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# Mind the Gap: Bridging Gender Wage Inequality in Louisiana

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# Mind the Gap: Bridging Gender Wage Inequality in Louisiana

## INTRODUCTION

The public policy of Louisiana is that “a woman who performs *public service* for the state is entitled to be paid the same compensation for her services as is paid to a man who performs the same kind, grade, and quality of service, and a distinction in compensation may not be made because of sex.”<sup>1</sup> Strikingly, Louisiana women who are not in public service are not entitled to the same protections.<sup>2</sup> President Bill Clinton has acknowledged, “[y]ou wouldn’t tolerate getting to vote in three out of every four elections. You wouldn’t like it if someone said you could only pick up three out of every four paychecks. But that is, in effect, what we have said to the women of America.”<sup>3</sup> This statement is even more applicable in Louisiana, where the wage gap is nearly 14% higher than the national average.<sup>4</sup>

Scholars in the field have recognized that federal gender wage equality provisions are dying out from various “ailments,” including “inefficiencies, excessive costs, bureaucratic red tape, and obsolescence.”<sup>5</sup> A legislative measure aimed at fixing these ailments could do much to aid all Louisiana workers and to bridge the gender wage gap that has plagued Louisiana for

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1. LA. REV. STAT. § 23:662 (2016) (emphasis added).
2. See generally *id.* §§ 23:662, 23:332.
3. President William J. Clinton, Remarks on The Equal Pay Act (June 10, 1998).
4. At the time of President Clinton’s speech, the national gender wage gap meant women earned 73.2 cents on the male dollar, the equivalent of approximately three out of every four paychecks a man received. *The Wage Gap Over Time*, NAT’L WOMEN’S L. CTR., [http://nwlc.org/wp-content/uploads/2015/08/wage\\_gap\\_over\\_time\\_overall\\_9.21.15.pdf](http://nwlc.org/wp-content/uploads/2015/08/wage_gap_over_time_overall_9.21.15.pdf) [<https://perma.cc/YC5S-LRJX>] (last visited Oct. 13, 2016). Louisiana’s gender wage gap for 2014 was 65 cents, meaning women in Louisiana would receive fewer than two out of every three paychecks a man in Louisiana receives. AM. ASS’N OF UNIV. WOMEN, *THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7* (2015) [hereinafter *THE SIMPLE TRUTH*]. This Comment was written before the most current version of *The Simple Truth* was released. The most current version can be accessed here: [http://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The-Simple-Truth](http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth) [<https://perma.cc/TN6P-ZPA2>].
5. Andrew Brenton, Comment, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practice*, 26 WIS. J.L. GENDER & SOC’Y 349, 350 (2011).

decades.<sup>6</sup> The gender wage gap<sup>7</sup> in Louisiana in 2014 was 35% and has been increasing in the last few years.<sup>8</sup> This statistic makes Louisiana last in the nation, where women make an average of 65 cents on the male dollar.<sup>9</sup> Nationally, women make an average of 79 cents on the male dollar, a wage gap of 21%.<sup>10</sup>

Historically, the gender wage gap has been explained away by several factors, including education, occupational segregation, childbearing, childrearing, and labor force participation.<sup>11</sup> As these factors have become less prevalent over time,<sup>12</sup> many have realized that a portion of the gender wage gap still cannot be explained and is attributable to gender wage discrimination.<sup>13</sup>

Currently, a woman in Louisiana has several methods to claim wage discrimination, including filing a claim under federal or state law.<sup>14</sup> However, these laws are insufficient and do not offer adequate protections to employees, specifically because Louisiana operates under two equal pay regimes, thus affording better protections to one group of working women over others.<sup>15</sup> Louisiana employees need a new statutory regime that is efficient, clear, and gives all employees equal rights and protections regardless of gender or employer. This regime should provide protection to both public and private employees in Louisiana. Therefore, the Louisiana Legislature should modify and pass Senate Bill 219, which failed during the 2015 Regular Legislative Session.<sup>16</sup>

Part I of this Comment provides background on the history of the gender wage gap in the United States and in Louisiana, as well as historical explanations and justifications for the existence of the gap. Part II and Part

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6. See generally *Hearing on S.B. 219 Before the H. Comm. on Labor & Indus. Relations*, 2015 Leg., Reg. Sess. (La. 2015).

7. The gender wage gap is the difference in the annual wages received by men and women, often for similar work. *THE SIMPLE TRUTH*, *supra* note 4, at 5.

8. *Id.* at 7.

9. *Id.*

10. *Id.*

11. Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool For Closing the Residual Gender Wage Gap*, 50 HARV. J. LEGIS. 385, 393 (2013).

12. See discussion *infra* Part I.A.1–6.

13. Kulow, *supra* note 11, at 393.

14. See Equal Pay Act of 1963, 29 U.S.C. § 206 (2012); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012); Lilly Ledbetter Fair Pay Act, 42 U.S.C. § 2000e (2012); Fair Labor Standards Act, 29 U.S.C. § 201 (2012); 29 U.S.C. § 216(b) (2012); LA. REV. STAT. §§ 23:303, 23:332, 23:665 (2016).

15. LA. REV. STAT. §§ 23:662, 23:332.

16. *Hearing on S.B. 219*, *supra* note 6.

III explain the current federal and state statutory frameworks governing wage discrimination, respectively. These sections include a discussion of the rights, exceptions, defenses, and procedural mechanisms used to sue under each statutory provision, as well as how the different statutory provisions are interrelated or contradictory. Additionally, Part II and Part III illustrate the current problems, difficulties, and ambiguities associated with both the federal and state laws governing equal pay rights and unlawful employment practices. Part IV discusses the recently proposed Louisiana bill, Senate Bill 219, which failed to make it to the House floor in the 2015 Regular Legislative Session, and analyzes changes that are needed for the proposal to successfully pass through the Louisiana Legislature and jumpstart the process of bridging gender wage inequality in Louisiana.

#### I. THE HISTORY AND EFFECT OF THE GENDER WAGE GAP

The term “gender wage gap” refers to the difference in women’s and men’s annual median earnings.<sup>17</sup> This figure is reported as a ratio, but can also be reported as an actual pay gap in annual median earnings from the previous year.<sup>18</sup> The earnings ratio is the ratio of women’s annual median salary and men’s annual median salary from the previous year.<sup>19</sup> For example, women in the United States earned an annual median salary of \$39,621 in 2014 and men earned an annual median salary of \$50,383.<sup>20</sup> Therefore, the earnings ratio expressed as a percentage in 2014 was 79%.<sup>21</sup> The gender wage gap expressed as an actual pay gap is the difference in men’s annual median salary and women’s annual median salary, expressed as a percentage when divided by men’s annual median salary.<sup>22</sup> For example, using the 2014 data from above, the pay gap was 21%.<sup>23</sup> The gender wage gap can also be reported in terms of men’s and women’s median weekly earnings. The median weekly earnings tend to lead to a smaller gender wage gap than the annual median salary calculations. Thus, in 2014, the weekly gender wage gap was approximately 18%.<sup>24</sup> Although

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17. THE SIMPLE TRUTH, *supra* note 4, at 5.

18. *Id.*

19. *Id.*

20. *Id.* at 7.

21. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 41 (2015).

22. *Id.*

23. *Id.*

24. THE SIMPLE TRUTH, *supra* note 4, at 17.

data confirms the existence of the gender wage gap, critics attempt to rationalize any wage discrepancy with an array of contributing factors.

### A. Explaining Away the Gender Wage Gap

Although the gender wage gap has narrowed since the 1950s,<sup>25</sup> it is far from being eradicated. Many scholars have suggested that the gap is explained by a variety of factors, including women's personal choices, such as childbearing and childrearing; ethnicity and age; education level; occupational segregation; experience and labor force participation; and employer discrimination.<sup>26</sup> However, none of these factors are sufficient to justify the entire gap between the wages of men and women.

#### 1. Childbearing and Childrearing

Society expects that women will become mothers.<sup>27</sup> Unfortunately, this societal expectation affects women's status in the labor market.<sup>28</sup> Employers presume women will be short-term workers, as it is expected

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25. The following are statistics of the pay gap for each year from 1960-2013: 1960-60.7%; 1961-59.3%; 1962-59.3%; 1963-58.9%; 1964-59.1%; 1965-59.9%; 1966-57.6%; 1967-57.8%; 1968-58.2%; 1969-60.5%; 1970-59.4%; 1971-59.5%; 1972-57.9%; 1973-56.6%; 1974-58.8%; 1975-60.2%; 1976-58.9%; 1977-59.4%; 1978-59.7%; 1979-60.2%; 1980-59.2%; 1981-61.7%; 1982-63.6%; 1983-63.7%; 1984-64.6%; 1985-64.3%; 1986-65.2%; 1987-66%; 1988-68.7%; 1989-71.6%; 1990-69.9%; 1991-70.8%; 1992-71.5%; 1993-72%; 1994-71.4%; 1995-73.8%; 1996-74.2%; 1997-73.2%; 1998-73.2%; 1999-72.3%; 2000-73.7%; 2001-76.3%; 2002-76.6%; 2003-75.5%; 2004-76.6%; 2005-77%; 2006-76.9%; 2007-77.8% or 22.2%; 2008-77.1%; 2009-77%; 2010-76.9%; 2011-77%; 2012-76.5%; and 2013-78.3%. *The Wage Gap Over Time*, *supra* note 4.

26. Kulow, *supra* note 11, at 393.

27. See Jessica Valenti, *Not Wanting Kids is Entirely Normal*, ATLANTIC (Sept. 19, 2012), <http://www.theatlantic.com/health/archive/2012/09/not-wanting-kids-is-entirely-normal/262367/> [<https://perma.cc/2G44-HQLM>]; Jessica Valenti, *Are All Women Born to be Mothers?*, WASH. POST (Aug. 31, 2012), [https://www.washingtonpost.com/opinions/are-all-women-born-to-be-mothers/2012/08/31/b5df2f0e-f2b1-11e1-adc6-87dfa8eff430\\_story.html?utm\\_term=.55a11d84ad0b](https://www.washingtonpost.com/opinions/are-all-women-born-to-be-mothers/2012/08/31/b5df2f0e-f2b1-11e1-adc6-87dfa8eff430_story.html?utm_term=.55a11d84ad0b) [<https://perma.cc/4P68-D4ZF>]. See also January W. Payne, *Forever Pregnant*, WASH. POST (May 16, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/15/AR2006051500875.html> [<https://perma.cc/BFJ2-72H9>]; Kay Johnson et al., *Recommendations to Improve Preconception Health and Health Care—United States*, 55 MORBIDITY & MORTALITY WEEKLY REP., Apr. 21, 2006, at 7.

28. *Id.*

they will be out of the labor force for certain periods to raise a family.<sup>29</sup> Employers do not typically associate this expectation with men as fathers.<sup>30</sup> A study by the American Association of University Women found that ten years after graduating college, 23% of mothers did not work, but 17% worked part-time.<sup>31</sup> However, during the same period, only 1% of fathers did not work, and only 2% worked part-time.<sup>32</sup> By 1998, mothers contributed to income in approximately 65.3% of families with children under 18, although only 46.6% did in 1975.<sup>33</sup> These statistics show that over time women have entered the workforce in more numbers and have contributed more to their family's income.

When mothers decide to return to the workforce, they are affected by the “motherhood” or “mommy” penalty, which is the idea that working mothers will face even larger disparities in pay or benefits than men or even women who do not have children.<sup>34</sup> One study found that men receive a 2.1% boost after having a child, a benefit not afforded to working mothers.<sup>35</sup> Childbearing and childrearing alone do not account for the entire gender wage gap, however, as women without children still experience inequity in pay compared to men. Another study found that a

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29. See Derek Thompson, *The Biggest Myth About the Gender Wage Gap*, ATLANTIC (May 30, 2013), <http://www.theatlantic.com/business/archive/2013/05/the-biggest-myth-about-the-gender-wage-gap/276367/> [https://perma.cc/Y4LM-FB3C].

30. See Peggy Drexler, *Stay-at-Home Dads Will Never Become the Norm*, TIME (Aug. 21, 2013), <http://ideas.time.com/2013/08/21/viewpoint-stay-at-home-dads-will-never-become-the-norm/> [https://perma.cc/5WN2-MCHW].

31. JUDY GOLDBERG DEY & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN, BEHIND THE PAY GAP (2007), <https://www.aauw.org/files/2013/02/Behind-the-Pay-Gap.pdf> [https://perma.cc/5WVA-9JM8].

32. *Id.*

33. *New and Stronger Remedies Are Needed to Reduce Gender-Based Wage Discrimination: Hearing Before the U.S. Senate Comm. on Health, Educ., Labor and Pensions*, 106th Cong. 11 (2000) (statement of Heidi I. Hartmann, Director, Institute for Women's Policy Research). In 2010, mothers who had children under six had a labor force participation rate of 62.5%. NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 20–21 (2013).

34. Allison Linn, *Women Can Have It All—But They'll Likely Pay a Mommy Penalty For It*, NBC NEWS (Nov. 15, 2013, 5:11 AM), <http://www.nbcnews.com/business/women-can-have-it-all-theyll-likely-pay-mommy-penalty-2D11591390> [https://perma.cc/THT4-GA2V].

35. *Equal Pay for Equal Work? New Evidence on the Persistence of the Gender Pay Gap: Hearing Before Joint Econ. Comm.*, 111th Cong. 2 (2009). This boost is called the “daddy bonus.” See Linn, *supra* note 34.

woman without children who worked full-time earned only 82% of what a full-time working male earned.<sup>36</sup> For a woman without children, losing 18 cents per male dollar is better than the 23-cent difference that mothers lose, but this factor does not account for the entirety of gender wage inequality.<sup>37</sup>

## 2. *Ethnicity and Age*

Even though Asian-American, Hispanic, African-American, and Caucasian women all experience different levels of wage disparity when compared with men, this disparity does not eliminate all wage inequality for women.<sup>38</sup> Hispanic and African-American women make approximately 89% of what their male counterparts make, while Caucasian and Asian-American women make 78% and 79%, respectively, of what their male counterparts earn.<sup>39</sup> Therefore, even race or ethnicity cannot explain the entire gender wage gap, just as other explanations offered by critics cannot.

