

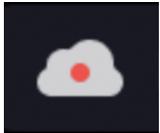
Webinar: Occupational Segregation and Equal Pay

SPEAKERS:

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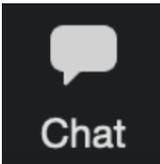
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Occupational Segregation and Equal Pay

- **What is it**
- **Why does it matter**
- **How is it changing over time**
- **How does it differ by race and ethnicity**

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Occupational segregation

Why now? What is it?

- **The COVID-19 pandemic has brought attention to the extent of racial & gender occupational segregation**
 - Women, particularly women of color, were more likely to work in jobs lost during the COVID-19 related recession.
- **Once in a generation investment in infrastructure**
 - Women are much less likely to benefit than men
- **Nontraditional occupations for women are defined in law (Perkins, WIOA) as fewer than 25% of women in the occupation (and vice versa for men)**
 - 9 of the 20 of the most common occupations for women working full-time are nontraditional for men
 - 9 of the 20 of the most common occupations for men working full-time are nontraditional for women
 - Almost 4-in-10 women and more than 4-in-10 men work in occupations that are 'traditional' for their gender.

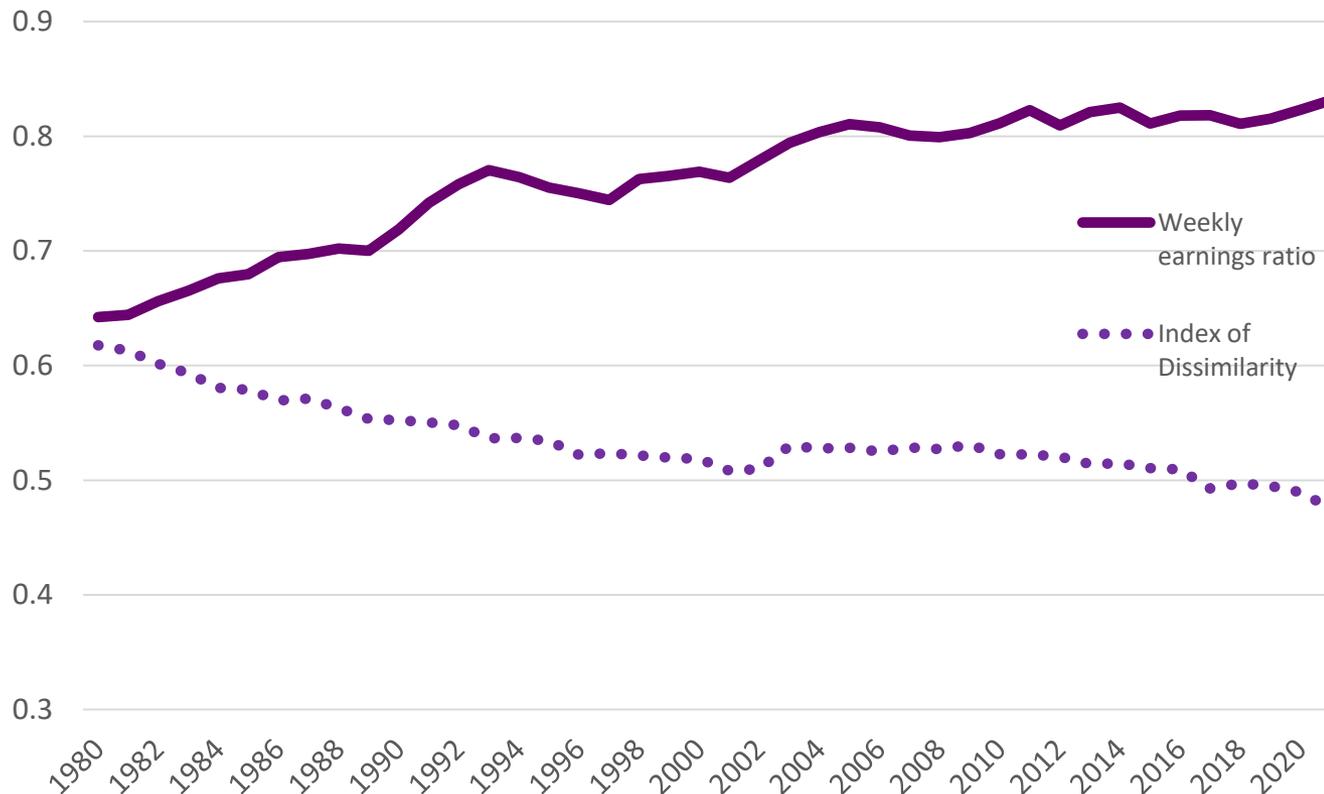
Occupational segregation and Equal Pay

Why does it matter?

- **33% of the gender wage gap is “explained” by occupational segregation** (Blau and Kahn, 2017)
