

The Francis Perkins Workplace Equity Act: Will Massachusetts Join California & Colorado in Pay Transparency?

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Pay inequity continues to be a problem throughout the United States and the Commonwealth. Women of every race are paid less than men at all education levels, and the problem is compounded if a woman is a member of a marginalized community.²

In 2021, Massachusetts Attorney General Maura Healey warned that, at the current rate, the gender pay gap between Massachusetts-based men and women will not be closed until 2059.³ It will take even longer for women of color to achieve parity with white men. Tackling this issue over the last several years, various states have passed laws increasing pay transparency, including many jurisdictions requiring businesses to publicize pay scales in job advertisements.⁴ Multistate employers seeking to remain compliant with state and federal laws must understand and comply with varying forms of pay transparency and discrimination laws.

The statistical differential between what a white man earns in the Commonwealth versus everyone else is sobering. For every dollar a white man earned in 2020, women earned 83 cents.⁵ The U.S. Department of Labor has reported that in nearly all occupations, women earn less than men in the United States.⁶ As highlighted below, EqualPayMA and the Office of

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² See *Factsheet: Gender Wage Inequality in the United States and What to Do About It*, EQUITABLE GROWTH (April 9, 2018), <https://equitablegrowth.org/factsheet-gender-wage-inequality-in-the-united-states-and-what-to-do-about-it> [<https://perma.cc/S5AL-CRNU>]. “The average earnings of all women who work full time, year-round is 80.5 percent (routinely reported as 81 percent) of men who work full time, year round. This adds up to total wage differences of more than \$799 billion annually. The wage gap is worse for black women and Latinas.” *Id.*

³ See Nik DeCosta-Klipa, *To Close Persistent Wage Gaps, Maura Healey Wants Massachusetts to Make Companies Open Up Their Books*, BOSTON.COM (June 9, 2021), <https://www.boston.com/news/politics/2021/06/09/to-close-persistent-wage-gaps-maura-healey-wants-massachusetts-to-make-companies-open-up-their-books> [<https://perma.cc/H568-XSQS>].

⁴ See generally CAL. LAB. CODE § 432.3 (West 2022) (effective Jan. 1, 2023); CAL. LAB. CODE § 232.5 (West 2003); 820 ILL. COMP. STAT. 112/10 (West 2003); MICH. COMP. LAWS ANN. § 408.483a (West 2022); VT. STAT. ANN. TIT. 21, § 495 (West 2018); COLO. REV. STAT. ANN. § 24-34-402(h)(II)(C)(i) (West 2022); ME. REV. STAT. TIT. 26, § 628 (West 2019); see also *infra* note 15.

⁵ See OFFICE OF ECON. EMPOWERMENT, FINDINGS REPORT: 2021 EQUALPAYMA ROUNDTABLE SERIES 4 (2022), <https://www.mass.gov/doc/2021-equalpayma-findings-report/download> [<https://perma.cc/L5MY-T84S>] [hereinafter *Equal Pay for All Findings Report*].

⁶ See U.S. DEP’T OF LAB. WOMEN’S BUREAU, MEDIAN ANNUAL EARNINGS BY SEX, RACE AND HISPANIC ETHNICITY, <https://www.dol.gov/agencies/wb/data/earnings/median-annual-sex-race-hispanic-ethnicity> [<https://perma.cc/BN35-MU2E>] (comparing earnings by demographic).

Economic Empowerment displayed the statistical disparity clearly in their 2021 Findings Report and importantly noted the impact on people of color:

In 2020, compared to each \$1 earned by a white, non-Hispanic man, on average:

- African American and Black women earned \$0.64, so they would need to work up to August 3rd to reach the total earned income of a white, non-Hispanic man from the prior year.
- Latinas earned \$0.57 and would have had to work until October 21st to earn the same as a white, non-Hispanic man during the prior year.
- Native Women earned \$0.60, making their equal pay day September 8th.
- In 2021, Mothers' Equal Pay Day was recognized on May 5th, as mothers make on average \$0.70 to fathers.
- Asian American women as a whole earned \$1.01.⁷

