’s large backlog causes serious delays before decisions are reached.

### Protecting Employees Who Share Pay Information

Protecting employees from retaliation for discussing pay has become a growing trend. So far twelve states—double the number since 2012—have taken important steps towards eliminating pay secrecy and closing the wage gap by enacting laws shielding workers from retaliation if they talk about what they earn. These states include California, Colorado, Connecticut, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, and Vermont. In addition, the New York legislature has passed a prohibition on pay secrecy that is awaiting a promised signature from the Governor.<sup>24</sup>

In addition, in September of 2015, the Department of Labor finalized its rule implementing President Obama’s Executive Order to ban pay secrecy in federal contracts.<sup>25</sup>

This new rule provides 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, the new rule creates 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. 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, President Obama's Executive Order and the Department of Labor's rule mark a tremendous victory for women workers.

## Expanding Protections for All Workers with the Paycheck Fairness Act

The efforts of the President, the Department of Labor, and states reflect progress in rectifying and preventing discriminatory practices. But now we must urge Congress to pick up the baton and pass the Paycheck Fairness Act.

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. These clear rules would provide workers with much-needed certainty that their livelihoods will not be at stake if they discuss their wages.

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

<sup>1</sup> NATIONAL WOMEN'S LAW CENTER, CLOSING THE WAGE GAP IS CRUCIAL FOR WOMEN OF COLOR AND THEIR FAMILIES 1 (2015), *available at* <http://www.nwlc.org/resource/closing-wage-gap-crucial-women-color-and-their-families>.

<sup>2</sup> The twelve states are California, Colorado, Connecticut, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, and Vermont. CAL. LAB. CODE §§ 232, 232.5 (West 2015); COLO. REV. STAT. ANN. § 24-34-402(1)(i) (West 2015) (applying to employers except those that are exempted from provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq.); 2015 Conn. Acts 15-196 (Reg. Sess.); 820 ILL. COMP. STAT. ANN. 112/10(b) (West 2015); LA. REV. STAT. ANN. § 23:664 (2014); ME. REV. STAT. ANN. tit. 26, § 628 (2014); MICH. COMP. LAWS ANN. § 408.483a(13a)(1) (West 2015); MINN. STAT. ANN. § 181.172 (West 2015); N.H. REV. STAT. ANN. § 275:41-b (2015); N.J. STAT. ANN. 10:5-12(r) (West 2015); OR. REV. STAT. ANN. § 659A.?? (West 2015); VT. STAT. ANN. tit. 21, § 495(a)(7)-(8) (West 2015); Emily Werth, Proposed Department of Labor Rule Will Shed Light on Federal Contractor Pay Practices, Help to Uncover Discrimination, NAT'L WOMEN'S L. CTR. (Aug. 7, 2014), *available at* <http://www.nwlc.org/our-blog/proposed-department-labor-rule-will-shed-light-federal-contractor-pay-practices-help-uncover>.

<sup>3</sup> INSTITUTE FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION 1 (2014), *available at* <http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications>.

<sup>4</sup> 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)).

<sup>5</sup> E.g., 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).

<sup>6</sup> 29 U.S.C. §§ 151-169 (2012).

<sup>7</sup> *Id.* § 158(a).

<sup>8</sup> *Id.* § 157.

<sup>9</sup> 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 Elec. Co. & Local Union 153, 340 N.L.R.B. 825, 836 (2003); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

<sup>10</sup> 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).

<sup>11</sup> See Vanguard Tours, Inc., 981 F.2d at 67; Jeannette Corp., 532 F.2d at 919.

<sup>12</sup> Int'l Bus. Mach. Corp., 265 N.L.R.B. 638, 638 (1982).

<sup>13</sup> 29 U.S.C. § 152 (2012).

<sup>14</sup> 548 U.S. 903 (2006).

<sup>15</sup> NLRB v. Yeshiva Univ., 444 U.S. 672, 690 (1994).

<sup>16</sup> NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 577-78 (1994).

<sup>17</sup> E. Greyhound Lines v. NLRB, 337 F.2d 84, 86 (6th Cir. 1964).

<sup>18</sup> NLRB v. Fla. Agric. Supply Co., Div. of Plymouth Cordage Co., 328 F.2d 989, 991 (5th Cir. 1964).

<sup>19</sup> NLRB v. Medina Cnty. Publ'ns, Inc., 735 F.2d 199 (6th Cir. 1984).

<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> H.K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970).

## COMBATING PUNITIVE PAY SECRECY POLICIES

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

<sup>24</sup> CAL. LAB. CODE §§ 232, 232.5 (West 2015); COLO. REV. STAT. ANN. § 24-34-402(1)(i) (West 2015) (applying to employers except those that are exempted from provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq.); 2015 Conn. Acts 15-196 (Reg. Sess.); 820 ILL. COMP. STAT. ANN. 112/10(b) (West 2015); LA. REV. STAT. ANN. § 23:664 (2014); ME. REV. STAT. ANN. tit. 26, § 628 (2014); MICH. COMP. LAWS ANN. § 408.483a(13a)(1) (West 2015); MINN. STAT. ANN. § 181.172 (West 2015); N.H. REV. STAT. ANN. § 275:41-b (2015); N.J. STAT. ANN. 10:5-12(r) (West 2015); OR. REV. STAT. ANN. § 659A (West 2015); VT. STAT. ANN. tit. 21, § 495(a) (7)(8) (West 2015); Jon Campbell, *Equal-Pay Bill Heads to Cuomo's Desk*, PRESSCONNECTS (Apr. 27, 2015, 5:41 PM), available at <http://goo.gl/N32Qe5>.

<sup>25</sup> DEP'T OF LABOR, OFCCP Final Rule, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 41 C.F.R. § 60-1 (2015).