



Addressing the Gender Pay Gap in America

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INTRODUCTION

Pay discrimination remains a persistent and intractable feature of the American economy. The following information is designed to provide a greater understanding of the scope of the problem, the laws designed to address it, the industries where it is most prevalent, and a variety of new proposals intended to help eradicate pay discrimination. If you believe you are being paid less than men doing similar work, you may need legal advice about how best to vindicate your rights.

THE SCOPE OF THE PROBLEM

One of the first attempts at officially addressing pay discrimination occurred in 1942. In response to the large number of women who entered the workforce to replace the men who had gone to fight in World War II, the National War Labor Board urged employers to voluntarily make “adjustments which equalize wage or salary rate paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations.” These recommendations were largely ignored, and most women were dismissed from their jobs once the war was over and men returned home.

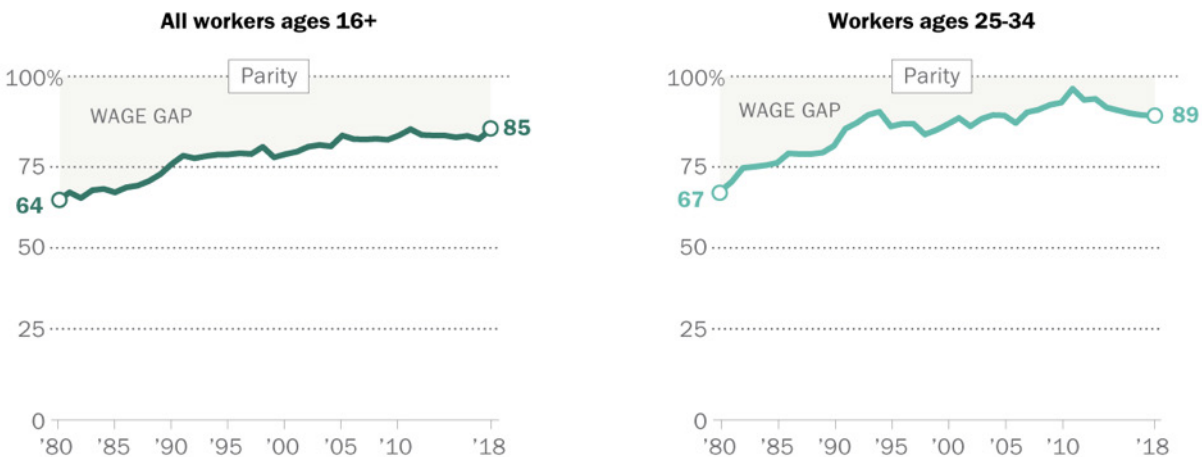
The following decades saw more women enter the traditional workforce as higher education became more attainable, and social attitudes toward marriage and motherhood shifted. But while more women were earning wages, they weren’t earning as much as their male counterparts.

According to the Pew Research Center, in 1980, for every dollar earned by a man, women earned 36 cents less.

Nearly 40 years later, in 2018, the Pew Research Center found that the pay gap had shrunk, but still existed, with women’s median hourly earnings at 15 cents per dollar less than men’s earnings.

The gender pay gap is narrower among young adults than among workers overall

Median hourly earnings of U.S. women as percentage of men’s median among ...



Note: Estimates are for civilian, non-institutionalized, full- or part-time employed workers with positive earnings. Self-employed workers are excluded.

