



## The Fair Pay Act Is Urgently Needed to Close Rhode Island's Wage Gap

Women in Rhode Island are typically paid **84 cents** for every dollar paid to men in the state.<sup>1</sup> This pattern is even starker for women of color: for every dollar paid to white, non-Hispanic men, Asian women make **77 cents**, Black women make **59 cents**, and Latinas make just **50 cents**.<sup>2</sup>

The wage gap for Rhode Island women amounts to a typical **annual loss of \$9,037**.<sup>3</sup> That loss is equal to almost 10 month's rent, 10 months of child care in a center, or 20 months of health insurance premiums.<sup>4</sup> In Rhode Island, 69.2% of mothers are breadwinners or co-breadwinners for their families.<sup>5</sup> The wage loss hurts both women and the many Rhode Island families that depend on their wages.

## The Fair Pay Act (H-5659/S-0509) Gives Rhode Island the Tools to Close the Wage Gap

The federal Equal Pay Act was passed by Congress over 55 years ago, and Rhode Island has had pay discrimination protections on the books for even longer. But loopholes and inadequacies in these laws have allowed pay discrimination to continue. The Fair Pay Act would strengthen Rhode Island's equal pay law and provide employers and employees with the tools they need to close the wage gap by:

### Extending equal pay protections to other groups

The Fair Pay Act will extend Rhode Island's equal pay protections beyond discrimination based on sex to other

protected characteristics which are often the basis of pay discrimination against working people, including race, religion, sex, sexual orientation, gender identity or expression, disability, age, or national origin. For example, nationally, for every dollar paid to white, non-Hispanic men, Black men are paid 73 cents and Latino men are paid 69 cents.<sup>6</sup>

The Fair Pay Act will help root out other discriminatory wage gaps, in addition to gender wage gaps. These protections will also address intersectional discrimination that individuals may experience based on, for example, their race and gender or their disability and gender combined. California, New Jersey, and Oregon have recently amended their laws to provide equal pay protections not only based on sex, but also race, ethnicity, and other protected characteristics.

### Ensuring Rhode Island courts use a fair "comparable work" standard to assess claims

The equal pay for "equal work" standard used in the federal Equal Pay Act and current Rhode Island law is a rigid standard that many courts have very strictly and narrowly interpreted to mean identical work.<sup>7</sup> Thus, if a plaintiff is unable to show that her male counterpart has the same job title, exactly the same responsibilities, and the same working conditions, a court may throw her case out at the very earliest stages of litigation. This analysis does not reflect the reality of today's workplaces and jobs, and denies too many pay discrimination victims the opportunity to have their claims fairly and fully heard.

By requiring equal pay for "comparable work," The Fair Pay Act will ensure that pay discrimination cases aren't thrown out based on minor differences in the work being compared. States across the country are increasingly recognizing the need for such a standard. Most recently, Massachusetts, Oregon, California, New Jersey and



Washington amended or clarified their equal pay laws to ensure a broader and fairer “comparable work” or “substantially similar” standard.

### **Closing loopholes in employer defenses**

Under Rhode Island’s current equal pay law, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an affirmative defense that the pay differential is based on any “reasonable differentiation except difference in sex.” Some courts have interpreted this type of defense so broadly that they have created loopholes in the law that allow employers to pay women less than men doing the same work without any compelling business reason justifying that lower pay. In particular, some courts have held that a male worker’s salary negotiations or higher previous salary justify a pay disparity, even if these factors themselves may be “based on sex.”<sup>8</sup>

The Fair Pay Act tightens this affirmative defense so that it can excuse a pay differential only where the employer can show that the differential is truly caused by something other than a protected characteristic, and is related to the position in question, consistent with business necessity, and accounts for the entire pay differential. By passing this bill, Rhode Island will join the growing chorus of states that have taken similar steps to close the legal loopholes courts have created in this defense, including Maryland, New York, California, New Jersey, and Washington.

### **Protecting employees from retaliation for discussing pay**

One of the reasons that pay discrimination is so difficult to root out is that employers often institute policies or practices prohibiting or discouraging employees from discussing their compensation with co-workers. A recent survey found that more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.<sup>9</sup> You can’t remedy pay discrimination if you have no idea whether you are making less than the man across the hall. When workers fear retaliation for talking about their pay, any pay discrimination they face continues to grow, undiscovered, in the shadows.

The Fair Pay Act stops employers from prohibiting or punishing employees for asking about, discussing, or disclosing information about pay and makes clear that employees cannot contract away or waive their rights to discuss and disclose pay. Eighteen states—including

Massachusetts, Connecticut, New Hampshire, New York, New Jersey, and Vermont—and the District of Columbia have enacted such protections in recent years.

### **Prohibiting reliance on salary history**

Using salary history in the hiring and pay setting process is an unfair practice that hurts all working people in Rhode Island, but has a disproportionately negative impact on women and people of color who are typically paid less than white men. It also penalizes individuals—predominately women—who had to reduce their hours or leave their prior job to care for children or family members, or who worked for the nonprofit sector, and whose prior salary, consequently, may not reflect their current qualifications or market conditions. Relying on salary history allows pay discrimination and wage gaps to follow women and people of color, hurting working people, their families, and the state’s economy.

