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# LEVEL THE PLAYING FIELD

**WOMEN ARE NOW THE  
PRIMARY BREADWINNERS  
IN ALMOST HALF OF ALL  
AMERICAN FAMILIES WITH  
CHILDREN—YET THE WAGE  
GAP PERSISTS. ALONG WITH  
INCREASED CORPORATE  
TRANSPARENCY AND  
LEGISLATIVE ACTION,  
THE EQUAL PAY ACT IS AN  
INVALUABLE TOOL FOR  
FIGHTING UNEQUAL PAY.**

By || **LORI ANDRUS**

Despite being the film's biggest draw, Oscar-winning actress Jennifer Lawrence was paid less than any of her male costars in *American Hustle*. Gillian Anderson, who plays Scully in *The X-Files*, was initially offered half of David Duchovny's 2016 revival. Players on the U.S. women's national soccer team earned as little as 40 percent of what their male counterparts made, despite the fact that the women's team generated \$20 million more revenue than the men's team in 2015.<sup>1</sup>

These are but a few recent examples of prominent women speaking out about a decades-long fight. It's a simple demand—equal pay for equal work—but one that defies easy solutions. One powerful tool for demanding fair pay, however, is suing under the Equal Pay Act.<sup>2</sup>

### Myths About the Wage Gap

Overt sexism is no longer tolerated,<sup>3</sup> so there must be a logical explanation for women's failure to achieve equality, right? Common explanations include "women's unwillingness to negotiate," despite the fact that those who insist on increased wages often suffer a backlash.<sup>4</sup>

Another explanation falsely assumes women don't want to lead, but women express an equal amount of ambition as men at the outset of their careers—only to fall behind years later when men achieve higher statuses.<sup>5</sup> Yet another explanation is that men need to support their families. However, women are the primary or sole source of family income in 40 percent of households with children under 18.<sup>6</sup>

In the legal realm, the excuse is, "There just aren't enough women lawyers to fill top positions." But women have been graduating from law school in near-equal numbers to men for 30 years.<sup>7</sup>

### Today's Subtle Sexism

A much better explanation for the discrepancy exists: second-generation discrimination.<sup>8</sup> Subconscious bias and stereotyped thinking still keep women in socially acceptable roles—and in a double bind.<sup>9</sup>

One recent survey of women in technology, for example, found that 84 percent of respondents have been told that they were "too aggressive."<sup>10</sup> Yet 53 percent also have been told that they were "too quiet." Forty-four percent were described as both "too aggressive" and "too quiet." How is that possible? Despite tremendous progress in the past several decades, we have a long way to go.

Thanks in part to the Sony email hack—which revealed embarrassing details of gender discrimination in the film industry—we are paying more attention to unequal pay. In January, President Obama proposed an Equal Employment Opportunity Commission (EEOC) regulation requiring companies with 100 or more employees to report wage information by race and gender.<sup>11</sup>

### Corporate America

In response to complaints about its highly sexualized advertising campaign, GoDaddy—a domain registrar and web-hosting company—pledged to become more transparent about its salaries. In October, it released a company-wide salary analysis that surprised critics: GoDaddy is near gender parity on salaries.<sup>12</sup> In the company's management ranks, however, women are paid

an estimated 96 cents on the dollar. Last year, Marc Benioff, CEO of the cloud computing company Salesforce, studied his company's pay gap and spent \$3 million increasing female employees' salaries to correct disparities.<sup>13</sup> Benioff has been celebrated as a champion of equal rights, and Salesforce was ranked as one of the best companies to work for in 2016.<sup>14</sup>

Perhaps Benioff recognized that corporate America is in the best position to correct the stubborn gender pay gap problem, regardless of the issue's underlying causes. The stakes are high: If female workers in California were paid the same amount as their male counterparts, they would be earning an additional \$33.6 billion annually.<sup>15</sup> Introducing transparency and accountability into compensation and performance review systems is a proven way to reduce the wage gap.<sup>16</sup>

Although many company executives stick their heads in the sand when it comes to pay inequity, ignoring the problem only opens companies up to litigation—which brings us to the Equal Pay Act and the promise it holds for female employees denied equal pay.