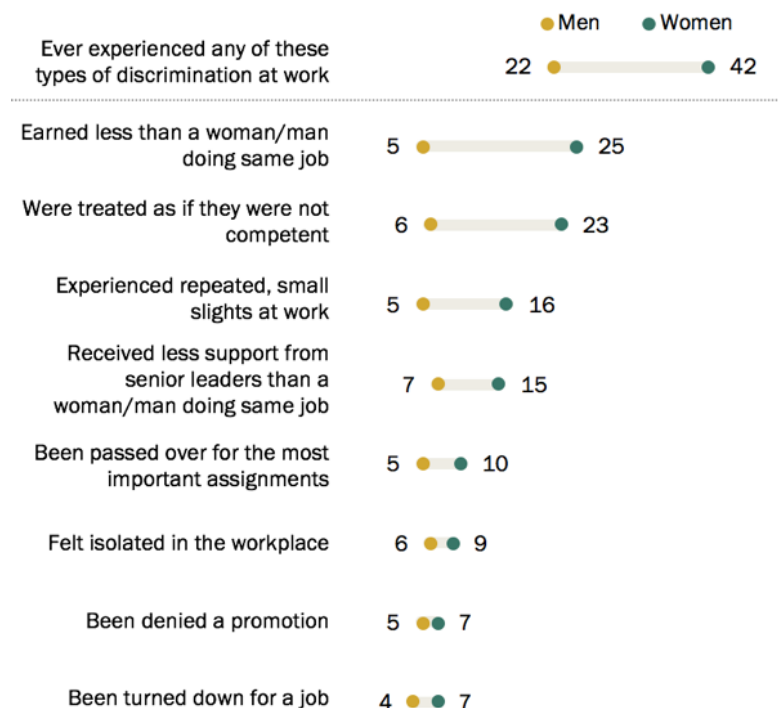
Source: Pew Research Center analysis of Current Population Survey data.

PEW RESEARCH CENTER

While some of the pay gap is attributable to factors such as educational attainment, work experience, and the types of jobs that are traditionally staffed by women, simple sex discrimination continues to prevent women from earning the salaries they deserve.

Roughly four-in-ten working women say they've experienced gender discrimination at work

% of employed adults saying they have experienced each of these things at work because of their gender



Source: Survey conducted July 11-Aug. 10, 2017.

PEW RESEARCH CENTER

Congress and state legislatures have passed laws prohibiting employment discrimination of any kind, and laws designed to specifically address sex discrimination and the pay gap, including the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, and the [Lily Ledbetter Fair Pay Act of 2009](#). Despite these efforts, the pay gap persists — something that both men (63%) and women (77%) believe the country should continue to address.

This report will cover those laws — their importance and deficiencies — as well as industries where the pay gap is especially glaring, and provide suggestions about what can be done to try to achieve pay equity between men and women.

THE LAWS

Equal Pay Act of 1963

There were 18 years of Congressional hearings before passage of the [Equal Pay Act of 1963 \(EPA\)](#). While President Kennedy's Commission on the Status of Women, established in 1961, made several suggestions, pay equality was the only one directly enacted into law. That success was due mainly to two arguments: that pay discrimination was immoral and that it was bad for the economy.

Women's groups, unions, and religious groups organized and lobbied hard for passage of the EPA. They testified in the Congressional hearings, and had indisputable evidence of pay discrimination on their side. Esther Peterson, assistant secretary for the Department of Labor, was the head of the Women's Bureau and testified that the low wages paid to women were driving them out of the workforce, which was detrimental to the economy and country at large. This

combination of equality and utilitarian arguments pushed the Equal Pay Act through Congress in 1963.

Unfortunately, the EPA came up well short of ensuring pay equity between the sexes. Due to the bill's narrow language, [the law only applied to 61% of women workers](#), and carved out exceptions for employees "in a bona fide executive, administrative, or professional capacity" — excluding most white collar workers. The law only guaranteed equal pay for men and women doing equal work, and the definition of equal work as jobs requiring the same skill, effort, and responsibility meant that the EPA could not address pay gaps caused by occupational segregation, which remains prevalent.

However, the EPA did set a bar for equal pay that has provided justice for hundreds of thousands of women.

According to information from the National Equal Pay Task Force, established by President Obama in 2010, the Department of Labor recovered over \$162 million on behalf of more than 269,000 workers in the 1960s and '70s. After the EEOC gained enforcement authority for the EPA, that agency recovered another \$52.7 million from 2000–'09.

Title VII of the Civil Rights Act of 1964

[The Civil Rights Act](#) was drafted with the primary intention of addressing racial inequality and discrimination, but from the beginning Title VII prohibited employment [discrimination based on religion, sex, and national origin, as well as race](#).

The amendment, which included sex as a protected class under Title VII was not — despite a popular myth — an attempt by opponents of the Civil Rights bill to sink its chances, but rather the result of savvy political organizing and lobbying by women's groups, with support from nearly every woman in Congress.