The Covid-19 pandemic also reversed many gains made toward closing the pay gap, and layoffs and a lack of childcare have forced many women out of the workforce entirely. The U.S. Department of Labor has reported that in February 2021, women's labor force participation rate was 55.8%—the same rate as April 1987.⁸ The pay gap has gained attention from the media and politicians over the last few years, including most notably by the World Cup-winning U.S. Women's National Team's class-action suit (and eventual \$24 million dollar settlement).⁹ The employment plaintiff's bar has also paid close attention to the gender pay gap. Since 2018, over 4,000 equal pay act charges have been filed throughout the United States with the Equal Employment Opportunity Commission.¹⁰ The EEOC's strategic plan has focused on pay-

⁷ *Equal Pay for All Findings Report*, *supra* note 5, at 4. "If the pay difference is not related to education, experience, seniority, a merit system, or working a different number of hours, it is likely that the pay difference amounts to either conscious or unconscious discrimination." Bridget Underhill, *Moving Closer to Pay Parity by Requiring Wage Transparency A Private Sector National Standard*, 97 U. DET. MERCY L. REV. 157, 159 (2019).

⁸ See Janelle Jones, *5 Facts About the State of the Gender Pay Gap*, U.S. DEP'T OF LAB. BLOG (March 19, 2021), <https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap> [<https://perma.cc/Y4Z6-E7JF>].

Unfortunately, the pandemic stalled gains made toward closing the pay gap, and layoffs and a lack of child care have forced many women out of the workforce entirely. In February 2021, women's labor force participation rate was 55.8% – the same rate as April 1987. And women of color and those working in low-wage occupations have been the most impacted.

Id.

⁹ See Andrew Dar, *U.S. Soccer and Women's Players Agree to Settle Equal Pay Lawsuit*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/02/22/sports/soccer/us-womens-soccer-equal-pay.html> [<https://perma.cc/R7KE-2U9N>].

¹⁰ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT AND LITIGATION STATISTICS, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0> [<https://perma.cc/MMS8-9KTX>] (filtering charges by Equal Pay claims for fiscal years 2016-2020).

disparity issues, and the Commission stated that pay-equity protection was one of its six major priorities in 2021 and would likely continue to be a focal point.¹¹ As employees are increasingly expecting more efforts from organizations surrounding the issues of diversity, equity, inclusion, and belonging, the stakes for Massachusetts employers regarding pay equity continue to rise.

In September, Governor Gavin Newsom expanded California's existing pay-transparency and data-reporting laws, specifically requiring both public and private employers of fifteen or more employees to post the pay scale for a position in any job posting beginning January 1, 2023.¹² Under California's law, pay scale is defined as the salary or hourly range the employer reasonably expects to pay for the position. This posting requirement includes company advertisements through third party sites like Indeed, LinkedIn, ZipRecruiter, or Monster. Additionally, California businesses must provide the pay scale to a current employee upon reasonable request.¹³

Importantly, violations of California's law are no laughing matter, with civil fines reaching up to \$10,000 per violation.¹⁴

In passing its pay transparency law, California joins many other states and cities. Colorado, Connecticut, Jersey City, Ithaca, and New York City have all imposed similar requirements for pay transparency in job postings or upon request.¹⁵ Similar to California, Washington State is requiring pay transparency in job postings beginning January 1, 2023.¹⁶ Nevada mandates employers and employment agencies *proactively* disclose wage or salary range to applicants who have completed an interview for a position or current employees applying for a promotion or transfer.¹⁷ These laws impact household names for American big business, including Amazon, Chevron, Disney, Meta (formerly Facebook), Microsoft, Starbucks and Twitter. Businesses are understandably concerned that the public disclosure of this pay information may create a competitive disadvantage.

¹¹ See *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017-2021*, at 8, <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021> [<https://perma.cc/XPW4-JVGK>] (outlining priorities); see also Trish Martin et al., *Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen*, LITTLER MENDELSON P.C. (Sept. 2, 2022), <https://www.littler.com/publication-press/publication/minding-pay-gap-what-employers-need-know-pay-equity-protections-0> [<https://perma.cc/Q9AZ-2YGW>].

¹² See CAL. LAB. CODE § 432.3; CAL. LAB. CODE § 232.5.

¹³ CAL. LAB. CODE § 432.3 (“An employer, upon request, shall provide an employee the pay scale for the position in which the employee is currently employed.”).

¹⁴ *Id.* at § 432.3(d)(4).

