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**House Committee on Financial Services, Subcommittee on Diversity and Inclusion**

**Hearing on Closing the Racial and Gender Wealth Gap Through Compensation Equity**

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Thank you for the opportunity to provide testimony to the Committee and the Subcommittee on Diversity and Inclusion on closing the racial and gender wealth gap through compensation equity. The National Women's Law Center (NWLC) fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. For almost 50 years, we have used the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and low-income women and families. Protecting against pay discrimination and wage gaps is a critical part of these efforts and key to addressing longstanding gender inequality at work and advancing women's economic security.

Race and gender wage gaps are pernicious and persistent. Women—especially Black and brown women—have long worked in essential but undervalued jobs that leave them struggling to support themselves and their families. One major driver of gender and race wage gaps is discrimination, often cloaked by employer-imposed pay secrecy policies and perpetuated by practices such as reliance on salary history in hiring. Bias (whether overt or implicit) and stereotypes can impact employer decisions at critical points—recruitment, hiring, performance evaluations and promotions, allocation of assignments and opportunities, and opportunities for advancement and leadership development—which not only create pay disparities, but perpetuate and magnify them over time and affect future compensation and employer contributions to retirement. Stereotypes about the needs, abilities and priorities of women, particularly those with families and caregiving responsibilities, or assumptions that only men are family breadwinners, contribute to women being denied promotions, or assignments or opportunities that would lead to career-track, high-paying jobs. Racial and gender bias and stereotypes also can intersect to create additional barriers to the hiring and advancement of women of color in the workplace.

Women's overrepresentation in underpaid, undervalued jobs is another factor driving wage gaps. Women are close to two-thirds of those working in jobs that pay the minimum wage or just a few dollars above it, as well as two-thirds of workers in tipped jobs.<sup>1</sup> Black women, Latinas, and Native American women are particularly overrepresented in the lowest-paying jobs.<sup>2</sup> They are thus particularly harmed by a \$7.25 federal minimum wage, and for tipped workers, a base wage of just \$2.13 an hour—unchanged in 30 years.

These inequities existed before the COVID-19 pandemic. But the current crisis has laid bare the deep gaps in our economic and social infrastructure that have resulted from decades of underinvestment and policy choices that failed to center the needs of women, especially Black, Latina, Native American, and Asian American and Pacific Islander women. Women of color are bearing the brunt of the COVID-19 pandemic and recession: as essential workers risking their lives for less pay than their male coworkers; as those who have disproportionately borne devastating job losses; and as those who are shouldering the majority of

responsibility for caregiving without necessary supports as our jerry-rigged caregiving infrastructure imploded this past year.

Proactive measures to promote compensation equity, and transparency of pay and demographic data, are especially critical as the COVID-19 pandemic has underscored and exacerbated race and gender inequities and barriers in the workplace.

**I. The COVID-19 pandemic has decimated women’s workforce participation and economic security.**

**A. The gender gap is a significant barrier to women and families’ economic security.**

Women are increasingly the primary or co-breadwinner in their families and cannot afford to be shortchanged by persistent gender pay gaps. Even before a global health crisis with devastating economic consequences, the gender wage gap undermined women’s economic security. Overall, when the wages of all women are compared to the wages of all men, women in the United States working full-time, year-round typically are only paid 82 cents for every dollar paid to men.<sup>3</sup> The gender wage gap is widest for many women of color; among women who hold full-time, year-round jobs in the United States, Black women are typically paid 63 cents, Native American women 60 cents, and Latinas just 55 cents for every dollar paid to white, non-Hispanic men.<sup>4</sup> White, non-Hispanic women are paid 79 cents and Asian women 87 cents for every dollar paid to white, non-Hispanic men, and wage gaps for Asian American and Pacific Islander women of some ethnic and national backgrounds are much larger.<sup>5</sup> Mothers working full-time, year-round typically are paid only 75 cents for every dollar paid to fathers, but the gaps are significantly larger for Black mothers, who are paid 52 cents for every dollar paid to white, non-Hispanic fathers; Native American mothers, 50 cents; and Latina mothers just 46 cents.<sup>6</sup>

Women with disabilities working full-time, year-round are typically paid just 80 cents when compared to their male counterparts with disabilities; under the Fair Labor Standards Act, employers may pay people with disabilities below the minimum wage, further depressing wages for women with disabilities.<sup>7</sup>

According to the latest data available, lesbians make less than gay or straight men, and gay men make less than straight men. Transgender women make less after they transition.<sup>8</sup>

This wage gap has remained stagnant for a decade.<sup>9</sup> Women are still paid less than men in nearly every occupation,<sup>10</sup> and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38% of the pay gap unexplained.<sup>11</sup>

The gender wage gap significantly diminishes the earning power of women. In 2019, the last year for which data are available, women’s median earnings were \$10,157 less per year than the median earnings for men, with even higher losses for many women of color.<sup>12</sup> Put another way: that is equal to about three months of rent, three months of child care payments, three months of health insurance premiums, two months of groceries, four months of student loan payments, and six tanks of gas.<sup>13</sup>

The wage gap affects women as soon as they enter the labor force, expands over time, and leaves older women with a gap in retirement income. Over the course of a 40-year career, a woman beginning her career today typically stands to lose \$406,280 to the wage gap.<sup>14</sup> Women of color stand to lose the most, with Black women typically losing \$964,400, Native American women losing \$986,240, and Latinas losing \$1,163,920 over their lifetime to the wage gap as compared to white, non-Hispanic men.<sup>15</sup> These lost wages severely reduce women’s ability to save for retirement and threaten their economic security later in life.

These figures are based primarily on data collected in 2019, before the COVID-19 pandemic began. Earnings lost to the wage gap have exacerbated the financial effects of the pandemic, falling particularly heavily on

women of color and the families who depend on their income. For many, race and gender wage gaps have left them without a financial cushion to weather the health and economic impacts of the pandemic.

The gender wage gap also is one contributing factor that has pushed millions of women out of the workforce during the COVID-19 pandemic as our nation's caregiving infrastructure broke down and families were forced to make impossible decisions about whose income they could "afford" to lose. Women's high jobless numbers and low workforce participation numbers also threaten to exacerbate gender wage gaps when women return to employment. Lost earnings due to the wage gap and unemployment not only leave women without a financial cushion to weather the current crisis, but also make it harder for them to build wealth, contributing to racial and gender wealth gaps and creating barriers to families' economic prosperity.

**B. Women are on the front lines of the pandemic and are being paid less than their male counterparts while they perform essential work.**

Women have been and continue to be on the front lines<sup>16</sup> of the pandemic. Women make up nearly two in three front-line workers, and women of every race and ethnicity—but especially Black women, Native American women, and Latinas—are overrepresented in the front-line workforce.<sup>17</sup> For example, 88% of registered nurses, 79% of teachers, and 69% of waiters and waitresses are women.<sup>18</sup> Women—disproportionately Black women and Latinas—make up more than eight in ten of those working as home health aides, personal care aides, and nursing assistants,<sup>19</sup> working for poverty-level wages and also at great risk for contracting COVID-19. Women of color also are overrepresented in the child care workforce; one in five (20%) child care workers are Latina, and an additional 19% are Black women.<sup>20</sup>

For more than a year, Black and brown women have been risking their lives to perform work deemed essential by the nation during this crisis, while being paid less than men in the same occupations. Women experience a gender wage gap in 94% of occupations, including low- and high-wage jobs,<sup>21</sup> and the wage gap in front-line occupations is yet another burden on the women taking on additional risk at work. For instance, pre-pandemic data show that women working as home health aides, personal care aides, or nursing assistants typically lose \$250 per month, or \$3,000 per year, due to the gender wage gap.<sup>22</sup> Moreover, the gender wage gap leaves women and their families less able to make ends meet through spells of unemployment in occupations with heightened risks of job loss. Waitresses, for instance, have faced high rates of unemployment and, prior to the pandemic, typically lost \$542 per month, or \$6,500 per year, to the gender wage gap.<sup>23</sup>

**C. Women have borne the brunt of job loss during the pandemic and their workforce participation is at a historic low.**

In addition to being overrepresented in essential jobs where they are paid less than their male counterparts, women have borne the majority of job losses since the onset of the pandemic and have left the workforce entirely in historic numbers. The industries where women predominate are among those that have been hardest hit, and women have tended to lose jobs at even higher rates than their representation in those industries would predict. Between February and April 2020, the leisure and hospitality sector shed about half of its workforce (49%, or more than 8.3 million jobs), with women accounting for the majority (54%) of those losses despite making up just 51% of the sector workforce pre-pandemic.<sup>24</sup> And between February 2020 and March 2021, women lost a net total of nearly 1.7 million leisure and hospitality jobs, representing 36% of women's total net job losses in the pandemic-induced recession.<sup>25</sup>

Women make up 48.4% of the retail trade workforce, but 94.9% of the net jobs lost in the retail sector from February 2020 through March 2021 were women's jobs.<sup>26</sup> Caught in a devastating Catch-22, many women in the retail sector continue to experience a high risk of being displaced from their jobs and a high risk of being

exposed to the virus if they go to work. And women in retail jobs were already undervalued and underpaid, a long-time problem now exacerbated by the current crisis.<sup>27</sup>

The situation is similarly grim for women working in health care. Between February 2020 and February 2021, the health care sector lost 568,300 jobs (about 4% of the pre-pandemic workforce).<sup>28</sup> More than three in four of the healthcare workers fighting the COVID-19 pandemic are women, and 88% of the jobs lost between February 2020 and February 2021 belonged to women. Home health aides, personal care aides, and nursing assistants are among the lowest paid workers across all industries and occupations, meaning they have been risking their lives to care for patients while being paid poverty-level wages.