 - Because women tend to work in different jobs than men, and women-dominated occupations pay less.
 - Almost as important as ‘discrimination’ (38%)
- **Between 1960 and 2008, 60% of wage growth for Black women, 40% for White women, and 45% for Black men is estimated to be due to greater occupational integration** (Hsieh et al 2013).
- **Progress in closing the gender wage gap stalled at the same time as progress in the integration of occupations.**

Since the early 2000s there has been a marked slowdown both in the closing of the gender wage gap and the integration of occupations

The Gender Earnings Ratio for Full-Time Weekly Workers and the Index of Occupational Segregation, all workers, 1980 to 2021



1970s and 1980s:

- Equal Pay Act; Title VII; Title IX; EO 11246 & Affirmative Action; birth control; job evaluations

1990s:

- End to comparable worth 'threat'
- Welfare reform
- Cont. union decline

2000s

- Growth of health and eldercare demand
- Fissuring/deregulation

2020s

- COVID-19

Occupational segregation

How is it measured?

- **Duncan & Duncan Index of Dissimilarity**

How many women and men would have to move occupations to get to a point where the gender ratio in each occupation is equal to gender ratio in the labor force

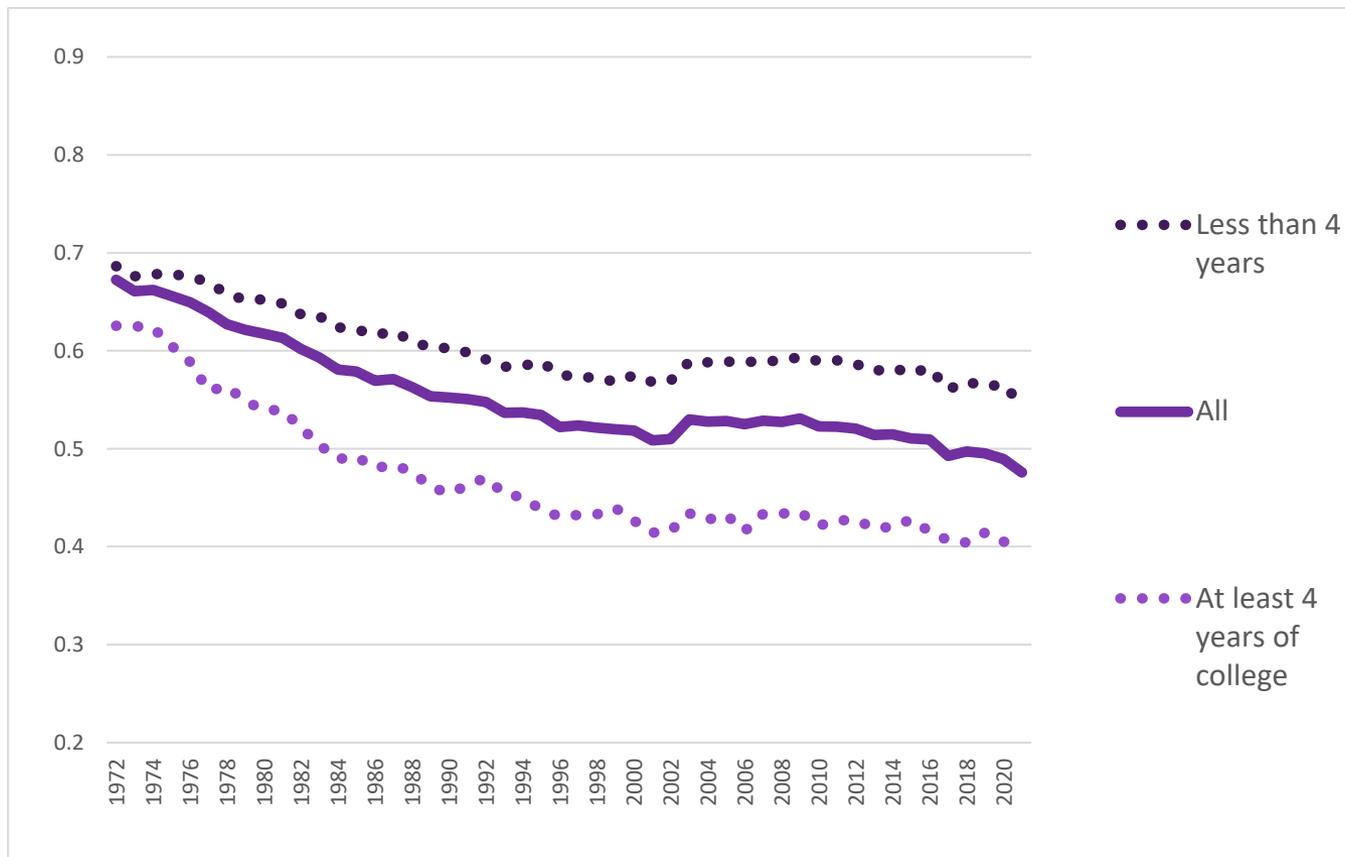
- 1.0 means full separation- women's and men's occupations do not overlap
- 0.0 means full integration- in each occupation, women's share of the occupation is equal to women's share of the workforce

