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February 6, 2012

Testimony before the New Jersey Assembly Committee on Women and Children

Thank you. My name is John Sarno, President & General Counsel for the Employers Association of New Jersey (EANJ). EANJ is nonprofit trade association comprised of New Jersey employers. I have been asked to share my views with the Committee concerning the factors accounting for a gender earnings gap in the State of New Jersey and other pay equity issues that may affect women in the State.

EANJ does not engage in lobbying. Since 1916, it has provided advice, counsel and training to employers on labor, employment and health care issues. I am a labor and employment lawyer and teach employment law. Therefore my remarks will focus on various legal issues.

In New Jersey, about half of the state's workforce is comprised of working women. Women comprise the majority of professional, technical, administrative support workers and women comprise the majority of sales and service workers in the state. Women are obviously a vital human resource to the state's employers and not in numbers alone. It is beyond doubt, the success of the state's economy depends upon women striving and thriving at work.

Working women also provide most of the caring giving as well. Whether it is caring for a child or an ill family member, it is women that are significantly more likely than men to be caregivers. The Rutgers Center for State Health Policy has estimated that there more than 700,000 working-age adults in New Jersey that provide care for a family member. About six in ten of these care givers work full-time. I mention this because there appears to be a relationship between caring and wages, that is to say, time spent out of the workforce or delayed entry into the workforce and wages, which I will discuss shortly.

First let me say that we can be proud that New Jersey was one of the first states in the nation that enacted a Family Leave law. The Family Leave law provides that an eligible employee who works for an employer with 50 more employees in the state can take a leave of absence to provide care for a newborn child of the employee, the placement of a child with the employee for adoption, or the serious health condition of a family member, including the civil union partner, of the employee.

Together with the federal Family and Medical Leave Act (FMLA), eligible employees can take up to 12-weeks of unpaid leave and be guaranteed under most circumstances that their jobs will be waiting for them upon return.

Regarding employees who work for smaller employers (49 employees or less) a survey conducted by the EANJ in 2007 indicated that many smaller employers already have adopted leave of absence policies to help employees cope with child care medical conditions.

The EANJ survey shows that 3 out of 4 respondents grant an employee a leave of absence to care for their own medical condition. Many extend this privilege to care for a seriously ill family member as well. Additionally, because New Jersey has a Temporary Disability Insurance law that supplements lost wages for up to 26-weeks of wage during periods of the employee's own disability, including disability due to pregnancy, many smaller employers grant a disability leave of absence and what is commonly known as maternity leave.

In short, most employers, regardless of size, understand that accommodating employees with family or medical needs is good for business. An employer spends a lot of time and effort training employees. It's hard when skilled employees leave. Many employers have found that it's best to make the effort to return the employee to work whenever possible, even if not legally required.

New Jersey is also one of only three states that have mandated Family Leave Insurance (FLI). While FLI is not a leave law, it has extended the Temporary Disability Insurance law and provides supplemental wages for six weeks to workers caring for ill family members, including civil union partners, newborns and newly adopted children.

The Rutgers Center for Women and Work has suggested that FLI has paid economic returns. In its study, using data collected by the Bureau of Labor Statistics between 1997 and 2009, women who took advantage of FLI reported a stronger attachment to the labor force and higher wages within a year of returning to work after giving birth.

Also, the study suggested women who return to work after a paid leave have a 39 percent lower likelihood of receiving public assistance and a 40 percent lower likelihood of receiving food stamps in the year following the child's birth, compared to those who return to work and take no leave at all, the study reported.

Together, these protections strengthen two bonds. One is obviously the bond between the parent and the child or the bond between a caregiver and a family member. But there's another bond,

and that's the bond between the employer and the employee. And as I have mentioned, most employers understand that accommodating employees with family or medical needs is simply good for business.

In 2007, guidance issued by Office of Legal Counsel for the Equal Employment Opportunity Commission (EEOC) to the EEOC regional offices addressed how to detect unlawful discrimination under federal equal employment laws against workers with caregiving responsibilities.

It is unlawful under both federal and State law to discriminate against workers because of sex or gender, including discrimination in wages and benefits. The guidance notes that caregiving responsibilities disproportionately affect working women generally, but is more pronounced among women of color, particularly African-American women. It also cited the following demographic data:

- 71% of mothers work outside the home;
- 53.3% of mothers with infants work outside the home;
- Only 1 in 10 working women can afford full-time daycare;
- Bias claims filed by caregivers, which include women and men caring for children and elderly parents, and disabled family members, increased 400% from 1992 – 2006
- Pregnancy discrimination charges rose 45% from 2005-2007.

As I have said, it is unlawful under both federal and State law to discriminate against workers because of sex or gender, including discrimination in wages and benefits. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits such discrimination and so does the New Jersey Law Against Discrimination (LAD). Both laws provide for a private right of action, a jury trial and robust equitable and legal damages, including punitive damages.

In addition to Title VII and LAD, both federal and State law prohibit unequal pay specifically because of sex and gender.

The federal Equal Pay Act, which is part of the Fair Labor Standards Act, prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions. Additionally, a provision of the New Jersey Wage and Hour law prohibits wage discrimination because of sex or gender. Like Title VII and LAD, these laws provide robust remedies to aggrieved employees.

In other words, there are four powerful laws in the State that deter and remedies wage discrimination because of sex and gender. Importantly, these laws also prohibit retaliation against employees who complain to their employer about unequal pay or discriminatory pay practices or when they file a charge to the EEOC or the N.J. Division on Civil Rights.