As do many of the justifications offered by those who believe the gender wage gap is a myth, age does not diminish the wage gap. Many women start a career with a smaller pay disparity compared to men who do the same type and classification of work, but that gap will only expand over time.<sup>40</sup> For example, in 2012, women aged 16 to 24 earned approximately 89 cents on the male dollar, women aged 24 to 34 earned about 90% of what men made, and women aged 35 and older earned between 75% and 78% of what men of the same age earned.<sup>41</sup> Generally, women will experience a wage

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36. Kulow, *supra* note 11, at 399–400.

37. *Id.*

38. THE SIMPLE TRUTH, *supra* note 4, at 11. Nationally, Asian-American women earn approximately 90% of what a Caucasian male earns. Hispanic and Latina women, however, earned approximately 54% of what a Caucasian male made. *Id.*

39. Alanna Vagianos, *The Gender Pay Gap is Alive and Well in All 50 States, Shows Study*, HUFFINGTON POST (Mar. 13, 2014, 7:06 AM), [http://www.huffingtonpost.com/2014/03/13/gender-wage-gap-study-aaaw\\_n\\_4950430.html](http://www.huffingtonpost.com/2014/03/13/gender-wage-gap-study-aaaw_n_4950430.html) [https://perma.cc/J94X-ZX3H].

40. THE SIMPLE TRUTH, *supra* note 4, at 8.

41. U.S. BUREAU OF LABOR STATISTICS, REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2012, at 9 tbl.1 (2013). In 2013, women aged 20–24 were paid 90% of what men of the same age were paid; women aged 55–64 were paid 77% of what men in the same age range were paid. After age 35, earnings begin to grow more slowly. THE SIMPLE TRUTH, *supra* note 4, at 12.

inequality plateau<sup>42</sup> after age 45 and a drop in wages after age 65.<sup>43</sup> This evidence indicates that although many might expect gender wage disparity to decrease as women age and spend more time in the labor market, this is not always the case, and gender wage inequality can grow with age.

### 3. Education

Similar to age, gender wage disparity can grow as women's education level attainment increases. The gap would presumably be smaller at higher levels of education, but this presumption is not always the reality. From the 1970s to the present, women earned less than men with the same level of education.<sup>44</sup> Nationally, women who earned a high school diploma made approximately \$21,000 per year, and men with a GED or high school diploma earned approximately \$22,000 per year.<sup>45</sup> Women with an advanced degree—including a master's, professional, or doctoral degree—earned an average annual salary of \$52,000, while men with a bachelor's degree earned approximately \$58,000 per year.<sup>46</sup> Finally, women with a master's degree are paid on average 70 cents on the dollar for what men with a master's degree are paid, and even women with a doctorate degree are paid less than men with a master's degree.<sup>47</sup> This evidence shows that even as women attain higher levels of education, their wages compared to men only decrease.<sup>48</sup>

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42. Generally, the wage inequality of women between the age of 45 and the age of 65 does not fluctuate. THE SIMPLE TRUTH, *supra* note 4, at 12 fig. 5.

43. THE SIMPLE TRUTH, *supra* note 4, at 12.

44. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 2-3 (1976). "At every level of academic achievement, women's median earnings are less than men's median earning, and in some cases, the gender pay gap is larger at higher levels of education." THE SIMPLE TRUTH, *supra* note 4, at 13.

45. Kulow, *supra* note 11, at 396.

46. *Id.*

47. *Id.*; Louisiana Women and the Wage Gap, NAT'L P'SHIP FOR WOMEN AND FAMILIES, <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/9-2015-la-wage-gap.pdf> [<https://perma.cc/8SJQ-UHRM>] (last visited Oct. 13, 2016).

48. The examples in the text show that women with a high school diploma earned approximately 95% of what their male counterpart earned, women with an advanced degree earned 89.6% of what a man with a bachelor's degree earned, and women with a master's degree earned 70% of what a man with a master's degree was paid, demonstrating that wage inequality actually increases as a woman's education level rises.



In Louisiana, the wage gap also exists as higher levels of educational attainment are reached, meaning education alone cannot account for the entire gender wage gap in the state.<sup>49</sup> For example, a Louisiana woman with a high school diploma was paid only 55 cents compared to her male counterpart, and a woman with a bachelor's degree was paid 75% of what a man with a bachelor's degree was paid.<sup>50</sup> As with United States women, Louisiana women who attain higher education levels—and who would likely have more occupational opportunities—still experience significant wage inequality.

#### 4. Occupational Segregation

Critics of the gender wage gap also attempt to justify wage inequality by referencing occupational segregation between men and women as a major factor.<sup>51</sup> Occupational segregation is the historical sorting of women into certain fields, including teaching, nursing, and the service industry.<sup>52</sup> Those critics who point to this segregation as an explanation of wage inequality argue men and women occupy different categories of work, and those jobs deemed traditionally male pay better than those traditionally categorized as female.<sup>53</sup>

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49. Beth Willinger, *Closing the Gender Wage Gap: How are Louisiana Women Doing?*, NEWCOMB C. CTR. FOR RES. ON WOMEN, <http://www.tulane.edu/~wc/text/wagegap.html> [https://perma.cc/RN6U-8PA2] (last visited Oct. 13, 2016).

50. *The Importance of Fair Pay for Louisiana Women*, NAT'L WOMEN'S L. CTR., [https://nwlc.org/sites/default/files/pdfs/2012equalpay-factsheets/louisiana\\_equalpaystatefactsheet.pdf](https://nwlc.org/sites/default/files/pdfs/2012equalpay-factsheets/louisiana_equalpaystatefactsheet.pdf) [https://perma.cc/EME5-XPUN] (last visited Oct. 13, 2016).

51. Jan Diehm & Margaret Wheeler Johnson, *Gender Wage Gap Heavily Influenced by Occupational Segregation*, HUFFINGTON POST (June 11, 2013, 7:41 PM), [http://www.huffingtonpost.com/2013/06/11/gender-wage-gap\\_n\\_3424084.html](http://www.huffingtonpost.com/2013/06/11/gender-wage-gap_n_3424084.html) [https://perma.cc/G95H-897B]. See also NAT'L EQUAL PAY TASK FORCE, *supra* note 33, at 6–8. However, the National Equal Pay Task Force study shows that occupational segregation accounts for only 28% of the gender wage gap, meaning 73% of the wage gap is unaccounted for after occupational segregation is removed. *Id.* at 17; see also Diehm & Wheeler Johnson, *supra*.

52. NAT'L EQUAL PAY TASK FORCE, *supra* note 33, at 6.

53. Occupational segregation can be viewed in two ways. First, through employer discrimination, meaning an employer is refusing to hire a certain class of employee and second, through employee choices, meaning an employee may not go into a certain field because of things like training and the hours required. NAT'L EQUAL PAY TASK FORCE, *supra* note 33, at 26. In 2014, approximately 40% of women worked in traditionally female occupations, but only 5% of men worked in these jobs. About 43% men worked in traditionally male occupations

Occupational segregation is also a significant issue in Louisiana. Women in Louisiana are generally segregated into jobs deemed traditionally female.<sup>54</sup> In traditionally male jobs, such as business and financial operations, women made \$23,083 less than men; as doctors, \$35,700 less; and in management, \$25,233 less.<sup>55</sup> In fields in which women traditionally are more often employed, women still made less than men. For example, in sales, women made \$23,666 less, and as teachers or librarians, women made \$7,992 less than men.<sup>56</sup> Just 11% of Louisiana women workers occupy the top executive, administrative, or managerial positions in the state.<sup>57</sup> Even when women move into the labor force and into jobs not traditionally deemed women's jobs, gender wage inequality persists.

#### *5. Experience and Labor Force Participation*

Behind the concept of experience and labor force participation is the idea that men experience fewer gaps in employment and as a result have more tenure, experience, training, and participation in the labor force.<sup>58</sup> One study found that women had approximately 12 years of labor experience compared to men's 16 years.<sup>59</sup> The study also found that women worked about 472 hours fewer than men each year.<sup>60</sup> Additionally, estimates state

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and just over 5% of women were in those jobs. Women were likely to work in professional, administrative support, sales, and service occupations, although men were likely to work in construction, maintenance and repair, and production and transportation occupations. THE SIMPLE TRUTH, *supra* note 4, at 15.

54. *Louisiana Women and the Wage Gap*, *supra* note 47.

In the health care and social assistance industry, women are paid just 71 cents for every dollar paid to men. In manufacturing, just 73 cents. In retail trade, 76 cents. And in educational services, women are paid 86 cents for every dollar paid to men. Across all industries, women are paid lower salaries than men.

*Id.* In sales, women are paid just 64 cents for every dollar paid to men. In production, just 67 cents. In management, 77 cents. In office and administrative support occupations, women are paid just 86 cents for every dollar paid to men. *Id.*

55. *Louisiana: State of Pay Inequity*, LA. PROGRESS, [http://www.louisianaprogress.org/wp-content/uploads/2013/04/April\\_2013\\_-\\_Policy\\_Brief\\_-\\_Pay\\_Inequity.pdf](http://www.louisianaprogress.org/wp-content/uploads/2013/04/April_2013_-_Policy_Brief_-_Pay_Inequity.pdf) [https://perma.cc/8MMA-5EFJ] (last visited Oct. 13, 2016).

56. *Id.*

57. Willinger, *supra* note 49.

58. *Id.*

59. Gary Siniscalco et al., *The Pay Gap, The Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 ABA J. LAB. & EMP. LAW 395, 405 (2014).

60. *Id.*

that women spend approximately three times more time outside the workforce than men.<sup>61</sup> However, from 1950 to 1998, women's labor force participation increased from 33.9 million workers to 59.8 million workers.<sup>62</sup> This statistic means women's labor force participation rose by 25.9 million between 1950 and 1998.<sup>63</sup> Meanwhile, men's labor force participation decreased by 11.5 million, falling from 86.4 million to 78.9 million between 1950 and 1998.<sup>64</sup>

During the First and Second World Wars, many women began to work outside the home,<sup>65</sup> and following those wars, the idea of women having a job, other than that of housewife and mother, took root.<sup>66</sup> Unfortunately, this phenomenon is also where the gender wage gap began. When a woman moved into the workforce, her wages were significantly lower than her male counterpart's wages,<sup>67</sup> meaning pay equity did not follow this feminization of the workplace.<sup>68</sup> Some progress toward pay equity was made in the 1980s, as even more women flocked into the national workforce. By 1985, women's labor force participation had increased to

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61. *Id.*

62. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950–1998 and 1998–2005*, MONTHLY LAB. REV., Dec. 1999, at 3, 4.

63. *Id.* at 6.

64. *Id.* Across all age groups, men's labor force participation decreased between 1950 and 1998, while women's labor force participation increased in all age groups except age 65 and older. *Id.* The study predicts that by 2025 the difference in men and women's will be 10.6 million, a significant decrease from the difference of 52.5 million in 1950. *Id.* at 5.

65. See Lyna Tucker, *How Women Helped Win the Great War*, U.S. ARMY (Nov. 10, 2008), [https://www.army.mil/article/14061/How\\_women\\_helped\\_win\\_the\\_Great\\_War](https://www.army.mil/article/14061/How_women_helped_win_the_Great_War) [<https://perma.cc/YV9X-9ZLG>]; *American Women in World War II: On the Home Front and Beyond*, NAT'L WORLD WAR II MUSEUM, <http://www.nationalww2museum.org/learn/education/for-students/ww2-history/at-a-glance/women-in-ww2.html> [<https://perma.cc/2HLL-LK5N>] (last visited Oct. 13, 2016).

66. See *Women and Work After World War II*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/general-article/tupperware-work/> [<https://perma.cc/2CUW-52CL>] (last visited Sept. 29, 2016). See also Elaine Tyler May, *Ambivalent Dreams: Women and the Home after World War II*, 13 J. WOMEN'S HIST. 151, 151–52 (2001).

67. Kulow, *supra* note 11, at 391. In 1950, 28% of women worked outside the home, but half of these women worked only part-time. *Id.* From 1950 to 1960, women earned 59 cents to 64 cents on the male dollar. *Id.*

68. Sharon M. Oster, *The Gender Gap in Compensation: Is There a Policy Problem?: The Gender Wage Gap*, 82 GEO. L.J. 109, 110 (1993). In 1960, 28% of married women were in the labor force, and only 18% of married women with children under six were in the work force. *Id.*

64%, largely due to women with young children entering the labor force.<sup>69</sup> By the 1990s, a majority of United States women worked outside the home, with nearly three-quarters of mothers working full-time.<sup>70</sup> Therefore, the justification that women do not have the training, experience, or participation in the labor force no longer rings as true as it might have in the 1950s and 60s, and the difference in pay cannot be attributed solely to lack of experience, training, or labor force participation.<sup>71</sup>

### 6. *Discrimination*

Even after taking all the preceding explanations into account, a percentage of the gender wage gap still cannot be explained.<sup>72</sup> One study found, after accounting for the preceding factors, a 7% difference still existed in male and female earnings one year after graduation, which grew to a 12% difference ten years after college graduation.<sup>73</sup> The remaining portion of the gender wage gap is likely attributable to discrimination. However, this discrimination against women does not take only the form of wage discrimination. Women are also discriminated against in other aspects of their employment,<sup>74</sup> and this labor force inflexibility makes bridging the gender wage gap difficult.

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69. *Id.*

70. U.S. DEPT. OF COMMERCE, WOMEN IN AMERICA, INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 27 (2011).

71. Kulow, *supra* note 11, at 397–98.

72. *Id.* at 405–06.