State and local governments also provide vital services that are even more necessary in the current crisis – including education, social services, and public health protections--and they employ over 17.4 million workers, six in ten of whom are women.<sup>29</sup> Between February 2020 and February 2021, nearly 1.4 million state and local government jobs were lost, with women accounting for 61% of those losses.<sup>30</sup> This is a devastating blow to women, who are more likely than men to hold state and local government jobs, particularly given that these jobs have a higher median wage and are more likely to provide important benefits than private sector jobs.

Even as jobs lost in the first weeks and months of the pandemic have begun to return with 916,000 net jobs in March 2021, women accounted for only 34.4% of that net gain. In fact, women would need nearly 15 straight months of job gains at that level to recover the over 4.6 million net jobs they have lost since February 2020.<sup>31</sup> Furthermore, women’s current overall unemployment rate of 5.7% masks even higher rates of unemployment for women of color, which remain exceptionally high: nearly 1 in 11 Black women ages 20 and over (8.7%) were unemployed in March 2021 and more than 1 in 13 Latinas ages 20 and over (7.3%).<sup>32</sup> Women are also facing high rates of long-term unemployment. Among adult women ages 20 and over who were unemployed in March 2021, 2 in 5 (46.5%) had been out of work for 6 months or longer and nearly 1 in 4 (24.0%) had been out of work for a year or longer.<sup>33</sup>

At the same time, official unemployment rates understate women’s job loss, as the lack of supports during the pandemic for individuals who are caregivers as well as breadwinners has forced women out of the workforce in droves. The gender wage gap contributed to this pushout as our nation’s caregiving infrastructure broke down and families were forced to make impossible decisions about whose income they could “afford” to lose. Over 1.8 million women have left the labor force entirely since the start of the pandemic, leaving women’s labor force participation rate—the share of adult women who are either working or looking for work—at 57.4%.<sup>34</sup> Before the pandemic, women’s labor force participation rate had not been this low since 1988.<sup>35</sup> The pandemic has led to a loss of a generation of gains.

#### **D. The lack of supports for workers with caregiving responsibilities has contributed to women’s unemployment and pay disparities.**

Women still shoulder the bulk of caregiving responsibilities,<sup>36</sup> and Black women and Latinas are especially likely to be both breadwinners and caregivers for their families.<sup>37</sup> The pandemic has revealed that our reliance on the underpaid and undervalued caregiving work of women of color, and of women more generally, places an unsustainable burden on women, families, and the economy overall. Care—including child care and paid family and medical leave—supports our economy and makes all other work possible. Even before the pandemic, too many working people could not access or afford the child care they needed.<sup>38</sup> A survey from 2018 found that mothers were 40% more likely than fathers to report that issues around child care negatively impact their careers.<sup>39</sup>

As our nation's already unstable care infrastructure broke down in March 2020, many working mothers have been called upon to manage caregiving for children and other family members, remote learning, and other responsibilities on top of their jobs. Many child care programs were forced to close as families were unable to pay and operational costs grew too high. Parents are also attempting to navigate school closures and shifting school schedules and hybrid learning, which have only exacerbated the burden felt by caregivers. Similar shocks occurred through systems families relied on for support with elder care and care of family members with disabilities. Studies of parents with young children during the pandemic found that mothers were four to five times more likely to have reduced their work hours or adjusted their schedules because of caregiving than fathers.<sup>40</sup> Women exited the labor force in record numbers during the pandemic,<sup>41</sup> driven in large part by the inaccessibility of child care.<sup>42</sup>

Lack of access to paid family and medical leave also harms women's health, wellbeing, and economic security. Before the pandemic, only one fifth of workers in the United States had access to paid family leave through their employers,<sup>43</sup> and just 40% had paid medical leave to address their own serious health conditions through an employer-provided short-term disability program.<sup>44</sup> For people working in low-wage and part-time jobs—most of whom are women—access is even more limited; among workers in the lowest 25% of wage earners, for example, only 9% had access to paid family leave.<sup>45</sup> The absence of comprehensive paid family and medical leave compounds may contribute to the number of women cutting back on their hours or leaving the workforce during the pandemic, negatively impacting earnings.

This may have larger ramifications in the longer term for women's workforce participation and pay equity. Companies routinely screen out applicants with long gaps in employment, which may have a disparate impact on women who stepped back from the paid workforce during the pandemic because of caregiving needs.<sup>46</sup> If high quality, affordable care and paid leave continue to remain inaccessible, parents—and particularly mothers, who already experience significant wage gaps—may be unable to return to work or will need to reduce their hours and correspondingly their earnings.<sup>47</sup>

## **II. Advancing equal pay provides benefits for the economy and for businesses.**

### **A. Equal pay would provide an enormous economic boost.**

Women were already struggling to make ends meet before the pandemic; closing the wage gap is essential for helping to lift women and children out of poverty. In 2019, nearly one in nine women in the U.S. lived in poverty, with high rates for women of color, including 18% of Native American women, 18% of Black women, and 15% of Latinas.<sup>48</sup> More than 1 in 3 families headed by unmarried mothers lived in poverty in 2019, and 60% of all poor children lived in families headed by unmarried mothers.<sup>49</sup> Six months into the pandemic, in October 2020 one in six Latinas (16.5%) and one in five Black, non-Hispanic women (20.1%) reported not having enough food in the past week, and many reported being behind on rent or mortgage payments.<sup>50</sup>

Addressing discrimination and closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.1% to 3.9%.<sup>51</sup> Increased wages would augment these workers' consumer spending power and benefit businesses and the economy.<sup>52</sup> Another study by McKinsey estimates that by closing the wage gap entirely, women's labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19% more than would otherwise be generated in 2025.<sup>53</sup>

## **B. A focus on pay equity is good for business.**

When employers do proactively implement practices to help prevent pay disparities in the first instance and to develop a diverse workforce, they reap rewards. A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity,<sup>54</sup> increased innovation, an expanded consumer base, and stronger financial performance.<sup>55</sup> Competitive — and thus equal — pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.<sup>56</sup> And when workers are confident they are being paid fairly, they are more likely to be engaged and productive.<sup>57</sup>

Significantly, shareholders and potential investors are recognizing these benefits and are increasingly interested in companies' commitment to diversity and equal employment opportunity. They see compliance with workplace laws—particularly with regard to equal pay—as an important factor impacting risk and profitability, and therefore relevant to investment decisions.<sup>58</sup> Activist investors, including Arjuna Capital and Trillium Asset Management, have led successful initiatives to encourage companies in the tech, consumer and financial services sectors to publicly disclose efforts to address gender pay inequity.<sup>59</sup> And the Bloomberg Gender Equality Index offers investors new transparency into a range of measures of gender equity and inclusion across 325 participating publicly traded companies, including pay equity measures such as mean and median gender wage gaps.<sup>60</sup>

## **III. Greater transparency and worker access to and control over pay information can help close gender and race wage gaps.**

The repercussions of the pandemic's impact on women's unemployment and labor force participation may reverberate for years to come, as women navigate not only the loss of seniority and advancement opportunities, but also barriers to re-entering the workforce in an economy that has fundamentally shifted available job opportunities. The pandemic also means women will be less likely to afford education and training that would allow them to move up or into another field. Long spells out of work also threaten to exacerbate race and gender wage gaps when women return to employment,<sup>61</sup> as unemployment and time out of the workforce tends to depress earnings when individuals do go back to work. Women returning to the workforce after months of unemployment or time out of the workforce entirely may have decreased bargaining power, because they cannot afford to be out of work any longer; employers, in turn, may pay lower wages to employees who have been unemployed or out of the workforce for long stretches of time. Both mean women may face larger wage gaps moving forward.

Even before the pandemic, individuals faced numerous barriers to accessing pay information and controlling how it is used in hiring and pay setting, resulting in gender and racial pay disparities that were often undetected or unchallenged. Those barriers remain, but the power disparity between workers and employers has been exacerbated by the economic impacts of the pandemic, further threatening to deepen wage gaps as women who were forced out of the labor market seek to re-enter it. Employers hold far more information than applicants and workers about budgets, the available wage for a job, compensation for different jobs within the company, compensation-setting guidelines, available benefits and whether they can be negotiated, and working conditions. This information asymmetry places applicants and workers at a distinct disadvantage in hiring and pay setting processes. As a result of widespread, illegal employer-imposed pay secrecy policies,<sup>62</sup> job applicants can find it difficult to gather pay information from current employees, who may be fearful of retaliation for sharing pay information with applicants or coworkers. The threat of retaliation is all too real; retaliation continued to be the most frequently cited claim in all charges filed with the EEOC in FY 2020.<sup>63</sup>

Such policies also undermine workers' ability and desire to challenge discrimination. Disparities that are present in initial salary at hiring often compound over time and affect salary increases, future performance-based compensation, and employer contributions to retirement—and are perpetuated by employers' reliance on applicants' prior salary history to set wages, allowing pay discrimination to follow women and people of color from job to job. These practices reduce employer incentives to proactively review and analyze their compensation practices, address any unjustified disparities between employees, and prevent such disparities from arising in the first instance.

