Oval Office Change May Not Trump Pay Equity –
Reasons for Optimism in Tumultuous Times

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There are many ways that gender can impact pay. Historically male-dominated occupations may command more dollars than female-dominated occupations of equal education, skill and responsibility. Differing social responsibilities, such as child care, or outright gender bias may affect women’s access to managerial positions and the boardroom. This paper focuses on the most direct example of the gender pay gap – women performing substantially the same job as men but for lesser pay. According to the Women’s Bureau of the U.S. Department of Labor, in 2015 women earned only 79.6 cents for every dollar earned by a man for full-time, year-round work. See, Issue Brief, Women’s Earnings and the Wage Gap, https://www.dol.gov/wb/resources/Womens_Earnings_and_the_Wage_Gap_17.pdf, citing, U.S. Census Bureau, Current Population Reports, “Income and Poverty in the United States: 2015,” “Table A-4,” available at https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf.

Throughout his presidency, President Barack Obama acted to fundamentally strengthen federal equal pay laws and combat pay discrimination. It started with the very first piece of legislation that he signed into law on January 29, 2009 – the Lilly Ledbetter Fair Pay Act (Pub. L. 111-2, S. 181), which empowers women to recover wages lost due to sex discrimination by extending the statute of limitations for filing a pay claim by amending the Civil Rights Act of 1964. But President Obama recognized that a significant obstacle exists that interferes with enforcing the nation’s equal pay laws – namely that many women simply don’t know that they are underpaid – and therefore they aren’t able to take steps to assert their right to “equal pay for equal work.”
Accordingly, during his tenure, President Obama took various executive actions to continue the fight against the gender pay gap and increase pay transparency.

For example, on April 8, 2014, President Obama signed Executive Order 13665, “Non-Retaliation for Disclosure of Compensation Information,” which was a strike against pay secrecy. It amended Executive Order 11246 (signed by President Lyndon Johnson in September 1965) which has long imposed non-discrimination and affirmative action rules upon federal contractors and subcontractors. President Obama’s Executive Order broadened those protections to also prohibit such contractors from discriminating and/or retaliating against workers for discussing, disclosing or inquiring about compensation information. In September 2015, the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) published a Final Rule revising the regulations implementing Executive Order 13665 and those regulations became effective on January 11, 2016. See, 41 CFR Part 60-1.

On that same Equal Pay Day in April 2014, President Obama also issued a Presidential Memorandum, “Advancing Pay Equality Through Compensation Data Collection,” in which he instructed the Secretary of Labor to propose a new regulation requiring federal contractors to submit summary data on compensation paid to their employees, including by race and gender. 79 FR No. 20751. And on the seventh anniversary of the Lilly Ledbetter Fair Pay Act, on January 29, 2016, President Obama announced that the Equal Employment Opportunity Commission (“EEOC”) had proposed a further revision to the rule governing the collection of such information – such that Employer Information Report (“EEO-1”) would require the annual collection of summary pay data by gender, race and ethnicity across from businesses with 100 or
more employees as well as from certain government contractors. This expansion would allow the EEOC and the OFCCP to use the submitted data to analyze pay disparities across industries and occupations, and facilitate enforcement of the country’s anti-discrimination laws. The new expanded reporting requirements are set to begin with the 2017 EEO-1 report – which is due on March 31, 2018, and per the Obama Administration, would cover over 63 million employees.

Drawing further attention to gender equality issues, President Obama also hosted the first ever White House Summit on the United State of Women on June 14, 2016, with the theme, “Today, we change tomorrow.” The Summit was focused on six key areas that impact women and girls, including economic opportunity and prosperity. As part of the Summit, and in furtherance of its agenda to close the pay gap, the White House announced a new “Equal Pay Pledge” for private sector companies that share in the commitment to equal pay. By becoming a signatory to “the Pledge,” companies publicly commit to take action to advance pay equity by:

- Acknowledging the critical role businesses must play in reducing the national pay gap;
- Conducting an annual company-wide gender pay analysis across occupations;
- Reviewing personnel processes to reduce unconscious bias and structural barriers;
- Embedding equal pay efforts into broader enterprise-wide equity initiatives; and
- Pledging to identify and promote other best practices to close the wage gap.


