

## **Testimony of Jenny R. Yang**

### **House Committee on Education and the Workforce**

#### **Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections Joint Subcommittee Hearing Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work**

**February 13, 2019**

Chair Bonamici, Chair Adams, Ranking Member Corner, Ranking Member Byrne, Chair Scott and Ranking Member Foxx, Members of the Committee: Thank you for this opportunity to submit testimony to the Committee and the Subcommittee on Civil Rights and Human Services and the Subcommittee on Workforce Protections.

For over 50 years, it has been illegal to discriminate based on pay. But, despite the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, our existing laws have not lived up to their promise. We continue to face profound challenges as a society in addressing pay inequality, and it is vital that Congress act to provide stronger tools to combat pay discrimination.

#### **I. Introduction**

In providing this testimony, I draw upon my service as Chair of the U.S. Equal Employment Opportunity Commission (EEOC) from September 2014 to January 2017, and as a member of the Commission from 2013 to 2018. In addition, I am currently a Partner with Working Ideal, which advises employers on building inclusive workplaces, recruiting diverse talent, and ensuring fair pay. I am also a Fellow at the Urban Institute, where I am examining the impact of changing workplace structures on low wage workers.<sup>1</sup> Prior to my time at the Commission, I spent 15 years litigating equal pay and other discrimination cases on behalf of employees.

In light of the limitations in current laws, it is not surprising that gender-based pay disparities have persisted for decades, notwithstanding a growing national consensus that such conduct is wrong. Pay discrimination remains a persistent problem that spans industries and geographic locations. Research shows that even when we control for factors such as education, occupation, industry, and work experience, significant gaps in earnings remain by gender, race, and ethnicity that cannot be explained.<sup>2</sup> Pay discrimination has significant consequences for

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<sup>1</sup> Although I have several affiliations in the work I do, today I am testifying on behalf of Working Ideal. The views here are my own and should not be attributed to any organization with which I am affiliated, their boards or funders.

<sup>2</sup> Francine D. Blau & Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends and Explanations, National Bureau of Economic Research (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>; National Women's Law Center,

America's families. Eliminating the pay gap would reduce the number of working poor, improve the financial security of many families, and strengthen the nation's economy.<sup>3</sup>

The problems with existing law can be categorized into three broad themes. First, courts have interpreted provisions of the Equal Pay Act in ways that are unjustifiable and that have made it extraordinarily difficult for employees to prevail. Second, a culture of secrecy has surrounded pay, which has kept employees from learning about pay disparities. And even when women learn of pay discrimination, they are often silenced by a fear of retaliation. Employees do not have a nationally consistent set of rules to protect discussions of pay. In addition, the EEOC, which is charged with interpreting and enforcing the Equal Pay Act, Title VII and other anti-discrimination statutes, has very limited information on employer pay practices, which undermines effective enforcement. Finally, under the Equal Pay Act, the remedies are inadequate to address the full range of harm suffered, and the opt-in enforcement mechanism provided by the statute ignores the realities of the modern workplace. As a result, insufficient incentives exist for employers to take meaningful action to identify and correct pay disparities.

While states and localities have stepped in to provide stronger pay equity protections, federal law lags behind. Several countries, including the United Kingdom, France, Germany, and Iceland, already have enacted laws aimed at reducing gender pay disparities by requiring employers to report pay information. The Paycheck Fairness Act would provide much needed tools to strengthen federal law by eliminating legal loopholes, fostering pay transparency, and promoting compliance.

During my tenure at the EEOC, combating pay discrimination was one of the agency's national strategic enforcement priorities, yet it was one of the most challenging areas in which make progress. Between 2010 and 2016, individuals filed with the EEOC tens of thousands of charges alleging pay discrimination,<sup>4</sup> and the agency recovered over \$85 million in monetary relief for victims of sex-based pay discrimination. Yet, we know these resolutions are just the tip of the iceberg. More often, pay disparities remain hidden from view. People typically have no idea they are paid less than others doing the same job. Without this knowledge, they are unable to report these problems to the EEOC. Even when employees learn – often by chance – of a pay disparity, it can take a tremendous toll to have to come forward, face a real likelihood of retaliation, find and pay for a lawyer, and then endure years of litigation. This burden on

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“Frequently Asked Questions about the Wage Gap,” (Sept. 2018); <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/Wage-Gap-FAQ.pdf>.

<sup>3</sup> National Partnership for Women & Families, “The Paycheck Fairness Act” (Jan. 2019), <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/the-paycheck-fairness-act.pdf>.

<sup>4</sup> Claims of sex-based pay discrimination can be made under the Equal Pay Act and Title VII. Under Title VII, an individual filing a charge of discrimination must first file a charge of discrimination with the EEOC. By contrast, an individual alleging a violation of the Equal Pay Act may go directly to court and is not required to file an EEOC charge beforehand. Thus, the EEOC sees only a subset of Equal Pay Act claims, because some individuals take their claims directly to court. See Equal Employment Opportunity Commission, “Equal Pay/Compensation Discrimination,” <https://www.eeoc.gov/laws/types/equalcompensation.cfm>.

victims, combined with a lack of sufficient remedies, leads to significant underreporting of the problem.

Across workplaces nationwide, the EEOC sees pay discrimination and retaliation against those who oppose unfair pay practices. In one such case, a female worker at a food distribution facility learned that a newly hired male colleague, with far less experience and skill, was given a higher salary.<sup>5</sup> The EEOC alleged that the employer fired her when it learned that she planned to file a charge of pay discrimination. In another case, the EEOC obtained relief for a female human resources executive who was paid \$35,000 less per year than her male predecessor, and \$19,000 less than the minimum salary for the position under the employer's own compensation system.<sup>6</sup> These cases tell a common story, which affects far too many Americans.

