

WORKPLACE FAIRNESS

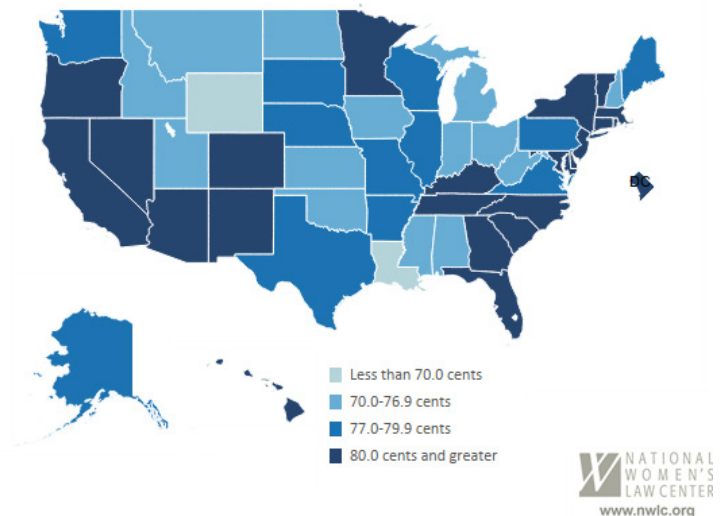
## PROGRESS IN THE STATES FOR EQUAL PAY

*For over 50 years, federal law has required that male and female employees receive equal pay for equal work. Yet women typically make just 80 cents on every dollar paid to men for full-time, year-round work, a gap in wages that has barely budged over the last decade. Across the country, state lawmakers are working to change this.*

It has been more than 50 years since the Equal Pay Act was passed, and since then we have seen women make tremendous strides in the labor force. However, women continue to be paid less than their male counterparts. Women working full time, year round typically make just 80 cents for every dollar paid to men working full time, year round.<sup>1</sup> And it's even worse for women of color. African American women are typically paid just 63 cents on every dollar paid to white, non-Hispanic men, and Latina women typically are paid only 54 cents for every dollar paid to their white, non-Hispanic male counterparts. Among the states, women fare best in New York, where women working full time, year round typically make 89 cents for every dollar their male counterparts make. Delaware and Florida follow New York, with the ratio of women's to men's earnings above 85 percent in both states. Women fare the worst relative to men in Wyoming, where women's earnings represent only 64 percent of men's earnings.

Across the country, there is a growing movement to finally close these wage gaps. In the past two years, lawmakers have introduced legislation in over half the states to finally ensure that workers receive equal pay, no matter where they work, and many of these bills have become law. State efforts to close the wage gap not only lift the states' economies, but also make meaningful change for women's and families' economic security. This fact sheet looks at states that enacted equal pay legislation in 2015 and 2016.

What Women Make for Every Dollar Men Make



### Recently Enacted Equal Pay Legislation

#### Promoting Pay Transparency

Pay secrecy policies and practices perpetuate pay discrimination by making it difficult for employees to learn about unlawful pay disparities. Employers often institute policies prohibiting or discouraging employees from disclosing their own compensation to other employees. According to a 2014 survey by the Institute for Women's Policy Research, more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.<sup>2</sup> When workers fear retaliation for talking about their pay, any pay discrimination they face continues to grow, undiscovered, in the shadows. Making it clear that workers have the right to ask about, discuss, and disclose their pay without repercussions is a powerful tool for discovering and remedying unequal pay.



A quickly growing number of states have enacted provisions to stop employers from retaliating against employees who discuss their wages with each other, or from outright prohibiting these discussions.

**California:** In 2015, California enacted strong equal pay legislation that, among other provisions, prohibits employers from retaliating against employees for disclosing their own pay, discussing the wages of others, asking about another employee's wages, or aiding or encouraging other employees to exercise their rights in these regards.<sup>3</sup> The law notes that there is no obligation to disclose one's pay.

**Connecticut:** Connecticut enacted a new law in 2015 to allow employees to discuss wages without fear of retaliation.<sup>4</sup> Specifically, the law makes clear that employees may disclose or discuss their own wages, as well as the wages of another employee if that employee voluntarily disclosed their wages, and that employees may inquire about the wages of another employee. The law also prohibits employers from requiring employees to sign waivers or other documents that deny them the right to discuss, disclose, or ask about wages, and prohibits employers from discharging, disciplining, discriminating against, retaliating against, or otherwise penalizing any employee who engages in wage discussions, disclosures, or inquiries. The law also makes clear that it does not compel disclosures.