Within six months, more than 100 of the largest and/or most known private employers in

Then, on November 8, 2016, Donald Trump was elected President of the United States after a polarizing campaign during which some would argue he exhibited a blatant disdain for women. Perhaps not surprising then, since Trump took office in January 2017, the official White House website no longer devotes any of its pages to the issues of Women or Fighting Discrimination or Equal Pay – and many expect that Trump will reverse or revoke Obama’s executive actions so that the new EEO-1 reporting requirements will be rescinded before they ever go into effect.

Still, even after Trump’s election, and as ongoing presidential support for pay equity becomes more and more unlikely, companies have continued to sign “the Pledge” notwithstanding that it no longer appears on the Trump administration’s White House website. And some companies have taken still more public action to show their commitment to eliminating the gender pay gap.
One of the most talked about such acts came from Audi – during the fifty-first Super Bowl on February 5, 2017. During the most-watched sporting event of the year, Audi ran an ad in which it boldly called attention to the pay disparity that persists between men and women in the U.S., while publicly advocating for and committing to pay equity. The sixty-second ad, entitled “Daughter,” tells the story of a girl competing in a soapbox/go-cart derby race. While she zips around the race course, her father watches and contemplates the struggle to discuss gender equality with her, narrating in the voiceover:

“What do I tell my daughter? Do I tell her her grandpa is worth more than her grandma?

That her dad is worth more than her mom?

Do I tell her that despite her education, her drive, her skills, her intelligence, she will automatically be valued as less than every man she ever meets?”

Determined, the daughter flies past each of her competitors, all of them boys. When she proudly crosses the finish-line, a car length ahead of the nearest boy, she’s hugged by her dad as the crowd cheers her victory. The father’s voiceover continues:

“Or maybe, I’ll be able to tell her something different.”

The commercial cuts to black, and Audi’s pledge appears onscreen:

“Audi of America is committed to equal pay for equal work.”

And Audi ends it message simply:

“Progress is for everyone.”

See, https://www.youtube.com/watch?v=qLvcMj3U4gA.
The reaction and feedback to the commercial was mixed. Many applauded Audi’s progressive message, its support of gender equality and the effort to empower women – which came just days after the historic Women’s March on Washington and its sister marches across the U.S. and throughout the world. But others labeled it liberal or feminist propaganda, complained that the ad was a political ploy or was unfair to men, and/or criticized Audi for being hypocritical – since some noted that Audi appears to have only two women on its fourteen-member executive team and zero women on its six-person management team. But whether favored or condemned, Audi’s commercial is a stark example of the issue of pay equality remaining at the forefront – for both the general public and for private companies – even under a Trump Presidency.

But is “commitment” like Audi’s enough to achieve pay equity? Can we hold companies like Audi accountable for whether “progress” is really being made? And how do we do so during a Trump Presidency when the focus and dedication that was previously given to gender equality issues has been abandoned? To this writer, a possible answer to these questions – and one way we can ensure that the Audi dad will someday be able to tell that “something different” to his daughter – is rooted in pay transparency.

Pay transparency is not a new idea. Indeed, it’s already happening all around us, at various levels and in many ways. Over the last decade websites such as Glassdoor.com, Payscale.com, Salary.com and Fairygodboss.com provide direct avenues by which employers and employees alike can report, research, compare and evaluate real compensation data disclosed by actual workers (usually anonymously).

1 How companies deal with executive hiring and promotional opportunities raises separate, but related, gender equity issues which is not the focus of this paper.

Nicole M. Rothgeb
Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.
and/or by the employer itself.

Taking transparency a step further, some private companies are embracing disclosure of pay data as a means by which to combat the pay gap. For instance, Whole Foods Market, with approximately 90,000+ employees, makes its salary information available to all employees. This open salary policy has been in place at Whole Foods for two decades and according to its co-CEO, John Mackey, is designed to build trust and creates a sense of “shared fate” where workers are all-for-one and one-for-all. Alison Griswold, Here’s Why Whole Foods Lets Employees Look Up Each Other’s Salaries, Business Insider, Mar. 3, 2014.