Immediately [after passage of the Civil Rights Act, almost a third of the charges filed with the Equal Employment Opportunity Commission alleged sex discrimination](#). The EEOC was initially very resistant to attacking sex discrimination with the same vigor it brought to the fight against racial discrimination. The agency promoted offensive tropes, declared sex discrimination nonexistent, and pointed to a lack of legislative history as an excuse not to act. In 1969, the recently created [National Organization of Women](#) convinced the EEOC to finally take sex discrimination seriously, and the EEOC issued new guidelines stating that sex-segregated job advertisements and pregnancy discrimination violated Title VII.

The EPA law
only applied to
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workers.

In addition to strengthening protections against sex discrimination and further narrowing the pay gap, including sex in Title VII led to the expansion of two crucial legal principles that have been vital in the fight against sex discrimination in employment

- First: disparate impact theory. Under the disparate impact theory, an employer does not need to *intentionally* discriminate against women to violate Title VII, but rather only has to institute a supposedly neutral rule or qualification that disproportionately disqualifies women — such as height and weight requirements.
- Second: sexual harassment. Under Title VII's prohibition on intentional discrimination, sexual harassment was found to be illegal sex discrimination because it created worse working condition for individuals because of their sex.

Pregnancy Discrimination Act of 1978

Shortly after the passage of the Civil Rights Act, women's rights activists sought to extend the protections afforded to pregnant women under Title VII. Despite the EEOC recognizing in 1972 that adverse treatment due to pregnancy, childbirth, or related medical conditions constituted illegal sex discrimination under Title VII, the Supreme Court rejected that argument. The court ruled in 1974 that a state law denying disability benefits to temporarily disabled pregnant women and new mothers did not violate the Equal Protection Clause of the Fourteenth Amendment. In 1976, the Court held that exclusions from a disability plan of pregnancy-related disabilities was not sex-based discrimination that could be challenged under the Title VII disparate impact theory — symbolizing a break from the more-sympathetic lower courts. Again, a year later, the Supreme Court decided that it was perfectly legal to exclude pregnancy from a company's sick leave policy.

Women's rights activists saw the need for a legislative solution. A coalition of organizations, including the [National Organization of Women](#), [National Partnership for Women and Families](#), and right-to-life groups, successfully lobbied Congress to pass the Pregnancy Discrimination Act in 1978.

The resulting legislation strengthened pregnant women's protections in the workplace, and the law's two main provisions stand today:

- the right to equal treatment for pregnant women;
- the same rights to workplace accommodations for pregnant women as for other temporarily disabled workers when they are unable to perform certain duties.

Lily Ledbetter Fair Pay Act of 2009

Lily Ledbetter worked at Goodyear Tire for over 19 years. After consistently receiving low pay raises and underwhelming performance reviews, Ledbetter sued Goodyear, alleging sex discrimination in violation of Title VII of the Civil Rights Act.

Ledbetter was originally awarded \$3.5 million by a jury, which was reduced to \$360,000 by a district judge. After a series of appeals, the case reached the Supreme Court, which held in a 5–4 decision that Ledbetter's claim was time-barred, since Ledbetter's charge was filed years after the original decision to pay her less than men in her position, and thus well outside the 180-day charge filing period.

The setback prompted activists to push for legislation to better protect women against such short and strict time bars which are particularly troubling in pay cases since people seldom know what others are being paid and may find out years after being hired about pay disparities, as Lily Ledbetter did.

In January 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. The act specifies that each discriminatory paycheck is a discrete act of discrimination — in effect, restarting the 180-day clock every paycheck, every time a discriminatory compensation decision is adopted, or every time a discriminatory decision is affected by a compensation decision. The law also covers victims of pay discrimination under the [Age Discrimination in Employment Act of 1967](#) and the [American with Disabilities Act of 1990](#).

State Laws

Many states have gone above and beyond the federal government in ensuring legal protections against pay discrimination. Often, as with the Maryland Fair Employment Practices Act, the state law simply mirrors federal law. A number of states, such as Louisiana, Texas, Utah, and Wisconsin, explicitly include pay-related provisions in their employment discrimination laws. Some states have expanded workplace protections to address numerous employment conditions, including wage discrimination.