73. THE SIMPLE TRUTH, *supra* note 4, at 13. Other estimates state gender discrimination can account for 25% to 40% of the gender wage gap, depending on economists' calculations. Vivien Labaton, *Five Myths About the Gender Pay Gap*, WASH. POST (July 25, 2015), [https://www.washingtonpost.com/opinions/five-myths-about-the-gender-pay-gap/2014/07/25/9e5cff34-fcd5-11e3-8176-f2c941cf35f1\\_story.html?utm\\_term=.9074a25ffe9d](https://www.washingtonpost.com/opinions/five-myths-about-the-gender-pay-gap/2014/07/25/9e5cff34-fcd5-11e3-8176-f2c941cf35f1_story.html?utm_term=.9074a25ffe9d) [<https://perma.cc/LVP7-42HH>].

74. Willinger, *supra* note 49. For example,

[T]he absence of flexible work schedules, sick leave, childcare facilities at educational institutions or work places, the failure of welfare programs to support women through completion of their education, reliable transportation, or assumptions by grammar schools that mothers are available 24/7 also serves as forms of discrimination against women workers.

*Id.*

### B. The Gender Wage Gap in Louisiana

Historically, in Louisiana, the gender wage gap has been substantially larger than the national gap.<sup>75</sup> Unfortunately, because the gender wage gap records for Louisiana are not as plentiful as the national records, only a certain time period of Louisiana data is available.<sup>76</sup> Louisiana women are also in the labor force in fewer numbers than women nationally.<sup>77</sup> However, labor force participation for Louisiana women with young children is almost identical to the national average.<sup>78</sup> Even with Louisiana women composing approximately 44% of the state's workforce,<sup>79</sup> in 2014, Louisiana was again ranked last—coming in at 65 cents on the male dollar,

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75. *Women Can't Afford Unfair Pay Today*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/womenunfairpayfactsheet/> [<https://perma.cc/4WCG-UVTD>] (last visited Oct. 13, 2016). The following are statistics for the gender wage gap in Louisiana during the mid-2000s to the present: 2004–67.9%; 2005–68.6%; 2006–66.2%; 2007–65.4%; 2008–67.3%; 2009–66.4%; 2010–67.2%; 2011–68.8%; 2012–66.9%; and 2013–65.9%. PETER FRONCZEK, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2004 AMERICAN COMMUNITY SURVEY REPORT 8 (2005); JOHN H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2005 AMERICAN COMMUNITY SURVEY REPORT 9 (2006); JOHN H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY REPORT 14 (2007); ALEMAYEHU BISHAW & JESSICA SEMEGA, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY REPORT 13 (2008); DAVID M. GETZ, U.S. CENSUS BUREAU, MEN'S AND WOMEN'S EARNINGS BY STATES AND METROPOLITAN AREAS: 2009, at 4 (2010); *Women Can't Afford Unfair Pay Today*, *supra*; *2011 Wage Gap: State Rankings*, NAT'L WOMEN'S L. CTR., <http://www.nwlc.org/resource/2011-wage-gap-state-rankings> [<https://perma.cc/5TAR-647S>] (last visited Nov. 1, 2016); *The Wage Gap by State for Women Overall*, NAT'L WOMEN'S LAW CTR., [http://www.nwlc.org/sites/default/files/pdfs/wage\\_gap\\_tables\\_2013\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/wage_gap_tables_2013_final.pdf) [<https://perma.cc/XP27-QHNY>] (last visited Nov. 1, 2016).

76. *See supra* note 75.

77. Willinger, *supra* note 49, at 2. In 2002, 60.2% of women in the United States were in the work force, but only 54.2% of Louisiana women were in the work force, making Louisiana 50th among the states and the District of Columbia in female work force participation. *Id.*

78. *Id.* at 3. Approximately 63.2% of Louisiana women with children under six are in the labor force, which is almost identical to the national participation of 63.5%. *Id.*

79. *See Office of Women's Policy Newsletters*, DEP'T OF CHILD. & FAM. SVCS., <http://www.dcf.la.gov/index.cfm?md=pagebuilder&tmp=home&pid=404> [<https://perma.cc/BE8X-REMD>] (last visited Nov. 1, 2016) (scroll down to November 2014).

or a 35% pay gap.<sup>80</sup> Although Louisiana women compose a significant portion of the labor force in the state, their efforts are not rewarded with gender wage equality.

*C. The Effect of the Gender Wage Gap on Louisiana Women and Families*

Families have increasingly come to rely on women's wages to make ends meet.<sup>81</sup> From 1967 to 2012, the percentage of mothers who brought home at least one-fourth of the family's earnings increased from 28% to 63%.<sup>82</sup> Now, approximately 40% of mothers with children under the age of 18 are the family's sole or primary breadwinner.<sup>83</sup> The pay gap can contribute to poor nutrition, poor living conditions, and fewer opportunities for children.<sup>84</sup> Across all families in the United States, income losses attributable to the gender wage gap totaled \$200.6 billion in 1997.<sup>85</sup> This number would be even larger when adjusted for inflation. To these mothers and their families, bridging the gender wage gap is more than a source of pride—it is a necessity to provide for their families.<sup>86</sup>

Reforming the gender wage gap in Louisiana would mean even more to Louisiana women and families, as it is significantly larger than the national average. In Louisiana, women head 16.6% of the households, compared to 12.2% nationally.<sup>87</sup> Additionally, all women in Louisiana who are employed

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80. THE SIMPLE TRUTH, *supra* note 4, at 7. Women in Louisiana earned an annual average of \$31,586, although men in Louisiana earned on average \$48,382. *Id.*

81. *Louisiana Women and the Wage Gap*, *supra* note 47.

82. THE SIMPLE TRUTH, *supra* note 4, at 4.

83. Brigid Schulte, *Nearly 40 Percent of Mothers Are Now the Family Breadwinners, Report Says*, WASH. POST (May 29, 2013), [https://www.washingtonpost.com/local/nearly-40-percent-of-mothers-are-now-the-family-breadwinners-report-says/2013/05/28/8de03ec8-c7bb-11e2-9245-773c0123c027\\_story.html](https://www.washingtonpost.com/local/nearly-40-percent-of-mothers-are-now-the-family-breadwinners-report-says/2013/05/28/8de03ec8-c7bb-11e2-9245-773c0123c027_story.html) [<https://perma.cc/PH5V-NBGV>].

84. Lindsay Blakely, *Face the Facts: The Gender Pay Gap Is Real*, CBS MONEY WATCH (Mar. 14, 2011, 4:27 PM), <http://www.cbsnews.com/news/face-the-facts-gender-pay-gap-is-real/> [<https://perma.cc/84L7-YTLQ>].

85. *New and Stronger Remedies Are Needed to Reduce Gender Based Wage Discrimination: Hearing Before the U.S. Senate Comm. on Health, Educ., Labor and Pensions*, *supra* note 33 (statement of Heidi I. Hartmann, Director, Institute for Women's Policy Research).

86. THE SIMPLE TRUTH, *supra* note 4, at 4.

87. See Willinger, *supra* note 49. In 2014, about 104,572 family households in Louisiana have incomes that fall below the poverty level, and eliminating the wage gap would provide much-needed income to women whose wages sustain families. *Louisiana Women and the Wage Gap*, *supra* note 47. In 2013,

full-time lose a combined total of approximately \$11 billion each year because of the gender wage gap.<sup>88</sup> Families, businesses, and the state economy suffer as a result of this gap.<sup>89</sup>

Individually, women making 77 cents on the male dollar can lose anywhere from \$400,000 to \$1.2 million over a working lifetime due to gender wage inequality.<sup>90</sup> The amount a woman loses over her career varies with the educational level she attains, but at every level of education women lose a large number of earnings over a working lifetime. Other estimates propose that the gender wage gap will cost women anywhere from \$400,000 to \$2 million over a lifetime.<sup>91</sup> For women in Louisiana, the gap would be significantly larger over the course of a working lifetime due to the larger gender wage disparity plaguing the state. Although the amount a woman can lose over a working lifetime can vary, and no matter the individual wage gap a woman experiences, she loses a significant amount of money each year compared to a man.

Women are shortchanged almost \$11,000 a year compared to men.<sup>92</sup> On average, women would lose \$435,049 in a 40-year period because of the gender wage gap.<sup>93</sup> This statistic means a woman would have to work 11 extra years to recoup lost earnings.<sup>94</sup> This loss could be even greater, depending on the level of the woman's education.<sup>95</sup> Closing the gender wage gap could mean four months of groceries, three months of rent and utilities, five months of child care, five months of health insurance, four months of student loan payments, and five tanks of gas for a woman and her family.<sup>96</sup>

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approximately 296,000 families are headed by women, and 63.9% of women are the family's primary or co-breadwinner, bringing in at least 25% of the family income. *Louisiana: State of Pay Inequity*, *supra* note 55.

88. *Louisiana Women and the Wage Gap*, *supra* note 46.

89. *Id.*

90. Kulow, *supra* note 11, at 385–86.

91. Catherine Lerum, *Equal Pay for Women Can Become a Reality: A Proposal for Enactment of the Paycheck Fairness Act*, 34 N. ILL. U. L. REV. 221, 229 (2013) (quoting 155 Cong. Rec. H129 (daily ed. Jan. 9, 2009) (statement of Rep. Holt)). A high school graduate can lose over \$700,000 in a working lifetime; a college graduate can lose \$1.2 million; and a professional school graduate can lose \$2 million. *Id.* at 231.

92. *The Wage Gap is Stagnant for Nearly a Decade*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/resources/wage-gap-stagnant-nearly-decade> [<https://perma.cc/K8SX-SQ6D>] (last visited Oct. 13, 2016).

93. *Id.*

94. *Id.* In 1974, women had to work nine days to make what men made in five days. WOMEN'S BUREAU, *supra* note 44.

95. See *The Wage Gap is Stagnant for Nearly a Decade*, *supra* note 92.

96. *Women Can't Afford Unfair Pay Today*, *supra* note 75.

Bridging gender wage inequality and providing women and families with these opportunities would contribute significantly to the nation's future.

Bridging the gender wage gap can also lift a significant number of Louisiana women and families out of poverty and can contribute to the economy of the state. If the gender wage gap in Louisiana were eradicated, an average working woman would have money for approximately 132 more weeks of food for her family, nearly 14 more months of mortgage and utilities payments, nearly 21 more months of rent, or 4,822 additional gallons of gas.<sup>97</sup> As with United States women in general, closing Louisiana's gender wage gap can afford women and families greater opportunities while reducing the need for scattered and ineffective legislative measures.

## II. THE FEDERAL FRAMEWORK FOR EQUAL PAY RIGHTS AND ITS FAILURES

Currently, equal pay protections are spread throughout various federal statutes.<sup>98</sup> Each statute has its own protections, prohibitions, defenses, burdens, and remedies.<sup>99</sup> This array of protective measures can present several problems for women who have suffered discrimination,<sup>100</sup> such as proving she receives a lower wage than a man, what elements she must prove, who will bear the burden of persuasion, and what type of defenses an employer may successfully be able to assert, among others.<sup>101</sup>

### A. *The Equal Pay Act of 1963*

The Equal Pay Act of 1963 was the first legislative attempt to eradicate the gender wage gap that plagued the United States.<sup>102</sup> The Equal Pay Act

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97. *Louisiana Women and the Wage Gap*, *supra* note 47. By eradicating the gap, Louisiana women could afford almost a year's worth of housing, that is, rent, mortgage, and taxes; or utilities, food, transportation, and internet; or one year's worth of a college education, plus pension and social security contributions, as well as healthcare costs. *Louisiana: State of Pay Inequity*, *supra* note 55.

98. See 29 U.S.C. § 206 (2012); 42 U.S.C. § 2000e; 29 U.S.C. § 201.

99. *Id.*

100. The federal laws discussed in this section apply to any employee—male or female—who has experienced discrimination. However, for purposes of this Comment the author uses “women” when discussing discrimination claims under the laws.

101. See discussion *infra* Part II.E.

102. Kulow, *supra* note 11, at 392.



added prohibitions to the Fair Labor Standards Act of 1938 (“FLSA”),<sup>103</sup> which applies to both unionized employees and non-unionized employees.<sup>104</sup> The Equal Pay Act added a subsection prohibiting discrimination within an establishment among employees “on the basis of sex.”<sup>105</sup> Specifically, an employer is prohibited from paying employees in the same establishment different wages than would be paid to an employee of the opposite sex for work that requires “equal skill, effort, and responsibility”<sup>106</sup> and is “performed under similar working conditions.”<sup>107</sup> To meet the burden for a claim of a violation of the Equal Pay Act, an employee must first prove that she is being paid less than her male comparator.<sup>108</sup> Issues arise when a female employee is being paid less than some male comparators but more than others. The federal circuits are split on whether the female employee must prove she is paid less than only one male comparator or whether she is paid less than the average of all male comparators.<sup>109</sup> This standard means, in addition to discovering she is being discriminated against, a woman then will not know whether she must prove her pay is less than only one male worker or all other male workers. This difficulty is coupled with all of the other statutory requirements to prove gender wage discrimination.

For example, an employee must also prove that her job requires “equal skill, effort, and responsibility” as her male comparator’s.<sup>110</sup> Courts will

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103. The FLSA is a federal provision that establishes a minimum wage and governs recordkeeping, overtime compensation, and child labor standards. The law applies to almost every employer in the United States, including federal, state, and local governments. The employers covered are those engaging in interstate commerce, producing goods for interstate commerce, or handling, selling, or working on goods that have been produced or moved in interstate commerce. 29 U.S.C. § 203. *See also Wages and Hours Worked: Minimum Wage and Overtime Pay*, U.S. DEP’T OF LAB., <https://webapps.dol.gov/elaws/elg/minwage.htm> [https://perma.cc/B4WL-XZ2V] (last visited Nov. 2, 2016).

104. *Fair Labor Standards Act Advisor*, U.S. DEP’T OF LAB., <http://webapps.dol.gov/elaws/whd/flsa/scope/screen10.asp> [https://perma.cc/J3FS-DCTB] (last visited Nov. 1, 2016).