- **IWPR Measures:**

- Workers ages 25-64 in the civilian labor force
- 2010 Occupational definitions (of ca 453 occupations)

Segregation is lower for workers with at least 4 years of college but progress stalled for both higher and lower levels of education

The Index of Occupational Segregation by Education, 1972-2021
Workers ages 25-64 in the civilian labor force



Integrating:

accountants, veterinarians, pharmacists, doctors, lawyers,

Not integrating:

electricians, mechanics, nursing care assistants, dental hygienists, teachers

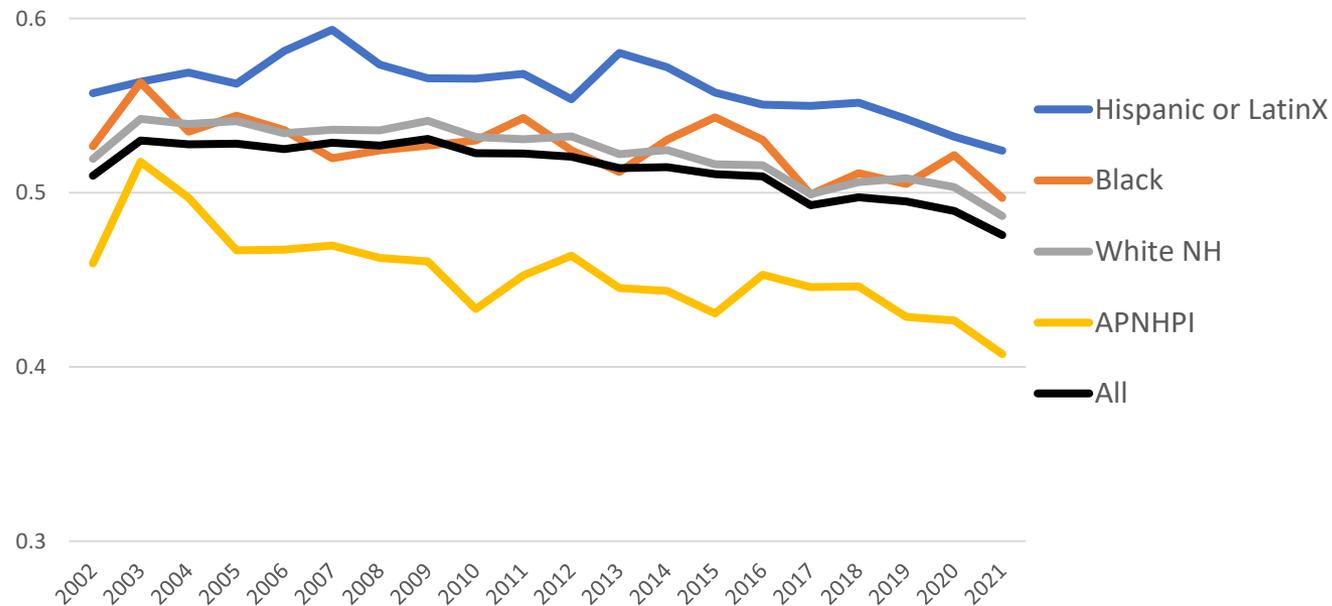
Getting worse:

Computer programmers

Gender segregation within racial/ethnic groups mirrors general trends: highest for LatinX workers (who have lower educational attainment) and lowest for AANHPI (highest educational attainment)

The Index of Occupational Gender Segregation by Race and Ethnicity, 2002-2021

Workers ages 25-64 in the civilian labor force



Segregation between women of different racial/ethnic groups is lower than between women and men

2021	Compared to White non-Hispanic women	Compared to White non-Hispanic men
Hispanic/Latinas	0.271466	0.532587
Black women	0.296433	0.557479
AANHPI women	0.304194	0.514283
White NH Women	n.a.	0.486671

- Unlike trends in gender segregation, segregation by race/ethnicity between women has stayed fairly stable since 1990
- While education matters, Black women have increased educational attainment and increased share of the White collar occupations that helped White women's real wage increase- but job quality has fallen in these jobs, and White women hold better jobs with occupations (Branch & Hanley 2014).

Occupational Segregation and Equal Pay

What is behind these trends? What to do?

- Why has progress in the gender wage gap and occupational integration stalled from 2000s onwards?
 - Disproportionate growth of women dominated – and undervalued-occupations (healthcare, eldercare)
 - Fissuring and deregulation leading to greater polarization
- Will the improvement in occupational integration during COVID-19 last?
 - Reflect both an increase in women's share of male dominated jobs (construction/transportation, etc) and a decline in female dominated jobs.
- How can we accelerate occupational integration and reduce the cost of occupational segregation?
 - No silver bullet: education; unionization; taxation; litigation

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Law as a Flawed Tool to Combat Occupational Segregation-Based Pay Inequity in the United States

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9, 2022



Roadmap

- ▶ Overview of potential federal equal pay claims
 - ▶ Title VII (1964)
 - ▶ Equal Pay Act (1963)
- ▶ Challenges with these claims in context of occupational segregation
- ▶ State Laws as Potential Tool
- ▶ Other opportunities and ideas?

Equal Pay Act (1963)

- ▶ **No employer** having employees subject to any provisions of this section **shall discriminate**, within any establishment in which such employees are employed, **between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions**, *except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.*

Equal Pay Act Claims

Plaintiff must establish that an employer pays:

1. Different wages to employees of opposite sex in the same establishment
 1. This language has been interpreted to require the plaintiff to identify a specific employee of the opposite sex doing the same job but earning more than the plaintiff. This person is known as a "comparator."
 2. The "same establishment" language has been narrowly interpreted in some cases as requiring the comparator to work in the same office or facility, barring claims based on lack of a comparator where a male employee does similar work, but at another office of the employer.
2. For "equal work" on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions
 1. Jobs must be "substantially equal"
 2. Some courts have interpreted this to mean jobs being compared must be "virtually identical" – big hurdle to an occupational segregation-based claim where you are talking about two different job titles, etc.