Countering widening gender and race wage gaps as a result of our current economic crisis will require increasing workers' access to and control over pay information, and proactive measures by employers to review, evaluate, and disclose their compensation data and compensation-setting policies. Although there are several promising practices businesses can adopt, my testimony focuses on a few key measures.

#### **A. Eliminating pay secrecy policies and providing salary ranges**

Workers face significant obstacles in gathering the information that would suggest that pay disparities are the result of bias, which undermines their ability to challenge it. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized. About 60% of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.<sup>64</sup>

A culture of secrecy around pay is bad for business not only because it gives cover to discrimination and bias, but also because it leads to poorer performance, employee dissatisfaction and lower motivation, and mistrust of management. Conversely, increasing transparency by allowing employees to discuss compensation, and providing employees with information about pay scales and pay-setting practices, increases the likelihood that employees will believe they are paid fairly, which in turn promotes employee engagement and productivity.

Nineteen states and the District of Columbia have enacted protections for workers who discuss their wages with each other.<sup>65</sup> But under federal law, workers have a patchwork of insufficient protections. Pursuant to Executive Order 13665 of 2014, federal contractors are prohibited from discriminating against employees and job applicants who inquire about, discuss, or disclose either their own or others' compensation; but that rule does not reach all private employers.<sup>66</sup> Section 7 of the National Labor Relations Act (NLRA) protects workers' rights to have conversations about wages as "concerted activities for the purpose of collective bargaining or other mutual aid or protection";<sup>67</sup> courts and the National Labor Relations Board have also found that pay secrecy rules can be unfair labor practices under the NLRA because they restrain protected concerted activity.<sup>68</sup> But NLRA protections do not extend to supervisors, public sector employees, domestic and agricultural workers, and various employees of railways and airlines,<sup>69</sup> and remedies for violations of employee rights under the NLRA are often not robust enough to act as a significant deterrent to employers.<sup>70</sup> That is why a provision in the Paycheck Fairness Act (H.R. 7), recently passed by the House of Representatives, stops employers from prohibiting or punishing employees for asking about, discussing, or disclosing information about pay and makes clear that employees cannot contract away or waive their rights to discuss and disclose pay.

Providing more information to applicants and employees about a position's salary range further reduces information asymmetry between workers and employers in the hiring process, and better enables worker negotiation for market rate compensation. Such a requirement relies on information that companies already possess (either in compensation systems or budgets), and increases the efficiency of employers' hiring processes by ensuring that a pool of applicants is limited to those who would be willing to accept

the position within the indicated salary range. Disclosure of salary ranges also provides companies with an incentive to proactively review and evaluate their compensation practices and address any unjustified disparities between workers. Revealing a position's salary range also is critical in negotiations and provides some brake on the influence of bias in offers. Three states—California, Colorado, and Washington—have enacted laws requiring employers to provide applicants with a position's salary range during the hiring process.<sup>71</sup>

The significantly narrower gender wage gap for employees working in the public sector—where pay secrecy rules are uncommon and pay is often publicly disclosed—suggests the difference that transparency makes. Only 15.1% of public sector employees report that discussing their wages is either prohibited or discouraged.<sup>72</sup> In the federal government, where pay rates and scales are more transparent and publicly available, and unionization rates are higher, the overall gender wage gap is 7%—significantly smaller than the overall gender wage gap of 18%.<sup>73</sup>

### **B. Regularly conducting equal pay audits and disclosing compensation metrics**

Reporting and disclosure of compensation metrics by employers promises to shine light on race and gender pay disparities, increase the likelihood of employer self-analysis and self-correction, and identify areas of concern for further investigation by enforcement agencies. Such analysis ensures that employers are reviewing wage data by sex, race, and ethnicity. A reporting requirement also provides an opportunity and strong incentive for employers to proactively self-evaluate their pay practices and not only correct unjustified pay disparities, but prevent them from occurring in the first place, helping to avoid litigation. Such analyses also are critical to the development of benchmarks to evaluate implementation of remedial measures and to guide future efforts.

Moreover, disclosure of some wage gap measures can promote employer compliance with equal pay standards in a number of important ways. States and countries around the world have passed legislation requiring analysis and disclosure of compensation data,<sup>74</sup> and research shows the positive effects of these mandates.<sup>75</sup> Disclosure requirements are a key driver of pay audits internationally; according to a recent survey of businesses in the U.K., which implemented a public disclosure requirement in 2018, “54% of U.K. respondents cite pay data reporting requirements from federal/national and regional governments as external drivers for them to perform pay equity analyses, versus 28% for their U.S. counterparts.”<sup>76</sup>

Publicly available compensation metrics can help workplace equality advocates more efficiently direct their own enforcement, outreach, and public education activities to industries or regions where pay disparities are most egregious. Individual employees can find out if they are working in an industry or region where they are more at risk of experiencing pay disparities, and be prompted to investigate further to ensure that they are being treated fairly. They also can better understand pay trends with their region and industries, and be empowered to seek and negotiate fair pay. Finally, public release of such metrics provides a strong incentive to employers to understand and be able to explain the drivers of any such gaps in their own workforces, and sharing their plans to move toward equity is also an important accountability mechanism that allows employers to be held to these plans by their employees and the broader public.

Additionally, disclosure of compensation metrics will substantially assist shareholders in making informed investment and voting decisions. Reporting and public disclosures are likely to encourage employers to proactively implement practices to help prevent pay disparities in the first instance. A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity, increased innovation, an expanded consumer base, and stronger financial performance.<sup>77</sup> All of these are of interest to investors. Voluntary disclosures are insufficient: investors cannot compare across companies; companies have incentives to report the rosier possible picture and are not required to



explain their plans to remedy wage gaps; and smaller, less-resourced companies may be at a disadvantage.

### **1. State and international efforts to require pay data collection and disclosure**

The Paycheck Fairness Act, passed by the House earlier this month, would require employers to report pay data by race, ethnicity, and gender to the Equal Employment Opportunity Commission (EEOC), and for that data to be shared with the Office of Federal Contract Compliance Programs (OFCCP). This requirement is especially critical because of opposition from employers and the prior administration to previous efforts by the EEOC and OFCCP to collect this type of pay data.<sup>78</sup> In 2017 the Trump administration halted an Obama administration initiative that required companies with 100 or more employees to report confidentially employee pay by job category, sex, race, and ethnicity as part of their annual Employer Information Report (EEO-1) to the EEOC.<sup>79</sup> Following litigation initiated by the National Women’s Law Center and its partners, the EEOC was ordered to collect compensation information from employers for 2017 and 2018, and did so,<sup>80</sup> but the data has as yet neither been analyzed nor made available in an aggregated form to the public. In 2019, the EEOC revised the EEO-1 form to eliminate future Component 2 reporting,<sup>81</sup> and OFCCP announced that it would neither seek nor rely on the Component 2 compensation data collected by the EEOC for its enforcement efforts.<sup>82</sup> Finally, in the summer of 2020, the EEOC announced it had contracted with the National Academies of Science, Engineering and Medicine’s Committee on National Statistics to select an expert panel to evaluate the utility of the 2017 and 2018 compensation data it collected pursuant to court order.<sup>83</sup> That effort is ongoing,<sup>84</sup> and its impact on future pay data collection initiatives by the EEOC and OFCCP is unknown.

In the absence of a federal requirement, states and localities have led a variety of efforts—through legislation and executive action—to compel corporate reporting and/or disclosure of compensation data or wage gap information. This year California implemented a law largely mirroring the EEO-1 Component 2 pay data collection, requiring private employers with one hundred or more employees to report annually pay data by gender, race, and ethnicity, based on the EEO-1 pay bands and job categories, to the state Department of Fair Employment and Housing.<sup>85</sup> Illinois recently passed a pay data reporting law requiring Illinois employers who file EEO-1 reports to submit that data to the state, which will then make the data public. The law also requires employers with 100 or more employees in the state to obtain an “equal pay registration certificate” from the state by providing a report listing each employee and their gender, race, ethnicity, and total wages.<sup>86</sup>

A number of jurisdictions require state or city contractors to affirmatively report employee pay data as a condition of applying for a contract, or maintaining a contract.<sup>87</sup> In many of these jurisdictions, such as New Jersey, public works and service contractors are required to report on numbers of employees broken down by gender, race, and compensation data across job categories and/or pay bands.<sup>88</sup> Minnesota requires that businesses seeking or having contracts for goods and services of \$500,000 or more with the state must submit an “equal pay compliance statement,” signed by the chair of the board or the CEO, to the Minnesota Commissioner of Human Rights in order to contract with the state; Minnesota does not require reporting or disclosure of the underlying data, although this data could be requested as part of an audit.<sup>89</sup>

Other countries have begun to pass legislation requiring analysis and disclosure of compensation data, as well. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Norway, Spain, Sweden, and the United Kingdom have all taken steps to require analysis, reporting, and either government or public disclosure of compensation by gender.<sup>90</sup> Research from abroad demonstrates the positive impact of reporting or disclosing compensation and wage gap metrics. For example, Denmark’s 2006 Act on Gender Specific Pay Statistics mandates that companies with over thirty-five employees report on gender pay gaps.