105. 29 U.S.C. § 206(d)(1). The law also contains a no-retaliation provision, which prevents an employer from retaliating or otherwise discriminating against an employee who brings an action under the Equal Pay Act’s provisions or aids another employee’s action. *Id.* § 215(a)(3).

106. *Id.* § 206(d)(1).

107. *Id.*

108. 6 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 107.07 (2d ed. 2008).

109. *Id.* *See, e.g.,* Hein v. Or. Coll. of Educ., 718 F.2d 910 (9th Cir. 1983); Brock v. Georgia Southwestern Coll., 765 F.2d 1026 (11th Cir. 1985).

110. 29 C.F.R. § 1620.14(a) (2016); LARSON, *supra* note 108, § 107.09.

consider factors such as the “experience, training, education, and ability”<sup>111</sup> required for the job to determine if the equal-skill hurdle is met.<sup>112</sup> The equal-effort requirement concerns the “measurement of the physical or mental exertion needed”<sup>113</sup> for job performance.<sup>114</sup> For the equal-responsibility requirement, courts will look at “the degree of accountability required for the performance of the job, with emphasis on the importance of the job obligation.”<sup>115</sup> An employee must also prove that the jobs are performed under similar working conditions.<sup>116</sup> Differences in working conditions generally fall into two broad categories—differences in place and differences in time.<sup>117</sup> Even if an employee can successfully allege and prove all of these requirements, an employer may still escape liability for wage discrimination based on gender.

The prohibition against employer action is not without its exceptions, as the Equal Pay Act grants an employer four affirmative defenses for any differential in pay between female and male workers.<sup>118</sup> The first affirmative defense is a seniority system.<sup>119</sup> This type of system allows an employer to compensate employees differently based on a systematic plan that accounts for how long an employee has been on the job.<sup>120</sup> The plan

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111. 29 C.F.R. § 1620.15(a); LARSON, *supra* note 108, § 107.09.

112. LARSON, *supra* note 108, § 107.09. *See also* 29 C.F.R. § 1620.15(a). The equal skill requirement means because a comparator employee possesses some training, education, or skill that the female being paid less does not possess, there is not an automatic disqualification of equal skill. However, this may factor into the analysis of affirmative defenses. LARSON, *supra* note 108, § 107.09.

113. 29 C.F.R. § 1620.16(a). *See also* LARSON, *supra* note 108, § 107.09.

114. 29 C.F.R. § 1620.16(a). *See also* LARSON, *supra* note 108, § 107.09.

115. 29 C.F.R. § 1620.17(a). Some factors considered under this analysis are supervisory authority of the two employees being compared, decision-making authority of the employees, financial responsibility, a greater responsibility by one employee than the other to generate revenue, and breadth of responsibility. LARSON, *supra* note 108, § 107.07.

116. 29 C.F.R. § 1620.18(a). The statute requires that the working conditions be similar rather than equal. *Id.*

117. LARSON, *supra* note 108, § 107.09. Differences in time will encompass exposure to elements, unpleasant surroundings and hazards. Differences in time include different shifts, which are not recognized by the Equal Employment Opportunity Commission (“EEOC”). *Id.*

118. 29 U.S.C. § 206(d)(1) (2012).

119. *Id.*

120. LARSON, *supra* note 108, § 107.11. The term “seniority system” is not defined in the Equal Pay Act, but has been interpreted by the Supreme Court in a Title VII context to mean a system that relies on relative lengths of employee services. *Id.* *See also* Cal. Brewers Ass’n v. Bryant, 444 U.S. 598, 606 (1980).

must be applied equally to men and women to qualify as a legitimate defense.<sup>121</sup> The second affirmative defense given to employers is a merit system,<sup>122</sup> which has been defined as “an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria.”<sup>123</sup> The third affirmative defense is a system that “measures earnings by quantity or quality of production.”<sup>124</sup> This system is easier to analyze than the previous two defenses because it requires a non-subjective inquiry.<sup>125</sup> The final affirmative defense the Equal Pay Act grants to employers is any differential “based on any other factor other than sex,”<sup>126</sup> commonly referred to as the “catch-all” defense, which can encompass a varying array of factors an employer chooses to assert.<sup>127</sup> These defenses allow the employer to legitimately pay female and male workers different rates of pay—even if an employee can demonstrate she does similar work to a male comparator and is being paid less for that work.

To bring a successful claim under the Equal Pay Act, an employee must first prove a prima facie case for a violation of the provisions of the Equal Pay Act.<sup>128</sup> Once the employee has shown the prima facie case, the

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121. LARSON, *supra* note 108, § 107.11.

122. 29 U.S.C. § 206(d)(1).

123. LARSON, *supra* note 108, § 107.12 (quoting *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980)).

124. 29 U.S.C. § 206(d)(1). This system is also called an “incentive system.” LARSON, *supra* note 108, § 30.04.

125. LARSON, *supra* note 108, § 107.13.

126. 29 U.S.C. § 206.

127. The fourth defense is referred to as a general catch-all category, which all the federal circuits interpret differently. LARSON, *supra* note 108, § 107.14. For example, “[o]ther factor than sex” defenses invoked by employers include shift differentials, red circle rates, temporary reassignment, and training programs. Debra H. Goldstein, *Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both*, 56 ALA. L. REV. 294, 296–97 (1995). *See also* H.R. Rep. No. 88-309 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 689. There has been some criticism regarding the fourth affirmative defense under the Equal Pay Act. For example, “Depending on the circuit, a defendant may avoid liability by doing as little as *proffering* a factor that is facially gender neutral, or he may have to do as much as *proving* the factor is a bona fide legitimate business reason.” Peter Avery, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 863 (2004). These differing standards create inconsistencies and an inability for the plaintiff to know if her claim will survive the shifting-burden stage of an Equal Pay Act analysis.

128. LARSON, *supra* note 108, § 108.10. This shifting of the burden means an employee bringing a claim must prove she is being paid less than a male

burden of persuasion shifts to the employer to show one of the affirmative defenses applies to the wage differential at issue.<sup>129</sup> A plaintiff will have two years to file a claim of discrimination from when she knows or should have reasonably known of the discriminatory practice<sup>130</sup> and will be eligible for two years of back pay from the time the lawsuit was commenced, as well as liquidated damages, attorney's fees, and court costs.<sup>131</sup> This law provides some relief for women who have experienced discrimination, but federal law also provides other protections and remedies for wage discrimination.<sup>132</sup>

*B. Title VII of the Civil Rights Act of 1964*

The Civil Rights Act of 1964 ("CRA"),<sup>133</sup> particularly Title VII, also gives protections to women regarding their compensation. Title VII makes it an unlawful employment practice for an employer to discriminate in compensation because of sex.<sup>134</sup> The term "employer" used in the CRA is fairly broad, meaning that most—if not all—employers in the United States

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comparator for equal work requiring equal skill, effort, and responsibility and that the job is performed under similar working conditions. *See* discussion *supra* notes 108–17 and accompanying text. The prima facie burden for a plaintiff does not require a showing of discriminatory intent on the part of the employer, as the statute is a strict liability statute. LARSON, *supra* note 108, § 108.10.

129. *Id.*

130. *Id.* § 108.08. The statute of limitations period is extended to three years if the discrimination was willful on the part of the employer. *Id.* Courts have also held that each discriminatory paycheck restarts the statute of limitations period. *Id.* This provision incorporates the discovery rule, which means the statute of limitations on the claim does not begin to run until a woman is aware or should be aware that a discriminatory practice has occurred.

131. *Id.* § 109.05. The back wages are extended to three years if the employer's violation was willful. *Id.* The liquidated damages can be up to the value of the two or three years of unpaid back wages an employee can receive. *Id.*

132. *See* discussion *infra* Part II.B–D.

133. Pub. L. 88-352, 78 Stat. 241 (1964).

134. 42 U.S.C. § 2000e-2(a)(1) (2012). The term "compensation" in the law covers wages as well as fringe benefits, such as retirement and pension benefits. LARSON, *supra* note 108, § 110.01. The law also contains a no-retaliation provision. It states,

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3(a).

are covered by the definition.<sup>135</sup> There are two types of cases for gender wage discrimination under Title VII—disparate treatment and disparate impact.<sup>136</sup> Under a disparate-treatment theory, an employee alleges that she is a member of a protected class and she occupies a job similar to a higher-paid male employee.<sup>137</sup> In a disparate-impact case, the employee is alleging that the employer's policies result in a negative impact on a protected class of individuals, such as sex.<sup>138</sup> As under the Equal Pay Act, even if an employee can successfully allege a prima facie case of gender wage discrimination, an employer can still escape liability.

Title VII grants employers several exceptions as to what will not constitute an unlawful employment practice,<sup>139</sup> thus preventing an employer from being liable to an employee who has experienced discrimination. The first affirmative defense afforded is a bona fide seniority or merit system.<sup>140</sup> The second defense is a system that "measures earnings by quantity or quality of production."<sup>141</sup> Finally, an employer can differentiate in pay to employees who work in different locations.<sup>142</sup> Additionally, Title VII states that it will not be an unlawful employment

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135. 42 U.S.C. § 2000e(b). Title VII defines an employer as

[A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States . . . or a State or political subdivision thereof.

*Id.* The Supreme Court of the United States has adopted the "payroll method" of determining who is an employer, which holds that if someone appears on the employer's payroll, there is an employment relationship on the day in question. LARSON, *supra* note 108, § 5.02.

136. LARSON, *supra* note 108, § 1.09.

137. *Id.* § 8.08, at 8-20 n.93. "Disparate treatment" in a gender context means that an employer is treating the employee differently from others simply because of her gender. *Id.* § 8.06.

138. *Id.* § 1.09. This type of discrimination does not necessarily result from an employer's intent to discriminate against a certain class. *Id.*

139. 42 U.S.C. § 2000e-h(2).

140. *Id.* A seniority system can be a protected defense if it is based on custom and practice, even if the system is not written into employer guidelines. LARSON, *supra* note 108, § 30.02. Because the language applying to merit systems under the Equal Pay Act and Title VII are similar, courts normally analyze these defenses similarly. *Id.* See also *supra* notes 122–23 and accompanying text.

141. 42 U.S.C. § 2000e-2(h). This defense can be used for disparate impact claims. LARSON, *supra* note 108, § 30.04.

142. 42 U.S.C. § 2000e-2(h).

practice for an employer to differentiate in compensation based on sex if the differential treatment is allowed under the regulations of the FLSA.<sup>143</sup> However, all of these defenses must not be the result of an intention to discriminate on the basis of sex.<sup>144</sup> Similar to the Equal Pay Act, if an employer can prove that one or more of these exceptions applies, then there is no liability for discrimination in wages.

Unlike the Equal Pay Act's system, the system to file a claim under Title VII is more complex. Title VII creates the Equal Employment Opportunity Commission ("EEOC") to which a plaintiff must file any allegations of wage discrimination before she can proceed with a claim in federal court.<sup>145</sup> A Title VII plaintiff will bear the burden of persuasion throughout the claim.<sup>146</sup> First, the plaintiff is required prove a prima facie case of discrimination, and she will also bear the burden of persuading the fact finder that any affirmative defense articulated by the employer does not apply.<sup>147</sup> A plaintiff faces an additional hurdle that a claim under Title VII must be filed with the EEOC within 180 or 300 days of the adoption of the discriminatory practice, depending on whether the state has its own human rights agency.<sup>148</sup> An employee who has successfully alleged and

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143. *Id.* This exception would incorporate the affirmative defenses granted under the Equal Pay Act. *See* discussion *supra* Part II.A.

144. 42 U.S.C. § 2000e-2(h). These defenses mean Title VII is not a strict liability statute because intent to discriminate based on sex must be shown.

145. *Id.* § 2000e-4. Therefore, a plaintiff must exhaust all administrative remedies before a claim of discrimination can be brought in federal court.

146. LAWRENCE SOLOTOFF & HENRY S. KRAMER, *SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORK PLACE* 8–37 (2006).

147. For a prima facie case of disparate treatment, a plaintiff must prove that she is a member of a protected class and that she has not been treated as well as a similarly situated employee who is not in the protected class. Goldstein, *supra* note 127, at 297. Once a plaintiff proves the two requirements, the burden shifts to the employer to articulate a legitimate and non-discriminatory reason for the salary disparity. LARSON, *supra* note 108, § 8.08, at 8-20 n.93. These factors can include length of service, seniority, education, experience, differences in the category of job, differences in duties and responsibilities, complexity of the work, productivity, skill, or another non-discriminatory factor. *Id.* § 13.01. Once the employer articulates a defense, the employee will bear the burden of persuading the fact finder that the articulated reason is simply a pretext for discrimination. *Id.* § 8.08. Examples include that the advance education or experience the employer claimed was not needed for the job category at issue or that the employer did not adopt the low wage practice for other employees. *Id.* § 13.01.

148. A claim must be filed within 180 days if the state has a human rights agency and within 300 days if the state does not have such an agency. 42 U.S.C. §2000e-5(e).

proved wage discrimination under Title VII is entitled to different forms of relief depending on whether her claim was for disparate treatment or disparate impact.<sup>149</sup> In many cases, women are not aware there has been a discriminatory employment practice adopted until well after the filing deadline has passed, making filing a claim under this provision challenging for many women employees, such as Ms. Lilly Ledbetter.<sup>150</sup>

### C. *The Lilly Ledbetter Fair Pay Act of 2009*

The Lilly Ledbetter Fair Pay Act of 2009 (“LLFPA”) resulted from a Congressional overruling of the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>151</sup> The LLFPA added language to the definition of an unlawful employment practice for purposes of a Title VII claim.<sup>152</sup> This definition was expanded to effectively restart the statute of

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149. An employee who alleges and proves disparate treatment would be eligible for unpaid wages, punitive damages, and compensatory damages, whereas a plaintiff who alleges and proves disparate impact would not be eligible for punitive and compensatory damages, but would be eligible for back wages. LARSON, *supra* note 108, §§ 3.09, 31.01. In both disparate treatment and disparate impact, a successful plaintiff can receive attorney’s fees. *Id.* §§ 3.09, 31.01 n.2 (citing *Richardson v. Lamar Cty. Bd. of Educ.*, 729 F. Supp. 806 (M.D. Ala. 1989); *Jones v. Miss. Dep’t of Corr.*, 615 F. Supp. 456 (N.D. Miss. 1985)), 97.01. The amount of punitive and compensatory damages available in disparate treatment vary according to the size of the employer. *Id.* § 3.09.

150. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). See also Jonathan Timm, *When the Boss Says, ‘Don’t Tell Your Coworkers How Much You Get Paid’*, ATLANTIC (Jul. 15, 2014), <http://www.theatlantic.com/business/archive/2014/07/when-the-boss-says-dont-tell-your-coworkers-how-much-you-get-paid/374467/> [<https://perma.cc/W4X6-YQNA>]; Jennifer Lawrence, *Why Do I Make Less Than My Male Co-Stars*, LENNY (Oct. 13, 2015), <http://www.lennyletter.com/work/a147/jennifer-lawrence-why-do-i-make-less-than-my-male-costars/> [<https://perma.cc/F8TL-L9KJ>]. Ms. Ledbetter worked for Goodyear for 19 years before she discovered she was being paid significantly less than her male counterparts. *Ledbetter*, 550 U.S. at 621. She brought claims for wage discrimination under the Equal Pay Act and Title VII, but the Supreme Court ruled that her Title VII claims fell outside the statute of limitations because she did not assert that her employer had discriminatory intent when it issued her paychecks or denied her raise. *Id.* at 637.

151. *Ledbetter*, 550 U.S. 618; see also Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5).

152. The LLFPA states,

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other

limitations period each time a discriminatory paycheck is issued.<sup>153</sup> Even with this expansion, discovery that wage discrimination has occurred is challenging, particularly as the United States operates under a social norm of pay secrecy.<sup>154</sup>

#### D. National Labor Relations Act

The National Labor Relations Act (“NLRA”) is important in the employment discrimination context because it governs pay secrecy and confidentiality (“PSC”) rules.<sup>155</sup> These types of rules, imposed by employers, prevent employees from discussing their wages with one another.<sup>156</sup> The NLRA prohibits an employer from requiring employees not to disclose or discuss their wages as a condition of employment.<sup>157</sup> However, the NLRA

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practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A). The LLFPA also allowed an employee to recover back wages up to two years before the discrimination claim was filed when the unlawful employment practices that were within the filing period were similar to those practices that occurred outside the filing period. *Id.*

153. GARY SINISCALCO ET AL., DEVELOPMENTS IN EQUAL PAY LAW: THE LILLY LEDBETTER ACT AND BEYOND 3 (2010), [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/2010\\_eeo\\_007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_007.authcheckdam.pdf) [<https://perma.cc/7ZX8-N49G>].

154. Gowri Ramachandran, *Pay Transparency*, PENN. ST. L. REV. 1043, 1044 (2012).

155. Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the Nat’l Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 126–31 (2003).

156. *Id.* at 124. See also *DirectTV U.S. DirectTV Holdings, LLC*, 359 N.L.R.B. No. 54, Jan. 23, 2013. In *DirectTV*, the NLRB considered an employer rule, which stated in part,

Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs and chat rooms.

*Id.* at \*7. The NLRB held that this rule could be reasonably construed to prohibit protected section 7 activity. *Id.* at \*1.

157. Leonard Bierman & Rafael Gely, “*Love, Sex and Politics? Sure. Salary? No Way*”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 169–70 (2004). The NLRA protects the rights of all employees to engage in “concerted activity for the purpose of . . . mutual aid or protection.” 29 U.S.C.



does not include within its definition of “employee” those who are categorized as supervisors,<sup>158</sup> meaning there is an entire class of employees not protected by the provisions. Even those employees protected by the NLRA will have issues benefitting from its protections.<sup>159</sup>

The National Labor Relations Board (“NLRB”) reviews employment practices, but only after an employee, union, or employer submits a formal allegation that a violation of the NLRA has occurred.<sup>160</sup> Additionally, the only remedies available after a NLRB review will be a cease-and-desist order and other affirmative action necessary to promote the policies of the NLRA.<sup>161</sup> Therefore, the NLRA is a reactive regime, as action is taken only once someone has reported a violation. The problems with the NLRA and other federal mechanisms governing wage discrimination demonstrate that the federal scheme as a whole is ineffective and incomprehensible on many levels.

#### *E. Problems in the Law*

Although the current federal legal regimes may have initially been successful at bridging the gender wage gap, progress in eliminating gender wage inequality in recent years has slowed, leading to stagnation over the past decade.<sup>162</sup> The current laws are riddled with inconsistencies and ambiguities, making it difficult for a woman to discover discrimination and successfully recover for any harm she has experienced. Change in the laws—making them more harmonized, efficient, and understandable—is necessary to work towards eliminating the gender wage gap for good.

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§ 157. Federal courts and the National Labor Relations Board (“NLRB”) have held that discussing wages in a concerted effort to improve them is a protected activity under the NLRA. WOMEN’S BUREAU, U.S. DEP’T OF LABOR, PAY SECRECY 1 (2014).

158. Brian P. O’Neill, Comment, *Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter*, 40 SETON HALL L. REV. 1217, 1247 (2010). The law covers most private-sector employees, but excludes public-sector employees and supervisors. See 29 U.S.C. § 152(3) (defining “employee”).

159. This is likely because the NLRA is, “as Professor William R. Corbett has noted, ‘one of the best-kept secrets’ of employment law.” Bierman & Gely, *supra* note 157, at 190 (citing William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMPL. & LAB. L. 259, 267 (2002)).

160. O’Neill, *supra* note 158, at 1238.

161. *Id.*

162. See *supra* notes 25 and 75 and accompanying text.

### 1. *The Stagnant Gap*

On a national level, the gender wage gap has not changed significantly over the past decade.<sup>163</sup> In Louisiana, the gender wage gap has fluctuated within a small range, never dropping under 30%.<sup>164</sup> As a 1997 report articulated, “[r]ecent increases in the female-to-male earnings ratio have been due more to declines in the earnings of men than to increases in the earnings of women.”<sup>165</sup> The report also stated that women’s earnings have remained stagnant since 1990 and men’s real earnings have actually dropped by 3.3%.<sup>166</sup> Even though the gender wage gap persists, “Congress has failed to acknowledge that the Equal Pay Act is ineffective for women to prevail on wage discrimination claims, and Congress will not take the affirmative action to resolve the current wage inequity between men and women.”<sup>167</sup> This failure is equally true for Louisiana’s legislators, who failed to pass a legislative solution that would have extended additional equal pay protections to public and private employees—both women and men—in the state of Louisiana.<sup>168</sup>

### 2. *Ambiguities in the Laws*

Claims under the Equal Pay Act and Title VII contain several differences. For instance, the Equal Pay Act is a strict liability statute, meaning no showing of discriminatory intent is necessary.<sup>169</sup> Conversely, a claim for disparate treatment under Title VII requires a showing of discriminatory intent.<sup>170</sup> Another difference is that a Title VII plaintiff will bear the burden of

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163. See *supra* note 25.

164. See *supra* note 75.

165. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 1996, at ix (1997) [hereinafter MONEY INCOME IN THE UNITED STATES]. See also IDA L. CASTRO, WOMEN’S BUREAU, U.S. DEP’T OF LABOR, EQUAL PAY: A THIRTY-FIVE YEAR PERSPECTIVE 30 (1998). Women’s earnings increased approximately 71% between 1960 and 2011, although men’s earnings increased at a slower rate of three percent during the same period. NAT’L EQUAL PAY TASK FORCE, *supra* note 33.

166. CASTRO, *supra* note 165, at 30. See also MONEY INCOME IN THE UNITED STATES, *supra* note 165, at ix.

167. Lerum, *supra* note 91, at 223.

168. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015). See also *Hearing on S.B. 219 Before the H. Comm. on Labor & Indus. Relations*, 2015 Leg., Reg. Sess. (La. 2015).

169. LARSON, *supra* note 108, § 107.07, at 107-41 n.3. See also MAUREEN F. MOORE, LABOR AND EMPLOYMENT IN LOUISIANA: A GUIDE TO EMPLOYMENT LAWS, REGULATIONS & PRACTICES § 7-5 (2d ed. 2016) (1992).

170. Avery, *supra* note 127, at 875.

persuasion throughout the claim, while an Equal Pay Act plaintiff will be relieved of the burden after a prima facie case of discrimination is shown.<sup>171</sup> Furthermore, a Title VII defendant must only articulate an affirmative defense, while an Equal Pay Act defendant must prove an affirmative defense.<sup>172</sup>

However, due to the federal circuits' interpretation of Equal Pay Act and Title VII claims, the federal statutory regime is confusing. This confusion and ambiguity from varying interpretations of the Equal Pay Act and Title VII make claims under both statutory regimes difficult for a plaintiff, as her burden of proof will change depending on which claim is evaluated and in which federal circuit.<sup>173</sup> This confusion and ambiguity also make the fact finder's mission difficult because of the differing burden of proof standards. Additionally, what evidence will withstand the burden of proof is drastically different depending on the circuit in which the claim is brought. One federal judge described the relation between the laws as "a complex area of law, suffused with legislative and judicial uncertainty."<sup>174</sup> Courts have exacerbated this complexity by failing to draw a clear line between the burdens of proof for gender wage discrimination claims.<sup>175</sup> Ambiguity also exists with regard to the affirmative defenses afforded to employers, particularly the fourth affirmative defense under the Equal Pay Act, commonly referred to as the "catch-all" category, as the category can include any number of reasons as long as it is deemed justifiable by a court.<sup>176</sup>

The LLFPA was enacted to aid employees who experienced discrimination by giving the employee a broader timeframe in which to file a discrimination claim.<sup>177</sup> However, the law ignores the reality of wage discrimination because a woman may have no idea how her pay compares to her coworker's pay.<sup>178</sup> Thus, the LLFPA has been criticized for failing to codify the discovery rule, which states that the statute of limitations period

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171. *Id.*

172. *Id.*

173. See discussion *supra* Part II.A–B.

174. Avery, *supra* note 127, at 852.

175. Goldstein, *supra* note 127, at 298. See also LARSON, *supra* note 108, § 110.02.

176. See LARSON, *supra* note 108, §§ 107.14, 110.02.

177. Siniscalco, *supra* note 153, at 1.

178. Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle*, 16 WM. & MARY J. WOMEN & L. 1, 8 (2009).

does not begin to run until a plaintiff knows or should have known of the discriminatory practice.<sup>179</sup>

### 3. *The Discovery Issue in Gender Discrimination*

One of the most glaring issues in both the national and state statutory regimes is that employees who have suffered discrimination have no way to discover the unlawful employment practices to which they have been subjected. Although the LLFPA was designed to extend the time for an aggrieved employee to file a pay discrimination claim, it did nothing to address the issue of discovering such unlawful employment practices.<sup>180</sup> Justice Ginsberg's *Ledbetter* dissent noted, "[c]ompensation disparities . . . are often hidden from sight. It is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries."<sup>181</sup> By not incorporating the discovery rule in the LLFPA, an employer could avoid liability simply because an employee was not aware an unlawful employment practice occurred.<sup>182</sup> This area is one in which a legislative measure is appropriate. By incorporating a discovery rule into its new equal pay protections, Louisiana would afford all its employees more rights than the current federal legislative scheme grants.

Some scholars suggest that a more expansive prohibition on the promulgation of PSC rules may also be in order.<sup>183</sup> Going against the prevailing social norm of pay secrecy, several proposals in the United States seem to make PSC rules "*per se* illegal."<sup>184</sup> This solution would allow employees to openly discuss wages and salaries without fear of retaliation or other disciplinary measures by an employer and would aid in the discovery of wage discrimination.

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179. Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay Secrecy-Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 378 (2012).

180. See Kulow, *supra* note 11, at 386 n.8.

181. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsberg, J., dissenting).

182. Zisk, *supra* note 178, at 23–25. However, Louisiana already uses the discovery rule in many aspects of the law and defendants still have a defense when a plaintiff brings a stale claim. See generally LA. CIV. CODE arts. 189, 2534 (2016).

183. Bierman & Gely, *supra* note 157, at 187.

184. *Id.* "Per se illegal" means the act is inherently illegal and no proof of surrounding circumstances is needed. See, e.g., Wage Awareness Protection Act, S. 2966, 106th Cong. (2002); Fair Pay Act, S. 684, 107th Cong. § 4(7) (2001); CAL. LAB. CODE § 232 (2002).

Additionally, many employees are unaware that they have rights under the NLRA, and “[p]revailing social norms are such that even fully knowing his or her rights under the NLRA, the vast majority of employees are still highly unlikely to bring charges regarding this matter to the NLRB.”<sup>185</sup> As there is not a driving force behind the rules, pushing employees to bring claims, the NLRA is not policing the area of pay secrecy as well as it should be. The NLRA also does not cover employees classified as supervisors, meaning that an entire class of employees could be subject to PSC rules as a condition of employment.<sup>186</sup> Therefore, simply by classifying an employee’s position as supervisory, an employer could legally escape the federal prohibition on PSC rules. The courts and the NLRB are also split on the definition of supervisor,<sup>187</sup> meaning an employee could or could not be covered under the NLRA depending on his or her job classification. This disagreement allows employers another way to escape federal regulations on PSC rules. By including supervisors under PSC rule prohibitions in Louisiana, there would be no such ambiguity. These problems in federal law mirror some issues in Louisiana law, all of which need to be remedied to finally bridge gender wage inequality.

