

Gender Based Discrimination and Pay Inequality

Recent large equal pay cases such as last year's \$118M Google gender settlement, and recent laws regarding pay equity and requiring pay transparency, spotlight employee compensation. Recent cases and trends on pay equity are discussed below.



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Overview of Gender Based Discrimination and Pay Inequality

What is gender-based pay discrimination?

Less pay for substantially similar work. It's the practice of paying employees differently without a legitimate reason such as experience, education, and job performance.

Why does it occur?

Lack of Transparency and Discretion - unconscious bias, stereotyping, occupational segregation, excessive "discretion" in compensation and lack of transparency combine to allow discrimination to flourish.

Whom does it affect?

Its effects are widespread, but **women and minorities** are especially impacted.

Most Significant Equal Pay Developments

1

2021 - *Chalmers v. City of New York* (S.D.N.Y. 2021)

Granted class certification for pay discrimination claims of mostly minority Fire Department Employees alleging they were paid less for substantially similar work performed by Building Department employees.

The case broke new ground because the Court allowed class certification for a subclass of white employees claiming they were paid less due to their association with the underpaid employees.

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2019 - *Lenzi v. Systemax*, 18-979 (2d Cir. 2019)

The Case established that pay discrimination "because of sex" is enough to violate Title VII - an employee does not need to allege that they were paid less for performing "equal work." as would be required under the Equal Pay Act.

Female department head (Risk Management) alleged she was paid less than male department heads (Internal Audit, etc.)

. Company argued it was entitled to set compensation using third party benchmarking that paid Risk Management less than other functions.

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2017 - Google \$118m gender settlement (*Ellis v. Google, LLC*, Case No. CGC-17-561299)

This case highlighted the prevalence of gender-based pay discrimination in the tech industry and the importance of **pay transparency**, inspiring other cases against

2012- *Pao v. Kleiner Perkins*, Cal.App. 1 Dist. 2012.

Female employee of Silicon Valley V.C. firm alleged a widespread, long-term pattern of gender discrimination in compensation (among other things). Although the defendant won the case, it brought the gender pay gap issue to the forefront and inspired other women to speak out.

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tech companies including Microsoft, Twitter, and others.

"Executive Pay Scholars have exposed: (1) the human dynamics and conditions that cause compensation markets to fail; (2) ineffectiveness of litigation to fully address abusive pay because of court reluctance to interfere with "business judgments" about compensation; and (3) the crucial role of transparency as a market-based tool to reform abusive pay practices." - Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination, Deborah Thompson Eisenberg, Ariz. St. L. J. vol 43:0951 - available at

https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2093&context=fac_pubs

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2010 - *Chen-Oster v. Goldman, Sachs* (S.D.N.Y. 2010) (1:10-cv-06950)

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2009 - Lilly Ledbetter Fair Pay Act

The act established that each paycheck is a separate discriminatory act for Statute of Limitations purposes, which was a necessary change because due to lack of transparency, pay discrimination is often discovered by employees after it is otherwise too late to file a claim.

This was in response to the 2007 case *Ledbetter v. Goodyear Tire & Rubber Co.*, where the Supreme Court held that employees could not sue under Title VII for discriminatory pay decisions made more than 180 days before the claim.

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1963 - Equal Pay Act (amendment to the FLSA)

Employers may not pay unequal wages to men and women who perform substantially equal jobs and work at the same establishment.

Only 4 defenses exist: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) any factor other than sex.

Female employees of investment bank alleged pay discrimination and other violations of Title VII. The case permitted class certification of disparate impact and disparate treatment claims but denied certification of claims alleging a "boys club" culture where individualized proof would overwhelm common issues..

Recent Developments in Pay Equity and Pay Transparency

1 **New York State Equal Pay Act (NYLL § 194) and California Fair Pay Act**

These laws require equal pay for “substantially similar work” and prohibits employers from retaliating against employees who discuss their pay.

2 **U.S. Women’s National Soccer Team v. U.S. Soccer Federation (\$24mm back pay agreement)**

The lawsuit highlighted the gender pay gap in sports and brought attention to the need for equal pay for female athletes.