A recent study of the law showed that from 2003 to 2008, the gender pay gap at mandatory reporting firms shrank 7% relative to the pre-regulation wage gap.<sup>91</sup> In Australia, reporting requirements apply to companies with one hundred or more employees. The pay gap has declined by more than four percentage points between 2013, when reporting began, and 2019—though a report issued in 2018 showed uneven results across industries with little progress in sectors such as accommodations and food service; health care and social assistance; and information, media and telecommunications.<sup>92</sup>

As of 2018, the United Kingdom requires public and private employers with at least 250 employees to annually submit to the U.K. Equality and Human Rights Commission, and publish on a publicly accessible website, information designed to show whether there is a difference in the average pay of their male and female employees, including: (1) the mean and median hourly rate of pay, (2) bonus pay paid to male and female employees, (3) proportions of male and female employees who were paid bonus pay, and (4) the proportions of male and female employees in preset pay bands by quartiles.<sup>93</sup> The government developed a guidance for employers regarding the collection and calculation of relevant data, and provided a portal on the government's website for submitting the data.<sup>94</sup> The data is publicly available and searchable on both a U.K. government website and various media websites.<sup>95</sup>

Since 2018, more than 10,000 companies have complied with the new regulation, including multinational U.S.- based companies with U.K. operations such as Apple, Adobe, and JP Morgan. Media organizations analyzed the data by employer, industry, and pay quartile, and published the results, publicly revealing the companies with the largest disparities.<sup>96</sup> Many companies also filed publicly accessible action plans, demonstrating that the reporting requirement spurred companies to explain their data and develop a plan to address disparities.<sup>97</sup> Nevertheless, the U.K. law has been criticized for failing to *require* employers to publish an action plan or report steps toward meeting their goals toward closing the wage gap—an improvement that some analysts recommend should apply in future changes to the U.K.'s law and to disclosure requirements elsewhere.<sup>98</sup> In addition, the U.K. is considering expanding its reporting and disclosure requirement to address race and ethnicity-based pay gaps.<sup>99</sup>

## **2. Reporting and disclosures by public issuers**

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires a public company to disclose the ratio of the compensation of CEO to the median compensation of its employees. In 2015, the Securities and Exchange Commission (SEC) issued the final rule implementing this legislative provision which requires companies to disclose: (1) the median of the annual total compensation of all its employees, except the CEO; (2) the annual total compensation of its CEO; and (3) the ratio of those two amounts. The rule requires disclosure of the pay ratio in registration statements, proxy and information statements, and annual reports that call for executive compensation disclosure.<sup>100</sup> Disclosure of employee compensation metrics by race and gender would be a natural complement to the existing Dodd-Frank requirement.

In the last several years, the SEC has solicited public comment on, and explored the concept of, mandating disclosure of environmental, social, and governance (ESG) information, including diversity and inclusion data.<sup>101</sup> To date it has refused to do so. In August 2020, the SEC approved a revision to Regulation S-K requiring public companies to include disclosures about "human capital" or workforce resources, but declined to provide a definition of the term or specific guidelines for the disclosures.<sup>102</sup> A recent report observed that most of the human capital disclosures filed lacked specific workforce data.<sup>103</sup>

Nevertheless, shareholder pressure has resulted in voluntary disclosures by some corporations. Arjuna Capital, an investment firm focused on sustainability and impact investing with an emphasis on gender and racial wage gaps, recently reported that "over the last seven years, at least 11 different investor groups have

filed 132 shareholder proposals at more than 69 companies, and many more have been engaged through shareholder dialogues.”<sup>104</sup> The shareholder campaign has primarily focused on encouraging companies in the financial services, consumer, healthcare, and technology/communications sectors to disclose gender and racial compensation metrics. Arjuna describes important developments as a result of the campaign, including the recommendation of proxy advisory firms like Institutional Shareholder Services (ISS) and Glass Lewis to shareholders that they vote in favor of these proposals.<sup>105</sup> Arjuna has helped secure Citigroup’s public disclosure of median pay gaps, and has helped secure agreements with numerous public companies to disclose median pay gaps, rather than adjusted wage gap figures, to take into account wage differences for the firm as a whole.<sup>106</sup>

### **C. Standardizing compensation-setting, and reducing reliance on salary negotiation and prior salary**

Setting compensation based on negotiation, rather than predetermined, objective standards and metrics can exacerbate gender and racial wage gaps, and create disparities between new and current employees. Women are less likely to negotiate for higher pay than men when they receive a job offer: in part, no doubt, because women who negotiate for higher pay are perceived more negatively than men who negotiate;<sup>107</sup> and in part because, based on their own prior experience with compensation, women are likely to expect and accept lower pay than men, assuming that such pay is consistent with the market rate.<sup>108</sup>

Limiting the use and scope of negotiation can narrow wage disparities between male and female employees, and for people of color—and taking these steps will also help avoid liability under the law, which can arise when employers rely on negotiation as a primary method of pay setting. Some companies have established compensation structures and practices to increase transparency and reduce discretion in pay-setting, including the use of salary ranges and objective criteria to set compensation, creating fixed salaries based on position or title, and prohibiting negotiation.<sup>109</sup>

During a negotiation, employers commonly rely on applicant’s current or prior salary to determine what salary to offer an applicant, and for applicants who have received unequal pay or suffered pay discrimination in a past job, salary history information ensures that the effects of past discrimination will follow them from one job to the next. According to a recent study by Harvard Business Review, a significant percentage of employers who conduct pay equity audits found that relying on applicants’ salary history is a key driver of gender pay gaps within their companies.<sup>110</sup> It is well-documented that women, especially women of color, face overt discrimination and unconscious biases in the workplaces, including in pay.<sup>111</sup> By using a woman’s salary history to evaluate her suitability for a position or to set her new salary, new employers allow past discrimination to drive hiring and pay decisions, which in turn, keeps women’s pay stagnant.<sup>112</sup> Gender-based discrimination in pay is further compounded by race for women of color.

Use of salary history as a pay-setting mechanism not only perpetuates these gender- and race-based disparities in the workforce, but it is also an imperfect proxy for an applicant’s value or interest in a position. For example, as the pandemic has driven millions of women out of the workforce, extended time out of the workforce further limits the relevance of an applicant’s salary history. Relying on salary history can lead to depressed wages for individuals who have previously worked in the public sector or in non-profits and are moving into the private sector. It can also deprive senior individuals with higher salaries who are looking to change jobs or re-enter the workforce the opportunity to be considered for lower paying jobs they might seek.

In 2016, Massachusetts became the first state to prohibit employers from seeking salary history from job applicants,<sup>113</sup> and thirteen states and Puerto Rico have followed.<sup>114</sup> Several governors and mayors have issued executive orders<sup>115</sup> and local municipalities have passed ordinances or issued human resources

policies incorporating similar bans.<sup>116</sup> The Paycheck Fairness Act ensures that an employer may rely on salary history if it is voluntarily provided by applicant, but only after the employer makes an offer of employment with an offer of compensation, and only to support a wage higher than the wage offered by the employer.

Recent research shows that state salary history bans are helping to narrow gender and racial wage gaps, including increasing employer transparency when it comes to pay.<sup>117</sup> These bans have resulted in higher wages for job-changers by an average of 8% for women and 13% for African Americans compared to control groups, according to a Boston University analysis of the effects of salary history bans in several states.<sup>118</sup>

#### **D. Using and communicating objective, measurable metrics for performance evaluations**

Studies show that unconscious gender bias is pervasive and leads men's skills, experience, and performance to be overvalued by employers, while those of women are undervalued.<sup>119</sup> Unconscious bias can drive gender pay disparities, particularly where performance evaluations and compensation setting is primarily based on subjective, discretionary decisions.<sup>120</sup> Structured compensation systems and objective performance evaluation criteria help reduce or eliminate ambiguity that can result in biased decisions at important points, including hiring, promotion, and awarding incentive payments.<sup>121</sup> Moreover, sharing such evaluation criteria and metrics with employees helps increase trust of management. Helping employees better understand expectations and justifications for employment decisions may lead to greater engagement and motivation.

Employers can also take steps to ensure that performance measures actually reflect employee performance and are not a reflection of factors outside employee control such as market swings, assignment of projects or clients, or a global pandemic. Despite the significant impact of the pandemic on workplace norms and expectations, not all employers have taken sufficient action in response. For instance, a recent study by McKinsey found that “[l]ess than a third of companies have adjusted their performance review criteria to account for the challenges created by the pandemic, and only about half have updated employees on their plans for performance reviews or their productivity expectations during COVID-19. That means many employees—especially parents and caregivers—are facing the choice between falling short of pre-pandemic expectations that may now be unrealistic, or pushing themselves to keep up an unsustainable pace.”<sup>122</sup> This failure to adjust performance and productivity metrics will affect women, people with disabilities or health conditions, and caregivers disproportionately, affecting their opportunities for advancement and earnings.