### III. LOUISIANA’S EQUAL PAY REGIME AND ITS PROBLEMS

In the past decade, progress in eliminating the gender wage gap has slowed and eventually stagnated.<sup>188</sup> The current laws are peppered with inconsistencies and ambiguities, making it difficult for a woman to discover discrimination and successfully recover for any harm she has experienced. In addition to federal protective measures, Louisiana currently has two statutory regimes governing gender discrimination.<sup>189</sup> The first is the Louisiana Employment Discrimination Law,<sup>190</sup> which governs all employees in the state. The second statutory regime is the Louisiana Equal Pay for Women Act,<sup>191</sup> which applies only to women who work in public service for the state. The law covers women in public positions and grants more protections than the law applicable to all Louisiana employees.

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185. Bierman & Gely, *supra* note 157, at 190.

186. GERALD MAYER & JON. O SHIMABUKURO, CONG. RESEARCH SERV., RL34350, THE DEFINITION OF “SUPERVISOR” UNDER THE NATIONAL LABOR RELATIONS ACT 1 (2012).

187. *Id.*

188. *See supra* notes 25 and 75.

189. *See generally* LA. REV. STAT. §§ 23:662, 23:332 (2016).

190. 1997 La. Sess. Law Serv. 1409 (West).

191. 2013 La. Sess. Law Serv. 374 (West).

*A. The Louisiana Employment Discrimination Law*

The Louisiana Employment Discrimination Law is largely co-extensive with federal prohibitions.<sup>192</sup> The law “prohibits intentional discrimination in employment because of . . . sex,”<sup>193</sup> and the law applies to public and private employers, employment agencies, and labor unions.<sup>194</sup> Under this law it is an unlawful employment practice to “[i]ntentionally pay wages to an employee at a rate less than that of another employee of the opposite sex for equal work on jobs in which their performance requires equal skill, effort, and responsibility and which are performed under similar working conditions.”<sup>195</sup> This language is almost identical to the language in the Equal Pay Act.<sup>196</sup>

The definition of employer under Louisiana law, however, is narrower than under Title VII.<sup>197</sup> The Louisiana definition states that an employer

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192. MOORE, *supra* note 169, § 7-2.

193. *Id.* The law also applies to discrimination based on race, color, religion, national origin, age, disability, or an individual’s sickle-cell trait. *Id.*

194. *Id.*

195. LA. REV. STAT. § 23:332(A)(3) (2016).

196. *Compare id.* § 23:332(A)(3) (it is an unlawful employment practice to “[i]ntentionally pay wages to an employee at a rate less than that of another employee of the opposite sex for equal work on jobs in which their performance requires equal skill, effort, and responsibility and which are performed under similar working conditions”), with 29 U.S.C. § 206(d)(1) (2012) (“No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .”).

197. *Compare* LA. REV. STAT. § 23:302(2) (“‘Employer’ means a person, association, legal or commercial entity, the state, or any state agency, board, commission, or political subdivision of the state receiving services from an employee and, in return, giving compensation of any kind to an employee. The provisions of this Chapter shall apply only to an employer who employs twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. ‘Employer’ shall also include an insurer, as defined in R.S. 22:46, with respect to appointment of agents, regardless of the character of the agent’s employment.”), with 42 U.S.C. § 2000e(b) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United

must employ 20 or more employees within the state for each working day in 20 or more calendar weeks of the current or previous calendar year.<sup>198</sup> The statute also requires that an employer receive services from the employee, who is in turn compensated.<sup>199</sup> Because Louisiana law covers fewer employers than national law, there is another contributing factor to gender wage inequality in play.

The variety of affirmative defenses available to employers also contributes to the inequality. Under the law, it is not an unlawful employment practice for an employer to compensate employees differently because of a bona fide seniority or merit system.<sup>200</sup> Additionally, a system that measures compensation by quantity or quality of production is allowed.<sup>201</sup> The law also includes the same “catch-all” defense provided in the Equal Pay Act.<sup>202</sup> Finally, an employer may pay different rates of compensation to employees who work in different locations.<sup>203</sup> Louisiana’s affirmative defenses are all very similar to the federal provisions, which also have done little to bridge the national gender wage gap.

Louisiana’s law does have a unique feature from federal law, which may help to bridge gender wage inequality long term. Under the Louisiana Employment Discrimination Law, an employee may file a discrimination charge with a local commission or the Louisiana Commission on Human Rights (“LCHR”) within 180 days of the unlawful employment practice.<sup>204</sup> The plaintiff may also file a claim of discrimination with the EEOC within 300 days of the unlawful employment practice or within 30 days after the

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States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.”).

198. MOORE, *supra* note 169. The definition of employer under Title VII is “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year.” 42 U.S.C. § 2000e(b). Louisiana law does not require that an employer be in an industry “affecting commerce.” LA. REV. STAT. § 23:302(2).

199. MOORE, *supra* note 169, § 7-2.

200. LA. REV. STAT. § 23:332(H)(3).

201. *Id.*

202. *Id.*

203. *Id.* This provision incorporates the final affirmative defense available under Title VII. *See supra* note 141 and accompanying text.

204. MOORE, *supra* note 169.

LCHR makes its final decision.<sup>205</sup> A third option allows a plaintiff to file a claim in a district court or in a federal district court where the alleged unlawful employment practice occurred within 90 days of receiving an EEOC right-to-sue letter.<sup>206</sup> There is no requirement that an employee exhaust all administrative remedies before filing suit.<sup>207</sup> However, the law does require a plaintiff intending to file a claim of discrimination to provide the employer with written notice at least 30 days prior to any court action, and it requires both parties make a good-faith effort to resolve the dispute prior to any court action.<sup>208</sup> The law also includes an anti-retaliation provision, but only for age discrimination and sickle-cell trait discrimination.<sup>209</sup> Therefore, there is no cause of action for retaliation in employment suits based on gender discrimination, an issue the law needs to address. This provision of Louisiana law is different from federal law and is one way Louisiana law is more progressive and employee-friendly than federal provisions. This law still gives private employees less protection than public employees, however, because their wages have an additional layer of protection under Louisiana law.

#### *B. The Louisiana Equal Pay for Women Act*

The Louisiana Equal Pay for Women Act supplements the Louisiana Employment Discrimination Law, providing additional protections to Louisiana women in public service.<sup>210</sup> The Louisiana Equal Pay for Women Act covers female employees who work 40 or more hours a week for a department, subdivision, agency, commission, board, or committee of the state.<sup>211</sup> The law prohibits an employer from paying one sex less than another in the same agency for work that is the same or is substantially similar.<sup>212</sup> The jobs must require equal skill, effort, education, and responsibility and must be performed under similar working conditions.<sup>213</sup> This law combines the prohibitions under the Equal Pay Act and Title VII, but adds a condition that the jobs require equal education.<sup>214</sup> This

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. LA. REV. STAT. § 23:669 (2016).

211. *Id.* § 23:663.

212. *Id.* § 23:664(A).

213. *Id.*

214. See discussion *supra* Part II.A–B.



additional requirement would make a claim even more difficult to prove for an employee who has been discriminated against.

Even though the law makes it more difficult for an employee who has experienced discrimination to bring a claim against an employer, the law does provide some additional benefits. For example, an employer cannot reduce the salary of one worker to meet that of another to comply with the statute.<sup>215</sup> Further, the Louisiana Equal Pay for Women Act also contains a no-retaliation provision, under which an employer cannot discipline or otherwise discriminate against employees who choose to disclose their wages, discuss their wages with another employee, or file a claim for a violation of the law.<sup>216</sup> An employee who successfully alleges and proves discriminatory practices by an employer is entitled to unpaid wages, reasonable attorney's fees, and court costs.<sup>217</sup> However, the unpaid wages are limited to 36 months before written notice to the employer.<sup>218</sup>

Similar to the federal legislative regimes, an employer can escape liability for discrimination by proving one of the four affirmative defenses justifies any difference in wages paid to a woman who holds the same

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215. LA. REV. STAT. § 23:664(C).

216. *Id.* The law states,

D. It shall be unlawful for an employer to interfere with, restrain, or deny the exercise of, or attempt to exercise, any right provided under this Chapter. It shall be unlawful for any employer to discriminate, retaliate, or take any adverse employment action, including but not limited to termination or in any other manner discriminate against any employee for inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee, or aiding or encouraging any other employee to exercise his or her rights under this Chapter.

E. It shall be unlawful for an employer subject to this Chapter to discriminate, retaliate, or take any adverse employment action, including but not limited to termination against an employee because, in exercising or attempting to exercise the employee's rights under this Chapter, such employee: (1) Has filed any complaint or has instituted or caused to be instituted any proceeding to enforce the employee's rights under this Chapter. (2) Has provided or will provide any information in connection with any inquiry or proceeding relating to any right afforded to an employee pursuant to this Chapter. (3) Has testified or will testify in any inquiry or proceeding relating to any right afforded to an employee pursuant to this Chapter.

*Id.*

217. *Id.* § 23:666(A).

218. *Id.* § 23:666(B). This time period is longer than the federal provisions provide. *See supra* notes 130 and 148 and accompanying text.

position as a man.<sup>219</sup> Unlike the federal system, however, these defenses have additional conditions attached.<sup>220</sup> These conditions include that the defense must be related to the job at issue and the employer must show there exists no alternative employment practice that would serve a “legitimate business purpose” without producing a wage differential.<sup>221</sup> The four affirmative defenses are available when pay is based on a seniority system, a merit system, an incentive system, or any wage differential based on a “bona fide factor other than sex.”<sup>222</sup> The fourth affirmative defense, generally referred to as a “catch-all” category, would include factors such as education, experience, and training, among other bona fide factors.<sup>223</sup> These additional conditions attached to employer affirmative defenses can make it more difficult to show that the pay difference between a female and male worker is justified.

The law also provides more protection to employees in Louisiana and differs from the federal scheme in that the statute of limitations is one year from when the employee knew or should have known that the employer was in violation of the chapter,<sup>224</sup> as the federal law does not incorporate the discovery doctrine.<sup>225</sup> The inclusion of the discovery doctrine is one way in which the state law favors an employee who has experienced discrimination. The Louisiana Equal Pay for Women Act is restricted to public employers in the state of Louisiana, but it gives an employee several avenues to seek remedies.<sup>226</sup> First, an employee may lodge a formal complaint with the employer, who will then have 60 days to investigate and respond.<sup>227</sup> After the employer has completed its investigation and if

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219. LA. REV. STAT. § 23:664(B).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* § 23:666(B)(4).

224. *See id.* § 23:667.

225. The discovery doctrine states that the statute of limitations does not begin to run until an employee discovers or should have discovered the unlawful employment practice. Ronald Turner, *Pliable Precedents, Plausible Policies, and Lilly Ledbetter*, 30 BERKELEY J. EMP. & LAB. L. 336, 367 (2009).

226. *See infra* notes 227–30 and accompanying text.

227. MOORE, *supra* note 169, § 7-5. The law states,

An employee who in good faith believes that her employer is in violation of this Chapter shall submit written notice of the alleged violation to the employer. An employer who receives such written notice from an employee shall have sixty days from receipt of the notice to investigate the matter and remedy any violation of this Chapter. If an employer remedies the violation in a manner that complies with the statute and within the time provided herein, the employee may not bring any action

a solution satisfactory to the employee has not been made, the employee can submit a complaint to the LCHR.<sup>228</sup> The LCHR will perform its own investigation and either issue a finding of discriminatory practices or will find there was no discrimination.<sup>229</sup> If no discrimination was found, the employee will still have the right to file a lawsuit, but only in the 19th Judicial District Court.<sup>230</sup> This law provides only one of many ways a Louisiana employee can bring a wage discrimination claim against her employer.

### *C. Procedural Recovery Mechanisms for Louisiana Employees*

Public employees in Louisiana can bring a claim under the Equal Pay Act, Title VII of the CRA, the Louisiana Employment Discrimination Law, or the Louisiana Equal Pay for Women Act.<sup>231</sup> Private employees in Louisiana can bring a claim under all of these laws except the Louisiana Equal Pay for Women Act.<sup>232</sup> The current scheme affords Louisiana public employees more rights than are offered to private employees in the state. Additionally, the laws and remedies available to all women in Louisiana and in the rest of the states are scattered in many different provisions.<sup>233</sup> In many cases, as under the federal regime, employees are not even aware of

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against the employer pursuant to this Chapter except as provided in Subsections B and C of this Section.

LA. REV. STAT. § 23:665(A).

228. MOORE, *supra* note 169, § 7-5. The law states, “If an employer fails to resolve the dispute to the satisfaction of such employee within the time provided herein, the employee may file a complaint with the commission requesting an investigation of the complaint pursuant to R.S. 51:2257.” LA. REV. STAT. § 23:665(B).

229. MOORE, *supra* note 169, § 7-5. The law states,

If the commission finds evidence of discriminatory, retaliatory or other adverse employment action on the part of the employer in violation of this Chapter but is unable to resolve or mediate the dispute, or fails to render a decision as to the dispute, or issues a finding of no discrimination on the part of the employer, the employee may institute a civil suit in the Nineteenth Judicial District Court.

LA. REV. STAT. § 23:665(C).

230. LA. REV. STAT. § 23:665(C).

231. Equal Pay Act of 1963, 29 U.S.C. § 206 (2012); Fair Labor Standards Act, 29 U.S.C. § 201 (2012); 29 U.S.C. § 216(b) (2012); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012); LA. REV. STAT. §§ 23:303, 23:332, 23:665.

232. 29 U.S.C. § 206; 29 U.S.C. § 201; 29 U.S.C. § 216(b); 42 U.S.C. § 2000e; LA. REV. STAT. §§ 23:303, 23:332.

233. *See* 29 U.S.C. § 206; 29 U.S.C. § 201; 29 U.S.C. § 216(b); 42 U.S.C. § 2000e; LA. REV. STAT. §§ 23:303, 23:332.

the rights and remedies available when they have experienced discrimination.<sup>234</sup> Women have moved in increasing numbers into the state and national workforce, and families have increasingly come to rely on women and their income for survival.<sup>235</sup> This problem necessitates a legislative regime under which all rights and remedies available for a violation are located in one place so that women, men, and future generations are treated both fairly and equally, and all have a chance at not only survival, but success. This reform would result in more efficiency and equity for all workers in Louisiana, regardless of sex.