The Paycheck Fairness Act would remedy many of the problems in existing law by closing judicially-created loopholes, creating clear and consistent anti-retaliation protections for discussion of pay, and putting the onus where it should be -- on employers to take action to prevent, identify and correct pay disparities, thus minimizing the hardship and risks faced by workers in coming forward. Specifically, this legislation would:

- Prohibit employers from using prior salary to justify pay differentials;
- Require employers to prove that the reason for pay disparities is job-related and consistent with a business need;
- Clarify the interpretation of “within any establishment” to ensure a broader reading that makes clear that comparisons can be made beyond the same physical facility;
- Prevent retaliation against workers who discuss their pay and combat pay secrecy policies that keep workers in the dark about pay discrimination;
- Require employers to report summary pay data, which would promote voluntary compliance and enable the EEOC to better identify discrimination and enforce the law; and;
- Provide greater incentives for employers to take action to address pay disparities by authorizing compensatory and punitive damages as well as an opt-out class action mechanism.

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<sup>5</sup> Equal Employment Opportunity Commission, “Hearn-Kirkwood Will Pay \$63,500 to Resolve EEOC Pay Discrimination and Retaliation Lawsuit: Food Service Distributor Unlawfully Disciplined and Later Fired Female Worker Who Complained about Unequal Wages, Federal Agency Charged,” (Jan. 1, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/1-5-16.cfm>.

<sup>6</sup> Equal Employment Opportunity Commission, “Royal Tire Will Pay \$182,500 for Wage Discrimination against Female Executive: EEOC Lawsuit Charged St. Cloud Tire Company Underpaid HR Director for Years in Violation of Federal Law,” (Aug. 4, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/8-4-14.cfm>.

## **II. The Equal Pay Act’s “Factor Other Than Sex” Defense has Made it Extraordinarily Difficult for Employees to Prevail.**

Since 1963, the Equal Pay Act has required that men and women in the same workplace be afforded equal pay for equal work.<sup>7</sup> The jobs need not be identical, but they must be substantially equal for the Equal Pay Act to apply. Job content, rather than job titles, must determine whether jobs are substantially equal.

The Equal Pay Act provides employers with four defenses to a claim of pay discrimination, including on the basis of “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>8</sup>

Courts have interpreted the last “factor other than sex” defense broadly, permitting employers to escape liability when women and men are paid differently for the same work. The ambiguity of this catch-all defense has made it unjustifiably difficult for workers to challenge pay discrimination.

Courts are divided on how to interpret this language. In some cases, employers have successfully defended differential pay based on factors that can be tainted by gender bias, such as salary history and success in pay negotiations. Courts also have permitted employers to defend pay differentials based on factors unrelated to the job in question. State and local laws have sought to fill the gaps created by ineffectual federal law, leaving national and multistate employers to contend with a patchwork of complex compliance issues.

In interpreting the “factor other than sex” defense, some courts have ruled that employers need not show that those factors are related to a legitimate business purpose.<sup>9</sup> The United States Court of Appeals for the Seventh Circuit has even ruled that an employer can defend pay differentials between men and women performing substantially equal work on the basis of a “random decision.”<sup>10</sup>

Some courts have permitted employers to set different pay for employees performing substantially equal work based on consideration of prior salary. But what a person earned at a prior job generally is not an appropriate way to determine what is fair at a different employer. If the new employer has decided to pay a certain wage to existing male employees, they should not be allowed to underpay a new female employee for doing equal work, just because another employer used a different salary scale or criteria. Salary surveys

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<sup>7</sup> 29 U.S.C. § 206(d).

<sup>8</sup> *Id.*

<sup>9</sup> See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (“The disagreement between this circuit (plus the eighth) and those that required an ‘acceptable business reason’ is established, and we are not even slightly tempted to change sides.”).

<sup>10</sup> *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 475 (7th Cir. 2012) (“Random decision is a factor other than sex.”).

often provide a range to describe market pay for a particular role. Some organizations pay higher or lower salaries in the market, but each employer should pay women and men fairly and consistently for the same work based on its actual salaries. Employees moving from a lower to a higher cost of living area, or from a nonprofit or small business to a larger employer, should not be paid less than others for the same work because their prior salary was at a lower level. Trying to justify unequal pay for equal work based on a decision made by another employer is an end run around the protections of the Equal Pay Act. Reliance on salary history in setting starting pay also runs the risk of perpetuating past discrimination that occurred in previous jobs. Because women’s earnings are lower than men’s in nearly all occupations,<sup>11</sup> reliance on prior pay systematically disadvantages women. For these reasons, many states and localities prohibit the consideration of salary history in setting pay.<sup>12</sup>

Courts have provided conflicting answers to the question of whether employers can rely on prior salary in setting pay to justify sex-based pay differentials. Two circuits allow employers to rely on prior pay if they also consider another sex-neutral factor.<sup>13</sup> By contrast, the United States Court of Appeals for the Ninth Circuit recently ruled that employers may never rely on prior pay.<sup>14</sup> The EEOC filed a friend-of-the-court brief in support of the employee, Aileen Rizo, who discovered she was paid less than her male counterparts doing the same job as a result of the employer’s practice of simply adding a five percent increase to the employee’s previous salary.<sup>15</sup> Rizo had moved to California from Arizona, and the employer’s rigid reliance on previous salary failed to account for any difference in the cost of living. This case demonstrates how reliance on prior pay can compound unjustified pay differentials between men and women performing the same job.

