INSTITUTE FOR WOMEN'S POLICY RESEARCH

POLICY BRIEF

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ON THE BOOKS, OFF THE RECORD: EXAMINING THE EFFECTIVENESS OF PAY SECRECY LAWS IN THE U.S.

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INTRODUCTION

The Equal Pay Act, passed over a half century ago, prohibits sex-based wage discrimination (U.S. Equal Employment Opportunity Commission 2020). But the gender pay gap remains substantial: full-time, year-round women workers earn 18 percent less than their male counterparts (Hegewisch and Mariano 2020). A lack of knowledge about who makes what within organizations contributes to this continuing disparity. A growing body of research suggests that pay transparency – improving such knowledge – reduces the gender wage gap (Baker et al. 2019; Bennedsen et al. 2019; Gamage et al. 2020; Kim 2015).

Pay transparency advances other aspects of workplace equity as well. Asymmetric wage information, whereby employers know more than workers about pay rates, undermines workers' ability to negotiate for higher pay. Improving pay transparency is an essential step towards empowering workers and ensuring corporate accountability.

In principle, the National Labor Relations Act (NLRA) protects workers' rights to discuss their pay. In practice, however, the NLRA has many loopholes limiting its effectiveness in protecting workers against employer retaliation for violating pay secrecy policies, such as the exclusion of workers with supervisory responsibilities (National Women's Law Center 2019a). The Paycheck

Research Highlights

- **Compared to men, women are more likely to work under a pay secrecy policy and to violate a formal pay secrecy policy.**
- **Between 2017-2018, nearly half of full-time workers reported they were either discouraged or prohibited from discussing wages and salaries.**
- **Over the past decade, despite increased state legislation preventing pay secrecy, informal pay secrecy has increased.**
- **Public sector and unionized workers are less likely to be subject to pay secrecy policies compared to their private sector and non-union counterparts.**

Fairness Act would strengthen protections and remedies, but Congress has failed to adopt it every year since its initial introduction in 2010 (National Women's Law Center 2019b).

In 2010, IWPR conducted a national survey on pay transparency and found that policies and practices restricting workers' rights to discuss their pay were widespread. At that time, about half of all workers (51 percent of women and 47 percent of men) – and 62 percent of women and 60 percent of men in the private sector – reported that they were either discouraged or prohibited from discussing wage and salary information (Hayes and Hartmann 2011).

Since then, more than a dozen states plus the District of Columbia have adopted legislation banning pay secrecy rules in the workplace. How have these laws affected pay secrecy policies? Do such policies stop discussions about pay? This briefing paper examines whether recent legislation has enhanced pay transparency, reveals what types of workers are still subject to pay secrecy policies, and provides the first analyses of whether employees abide by these workplace speech restrictions.

METHODOLOGY

In the fall of 2017, we partnered with the survey research firm GfK Knowledge Networks (now Ipsos) to field a national survey of U.S. workers; we then re-surveyed a subsample in late fall 2018. The survey was restricted to full-time employees aged 18 and over who were not self-employed. We obtained 2,568 complete surveys in 2017, and 1,694 from the follow-up, for a total sample of 4,262 valid responses.[1] We weighted the samples to produce estimates representing the adult (18 years and over) U.S. population who are full-time employees. Analyses based on the 2017/2018 survey update the results of the original IWPR survey.

The survey results suggest that, between 2010 and 2018, a declining share of workers reports workplace policies that formally prohibit discussion of pay. At the same time, however, pay secrecy rules appear to have shifted from formal prohibition to informal discouragement of pay transparency. Private sector and non-unionized workers are especially likely to work under pay secrecy policies. Moreover, women continue to be more likely than men to be subject to pay transparency bans, but women are also more likely than men to discuss pay even when prohibited. Understanding where and how recent state-level anti-secrecy laws fall short can help identify effective strategies for empowering workers, especially women. This paper concludes with a discussion of the policy implications of our findings for closing the gender pay gap.

[1] The follow-up survey was designed to measure changes in workplace policies and respondents' characteristics between 2017 and 2018, an aspect of the research not discussed in this brief.