¹⁵ See COLO. REV. STAT. § 8-5-201 (West 2022); CONN. GEN. STAT. ANN. § 31-40z (West 2021); JERSEY CITY, N.J., CODE OF ORDINANCES § 148-4.1 (2022); ITHACA, NY, CODE OF ORDINANCES § 215-3(F) (2022); NEW YORK CITY, NY, N.Y.C. ADMIN. CODE § 8-107(32) (2022).

¹⁶ See WASH. REV. CODE ANN. § 49.58.110 (West 2022) (effective Jan. 1, 2023).

¹⁷ See NEV. REV. STAT. ANN. § 613.133 (West 2021).

Massachusetts currently has a bill pending before the Massachusetts legislature that mirrors Colorado and California's law. The proposed bill, named the Francis Perkins Workplace Equity Act (the Perkins Bill), will command certain Massachusetts employers with 100 or more employees to provide the pay scale in any job posting or advertisement and upon request by any employee.¹⁸ The Bill's namesake is telling. An American workers' rights advocate who served as Secretary of Labor, Francis Perkins, designed Social Security, created minimum wage and overtime pay, and drafted the legislation behind the New Deal under President Franklin Delano Roosevelt.¹⁹ Perkins was the first woman ever to serve in a presidential cabinet in 1933.²⁰

Governor-Elect Healey has been outspoken regarding increased transparency and disclosure by Massachusetts businesses to close the gender pay gap.²¹ The Perkins Bill would surely be welcomed by her administration. Testifying before the Massachusetts Senate in June 2021, Healey said, "If we're going to build an equitable economy we have to begin by closing racial and ethnic wage gaps. We cannot fix what you don't measure."²² Nevertheless, the Perkins Bill has been with the Senate Ways and Means Committee since March 3, 2022, and it appears the sponsors of the proposed law will not push for passage before the legislative term ends this year, and the Perkins Bill must be reintroduced when the legislature returns for the 2023-2024 session in January. At a moment where many women, particularly women of color, are looking to reenter the workforce, the Perkins Bill's passage could not come soon enough.

The Commonwealth has been a trailblazer for addressing pay inequity. Massachusetts has required equal pay since 1945.²³ Six years ago, Massachusetts became the first state in the nation to bar employers from asking a job applicant's salary history before offering them a job.²⁴ If passed, the Perkins Bill will accompany the Massachusetts Equal Pay Act, which was enacted in 2018 and made unlawful certain practices like the one mentioned above. The Equal Pay Act intended to ensure that the lower salaries historically paid to racially and ethnically marginalized communities and women did not follow those individuals their entire careers as they changed jobs and employers. As the Senate weighs the Perkins Bill, Massachusetts employers will be

¹⁸ See S.B. 2721, 192d GEN. CT. SESS. (Mass. 2021-2022).

¹⁹ See generally KRISTIN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE OF FRANCIS PERKINS, FDR'S SECRETARY OF LABOR AND HIS MORAL CONSCIENCE* 161-93 (Random House, Inc., 1st ed. 2009).

²⁰ *Id.* at 173 (detailing "hundreds of endorsement letters flood[ing]" FDR's office encouraging Perkins' appointment to Secretary of Labor). Perkins eventually served in the role for twelve years and oversaw the New Deal and the Social Security Act of 1935. See *id.*

²¹ See Press Release, Office of Attorney General Maura Healey, *AG Healey Issues Guidance for Employers on Equal Pay Law* (March 1, 2018) (on file with author); DeCosta-Klipa, *supra* note 3.

²² See DeCosta-Klipa *supra* note 3. Attorney General Healey said, "I think we need to be intentional at looking at what's actually happening within our workplaces, not from a place of defensiveness, but through a recognition that this is going to actually make us all better." *Id.*

²³ See MASS. GEN. LAWS ch. 149, § 105A; Office of Att'y Gen. Maura Healey, *Learn More Details About the Massachusetts Equal Pay Act*, <https://www.mass.gov/service-details/learn-more-details-about-the-massachusetts-equal-pay-act> [<https://perma.cc/W6P7-G8GB>].

²⁴ See *Id.*

watching closely as the impact on all businesses will be monumental and, more importantly, will support parity in wages for all Massachusetts workers.