Courts have continued to permit employers to defend equal pay claims based on market forces or differences in prior experience and qualifications, despite Supreme Court precedent to the contrary. In 1974, the Supreme Court rejected the argument that employers should be permitted to pay women less than men on the basis of market forces.<sup>16</sup> In *Corning Glass Works v. Brennan*, the Court recognized that the pay “differential arose simply because men would not work at the low rates paid women inspectors, and reflected a

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<sup>11</sup> Institute for Women’s Policy Research, “The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity,” (Apr. 9, 2018), <https://iwpr.org/publications/gender-wage-gap-occupation-2017-race-ethnicity/>.

<sup>12</sup> American Association of University Women, State and Local Salary History Bans (Sept. 18, 2018), <https://www.aauw.org/article/state-local-salary-history-bans/> (California, Delaware, Oregon, and Puerto Rico passed bills to prohibit employers from using a job applicant’s salary history during the hiring process. Dozens of other states introduced similar legislation.).

<sup>13</sup> *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (“[A]n individual’s former salary can be considered in determining whether pay disparity is based on a factor other than sex.”); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (“there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience”); *White v. ThyssenKrupp Steel USA, LLC*, 743 F. Supp. 2d 1340, 1354 (S.D. Ala. 2010) (“prior pay plus experience establishes an affirmative defense under the [Equal Pay Act]”).

<sup>14</sup> *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) en banc, cert. petition filed Sept. 4, 2018.

<sup>15</sup> *Id.*

<sup>16</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (employer violated the Equal Pay Act when it “took advantage” or the market by paying women less than men for the same work).

job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.”<sup>17</sup>

Despite this ruling, courts have continued to permit employers to defend sex-based pay differentials based on a “market forces” theory.<sup>18</sup> For example, courts have approved subjective considerations of the assumed market rate for a position or for an employee of certain experience or education level.<sup>19</sup> Consideration of market forces shifts focus from the central question of whether an employer is providing equal pay for equal work. Bias can taint pay decisions when the employer assesses an artificially higher or nebulous “market value” to male candidates.

The EEOC filed a friend-of-the-court brief in a case before the United States Court of Appeals for the Sixth Circuit in which a woman alleged that she was paid substantially less than men who performed the same job of account manager.<sup>20</sup> In considering whether the employer met its burden to prove an affirmative defense, the trial court approved the employer’s alleged consideration of factors including “market value.” The EEOC argued that the employer failed to provide evidence that the pay differential was actually based on market value, or other considerations like skill, education, and experience. Nevertheless, the Sixth Circuit affirmed summary judgment for the employer.

Some courts have permitted employers to defend pay discrimination claims based on differential success in the pay negotiation process, despite research demonstrating that women and racial minorities are more likely to face backlash in pay negotiations.<sup>21</sup> Employers tend to penalize women who initiate negotiations for higher compensation more than they do men, as women are often judged more harshly for seeking higher pay than men.<sup>22</sup> In addition, the pay negotiation process and outcomes are often arbitrary and fail to provide an objective, job-related criteria to justify pay differentials.

The EEOC participated in one such case illustrating how the salary negotiation process can play out differently for men and women. In 2014, the EEOC filed a friend-of-the-court brief in the case of *Margaret Thibodeaux-Woody v. Houston Community College*.<sup>23</sup> Houston Community College hired Margaret, an adjunct professor, for one of two open program manager positions. The man hired for the second position had the same degree from the same

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<sup>17</sup> *Id.* at 205.

<sup>18</sup> See *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697 n. 6 (7th Cir. 2006).

<sup>19</sup> See *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 703 (7th Cir. 2003); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994).

<sup>20</sup> *Foco v. Fruedenberg-NOK General Partnership, Vibracoustic N.A.*, No. 12-2174 (6th Cir. 2013).

<sup>21</sup> Bowles, H. R., Babcock, L., & Lai, L. (2007). Social incentives for gender differences in the propensity to initiate negotiations: Sometimes it does hurt to ask. *Organizational Behavior and Human Decision Processes*, 103(1), 84-103.

<sup>22</sup> *Id.*

<sup>23</sup> No. 13-20738 (5th Cir. 2014).

university and similar work experience. Initially, the college offered them the same starting salary of about \$41,000. When Margaret tried to negotiate, she was told that she could not. Yet, when the male candidate sought to negotiate, the college paid him over \$10,000 more. About a year later, when Margaret learned of the pay disparity and approached human resources, she was told that nothing could be done. Instead, her supervisor urged her to rely on her husband's salary as an additional source of income. After filing a charge of discrimination with the EEOC, Margaret alleged that her employer retaliated with a lower performance evaluation and unfair discipline.

Margaret filed a lawsuit under the Equal Pay Act and Title VII. The district court dismissed her claims, relying on the college's defense that the man negotiated a higher salary. Six years after she started her job, the U.S. Court of Appeals for the Fifth Circuit reinstated her pay claims but rejected her retaliation claims. The hurdles faced by Margaret in pursuing her right to be paid equally for equal work illustrate many of the problems that the Paycheck Fairness Act would address.

### **III. The Paycheck Fairness Act Takes a Measured Approach to Strengthen Protections for Equal Pay.**

Gaps and ambiguities in the law have led to a lack of clarity regarding employers' obligations and workers' rights to equal pay for equal work. Consistent with the original intent of the Equal Pay Act, the Paycheck Fairness Act would address these gaps to combat pay discrimination more effectively.

