

# Women’s Marches Occur Worldwide, but New Jersey is No Closer to Equal Pay Between Genders

by Mana Ameri

On Jan. 21, the Women’s March on Washington drew over five million participants worldwide, and about one million participants in Washington, D.C. alone.<sup>1</sup> The march was the largest single-day demonstration in U.S. history.<sup>2</sup> Participants came out to advocate legislation and policies regarding human rights, including women’s rights. Although women’s rights have made great strides, women still face discrimination and institutional barriers to equal treatment.

## Gender Wage Gap

In 2016, a woman working full time year round in the United States made, on average, 80 cents for every dollar earned by a man, a gender wage gap of 20 percent.<sup>3</sup> In the same year, New Jersey had a gender wage gap of 18 percent, a slight improvement on the nationwide average.<sup>4</sup> For women of color, these disparities are even greater.<sup>5</sup> Applying the rate of change in the gender wage gap seen in the United States since 2001, women will not reach pay equity with men until 2152.<sup>6</sup>

The gender wage gap is not only a matter of fairness. It impacts families (including men) nationwide, as mothers and wives increasingly become the primary or sole breadwinners. Currently, women fill this role in nearly 40 percent of families.<sup>7</sup> Lost wages also means families have less money to spend on basic goods and services, directly impacting the economy.

The gender wage gap itself is more complicated than a single number or percentage. Gender wage gap statistics represent an average of what all women earn, working full time and year round, compared to an average of what all men earn, working full time and year round.<sup>8</sup> However, the gap does not reflect a comparison of men and women doing identical work. Multiple factors drive the gender wage gap, including differences in occupation, education, seniority, work hours, experience, race and region.<sup>9</sup> Critics often argue these factors are the sole factors causing the gender wage gap and, after controlling for them, the wage gap is inconsequential. However, research shows that

only 62 percent of the gender wage gap can be attributed to those factors. The remaining 38 percent of the gender wage gap is due to “unexplained reasons.”<sup>10</sup>

Researchers attribute a portion of this unexplained percentage of the gender wage gap to discrimination and bias.<sup>11</sup> Unfortunately, it is difficult to precisely measure the extent to which discrimination and bias contribute to the wage gap. There is little transparency with respect to pay practices, and employees often have scant access to pay information. Further, some employers either formally prohibit or discourage the discussing of compensation. Although researchers struggle to precisely quantify the impact discrimination and bias have on the gender wage gap, most agree they undoubtedly have an effect.<sup>12</sup> A number of studies and statistics support this conclusion.

For example, each year thousands of cases are brought before the federal Equal Opportunity Employment Commission (EEOC) alleging gender discrimination. In 2016, 18 percent of these complaints were decided or settled in favor of the person who filed the charge; and this figure says nothing of the instances where these disputes are resolved or otherwise go unreported.<sup>13</sup> A recent study has shown that, one year out of college, women earned roughly 93 percent of what their male counterparts earned after controlling for hours, occupation, college major, industry and other factors.<sup>14</sup> Further, studies have shown that among identical résumés, where only the name differs, perceived gender affects whether the candidate is hired, the starting salary offered, and the employer’s overall assessment of the candidate’s quality.<sup>15</sup>

## Federal and State Equal Pay Legislation

Although discrimination is just one contributor to the gender wage gap, this does not diminish the need to address it. Currently, the legal recourse to eliminate and deter discrimination is the principal of equal pay for equal work. This principle has been established by federal laws, such as the Equal Pay Act of 1963<sup>16</sup> and Title VII of the Civil Rights Act of 1964.<sup>17</sup> These laws require

employers to pay employees equally for performing work that requires equal skill, effort, and responsibility, and is performed under similar working condition. Exceptions to equal pay for equal work under the Equal Pay Act exist where payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.<sup>18</sup>

While these federal laws have helped to erode discrimination, their full impact has not been realized given the way courts have interpreted the scope of these laws. For instance, courts have narrowed the Equal Pay Act's reach over time, applying a strict interpretation to what constitutes equal work.<sup>19</sup> At the same time, courts have broadly interpreted the defenses under the Equal Pay Act, such as the "any factor other than sex" defense.<sup>20</sup> Additionally, the Equal Pay Act does not specifically mention other issues, such as pay transparency and pay secrecy rules, even though such rules can shield discrimination and depress wages.