### The Equal Pay Act

The Equal Pay Act (EPA) became law in 1963 as an amendment to the Fair Labor Standards Act (FLSA). It states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.<sup>17</sup>

**\$33.6 billion**  
**The amount of annual wages female workers in California are losing because they are paid less than their male counterparts.**

# It's a simple demand— equal pay for equal work— but one that defies easy solutions.

There are four exceptions: for pay based on seniority, merit, quantity or quality of production, or another differentiating factor not based on sex.<sup>18</sup>

To bring a claim, the plaintiff must be able to identify at least one male colleague who is doing the same or substantially similar work but for more pay.<sup>19</sup> This can be a hurdle since it is generally taboo to discuss pay with coworkers. Further, many employers do not allow employees to discuss their salaries with each other—indeed, only 10 states prohibit employers from firing employees who reveal their wages.<sup>20</sup>

Plaintiffs who learn about pay disparity and wish to bring a collective action must demonstrate that the gender gap is not limited to their individual circumstances.<sup>21</sup> Sadly, this is generally a safe assumption since women are paid less than men in every single industry in the United States.<sup>22</sup> Still, the best practice is to initiate a class action with multiple named plaintiffs—or, at the very least, with reliable information that other female employees also are being paid unfairly.

Notably, the EPA does not require a showing of intentional discrimination. Unlike Title VII, double damages are available under the EPA, and claimants do not need to file a discrimination charge with the EEOC first.<sup>23</sup> Attorney fees are also recoverable.<sup>24</sup>

EPA claims brought as class actions are subject to the same procedural mechanisms as FLSA actions.<sup>25</sup> In most circuits, a class is conditionally certified on a “very low” standard: Is the named plaintiff “similarly situated” to the employees included in the class definition?<sup>26</sup> At that point, notice of the lawsuit goes out to all class members,

who must—along with the named plaintiffs—“opt in” to the lawsuit to have their EPA claims adjudicated.<sup>27</sup> At the end of discovery, a defendant can seek to have the class decertified. Even if a defendant is successful at the decertification stage, however, the individuals who opted in are considered parties to the lawsuit, and their claims may proceed individually.

The strongest EPA class actions involve uniform business practices that either treat women differently or have a disparate impact on female employees. The more regimented the business, the easier it will be to get class certification. Uniform job descriptions and standardized performance evaluations are two good indicators that the named plaintiff is similarly situated to her coworkers.

You will need a labor economist—and possibly a pure statistician—to crunch the numbers. Depending on the industry, you also may want an industrial or organizational psychologist who can opine about the male-dominated nature of the business and the barriers to women’s advancement in the company.

If you are seeking to certify a class of female workers at multiple job sites, you will need to overcome the EPA’s “single establishment” rule, which requires both the plaintiff and her comparator to be “employees in [the same] establishment.”<sup>28</sup> The case law on this issue is mixed, but there is a “widely followed standard recognizing that central control and administration of disparate job sites can support a finding of a single establishment for purposes of the EPA,” and the hallmarks of this standard are “centralized control of job descriptions, salary administration, and job assignments or functions.”<sup>29</sup>

## State-Level Opportunities

There is a push for wage equity legislation at the state level, too. California, for example, recently amended its equal pay statute, making its law the strongest in the country. The amended law shifts the burden of demonstrating that any difference in pay is due to a reason other than gender to the employer.<sup>30</sup>

The law also makes clear that employers cannot retaliate against employees who ask about pay, and it eliminates the single establishment rule by allowing certification of a class of employees across the entire state—even if they work in separate physical locations. Many other states are considering legislative proposals to pass or strengthen equal pay laws as well.<sup>31</sup>

Despite the EPA’s strong public policy underpinnings, it remains an underused statute. It’s time to dust off this old law and put it to good use. With thorough factual research, careful pleading, and strong advocacy, plaintiff attorneys have a real opportunity to change the status quo by bringing cases under the EPA. It’s the best way to hold corporations accountable for their contributions to the gender wage gap. ▣



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## NOTES

1. Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. Times (Mar. 31, 2016), [www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html](http://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html); Bill Chappel, *U.S. Women’s Soccer Team Members File Federal Equal-Pay Complaint*, NPR (Mar. 31, 2016), [www.npr.org/sections/thetwo-way/2016/03/31/472522790/members-of-u-s-women-s-national-team-file-federal-equal-pay-complaint](http://www.npr.org/sections/thetwo-way/2016/03/31/472522790/members-of-u-s-women-s-national-team-file-federal-equal-pay-complaint).
2. 29 U.S.C. §206(d)(1) (2007).
3. Eric Jaffer, *The New Subtle Sexism Toward*