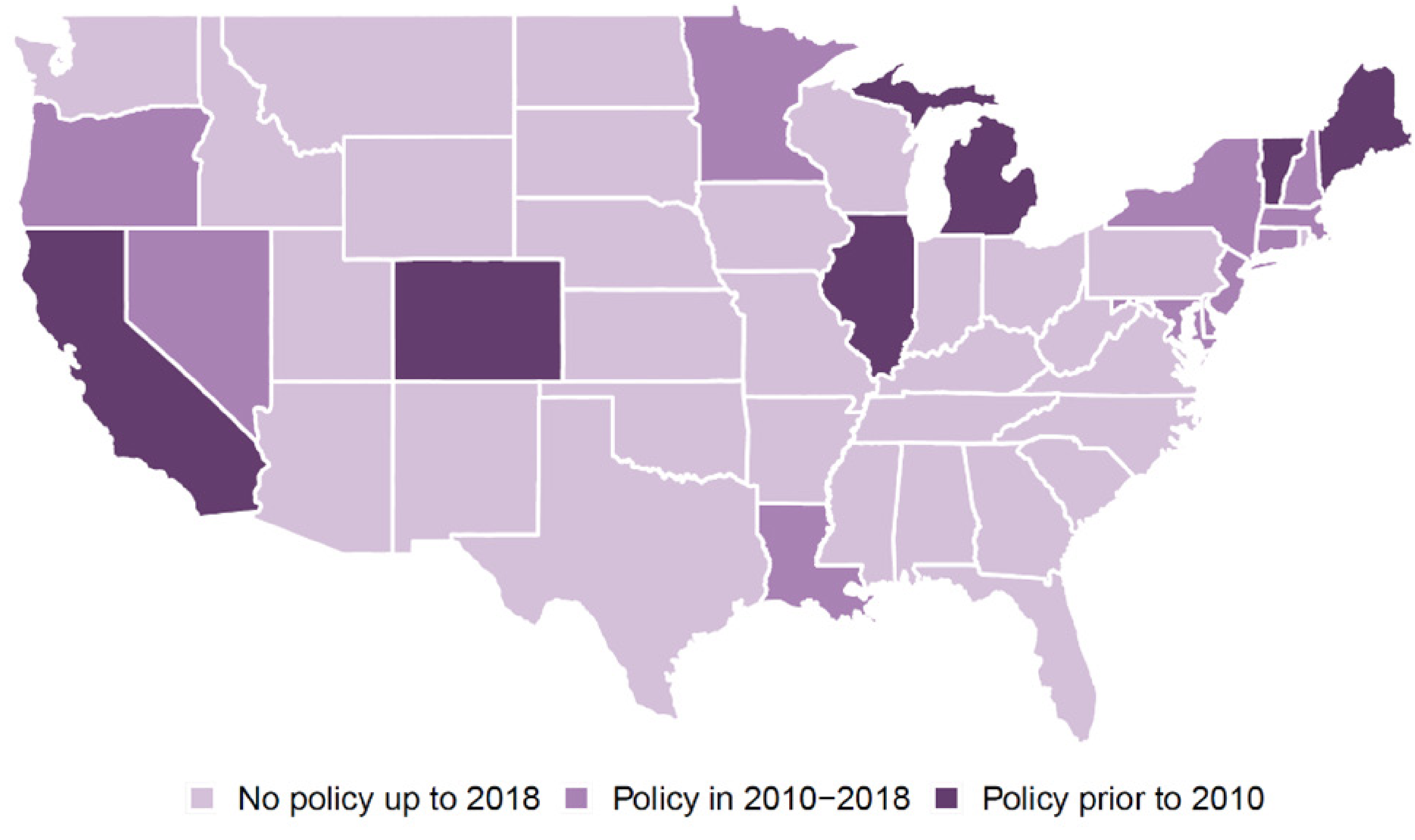
A DECADE OF CHANGE: PROGRESS AND LIMITS OF PAY TRANSPARENCY LAWS SINCE 2010

IWPR's 2010 national survey asked workers whether they were allowed to discuss their pay or were subject to workplace rules, formal or informal, that discourage or ban workers from discussing wages and salaries with one another (Hayes and Hartmann 2011). Courts have consistently ruled that discussions about wages and salaries constitute "concerted activity", and thus are protected against employer interference under Section 7 of the NLRA (Gely and Bierman 2003). Given this legal protection, the survey results were surprising: nearly one in five workers said their employer had a formal prohibition against discussing pay, and roughly half of all workers – rising to more than 60 percent of private-sector workers – said they were subject to a pay secrecy policy of some kind (Rosenfeld 2017).

The prevalence of pay secrecy practices in the workplace may partly flow from the loopholes in and weak enforcement of the NLRA. The law permits employers with a "legitimate and substantial business justification" to institute secrecy policies. It excludes supervisors (broadly defined), public sector workers, domestic workers, agricultural workers, and workers employed by railroads or airlines (National Women's Law Center 2019a). In addition, employers who are found to violate the law are usually subject only to minor fines and penalties.

Following the publication of IWPR's 2010 survey, and faced with the defeat of the Paycheck Fairness Act in the Republican-controlled Senate, lawmakers turned to other strategies to combat pay secrecy (National Women's Law Center 2019a). In 2014, President Obama issued an executive order barring firms that contracted with the federal government from maintaining pay secrecy policies. Upon signing the order, the President declared, "Pay secrecy fosters discrimination and we should not tolerate it" (Eilperin 2014). In just the past decade, over a dozen states and the District of Columbia joined California (strengthening an earlier prohibition), Illinois, Colorado, Maine, Michigan, and Vermont in passing their own legislation banning pay secrecy rules. The scope of these anti-secrecy laws varies across states, but they all explicitly ban retaliation against workers who discuss pay and prohibit employers from requiring workers to waive their right to discuss pay (Harris 2018).

FIGURE 1. U.S. states regulating pay secrecy policies



Notes: This map shows the states with policies regulating pay secrecy in the workplace as of 2018. Six states (California, Illinois, Colorado, Maine, Michigan, and Vermont) had policies in place prior to 2010. Eleven states (Connecticut, Delaware, Louisiana, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, and including the District of Columbia) instituted policies between 2010 and 2018. We fielded our survey in the fall of 2017 and 2018. Since then, lawmakers in Hawaii, Nebraska, Virginia, and Washington have taken action to curb pay secrecy policies in their states. We classify these states as "no policy up to 2018" since they had not passed legislation at the time of our survey.
Source: Authors' analysis of state legislation.

WITH TIGHTENED LEGAL RESTRICTIONS, FORMAL WORKPLACE PROHIBITIONS DECLINED, YET PAY SECRECY POLICIES REMAIN PREVALENT

In our 2017-2018 survey, we replicated IWPR's original pay secrecy question to ask whether respondents' employers publicized wage and salary information, permitted discussions of wages and salaries, discouraged such discussions, or prohibited them outright. Nationally, in 2017/2018 about half of all workers (48.2 percent) reported that they were either banned or discouraged from discussing their pay (Figure 2), reflecting little change from 2010 (48.4 percent).[2] The share of workers reporting formal prohibitions declined from 18.1 percent in 2010 to 12.8 percent – a substantial change.[3] At the same time, however, the share of workers whose employers discouraged pay discussion actually increased from 30.3 percent to 35.4 percent.[4] These results may reflect employers switching from formal to informal pay secrecy rules in the wake of increased national attention and state-level legislation.