#### **A. Employers would be Prohibited from Using Prior Salary to Justify Pay Differentials.**

Questions about salary history run the risk of perpetuating lower pay for women, particularly women of color who have historically been paid less than men.<sup>24</sup> Reliance on salary history simply exacerbates existing pay inequities.<sup>25</sup> Workers who have faced discrimination because of sex or race, may be paid less than the market rate for their position.<sup>26</sup> The pay gaps between women of color and white men within the same occupational groups are generally higher than the gap between white women and white men in the same occupational groups,<sup>27</sup> reflecting the intersectional nature of pay discrimination for women of color. For these reasons, consideration of prior pay fails to offer a useful or equitable tool to set future pay.

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<sup>24</sup> Payscale, "The Salary History Question: Alternatives for Recruiters and Hiring Managers."

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Institute for Women's Policy Research, "The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity," (Apr. 9, 2018), <https://iwpr.org/publications/gender-wage-gap-occupation-2017-race-ethnicity/> (Among women who hold full-time, year-round jobs in the United States).

A significant number of states and localities prohibit employers from requesting salary history information from job applicants.<sup>28</sup> Section 10 of the Paycheck Fairness Act would update federal law to prohibit employers from perpetuating past discrimination by relying on prior pay.

**B. Employers Would be Required to Prove that the Reason for Pay Disparities Is Job-Related and Consistent with a Business Need.**

There is no reason to allow, as some courts now do, arbitrary and sometimes even frivolous reasons to justify gender-based pay disparities simply because they may qualify as “a factor other than sex.”<sup>29</sup> Section 3 of the Paycheck Fairness Act would clarify that sex-based pay differentials cannot be justified by arbitrary criteria that have nothing to do with job performance or business needs.

Title VII of the Civil Rights Act of 1964 also prohibits discrimination in compensation on the basis of sex and provides an established standard for evaluating the lawfulness of neutral practices that have an adverse effect on the basis of sex. That standard has been the subject of judicial interpretation for more than four decades. In 1971, the Supreme Court in the landmark case, *Griggs v. Duke Power Co.*,<sup>30</sup> upheld the disparate impact method of proving discrimination. In *Griggs*, the Supreme Court recognized that Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. In amending Title VII, with the passage of the Civil Rights Act of 1991, Congress acted to codify the burden of proof standards set forth in *Griggs* and embedded the disparate theory in the law.<sup>31</sup>

In enacting our civil rights laws, Congress has recognized that discrimination can operate in many different ways, and the consequences of actions matter, not just motives. The Equal Pay Act holds employers responsible for the harms they create as a result of inequitable pay practices. It is not sufficient for an employer to disclaim responsibility for arbitrary rules or systems that operate in an unfair manner on the grounds that it did not intend to discriminate. To be effective, our laws must provide employers with sufficient incentives to examine and understand the consequences of their pay practices.

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<sup>28</sup> HRDive, “Salary history bans: A running list of states and localities that have outlawed pay history questions,” (Feb. 6, 2019), <https://www.hrdive.com/news/salary-history-ban-states-list/516662/> (noting provisions in California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, and Vermont, as well as the Commonwealth of Puerto Rico and ten localities that regulate inquiries into pay history).

<sup>29</sup> See, e.g., *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d at 475.

<sup>30</sup> 401 U.S. 424 (1971).

<sup>31</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071.

### C. The Paycheck Fairness Act Would Ensure that the Interpretation of “Establishment” Incorporates Workplace Realities.

The Equal Pay Act allows for the comparison of jobs "within any establishment."<sup>32</sup> As workplaces have changed dramatically over the past half century, more employers have multiple facilities at which the same jobs are performed, and more employees work remotely, performing the same work from different geographic locations. Interpreting “any establishment” to mean a single physical facility, as some courts have done, is out of step with the realities of today’s workplace. For example, when women work in jobs where the only comparators are located in other facilities, a narrow judicial interpretation of this provision can elevate form over substance, leading to untenable constraints on job comparisons. Indeed, in cases challenging systemic discrimination, larger sample sizes lead to a more powerful and accurate analysis.

The Paycheck Fairness Act takes a step in the right direction by recognizing that employees may perform substantially equal work in different physical locations. The legislation would make clear that workers who perform work within the same county, or similar political subdivisions, “shall be deemed to work in the same establishment” and can serve as comparators for pay rate comparisons.<sup>33</sup> This provision adapts the law to the realities of the modern workplace by ensuring employees have an effective means to challenge discrimination that extends beyond a single brick and mortar location.

The Paycheck Fairness Act makes clear that it sets a floor and not a ceiling for appropriate geographic comparisons by providing that the above language “shall not be construed as limiting broader applications of the term ‘establishment’” consistent with EEOC guidance.<sup>34</sup> The EEOC’s Compliance Manual, issued nearly 20 years ago in December 2000, provides that while “establishment” ordinarily means a physically separate place of business, “[t]wo or more physically separate portions of a business should be considered one “establishment” if personnel and pay decisions are determined centrally and the operations of the separate units are interconnected.”<sup>35</sup> As the EEOC and courts have recognized, appropriate comparisons can extend across geographic units beyond the county or similar subdivisions where there is a central administrative unit that hires the employees, sets the compensation, and assigns work locations.<sup>36</sup> As courts have explained, it does not make sense to permit an employer to rely on geographic boundaries in applying the “establishment” language where the

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<sup>32</sup> 29 U.S.C. § 206(d).

<sup>33</sup> Paycheck Fairness Act of 2019, H. R. 7, 116th Cong. § 3(c) (2019).

<sup>34</sup> *Id.*

<sup>35</sup> Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 10: Compensation Discrimination, § IV(D), [https://www.eeoc.gov/policy/docs/compensation.html#N\\_44\\_](https://www.eeoc.gov/policy/docs/compensation.html#N_44_).

