

EMPLOYMENT

FACT SHEET

Combating Punitive Pay Secrecy Policies

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Nearly fifty years after President Kennedy signed the Equal Pay Act into law, the typical woman working full time year-round is paid just 77 cents on the dollar compared to her male counterpart. All too often, wage disparities go undetected because employers maintain policies that punish employees who voluntarily share salary information with their coworkers. When employees fear retaliation, there is a serious "chilling effect" on any conversations about wages. Moreover, the federal law that protects some employees from such retaliation is full of loopholes that have allowed the unfortunate practice of penalizing employees who discuss their wages to flourish, and only six states prohibit employers from firing employees who reveal their wages.¹ As a result, workers can be paid unfair wages for years prior to discovering pay disparities, if they discover them at all. Even if they do discover disparities, they may feel powerless to address them because they fear retaliation for violating the pay secrecy policy. In order to detect and combat pay discrimination, employees must be able to share salary information with their coworkers without fear of punishment.

Pay Secrecy and Confidentiality Policies Are Prevalent in Many Private-Sector Workplaces

Many workplaces have official policies requiring employees to keep the amount they are paid secret and banning them from sharing this information with their coworkers. A 2010 study by the Institute for Women's Policy Research found that almost a quarter of private-sector employees work in settings with formal policies against discussing salary information and/or where workers can be punished for discussing their salaries.² Even in workplaces without formal pay secrecy policies, managers still discourage employees from disclosing their wages to their coworkers – the same study found that an additional 38 percent of private-sector workers said this was the case.³ Indeed, over 61 percent of the private-sector workers surveyed reported that discussing their wages is either prohibited or discouraged.⁴

As the Supreme Court has recognized, the "[f]ear of retaliation is the leading reason" why many victims of pay and other discrimination "stay silent."⁵ Workers who violate formal pay secrecy policies (or ignore their managers' informal admonitions) face potential retaliation, including the prospect of being fired, demoted, or passed over for raises and promotions. Fear of retaliation only exacerbates the many hurdles employees face in gathering information that would suggest they have experienced wage discrimination. In fact, in many instances, workers learn of egregious pay discrimination only by accident.⁶

Federal Law Fails to Adequately Protect Workers Against Retaliation

The National Labor Relations Act⁷ (NLRA) bars employers from "interfer[ing] with, restrain[ing], or coerc[ing]"⁸ employees who engage in protected conduct, defined



as “concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection.”⁹ Courts and the National Labor Relations Board (NLRB) have found that conversations about wages are necessary for collective bargaining or other mutual aid or protection and that rules that ensure that employees can never talk about their wages can be unfair labor practices because they can inhibit these protected labor practices.¹⁰

Despite the NLRA’s protections, a number of loopholes have led employers to commonly adopt pay secrecy policies, including those that are punitive. *First*, the NLRA permits employers to institute policies that interfere with conduct protected by the NLRA if there is a “legitimate and substantial business justification” for doing so.¹¹ Courts have interpreted this provision broadly, allowing, for example, prohibitions on any discussion of wages during working time¹² and on employees’ distribution of wage information compiled by the company.¹³

Second, the NLRA only protects a fairly narrow group of employees. It does not protect supervisors, a group that is defined broadly as including “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . [if the foregoing] requires the use of independent judgment.”¹⁴ This means that a manager would have no means of objecting to a policy that prevented her from ever learning about gender-based pay disparities. *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁵ illustrates that point. Lilly Ledbetter was one of the few female supervisors at the Goodyear plant in Gadsden, Alabama, and worked there for close to two decades. She faced sex discrimination at the plant and was told by her boss that he did not think a woman should be working there. Goodyear did not allow its employees to discuss their wages, and Ms. Ledbetter did not learn that she was being paid less than all her male colleagues until she received an anonymous note sharing this information, after she had worked at the plant for many years.

Because she was a “supervisor,” the NLRA would not have prevented Goodyear from firing or disciplining Ms. Ledbetter if she had asked her coworkers about their salaries. Some courts have also held that university faculty,¹⁶ nurses,¹⁷ bus line dispatchers,¹⁸ supervisors

who work only seasonally,¹⁹ sports editors,²⁰ and a wide range of other employees are supervisors. Moreover, the NLRB has limited jurisdiction; for example, public sector workers are excluded from its protection.

Third, the remedies available under the NLRA are extremely limited and fail to effectively deter employers from adopting pay secrecy policies that penalize workers. Even if a worker qualifies for NLRA protection and shows that he or she was retaliated against illegally because of a policy that constitutes an unfair labor practice, the only remedies are reinstatement, limited back pay,²¹ and an order that the employer rescind its policy.²² No damages are available²³ to fully compensate workers for the harm they may have suffered as a result of being punished for discussing their wages. If an employee quickly finds another job paying as much, the employer will be liable for little or no back pay. The frequent use of formal and informal penalties for violating pay secrecy policies illustrates that the NLRA does not effectively deter the widespread use of such policies.