Locally, the District of Columbia Human Rights Act (DCHRA) protects employees from discrimination in any employment action, including compensation decisions, based on 16 protected traits, including sex and sexual orientation. Unlike Title VII, the DCHRA protects all employees (no matter how small the company), allows for a more-timely adjudication of individual claims, and has higher compensatory and punitive damage caps than Title VII. D.C. has also passed the District of Columbia Wage Payment and Collection Law, which covers wages in the form of bonuses, commissions, unused vacation days, and more, and provides for liquidated damages in the amount of three times the amount of unpaid wages.

INDUSTRIES

Big Law

The #MeToo movement has shed a light on an all-too-common practice of underpaying female attorneys in Big Law firms. In just this past year, there have been several broad claims of sex harassment and pay discrimination against Big Law firms. In April 2018, three associates served Morrison & Foerster, LLP with a \$100 million proposed class action. The plaintiffs allege that the firm delayed advancement opportunities for attorneys who took maternity leave. A partner at Manatt, Phelps & Phillips, LLP filed an EEOC charge, alleging that the firm systemically underpaid female attorneys and developed a “good old boys” culture. A proposed class action case against Ogletree, Deakins, Nash, Smoak & Stewart, LLP claimed that the firm leadership disproportionately favored men for advancement opportunities.

A case that has highlighted the systemic barriers faced by victims of discrimination has been the battle that four former associates at Jones Day have been fighting against the firm. Their proposed \$200 million class action lawsuit alleging pervasive sex discrimination, including lower pay and fewer promotions, hit a roadblock when a court denied one plaintiff’s motion to proceed anonymously. Instead of revealing her identity and risking career-ending stigma, “Jane Doe 4” was removed from the complaint as a named plaintiff.

The fear of [retaliation](#) is [among the greatest reasons discrimination victims are afraid to speak out](#). As employment attorney Joseph Abboud notes in discussing Jane Doe’s dilemma, “Our nation’s courts have a long and valuable tradition of ensuring public access to legal proceedings and documents, as such transparency can help promote the integrity of the legal system, and vindicates constitutionally guaranteed freedoms of speech and access to certain government proceedings. Yet when the requirement of public exposure silences whistleblowers and allows private abuses to persist, the public interest suffers.”

While Big Law is far from the only industry to experience pay inequality and sex discrimination, it does have a history of being male-dominated. Frequently described as “boys’ clubs,” large law firms have high earners and a clear hierarchy that makes the power imbalance between colleagues especially acute. It is up to the partners at top law firms to take the epidemic of sex discrimination in their industry seriously, and change their policies to ensure equal pay and treatment.

Big Tech

Big Tech is another industry where women have historically struggled with sex discrimination and harassment. Like Big Law, technology companies have traditionally been dominated by men, and often perpetuate misogynistic cultures. According to a study detailed in the [Atlantic](#), [90% of survey respondents had witnessed sexist behavior at technology conferences and meetings](#), and 60% had experienced unwanted sexual advances. Many tech companies begin as startups, which generally skirt employment laws and regulations, and don't have human resources departments when they first launch.

Some of the largest and best-known technology companies have been the biggest offenders. Uber has struggled with a well-documented history of gender discrimination, including paying female employees less than males. In February 2019, Google announced that it would end forced arbitration and class action waivers after 20,000 Google employees walked out in November 2018 over perceived lenient treatment toward executives accused of sexual harassment.

The issues, however, are not limited to successful startups and Fortune 500 companies. Women across the spectrum in the tech sector are often treated, and paid, worse than their male counterparts. The imbalance in power, and sheer numbers, is worse than comparative industries, [like Wall Street](#).ⁱ This leads to men being offered higher salaries 60% of the time,ⁱⁱ according to a [Hired.com report](#). It's not surprising, then, that women in tech are twice as likely to quit when compared to men, creating a sex-disparity feedback loop.