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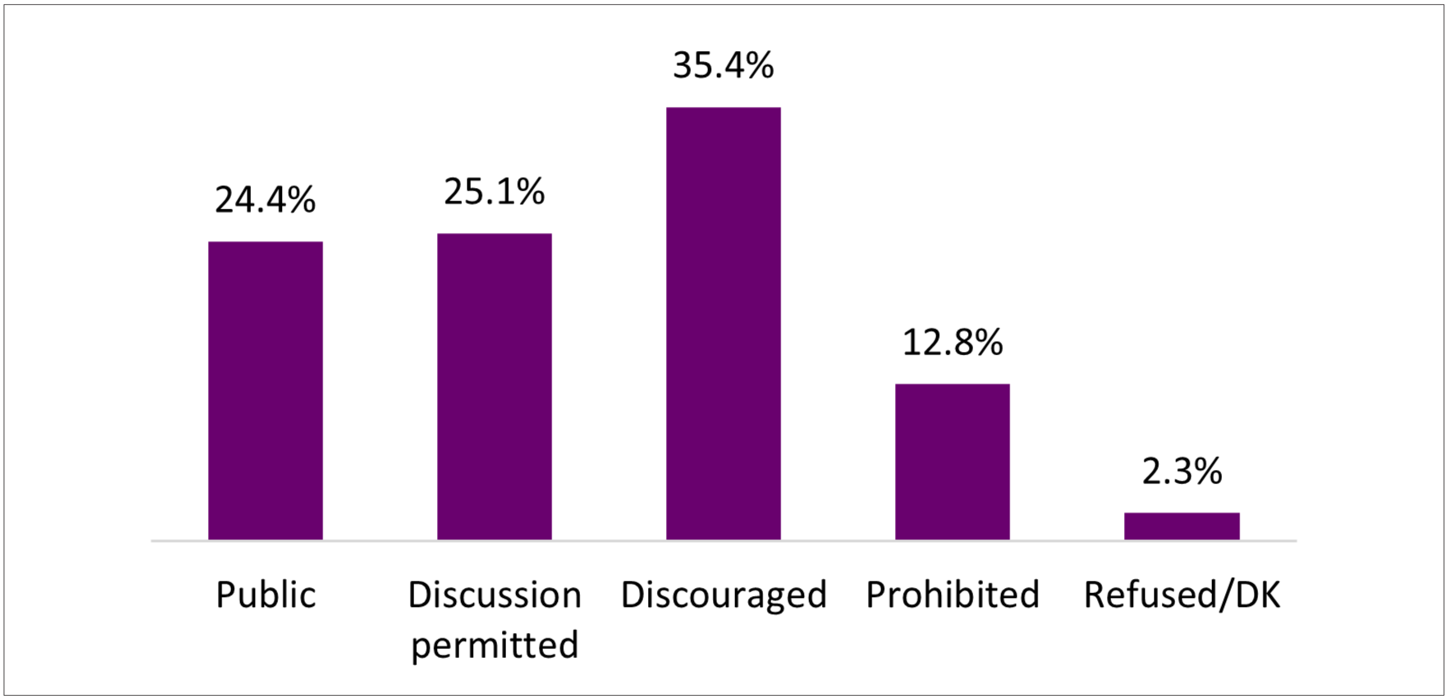
[2] See Figure 1 in Rosenfeld (2017).
[3] As note 2 above.
[4] Some of the apparent changes may be due to different samples: whereas the 2010 IWPR survey included part-time workers, the 2017/2018 surveys only include full-time workers.

FIGURE 2. Pay secrecy policies among U.S. workers, 2017/2018



Notes: Figure shows the percentage of U.S. workers subject to each pay secrecy policy. Percentages are weighted using survey weights.
Source: Authors' analysis of the 2017/2018 Pay Secrecy survey.

These national results include workers in states with pay secrecy laws as well as workers in states without such protections. Table 1 disaggregates survey responses into three groups: workers in states with no statutes against pay secrecy at the time of the survey, workers in states that banned pay secrecy policies before 2010, and workers in states that enacted pay secrecy prohibitions between 2010 and 2018. The analysis finds that workers in states with no pay secrecy bans are the least likely of all groups to report that pay information is public (23.1 percent) or that discussion is permitted (23.2 percent). Interestingly, workers in states with recently-adopted pay secrecy prohibitions report relatively similar results: 26.2 and 24.7 percent respectively. Employees in states with policies in place prior to 2010 are most likely to work for transparent organizations.

While restrictions on discussions about pay are more prevalent in those states that have not enacted legislative bans, even in states with pay secrecy bans, nearly one in ten workers is formally barred from discussing pay. These results suggest that state-level action has been only marginally effective, especially when the policy has been in place for a significant period.

TABLE 1. Workers in States with Recent Pay Transparency Laws Are Not Substantially More Likely to Report Pay Transparency than Workers in States with No Such Laws

Pay secrecy policies among U.S. workers, by state-level legislation

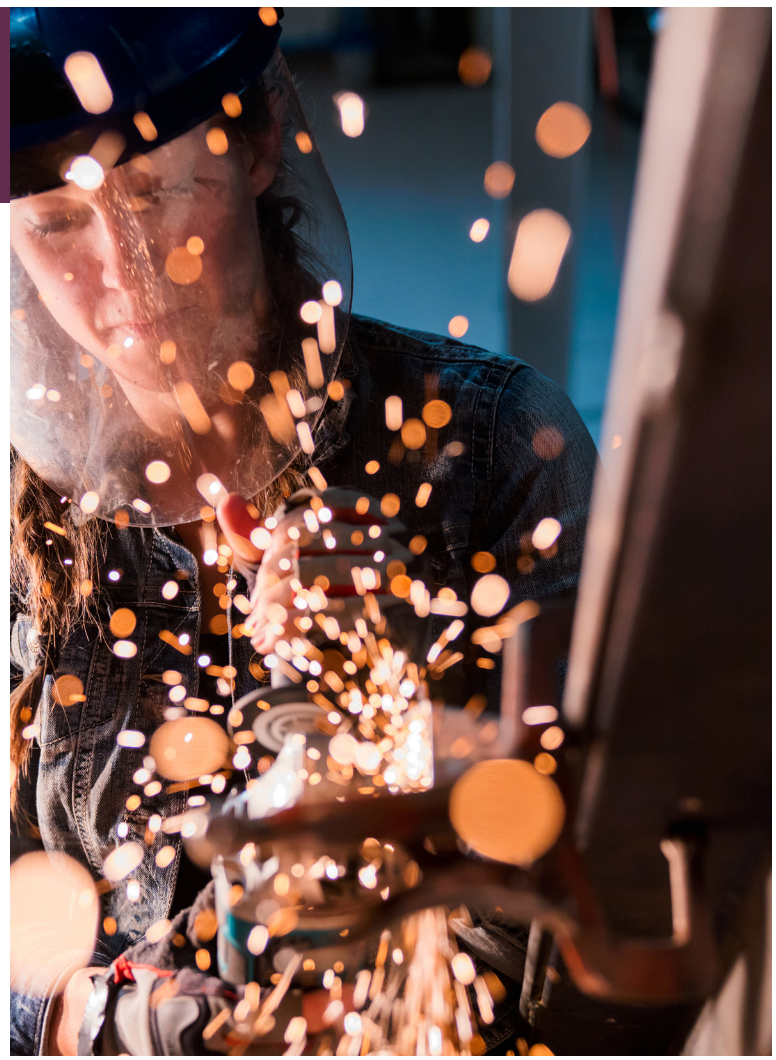
Pay secrecy policy	No policy up to 2018	Policy between 2010 and 2018	Policy prior to 2010
Public	23.1	26.2	26.5
Discussion is permitted	23.2	24.7	30.6
Discussion is discouraged	35.6	37.3	32.9
Discussion is formally prohibited	15.5	9.4	8.4
Refused/Don't know	2.5	2.4	1.6
Unweighted *N*	2,489	874	899

