WOMEN'S RIGHTS IN THE WORKPLACE: THE STRUGGLE IS STILL REAL

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INTRODUCTION

Once upon a time in a faraway land there was a princess trapped in a castle waiting for her prince to come to her rescue. Stop. Hang on. Wait a minute. Back it up. Rewind. This is the twenty-first century, isn't it? The year 2019? Women are not sitting at home waiting for their prince to arrive to rescue them. They are in the workforce.

Today women are providing for their families in record numbers. According to a recent White House report, women's workforce participation is at its highest rate ever and women's earnings make up a growing share of household incomes.[1] There are over 74.6 million women in the workforce of United States, which is approximately 47% of women.[2] This number is significant when considering that women comprise 50.9% of the total U.S. population.[3] While impressive, when taking a deeper look into the numbers, the number of women in decision making and leadership positions dramatically shrinks that percentage.

For example, of the 535 members of Congress, only 127 are women.[4] That is only 23.7%.[5] The percentage of women serving as equity partners at law firms is 19%,[6] and only 33% of state court judges are female,[7] despite the ratio of men to women at law school now being approximately fifty-fifty.[8] In 2017, Harvard Law School had its first graduating class of an equal

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1. Deborah Vagins & Georgeanne Usova, *The Equal Pay Act: You've Come a Long Way, Baby (But Not All the Way)* ACLU (2011), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/equal-pay-act-youve-come-long-way-baby-not-all-way.

2. Mark DeWolf, *12 Stats About Working Women*, U.S. DEPT. OF LABOR BLOG (Mar. 1, 2017), https://blog.dol.gov/2017/03/01/12-stats-about-working-women.

3. Julie Meyer & Lindsay Howden, *Age and Sex Composition: 2010 Census Brief* (May 2011), https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-03.pdf.

4. CTR. FOR AM. WOMEN & POLITICS, WOMEN IN THE U.S. CONGRESS 2019 (2019).

5. *Id.*

6. Destiny Peery, *The Promotion and Retention of Women in Law Firms: 2017 Annual Survey Report*, NWLC http://www.legalexecutiveinstitute.com/wp-content/uploads/2018/05/130-PM-2017-NAWL-Survey-Report.pdf.

7. *2018 US State Court Women Judges*, NAWJ (2019), https://www.nawj.org/statistics/2018-us-state-court-women-judges.

8. Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES, Dec. 16, 2016, at 1.

number of men and women.[9] Nationwide there are currently 55,766 women enrolled in law school, compared to 55,059 men.[10]

While women make up 47% of business school graduates,[11] only 4.8% of CEOs of Fortune 500 companies are women,[12] When considering the medical field, women hold 18% of hospital CEOs and 16% of all deans and department chairs in the U.S.[13] However, in 2017, for the first time the majority of students entering medical school were women,[14] a total of 50.7% of students.[15] Finally, when considering the number of women in STEM (Science, Technology, Engineering, and Mathematics) fields, the gender gap is particularly pronounced in engineering and computer science, where nearly four out of every five doctoral graduates in 2014 were men.[16]

The list goes on with each profession that is typically stereotyped as a male-held position. As a result, numerous laws have been enacted in the U.S. over the past several decades to prohibit discrimination on the basis of sex in the workplace. The focus of this papers is on the issue that despite all the laws that have been enacted to protect women in the workplace, how is it possible that equality STILL does not exist at work?

I. THE HISTORY OF WOMEN'S RIGHTS LAWS IN THE WORKPLACE

In order to understand where women's rights in the workplace are now, we have to look back at its evolution. How far have we come as a nation?

A. Nineteenth Century

Many of the laws that were in place in the early nineteenth century were not intended to assist women at work. Rather, stereotypes persisted that women were to be home caring for children and their household. Thus, many

9. RBG (Magnolia Pictures 2018).

10. Olson, *supra* note 8, at 1.

11. GMAC Research Team, *Why More Women Are Applying to Business School*, MBA.COM (Jan. 11, 2018), https://www.mba.com/mbas-and-business-masters/articles/women-in-business/why-women-are-applying.

12. Zameena Mejia, *Just 24 female CEOs lead the companies on the 2018 Fortune 500 - fewer than last year,* CNBC (May 21, 2018), https://www.cnbc.com/2018/05/21/2018s-fortune-500-companies-have-just-24-female-ceos.html.

13. Christina Mangurian et al., *What's Holding Women in Medicine Back from Leadership,* HARV. BUS. REV. (Nov. 7, 2018).

14. Michael A. Chandler, *Women Are Now a Majority of Entering Medical Students Nationwide*, WASH. POST (Jan. 22, 2018).

15. Assoc. of Am. Med. Colleges, *More Women Than Men Enrolled in U.S. Medical Schools in 2017*, AAMCNEWS (Dec. 18, 2017), https://news.aamc.org/press-releases/article/applicant-enrollment-2017/; Assoc. of Am. Med. Colleges, FACTS: Applicants, Matriculants, Enrollment, Graduates, MD-PhD, and Residency Applicants Data, AAMC, https://www.aamc.org/data/facts/ (last accessed May 6, 2019) (scroll down to click on *2017 Applicant and Matriculant Data Tables: Total Applicants and Matriculation to U.S. Medical Schools by Sex, 2017*).

16. *Women in STEM*, BEST COLLEGES, https://www.bestcolleges.com/resources/women-in-stem/ (last accessed May 6, 2019).

of the laws reflect this idea and restricted a women's ability to work at all, for example, banning women from working overtime and at night.[17]

Myra Bradwell was the first female attorney to apply to the Supreme Court of Illinois to practice law.[18] Her application was denied, despite the fact that she met all the necessary qualifications, including passing the bar examination.[19] While the Court agreed that all citizens enjoy certain privileges and immunities which individual states cannot take away, it did not agree that the right to practice law in state's court is one of them.[20] There was no agreement that this right depended on citizenship.[21] The Court upheld the State's determination and denied Ms. Bradwell's application to practice law through admission to a State bar, despite the fact she met the State's age, character, and educational requirements . The Court ultimately found that the right to practice law was not a right or privilege of national citizenship guaranteed to the citizens of each State by the Fourteenth Amendment. Thus, the Court upheld the State's determination that women were not allowed to practice law.[22]

The stereotypes of the time were clearly demonstrated in Justice Bradly's concurring opinion, stating that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[23] Justice Bradley went above and beyond the constitutional explanations of the case to describe the reasons why it was natural and proper for women to be excluded from the legal profession. He cited the importance of maintaining the "respective spheres of man and woman," with women performing the duties of motherhood and wife in accordance with the "law of the Creator."[24]

For a long period of time women were "protected" from the harms of the workplace by laws that "protected" their interests. However, United States Supreme Court Justice Ruth Bader Ginsburg ("Justice Ginsburg") aptly described what such laws were actually set out to accomplish when she said, "the pedestal on which some thought women were standing all too often turned out to be a cage."[25]

Over time, women tried fervently to abolish these protective laws on the books. One way women challenged this kind of reasoning was, and still is, to develop the potential of the protection under the equal protection clause

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17. *Equal Pay Act*, HISTORY (Apr. 2, 2019), https://www.history.com/topics/womens-rights/equal-pay-act.