**Delaware:** In June 2016, Delaware passed a bill making it unlawful for employers to prohibit employees from inquiring about, discussing, or disclosing their wages or the wages of another employee or to retaliate against employees for exercising these rights.<sup>5</sup> It further prohibits employers from requiring employees to sign any document purporting to waive their right to disclose or discuss their wages. The law makes clear that it does not create an obligation for an employer or employee to disclose wages.

**Maryland:** In May 2016, Maryland passed the Equal Pay for Equal Work Act, which, in addition to other provisions, makes it unlawful for an employer to prohibit employees from inquiring about, discussing, or disclosing their wages or the wages of other employees, or to take adverse employment action against an employee for exercising these rights.<sup>6</sup> Additionally, employers cannot require an employee to sign waivers that purport to deny the employee the right to disclose or discuss the employee's wages. The Act allows employers to place reasonable workday limitations on the time, place, and manner for exercising these rights, permitting them to issue policies that, for instance, limit employees from discussing another employee's wages without that employee's prior permission. The Act clarifies that these pay transparency provisions do not compel anyone to share compensation

information.

**Massachusetts:** In July 2016, Massachusetts passed a strong equal pay law that makes it unlawful for an employer to require that an employee refrain from inquiring about, discussing, or disclosing information about the employee's own wages or the wages of another employee.<sup>7</sup> The law also prohibits employers from retaliating against an employee for disclosing the employee's wages or inquiring about or discussing the wages of another employee. Employers are prohibited from contracting with an employee to avoid complying with these pay transparency provisions. The law does make clear, however, that a human resources employee or an employee whose job responsibilities require or allow access to other employees' compensation information can be prohibited from disclosing such information without prior written consent from the employee, unless the compensation information is a public record. The law also makes clear that it does not obligate an employer to disclose an employee's wages to another employee or a third party.

**New York:** New York passed a new equal pay law in 2015 that prohibits employers from taking actions against employees for inquiring about, discussing, or disclosing their wages or another employee's wages.<sup>8</sup> The law does, however, make clear that employers are allowed to institute reasonable workplace and workday limitations on wage discussions, such as prohibiting an employee from discussing or disclosing another employee's wages without that employee's permission. Likewise, employees who have access to wage information as part of their essential job functions (such as human resources professionals), are not covered by the law's pay secrecy protections unless their disclosure is in response to a complaint or charge, investigation, proceeding, hearing, or action. The law also does not compel any disclosure of wages.

**Oregon:** A new law passed in 2015 in Oregon makes it unlawful for employers to discharge, demote or suspend, or discriminate or retaliate against employees in any terms or conditions of employment for engaging in pay discussions.<sup>9</sup> This includes the employee's right to inquire about, discuss, or disclose in any manner their own wages or the wages of another employee, as well as the employee's right to make any sort of complaint or charge based on her disclosure of wage information. However, these protections do not apply to employees with access to wage information as part of their job functions (such as human resources professionals), unless the employee is making a disclosure in response to a charge, complaint, investigation, proceeding, hearing or action.



## ***Allowing Fairer Comparisons of Work and Pay***

The federal Equal Pay Act and many state equal pay laws have long required equal pay for “equal work.” Many courts have narrowly and rigidly applied the “equal work” standard to throw out pay discrimination cases based on minute or irrelevant differences in the work or experience being compared. In response, states are increasingly considering adopting “substantially similar” or “comparable work” standards that hold the possibility of broader and fairer comparisons that reflect the reality of the modern workplace.

**California:** California’s new law requires equal pay for “substantially similar work,” when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, rather than “equal work,” ensuring that minor differences between jobs will not be sufficient to defeat a pay discrimination claim.<sup>10</sup> These critical changes will help courts better identify and rectify sex-based pay discrimination.

**Massachusetts:** Massachusetts law has long required equal pay for “comparable work,” and its new equal pay law provides an explicit definition of “comparable work.”<sup>11</sup> Massachusetts’ new law defines “comparable work” as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.” The law makes clear that a job title or job description alone shall not determine comparability.

## ***Closing Loopholes in Employer Defenses***

Current federal law and most state laws provide that a difference in pay will not be considered discriminatory where an employer can show that the differential was made pursuant to a seniority system; a merit system; a production system; or a differential based on any other factor other than sex. Many courts, however, have interpreted these exceptions broadly, creating legal loopholes in which employers can justify almost anything as a “factor other than sex” without much scrutiny from the courts.<sup>12</sup> This makes it extremely difficult for workers to challenge their unfair pay. Recently, several states have taken steps to strengthen their laws by limiting the employer defenses to claims of pay discrimination.