Notes: This table presents the percentage of U.S. workers working under pay secrecy policies, by whether their state has passed legislation regulating such policies. Percentages are weighted. See Figure 1 for the states included in each group.

Source: Analysis of 2017/2018 Pay Secrecy survey.

PUBLIC-SECTOR WORKERS AND UNIONIZED WORKERS ARE LESS LIKELY TO BE SUBJECT TO PAY SECRECY

Prior research indicates two workforce characteristics that influence the likelihood of being subject to a pay secrecy policy: labor market sector and union membership (Rosenfeld 2017). In 2010, only 15.1 percent of government employees said that their employer discouraged or prohibited them from talking about pay, and less than a third of union members reported that they worked under a pay secrecy policy.[5] As Figure 3 shows, government employees and union members continued to experience greater pay transparency in 2017-18. As in 2010, the large majority of public sector employees (nearly 75 percent) work in organizations that publicize pay. By contrast, just one in ten private sector workers report that pay information is public at their workplace, even lower than the 2010 level (17 percent).[6]



[5] See Table 2 of Rosenfeld (2017).

[6] See Figure 1 of Institute for Women's Policy Research (2017).

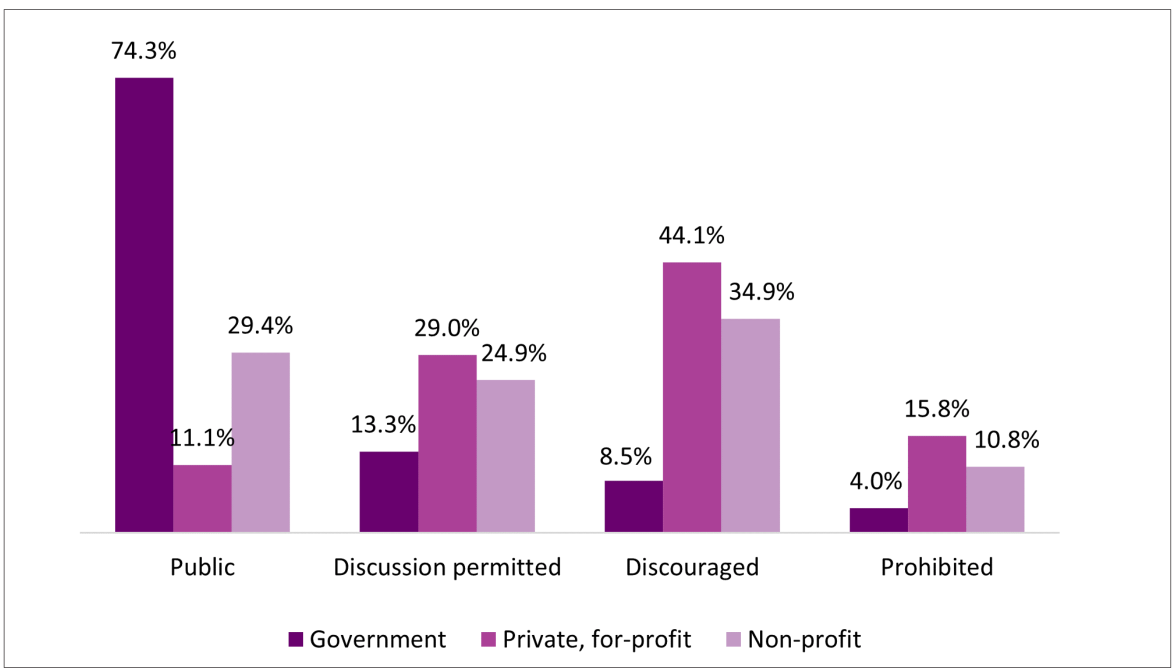
The majority of the U.S. labor force works for a private sector, for-profit organization.[7]

Altogether, 60 percent of workers in the for-profit, private sector work under a pay secrecy policy of some sort, just six percentage points lower than in 2010 (66 percent).[8] The proportion of private-sector workers who reported that they are formally prohibited from discussing their pay fell from 25 percent in 2010 to 16 percent in 2017-18, but at the same time, the share of private-sector workers reporting that they are discouraged from discussing their pay increased from 41 percent to 44 percent.[9]

While workers in non-profit organizations are more likely than workers in private, for-profit organizations to report transparent pay policies, on the whole pay policies in the non-profit sector are much closer to the restrictive practices used in the private sector than to the more transparent policies in the public sector (Figure 3).

FIGURE 3. Just One in Ten Private Sector Workers but Seven in Ten Public Sector Workers Report Full Pay Transparency

Pay secrecy policies among U.S. workers by sector, 2017/2018



Notes: Figure shows the percentage of U.S. workers subject to each pay secrecy policy, by sector (government; private, for-profit; non-profit). Percentages are weighted. Sample excludes those who responded "refused/don't know" to the questions about either pay secrecy policy or sector (n=118).