<sup>36</sup> *See id.*, citing *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592-93 (11th Cir. 1994) (plaintiff who worked for a security services company, and her comparators who worked at military facilities pursuant to the security company's contracts, were employed at the same "establishment" because of centralized control and the functional interrelationship between the plaintiff and the comparators); *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 58 (5th Cir. 1975) (school district was one "establishment").

employer itself has adopted a uniform pay policy that does not depend on geography.<sup>37</sup> The primary focus is on whether workers are actually similarly situated, thus making it reasonable to compare their pay.<sup>38</sup>

#### **D. Employers Would be Prohibited from Utilizing Pay Secrecy Policies and from Retaliating Against Workers Who Discuss Pay.**

The Paycheck Fairness Act also will help to bring pay practices into the sunlight by providing coherent and consistent anti-retaliation protections for employees. A 2010 survey found that about half of all employees report they are formally barred or discouraged from discussing or disclosing information about their pay, with an even greater proportion of private sector employees indicating that pay information at their workplace is secret.<sup>39</sup> A significant number of states and localities have passed laws prohibiting pay secrecy policies.<sup>40</sup> It is time for federal law to foster greater transparency about salary – a critical first step in identifying pay disparities.

Current federal anti-retaliation statutes make it unlawful for employers to take adverse action because an individual has engaged in protected activity such as opposing a discriminatory practice or participating in an EEO process. Section 3 of the Paycheck Fairness Act would bring clarity to the anti-retaliation provision of the Equal Pay Act with an express prohibition of pay secrecy policies. This provision also would explicitly prohibit employers from taking adverse action against employees for discussing pay.

In 2016, the EEOC issued updated guidance on retaliation. This guidance notes that taking adverse action against an employee “for discussing compensation may implicate the EEO anti-retaliation protections as well as a number of other federal laws . . . .”<sup>41</sup> Pay secrecy policies may impede employees from learning of discrimination and may deter employees from engaging in protected activity. The EEOC guidance provides that “talking to coworkers to gather information or evidence in support of a potential EEO claim” is protected activity.<sup>42</sup>

Consistent with this guidance, the Paycheck Fairness Act would expressly prohibit employers from retaliating against workers who discuss pay, ensuring protection for workers who have not yet complained of pay discrimination or participated in an investigation. The EEOC guidance also addresses the protections of the National Labor Relations Act (NLRA)<sup>43</sup>

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<sup>37</sup> *Grumbine v. United States*, 586 F. Supp. 1144, 1148 (D.D.C. 1984).

<sup>38</sup> *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan. 1986).

<sup>39</sup> Ariane Hegewisch, et al., “Pay Secrecy and Wage Discrimination,” Institute for Women’s Policy Research (2011), <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

<sup>40</sup> See National Women’s Law Center, “Workplace Fairness: Progress in the States for Equal Pay” (Sept. 2016), <https://nwlc.org/wp-content/uploads/2016/01/Progress-in-the-States-for-Equal-Pay-9.26.16.pdf>.

<sup>41</sup> Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#fig12>.

<sup>42</sup> *Id.*

<sup>43</sup> 29 U.S.C. §§ 151-169.

regarding employees' discussions of pay. The NLRA protects non-supervisory employees from employer retaliation when they discuss wages with colleagues as "concerted activity."<sup>44</sup> The NLRA prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants. However, the NLRA protections for pay discussions do not cover all workers – for example, they do not extend to supervisors, managers, agricultural workers, and employees of rail and air carriers. In addition, remedies are limited, as the NLRA does not provide workers with a private right of action.<sup>45</sup>

Although the Equal Pay Act, Title VII, the NLRA, and a patchwork of state and local laws provide certain protections for workers who discuss pay, the Paycheck Fairness Act would provide a coherent and nationally consistent set of rules addressing employees' discussions of pay and the consequences when employers violate those rules.

### **E. Employers Would Report Pay Data.**

Section 8 of the Paycheck Fairness Act would require the EEOC and the Department of Labor to collect pay data from employers. This reporting requirement would assist employers in evaluating their pay practices to prevent discrimination and would strengthen the enforcement of equal pay laws.

During my tenure as Chair, the EEOC moved forward in September 2016 to collect summary pay data from employers with 100 or more employees to more effectively combat pay discrimination.<sup>46</sup> The data collection would have required these employers to provide confidential annual reports to the EEOC about employee pay, broken down by job category, sex, race, and ethnicity. Because the data would be disaggregated by sex, race, and ethnicity, the information would help to address the intersectional nature of pay discrimination for women of color. The data would help to address discrimination in the form of occupational segregation in lower paying jobs. Collecting this information would be a significant step forward in addressing pay discrimination.

In assessing a charge of discrimination during an investigation, the EEOC could consider pay data together with other evidence gathered to determine how to focus the investigation

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<sup>44</sup> See, e.g., *NLRB v. Main St. Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (employer violated the NLRA by imposing a rule prohibiting pay discussions and improperly fired plaintiff because she discussed wages with coworkers to determine whether they were being paid fairly); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (9th Cir. 1993) ("an unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid under the Act."); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (employer's rule prohibiting wage discussions was an unfair labor practice under the NLRA, because "wage discussions can be protected activity" and "an employer's unqualified rule barring such discussions has the tendency to inhibit such activity").

<sup>45</sup> *National Licorice Co., v. NLRB*, 309 U.S. 350, 362, 364, 366 (1940) (National Labor Relations Board proceedings are "not for the adjudication of private rights").