**California:** California’s new law tightens its employer defenses to pay discrimination claims by requiring that an employer’s stated justifications be applied reasonably and account for the entire wage differential.<sup>13</sup> These important requirements ensure that an employer is held accountable for any amount of an employee’s lower pay that is derived from sex discrimination. The law also narrows the “factor

other than sex” defense by requiring any stated “factor other than sex” be related to the position in question, consistent with business necessity, and not derived from a sex-based differential in compensation. The defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. These critical changes to California’s equal pay laws will help courts better identify and rectify sex-based pay discrimination.

**Maryland:** Maryland’s new law closes loopholes in employer defenses by limiting the bona fide factor other than sex or gender identity defense.<sup>14</sup> Maryland’s law now requires that this factor not be based on or derived from a gender-based differential in compensation, that it be job-related and consistent with a business necessity, and that it account for the entire differential in pay.

**Massachusetts:** Massachusetts’ new equal pay law clarifies that while variations in wages based on seniority shall not be prohibited, time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave shall not reduce seniority.<sup>15</sup> The law also explicitly provides that an employee’s previous wage or salary history shall not be a defense to a pay discrimination action. And while the new law adds additional legal bases for wage differences, such as a merit system and a system which measures earnings by quantity or quality of production, the new law did not include the “factor other than sex” defense thereby avoiding introducing a large loophole in the law’s protections.

**New York:** New York’s new law closes the “factor other than sex” loophole in the employer defenses by requiring that the stated factor not be derived from a sex-based differential in compensation, that it be job-related with respect to the position in question, and consistent with business necessity.<sup>16</sup> Moreover, the stated “bona fide factor other than sex” will not be a defense to pay discrimination where the employee can show that the employer uses a particular employment practice that causes a disparate impact on the basis of sex, and that an alternative employment practice exists that would serve the same business purpose without producing the differential, but the employer has refused to adopt it.

## ***Prohibiting Use of Salary History in Hiring***

When an employer relies on a job candidate’s prior salary in hiring or in setting pay, any pay disparity or discrimination the candidate faced in her past employment is replicated and perpetuated throughout her career. Relying on prior salary history also penalizes job candidates who reduced their hours in their prior job, or left their prior job for several years, to care for children or other family members. Several states have proposed legislation prohibiting employers from



seeking prior salary history information from job candidates and employees.

**Massachusetts:** With its new equal pay law passed in July 2016, Massachusetts became the first state to prohibit employers from asking job candidates and employees for their prior salary history before extending a job offer with compensation.<sup>17</sup> Specifically, Massachusetts' trailblazing new law prohibits employers from seeking the wage or salary history of a prospective employee from the prospective employee or from a current or former employer or from requiring that a prospective employee's prior wage or salary history meet certain criteria. The law does permit, however, an employer to confirm prior wages or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee or if a prospective employee voluntarily discloses such information.

### ***Challenging Occupational Segregation***

Women continue to earn less than men in part because they are not offered the same opportunities for career advancement and promotions. Many employers continue to operate based on sex stereotypes about the competence and commitment of women—and mothers in particular—assuming that women will be uninterested or unable to perform jobs that require longer hours, frequent travel, or skills often associated with men, such as physical strength.<sup>18</sup> As a result, women are underrepresented in higher-paying positions and fields.

**Maryland:** Maryland's new law prohibits employers not only from paying discriminatory wages, but also from offering less favorable employment opportunities based on sex or gender identity.<sup>19</sup> As defined in the act, offering less favorable opportunities means assigning or directing employees to less favorable positions or career tracks; failing to provide information about promotion or advancement opportunities in the full range of career tracks offered by the employer; or limiting or depriving employees of employment opportunities that would have been available but for their sex or gender identity. This new language aims to address discrimination in who is informed about, encouraged to apply for, and considered for promotions or other career advancement opportunities.

### ***Requiring Record Keeping and Data Reporting and Incentivizing Self-Evaluation***

When employers collect and keep records and data on employee compensation, evaluate that data, and provide such data to state enforcement agencies, employers are better able to root out pay discrimination in their workplaces and state agencies are better able to focus investigation

and enforcement resources toward employers likely to be engaged in pay discrimination.