#### **IV. Closing the wage gap requires a broader policy agenda promoting economic security for women and families.**

Measures promoting pay transparency, and worker access to and control over pay information, are a critical element of ensuring compensation equity. But wage gaps are also the result of gendered and racist stereotypes about women's work, and outdated workplace structures and policies, including low wages, lack of accommodations for pregnant workers, lack of paid leave and stable work schedules, lack of access to affordable child care, or union support, that make it hard for women to get and keep good jobs, and advance and become leaders at work. While the House has already passed key legislation in the 117<sup>th</sup> Congress including the Paycheck Fairness Act (H.R. 7), the Equality Act (H.R. 5), and the Protecting the Right to Organize (PRO) Act (H.R. 842), we need a number of other policies to address longstanding structural issues, including:

- Raising the federal minimum wage to \$15 an hour by 2025 and phasing out any exclusions, including those that currently apply to tipped workers and people with disabilities, as the Raise the Wage Act (H.R. 603) would do.
- Providing job-protected paid leave to ensure that working people are able to take the time they need to care for themselves and their families without risking their livelihoods.

- Providing large-scale public investments in our care infrastructure to ensure that families can care for their loved ones, that the women who do this work are paid living wages, and that families can find and afford high-quality care, not just during the pandemic but into the future, through legislation based on the American Jobs Plan and the American Families Plan.
- Ensuring the availability of refundable tax credits like the Child Tax Credit and the Earned Income Tax Credit (and, for 2021, the Child and Dependent Care Tax Credit), and making improvements to these credits enacted in the American Rescue Plan to boost workers' incomes and ameliorate wage disparities.
- Extending collective bargaining rights to public service workers across the country, a majority of whom are women, through the Public Service Freedom to Negotiate Act (H.R. 3463 in the previous Congress).
- Giving working people more predictability, stability, and voice in their work schedules by advancing the Schedules That Work Act (H.R.5004 in the previous Congress) and the Part-Time Worker Bill of Rights (H.R. 5991 in the previous Congress).
- Protecting the rights of domestic workers and others excluded from key labor and employment protections through the Domestic Workers Bill of Rights (H.R. 3760 in the previous Congress).
- Ensuring pregnant workers are no longer forced to choose between a healthy pregnancy and a paycheck by passing the Pregnant Workers Fairness Act (H.R. 1065).
- Addressing workplace harassment by advancing the BE HEARD in the Workplace Act (H.R. 2148 in the previous Congress) and the EMPOWER Act. (H.R. 1521 in the previous Congress).

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We cannot build back an economy that works for everyone without ensuring that people can work with equality, safety, and dignity—starting with equal pay. Proactive measures to close gender and race wage gaps are critical steps toward ensuring this becomes reality.

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- <sup>1</sup> NAT'L WOMEN'S LAW CTR. (NWLC), THE RAISE THE WAGE ACT: VALUING WORKING PEOPLE AND ADVANCING EQUAL PAY (Mar. 2021), <https://nwlc.org/wp-content/uploads/2019/10/RTWA-FS-2021-v3.pdf>.
- <sup>2</sup> *Id.*
- <sup>3</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2020), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> Jasmine Tucker, *The Wage Gap Has Robbed Women of Their Ability to Weather COVID-19*, NWLC (Mar. 2021), <https://nwlc.org/resources/the-wage-gap-has-robbed-women-of-their-ability-to-weather-covid-19>.
- <sup>7</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO, *supra* note 3.
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.*
- <sup>10</sup> NWLC, WOMEN EXPERIENCE A WAGE GAP IN NEARLY EVERY OCCUPATION (Apr. 2018), <https://nwlc.org/resources/women-experience-and-wage-gap-in-nearly-every-occupation/>.
- <sup>11</sup> Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECON. RESEARCH (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>.
- <sup>12</sup> See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO, *supra* note 3, at 1.
- <sup>13</sup> *Id.*
- <sup>14</sup> Tucker, *supra* note 6, at 2.
- <sup>15</sup> *Id.*
- <sup>16</sup> "Front-line workforce" is defined using the methodology outlined in Hye Jin Rho, Hayley Brown, & Shawn Fremstad, *A Basic Demographic Profile of Workers in Front-line Industries*, CTR. ON ECON. AND POL'Y RES. (Apr. 2020), <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.
- <sup>17</sup> Tucker, *supra* note 6, at 3.
- <sup>18</sup> *Id.*
- <sup>19</sup> For instance, women account for 77.1% of the health care workforce, and women—disproportionately Black women and Latinas—make up more than eight in ten of those working as home health aides, personal care aides, and nursing assistants. Claire Ewing-Nelson, *More Than Three in Four of the Health Care Workers Fighting COVID-19 Are Women*, NWLC (Dec. 2020), <https://nwlc.org/resources/more-than-three-in-four-of-the-health-care-workers-fighting-covid-19-are-women>.
- <sup>20</sup> Claire Ewing-Nelson, *One in Five Child Care Jobs Have Been Lost Since February, and Women Are Paying the Price*, NWLC (Aug. 2020), <https://nwlc.org/resources/one-in-five-child-care-jobs-have-been-lost-since-february-and-women-are-paying-the-price>.
- <sup>21</sup> Tucker, *supra* note 6, at 4.
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.*
- <sup>24</sup> Amanda Fins, *Women in Leisure and Hospitality Are Among the Hardest Hit by Job Losses and Most at Risk of Covid-19 Infection*, NWLC (Nov. 2020), <https://nwlc.org/wp-content/uploads/2020/11/LeisureFS.pdf>.
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- <sup>26</sup> Claire Ewing-Nelson & Jasmine Tucker, *Only About One Third of the 916,000 Jobs Gained Last Month Went to Women*, NWLC (Apr. 2021), <https://nwlc.org/wp-content/uploads/2021/04/March-Jobs-Day-2021-v1.pdf>.
- <sup>27</sup> See Amanda Fins, *COVID-19 and the Ensuing Recession Puts Women in Retail at Risk*, NWLC (July 2020), <https://nwlc.org/resources/covid-19-and-the-ensuing-recession-puts-women-in-retail-at-risk>.
- <sup>28</sup> NWLC calculations based on U.S. Department of Labor, Bureau of Labor Statistics, *Employment Situation Summary, Historical Data for Table B-5a: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted*, <https://www.bls.gov/web/empsit/ceseeb5a.htm>.

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- <sup>29</sup> Claire Ewing-Nelson, *As State and Local Governments Face a Fiscal Crisis, Women's Jobs Are on the Line*, NWLC (July 2020), <https://nwlc.org/wp-content/uploads/2020/07/Governmentworkersfactsheet-2.pdf>.
- <sup>30</sup> NWLC calculations based on U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, Historical Data for Table B-5a: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, <https://www.bls.gov/web/empsit/ceseeb5a.htm>.
- <sup>31</sup> See Ewing-Nelson & Tucker, *supra* note 26.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> Claire Ewing-Nelson, *Another 275,000 Women Left the Labor Force in January*, NWLC (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf>.
- <sup>36</sup> See BLS, *American Time Use Survey, Table 1: Time spent in detailed primary activities and percent of the civilian population engaging in each activity, averages per day by sex, 2019 annual averages*, U.S. DEP'T OF LABOR (June 25, 2020), <https://www.bls.gov/news.release/atus.t01.htm>.
- <sup>37</sup> See, e.g., Sarah Jane Glynn, *Breadwinning Mothers Are Critical to Families' Economic Security*, CTR. FOR AM. PROGRESS (Mar. 2021), <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm>.
- <sup>38</sup> In 2018, the average annual cost of full-time care ranged from just under \$4,000 to more than \$20,000 a year, depending on the location, the type of care, and the age of the child. See *The US and the High Price of Child Care*, CHILD CARE AWARE OF AM. (2019), <https://info.childcareaware.org/download-price-of-care-extras?submissionGuid=7a44f26f-34ad-4e21-b1a3-4f35843e2a11> (Appendices I and II).
- <sup>39</sup> Leila Schochet, *The Child Care Crisis Is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 2019), <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce>.
- <sup>40</sup> Sarah Jane Glynn et al., *How COVID-19 Sent Women's Workforce Progress Backward*, CTR. FOR AM. PROGRESS (Oct. 2020), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward>.
- <sup>41</sup> *A Year of Strength & Loss: The Pandemic, The Economy, & The Value of Women's Work*, NWLC (Mar. 2021), [https://nwlc.org/wp-content/uploads/2021/03/Final\\_NWLC\\_Press\\_CovidStats.pdf](https://nwlc.org/wp-content/uploads/2021/03/Final_NWLC_Press_CovidStats.pdf).
- <sup>42</sup> Misty L. Heggeness & Jason M. Fields, *Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Aug. 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html>.
- <sup>43</sup> U.S. Dep't of Labor, Bureau of Labor Statistics (BLS), *National Compensation Survey: Employee Benefits in the United States* (Mar. 2020), <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf>.
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> Reade Pickert et al., *Moms Are Struggling to Break Back Into the U.S. Workforce*, BLOOMBERG (Apr. 16, 2021), <https://www.bloomberg.com/news/articles/2021-04-16/labor-participation-rate-2021-women-especially-moms-lag-behind-everyone-else>. See also Matthew O'Brien, *The Terrifying Reality of Long-Term Unemployment*, THE ATLANTIC (Apr. 13, 2013), <https://www.theatlantic.com/business/archive/2013/04/the-terrifying-reality-of-long-term-unemployment/274957>.
- <sup>47</sup> See generally, Robert Paul Hartley et al., *A Lifetime's Worth of Benefits: The Effects of Affordable, High-quality Child Care on Family Income, the Gender Earnings Gap, and Women's Retirement Security*, NWLC & CTR. ON POVERTY & SOCIAL POL'Y AT COLUMBIA UNIV. (Mar. 2021), <https://nwlc.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits-FD.pdf>.
- <sup>48</sup> Amanda Fins, *NATIONAL SNAPSHOT: POVERTY AMONG WOMEN AND FAMILIES, 2020*, NWLC (Dec. 2020), <https://nwlc.org/resources/national-snapshot-poverty-among-women-families-2020/>.
- <sup>49</sup> *Id.*

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<sup>50</sup> Claire Ewing-Nelson & Jasmine Tucker, ONE IN SIX LATINAS AND ONE IN FIVE BLACK, NON-HISPANIC WOMEN DON'T HAVE ENOUGH TO EAT, NWLC (Nov. 2020), <https://nwlc.org/resources/one-in-six-latinas-and-one-in-five-black-non-hispanic-women-dont-have-enough-to-eat/>.