18. *Bradwell v. State of Illinois*, 83 U.S. 130, 131 (1872).

19. *Id.* at 130.

20. *Id.* at 135.

21. *Id.* at 139.

22. *Id.* at 139.

23. *Id.* at 141.

24. *Id.* at 141.

25. MARY ZAIA, YOU CAN'T SPELL TRUTH WITHOUT RUTH 5 (2018).

of the Fourteenth Amendment.[26] The Supreme Court historically has examined equal protection challenges by categorizing the interest at issue such as, race, economic status, nationality, or sex, and then then applying the appropriate standard of review to the interest at hand.[27] Attorneys that came before the Supreme Court tried to argue that sex is a "suspect class" and as a result should be treated with the "strict scrutiny test."[28] However, case after case, the Court denied cases on this theory. The Court believed that only minorities were protected from discrimination; however, because women were 50% of the country's population,[29] the justices had a hard time believing that discrimination on the basis of sex even existed at all.

In the late nineteenth century, women attempted another push towards equality and tried to pass the Equal Rights Amendment ("ERA"). They came close, but the ERA failed to be ratified in enough states to become an amendment to the Constitution of the United States.[30]

B. Twentieth Century

By the early twentieth century, women made up one quarter of the workforce and incrementally, laws were enacted to protect their interests.[31] In the beginning of the 1900s and through the mid-1900s, as men went off to war, many women worked the jobs that men had left behind.[32] This included both blue collar and white-collar jobs.[33]

However, when the war was over and the men returned home, women wanted to continue working, but many were immediately fired and sent back home to care for the home and children.[34] Women wanted to continue to work to support their families so they decided to fight back. As a result, many laws were overturned and women began being treated like equals in the workplace. One by one, as minds changed, the laws changed.

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26. *Doesn't the 14th Amendment Already Guarantee Women Equal Rights Under the Law?*, ERA EDUCATION PROJECT: EQUAL MEANS EQUAL, http://eraeducationproject.com/doesnt-the-14th-amendment-already-guarantee-women-equal-rights-under-the-law/ (last accessed May 6, 2019).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id*; *Ratification Info State by State*, Alice Paul Institute, www.equalrightsamendment.org/era-ratification-map (last accessed June 26, 2019).

31. HISTORY, *supra* note 17.

32. Susan Milligan, *Stepping Through History: A Timeline of Women's Rights From 1769 to the 2017 Women's March on Washington*, U.S.NEWS (June 20, 2017), https://www.usnews.com/news/the-report/articles/2017-01-20/timeline-the-womens-rights-movement-in-the-us.

33. Johnson Hur, *History of Women in the Workforce,* BeBusinessed.com, https://bebusinessed.com/history/history-of-women-in-the-workforce/ (last accessed June 26, 2019).

34. *Id.*

1. Fair Labor Standards Act of 1938

The most precedential law that was enacted and changed the basic operations of most workplaces at this time was the Fair Labor Standards Act ("FLSA"). Secretary of Labor Frances Perkins worked ardently to develop legislation to help underpaid workers and exploited child laborers.[35]

> "In 1933 when President Franklin D. Roosevelt asked Frances Perkins to become Secretary of Labor, she told him that she would accept the appointment if she could advocate a law to put a floor under wages and a ceiling over hours of work and to abolish abuses of child labor. When Roosevelt heartily agreed, Frances Perkins asked him, 'Have you considered that to launch such a program . . . might be considered unconstitutional?' President Franklin D. Roosevelt retorted, 'Well, we can work out something when the time comes.'"[36]

With assistance from two constitutional attorneys, who drafted the law so that it would pass muster in front of the Supreme Court, Perkins assisted in enacting the FLSA.[37] The FLSA was enacted in 1938 and established minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in both the private sector and public sector.[38] The Wage and Hour Division of the United States Department of Labor administers and enforces the FLSA.[39] The FLSA covers all employees of certain enterprises having workers engaged in interstate commerce, including, producing, handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce.[40]

However, Congress left out some key components to the FLSA including the issues of vacation, holiday, sick time, meals or rest periods, pay raises and fringe benefits.[41] The FLSA "does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work."[42] Furthermore, the FLSA does not provide "wage payment or collection procedures for an employee's usual or promised wages or commissions in excess of those required by the FLSA."[43] As a result, additional legislation was required in order to provide sufficient protection to women in the workforce.

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35. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage,* U.S. DEP'T OF LABOR, https://www.dol.gov/general/aboutdol/history/flsa1938 (last accessed May 6, 2019).

36. *Id.*

37. *Id.*

38. 29 U.S.C. § 203 (1938).

39. *Id*. § 204(a) (2006).

40. *Id.* § 203(e) (2018).

41. Wage & Hour Div., *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP'T OF LABOR (2016), https://www.dol.gov/whd/regs/compliance/hrg.htm.

42. Wage & Hour Div., *Questions and Answers About the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, https://www.dol.gov/whd/flsa/faq.htm (last accessed May 6, 2019).

43. *Minimum Wage*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/wages/minimumwage (last accessed May 6, 2019).