Moreover, the procedure for bringing NLRA complaints is lengthy, burdensome, and potentially expensive, further discouraging workers from seeking to enforce their rights. Workers must bring complaints to the NLRB within six months of when they knew or should reasonably have known of the unfair policy.²⁴ The NLRB’s large backlog – which will likely grow even longer due to upcoming budget cuts²⁵ – causes serious delays before decisions are reached.

Employees Who Share Pay Information Should Be Protected From Retaliation

The Paycheck Fairness Act would establish a bright-line rule banning retaliation against workers who discuss their wages. This change in the law would greatly enhance employees’ ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination. The protection would apply to all employees covered by the Equal Pay Act’s ban against pay discrimination, including supervisors. And workers who believe they have faced retaliation would have options and remedies beyond those available under the NLRA, including full compensation for any injury caused by retaliation. These clear rules would provide workers with much-needed certainty that their livelihoods will not be at stake if they discuss their wages.

Congress has thus far failed to pass the Paycheck Fairness Act, but in the meantime the administration could protect individuals employed by federal contractors from retaliation for sharing wage information, by means of an executive order or other executive action. The Department of Labor estimates that about 22 percent of the American workforce is employed by federal

contractors.²⁶ Whether through legislation or executive action, employees have a compelling need for protection from retaliation for sharing wage information with coworkers. This protection will empower workers to combat gender-based wage disparities and enhance enforcement of pay discrimination laws.

- 1 The six states are California, Colorado, Illinois, Maine, Michigan, and Vermont. Cal. Lab. Code §§ 232, 232.5, Colo. Rev. Stat. Ann. § 24-34-402(l)(i) (exempting employers that are exempted from provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq.), 820 Ill. Comp. Stat. Ann. 112/10-b, Me. Rev. State. Ann. tit. 26, § 628, Mich. Comp. Laws Ann. § 408.483a(13a)(1), Vt. Stat. Ann. tit. 21, § 495(a)(8)(B)(i)-(iii).
- 2 Ariane Hegewisch, Claudia Williams & Robert Drago, Institute for Women's Policy Research, Pay Secrecy and Wage Discrimination, June 2011 (available at <http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications>).
- 3 *Id.*
- 4 *Id.*
- 5 Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846, 852 (2009).
- 6 *E.g., Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (plaintiff learned of a pay disparity when a printout listing her own and co-workers' salaries mysteriously appeared on her desk); *McMillan v. Mass. Soc 'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff discovered a pay disparity when her salary and the salaries of other department heads were published in the newspaper).
- 7 29 U.S.C. §§ 151-169 (1970).
- 8 *Id.* at § 158(a).
- 9 *Id.* at § 157.
- 10 *NLRB v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510-11(8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d Cir. 1992); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976); *Campbell Electric Co. & Local Union 153*, 340 N.L.R.B. 825, 2003 WL 22295365, at **18 (2003); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).
- 11 See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).
- 12 See *Vanguard Tours, Inc.*, 981 F.2d at 67; *Jeannette Corp.*, 532 F.2d at 919.
- 13 *International Business Machines Corp.*, 265 N.L.R.B. 638 (1982).
- 14 29 U.S.C. § 152.
- 15 548 U.S. 903 (2006).
- 16 *NLRB v. Yeshiva University*, 444 U.S. 672 (1994).
- 17 *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 577-78 (1994).
- 18 *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964).
- 19 *NLRB v. Fla. Agric. Supply Co., Div. of Plymouth Cordage Co.*, 328 F.2d 989 (5th Cir. 1964).
- 20 *NLRB v. Medina County Publ'ns, Inc.*, 735 F.2d 199 (6th Cir. 1984).
- 21 Robert M. Worster, III, If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA 's Goals Are Defeated Through Inadequate Remedies, 38 U. RICH. L. REV. 1073, 1076 (2004).
- 22 Employees who have been retaliated against have a duty to mitigate the harm by immediately seeking alternative employment and the average back pay award is very small – in 2009, the most recent year for which data is available, the average back pay award was just \$5205. NWLC calculation: in 2009, 14,825 employees were receiving back pay from employers and employers paid \$75,754,271 in back pay. 100 NLRB ANN. REP. 100 (2009).
- 23 *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).
- 24 *In re Cab Assoc. & Bldg. Material Teamsters, Local 282*, 340 N.L.R.B. 1391, 1392 (2003).
- 25 Ryan Grim, NLRB: *White House Muzzled Us in Budget Debate*, HUFFINGTON POST, Mar. 9, 2011, http://www.huffingtonpost.com/2011/03/09/nlrb-white-house-muzzled-n_833354.html.
- 26 Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, Facts on Executive Order 11246 — Affirmative Action, available at <http://www.dol.gov/ofccp/regs/compliance/aa.htm> (last visited Apr. 10, 2012).