<sup>46</sup> Equal Employment Opportunity Commission, "EEOC to Collect Summary Pay Data" (Sept. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.

and whether to request additional information from the employer. When EEOC enforcement staff requests information from an employer, the employer has the opportunity to explain its practices, provide additional data, and explain any non-discriminatory reasons for its pay practices and decisions. For example, the employer can provide more detailed information about pay by occupation and legitimate factors that could explain any apparent pay disparities. After considering all of this information and data, along with other relevant evidence, the EEOC makes a finding as to whether discrimination was the likely cause of the pay disparities.

The collection of employer pay data would support and enhance voluntary compliance by motivating employers to strengthen their systems and practices to collect and review compensation data. Many organizations still do not regularly collect and analyze pay data by demographics for potential disparities and have inconsistent or non-existent formal reviews. Because employers would need to compile and file this report, many more employers would establish a regular practice of reviewing their pay data by demographics at least at a summary level every year. Formalized and institutionalized pay data reporting would encourage employers to identify and address pay equity on their own – increasing the positive impact of reporting requirements. EEOC also would publish aggregate pay information to enable employers to evaluate their pay data against industry benchmarks, consistent with its longstanding practice of reporting aggregate workforce demographic data.

Through extensive consultation with stakeholders, the EEOC sought to minimize the burden on employers by building on existing annual reporting requirements. The pay data collection enhances the existing Employer Information Report, also known as the EEO-1 report, to include pay information along with the workforce demographic information that has been collected for over fifty years. The EEOC and the Department of Labor have long used EEO-1 workforce demographic data to identify trends, inform investigations, and focus resources. To report pay information, employers would provide data electronically, drawing from their existing human resources databases without incurring significant burden.

Despite this extensive process with two opportunities for public comment, the Trump administration, after consulting with business groups, announced a “review and immediate stay” of the EEO-1 pay data collection in August 2017.<sup>47</sup> The Paycheck Fairness Act would address the critical need for better pay data by codifying a requirement for employers to report pay data, which would provide the EEOC with a powerful tool to better focus its resources to combat pay discrimination. The United States already lags behind several countries, including the United Kingdom, France, Germany, and Iceland, which have already enacted laws aimed at reducing gender pay disparities by requiring employers to report pay information. American companies doing business in those countries have demonstrated that they can comply, since they are already reporting pay information across the globe.

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<sup>47</sup> Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs to Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission (Aug. 29, 2017), [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

#### **IV. Stronger Incentives are Needed to Promote Proactive Efforts to Address Pay Equity.**

Section 3 of the Paycheck Fairness Act would create stronger incentives for employers to take proactive steps to address pay equity by allowing employees to pursue class actions and to seek compensatory and punitive damages.

##### **A. Employees Should be Able to Join Together in a Class Without the Need to File a Notice with the Court.**

Pay discrimination is often a systemic problem, which is most effectively proven and remedied by adjudicating the claims of all those adversely affected. The Equal Pay Act's collective action provision creates a significant barrier to tackling systemic pay discrimination because each employee must publicly file a notice with the court in order to participate in the case. Placing this burden on workers has a chilling effect on employees reluctant to notify their employer and go public with their concerns. This typically results in only a small fraction of those adversely affected actually recovering for pay discrimination. Many employees cannot afford the risk of retaliation for joining a lawsuit. Other employees may not have direct knowledge of what others are paid, so they may not feel comfortable opting-in to the case at the outset.

Virtually every other employment discrimination law allows employees to pursue class actions under Rule 23 of the Federal Rules of Civil Procedure, which generally apply to cases brought in federal court. Rather than be required to notify their employer and the court of an interest in opting-in to an action, employees are permitted to choose to opt-out of the class, resulting in significantly higher participation. In opt-in collective actions, it would not be unusual to have only about 20% of eligible participants choose to file a notice in court.

In 1963, when the Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), there were no other federal laws addressing sex discrimination at work. Since the Federal Rules of Civil Procedure were not enacted until 30 years later, the Equal Pay Act borrowed the procedures governing multi-party claims from the FLSA §216(b) collective action provisions.

By limiting the financial exposure of employers who violate the Equal Pay Act to the differences in pay because of sex for only those workers who join the lawsuit, the current law reduces even further the incentive for employers to take steps affirmatively to detect and promptly remedy gender-based pay disparities. Section 3 of the Paycheck Fairness Act would address this shortcoming in the Equal Pay Act by permitting employees to utilize the Rule 23 class structure. This permits all workers adversely affected by the unlawful pay practices to be encompassed within the certified class, unless they elect to opt out. This procedural update would modernize the Equal Pay Act, provide greater protection for workers, and strengthen

incentives for compliance. This change will make it far more effective to combat systemic sex-based wage discrimination and provide relief to all those affected.<sup>48</sup>

## **B. Compensatory and Punitive Damages are Needed to Make Victims Whole and Deter Violations.**

Although as discussed further below, a number of employers are taking steps to adopt fair and transparent pay policies -- recognizing they are good for business -- many other employers have avoided evaluating their pay practices to identify potential discrimination.

The Paycheck Fairness Act would strengthen the remedies available under the Equal Pay Act to provide compensatory and punitive damages. The goals of our anti-discrimination laws are to put victims of discrimination in the same position that they would have been in if the discrimination had not occurred as well as to deter future violations. The Equal Pay Act remedies are far too limited to meet these objectives. Under the Equal Pay Act, successful plaintiffs typically recover the difference in wages they were paid compared to those of the opposite sex who performed equal work for the two years before the complaint was filed. Where employees can prove the violation was willful, they can receive three years of back pay. Where an employer fails to demonstrate that the challenged pay disparities were the product of good faith, then the plaintiffs may also recover liquidated damages in the amount of the pay disparity.