Source: Analysis of the 2017/2018 Pay Secrecy survey.

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[7] Authors' calculation based on labor force statistics from the Current Population Survey, available at https://www.bls.gov/web/empsit/cpsee_e05.htm.

[8] As note 6 above.

[9] As note 6 above.

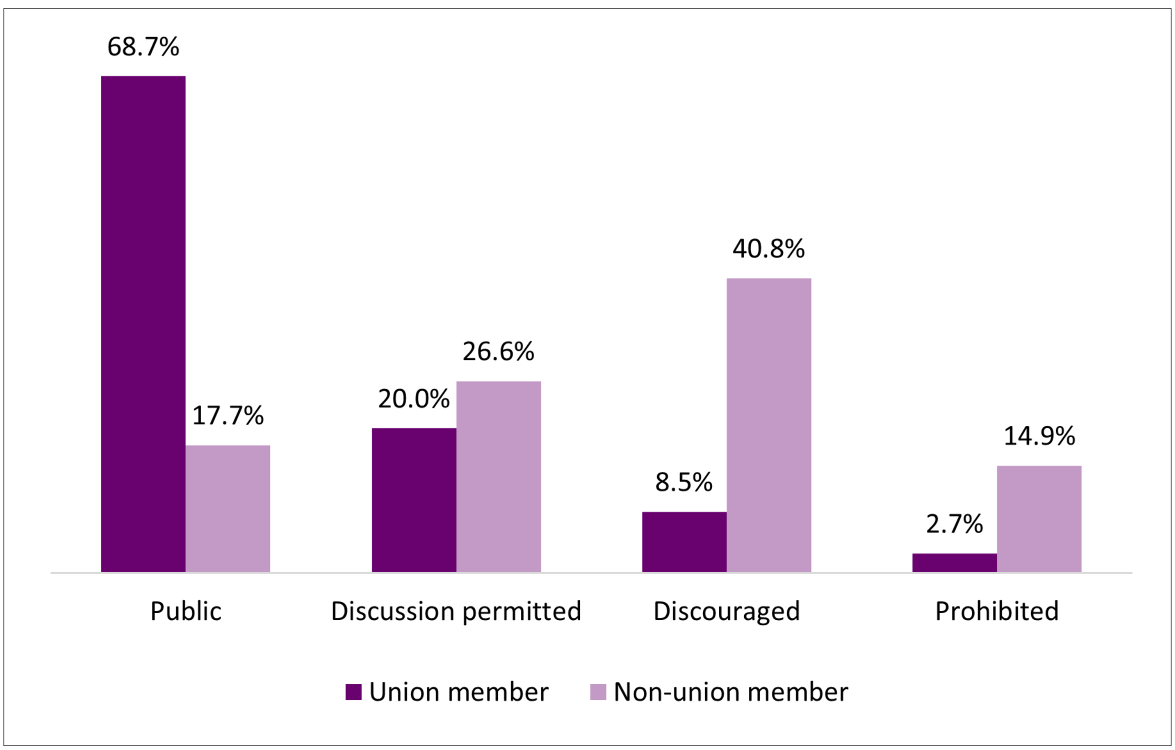
UNIONIZATION PROVIDES GREATER PAY TRANSPARENCY

What about the effect of unionization? Figure 4 below confirms what past research has shown: unionized workers are much less likely to report that their workplaces have a pay secrecy policy. Over two-thirds of unionized respondents (68.7 percent) say that pay is public at their organization; another 20 percent report they are permitted to discuss pay. The majority of workers without union representation work under a pay secrecy policy (55.7 percent), including 14.9 percent who say that their employer formally bars talking about pay with one's peers.

The unionization rate in the United States today has fallen to just over 10 percent; in the private sector it is closer to 6 percent, just one-fifth of the rate in the public sector (33.9 percent; U.S. Bureau of Labor Statistics 2019). The majority of full-time workers (63.3 percent) in our sample were non-union workers employed by private, for-profit firms. Among this group, almost two-thirds (63.5 percent) are subject to a pay secrecy policy (Figure 5).

FIGURE 4. Non-Union Workers Are Far More Likely than Union Workers to be Prohibited or Discouraged from Discussing Pay