**Massachusetts:** Massachusetts' new equal pay law provides an affirmative defense to liability to employers who have completed a self-evaluation of their pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work.<sup>20</sup> The self-evaluation may be of the employer's own design, but the law requires that it be reasonable in detail and scope in light of the size of the employer, or that it be consistent with standard templates or forms issued by the attorney general.

**North Dakota:** In 2015, North Dakota strengthened its equal pay law to include important record keeping and reporting requirements.<sup>21</sup> It requires employers to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment for individuals employed by the employer, and requires the employer to preserve these records for the length of the individual's employment plus two additional years. Employers must also report on these records whenever the state inquires.

### ***Strengthening Equal Pay Protections***

Current federal law and most state laws prohibit employers from engaging in sex-based wage discrimination between men and women working in the "same establishment" doing equal work. Unfortunately, some courts have interpreted this to allow an employer to pay a woman less than a man doing the same work if the two employees are working in different facilities or offices. Several states have recently taken steps to fix this weakness in the prohibition against pay discrimination.

**California:** California's new law eliminates the "same establishment" requirement in the law's prohibition on sex-based pay discrimination.<sup>22</sup> Previously, California prohibited employers from paying individuals at a wage rate less than it paid to employees of the opposite sex "in the same establishment." By eliminating the "same establishment" requirement, California's new law ensures that employers cannot get away with pay discrimination simply because they have multiple work sites.

**Maryland:** Maryland's new equal pay law clarifies that employees who work at separate worksites within the same county for the same employer are employees at the "same establishment" for purposes of equal pay requirements.<sup>23</sup>

**New York:** New York's new law expands the definition of "same establishment" in its prohibition on pay discrimination to include all of an employer's workplaces located in a geographical region no larger than a county.<sup>24</sup>



## ***Improving Workers' Ability to Challenge Pay Discrimination***

In some states, even if an employee manages to discover that she has been discriminated against in the payment of her wages due to her sex, she may be barred from challenging the discrimination under the state's equal pay law and obtaining relief in court due to an unjust application of a state statute of limitations. As a result, some states have been considering laws similar to the federal Lilly Ledbetter Fair Pay Act that clarify what discriminatory events trigger the statutes of limitations for pay discrimination claims.

**Massachusetts:** Massachusetts' new equal pay law clarifies that an unlawful employment practice occurs triggering the statute of limitations whenever a discriminatory compensation decision or other practice is adopted; when an employee becomes subject to a discriminatory compensation decision or other practice; or when an employee is affected by application of a discriminatory compensation decision or other practice, including each time wages are paid, resulting in whole or in part from such a decision or other practice.<sup>25</sup>

**North Dakota:** North Dakota's new equal pay law clarifies that an unlawful employment practice occurs whenever a discriminatory compensation decision or other practice is adopted; when an individual becomes subject to a discriminatory compensation decision or other practice; or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.<sup>26</sup>

## ***Increasing Available Relief for Employees***

Ensuring that equal pay laws provide for adequate damages or penalties is essential to incentivizing employers to lead the way in tackling the wage gap and to fully compensating victims of pay discrimination.

**Illinois:** Illinois' new law increases the civil penalties employers may incur for violations under the equal pay law to up to \$5,000 for each employee affected.<sup>27</sup>

**Utah:** In 2016, Utah amended its Antidiscrimination Act to increase the remedies available to an employee who is determined to have been paid discriminatory wages through an administrative hearing.<sup>28</sup> Such an employee is now entitled to back-pay plus an additional award equal to the amount of back pay. The employee receives this doubled amount unless the employer can demonstrate that they were acting in good faith when determining compensation and had

reasonable grounds to believe that their actions were not pay discrimination.

## ***Expanding Employers Covered by Equal Pay Law***

Many equal pay laws apply only to employers with a minimum number of employees even though pay discrimination can happen in any size employer. Some states are enacting legislation to ensure that all employees are protected by state equal pay laws.

**Illinois:** In 2015, Illinois amended its Equal Pay Act previously passed in 2003 by expanding the Act's coverage from employers with four or more employees to all employers in the state.<sup>29</sup>

**Nebraska:** During its 2016 legislative session, Nebraska enacted an amendment to its equal pay law that expanded the number of employers required to pay their workers an equal wage from employers with fifteen or more employees to employers with at least two employees.<sup>30</sup>

## ***Holding State Contractors Accountable***

Employers who contract with the state are paid through public funds, and therefore have a special duty to address pay disparities. To ensure that the state does business with contractors who are following the laws, some states have enacted provisions to require contractors to certify that they are in compliance with state and federal equal pay laws.