Title VII of the Civil Rights Act of 1964 was amended in 1991 to authorize compensatory and punitive damages for victims of intentional discrimination. Section 3 of the Paycheck Fairness Act would permit prevailing plaintiffs to recover compensatory damages and, as an alternative to liquidated damages, an award of punitive damages, in addition to backpay. Compensatory damages include out-of-pocket expenses resulting from the discrimination, such as medical expenses or costs incurred in finding a new job, as well compensation for non-economic damages, including mental anguish or loss of reputation. Punitive damages would be allowed when the employer engaged in intentional discrimination, acting with malice or reckless disregard for the law. To be eligible for these damages, plaintiffs will need to satisfy high standards of proof.

Strengthened remedies for discrimination are needed to more effectively deter violations and promote affirmative incentives for employers to be more vigilant in detecting and promptly correcting gender-based pay disparities. Current law principally provides victims of unequal pay practices simply payment of the wages they should have been paid. In many cases, these limited remedies do not fully compensate workers for discrimination by failing to permit recovery for the adverse consequences of being subject to pay disparities caused by one's gender. Workers also encounter burdens and obstacles in detecting and trying to remedy

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<sup>48</sup> American Bar Association, "The Paycheck Fairness Act," [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/discrimination/the-paycheck-fairness-act/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/).

pay disparities. As such, current law provides little incentive for many workers to seek to enforce their rights and challenge practices causing gender-based pay disparities.

Current law also provides little incentive to employers to expend resources to detect and rectify pay disparities since the primary penalty for violating the law simply requires them to pay the wages they should have paid years earlier. We need protections against gender-based pay disparities that will have a greater likelihood of ending this pernicious conduct.

## **V. Transparent and Fair Pay Practices Strengthen Organizations and Benefit All Workers.**

The Paycheck Fairness Act offers supports for both employees and employers. All workers benefit from fair and transparent pay practices. Section 9 of the Act directs the Department of Labor to research and share effective methods to identify and address pay discrimination, which will provide a valuable resource for employers. Unfair pay practices are bad for business. Pay discrimination can expose employers to legal challenges, lost productivity, and low staff morale. Recognizing these concerns, many employers have made commendable efforts to thoroughly examine their pay practices.

Companies like Microsoft, Amazon, American Express, Cisco, and Bank of America have adopted policies to refrain from asking questions about salary history.<sup>49</sup> Increasingly, businesses recognize that unequal pay fails to inspire trust, confidence, or loyalty in their employees.<sup>50</sup> In fact, it undermines these critical components of positive company culture and can impact recruiting and retention.

Whole Foods took steps to ensure equal pay for equal work by building transparency into compensation practices. In 1986, CEO John Mackey implemented an open pay policy that allows staff to easily look up anyone's salary or bonus from the previous year.<sup>51</sup> The policy was adopted to promote a culture of shared information and to create a sense of a "shared fate" among employees.<sup>52</sup> Mackey explained, "If you're trying to create a high-trust organization, an organization where people are all-for-one and one-for-all, you can't have secrets."<sup>53</sup>

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<sup>49</sup> National Public Radio, "More Employers Avoid Legal Minefield by Not Asking about Pay History (May 3, 2018), <https://www.npr.org/2018/05/03/608126494/more-employers-avoid-legal-minefield-by-not-asking-about-pay-history>.

<sup>50</sup> Payscale, "Should the Salary History Question Be Banned by Federal Law?" (Feb. 9, 2018), <https://www.payscale.com/career-news/2018/02/should-salary-history-question-be-banned-by-federal-law>.

<sup>51</sup> Alison Griswold, "Here's Why Whole Foods Lets Employees Look Up Each Other's Salaries," *Business Insider* (Mar. 3, 2014).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Salesforce has drawn attention for its commitment to review employee compensation on an annual basis.<sup>54</sup> The company spent \$6 million to make adjustments to ensure equal pay for equal work, considering differences in pay not only for gender, but also race and ethnicity.<sup>55</sup> Major employers are also taking the previously unprecedented step of publicly disclosing data on their pay equity analysis – with companies like Salesforce, Microsoft, Amazon, and the Gap publishing their findings and plans on company websites or putting them in public press releases.<sup>56</sup>

When companies comply with the law and ensure pay equity, they not only mitigate their liability risks, they also avoid costs in morale and turnover and reputational harm. Gender pay equity boosts workforce diversity, which is associated with a host of benefits such as increased innovation and stronger financial performance.<sup>57</sup> Voluntarily publishing pay equity numbers stands to benefit corporate brands.<sup>58</sup>

Employee pay has become increasingly transparent with platforms like Glassdoor<sup>59</sup> that allow individuals to anonymously share salary information and review companies and their management. Millennials have helped to lead the way with more open discussions of pay in the workplace and online.<sup>60</sup> Employers are increasingly aware of the reputational harm that can result from outdated and discriminatory pay practices. Businesses that set pay fairly find it easier to attract and retain talent when people are paid what they are worth. Additionally, research has shown that pay transparency has beneficial effects for the labor market.<sup>61</sup>

During my tenure as Chair, the EEOC provided training on equal pay issues across the country, reaching tens of thousands each year. The EEOC's training encouraged employers to take a hard look at their compensation practices annually and to take action to correct

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<sup>54</sup> Cindy Robbins, "2018 Salesforce Equal Pay Assessment Update," Salesforce (Apr. 17, 2018), <https://www.salesforce.com/blog/2018/04/2018-salesforce-equal-pay-assessment-update.html>.