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2019 - Paycheck Fairness Act

The act strengthens the Equal Pay Act, including by limiting defenses such as the "factor other than sex" defense, allowing **punitive damages** and **mental distress** damages and **streamlining the opt-in process** for class cases.

Current Trends on Pay Equity



Emphasis on diversity and inclusion



Encouraging salary negotiation



Remote work and flexible schedules

Training isn't enough!

1. Prevention

- a. Increase Transparency
- b. Reduce Discretion in setting compensation

2. Treatment

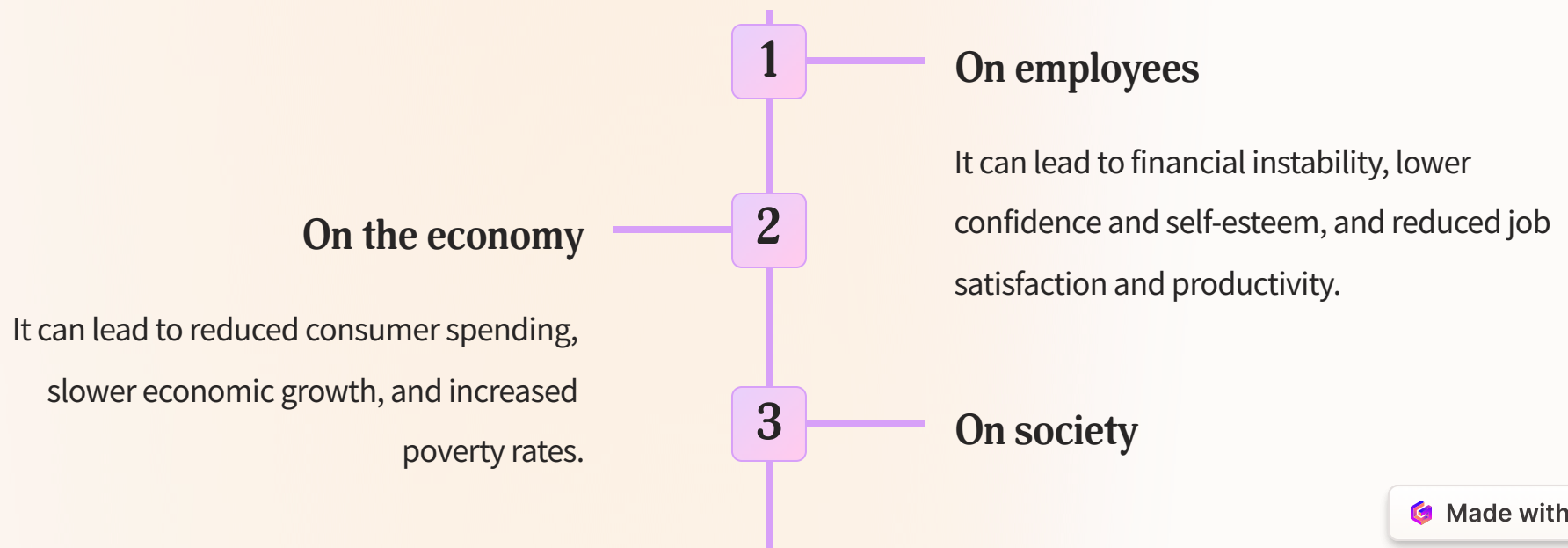
- a. Have counsel conduct compensation analyses

Negotiation outcomes are no

defense to most pay discrimination claims.

Remote work and flexible schedules are becoming more common and employees may be willing to accept less compensation as a result.

Impact of Gender-Based Pay Inequality



It can perpetuate broader inequalities and lead to a less equitable and just society.

Challenges and Solutions in Addressing Gender-Based Pay Discrimination

Challenges

- Limited access to information about pay practices
- Implicit bias and stereotypes
- Limited bargaining power for employees

Solutions

- Pay transparency and reporting requirements
- Set pay using objective work-related criteria
- Training and education on unconscious bias
- Collective bargaining

Conclusion and Call to Action

The time for change is now

We must recognize and address the systemic discrimination that contributes to gender-based pay inequality.

What you can do

To identify claims, look for areas where there are substantially overlapping job duties with limited transparency and significant management discretion in setting compensation.

To prevent claims, conduct internal pay audits using professionals: legal counsel and Industrial-Organizational Psychologists.