EPA creates a form of strict liability – no discriminatory intent required

Equal Pay Act Defenses

Employers are *not* liable under the EPA when a pay disparity comes from :

1. A seniority system
2. A merit system
3. A system that measures earnings by quantity or quality of production, or
4. “Any other factor than sex”

Last defense has created a large loophole under which courts have allowed many non job-related reasons to excuse pay disparities (prior higher salary of a man, allegedly better negotiation skills, market value, “management potential,” etc. – even if these reasons may be sex-related).

EPA provides very limited relief in context of occupational segregation

- ▶ A plaintiff may only sue her own employer, potentially reaching pay discrimination due to occupational segregation within one employer. Occupational segregation across employers is not actionable.
- ▶ The EPA only reaches a narrow band of pay discrimination claims that arise when there is "*equal work*." Thus, numerous courts have ruled that EPA claims can succeed only when the woman suing holds a job that is very similar (or even "virtually identical") to the comparator job that a man holds. Occupational segregation involves unequal pay between *different* job titles (i.e. primary female cafeteria workers v. primarily male janitors).
- ▶ The "equal work" being compared to must be within the same establishment of the same employer (with broad defenses).
- ▶ The EPA only prohibits sex-based unequal pay, not race-based unequal pay, limiting theories of recovery in occupational segregation cases where women are paid unequally due to the intersection of their sex and race

Title VII (1964)

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, **or otherwise to discriminate against any individual with respect to his compensation**, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin;**

Title VII Pay Discrimination Claims

1. *Individual Disparate Treatment Claims*

Under the disparate treatment theory, an employer's *intent* or *motive* is an essential element of liability for a violation of Title VII - proof of discriminatory motive is critical to establish a prima facie case.

2. *Group Claims*

Can show pattern or practice of disparate treatment, or disparate impact, using statistics and other evidence to create evidence of discrimination

Claims can be brought under Title VII for pay discrimination based on sex and race.

Title VII
provides
limited relief
in context of
occupational
segregation

- ▶ A plaintiff may only sue her own employer (no cross-employer occupational segregation relief, similar to EPA)
- ▶ Hard to discover unequal pay in first place (e.g. Lily Ledbetter discovering it 20 years after pay set), similar to EPA
- ▶ Plaintiff must establish employer's intent to discriminate under Title VII (not strict liability like EPA). This can be a high bar, which, coupled with leeway given to employer "legitimate nondiscriminatory reason" for pay disparities, has greatly limited Title VII's reach
- ▶ Many courts have interpreted Title VII narrowly in pay claims as well (and EPA's defenses including factor other than sex defense are incorporated into Title VII pay claims)

Other Litigation Challenges



State Law Developments Relevant to Occupational Segregation – An Opportunity?

1. A number of recently-enacted or amended state equal pay statutes contain *broader* definitions of “equal work” that could create more traction for occupational segregation-based pay claims within an employer.
2. A few examples:
 1. Massachusetts
 2. California
 3. Oregon
 4. Others – Colorado, Washington, Maryland, Maine, Illinois, New Jersey, etc.
3. Although there is not yet a body of caselaw interpreting these new statutes, they are promising.

Opportunities and Ideas for Combatting Pay Inequity Caused By Occupational Segregation?

1. Bring occupational segregation-based pay discrimination lawsuits under new, broader "comparable worth/similarly situated" state laws to test whether these laws will encompass pay discrimination between occupations
2. Encourage/require private sector to adopt job evaluation models from unionized workforces and federal government (where pay gap is smaller) to level pay between similar occupations within a workplace
 1. Conduct job evaluation study comparing different occupations within one employer requiring same level of qualifications and work duties. Point system translates into a pay grade.
3. Adopt models from other countries to address impact of occupational segregation on pay
 1. Recent Canadian Equal Pay law directly addresses occupational segregation in federally regulated employers
4. Amend Equal Pay Act – Enact Paycheck Fairness Act
 1. Would broaden "same establishment" provision - employees would be deemed to work in the same establishment if the employees worked for the same employer at workplaces located in the same county or similar political subdivision
 2. BUT doesn't change "equal work" language that is so problematic for occupational segregation claims?
5. Other creative ideas for addressing occupational segregation via law?



“The court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination.”

Ledbetter dissent