**Delaware:** In 2015, Delaware enacted a law that requires, as a condition of public works contracting, that employers not discriminate against any applicant or employee, including by engaging in sex-based pay discrimination.<sup>31</sup> Moreover, the new law explicitly requires contractors to ensure that employees receive equal pay for equal work, without regard to sex.

## ***Empowering Employees to Report Violations***

Equal pay laws can be most effective when employees are empowered and enabled to report violations to the relevant state agencies. Some states have developed new initiatives for ensuring that equal pay violations do not remain unknown to those who can help.

**Rhode Island:** At the beginning of 2015, Rhode Island launched the RI Pay Equity Tip Line, "a telephone line allowing women and men to report employers who violate the Rhode Island law that bans gender-based wage discrimination."<sup>32</sup> The tip line is operated by the state Department of Labor and Training. In addition to the tip line, employees can file a complaint on the Department's website.



1 National Women's Law Center calculations based on U.S. Census Bureau, Current Population Survey, Historical Data, Table P-38: Full-Time, Year-  
Round Workers by Median Earnings and Sex, *available at* <http://www.census.gov/hhes/www/income/data/historical/people/>. Median earnings  
are in 2015 dollars.

2 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](http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file) (revealing that 60 percent of private sector  
male employees and 62 percent of private sector female employees report that their employers either prohibit or discourage the discussion of  
wages).

3 S. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).

4 H.B. 6850, 2015 Gen. Assemb. (Conn. 2015).

5 H.B. 314, 148th Gen. Assemb. (Del. 2016) (amending 19 Del. C. § 711 (2016))

6 H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015))

7 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

8 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. LAB. LAW §§ 194, 198 (Consol. 2015)).

9 H.B. 2007, 78th Leg. Assemb. (Or. 2015) (amending OR. REV. STAT §§ 659A.885)

10 S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).

11 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

12 For more information on the "factor other than sex" loophole, see <http://nwlc.org/resources/paycheck-fairness-closing-factor-other-sex-gap-equal-pay-act/>

13 S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).

14 H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015))

15 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

16 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. Lab. Law §§ 194, 198 (Consol. 2015)).

17 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

18 National Women's Law Center, Sex Stereotypes: How They Hurt Women in the Workplace - and in the Wallet (2013), *available at* [https://nwlc.org/wp-content/uploads/2015/08/suits\\_fact\\_sheet\\_-\\_sex\\_stereotypes\\_01.30.2013.pdf](https://nwlc.org/wp-content/uploads/2015/08/suits_fact_sheet_-_sex_stereotypes_01.30.2013.pdf)

19 H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015))

20 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

21 H.B. 1257, 64th Gen. Assemb. (N.D. 2015) (amending N.D. CENT. CODE ANN. §§34-06.1-03, 34-06.1-05- 34-06.1-07 (2015)).

22 S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)).

23 H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015))

24 S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. LAB. LAW §§ 194, 198 (Consol. 2015)).

25 S. 2107, 189th Gen. Ct. (Mass. 2016) (amending Mass. Gen. Laws Ch. 149 §§ 105A, 105B, 151)

26 H.B. 1257, 64th Gen. Assemb. (N.D. 2015) (amending N.D. CENT. CODE ANN. §§34-06.1-03, 34-06.1-05- 34-06.1-07 (2015)).

27 H.B. 3619, 99th Gen. Assem. (Ill. 2015) (amending 820 ILL. COMP. STAT. ANN. 112 § (West 2015)).

28 S.B. 185, 2016 Gen. Sess. (Utah 2016) (amending Utah Lab. Code Ch. 5 §§ 104, 107)

29 H.B. 3619, 99th Gen. Assem. (Ill. 2015) (amending 820 ILL. COMP. STAT. ANN. 112 § (West 2015)).

30 L.B. 83, 104th Leg., 2nd Sess. (Neb. 2016) (amending Neb. Rev. Stat. § 48-1220)

31 H.B. 3, 148th Gen. Assemb. (Del. 2015) (amending 29 Del. C. § 6962 (2015)).

32 *Raimondo Launches Pay Equity Tip Line, Website*, RI.gov (Feb. 10, 2015), <http://www.ri.gov/press/view/24002> (last visited Sept. 25, 2016).