Even further along in the transparency spectrum is Buffer, a social media sharing startup company with about 75 employees (as of early 2017), that truly lives by its self-proclaimed “Default to Transparency” core value. https://buffer.com/about#buffer-values. Buffer is a pioneer in what it and others refer to as “radical transparency,” whereby everything at Buffer is open and accessible – the company’s financials, equity and ownership breakdowns, revenues, demographics about the workforce – including its diversity dashboard, as well as staff salaries (from the CEO on down, with names) and even the formula Buffer uses to calculate wages. https://buffer.com/transparency. And Buffer has thrown its doors wide open – all of these items are available publicly.

But even at such a transparent company, the gender pay gap may persist. In 2016, Buffer conducted a pay data analysis and discovered it had an approximate $10,000 wage gap – men’s average salaries at Buffer were determined to be $98,075, while women’s average salaries were found to be $89,205. Emily Peck, Even at a Company Obsessed with Fair Pay, Women Make Less than Men, Huffington Post, Mar.
21, 2016. Admirably, Buffer has announced the steps it is taking to address its wage gap, namely hiring more female developers (since the audit found that employees in the development area are paid more)⁡ and reviewing and reconsidering how the company measures “experience” in its salary formula and in opportunities for advancement.

Lydia Dishman, *Why Salary Transparency Didn’t Eliminate the Gender Wage Gap at this Startup*, Fast Company, Mar. 31, 2016; Bourree Lam, *When Everyone Know How Much Everyone Else is Paid*, The Atlantic, Mar. 28, 2016. But the analysis itself reveals that even in companies like Buffer, where transparency is the reality, gender bias may still creep into and impact salaries – and thereby perpetuate the gender wage gap.

So, given the mainstream attention and the public pronouncements – by the populace generally and by some private companies that see the benefit of pay transparency as a means to combat the pay gap – what else can be or is being done, especially now that the issue is not a priority for this President? Action at the state level is now, and must continue to be, the focus.

A number of states already have laws on the books that seek to prevent pay secrecy in private employment by prohibiting retaliation and discrimination against employees who disclose or discuss their wages or engage in similar activity. These states include, California (Cal. Lab. Code §232(a)-(c) and §1197.5(j)(1)), Colorado (Colo. Rev. Stat. §24-34-402(1)(i)), Connecticut (Conn. Gen. Stat. §31-40z), Illinois (820 Ill. Comp. Stat 112/10(b)), Louisiana (La. Rev. Stat. Ann. §23:664D), Maine (Me. Rev.

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⁡ The emphasis of this paper is not on how to address and respond to the fact that certain industries and/or individualized employment roles are still more likely to be filled by male employees instead of equally qualified and skilled females, but pay transparency is still helpful in raising social awareness of this other important cause of differential earnings between women and men.

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Beyond tackling pay secrecy, some local governments are going even further by prohibiting private employers from asking about or taking into account an applicant and/or new employee’s prior salary history. These laws are intended to narrow the gender wage gap by preventing employers from setting initial pay based upon the wages and benefits at a prior job – which may themselves have been the product of gender bias. Massachusetts (Bill S2119), Puerto Rico (Act No. 16), and Philadelphia (Bill No. 160840) have each passed such laws, while similar legislation is now pending in Florida (H.B. 319, S.B. 410), California (A.B. 168), Iowa (S.F. 340), Montana (S.B. 148), Texas (H.B. No. 290) and Virginia (H.B. 2190). Such prohibitions are meant to stop the perpetuation of the gender pay disparity that occurs when a new employer bases a starting salary upon an applicant’s prior unequal compensation package, and thereby tackle the persistent wage gap.
Despite the lack of support from the current Oval Office, there is reason for some level of optimism that efforts to achieve pay equity continue to move forward. First, mainstream attention to the issue remains prevalent. Second, the response from so many major companies to the Obama Administration’s initiatives and, in particular to increasing pay transparency, suggests there is commercial and/or operational value to companies that reduce the gender pay gap. Third, by providing real access to critical evidence necessary to bring litigation, pay transparency may revitalize the ability to redress pay inequity. In this aspect “equal pay for equal work” claims will not be dependent upon the occupant of the White House but rely instead upon the private attorney general structure which underlies much of the existing anti-discrimination legislation. Finally, continuous and growing efforts of states to reduce one of the root causes of pay inequity – the reliance on prior salary history in initial hiring, especially in professional positions – also provide a path forward. Only time will tell if the Audi dad’s hope – that he will be able to tell his daughter “something different” – can become the reality.