#### IV. LOUISIANA'S LEGISLATIVE SOLUTION

In the 2015 Regular Session of the Louisiana Legislature, Senator Edwin R. Murray proposed a bill aimed at expanding additional equal pay protection to all Louisiana workers.<sup>236</sup> However, the bill was involuntarily deferred by a vote in the House Labor and Industrial Relations Committee,<sup>237</sup> and the law did not make it to the House floor for a vote—it therefore stood no chance of continuing through the legislative process and being enacted into state law.<sup>238</sup>

##### A. Louisiana Senate Bill 219

Louisiana Senate Bill 219 is one example in a series of attempts to bridge the wide gap in gender wage inequality that has plagued Louisiana for decades.<sup>239</sup> The proposed bill applied the protections in the Louisiana Equal Pay for Women Act to both public and private employees.<sup>240</sup> Senate Bill 219 defined “employee” more broadly than the current regime, defining an employee as “any individual who works for the employer in

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234. See discussion *supra* Part II.E.3.

235. See discussion *supra* Parts I.A.5, I.C.

236. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

237. *Id.* (involuntarily deferred in House Committee on Industrial & Labor Relations). When an instrument is involuntarily deferred, it may be rescheduled for a committee hearing only by a two-thirds vote of the committee members. See H.R. 6.9, H.R. 6.10.

238. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015) (involuntarily deferred in House Committee on Industrial & Labor Relations).

239. See S.B. 334, 2014 Leg., Reg. Sess. (La. 2014) (died in Senate); S.B. 219, 2015 Leg., Reg. Sess. (La. 2015); S.B. 254, 2016 Leg., Reg. Sess. (La. 2016). This Comment was written prior to the 2016 Regular Session of the Louisiana Legislature where Senator Morrell proposed an almost identical bill to S.B. 219. S.B. 254, 2016 Leg., Reg. Sess. (La. 2016). This bill too did not make it to the House floor. S.B. 254, 2016 Leg., Reg. Sess. (La. 2016) (bill defeated in ten to five vote).

240. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

return for compensation.”<sup>241</sup> The definition of employer was also changed, adding to the current definition that “any individual, partnership, corporation, association, business, trust, person, contractor, labor organization, or entity for whom fifty or more full-time equivalent employees are gainfully employed within the state.”<sup>242</sup> This change could have made great strides toward reducing gender wage inequality by extending rights to both men and women in both public and private service.

Similarly, even though employers were allowed four affirmative defenses, which were very similar to those under the Equal Pay Act, they were slightly more restrictive, meaning both women and men could have been more likely to allege and prove gender wage discrimination.<sup>243</sup> The proposed law would have changed the current legislative regime, Louisiana Revised Statutes section 23:301 and the following, by adding that the fourth affirmative defense must be a bona fide factor, other than sex, that is consistent with a business necessity.<sup>244</sup> Unlike the Equal Pay Act and Title VII, this provision would cover both intentional discrimination and unintentional discrimination.<sup>245</sup> These additional restrictions could have made it more difficult for an employer to justify a difference in wages between men and women. The restrictions also could have made it less likely an employer would want to take the risk of paying different wages to workers of different sexes, thus risking a suit against an employee that the employer may not win.

Employees who believe there has been a violation of the statutory regime must first make a complaint to their employers, and the employer has 60 days to investigate and remedy any discriminatory differential in pay.<sup>246</sup> If the employer remedies the discrimination to the satisfaction of the aggrieved employee, the employee can no longer bring an action regarding a violation of the statute.<sup>247</sup> However, if the employer fails to

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241. *Id.* The current law defines an employee as any female who is employed for 40 or more hours a week. *Id.* Therefore, the bill would also extend equal pay protections to part-time workers in the state. *Id.*

242. *Id.* This provision changes the law from applying only to the state or one of its political subdivisions to all employers, both public and private, within the state that have 50 or more employees. *Id.*

243. *Id.*

244. *Id.* This is different from a “bona fide factor other than sex” exception in the current law.

245. *Id.* The Equal Pay Act does not require the discrimination to be intentional, although Title VII applies to circumstances in which the discrimination is intentional. *See supra* notes 169–70 and accompanying text.

246. *Id.*

247. *Id.*

resolve the complaint, the employee can file a complaint with LCHR.<sup>248</sup> If the Commission finds no violations within 180 days from the filing of the complaint, or if the LCHR issues a finding of no discrimination, the employee can institute a civil suit in any district court within the state.<sup>249</sup> This system allows more employees to file discrimination claims in the state because the employee is no longer required to file suit in the 19th Judicial District Court.<sup>250</sup> An employee must bring the wage discrimination claim in a district court within one year of the date an employee is aware or should have been aware that the employer was in violation of the provisions.<sup>251</sup> This procedural mechanism for recovery appears to be more straightforward and efficient than the federal mechanisms for wage discrimination recovery.

An employer who commits wage discrimination would be liable for unpaid wages, attorney's fees, interest, and costs.<sup>252</sup> An employee who prevails on a wage discrimination claim may be awarded additional liquidated damages up to the amount of any unpaid wages.<sup>253</sup> The court also has discretion to order the reinstatement of employment, promotion, or compensation for lost benefits to the employee who has suffered discrimination.<sup>254</sup> However, the unpaid wages an employee can receive are limited to violations within the past 36 months before the employee sent notification of the alleged unlawful employment practice to the employer.<sup>255</sup> Under federal law, an employee may only receive unpaid wages for two years before the last unlawful paycheck that the employee received.<sup>256</sup> This difference means that under the proposed bill, Louisiana law would afford greater relief to its workers than is afforded under federal law.

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248. *Id.*

249. *Id.* The federal statutes do not allow an employee to first file a complaint with an employer, possibly remedying any discrimination before resorting to administrative remedies or adjudication.

250. Compare S.B. 219, 2015 Leg., Reg. Sess. (La. 2015), with LA. REV. STAT. § 23:665 (2016).

251. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015). This provision is the discovery rule, which was not incorporated into the federal regime with the passage of the LLFPA. Thus, if an employee discovers or should have discovered an unlawful employment practice and waits more than one year to file a claim for discrimination, the claim would be barred by the statute of limitations.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. See 29 U.S.C. § 206 (2012); 42 U.S.C. § 2000e.

### *B. Equal Pay Legislation*

Although Senate Bill 219 was a good proposal to jumpstart the process of bridging gender wage inequality in Louisiana, additional changes are needed. For example, the proposed bill was more progressive in that it eliminated the gender identifier<sup>257</sup> in the previous law, which is a step forward in breaking down ingrained social norms of separating men and women under the law.<sup>258</sup> Additionally, the bill kept the discovery rule in Louisiana law, meaning the statute of limitations on a discrimination action did not begin to run until an employee knew or should have known of the discrimination. However, the bill needs improvements to make progress in eliminating gender wage inequality. The proposed bill classified an employer as a person or entity with 50 or more employees, excluding a large number of employers from the bill's provisions.<sup>259</sup> Louisiana should look to equal pay legislation in other states for guidance to devise a system equitable to employees and employers, as well as one that would pass in the state legislature.

#### *1. States with Low Gender Wage Gaps*

Several states with low gender wage gaps, such as Hawaii, Maryland, and Florida,<sup>260</sup> as well as one state in the middle of the gender wage gap calculation—California—have laws showing the changes Louisiana could make to bridge the gender wage gap currently plaguing its women workers. Similar to Louisiana's current regime, Hawaii's law contains two separate provisions.<sup>261</sup> The first provision applies to all public and private

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257. The Louisiana Equal Pay for Women Act stated, "a woman who performs public service for the state is entitled to be paid the same compensation for her services as is paid to a man who performs the same kind, grade, and quality of service, and a distinction in compensation may not be made because of sex." LA. REV. STAT. § 23:662 (2016). S.B. 210 would have changed this language to "the public policy of this state is that all employees shall be compensated equally for work that is the same or comparable in kind and quality. No distinction in compensation may be made because of sex." S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

258. See generally Joseph A. Custer, *The Three Waves of Married Women's Property Acts in the Nineteenth Century with a Focus on Mississippi, New York, and Oregon*, 30 OH. NORTHERN UNIV. L. REV. 395 (2014).

259. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

260. FLA. STAT. ANN. § 448.07 (West 2016); HAW. REV. STAT. ANN. §§ 378-1-378-6, 387-1, 387-4-387-8, 387-12 (West 2016); MD. CODE ANN., LAB. & EMPL. §§ 3-301-3-309 (West 2016).

261. HAW. REV. STAT. ANN. §§ 378-1, 387-1.

employees, except those who work for the United States government,<sup>262</sup> and the second provision applies only to private employees.<sup>263</sup> The laws in Maryland, Florida, and California cover both public and private employees.<sup>264</sup>

*a. Similarities in the Provisions*

Hawaii's, Maryland's, and Florida's laws contain several similar provisions. First, Hawaii's law, which applies to all workers, and Florida's law prohibit discrimination in pay between workers of different sexes who work in the same establishment; on jobs that require equal skill, effort, and responsibility; and who work under similar conditions.<sup>265</sup> Second, the affirmative defenses allowed to an employer in Hawaii's law and Florida's law are also similar. The provisions provide employers with certain affirmative defenses, including a seniority system, a merit system, a system that measures compensation based on quantity or quality of production, and a differential based on any other permissible factor other than sex.<sup>266</sup> Maryland's law also includes these merit system and seniority system affirmative defenses.<sup>267</sup> Additionally, Hawaii's provision, which applies only to private employees, includes a seniority system affirmative defense.<sup>268</sup> These similarities indicate there are some provisions that should be in all equal pay legislation.

*b. Differences in the Laws*

Although the laws provide some similar protections and defenses, there are also many differences. First, Maryland's law prohibits discrimination in wages for work that is of comparable character or for

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262. *Id.* § 378-1.

263. *Id.* § 387-1. Thus, Hawaii's statutory regime appears to be the inverse of the system that is currently in effect in Louisiana.

264. FLA. STAT. ANN. § 448.07; MD. CODE ANN., LAB. & EMPL. § 3-302; CAL. LAB. CODE § 1171 (2016). The law covers employers who have at least two or more employees. The law is more radical than the Louisiana law, under which only employers with 50 or more employees would be covered. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

265. HAW. REV. STAT. ANN. § 378-2.3; MD. CODE ANN., LAB. & EMPL. § 3-307.

266. HAW. REV. STAT. ANN. § 378-2.3; FLA. STAT. ANN. § 448.07. Under Florida law, the "catch-all" category must be exercised in good faith. FLA. STAT. ANN. § 448.07(2)(a).

267. MD. CODE ANN., LAB. & EMPL. § 3-304. This provision gives a list of more detailed defenses to employers than other state's statutory provisions.

268. HAW. REV. STAT. ANN. § 378-2.3.



work that is of the same operation, same business, or same type.<sup>269</sup> Hawaii's private employee provision prohibits the payment of different wages between the sexes.<sup>270</sup>

The laws also contain different types of affirmative defenses. For example, Hawaii's first provision, which applies to all workers, includes a defense for a bona fide occupational qualification.<sup>271</sup> Hawaii's private employee provision and Maryland's law contain different affirmative defenses. Hawaii's law allows the payment of different wages based on length of service, differences in duty or service, differences in shift or time of day of work, or differences in hours of work.<sup>272</sup> An employer's affirmative defenses under Maryland's law include jobs that require different abilities or skills, jobs that require regular performance of different duties or services, and work that is performed on different shifts or at different times of day.<sup>273</sup>

A successful plaintiff under any law may recover unpaid wages, but an employer's liability for the wages differs under each provision.<sup>274</sup> Hawaii's provision, covering all employees, allows back pay, attorney's fees, and other fees for two years before the filing of the claim.<sup>275</sup> Hawaii's private employee provision provides for unpaid wages and overtime, with no apparent time limit, and allows for liquidated damages if the violation is willful.<sup>276</sup> Maryland's law allows the recovery of the difference in wages between male and female workers, as well as any liquidated damages.<sup>277</sup> A successful plaintiff in Florida may recover back pay for one year before the filing of the claim.<sup>278</sup>

The statute of limitations period also differs under each law. A claim under Hawaii's provisions must be filed within two years of the unlawful employment conduct.<sup>279</sup> Maryland's law provides for a three-year statute

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269. MD. CODE ANN., LAB. & EMPL. § 3-304.

270. HAW. REV. STAT. ANN. § 387-4. This law does not contain the requirement that the workers be in the same establishment or that the jobs require equal skill, effort, or responsibility.

271. *Id.* § 378-2.3.

272. *Id.* § 387-4. These affirmative defenses are different from both Hawaii's other provision and the federal Equal Pay Act.

273. MD. CODE ANN., LAB. & EMPL. § 3-304. This provision gives a list of more detailed defenses to employers than other state's statutory provisions.

274. *See infra* notes 275–78.

275. HAW. REV. STAT. ANN. § 378-5.

276. *Id.* § 387-12.

277. MD. CODE ANN., LAB. & EMPL. § 3-307.

278. FLA. STAT. ANN. § 448.07 (West 2016). The proposed Louisiana law allows for the recovery of three years of back pay.

279. HAW. REV. STAT. ANN. §§ 378-5, 381-12.

of limitations period,<sup>280</sup> while Florida's statute of limitations is six months after the worker's employment has been terminated.<sup>281</sup> Maryland's law also prohibits an employer from retaliating when an employee makes a complaint, brings an action, or testifies in the action of a fellow employee.<sup>282</sup> The differences in the laws show that the provisions can be tailored differently to each state but still be strict and effective at eliminating gender wage inequality.