In 2018, the magazine [Pando](#) published a profile of Vanessa Kaskiris, a woman from East Los Angeles who worked her way through UC Berkeley and obtained a job with the university's IT department. Despite landing seemingly great jobs post-college, Kaskiris and her female colleagues were subjected to a misogynistic culture where their contributions were minimized, they were denied advancement opportunities, and they were generally demeaned by many of their male colleagues and bosses. Kaskiris filed a complaint with the Office for Prevention of Harassment and Discrimination, which, after six months, found that the department had in fact created a hostile work environment. Despite winning her claim, though, Kaskiris was still left searching for justice: None of the perpetrators faced real consequences, and Kaskiris was pushed into another department on campus. Similarly, the other women in the Berkeley IT department were never fully compensated for the promotions they were denied or the harassment they endured.

Sadly, this is not an experience unique to the tech world.

Nontraditional Employment

Due to increasing pressure to improve performance and profits, more and more companies have come to rely on staffing agencies and independent workers to fill more company functions at a lower cost, according to David Weil, former head of the Department of Labor's Wage and Hour Division. This rapid evolution of the "gig economy" has outpaced the development of the law in some cases, leaving workers without the protections they deserve.

Gender discrimination in the contractor economy naturally includes a pay gap. Part of this is probably due to women accepting lower-paying contract jobs, such as child care or home-based

90% of survey respondents had witnessed sexist behavior at technology conferences and meetings.

sales, while men generally work in higher-paying trade jobs, like plumbingⁱⁱⁱ — but even when men and women work in the same exact job at the same rate, men tend to fare better. For instance, a [study](#) by economists at Stanford University and the University of Chicago found a 7% earnings gap between men and women Uber drivers.

The three biggest [reasons identified](#) were that men supposedly drive faster, stick with the app longer (and therefore learn how to be more productive), and are more willing to drive in higher-crime areas that can pay more.^{iv}

California legislators just recently approved a landmark bill that would reclassify contract workers for companies like Uber and Lyft as employees. This would be a significant step, since currently more than a million workers in California alone are exempt from basic worker protections and minimum wage laws because of their contractor status. It is unclear what the total effect of this shift will have on reducing the pay gap, since gig employers will continue to fight the changes, but efforts to pass similar legislation are underway in New York, and failed attempts in Oregon and Washington could [gain new life](#).^v

Finally, even [among self-employed workers, new research finds a 28% wage gap](#). Despite all of the advantages of being one's own boss, and the freedom to set one's own hours and prices, women tend to fare worse than men. Part of this is due to women preferring a more-favorable work-life balance, but much of the wage gap is a result of gender stereotypes.

According to a [survey](#) from FreshBooks and Research Now, 20% of women felt the need to charge less than their male counterparts to keep clients, and nearly a third of self-employed women believe that they are not taken as seriously because of their gender, and that they have to work harder than similarly situated men.^{vi}

As the gig economy grows and more people work in untraditional roles, it's crucial that the law catch up and protect women from unfair pay and harassment.



SOLUTIONS

Salary Transparency

While some women may think they are being underpaid based on their gender, that can be difficult to prove. Sharing salary information is generally considered gauche, and employers usually discourage such sharing among their employees.

The [National Labor Relations Act](#) protects covered employees from employer interference and retaliation when engaging in “concerted activities” pertaining to collective bargaining, which the National Labor Relations Board (NLRB) has found to include discussing wages. However, there are exceptions to this rule, available relief is limited, and an employee can only file a claim with the NLRB — not in court.

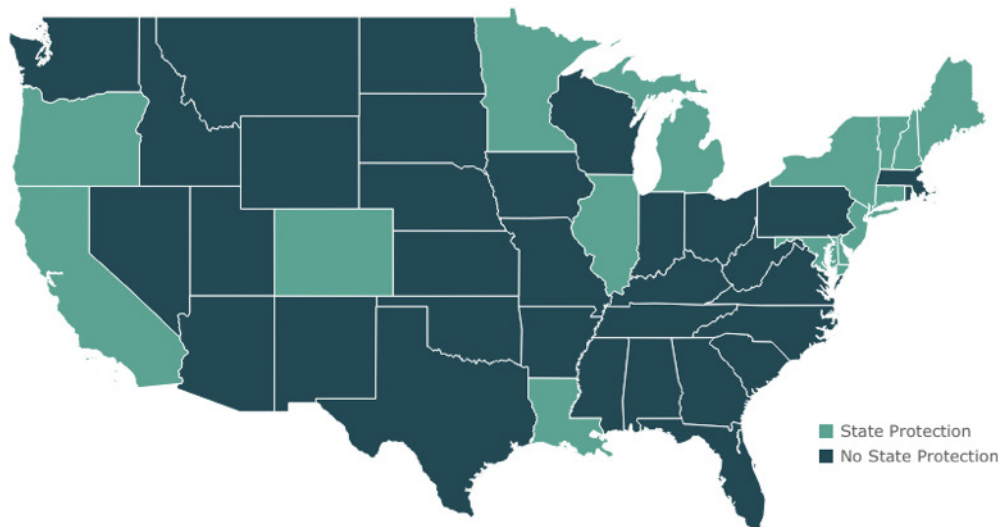
Federal contractors and subcontractors cannot retaliate against employees who inquire or speak about their or others’ salaries by executive order, but there is no analogous federal rule pertaining to private employees.