<sup>51</sup> Heidi Hartmann, Jeff Hayes & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy*, INST. FOR WOMEN'S POL'Y RES. (IWPR) (Jan. 13, 2014), <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy/>.

<sup>52</sup> See *id.* (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to that of their male counterparts).

<sup>53</sup> Kweilin Ellingrud et al., *The Power of Parity: Advancing Women's Equality in the United States*, MCKINSEY GLOBAL INST. (Apr. 2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap were only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

<sup>54</sup> Research indicates that workers are more productive when salary is transparent. See Emiliano Huet-Vaughn, *Striving for Status: A Field Experiment on Relative Earnings and Labor Supply*, UC BERKELEY (Nov. 2013), [http://econgrads.berkeley.edu/emilianohuet-vaughn/files/2012/11/JMP\\_e.pdf](http://econgrads.berkeley.edu/emilianohuet-vaughn/files/2012/11/JMP_e.pdf).

<sup>55</sup> Vivian Hunt et al., *Why Diversity Matters*, MCKINSEY & CO. (Feb. 2015), <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters> (finding diverse workforces correlate with better financial performance, because diversity helps to recruit the best talent, enhance the company's image, increase employee satisfaction, and improve decision making, including fostering innovation); Sylvia Ann Hewlett, et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation>. Conversely, companies that fail to address gender wage disparities and discriminatory employment practices could damage their reputation and brand among consumers, leading to a loss of profits and shareholder value. See Natasha Lamb & Will Klein, *A Proactive Approach to Wage Equality is Good for Business*, EMP. REL. TODAY (July 16, 2015), <http://arjuna-capital.com/news/a-proactive-approach-to-wage-equality-is-good-for-business/>.

<sup>56</sup> A recent survey found that the top reasons Millennials and Gen Zs plan to leave their current employment in the next two years are “[d]issatisfaction with pay and lack of advancement and professional development opportunities.” THE DELOITTE GLOBAL MILLENNIAL SURVEY 2019 (2019), <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>; Lauren Noel & Christie Hunter Arscott, WHAT YOU SHOULD KNOW ABOUT THE YOUNG, FEMALE TALENT AT YOUR ORGANIZATION, ICEDR (2015), [https://www.icedr.org/research/documents/14\\_millennial\\_snapshot.pdf](https://www.icedr.org/research/documents/14_millennial_snapshot.pdf) (finding that Millennial women leave jobs primarily for more compensation).

<sup>57</sup> Courtney Seiter, *The Counterintuitive Science of Why Transparent Pay Works*, FASTCOMPANY.COM (Feb. 26, 2016), <http://www.fastcompany.com/3056975/the-future-of-work/the-transparent-pay-revolution-inside-the-science-and-psychology-of-open->

<sup>58</sup> See Lamb & Klein, *A Proactive Approach*, *supra* note 55; Natasha Lamb, *Closing the Pay Gap: Silicon Valley's Gender Problem*, ETHICAL BOARDROOM (June 7, 2016), <https://ethicalboardroom.com/closing-the-pay-gap-silicon-valleys-gender-problem/>; Trillium Asset Mgm't, Letter to Citigroup Shareholders (Apr. 16, 2016), <https://www.sec.gov/Archives/edgar/data/831001/000121465916010905/j415160px14a6g.htm>.

<sup>59</sup> NATASHA LAMB & MICHAEL PASSOFF, RACIAL AND GENDER PAY SCORECARD (4th ed.), ARJUNA CAPITAL AND PROXY IMPACT 5 (Mar. 2021), *Racial-Gender-Pay-Scorecard-2021-Arjuna-Capital-and-Proxy-Impact.pdf*; Anders Keitz, *Why Arjuna Capital's Natasha Lamb Is a Force in Pay Equity Push*, THE STREET, Mar. 9, 2018, <https://www.thestreet.com/markets/corporate-governance/arjuna-s-lamb-a-force-in-pay-equity-push-14516800>; Trillium Asset Mgm't, Letter to Citigroup Shareholders, Apr. 16, 2016, <https://www.sec.gov/Archives/edgar/data/831001/000121465916010905/j415160px14a6g.htm>.

<sup>60</sup> Bloomberg, *Bloomberg Gender Equality Index 2021 Gender Reporting Framework* 5-6 (June 2020), [https://data.bloomberglp.com/company/sites/46/2020/05/GEI2021-Framework\\_PDF\\_FNL.pdf](https://data.bloomberglp.com/company/sites/46/2020/05/GEI2021-Framework_PDF_FNL.pdf).

<sup>61</sup> While the wage gap may have shrunk recently by some measures, it has done so for the wrong reasons. An analysis of weekly earnings data during the pandemic reveals although that the wage gap narrowed, it was because the lowest paid women were more likely to lose their jobs during COVID, meaning they are no longer



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counted when calculating women’s median weekly earnings. *Equal Pay Day 2021: The Results of a COVID-Impacted Economy*, INST. WOMEN’S POL’Y RESEARCH (Mar. 24, 2021), <https://iwpr.org/media/in-the-lead/equal-pay-day-2021-the-results-of-a-covid-impacted-economy>.

<sup>62</sup> *Combating Punitive Pay Secrecy Policies*, NWLC (Feb. 2019) <https://nwlc.org/wp-content/uploads/2019/02/Combating-Punitive-Pay-SecrecyPolicies.pdf>.

<sup>63</sup> In FY 2020, retaliation accounted for 55.8% of all charges filed. See EEOC, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data (Feb. 26, 2021), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data>.

<sup>64</sup> Shengwei Sun et al., IWPR, ON THE BOOKS, OFF THE RECORD: EXAMINING THE EFFECTIVENESS OF PAY SECRECY LAWS IN THE U.S. (Jan. 2021), <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf>. “The proportion of private-sector workers who reported that they are formally prohibited from discussing their pay fell from 25 percent in 2010 to 16 percent in 2017-18, but at the same time, the share of private-sector workers reporting that they are discouraged from discussing their pay increased from 41 percent to 44 percent.” *Id.*

<sup>65</sup> NWLC, PROGRESS IN THE STATES FOR EQUAL PAY (Nov. 2020), <https://nwlc.org/wp-content/uploads/2019/11/State-Equal-Pay-Laws-2020-11.13-v2.pdf>. Research indicates that some workers fared better in states that passed such laws. See Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, INDUS. REL. (Oct. 2015) (finding that “women with higher education levels who live in states that have outlawed pay secrecy have higher earnings, and that the wage gap is consequently reduced”), [https://www.researchgate.net/publication/281769563\\_Pay\\_Secrecy\\_and\\_the\\_Gender\\_Wage\\_Gap\\_in\\_the\\_United\\_States](https://www.researchgate.net/publication/281769563_Pay_Secrecy_and_the_Gender_Wage_Gap_in_the_United_States).

<sup>66</sup> DEP’T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP), *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 80 Fed. Reg. 54934 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.

<sup>67</sup> 29 U.S.C. § 157; see also *Flex Frac Logistics, L.L.C. v. N.L.R.B.*, 746 F.3d 205, 208 (5th Cir. 2014) (“A ‘workplace rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] section 8(a)(1)[of the NLRA].”) (internal citations omitted); *N.L.R.B. v. Inter-Disciplinary Advantage, Inc.*, 312 F. App’x 737, 744 (6th Cir. 2008); *Campbell Elec. Co. & Local Union 153*, 340 N.L.R.B. 825, 836 (2003); *N.L.R.B. v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. N.L.R.B.*, 989 F.2d 1502, 1510–11 (8th Cir. 1993); *N.L.R.B. v. Vanguard Tours, Inc.*, 981 F.2d 62, 66–67 (2d Cir. 1992); *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 916, 918 (3d Cir. 1976).

<sup>68</sup> See NWLC, COMBATING PUNITIVE PAY SECRECY POLICIES (Feb. 2019), <https://nwlc.org/resources/combating-punitive-pay-secrecy-policies/>.

<sup>69</sup> See 29 U.S.C. § 152 (defining “employer” and “employee”). In 2006, the National Labor Relations Board issued three decisions providing further guidance for determining supervisor status under the NLRA. See *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006); *Croft Metals Inc.*, 348 NLRB No. 38 (Sept. 29, 2006); *Golden Crest Health Care Ctr.*, 348 NLRB No. 39 (Sept. 29, 2006).

<sup>70</sup> 29 U.S.C. § 152.