2. Equal Pay Act of 1963

In 1963, the Equal Pay Act (EPA) was enacted. As an amendment to the FLSA, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort, and responsibility, and that are performed under similar working conditions within the same establishment.[44]

In 1961, prior to the bill being introduced to Congress,

> "Esther Peterson was appointed to head the Women's Bureau in the Department of Labor, which was responsible for administering gender-issue labor laws. At her urging, President John F. Kennedy established the Presidential Commission on the Status of Women to develop recommendations for achieving equality. She gathered data, built coalitions, and won over opponents in a successful campaign to bring an Equal Pay Act before Congress. In February of 1963, Esther Peterson submitted a draft bill of an Equal Pay Act to Congress on behalf of the Kennedy administration."[45]

With her assistance, United States House Representative Katharine St. George helped lead the charge for a bill in Congress.[46] The bill was signed into law on June 10, 1963. President John F. Kennedy praised it as a "first step" forward, but acknowledged that much remains to be done to achieve full equality of economic opportunity for women.[47]

Despite the fact that the EPA was the first national civil rights legislation focusing on employment discrimination, the EPA includes guidelines for when unequal pay is permitted.[48] Specifically on the basis of merit, seniority, workers' quality or quantity of production and other factors not determined by gender.[49] This leaves open the door for an employer to discriminate on the basis of sex. To address these concerns the EPA provides, "employees who believe they are being discriminated against can either file a complaint with the Equal Employment Opportunity Commission ("EEOC") or directly sue their employer in court."[50]

However, there are limitations on both sides to filing suit. "The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same – within two years of the alleged unlawful compensation

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44. 29 U.S.C. § 206(d) (1963).

45. *Equal Pay Act of 1963*, NAT'L PARK SERV. (Apr. 1, 2016), https://www.nps.gov/articles/equal-pay-act.htm.

46. Rosa Cho & Abagail Kramer, *Everything You Need to Know about the Equal Pay Act*, ICRW (Nov. 2016), https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf.

47. *Equal Pay Act of 1963*, *supra* note 45.

48. S. Rep. No. 13050 (remarking on the Civil Rights Act of 1963).

49. 29 U.S.C. § 206(d).

50. Filing a Charge of Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/charge.cfm (last accessed May 6, 2019).

practice or, in the case of a willful violation, within three years."[51] This is problematic because of the practicalities of when an individual decides to file with the EEOC, the filing of an EEOC charge under the EPA does not extend the time frame for going to court. Therefore, an individual must weigh the benefits and the burdens of filing in each venue. As a result, President John F. Kennedy is still correct that much still remains to be done today.

3. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 ("CRA") prohibits discrimination in a broad array of conduct including public accommodations, governmental services, and education.[52] While ground breaking, the CRA did not pass without challenge. Five hundred amendments were made to the bill and Congress debated the bill for a total of 534 hours.[53] In fact, "sex" was added only two days before the bill's passage in the House, without prior hearing or debate, by an amendment offered by Representative Howard Smith, who opposed the civil rights bill but believed his amendment "[would] do some good for the minority sex."[54]

Title VII of the CRA ("Title VII") goes beyond simply ensuring equal pay but outright bars discrimination based on race, sex, color, religion, and national origin. This extends to all aspects of employment, including prohibiting discrimination in recruitment, hiring, firing, wages, assignment, promotions, benefits, discipline, discharge, and layoffs.[55] Title VII applies to private employers, labor unions, and employment agencies.[56]

Title VII also created the United States Equal Employment Opportunity Commission (EEOC), a five-member, bipartisan commission whose mission is to eliminate unlawful employment discrimination. The law provides that the Commissioners, no more than three of whom may be from the same

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51. 29 U.S.C. § 255 (1963).

52. 42 U.S.C. § 2000e-2 (1964).

53. 110 CONG. REC. 2583 (remarks of Rep. Smith); *1964,* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, www.eeoc.gov/eeoc/history/35th/milestones/1964.html (last accessed June 26, 2019).

54. Eric Dreiband & Brett Jones Day, *The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, Jones Day (April 2015), www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreibandlgbt.authcheckdam.pdf; *See id*. (remarks of Reps. Tuten, Pool, Andrews, and Rivers expressing same concern, for example Rep. Andrews). "Unless this amendment is adopted, the white women of this country would be drastically discriminated against in favor of a Negro woman." *Id.* "[A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister." *Id.* at 2580 (remarks of Rep. Martha Griffiths); *see* Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 156 n.124 (1997).

55. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

56. *Id.*

political party, are appointed to five-year terms by the President and confirmed by the Senate. The Chairman of the agency appoints the General Counsel. The first Chairman of the EEOC was Franklin D. Roosevelt, Jr. when the EEOC opened its doors for business on July 2, 1965, only one year after Title VII's enactment into law. The EEOC was established to ensure equality of opportunity by vigorously enforcing federal legislation prohibiting discrimination in employment—particularly discrimination on the basis of religion, race, sex, color, national origin, age, or disability.[57] The greatest benefit of the EEOC is its ability to file an action against an employer if the claim of discrimination is not settled through mediation. This allows discrimination cases to proceed forward, even if the complaining party does not have representation by an attorney.[58]

Only two years after Title VII was enacted, prominent civil rights attorney Carl Rachlin wrote a scathing law review article for the Boston College Law Review thoroughly detailing all of the various limitations and qualifications of Title VII.[59] He criticized that Title VII only applies to "covered employers," which today consists of having at least fifteen (15) employees or more. Plus, the employee must be working at that employer for a specified period of time, which varies depending on whether the employer is a private business, state or local government, or a federal agency.[60] Additionally, he notes Title VII permits an employer to apply different standards of compensation pursuant to certain seniority systems. This poses a problem because as he explains, by writing in the seniority system exception, Congress made no effort to right years of wrong (to give it its best face) in the hopes of setting sail for a reasonable future. So even if the employment practice was once legal and now illegal, so long as moving forward there is no discrimination, there is no unlawful act. However, that doesn't correct the numerous instances of discrimination on the basis of sex that occurred of the years prior to the law changing, which could have affected women's pay rates.

Despite the fact that the majority of his time was spent defending actions that led to the Supreme Court to throw out the convictions of thousands of young people, both black and white, who struggled to desegregate public accommodations in the South, it is evident that Carl Rachlin's approach also applies to sex-based discrimination .[61] Very few amendments have been made to the CRA since its inception and as a result, women still struggle to achieve equality in the workplace.

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57. *Equal Employment Opportunity Commission*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Equal-Employment-Opportunity-Commission (last accessed May 6, 2019).

58. *Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/mediation/ (last accessed May 6, 2019).

59. *See* Carl Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. L. REV. 473, 473 (1966).