- Women in the Workplace*, Fast Co. (Jun. 2, 2014), [www.fastcompany.com/3031101/the-future-of-work/the-new-subtle-sexism-toward-women-in-the-workplace](http://www.fastcompany.com/3031101/the-future-of-work/the-new-subtle-sexism-toward-women-in-the-workplace).
4. Shankar Vedantam, *Salary, Gender, and the Social Cost of Hagging*, Wash. Post (July 30, 2007), [www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900827.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900827.html); Adam Grant & Sheryl Sandberg, *When Talking About Bias Backfires*, N.Y. Times (Dec. 6, 2014), [www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html?\\_r=0](http://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html?_r=0); Rachel Feintzeig, *Women Penalized For Promoting Women*, Wall St. J. (July 21, 2014), [blogs.wsj.com/atwork/2014/07/21/women-penalized-for-promoting-women-study-finds/](http://blogs.wsj.com/atwork/2014/07/21/women-penalized-for-promoting-women-study-finds/); Maria Konnikova, *Lean Out: The Dangers For Women Who Negotiate*, The New Yorker (June 10, 2014), [www.newyorker.com/science/maria-konnikova/lean-out-the-dangers-for-women-who-negotiate](http://www.newyorker.com/science/maria-konnikova/lean-out-the-dangers-for-women-who-negotiate).
  5. Lisa Miller, *Stop Blaming Women For Holding Themselves Back at Work*, N.Y. Magazine (Dec. 1, 2014), [nymag.com/thecut/2014/12/stop-blaming-women-for-holding-themselves-back.html](http://nymag.com/thecut/2014/12/stop-blaming-women-for-holding-themselves-back.html).
  6. Wendy Wang, Kim Parker & Paul Taylor, *Breadwinner Moms*, Pew Res. Ctr. (May 29, 2013), [www.pewsocialtrends.org/2013/05/29/breadwinner-moms/](http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/).
  7. Annual statistics from the American Bar Association show that women accounted for about 40 percent of first-year law students in 1985 and 50 percent by 1992. Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, *Enrollment and Degrees Awarded, 1963-2012 Academic Years*, [www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.pdf).
  8. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001).
  9. Catherine Rampell, *Be Pretty, But Not Too Pretty: Why Women Just Can't Win*, Wash. Post (Jan. 21, 2016), [www.washingtonpost.com/opinions/no-women-still-cant-win-in-politics-and-business/2016/01/21/5529c28e-c079-11e5-83d4-42e3bceea902\\_story.html](http://www.washingtonpost.com/opinions/no-women-still-cant-win-in-politics-and-business/2016/01/21/5529c28e-c079-11e5-83d4-42e3bceea902_story.html).
  10. *Id.*
  11. Danielle Paquette & Drew Harwell, *Obama Targets Gender Pay Gap With Plan to Collect Companies' Salary Data*, Wash. Post (Jan. 20, 2016), [www.washingtonpost.com/news/wonk/wp/2016/01/29/obama-targets-gender-pay-gap-with-plan-to-collect-salary-data-from-big-businesses/](http://www.washingtonpost.com/news/wonk/wp/2016/01/29/obama-targets-gender-pay-gap-with-plan-to-collect-salary-data-from-big-businesses/).
  12. Hayley Ringle, *GoDaddy Reveals Company Gender Salary Comparison Data*, Phoenix Bus. J. (Oct. 14, 2015), [www.bizjournals.com/phoenix/blog/techflash/2015/10/godaddy-reveals-company-gender-salary-comparison.html](http://www.bizjournals.com/phoenix/blog/techflash/2015/10/godaddy-reveals-company-gender-salary-comparison.html).
  13. Kristen Bellstrom, *Salesforce Spent \$3 Million to Close the Gender Pay Gap. Here's Why That's a Big Deal*, Fortune (Nov. 7, 2015), [fortune.com/2015/11/07/salesforce-3-million-close-pay-gap/](http://fortune.com/2015/11/07/salesforce-3-million-close-pay-gap/).
  14. Emily Peck, *This is What Happens When a CEO Actually Cares About Equality for Women*, Huffington Post (Nov. 16, 2015), [fortune.com/best-companies/salesforce-com-8/](http://fortune.com/best-companies/salesforce-com-8/).
  15. Li Zhou, *Can California Prevent Wage Discrimination Against Women?*, The Atlantic (Oct. 7, 2015), [www.theatlantic.com/business/archive/2015/10/california-gender-wage-gap-fair-pay-act/409549/](http://www.theatlantic.com/business/archive/2015/10/california-gender-wage-gap-fair-pay-act/409549/).
  16. Courtney Seiter, *The Counterintuitive Science of Why Transparent Pay Works*, Fast Co. (Feb. 26, 2016), [www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open-](http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open-)
  17. 29 U.S.C. §206(d)(1) (2007).
  18. *Id.*