<sup>71</sup> *Salary Range Transparency Reduces the Wage Gap*, NWLC (Jan. 2020), <https://nwlc.org/wp-content/uploads/2018/06/Salary-Range-and-Transparency-FS-2020-1.17.2020-v2.pdf>

<sup>72</sup> Sun et al., *supra* note 64.

<sup>73</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GENDER PAY DIFFERENCES: THE PAY GAP FOR FEDERAL WORKERS HAS CONTINUED TO NARROW, BUT BETTER QUALITY DATA ON PROMOTIONS ARE NEEDED (Dec. 2020), [https://www.gao.gov/products/gao-21-67#:~:text=The%20overall%20pay%20gap%20between,of%20Personnel%20Management%20\(OPM\)](https://www.gao.gov/products/gao-21-67#:~:text=The%20overall%20pay%20gap%20between,of%20Personnel%20Management%20(OPM)).

<sup>74</sup> See NWLC, PROMOTING PAY TRANSPARENCY TO FIGHT THE GENDER WAGE GAP: CREATIVE INTERNATIONAL MODELS (Mar. 2020), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf> (providing an overview of the legislation); FAWCETT SOCIETY, THE GLOBAL INSTITUTE FOR WOMEN’S LEADERSHIP AND THOMSON REUTERS FOUNDATIONS, GENDER PAY GAP REPORTING: A COMPARATIVE ANALYSIS (Sept. 2020), <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>.

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- <sup>75</sup> See Morten Bennesen et al., *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them*, HARV. BUS. REV. (Jan. 23, 2019), <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them>; AUSTRALIA'S GENDER PAY GAP STATISTICS 2020, <https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>; Progress Report, 2017-18, Australian Government Workplace Equality Agency (2019), <https://www.wgea.gov.au/sites/default/files/documents/wgea-progress-report-2017-18.pdf>.
- <sup>76</sup> See HARV. BUS. REV. ANALYTIC SERVS., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do 3* (2019), <https://resources.trusaic.com/pay-equity-resources-hub/harvard-business-review-trusaic-pulse-survey>.
- <sup>77</sup> *Id.*; see Hunt, *Why Diversity Matters*, *supra* note 55, at 9–13.
- <sup>78</sup> See U.S. DEP'T OF LABOR, OFCCP, NON-DISCRIMINATION IN COMPENSATION; COMPENSATION DATA COLLECTION TOOL, ADVANCED NOTICE OF PROPOSED RULEMAKING, 76 Fed. Reg. 49398 (Aug. 10, 2011); OFCCP, GOVERNMENT CONTRACTORS, REQUIREMENT TO REPORT SUMMARY DATA ON EMPLOYEE COMPENSATION, NOTICE OF PROPOSED RULEMAKING, 79 Fed. Reg. 46561 (Aug. 8, 2014).
- <sup>79</sup> U.S. OFFICE OF MGM'T AND BUDGET, NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION (Sept. 29, 2016), <https://www.reginfo.gov/public/do/DownloadNOA?requestID=275763>.
- <sup>80</sup> *Nat'l Women's Law Ctr. v. Office of Mgm't & Budget*, Civ. Action No. 17-cv-2458 (D.D.C.), Order dated Oct. 29, 2019; Order dated Feb. 10, 2020.
- <sup>81</sup> EEOC, Notice of Information Collection – Request for New Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2, 84 Fed. Reg. 48138 (Sept. 12, 2019).
- <sup>82</sup> OFCCP, INTENTION NOT TO REQUEST, ACCEPT, OR USE EMPLOYER INFORMATION REPORT (EEO-1) COMPONENT 2 DATA, 84 Fed. Reg. 64932 (Nov. 25, 2019).
- <sup>83</sup> EEOC, *EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection* (July 16, 2020), <https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection>.
- <sup>84</sup> NAT'L ACADS. OF SCI., ENG'G, AND MED., PANEL TO EVALUATE THE QUALITY OF COMPENSATION DATA COLLECTED FROM U.S. EMPLOYERS BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION THROUGH THE EEO-1 FORM, <https://www.nationalacademies.org/our-work/panel-to-evaluate-the-quality-of-compensation-data-collected-from-us-employers-by-the-equal-employment-opportunity-commission-through-the-eeo-1-form#sectionCommittee>.
- <sup>85</sup> 2020 Cal. Legis. Serv. Ch. 363 (S.B. 973), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973).
- <sup>86</sup> Ill. Laws P.A. 101-656 (SB 1480), <https://www.ilga.gov/legislation/101/SB/PDF/10100SB1480lv.pdf>.
- <sup>87</sup> See N.M. Exec. Order No. 2009-049 (Dec. 18, 2009), <http://www.generalservices.state.nm.us/uploads/FileLinks/864df4748b2440569b3af8a95ce155d8/eo2009-049.pdf>; N.Y. Exec. Order No. 162 (Jan. 9, 2017), <https://www.governor.ny.gov/news/no-162-ensuring-pay-equity-state-contractors>; A.B. 1, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Pub. L. 1945, c.169, and supplementing 1952, c.9 (C.34:11-56.1 et seq.) (2018)), [http://www.njleg.state.nj.us/2018/Bills/A0500/1\\_11.HTM](http://www.njleg.state.nj.us/2018/Bills/A0500/1_11.HTM); <https://www.nj.gov/oag/dcr/downloads/030220-Equal-Pay-Act-Guidance-Appendices-Only.pdf>; Albuquerque, N.M., Ordinance 15-47 (May 21, 2015), <https://cabq.legistar.com/LegislationDetail.aspx?ID=2242779&GUID=5F9F9F24-2151-4912-85D3-5B8ADB27F29A&FullText=1>; San Francisco, Cal., The San Francisco Equal Pay Ordinance (Dec. 23, 2015), <https://sf-hrc.org/sites/default/files/Report%20on%20the%20Equal%20Pay%20Ordinance.pdf>.
- <sup>88</sup> See New Jersey Equal Pay Act, New Jersey Department of Labor and Workforce Development (n.d.), <https://www.nj.gov/labor/equalpay/equalpay.html>.
- <sup>89</sup> See Minn. Stat. Ann. § 363A.44; FAQs on Equal Pay Certificate, [https://mn.gov/mdhr/assets/Equal\\_Pay\\_FAQ-2017\\_tcm1061-297767.pdf](https://mn.gov/mdhr/assets/Equal_Pay_FAQ-2017_tcm1061-297767.pdf).
- <sup>90</sup> For an overview of this legislation, see *supra* note 74; see also Louron Pratt, *Spanish government introduces law for businesses to disclose gender pay gap figures*, EMPLOYEE BENEFITS (Oct. 13, 2020), <https://employeebenefits.co.uk/spanish-government-pay-gap-law/>.

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<sup>91</sup> See *Bennedsen et al.*, *supra* note 75.

<sup>92</sup> See AUSTRALIA'S GENDER PAY GAP STATISTICS 2020 & AUSTRALIAN GOVERNMENT WORKPLACE EQUALITY AGENCY, *supra* note 75.

<sup>93</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017 No. 172, (U.K.), [http://www.legislation.gov.uk/uksi/2017/172/pdfs/uksi\\_20170172\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/172/pdfs/uksi_20170172_en.pdf); *What is the Equality Act?* EQUALITY AND HUM. RIGHTS COMM'N (Oct. 30, 2017), <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>; Government Equalities Office, *Gender Pay Gap Reporting*, GOV.UK (Jan. 28, 2017), <https://www.gov.uk/government/news/gender-pay-gap-reporting>.

<sup>94</sup> *Id.* see also *Report your gender pay gap data*, GOV.UK, <https://www.gov.uk/report-gender-pay-gap-data>.

<sup>95</sup> See *Search and compare gender pay gap data*, GOV.UK, <https://gender-pay-gap.service.gov.uk/>; Lucy Meakin & Hayley Warren, *Second Year of U.K. Gender Pay Gap Reporting Indicates Little Has Changed So Far*, BLOOMBERG (Apr. 4, 2019), <https://www.bloomberg.com/graphics/2019-uk-gender-pay-gap/>. In 2020 the U.K. government suspended reporting requirements due to the effects of the COVID-19 pandemic, but recently reinstated them. *Coronavirus: Gender pay gap enforcement delayed by a further six months*, BBC NEWS (Feb. 23, 2021), <https://www.bbc.com/news/uk-politics-56167925>.

<sup>96</sup> See Aleksandra Wisniewska et al., *Gender Pay Gap: women still short-changed in the UK*, FIN. TIMES (Apr. 23, 2019), <https://ig.ft.com/gender-pay-gap-UK-2019/>; see also *id.* Analyses of the pay quartile data demonstrate that in most companies, women are underrepresented in higher paying jobs and overrepresented in low paying jobs. See, e.g., Daniella McGuigan, *Gender Pay Gap Reporting—Happy Anniversary?*, NAT'L L. REV. (Apr. 5, 2019), <https://www.natlawreview.com/article/gender-pay-gap-reporting-happy-anniversary>.

<sup>97</sup> Hannah Murphy, *UK Pay Data Force Companies to Mind the Gender Gap*, FIN. TIMES (Sept. 26, 2017), <https://www.ft.com/content/dd21e03e-634a-11e7-8814-0ac7eb84e5f1> (e.g., “After digging into its pay data, Virgin Money drew up several initiatives to improve gender balance generally in its highest ranks”); MCKINSEY & CO., UK GENDER PAY GAP REPORT 2018 (2018), <https://www.mckinsey.com/uk/our-people/uk-gender-pay-gap-report>; Cisco, CISCO UK GENDER PAY GAP REPORT (2018), [https://www.cisco.com/c/dam/en\\_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf](https://www.cisco.com/c/dam/en_us/about/inclusion-collaboration/uk-gender-pay-gap-report.pdf).