60. *Id.*

61. Wolfgang Saxon, *Carl Rachlin, 82, a Lawyer for Civil Rights Demonstrators,* N.Y. TIMES (Jan. 4, 2000).

4. Pregnancy Discrimination Act

Moving forward a few years, the Pregnancy Discrimination Act (PDA) was signed into law by President Jimmy Carter on October 31, 1978.[62] The PDA was enacted as a result of Congress's disappointment with how the Supreme Court ruled in *Geduldig v. Aiello* and *General Electric v. Gilbert*.[63]

In *Geduldig v. Aiello*, Carolyn Aiello experienced disability as a result of complications during her pregnancy. She was ineligible for benefits from California's Disability Fund under Section 2626 of California's Unemployment Insurance Code. Section 2626 denied benefits to women whose disabilities resulted from pregnancy. Ms. Aiello challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment. The United States District Court for the Northern District of California held the statute unconstitutional. The State of California appealed to the United States Supreme Court.[64] The Supreme Court reversed the District Court and upheld the statute accepting California's interest in keeping the Disability Fund program solvent and maintaining the low contribution rate from program members. The Court noted that insuring disability resulting from pregnancy complications would be "extraordinarily expensive" and make the program "impossible to maintain."[65] The Court stated that just as in *Dandridge v. Williams*, California was not obligated by the Equal Protection Clause to "choose between attacking every aspect of a problem or not attacking the problem at all."[66] For that reason, "California could constitutionally choose which disabilities to insure through the Disability Fund in order to maintain the solvency and contribution level of the program."[67]

In *General Electric v. Gilbert*, "General Electric Company (GE) offered its employees a disability plan for non-occupational sicknesses and accidents, but the plan did not cover disabilities from pregnancy. A class of female employees of GE sued their employer for sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[68] On appeal to the Supreme Court, the Court held that employers have the right to exclude any condition from a disability plan with a reasonable basis. The Court referred to the previous decision, *Geduldig v. Aniello*, which dealt with a similar case under the Equal Protection Clause. In that case, the Court held that the pregnancy exclusion divided the employees into two groups, one that was solely female and the other that contained both sexes, so the distinction is not primarily sex-based.[69] The Court applied the same analysis to this case.

62. 42 U.S.C. § 2000e *et seq.*

63. *History of the Pregnancy Discrimination Act*, JURIST (Dec. 20, 2014), https://www.jurist.org/archives/feature/background-for-pda/.

64. Geduldig v. Aiello, 417 U.S. 484 (1974).

65. *Id.*

66. *Id.*

67. *Id.*

68. General Electric Company v. Gilbert, 429 U.S. 125 (1976).

69. *Id.*

Because the disability plan was not worth more to men than it was to women, the Court concluded that it did not discriminate based on sex.[70]

The PDA was enacted as an Amendment to Title VII of the Civil Rights Act of 1964.[71] The PDA makes it clear that "because of sex" or "on the basis of sex," as used in Title VII, includes "because of or on the basis of pregnancy, childbirth or related medical conditions."[72] Therefore, the PDA forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.[73]

Moreover, under the Americans with Disabilities Act (ADA), if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee.[74] For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if, and only if, it does so for other temporarily disabled employees.[75]

However, this law also left open the door for further discrimination. If employers do not allow for reasonable accommodations under the ADA for their temporarily disabled employees, then a reasonable accommodation would not be required by the employer and as a result, the employee could be put on unpaid medical leave, depending on the sick and vacation leave policies of the employer. As a result, because all of these holes in the PDA, women continue to face hardship in the workplace when it comes to their pregnancies.

5. Family Medical Leave Act

On February 5, 1993, the Family Medical Leave Act (FMLA) was enacted and granted eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.[76] U.S. House Representative William D. Ford from Michigan introduced this bill to the House on January 5, 1993.[77] It was one of the first bills that President Clinton signed into law.[78] Under the FMLA, an eligible employee is

> one who works for a covered employer, has worked for the employer for at least twelve months, has at least 1,250 hours of service for the

70. *Id.*
71. Title VII of the Civil Rights Act of 1964, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (1978)).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Family Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*
77. *See id.*
78. *See id.*

> employer during the twelve month period immediately preceding the leave … and works at a location where the employer has at least fifty employees within seventy-five miles.[79]

A covered employer is a private sector employer with fifty or more employees in twenty or more workweeks in the current or preceding calendar year.[80] In addition, all public agencies and private elementary or secondary schools, regardless of the number of employees it employs, are covered employers.[81] Employees working in the workforce that meet these requirements and work for a covered employer have the ability to take FMLA leave for the birth of a child or placement of a child for adoption or foster care and are able to continue to receive their health insurance coverage.[82] In addition, upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.[83]

However, FMLA does not provide paid leave, nor does it promise you "your job," but simply "a" job upon your return. In addition, many employers are not considered "covered employers," which leaves a gap in the protections this Act provides.

Unfortunately, despite the extensive protection the FMLA provides, only 60% have access to unpaid FMLA protection.[84] This poses a major issue because it means that 40% of women that are pregnant are potentially at risk of losing their job, and their health insurance for their new family, if they want to take time off after their pregnancy. In fact, sadly, only 13% of the private workforce in the United States has access to paid leave. This also demonstrates another issue in the legislation that does not adequately protect women's rights in the workplace.

6. Whistleblowers Protection Act

The Whistleblowers Protection Act ("WPA") is rarely thought to concern a women's right in the workplace, however, it provides one of the key rights necessary to have the ability to speak freely about the wrongdoing occurring in the workplace: anti-retaliation protection. The WPA protects federal employees and applicants for employment who lawfully disclose information they reasonably believe evidences:

> A violation of law, rule or regulation;
>
> Gross mismanagement;

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79. Wage & Hour Div., *Fact Sheet #28: The Family and Medical Leave Act*, U.S. DEP'T OF LABOR (2012), https://www.dol.gov/whd/regs/compliance/whdfs28.pdf.

80. *Id.*

81. *Id.*

82. Wage & Hour Div., *Fact Sheet #28A: Employee Protections under the Family and Medical Leave Act*, U.S. DEP'T OF LABOR (Sept. 2012), https://www.dol.gov/whd/regs/compliance/whdfs28a.pdf.

83. *Id.*

84. *Id.*

A gross waste of funds;

An abuse of authority;

Or a substantial and specific danger to public health or safety.[85]

Under the WPA, certain federal employees may not retaliate or take unfavorable personnel actions against an employee or applicant for employment because of the employee or applicant's protected whistleblowing actions.[86] The Whistleblowers Act has become integral in giving those being discriminated against a voice and an avenue to file a complaint without fear of retaliation of their employer. Many states have enacted their own version of the WPA; however, in some states, not all cases of discrimination are covered, thereby leaving yet another gap in the law and in women's rights in the workplace.