The Fair Pay Act prohibits employers from seeking and relying on job applicants’ salary history in the hiring process and in setting pay. Massachusetts, Connecticut, Vermont, Delaware, Oregon, California, and Hawai’i have passed similar protections and all with bipartisan support. And cities from Kansas City, MO, to Louisville, KY, and New York City, have also prohibited employers from seeking salary history from job applicants.

### **Increasing transparency around pay**

When an employer asks a job applicant what his or her salary expectations are without providing the applicant any information about the pay for the position, women and people of color lose out. Studies show that women often ask for less than men when they negotiate, even when they are equally qualified and applying for similar jobs.<sup>10</sup> Studies also show, however, that when job applicants are clearly informed about the context for negotiations, including the typical pay for the position, women are more successful in negotiating and the gender wage gap is reduced.<sup>11</sup> Being transparent with employees about salary ranges is also shown to promote employee loyalty and productivity<sup>12</sup> and provides employers an opportunity to proactively review and evaluate their compensation practices and address any unjustified disparities between employees.

The Fair Pay Act helps level the negotiating playing field by requiring an employer to provide a job applicant with the salary range for the position to which she is applying upon request or before inquiring about the applicant’s wage expectations, or making an offer of compensation, whichever is greater. It also increases pay transparency



by requiring employers to provide the salary range for an employee's job title and comparable jobs annually and upon request. In 2017, California enacted a provision requiring employers to provide the salary range for a position to an applicant upon request and several states are considering similar provisions this session.

### Improving remedies for pay discrimination

Adequate damages and penalties for violating equal pay laws are essential to fully compensating victims of pay discrimination and to incentivizing employers to lead the way in tackling the wage gap. Weak remedies for pay discrimination—for example, only requiring an employer to pay little more than what they should have paid an employee to begin with—mean that employers that discriminate in pay can come out ahead by gambling that they won't get caught. Moreover, an employee who is a victim of pay discrimination can suffer significant financial losses, making her less likely to be able to take care of herself and her family, as well as undermining her retirement security. Allowing victims of pay discrimination

to recover back pay and compensatory and punitive damages will ensure that victims of pay discrimination are made whole for the discrimination they experience.

The Fair Pay Act will incentivize employers to prevent pay discrimination in the first instance by allowing a victim of pay discrimination to bring a claim either with the Director of Labor and Training or in court and receive monetary relief, including compensatory and punitive damages. The bill also provides for civil penalties to deter employers from violating the law. Other states have similarly recognized the need for robust remedies and penalties for pay discrimination, including Utah, Illinois, Oregon, New Jersey, and Washington, which have all taken steps to increase damages and penalties in the last several years.

- 1 NAT'L WOMEN'S LAW CTR., *The Wage Gap, State by State*, <http://nwlc.org/resources/wage-gap-state-state/>.
- 2 State wage gaps for women of color calculated by National Women's Law Center (NWLC) based on 2013-2017 American Community Survey Five-Year Estimates (<http://www.census.gov/acs/www/>).
- 3 The amount lost to the wage gap in a year is the difference between women's and men's median annual earnings for full time, year round workers calculated by NWLC based on 2017 American Community Survey One-Year Estimates, <http://www.census.gov/acs/www/>.
- 4 Median gross rent for Rhode Island is \$941 per month. U.S. Census Bureau, 2017 American Community Survey 1-Year Estimates. Average monthly employee contribution for employer-based family coverage in Rhode Island is \$448. U.S. Dep't of Health and Human Services, Agency for Healthcare Research and Quality, Medical Expenditure Panel Survey: 2017, Table II.D.2, 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, 2017. Average costs for child care in a center in Rhode Island for a four-year-old is \$10,433 annually or \$869 monthly. Child Care Aware of America, Rhode Island Cost of Child Care.
- 5 Sarah Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CTR. FOR AMERICAN PROGRESS (Dec. 2016), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>.
- 6 PEW RESEARCH CTR., RACIAL, GENDER WAGE GAPS PERSIST IN U.S. DESPITE SOME PROGRESS (2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.
- 7 See DEBORAH THOMPSON EISENBERG, SHATTERING THE EQUAL PAY ACT'S GLASS CEILING, SMU LAW REVIEW, Vol. 63 (2010) pp 39-41, [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1897&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1897&context=fac_pubs).
- 8 NAT'L WOMEN'S LAW CTR., PAYCHECK FAIRNESS: CLOSING THE "FACTOR OTHER THAN SEX" GAP IN THE EQUAL PAY ACT (2012), <https://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf>.
- 9 INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION 1 (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).
- 10 See Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (2003) (finding that women ask for less when they do negotiate and that women business school graduates who negotiate fare 30 percent worse than their peers who are men); Jenny Save-Soderbergh, *Are Women Asking for Low Wages? Gender Differences in Wage Bargaining Strategies and Earning Bargaining Success*, SWEDISH INST. SOC. RES. WORKING PAPER SERIES 7/2007 10 (2007), available at [https://ideas.repec.org/p/hhs/sofiwp/2007\\_007.html](https://ideas.repec.org/p/hhs/sofiwp/2007_007.html).
- 11 See, e.g., Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiations*, 89 J. PERSONALITY & SOC. PSYCH. 951, 955-56 (2005).
- 12 See Andrew Chamberlain, *Is Salary Transparency More Than a Trend?*, Glassdoor (Apr. 27, 2015), <https://www.glassdoor.com/research/studies/is-salary-transparency-more-than-a-trend/>; Deborah Thompson Eisenberg, *Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 Ariz. State L.J. 951, 1001-15 (2011).