  19. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).
  20. Only California, Colorado, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, and Vermont prohibit employers from firing employees who reveal their wages. U.S. Dep't of Labor, Women's Bureau, *Fact Sheet*, [www.dol.gov/wb/media/pay\\_secretcy.pdf](http://www.dol.gov/wb/media/pay_secretcy.pdf); *Combating Punitive Pay Secrecy Policies*, Nat'l Women's Law Ctr., [www.nwlc.org/sites/default/files/pdfs/4.11.11\\_pay\\_secretcy\\_fact\\_sheet.pdf](http://www.nwlc.org/sites/default/files/pdfs/4.11.11_pay_secretcy_fact_sheet.pdf); Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 Colum. J.L. & Soc. Probs. 361 (2013); see also Lydia DePillis, *Legislators Organize Blitz of Equal-Pay Legislation in Nearly Half the States*, Wash. Post (Jan. 28, 2016), [www.washingtonpost.com/news/wonk/wp/2016/01/28/legislators-organize-blitz-of-equal-pay-legislation-in-nearly-half-the-states/](http://www.washingtonpost.com/news/wonk/wp/2016/01/28/legislators-organize-blitz-of-equal-pay-legislation-in-nearly-half-the-states/).
  21. Be careful that your client does not access or take documents from her employer that she should not. In some jurisdictions, "purloined" documents can jeopardize a client's case.
  22. *The Status of Women in the States: 2015—Employment and Earnings*, Inst. for Women's Policy Res. (Mar. 2015), [www.iwpr.org/publications/pubs/the-status-of-women-in-the-states-2015-2014-employment-and-earnings](http://www.iwpr.org/publications/pubs/the-status-of-women-in-the-states-2015-2014-employment-and-earnings); *The Simple Truth About the Gender Pay Gap*, Am. Ass'n of Univ. Women (2014), [www.aauw.org/files/2014/03/The-Simple-Truth.pdf](http://www.aauw.org/files/2014/03/The-Simple-Truth.pdf); *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, Nat'l Equal Pay Task Force (June 2013), [www.whitehouse.gov/sites/default/files/image/image\\_file/equal\\_pay-task\\_force\\_progress-report\\_june\\_10\\_2013.pdf](http://www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress-report_june_10_2013.pdf).
  23. 29 U.S.C. §216(b) (2007).
  24. *Id.*
  25. Fed. R. Civ. P. 23 does not apply to EPA claims. Instead, employees are required to affirmatively "opt-in" to the action once a class has been conditionally certified. 29 U.S.C. §§206(d), 216(b).
  26. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). Although *Hoffmann-La Roche* arose under the Age Discrimination in Employment Act (ADEA), it is applicable to EPA standards because both the ADEA and the EPA proceed under the FLSA's enforcement provisions. As such, courts may look to ADEA collective action cases in assessing the appropriate standards for collective action certification. See, e.g., *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 147 n.5 (4th Cir. 1992) ("[S]ince the ADEA incorporates §16(b) of the FLSA into its enforcement scheme, the same rules govern judicial management of class actions under both statutes."). For cases conditionally certifying EPA classes, see *Wellens v. Daiichi Sankyo, Inc.*, 2014 WL 2126877 (N.D. Cal. May 22, 2014); *Moore v. Publicis Groupe SA*, 2012 WL 2574742 (S.D.N.Y. Jun. 29, 2012); *Rochlin v. Cincinnati Ins. Co.*, 2003 WL 21852341 (S.D. Ind. Jul. 8, 2003); *Chapman v. Fred's Stores of Tenn., Inc.*, 2013 WL 1767791 (N.D. Ala. Mar. 15, 2013).
  27. 29 U.S.C. §§206(d), 216(b).
  28. 29 U.S.C. §206(d)(1). The EEOC has explained that "the term 'establishment' . . . refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business" and that "each physically separate place of business is ordinarily considered a separate establishment." 29 C.F.R. §1620.9(a) (2015).
  29. *Kassman v. KPMG LLP*, 2014 WL 3298884 at \*8 (S.D.N.Y. Jul. 8, 2014) (citing *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994)). For other helpful authority, look at the following cases and their progeny: *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72 (2d Cir. 2015); *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975); *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453 (9th Cir. 1985).
  30. Cal. Lab. Code §1197.5 (2016).
  31. Noreen Farrell, *Will the Domino Effect Close the Wage Gap?*, Huffington Post (Jan. 29, 2016), [www.huffingtonpost.com/noreen-farrell/will-the-domino-effect-cl\\_b\\_9081058.html](http://www.huffingtonpost.com/noreen-farrell/will-the-domino-effect-cl_b_9081058.html).