C. Twenty-First Century

1. Lilly Ledbetter Fair Pay Act

The beginning of the twenty-first century brought many laws to the forefront of Congress. The Lilly Ledbetter Fair Pay Act was enacted in 2009 and amended Title VII of the Civil Rights Act of 1964.[87] This Act was the first bill that President Barack Obama signed into law.[88] It overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which severely restricted the time period for filing complaints of employment discrimination concerning compensation.[89] It was enacted to clarify that a discriminatory compensation decision or other practice that is unlawful occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice and other purposes.[90] This Act recognizes the reality of wage discrimination and restores bedrock principles of American law so that women are not shortchanged in their pay checks or in their ability to seek legal remedies for discrimination on the basis of sex.[91]

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85. *Whistleblower Protection Act (WPA)*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, https://www.cpsc.gov/About-CPSC/Inspector-General/Whistleblower-Protection-Act-WPA (last accessed May 6, 2019); *OSHA Fact Sheet: Your Rights as a Whistleblower*, OSHA.GOV, https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf (last accessed May 6, 2019).

86. *Whistleblower Protection Act (WPA*), *supra* note 85.

87. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

88. Petula Dvorak, *The Equal-Pay Fight Isn't Over, So Lilly Ledbetter Returned to the Supreme Court Steps*, WASH. POST (Aug. 30, 2018), https://www.washingtonpost.com/local/the-equal-pay-fight-isnt-over-so-lilly-ledbetter-returned-to-the-supreme-court-steps/2018/08/30/aca360e4-ac60-11e8-a8d7-0f63ab8b1370_story.html?utm_term=.7a3a84426268.

89. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).

90. *Id.*

91. U.S. Equal Emp. Opportunity Commission, *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, EEOC.GOV (Aug. 20, 2013), https://www.eeoc.gov/eeoc/publications/upload/EPA-Ledbetter-brochure-8-20-2013-OLC.pdf.

One of the most important aspects of this Act is the provision for explicit retroactivity, which allows recovery of back pay for up to two years preceding the filing of the charge.[92]

This Act is one example of when Congress enacted an additional law to close a gap in the protections that Title VII provides. Lilly Ledbetter once stated that, "the consequences of pay discrimination, they last your entire life. We cannot subject another generation of women, our daughters, our granddaughters, to this injustice."[93] Therefore, her Act is now protecting women for future generations from discrimination on the basis of their sex.

II. NEW AND PROPOSED LAWS ADVANCING WOMEN'S RIGHTS IN THE WORKPLACE TODAY

All of these laws were enacted to protect women's rights because women were suffering from discrimination on the basis of their sex on a daily basis in the workplace. In fact, most of these laws were enacted by Congress shortly following a Supreme Court case in which the justices interpreted the law in a different manner than the lawmakers intended. Congress then took it upon themselves to try to clarify each and every law by enacting new laws, which is exactly how the Equal Pay Act and the Pregnancy Discrimination Act came about.

A. Federal Laws

If the EPA and Title VII is the law of the land, then, at least in theory, if the laws were followed as required, there should not be a pay gap. However, sometimes reality is different than theory. The current pay gap, on average, is that for every dollar a man earns, a woman earns only $0.80.[94] This gap grows even larger when race and ethnicity are considered. Despite the many laws that have been enacted, little progress has been made with the pay gap. Many laws have been proposed on the federal level to assist in closing this gap.

In addition, there is a significant lack of protections on the books for women that are pregnant that want and need to continue working during their pregnancy. Many women are forced to choose between a healthy pregnancy and their job. Moreover, women are fired for merely being pregnant. Despite the protections of Title VII and FMLA, there are still several holes within the existing laws. Many laws have been proposed on the federal level to assist women in the workplace during their pregnancy.

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92. *Id.*

93. Emma Newburger, *Nancy Pelosi and Democratic Lawmakers Unveil the Paycheck Fairness Act in an Effort to Close the Gender Wage Gap*, CNBC.COM (Jan. 31, 2019), https://www.cnbc.com/2019/01/30/nancy-pelosi-unveils-the-paycheck-fairness-act-to-close-the-pay-gap.html.

94. *Id.*

1. Paycheck Fairness Act

The EPA and Title VII helped change the inequalities that existed in the twentieth century. However, "these laws have not closed the persistent gap between women's and men's wages."[95] One law that sits in Congress today to close the pay gap is the Paycheck Fairness Act ("PFA"). This act was introduced on January 6, 2009.[96] This act then sat by idly until ten years later, Speaker of the House Representative Nancy Pelosi reintroduced the PFA.[97] The PFA seeks to amend the FLSA and it would "help to close the punishing gaps by eliminating loopholes in the EPA, helping to break harmful patterns of pay discrimination and strengthening workplace protections for women."[98] For employees, the PFA would:

> Protect against retaliation for discussing salaries with colleagues;
>
> Prohibit employers from screening job applicants based on their salary history or requiring salary history during the interview and hiring process;
>
> Require employers to prove that pay disparities exist for legitimate, job-related reasons;
>
> Provide plaintiffs who file sex-based wage discrimination claims under the EPA with the same remedies as are available to plaintiffs who file race-based or ethnicity-based wage discrimination claims under the Civil Rights Act;
>
> Remove obstacles in the EPA to facilitate plaintiffs' participation in class action lawsuits that challenge systemic pay discrimination;
>
> Create a negotiation skills training program for women and girls;
>
> Direct the Department of Labor to conduct studies to eliminate pay disparities between men and women; and
>
> Make available information on wage discrimination to assist the public in understanding and addressing such discrimination.[99]

Thus, the PFA would provide the updates needed to make the EPA a far more effective legal tool for women and should assist in closing the gender pay gap.

Many people do not believe that the pay gap currently exists. Some believe that it is simply a political farce while others argue that the statistics have been manipulated. Some Congress members have called the PFA unnecessary, because gender discrimination is already illegal and argue that the

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95. *Fact Sheet: The Paycheck Fairness Act*, NAT'L PARTNERSHIP (Jan. 2019), http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/the-paycheck-fairness-act.pdf.