Momentum to pass more aggressive legislation has recently stalled in Congress. This has left the states with the responsibility of addressing gender discrimination in the workplace. While many states, like New Jersey, already maintain equal pay laws, most of them mirror federal law and, thus, contain the same shortcomings, such as a narrow interpretation of "equal work," broad application of the defenses, insufficient deterrence, and no requirement for pay transparency. States such as California, Maryland, New York, and Massachusetts have recently passed equal pay amendments expanding the protections afforded under their current laws.<sup>21</sup> These states currently have some of the most progressive equal pay laws.<sup>22</sup> Some of the amendments aim to strengthen current equal pay standards, create pay transparency rules, expand equal pay protections beyond sex, and create a stronger deterrent for discrimination.

### **New Jersey's Proposed Equal Pay Legislation**

In early 2016, New Jersey introduced S-992, which proposed to expand the protections against employment discrimination afforded under the current New Jersey Law Against Discrimination and federal law.<sup>23</sup> Employers would be permitted to pay workers of different sexes doing similar jobs in an unequal manner only if they could demonstrate the unequal treatment was justified based on factors such as training, education, experience or job performance.<sup>24</sup>

The key amendments in the bill include: 1) a lower standard from "equal work" to "substantially similar work"; 2) a "restarting" of the statute of limitations each time wages are paid to the employee, but without any limitation of the amount of back pay an employee could recover; 3) a prohibition against employers taking reprisal against an employee for disclosing information about the job position and themselves; 3) the availability of treble damages awards; 4) a continual reporting requirement of employee demographics and compensation information for employers who are government contractors; and 5) a prohibition against requiring employees or prospective employees to consent to a shortened statute of limitation or to waive any of the protections provided by law.<sup>25</sup> Most of these amendments were modeled after those passed in California.

The bill passed by decisive margins in both the New Jersey Senate and Assembly. Governor Chris Christie then issued a conditional veto of the bill,<sup>26</sup> citing objections to each amendment proposed in S-992. Most of the objections were based on the fact that the amendments were an expansion of federal law or court precedent, which was the actual purpose of the amendments.<sup>27</sup> The purpose of lowering the stringent "equal work" legal standard to "substantially similar work" was to alleviate the known difficulties employees face in bringing suits in federal court under the current laws.<sup>28</sup> Christie called this "nonsensical," noting it would make "New Jersey business unfriendly," and further stating he did not want the state to be a "liberal outlier."<sup>29</sup> Making treble damages available, along with providing for back pay for the entire time period of discrimination, were to serve as key deterrents for discrimination. Christie objected to those amendments as well.<sup>30</sup>

The governor also took issue with the reporting requirement, arguing it would impose another burdensome reporting mandate on businesses and would not improve New Jersey anti-discrimination laws.<sup>31</sup> Transparency and the collection of pay data are significant tools to ensure compliance with the law. Advocates argue that this concern is an overused red herring, since such information can be provided without imposing extensive burdens on businesses. In fact, businesses are already required to submit some information to the EECO on race and gender. While uncertain under the current administration, businesses may also soon be required to collect and report compensation and job information to the EEOC.<sup>32</sup>

The bill went back to the Legislature, which unsuccessfully sought to override the governor's veto by a two-

thirds majority. While under Christie the adoption of the bill seems unlikely, it could be revived under the next administration. The efforts at eliminating the gender wage gap continue to gain momentum, and will undoubtedly be an important issue in the primary election in New Jersey. ■

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## Endnotes

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