Finally, in 2009 President Obama signed the Ledbetter Fair Pay Act, which in effect overruled a 2007 U.S. Supreme Court decision and extended the statute of limitations for filing a suit for

unequal or discriminatory pay. As a practical matter, things, the Fair Pay Act has required employers to keep pay records for years after an employee has left employment.

As employees are free to file charges and lawsuits, employers are permitted to defend themselves of such allegations. Suffice to say, litigation in this area of the law is very complex, requiring a sophisticated understanding of burdens of proof, among other things.

I will try to net it out.

Generally speaking, where there is a pay disparity performing the same or similar job and requiring substantially equal skill, effort and responsibility under similar working conditions, an employer must show that a factor or factors other than sex accounts for the disparity. These include: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex, which includes “market forces.” For example, it could be that an employer is trying to lure away an employee from another company, who happens to be a man. To do so, the employer decides to raise the salary for the job as an inducement to accept the offer. That salary is now higher than an existing employee performing the same work who happens to be a woman. Paying the higher salary to induce the male to take the job is not unlawful discrimination. The wage disparity was the result of a market bargain. Cases illustrating this point are:

- In a 2008 case, a New York federal district court dismissed the plaintiff’s Equal Pay Act claim, holding that “salary matching is permitted under the Equal Pay Act” because “it allows an employer to reward prior experience and to lure talented people from other settings.” The district court came to this conclusion despite the fact that the men and women had similar experience and qualifications for the position. *Sparrock v. NYP Holdings, Inc.*, No. 06 Civ. 1776, 2008 WL 744733, at *16 (S.D.N.Y. Mar. 4, 2008).
- Similarly, another district court stated that “[o]ffering a higher starting salary in order to induce a candidate to accept the employer’s offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity. Indeed, that court stated that “[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the [Equal Pay Act], even though the current work may not justify the higher wage.” *Glunt v. GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing *Mazzella v. RCA Global Commc’ns, Inc.*, 814 F.2d 653 (2d Cir. 1987) and *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981)).
- In a 2007 case, a federal district court accepted that higher pay for the male comparator was necessary to “lure him away from his prior employer. The court emphasized that “[s]alary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as ‘a factor other than sex.’” *Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 U.S. Dist. LEXIS 18435, at *13 (S.D.N.Y. Mar. 8, 2007).

Likewise, the law recognizes years on and off the job as a “market force.” And as already noted, woman will spend more time off the job because the caregiving role within the wider society falls disproportionately on them. As noted, a greater percentage of women than men tend to leave the labor force for child birth, child care and elder care. Also, some of the wage gap is explained by the percentage of women who were not in the labor force during previous years.

And this is the issue that is most complex of all. It is permissible for an employer to base a pay decision on a factor other than sex, such as years on the job. Yet woman, on average, will spend fewer years on the job because of their role as caregiver. For this same reason, women will also delay entry into the workforce in the first instance. Presumably, this decision has been made willingly. It would be immoral if not otherwise. But even if life’s circumstances made this choice less than optimal, the law does not provide a remedy for this situation. It would be the same for any man. If circumstances resulted in a break in service from the job, he too would be subject to the same market forces.

I am not suggesting that sex discrimination in the workplace does not exist. Unfortunately, it still does. Nationally, women typically earn about 80 percent of men’s earnings. Moreover, college educated women are actually faring worse relative to college educated men, taking home about 75 percent of their male peers’ earnings. Of course, we cannot say that this disparity is caused by sex discrimination alone or even when sex discrimination does occur, how much of the disparity is caused by factors other than the employer’s discriminatory decision. Multiple factors relating to educational and occupational choices, time spent off the job, and delayed entry into the workforce all play a part in this statistical disparity. But when job discrimination can be proven, existing laws will and should provide a remedy.

I am also not suggesting that time spent off the job and delayed entry into the workforce is the only social dimensions that may cause wage disparities. There may be others. An analysis done by the *New York Times* (Nov. 16, 2009) concluded:

The implication is that in most jobs where a wage gap exists, it is probably not due to overt discrimination, with bosses deciding, Mad-Men-style, that women should receive unequal pay for equal work. Rather, in most jobs, the different career choices that men and women make — or perhaps the different career opportunities men and women have available to them — account for big differences in pay.

The law, particularly fair labor law, is a blunt instrument and cannot likely remedy the effects of personal choices dictated by the market or social circumstances. The law works best when an individual can demonstrate that an unlawful act has caused direct and tangible harm. I do not think that workplace law can remedy situations that may be caused by the market or by circumstances within the wider society.

This is why there are four very powerful laws now on the books and none of them require an employer to correct or be liable for discrimination it did not directly cause.

Let me also briefly mention a concern about litigation that is used for purposes other than to remedy discrimination caused directly by an employer.

In New Jersey, as well as nationally, the costs associated with employment-related litigation may be creating a significant impediment to hiring, wage growth and job creation. Employment-related litigation, such as harassment and discrimination, unequal pay and all forms of wrongful termination, increases the costs of hiring and firing and evidence suggests that such litigation has suppressed hiring and wage growth for decades.

Speaking for myself, I am proud to be living and working in state that values the contribution that women make to the economy. I am a spouse of a working woman and I have personal knowledge of how families and communities continue to be enriched by bread winners who happen to be women.

On the other hand, I also have professional knowledge of the costs of excessive, and sometimes frivolous, litigation to employers. And believe that the current system of resolving inequities in the workplace is doing a disservice to employers, employees and to the state's economy.

I will be more than willing at some future date to look into we might have a more rational system her in New Jersey.

For now, however, I will try to answer whatever questions that you may have.