Pay secrecy policies among U.S. workers by union membership, 2017/2018

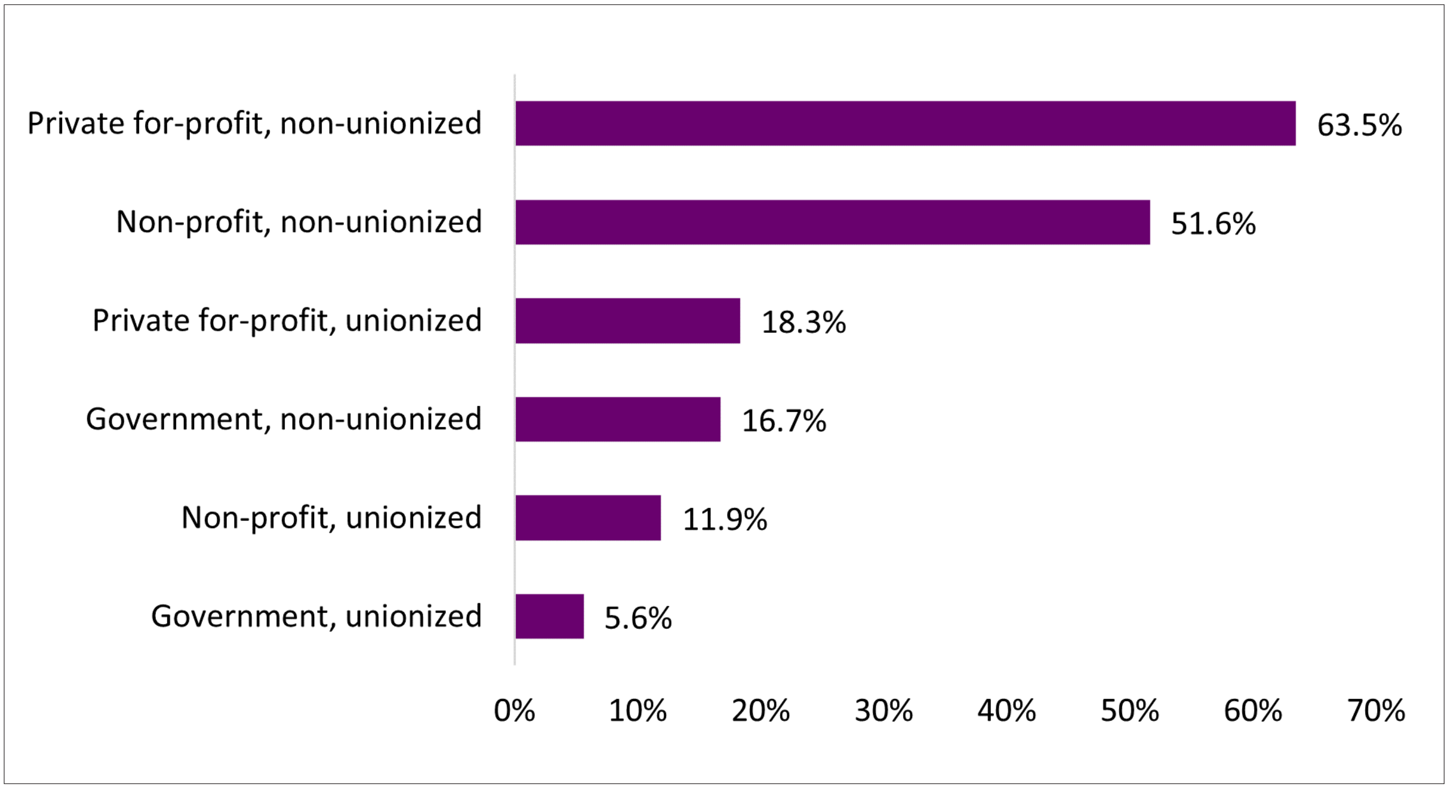


Notes: Figure shows the percentage of U.S. workers subject to each pay secrecy policy, by whether the worker belongs to a union. Percentages are weighted. Sample excludes those who responded "refused/don't know" to the questions about either pay secrecy policy or union membership (n=112).

Source: Analysis of the 2017/2018 Pay Secrecy survey.

FIGURE 5. Pay Secrecy Policies are Most Common for Non-Union Private Sector Workers

Percentage of workers subject to pay secrecy policies, by employment sector and union membership status, 2017/2018



Notes: Figure shows the percentage of U.S. workers subject to pay secrecy policies (either discouraged or prohibited from discussing pay), by sector (government; private, for-profit; non-profit) and union member status. Percentages are weighted. Sample excludes those who responded "refused/don't know" to the questions about either pay secrecy policy, sector, or union member status (n=146).

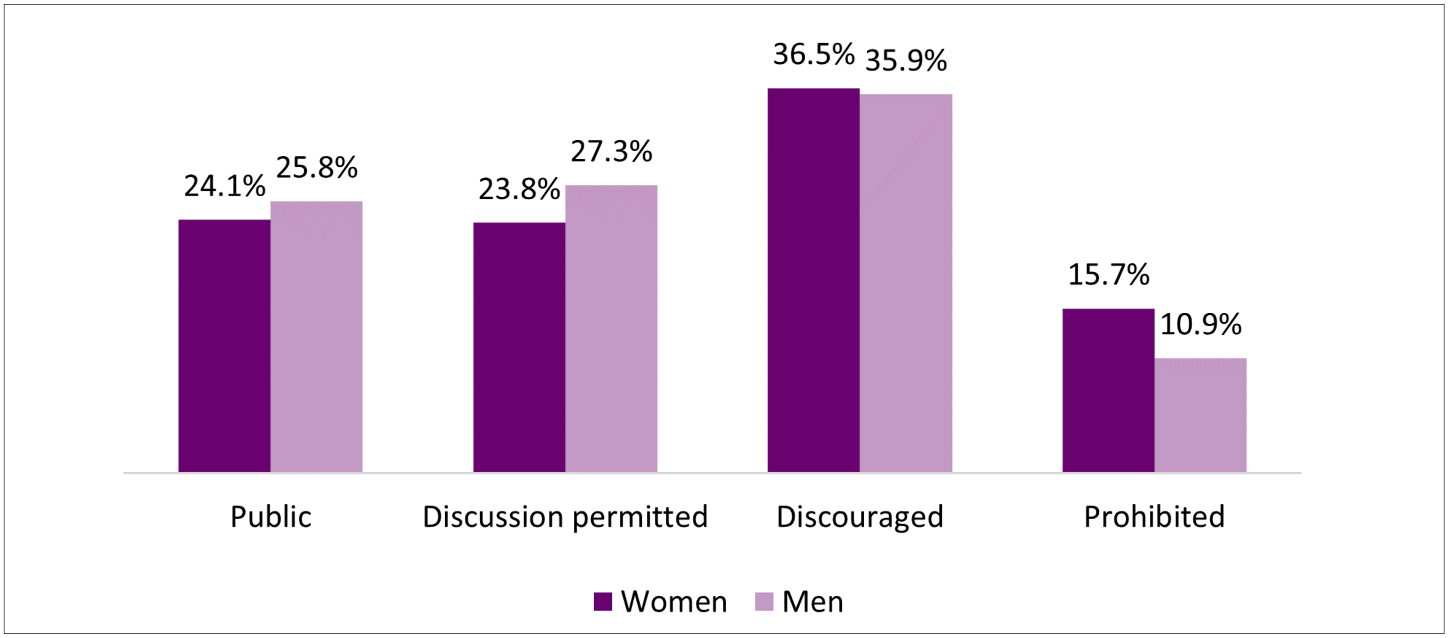
Source: Analysis of 2017/2018 Pay Secrecy survey.