96. S. 1869, 115th Cong. (2017).

97. *Id.*

98. *Id.*

99. *Id.*

bill's regulations would only discourage companies from hiring women.[100] Critics of the pay gap claim it exists for many reasons such as:

> Women work less than men,
>
> Women don't take jobs that require travel or relocation,
>
> Men assume more high-risk jobs than women,
>
> Women are less likely to negotiate salary, and
>
> Women place a higher priority on personal fulfillment than men when looking for a job.[101]

In response to these critics, over the course of their career, women work less than men because usually after giving birth, women take parental leave to spend time with their child, whether paid or, more likely, unpaid. As a result, because women are often not on paid leave, their total average earnings decrease with the birth of each child. Additionally,

> "nearly one-third of the gap in earnings is due to the fact that women tend to work in different occupations from men, and that the occupations in which women are the large majority of workers have lower earnings than those in which most workers are men. For example, women are only a quarter of workers in computer and mathematical occupations, which tend to have earnings well above average."[102]

Furthermore,

> "research suggests that differences in negotiating behaviors between women and men may partly explain differences in starting salaries and salary growth over time. When individual wage negotiations are not explicitly encouraged, women are less likely than men to negotiate aggressively or to question salaries suggested to them by their employer or manager. Yet, when women negotiate as aggressively as men, they may be viewed more negatively than men."[103]

Thus, the overarching theme of critics' is that the stereotypical roles of men and women remain in effect today and as a result women continue to struggle. However, if the PFA was passed, it would move women closer to equality in the workplace by placing stricter restrictions on employers and requiring employers to pay men and women equal wages.

2. The Pregnant Workers Fairness Act

Throughout the U.S. women still suffer from discrimination based on their pregnancy. Discrimination is in every industry, across race and

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100. *Id.*

101. Romina Boccia, *The Unintended Consequences of the Paycheck Fairness Act*, at 4, INDEP. WOMEN'S F. (2010), https://women.ca.gov/wp-content/uploads/sites/96/2017/12/Boccia.pdf.

102. *Women's Earnings and the Wage Gap*, U.S. DEP'T OF LABOR (2015), https://www.dol.gov/wb/resources/womens_earnings_and_the_wage_gap_17.pdf.

103. *Id.*

ethnicity and in every state. Too often, pregnant workers are forced out of their jobs and denied small accommodations that would enable them to continue working and supporting their families.[104] One act that would add additional protections for pregnant women is the Pregnant Workers Fairness Act ("PWFA"). The purpose of the PWFA is "to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition."[105] This Act was introduced to Congress on May 11, 2017, by United States House Representative Jerrold Nadler from New York.[106] The PWFA would help prevent employers from forcing pregnant women out of the workplace and ensure that employers provide reasonable accommodations to pregnant women who want to continue working during their pregnancy.[107]

The PWFA would:

> Clarify that employers must make reasonable accommodations for workers affected by a known limitation related to pregnancy, childbirth or related medical conditions;
>
> Require an interactive process between employers and pregnant workers to determine appropriate reasonable accommodations, similar to the Americans with Disabilities Act;
>
> Provide an exemption for businesses if an accommodation imposes an undue hardship on an employer;
>
> Protect pregnant workers from retaliation, coercion, intimidation, threats or interference if they request or use an accommodation; and
>
> Apply to employers with 15 or more employees and provide protections for both job applicants and employees.[108]

One problem that pregnant women face is that during their pregnancy sometimes they are not able to perform their job under the usual circumstances exactly as outlined in their job description. Therefore, they need an accommodation under the ADA as a temporarily disabled employee. Frequently, pregnant workers who need accommodations are forced out of their jobs unnecessarily when perhaps a simple minor adjustment would allow them to keep working.[109]

For example, an activity director at a nursing home in Valparaiso, Indiana, was terminated after she requested and was denied a reasonable accommodation for a change in some physical aspects of her job to prevent having

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104. *Fact Sheet: The Pregnant Workers Fairness Act*, NAT'L PARTNERSHIP (May 2017), http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/fact-sheet-pwfa.pdf.

105. H.R. 2417, 115th Cong. (2017).

106. *Id.*

107. *Fact Sheet: The Pregnant Workers Fairness Act, supra* note 104.

108. *Id.*

109. *Id.*

another miscarriage.[110] While a retail worker in Salina, Kansas, was terminated after she requested and was denied a reasonable accommodation for merely needing to carry a water bottle to stay hydrated and prevent urinary infections.[111] Lastly, a hardware assembler in Mt. Hope, Ohio, was terminated after she requested and was denied a reasonable accommodation because her doctor recommended that she not work more than an eight-hour shift or lift more than twenty pounds due to the heightened risk of gestational diabetes and the threat of preterm labor.[112]

Approximately 85% of working women will become mothers during their careers.[113] Women need protections under the law to maintain both a healthy pregnancy and their income and health insurance for their growing family. If women were accommodated, then they would be able to continue to work and gain seniority in their position, which is necessary in order to gain equal pay. The PWFA would enact the necessary additional protections under the law.

B. Across the Country

Across the country, there is a growing movement to finally close the wage gap for women.[114] In the past few years, legislatures have introduced bills in over two-thirds of the states to finally ensure that workers receive equal pay for equal work, no matter where they work. Many of these bills have recently become law.[115]

1. Pay Transparency

One area that states have tried to implement additional protections under the law is in promoting pay transparency. Employers often institute policies prohibiting or discouraging employees from disclosing their own compensation to other employees.[116] Many people, both men and women, have been fired for simply disclosing their pay to another person. Over the course of the last few years, "eighteen states and the District of Colombia have enacted provisions to stop employers from retaliating against employees who

110. Serednyj v. Beverly Healthcare, 656 F.3d 540 (7th Cir. 2011).

111. Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669 (D. Kan. June 9, 2009).

112. Mullet v. Wayne-Dalton Corp., 338 F. Supp. 2d 806 (N.D. Ohio Sept. 27, 2004).

113. *Fertility of Women in the United States: 2014: Table 6. Completed Fertility for Women age 40 to 50 Years Old a Selected Characteristics: June 2014*, U.S. CENSUS BUREAU (Apr. 7, 2015), https://www.census.gov/data/tables/2014/demo/fertility/women-fertility.html (Unpublished calculation. The reported percentage of women who had become mothers by age 40 to 44 as of 2014 is 84.7 percent.); see *Fact Sheet: The Pregnant Workers Fairness Act*, *supra* note 104, at 7.