*c. California*

California, which is in the middle of the gender wage gap ranking,<sup>283</sup> recently passed an equal pay bill that some call the toughest in the nation.<sup>284</sup> The bill is an attempt to eliminate the average 16-cent wage gap plaguing the state, as it prohibits the payment of different compensation between the sexes for work of substantially similar character that requires similar skill, effort, and responsibilities.<sup>285</sup> However, the law has several differences from federal law and provisions in other states. For instance, the bill eliminates the requirement that a wage differential be in the same establishment.<sup>286</sup> The law also provides an employer similar affirmative defenses to federal law, but these defenses, particularly the one based on any factor other than sex, must be related to the job and must be consistent with a business necessity.<sup>287</sup> Additionally, the defenses an employer relies

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280. MD. CODE ANN., LAB. & EMPL. § 3-307.

281. FLA. STAT. ANN. § 448.07. The law does not incorporate the discovery rule, however, but the statute of limitations starts running after the employee is no longer employed.

282. MD. CODE ANN., LAB. & EMPL. § 3-308.

283. THE SIMPLE TRUTH, *supra* note 4, at 7.

284. Patrick McGreevy & Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, L.A. TIMES (Oct. 6, 2015), <http://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html> [https://perma.cc/W7XE-UW6T].

285. S.B. 358, 2015 Leg., Reg. Sess. (Ca. 2015). The wage gap among Latina women in California is the largest in the nation at 44 cents per male dollar. *Id.* The bill is different from other states' laws because the skill, effort, and responsibilities of the jobs do not have to be equal, but merely similar. *Id.* This difference would allow more flexibility in job comparison.

286. *Id.* The Equal Pay Act and several other states require that a female worker and her male comparator work in the same establishment. *See* discussion *supra* Part II.A, Part IV.B.1.a–b.

287. S.B. 358, 2015 Leg., Reg. Sess. (Ca. 2015).

on must account for the entire wage differential between a woman and her male co-worker.<sup>288</sup>

An employee may institute an action for a violation of the law within two years of the cause of action occurring or within three years if the violation was willful.<sup>289</sup> An employee who successfully alleges and proves wage discrimination is owed all wage and interest of which she was deprived because of the discrimination, as well as an equal amount in liquidated damages.<sup>290</sup> The law also prohibits discrimination or retaliation if employees disclose their wages, discuss their wages, or inquire about another employee's wages.<sup>291</sup> The statute of limitations on this action is one year after the cause of action occurs.<sup>292</sup> As the law took effect January 1, 2016, data about how the provisions have affected gender wage disparity in California does not exist yet. However, before the law was passed women working full-time in California lost more than \$33 billion each year because of the gender wage gap.<sup>293</sup> However, the law has caused employers to reevaluate what it means for a job to be substantially similar, to reconsider how the employer classifies its employees, and to reexamine payroll to discover disparities.<sup>294</sup> Proponents hope these stricter provisions will help to bridge the remaining gender wage gap in California.<sup>295</sup> California's law shows that change is necessary to drive progress of the gender wage gap forward.

## 2. Proposed Equal Pay Modifications in Louisiana

By looking at the successes and failures of provisions in other states, Louisiana can modify its law to achieve the best results. First, Louisiana should expand all equal pay measures to cover both public and private employees, giving all workers in the state the same protections. Most of the provisions in other states cover employers with at least one or more

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288. *Id.* Under other provisions, the defense could apply to only part of the wage difference, meaning an employer could claim all the affirmative defenses accounted for the wage differential. Under California law, however, the employer must articulate one affirmative defense that accounts for the entire wage difference. *Id.*

289. *Id.*

290. *Id.* The law does not appear to contain a temporal limit on an employer's liability for back wages.

291. *Id.*

292. *Id.*

293. S.B. 358, 2015 Leg., Reg. Sess. (Ca. 2015).

294. Lauren Weber, *For Bosses in California, A Tough New Fair Pay Law*, WALL STREET J. (Dec. 29, 2015), <http://www.wsj.com/articles/for-bosses-in-california-a-tough-new-fair-pay-law-1451429688> [<https://perma.cc/T8C8-ARDE>].

295. S.B. 358, 2015 Leg., Reg. Sess. (Ca. 2015).

employees.<sup>296</sup> However, Louisiana could still afford protection to its small businesses<sup>297</sup> by increasing this number, making a compromise between the interests of workers and businesses.<sup>298</sup> Louisiana could also adopt California's method and grant protections to jobs with similar—but not equal—skill, effort, and responsibility. This provision would make it easier for courts to compare a female's job to a higher-paid male.

Louisiana should also revise the affirmative defenses available to employers. A more detailed provision of the affirmative defenses available to an employer, such as the laws in California, Maryland, or Hawaii, would be beneficial. California's affirmative defenses are the strictest of all, but this type of measure is needed to bridge the wage gap in Louisiana. When the average difference in men and women's wage in Louisiana is 35 cents, drastic action is needed. By making a justification for gender wage inequality harder for an employer to claim, Louisiana can finally begin moving towards the elimination of gender wage disparity. Of all the laws evaluated, Louisiana currently allows the most expansive recovery of unpaid wages at three years of back wages.<sup>299</sup> However, several states do not contain a temporal limit on recovery. In this way, Louisiana's proposal of three years of back-wages recovery is a compromise from other successful laws, as the unpaid wages liability of the employer balances interests while still providing a Louisiana woman with more protection than federal law provides. Louisiana's incorporation of the discovery rule should remain in the law<sup>300</sup> because it affords a protection to employees who have been discriminated against, but who are unable to discover such discrimination. With these modifications,

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296. See, e.g., FLA. STAT. ANN. § 448.07(b) (West 2016); HAW. REV. STAT. ANN. §§ 378-1, 387-1 (West 2016); MD. CODE ANN., LAB. & EMPL. § 3-301(b) (West 2016); N.D. CENT. CODE ANN. § 34-06.1-02 (West 2016); W. VA. CODE ANN. §§ 21-5B-1(1), 21-5E-2(1) (West 2016).

297. Small businesses were a concern during the hearing on Senate Bill 219 in the House Committee on Industrial and Labor Relations. See generally *Hearing on S.B. 219 Before the H. Comm. on Labor & Indus. Relations*, 2015 Leg., Reg. Sess. (La. 2015). This concern is also why the definition of employer was changed from an entity with 25 or more employees to 50 or more employees. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

298. One solution would be to retain the 50-employee figure included in the bill as it passed through the Louisiana Senate. Another proposal would be an employee as an entity with 25 or more employees as was originally proposed in the bill.

299. Compare LA. REV. STAT. § 23:661 (2016), with FLA. STAT. ANN. § 448.07(3); HAW. REV. STAT. ANN. §§ 378-5(b), 387-12; MD. CODE ANN., LAB. & EMPL. § 3-307; N.D. CENT. CODE ANN. § 34-06.1-05; W. VA. CODE ANN. §§ 21-5B-4, 21-5E-4 CAL. LAB. CODE § 1197.5(b) (2016).

300. LA. REV. STAT. § 23:667.

Louisiana's law would afford additional protections to women who work in the private sector and would indicate a significant effort to eliminate gender wage inequality. The compromises are also likely to help the bill pass through the Louisiana Legislature, thereby affording all workers protection and the ability to discover and enforce their rights when discrimination occurs, but balance those interests against the employer's business interests.

*C. No-Retaliation Provisions, Pay Secrecy, and Confidentiality Rules*

One of the most glaring difficulties in wage discrimination cases is how an employee actually discovers she has experienced discrimination. One solution would be to incorporate a prohibition on PSC rules into state law.<sup>301</sup> Currently, the NLRA prohibits employers from making it a condition of employment that employees not discuss their wages with other employees.<sup>302</sup> The practice of wage secrecy is in line with prevailing social norms in the United States,<sup>303</sup> but it is a significant impediment to eradicating wage discrimination. An exception to PSC prohibitions allows employers to limit discussion of wages during business hours because a legitimate business reason exists in promoting and maintaining workplace efficiency.<sup>304</sup>

Several states currently have laws prohibiting PSC rules.<sup>305</sup> The remedies available under violations of these statutes vary,<sup>306</sup> and the laws are likely preempted concerning general employees, but they are good law as applied to employees classified as supervisors.<sup>307</sup> Louisiana law currently does not cover anti-retaliation in wage discrimination claims, however, as the protection extends only to sickle-cell and age discrimination cases.<sup>308</sup> Therefore, a solution that extends this protection to all Louisiana workers is necessary.

The Louisiana Equal Pay for Women Act currently prohibits retaliation or any other action by an employer against an employee who inquires about, discloses, or discusses wages or salary,<sup>309</sup> but this law applies only to public employees. Additionally, the law does not bar an employer from prohibiting

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301. One scholar believes some additional legislation is needed to prevent PSC rules from interfering with Title VII rights. O'Neill, *supra* note 158, at 1230.

302. See discussion *supra* Part II.D.

303. Timm, *supra* note 150, at 6.

304. O'Neill, *supra* note 158, at 1240.

305. *Id.* at 1243.

306. *Id.* at 1244.

307. *Id.* at 1252. These laws are good law because the NLRA already outlaws PSC rules for most employers in the United States.

308. MOORE, *supra* note 169, § 7-8.

309. LA. REV. STAT. § 23:664 (2016).

the disclosure of wages as condition of employment.<sup>310</sup> The law also does not prohibit an employer from requiring an employee to sign a waiver or any other document prohibiting the disclosure of wages.<sup>311</sup> A new statutory regime must include these types of protections.

Looking at how other states formulate PSC laws may help Louisiana create a law that is beneficial to both employees and employers and that could pass through the Louisiana Legislature. Currently, 10 states and the District of Columbia have prohibitions on PSC rules.<sup>312</sup> Most of the laws have similar prohibitions. First, an employer cannot prohibit employees from disclosing their wages or discussing wages with another employee.<sup>313</sup> Second, an employer cannot require employees to waive their rights or sign a document as a condition of employment prohibiting them from discussing or disclosing wages.<sup>314</sup> Finally, an employer cannot discharge, discipline, or otherwise discriminate against employees who voluntarily disclose their wages.<sup>315</sup>

Although the laws all seem to have similar requirements, Louisiana could make its provisions more progressive. First, Louisiana should extend PSC rule prohibitions to gender wage discrimination claims so that a female employee may bring an action for any discrimination or retaliation experienced because she disclosed or discussed her wages. Second, the prohibition should be clear that the definition of “employee” covers both non-supervisory and supervisory employees, thereby extending protection beyond what the NLRA grants. Finally, Louisiana should be clear that all three forms of PSC rules prohibitions are covered. These changes would provide protections to all employees, but still allow employers to limit discussion or other employee action during certain times—such as during business hours—to promote

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310. S.B. 219, 2015 Leg., Reg. Sess. (La. 2015).

311. *Id.*

312. The states are California, Colorado, Illinois, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, and Vermont, as well as the District of Columbia. *Pay Secrecy*, U.S. DEP'T OF LAB. FACT SHEET, Aug. 2015, at 4, [https://www.dol.gov/wb/media/pay\\_secrecy.pdf](https://www.dol.gov/wb/media/pay_secrecy.pdf) [<https://perma.cc/WJ98-B66S>].

313. See CAL. LAB. CODE § 232 (West 2016); COLO. REV. STAT. ANN. § 24-34-402 (West 2016); D.C. CODE ANN. § 32-1452 (West 2016), ME. REV. STAT. ANN. tit. 26 § 628 (West 2016), MICH. COMP. LAWS ANN. § 408.483a (West 2016), MINN. STAT. ANN. § 181.172 (West 2015), N.H. REV. STAT. ANN. § 275:41-b (West 2016), VT. STAT. ANN. tit. 21 § 495 (West 2016).

314. *Id.*

315. See CAL. LAB. CODE § 232; COLO. REV. STAT. ANN. § 24-34-402; D.C. CODE ANN. § 32-1452; 820 ILL. COMP. STAT. ANN. 112/10 (West 2016); LA. REV. STAT. § 23:664 (2016); ME. REV. STAT. ANN. tit. 26 § 628 (West 2016); MICH. COMP. LAWS ANN. § 408.483a; MINN. STAT. ANN. § 181.172; N.H. REV. STAT. ANN. § 275:41-b; VT. STAT. ANN. tit. 21 § 495.

workplace efficiency. As with equal pay provisions, this law would strike a balance between protecting both employees' rights and employers' businesses.

#### CONCLUSION

Employees in Louisiana should have a statutory regime that is free of inefficiencies and ambiguities, as well as one that gives equal rights and protections to all employees. As Governor John Bel Edwards advised in his inauguration speech, the Louisiana Legislature “should finally pass effective equal pay so that women, the economic leaders of many households, get the same pay for the same work.”<sup>316</sup> Accordingly, Senate Bill 219 should be passed with certain modifications, extending equal pay protections to all employees in Louisiana, both public and private. First, the equal pay protections should include jobs with similar—but not equal—skill, effort, and responsibility, making comparison between a female and male easier. Second, the bill should revise and make stricter the affirmative defenses afforded to employers. Third, the bill should extend no-retaliation provisions to all employees, particularly if employees choose to discuss or disclose their wages, bring an action for employment discrimination, or aid other employees in their cases of discrimination. Finally, the statutory regime should be modified to include an explicit ban on PSC rules and forbid Louisiana employers from making it a condition of employment that employees must not disclose or discuss their wages. This addition should also expand the definition of an employee in Louisiana law to include those employees classified as supervisors. To reach gender wage equity, all workers must have equal protections under the law. When approximately 40% of United States women are their family's primary breadwinners and the gender wage gap in Louisiana is 35%, justice requires granting equal pay to all workers and establishing an efficient mechanism to enforce all workers' rights. Louisiana can accomplish this task by granting equal rights to all employees and establishing an efficient mechanism for the enforcement of those rights.

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316. John Bel Edwards, Governor of La., Inaugural Address (Jan. 11, 2016), <http://gov.louisiana.gov/news/governor-john-bel-edwards-inaugural-address> [<https://perma.cc/QLT5-HG6Y>].

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