WOMEN ARE MORE LIKELY THAN MEN TO WORK UNDER A PAY SECRECY POLICY

The primary impetus behind lawmakers' efforts to prohibit pay secrecy policies is to eliminate a means by which employers can, intentionally or not, discriminate against women in setting pay. Information about co-workers' pay can reveal ongoing or past instances of unlawful wage and salary disparities. The absence of such information means many women may never become aware of discriminatory pay gaps. In 2010, women were not significantly more likely to report working under a pay secrecy rule compared with men (54.2 percent of women and 52.3 percent of men; Rosenfeld 2017). This had changed by 2017/2018, when 52.2 percent of women and 46.8 percent of men reported working under a pay secrecy policy (Figure 6). Women were significantly more likely than men to report that their employer formally barred discussing pay (15.7 percent and 10.9 percent, respectively).

FIGURE 6. Women Are More Likely Than Men to be Subject to Formal Pay Secrecy Rules

Pay secrecy policies among U.S. workers by gender, 2017/2018



Notes: Figure shows the percentage of U.S. workers subject to each pay secrecy policy, by gender. Percentages are weighted. Sample excludes those who responded "refused/don't know" to the questions about pay secrecy policy (n=80).

Source: Analysis of the 2017/2018 Pay Secrecy survey.

DO PAY SECRECY POLICIES WORK?

Do workers take pay secrecy policies seriously and abide by their restrictions? The 2017/2018 survey asked respondents whether they talk about wages and salaries with their colleagues.[10] Of particular interest is whether workers who lack access to pay information nonetheless discuss pay. Pay information could be empowering for these workers.[11] Among this group, as one would expect, workers who report that they are permitted to discuss their pay are significantly more likely to do so than workers who are discouraged or prohibited from doing so. In workplaces with no speech prohibitions, over half of all workers (52.3 percent) report discussing pay with their peers. In workplaces that discourage workers from discussing pay, well over a third of workers (36.8 percent) say they nonetheless discuss pay. And in establishments with a formal ban on discussing pay, just under a third of workers (30.4 percent) say they engage in such talk (Table 2). The comparatively low proportion of workers reporting pay discussions in organizations where pay rates are publicly available (33.8 percent) likely stems from the lack of a need to talk about something to which everyone has access.

[10] The 2010 survey did not include such a question.

[11] This part of our analysis excludes those who have access to pay information as a condition of their jobs (for example, HR managers).

Table 2. Share of workers who discuss their pay with their coworkers, by pay secrecy policy	
Pay secrecy policy	**Percent**
Public	33.8
Discussion is permitted	52.3
Discussion is discouraged	36.8
Discussion is formally prohibited	30.4
Refused/Don't know	10.3
Overall	38.6
Unweighted *N*	3,455

Notes: Table shows the percentage of U.S. workers who discuss their pay, by the pay secrecy policy at their workplace. Sample restricted to those who are not granted access to pay information as part of their jobs. Percentages are weighted.
Source: Analysis of the 2017/2018 Pay Secrecy survey.

In short, not everyone who is permitted to discuss pay actually does so (though having that permission makes it significantly more likely) and not everyone who is prohibited or discouraged from discussing their pay heeds that prohibition (though such prohibitions make it much less likely that pay is discussed). Does the willingness to violate workplace pay secrecy policies vary by gender?

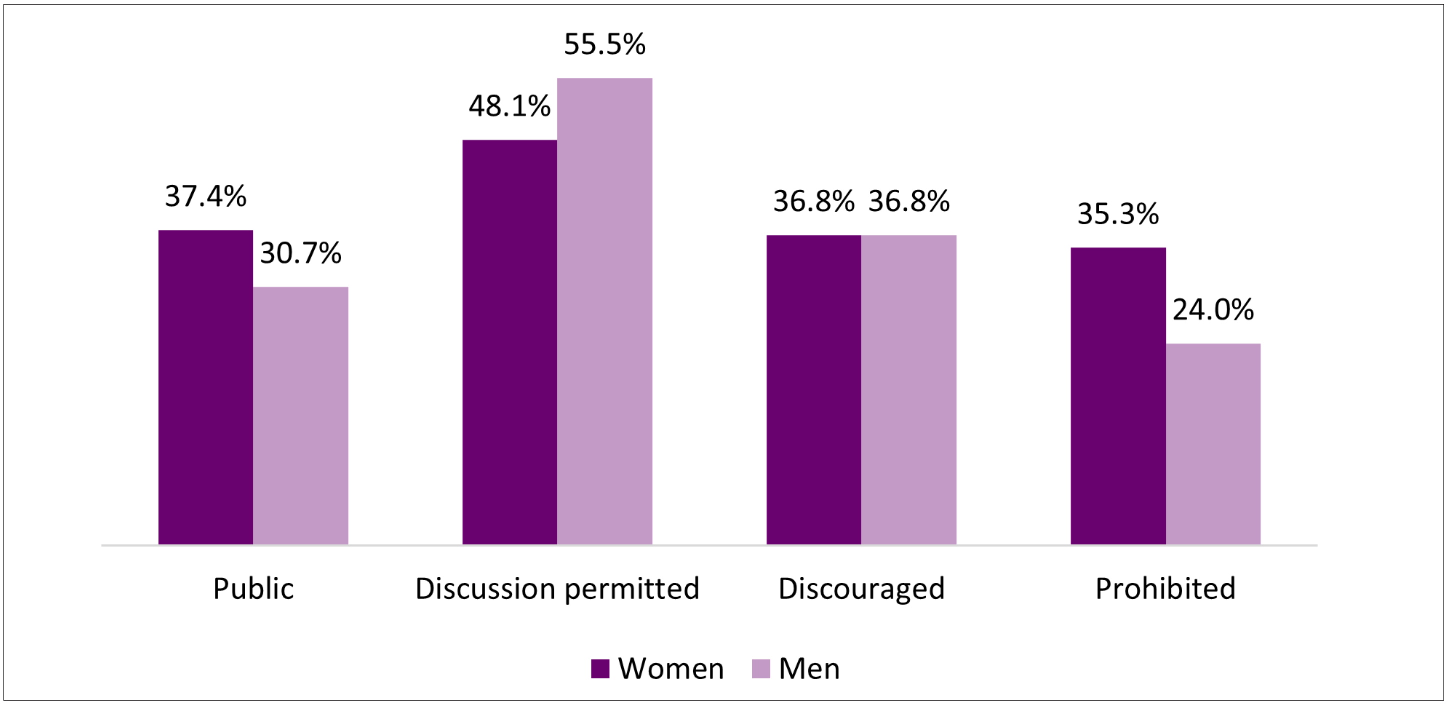
On the one hand, women may uncover possible gender pay disparities by discussing their pay, and thus may be expected to be more likely to ignore pay secrecy rules. On the other hand, prior research suggests that women are less likely to engage in risky behavior in the workplace,[12] and thus women may be less likely to violate formal or informal policies against discussing pay. The 2017/2018 survey supports the former—that women are significantly more likely to break the rules: 35.3 percent of women but just 24.0 percent of men subject to a formal pay secrecy policy say they talk about pay (Figure 7). Women are also more likely than men to discuss wages and salaries in those workplaces that publicize pay (37.4 percent compared with 30.7 percent).