114. Women's Bureau, *Pay Secrecy*, U.S. DEP'T OF LABOR (2016), https://www.dol.gov/wb/media/WB_508-PaySecrecy.pdf.

115. *Id.*

116. *Id.*

discuss their wages with each other, or from outright prohibiting these discussions."[117]

2. Salary History

In addition, a topic of discussion in many states has been whether a state should prohibit the 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 employment."[118] Between 2000 and 2015, eleven states enacted legislation prohibiting employers from seeking prior salary history information from job candidates and employees.[119] These states include California, Colorado, Connecticut, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, and Vermont.[120]

3. Expanding Protections to other Classifications

California and New Jersey also passed legislation to include protection for classifications other than sex, like race, ethnicity, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, gender identify or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for services in the armed forces.[121]

4. Other State Laws

Finally, many other states have enacted laws to protect women's rights in the workplace. Some of these protections include:

Allowing fairer comparisons of work and pay;

Closing loopholes in employer defenses;

Challenging occupational segregation;

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117. *Workplace Fairness: Progress in the States for Equal Pay*, NWLC (Jan. 2016), https://nwlc.org/wp-content/uploads/2016/01/Progress-in-the-States-for-Equal-Pay-1.29.161.pdf.

118. *Pay Secrecy, supra* note 114; *PROGRESS IN THE STATES FOR EQUAL PAY,* National Women's Law Center (June 2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/Progress-in-the-States-for-Equal-Pay-FINAL.pdf ["NWLC Progress"]*;see Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, NWLC (June 2017), https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=VCSz3jykQMbnQw-OPqYFc-drZX_1qRZmKMo93tAm-Zdb4SBYIh5Ttu7k6dka19dpldiajpiPF3fQSQj4EI69nKOWZuX_qE2cThz4EOgsN8P0; *see also Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/practices/index.cfm (last accessed May 6, 2019).

119. *Pay Secrecy, supra* note 114, at 2; *Id.*

120. *Id.*

121. N.J. STAT. ANN. § 10:5-12 (2018); CAL. LAB. CODE §1197.5 (2019).

Involving workers' ability to challenge pay discrimination;

Increasing available relief for employees; and

Holding state contractors accountable.[122]

5. Oregon Equal Pay Act of 2017

Oregon has been a pioneer in the twenty-first century and created a brand new broad Equal Pay Act. Oregon tried to improve its $0.79 pay gap - .01 cent lower than the national average - by passing the Oregon Equal Pay Act of 2017 (OEPA).[123] It is one of the broadest pay equity laws in the country, as it covers much more than gender. The OEPA prohibits pay discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age.[124] In addition, the OEPA goes further and defines compensation as "wages, salary, bonuses, benefits, fringe benefits and equity-based compensation."[125]

The OEPA was enacted in June of 2017, however, the provisions of the Act have slowly been implemented over the course of the last eighteen months.[126] As of October 6, 2017, it became illegal for employers to ask candidates about their salary history.[127] As of January 1, 2019, it became illegal for employers to discriminate against employees in a protected class, as described above, by paying them lower wages for work of comparable character, which is defined as "'substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work, regardless of the employee's job description or job title.'"[128] Employees asked about their salary history or alleging pay equity discrimination now have the right to pursue a private right of action through the Bureau of Labor and Industries in Oregon.[129] One of the most significant and future looking aspects of the OEPA is that as of January 1, 2024, employees will be able to "bring a civil suit under the provision prohibiting employers from inquiring into prospective employees' salary histories, and may also bring a suit on behalf of others who are similarly situated, i.e. a class action."[130]

Under the provisions of the OPEA, employers may pay employees for work of comparable character at different compensation levels if the entire

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122. *Pay Secrecy*, *supra* note 114, at 3–7; *see NWLC Progress supra* note 118.

123. OR. REV. STAT. § 652.220 (2019); CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, P60-252, CURRENT POPULATION REPORTS: INCOME AND POVERTY IN THE UNITED STATES: 2014, at 7 (Sept. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf.

124. *Id.*

125. OR. REV. STAT. § 652.210(1) (2019).

126. Abby Engers, *Oregon Equal Pay Act Compliance Checklist for Employers,* MAC'S LIST, https://www.macslist.org/for-employers/oregon-equal-pay-act-compliance-guide (last accessed May 6, 2019).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

difference in compensation levels is based on a bona fide factor related to the position and:

> A seniority system;
>
> A merit system;
>
> A system that measures earnings by quantity or quality of production, including piece-rate work;
>
> Workplace locations;
>
> Travel, if travel is necessary and regular for the employee;
>
> Education;
>
> Training;
>
> Experience; or
>
> Any combination of these factors, if the combination of these factors account for the entire compensation differential.[131]

The OEPA covers all state workers and private employers with one or more employees performing work in the State of Oregon.[132] In addition, there is no exemption for employees that are covered by a collective bargaining agreement.[133] The State of Oregon has moved into the twenty-first century with this new Equal Pay Act, however, as long as seniority is a qualification, just as Carl Rachlin stated, it will constantly be an obstacle to achieving equal pay.

6. State of Michigan

Since the inception of the Women's Movement, Michigan has been ahead of the pack when it comes to women's rights, especially in the workplace. Michigan has been a pioneer, paving the way for other states to follow.

a. Abolishment of Pay Secrecy Act in Michigan

The abolishment of the pay secrecy laws is one of the first examples of when Michigan was ahead of the curve when it came to women's rights in the workplace. In 1982, Michigan enacted a law which prohibited employers from doing any of the following:

> Require as a condition of employment non-disclosure by an employee of his or her wages; require an employee to sign a waiver or other document which purports to deny an employee the right to disclose his or her wages; and discharge, formally discipline, or otherwise discriminate against an employee for job advancement on the basis of having disclosed his or her wages.[134]

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131. *Id.*
132. *Id.*
133. *Id.*
134. MICH. COMP. LAWS § 408.483a(1)(a)-(c) (1982).