However, [legislators in 15 states and D.C. have passed salary transparency laws that make it illegal for employers to prohibit their workers from discussing salaries with one another](#), and for employers to retaliate against employees who do so.

Equal Pay and Pay Transparency Protections

Hover over the map for information on available state protections.

○ Equal Pay
● Pay Transparency



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ALASKA

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HAWAII

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DC

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Salary History Bans

Because employers often use prior salaries to determine current and future wages, pay decisions can often create a cycle of inequality. More than 18 states have laws in place to prevent or place limits on how much prior salary information an employer or prospective employer can ask for. California has gone further, prohibiting the use of prior salary information in making hiring decisions or salary determinations, and requiring that employers make their pay-scale information available upon reasonable request.

EEO-1 Reports

The EEOC has historically collected information from employers with more than 100 employees about the racial, gender, and ethnic breakdown of their workforces to create EEO-1 Reports. Under the Obama administration, the Office of Management and Budget (OMB) directed the EEOC to start including wage and hour information in those reports.

The OMB under the Trump administration then reversed the decision to include pay and hour information. The [National Women's Law Center](#) and the [Labor Council for Latin American Advancement](#) challenged the reversal in court, and the federal district court in D.C. found the reversal to be arbitrary and lacking the required "reasoned explanation." The case is on appeal to the U.S. Court of Appeals for D.C. Meanwhile, the EEOC again began collecting pay data starting in 2017, but recently indicated that it will discontinue that effort. While these reports are not publically available, they can be used by the EEOC in its enforcement efforts.

CONCLUSION

As outlined in this ebook, pay discrimination is governed by various laws that can be difficult to navigate on your own. If you believe you are a victim of pay discrimination, an attorney will be able to advise you about whether there is a federal or state law that protects you — and, if so, what your next steps should be. Depending on the law and jurisdiction, plaintiffs may face different procedural requirements about how, when, and where to file a claim. Some laws may have short time limits, so you should contact an attorney in a timely manner if you believe you are a victim of pay discrimination. Some laws allow workers to file a lawsuit right away, while others require filing a claim with an administrative agency that will investigate your claim. Again, procedural requirements can differ. Because of the patchwork of federal and state laws covering pay and gender discrimination, it is important to gather facts and speak to an attorney to assess your individual situation.

ADDITIONAL RESOURCES

Equal Pay Act

<https://www.eeoc.gov/laws/statutes/epa.cfm>

Facts About Equal Pay and Compensation Discrimination (EEOC Publication)

<https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>

<https://www.eeoc.gov/laws/types/equalcompensation.cfm>

U.S. Equal Employment Opportunity Commission (EEOC)

<https://www.eeoc.gov/>

National Organization of Women

<https://now.org/>

State Representatives

<https://www.house.gov/representatives>

END NOTES

ⁱ <https://www.theguardian.com/world/2018/mar/17/sexual-harassment-silicon-valley-emily-chang-brotopia-interview>.

ⁱⁱ <https://hired.com/page/wage-inequality-report>.

ⁱⁱⁱ <https://money.cnn.com/2018/07/05/news/economy/gig-economy-gender-wage-gap/index.html>.

^{iv} <https://www.nber.org/papers/w24732.pdf>.

^v <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html>.

^{vi} <https://www.freshbooks.com/press/data-research/women-in-the-workforce-2018>.

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