Men, on the other hand, are more likely to report discussing pay where there are no prohibitions, and men and women are equally likely to talk (or not talk) about pay in contexts where employers discourage such discussions (Figure 7).

[12] For research on gendered patterns of rule-breaking in the workplace, see Huiras et al. (2000) and Morrison (2006).

FIGURE 7. Women Are Significantly More Likely than Men to Discuss Pay Even When Doing So Is Formally Prohibited

Share (%) of workers who discuss their pay, by gender and pay secrecy policies, 2017/2018



Notes: Figure shows the percentage of U.S. workers who discuss their pay, by gender and pay secrecy policy. Sample is restricted to those who are not granted access to pay as part of their jobs, and excludes those who responded "refused/don't know" to the question about pay secrecy policy (n=80; 38 women and 42 men). Percentages are weighted.

Source: Analysis of the 2017/2018 Pay Secrecy survey.

Altogether, among workers who are formally prohibited from discussing pay, one in three women violate such policies, compared with one in four men. These findings point to a conundrum faced by women in the workplace. They likely have more to gain from knowing what colleagues earn, and yet they are more likely than men to be subject to formal pay secrecy policies. Women workers are pushing back against pay secrecy rules, but by doing so, they may be more likely to face adverse consequences.

CONCLUSIONS AND POLICY IMPLICATIONS

This briefing paper presents updated data on organizations' pay secrecy policies across the United States. The 2017/2018 survey findings suggest that pay secrecy policies remain common despite recent media attention, executive action, and state-level legislation meant to curtail them. Since 2010, there has been a clear drop in the proportion of workers who report that their employer formally prohibits pay discussions, but there has been no corresponding increase in the share of workers reporting that they are free to discuss their pay, or work in organizations where pay rates are publicly available. Instead of greater transparency, the share of workers reporting that they are discouraged from discussing their pay has increased. Overall, existing legislative changes have not been sufficient to rid workplaces of rules against discussing pay.

Restrictions on workers' freedom to discuss their pay are concentrated in private-sector, non-union organizations. While pay secrecy policies are not universally effective in stopping discussions about pay—a substantial share of workers report talking about their pay with colleagues despite restrictions—the presence of such a policy is associated with reduced pay discussions among workers.

The survey finds substantial gender differences: Women are more likely than men both to work under a formal pay secrecy policy and to violate that policy. This suggests a greater dissatisfaction with the status quo by women. Women are much more likely than men to report experiencing gender-based discrimination in pay and promotions, and to see gender discrimination as a major problem in the workplace (Parker and Funk 2017; Saad 2015). Yet, research also points to the perils of leaving it to individual women to seek out information and negotiate their salaries. Several studies suggest that women and men do not fare equally when they do negotiate for higher pay, that women tend to be penalized for attempting to do so, and that, even when men and women request the same salary, women receive lower offers than men (Artz et al. 2018; Exley et al. 2020; Hernandez-Arenaz and Iriberri 2018; Säve-Söderbergh 2019).

Nevertheless, workplace transparency practices can likely help equalize opportunities at the bargaining table. Existing research suggests that gender differences in negotiation outcomes are less pronounced when the terms of negotiation and the bargaining range are clear, whereas ambiguity amplifies the gender difference (Recalde and Vesterlund 2020). Thus, initiatives to enhance workplace pay transparency would not only allow women to uncover whether they are being illegally underpaid, they may also benefit them at the negotiation table. Moreover, in organizations where pay is public and where there is less reliance on individual negotiation, such as in the federal government or in unionized workplaces, gender wage gaps are smaller (Hegewisch and Ahmed 2019; U.S. GAO 2020).

Not knowing what one's colleagues earn, and not being able to find out, disadvantages workers subject to bias and provides cover for employers engaged in pay discrimination, whether intentional or not. State-level pay transparency laws were designed to lower this barrier, by explicitly prohibiting retaliation against workers for discussing wages and salaries. Legislation alone, however, does not appear to be enough to shift entrenched workplace norms and practices regarding pay secrecy. There is a need to understand better why these laws have had limited effects on the ground and to suggest improvements.

Legislation alone might not be enough to shift entrenched workplace norms and practices regarding pay secrecy. Many workers subject to a pay secrecy policy may not know that these policies are illegal, and employers imposing illegal restrictions may not believe that there is a realistic threat of enforcement. Legislation should be backed up by enforcement and information. Future research should also investigate how to address employers' informal pay secrecy practices and how to challenge longstanding "salary taboos" among workers.

Moreover, while these laws protect workers from retaliation for discussing wages and salaries, they do not mandate transparency practices by the employers and they leave the responsibility for finding out about pay to individual (women) workers. Anti-secrecy laws can be more effective when complemented by other approaches, such as limiting employers' reliance on salary history during recruitment and selection, mandating employers to provide job applicants with the salary range for the advertised position, strengthening measures to increase employers' analysis of their own pay policies, and adding pay reporting to employers' obligation to report equal employment opportunity data (for example, see Frye 2020).

Last but not least – given that public-sector workers and unionized workers are much less likely to be subject to pay secrecy, and also tend to benefit from lower gender wage gaps – strengthening workers' rights to unionize and supporting investment in public-sector jobs would likely be particularly effective in increasing pay transparency as well as improving pay equity.

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All photos from Getty Images.

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