<sup>55</sup> *Id.*

<sup>56</sup> See Diversity at Amazon, [https://www.amazon.com/b/ref=tb\\_surl\\_diversity/?node=10080092011](https://www.amazon.com/b/ref=tb_surl_diversity/?node=10080092011)); Salesforce, Equality at Salesforce: The Equal Pay Assessment Update (March 8, 2016), <https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html>; Cora Lewis, These Companies are Eliminating Their Gender Pay Gaps, BuzzFeed (March 14, 2016), [https://www.buzzfeed.com/coralewis/companies-are-eliminating-their-gender-pay-gaps?utm\\_term=.ek1I5WEXv#.nkGVy6reK](https://www.buzzfeed.com/coralewis/companies-are-eliminating-their-gender-pay-gaps?utm_term=.ek1I5WEXv#.nkGVy6reK).

<sup>57</sup> See Catalyst, "Why Diversity Matters," (July 2013),

[https://www.catalyst.org/system/files/why\\_diversity\\_matters\\_catalyst\\_0.pdf](https://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf)

<sup>58</sup> See Payscale, "Want to Build a Great Employer Brand? Focus on Your Pay Brand First," (Mar. 12, 2018), <https://www.payscale.com/compensation-today/2018/03/employer-brand-pay-brand>.

<sup>59</sup> See <https://www.glassdoor.com/index.htm>.

<sup>60</sup> Lauren Weber and Rachel Emma Silverman, "Workers Share Their Salary Secrets," Wall Street Journal (Apr. 16, 2013), <https://www.wsj.com/articles/SB10001424127887324345804578426744168583824>; Jen Doll, "Could Millennials End Salary Secrecy? One long-held taboo of office life is that you're not supposed to talk about what you make. It appears that may be changing." (Apr. 17, 2013), <https://www.theatlantic.com/business/archive/2013/04/could-millennials-end-salary-secrecy/316182/>.

<sup>61</sup> Zoë B. Cullen and Bobak Pakzad-Hurson, "Equilibrium Effects of Pay Transparency in a Simple Labor Market," (Apr. 2018), <https://www.hbs.edu/faculty/Pages/item.aspx?num=52648>.

problems. The agency asked employers to be part of the solution by putting policies in place to ensure equal pay for equal work – and by adopting best practices for fair, consistent, and nondiscriminatory compensation. Individuals should be designated to monitor pay practices. Training should be provided to supervisors involved in setting pay. Job-related criteria should be used to determine base pay, raises, overtime, and bonuses as well as in making other decisions affecting pay such as performance evaluations, job assignments, and promotions. Pay gaps should not arise from consideration of prior salary or differential success in salary negotiations.

By adopting promising practices and making an organizational commitment to equal pay, employers can take major steps toward making pay discrimination a thing of the past. The Paycheck Fairness Act would encourage employers to take those steps by spurring increased voluntary compliance with the law.

## **VI. Conclusion**

To ensure that the promise of equal pay becomes a reality, our laws must change. The Paycheck Fairness Act takes a measured approach to strengthen the Equal Pay Act to provide meaningful solutions to the persistent problem of pay discrimination. Robust laws and enforcement of protections against pay discrimination create accountability, which is a key factor to disrupt bias in the workplace. It is time for Congress to pass this legislation and take a critical step forward in the fight to ensure equal pay for equal work.

## JENNY R. YANG

Jenny R. Yang served as Chair of the U.S. Equal Employment Opportunity Commission from September 2014 to January 2017 and as Vice-Chair and a member of the Commission from 2013 to 2018. Under her leadership, the Commission launched the Select Task Force on the Study of Harassment in the Workplace to identify innovative solutions to prevent harassment at work and led efforts to strengthen the EEOC's annual data collection to include employer reporting of pay data. As Chair, Ms. Yang created new procedures for public input on guidance documents to promote transparency and launched digital systems to facilitate online charge information.

Currently, Ms. Yang serves as a Partner with Working Ideal where she advises employers in applying evidenced-based research in the design and implementation of employment practices to prevent harassment, foster diverse and inclusive workplaces, and advance pay equity. In addition, as a Fellow with the Urban Institute in the Center on Labor, Human Services, and Population, and an Open Society Foundations Leadership in Government Fellow, Ms. Yang is studying the impact of structural changes in the workplace on employment protections – including anti-harassment protections – for the growing number of Americans working as independent contractors, subcontractors, temporary workers, and in the gig economy. She is also an adjunct professor at Georgetown University Law Center teaching a seminar on the history and evolution of Title VII, examining how social change, evolving ideas of race and gender, globalization, and technology will continue to shape Title VII.

Prior to joining the EEOC, Ms. Yang spent a decade representing workers in civil rights and wage and hour actions nationwide as a partner at Cohen Milstein Sellers & Toll PLLC. From 1998 to 2003, she served as a Senior Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section. Prior to that, Ms. Yang was a fellow at the National Employment Law Project. Ms. Yang clerked for the late U.S. District Judge Edmund Ludwig in the Eastern District of Pennsylvania. A graduate of Cornell University, she earned a B.A., with distinction, in Government. She received her J.D., cum laude, from New York University School of Law, where she served as an editor of the Law Review and a Root-Tilden Public Interest Scholar.

Jenny R. Yang is a fellow at the Open Society Foundations (OSF) and the Urban Institute as well as adjunct faculty at Georgetown University Law Center. However, this testimony is not a product of OSF, the Urban Institute or Georgetown University Law Center. The views expressed are those of the author and should not be attributed to OSF, the Urban Institute, Georgetown University Law Center, its trustees, or its funders.