Pay secrecy laws cause the pay gap to persist, however, since 1982, Michigan has abolished this practice.

b. Governor Gretchen Whitmer – Executive Directive 2019-10

On January 8, 2019, Governor Gretchen Whitmer signed into effect Executive Directive 2019-10, which addresses the pay gap and equal pay for equal work in the State of Michigan .[135] The Executive Directive states in pertinent part:

> Acting pursuant to Article 5, § 1 and § 8 of the Michigan Constitution of 1963, I hereby direct the following: State departments and autonomous agencies subject to the supervision by the Governor under Article 5, § 8 of the Michigan Constitution of 1963 shall not do either of the following:
>
> Inquire about a job applicant's current or previous salaries unless and until the department or agency first makes a conditional offer of employment, including an explanation of proposed compensation. Make inquiry of a current or prior employer or search public records databases to ascertain an applicant's current or previous salary.[136]

The Executive Directive also states that "a state department or other agency … shall take reasonable measures to avoid inadvertently discovering salary history while gathering other information about an applicant."[137] "Information unintentionally discovered relating to an applicant's salary history must not be used by the department or agency in an employment decision."[138] Governor Whitmer stated, "'[i]t's pretty simple, women deserve equal pay for equal work.' … 'This is not just a women's issue.' … 'It's an economic issue that hurts working families.'"[139] "Closing gender gaps would have sweeping implications for families and children in the state, including the 284,000 Michigan families that were headed by a single female parent in 2010, according to the United States Census."[140] Governor Whitmer further stated, "'[t]here's not one magic solution to eliminate the wage gap.' … 'But it makes sense that if you ask people what they were paid before, and that's how you set their pay, we're going to continue to perpetuate the same practices that have created a wage gap to begin with.'"[141]

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135. Office of Governor Gretchen Whitmer, Executive Directive No. 2019-10 (Jan. 8, 2019), https://www.michigan.gov/documents/whitmer/Executive_Directive_2019-10_646942_7.pdf.

136. *Id.*

137. *Id.*

138. *Id.*

139. Lindsay VanHulle, *Michigan Gov. Whitmer Sets 'Equal Pay' Rules to Boost Women in State Hiring,* BRIDGEMICHIGAN (Jan. 9, 2019), https://www.bridgemi.com/public-sector/michigan-gov-whitmer-sets-equal-pay-rules-boost-women-state-hiring.

140. *Id.*

141. *Id.*

Michigan is only one of a few states that have banned employers from asking applicants about their salary history in some capacity.[142] Many other states have expanded the law into the rest of the public sector (offices not under the supervision or control of the Governor) and the private sector as well. However, women are not out of the woods yet. Under Michigan law, "a local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee."[143] The only exception to this law is requiring a "criminal background check for an employee or potential employee in connection with the receipt of a license or permit from a local governmental body."[144] This means that a local governmental body cannot enact a local ordinance banning an entity from making a request of a person's salary during the interview process. Despite the Governor's best efforts, like those of her counterparts in other states, until this law is overruled, the majority of women will continue to see decreased wages in the State of Michigan, which will cause Michigan's economy to suffer as well.

Despite the trailblazing progress that Michigan has made in the last several decades, much remains to be done. These laws are a great start to protecting women's rights in the workplace in the twenty-first century, however, there are still several gaps in the law that leave open the possibility of discrimination on the basis of sex.

CONCLUSION

With all these various laws on the books that provide protection to women's rights in the workplace, how is there still inequality in the workplace? There is an obvious theme that flows within all the laws and proposed laws stated above. Within each law, there are various exclusions, exceptions, and exemptions. There are holes within each and every law listed above. But why does this exist? Every law listed above has been enacted in order to correct discrimination that occurred to a woman in the workplace. From not receiving a promotion to being fired because of pregnancy, women have suffered for decades from sex-based discrimination in the workplace. Because of this, every law described above is a prohibitive law. As a result, how can Congress possibly enact enough laws to prohibit every possible type of discrimination? The simple answer: it can't.

However, we should still continue to enact additional laws to assist the Courts and employers in defining what acts are allowed and what acts are prohibited. More laws provide more guidance to employers, which will make it more difficult to allow discrimination to continue in the workplace. In addition, employees will benefit because there would be additional legal

142. *Id.*
143. MICH. COMP. LAWS § 123.1384 (2015).
144. *Id.*

avenues that they could take in order to correct any discrimination that does occur.

The main cause of the problem though is not in the laws, but in the way people think. The typical stereotypes of men and women still exist today and many people still believe that men belong at work as the breadwinners and women belong at home to care for the children. Until more people change the way they see women in the workplace, these gender specific stereotypes will continue to live on and we will not achieve equality. In my opinion, I think that regardless of the amount of laws that are enacted, discrimination will occur, until people have changed the way they think of these stereotypes.

Justice Ginsburg has been integral in changing the minds on the bench and in society when it comes to women's rights in the workplace and everywhere else. She has said for a long time that we have come far, but are not all the way there yet.[145] She often quotes Sarah Grimke, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our necks."[146] I believe that we have certainly broken the glass ceiling, but we are left to step on the broken glass barefoot as we cross the finish line of equality in the workplace. Equal protection under the law does not mean equal treatment under the law or equality in the workplace. The only way we can achieve equal treatment under the law is to change the minds of those that are in decision making positions in order to make a difference.[147]

Justice Ginsburg's daughter said in response to the question of how she feels about her mother being appointed as the second woman ever to sit on the Supreme Court, "[i]t's fine, but it would be finer still when so many women are judges in all the courts of our land, that no one keeps count anymore."[148] I dream of a day when we stop counting the women on the Court, because at that point it won't be an achievement that we have reached equality, rather it would be an everyday reality.

I believe Justice Ginsburg said it best when she said, "[e]very modern human rights document has a statement that men and women are equal before

145. HELENA HUNT, RUTH BADER GINSBURG: IN HER OWN WORDS 127 (2018).

146. *Id*. at 90.

147. This requires advocacy and it takes support from everyone to achieve equality at work. It starts out with support of your family members. I know I wouldn't be where I am today without the amazing support of my mother, the original feminist in my family, who was a trailblazer in her own way by fighting for varsity sports for women at Centerline High School, or my father who always told me I can do anything I set my mind to. In addition, I don't know where I would be if I didn't have such a supportive spouse, who always encouraged me to pursue my dreams, whether here or abroad. It also takes the support of the people you work with, by standing up for you when discrimination does occur. It ends with support in your community. With all the women's advocacy groups out there, from the Women Lawyers Association of Michigan to the Women in the Profession Group of the American Bar Association to the ACLU, there is now a way to support women and give them a voice to achieve equality in the workplace and everywhere else. These groups allow women to speak up for what they believe in and give them the opportunity to develop their leadership skills.

148. *Hunt*, *supra* note 145 at 56.

the law. Our Constitution doesn't. I would like to see, for the sake of my daughter and my granddaughter and all the daughters who come after, that statement as part of our fundamental instrument of Government."[149] I agree with Justice Ginsburg and if I ever have the honor and privilege of having a daughter, then I hope that one day the word "woman" is acknowledged in the Constitution, demonstrating to her that women are equal under the law. Until then, fight on, because the struggle is STILL real!

149. *Id*. at 14.