<sup>98</sup> THOMPSON REUTERS FOUNDATION, ET AL., GENDER PAY GAP REPORTING: A COMPARATIVE ANALYSIS (Oct. 14, 2020), <https://www.kcl.ac.uk/giwl/assets/gender-pay-gap-reporting-a-comparative-analysis.pdf>.

<sup>99</sup> *UK Businesses Call for Mandatory Reporting of Ethnicity Pay Gap*, THE FIN. INFO (Apr. 18, 2021), <https://thefinanceinfo.com/2021/04/18/uk-business-groups-call-for-mandatory-reporting-of-ethnicity-pay-gap/>

<sup>100</sup> Deb Lifshay, *The CEO Pay Ratio: Data and Perspectives from the 2018 Proxy Season*, HARV. L. SCH.F. ON CORP. GOVERNANCE (Oct. 14, 2018), <https://corpgov.law.harvard.edu/2018/10/14/the-ceo-pay-ratio-data-and-perspectives-from-the-2018-proxy-season/>. Note, however, that companies can select their own methodologies and that the CEO-to-median worker pay ratios are not intended to be comparable across companies or industries.

<sup>101</sup> See Securities and Exchange Comm'n, Concept Release: Business and Financial Disclosure Required by Regulation SK, Release No. 33-10064; 34-77599; File No. S7-06-16 (April 16, 2016), <https://www.sec.gov/rules/concept/2016/33-10064.pdf>; Proposing Release, Modernization of Regulation S-K Items 101, 103, and 105, 84 Fed. Reg. 44358 (Aug. 23, 2019).

<sup>102</sup> See Securities and Exchange Comm'n, Final Rule, Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726 (Aug. 26, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-19182.pdf>.

<sup>103</sup> See Tom Zanki, *Most Firms Withhold Hard Data in Human Capital Disclosures*, LAW360 (Apr. 27, 2021), <https://www.law360.com/articles/1379085/most-firms-withhold-hard-data-in-human-capital-disclosures>.

<sup>104</sup> LAMB & PASSOFF, *supra* note 59, at 5.

<sup>105</sup> *Id.* at 10.

<sup>106</sup> *Id.* at 10–11.

<sup>107</sup> See LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE* (2007); Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007).

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<sup>108</sup> See LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003) (finding that women ask for less when they do negotiate and that women business school graduates who negotiate fare 30 percent worse than their peers who are men); Jenny Save-Soderbergh, *Are Women Asking for Low Wages? Gender Differences in Wage Bargaining Strategies and Ensuing Bargaining Success*, STOCKHOLM U. SWEDISH INST. SOC. RES. WORKING PAPER SERIES 7/2007 10 (2007), [https://ideas.repec.org/p/hhs/sofiwp/2007\\_007.html](https://ideas.repec.org/p/hhs/sofiwp/2007_007.html).

<sup>109</sup> See Maya Raghu & Caitlin Lowell, *Employer Leadership to Advance Equal Pay: Examples of Promising Practices*, NWLC (Mar. 2017), <https://nwlc.org/wp-content/uploads/2017/03/Equal-Pay-Practices-4.19.17.pdf>.

<sup>110</sup> HARV. BUS. REV. ANALYTIC SERVS., *Navigating the Growing Pay Equity Movement*, *supra* note 76, at 5.

<sup>111</sup> For example, in a recent experiment where scientists were presented with identical resumes—one with the name John and the other with the name Jennifer—the scientists offered the male applicant for a lab manager position a salary of nearly \$4,000 more than the female applicant. Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE UNITED STATES OF AMERICA (Aug. 2012), <http://www.pnas.org/content/109/41/16474.abstract#aff-1>.

<sup>112</sup> The class action lawsuit *Beck v. Boeing*, 203 F.R.D. 459 (W.D. Wash. 2000), settled in 2004 for \$72.5 million, illustrates how reliance on past salary leads to employers paying women less. Boeing set the salaries of newly hired employees as their immediate past pay plus a hiring bonus which was set as a percentage of their past salary. Raises were also set as a percentage of an employee's salary. Boeing claimed it set pay based on a neutral policy, but since women had lower average prior salaries than men, these pay practices led to significant gender disparities in earnings that compounded over time and could not be justified by performance differences or other objective criteria.

<sup>113</sup> M.G.L. ch. 149 § 105A.

<sup>114</sup> Cal. Lab. Code § 432.3; 2019 Colo. Legis. Serv. Ch. 247 (S.B. 19-085); Conn. Gen. Stat. Ann. § 31-40z; Del. Code Ann. tit. 19 § 709B; Haw. Rev. Stat. § 378-2.4; Ill. Pub. Act 101-017; 2019 Me. Legis. Serv. Ch. 35 (S.P. 90) (L.D. 278); 2018 NJ A.B. 1094 (enacted); 2019 Sess. Law News of N.Y. Ch. 94 (S. 6549); Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885; P.R. Laws Ann. tit. 29 § 251-259; 21 V.S.A. § 495(m); 2019 WA H.B. 1696 (enacted); H.B. 123, 2020 Leg., 441st Sess. (Md. 2020).

<sup>115</sup> See, e.g., Exec. Order No. 2019-02 (Jan. 15, 2019); Mi. Exec. Order No. 2019-10 (Jan. 8, 2019); N.J. Exec. Order No. 1 (Feb. 1, 2018); N.Y. Exec. Order No. 161 (Jan. 9, 2017); N.C. Exec. Order No. 93 (April 2, 2019); Pa. Exec. Order No. 2018-18-03 (Sept. 4, 2018); Chi. Exec. Order No. 2018-1 (Apr. 10, 2018); *Mayor Keisha Lance Bottoms Bans "Salary History Box" Requirement on City of Atlanta Applications*, ATLANTAGA.GOV (Feb. 18, 2019), <https://www.atlantaga.gov/Home/Components/News/News/11942/672>; Pittsburgh, PA Ord. No. 2017-1121 (Jan. 30, 2017); Jackson, MS Ord. No. 2019-13(1); Columbia, SC Ord. No. 2019-022 (August 9, 2019); *Mayor Biskupski signs Gender Pay Equity policy on first day of Women's History Month*, SLC.GOV (Mar. 8, 2018) <https://www.slc.gov/blog/2018/03/01/mayor-biskupski-signs-gender-pay-equity-policy-on-first-day-of-womens-history-month/>; Louisville, KY Ord. No. 066 (May 22, 2018); Kansas City, MO Ord. No. 190380 (May 23, 2019); St. Louis, MO Ord. No. 71095 (Jan. 2020).

<sup>116</sup><sup>116</sup> *Governor Northam Announces Employment Equity Initiative for State Agencies*, VIRGINIA.GOV (June 20, 2019), <https://www.governor.virginia.gov/newsroom/all-releases/2019/june/headline-841165-en.html>; Montgomery County, MD, County Code art. II, § 33-25 (2019); *Richland County votes to 'Ban the Box,' won't ask job applicants about criminal past* (June 5, 2019), <https://www.thestate.com/news/local/article231151348.html>; D.C. Dep't of Hum. Res., District Personnel Instruction No. 11-92 (Nov. 17, 2017), [https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm\\_11B\\_92\\_salary\\_history\\_instruction.pdf](https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_11B_92_salary_history_instruction.pdf); New Orleans Exec. Order No. mjl 17-01 (Jan. 25, 2017); Cincinnati, OH Ord. No. 0083-2019 (Mar. 13, 2019); Toledo, OH Ord. No. 173-19 (June 26, 2019); Kansas City, MO Ord. No. 190380 (May 23, 2019); San Francisco, CA Ord. No. 170350 (July 19, 2017); Philadelphia, PA Ord. No. 160840; N.Y.C. Exec. Order No. 21 (Nov. 4, 2016); Albany Cty. Loc. L. No. P for 2016 (Dec. 17, 2017); Westchester Cty. Res. No. 28-2018 (July 9, 2018); Suffolk Cty. Loc. L. No. 25-2018 (No. 20, 2018).

<sup>117</sup> Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap; Early Evidence from California's Salary History Ban* (Feb. 1, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3277664](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277664).

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<sup>118</sup> NWLC, ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB (Dec. 2020), <https://nwlc.org/wp-content/uploads/2020/01/Asking-for-Salary-History-2020-12.7.2020.pdf>.

<sup>119</sup> Iris Bohnet et al., *When Performance Trumps Gender Bias: Joint Versus Separate Evaluation*, HARV. BUS. SCH. WORKING PAPER 12-083 4 (Mar. 16, 2012), <http://www.hbs.edu/faculty/publication%20Files/12-083.pdf>; Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (Mar. 2007), [http://gender.stanford.edu/sites/default/files/motherhoodpenalty\\_0.pdf](http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf).

<sup>120</sup> See Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 ORG. SCI. 601, 613-14 (2002).

<sup>121</sup> See *id.* at 614.

<sup>122</sup> McKinsey & Co., *Women in the Workplace 2020* (Sept. 30, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>.