



Equal Pay Act

Who, What, Why . . .

Who does it apply to: Virtually all employers with employees of the opposite sex are subject to the Equal Pay Act (EPA).

What is the rule: Employers cannot pay one sex higher wages than the other for jobs that require equal work based on skill, effort, and responsibility that are performed under the same working conditions unless there is a legitimate exception to justify the difference.

What counts as “wages”: Almost anything you offer as an incentive to an employee is counted under the EPA. It includes pay, bonuses, expense accounts, allowances, lodging, use of a company car, etc. It also includes fringe benefits such as insurance, retirement benefits, leave, vacation or PTO, holidays, and regular days off.

What goes into equal work: Under the EPA, job titles don't make much difference. The EPA looks across descriptions to make sure like work goes with like pay. To answer the question you set aside the common core duties between the jobs in question and focus on the differences in the following:

- *Skill:* Consider the experience, training, education, and ability required to do the job (not of the person doing it).
- *Effort:* Consider the level of physical and mental exertion required to do the job including factors that create or alleviate stress in performance of the work.
- *Responsibility:* Consider the degree of accountability, creativity, supervisory responsibility, and individual judgment that go into performing the job.
- *Working conditions:* Consider the surroundings and hazards of the position. Is it dangerous or distasteful? Is it unpleasantly hot or cold?

If these characteristics are the same or very similar, the jobs will be considered the same under the EPA and any differences specifically between the sexes will create liability – unless an exception applies.

Are there exceptions: The following exceptions may allow disparity over wages between the sexes:

- *Seniority:* A male employee hired five years ago may make more than a female employee hired five minutes ago so long as the seniority system is formalized and has been followed closely in the past.
- *Merit:* A female employee who has performed admirably in an orderly and systematically applied system may make more than a male counterpart for the same job. Merit systems should be formalized such that they are in writing or all of the employees are clear on the policy.
- *Quantity/Quality pay systems:* Male and female employees paid based on the quantity of items they produce or the quality of the work they produce may be paid differently so long as there are no other extraneous discriminatory factors affecting their pay.
- *Factors “other than sex”:* The black hole of distinctions. It could be anything, but it better be well thought out and documented. Examples that have been accepted in this category are experience, training provided without discrimination, financial crisis, differences in educational background of the employees, and actual economic benefit to the employer (one employee produces higher profits in the same job).

Common Situations:

Market force theory: General Electronics has discovered that women will historically and statistically work for less than men and rarely attempt to bargain a better wage at hiring. Upon suit by an employee, the company raises this as a defense. They pay women less because they are willing to work for less. Will this defense hold up? No, but it has been tried in several variations many times.

Red circle rates: Sarah has been with Bayou Bakery for 35 years and just can't knead the dough like she used to. Without reducing her pay, Bayou moves Sarah to an inventory clerk position. Several males in the inventory clerk position file an equal pay claim because Sarah makes so much more. Will Bayou be sacked? No. Courts have found this to be an acceptable reason “other than sex” to have a different wage. And remember, the EPA goes against both sexes. Men can make claims, too.

Extra duties: John has the extra responsibility of turning on the lights and unlocking the doors each day at Steam Clean America. Amy, Mary, and Jane have the same job as John at Steam, without the extra task regarding lights and locks. John is paid more than the ladies and they file a claim. Will John's extra duties justify his higher wage? Probably not. While extra duties can be a justification "other than sex" to pay more, they have to be more than just turning on the lights. Of course, if the difference in pay is very small, a court may consider and accept the difference. The size of the difference in pay between the sexes is a consideration in determining equal pay claims.

Successor liability: During the process of finding a replacement for his office manager, Suzy, Dr. Jose Cuervo discovers Stan. Stan has almost exactly the same qualifications Suzy did for the position, but Dr. Cuervo retains Stan for 10% more in salary. Suzy learns this from a close friend still working for Dr. Cuervo and makes a claim. Will she be successful? Probably. A former employee can reach in and get the difference in pay plus penalties going back up to three years against an employer in circumstances like this. Unless Dr. Cuervo can come up with additional job duties which Stan has agreed to or some other excuse, he will get bottled up on this one.

Not from around here: Joe's Auto Parts has facilities and stores all over the U.S. All the locations have their own HR representatives that handle hiring, firing, promoting, and wages within nominal guidelines set at corporate. Natalie, who works in the Lubbock facility learns that male employees performing the same job in Harlingen make more for the same job. Joe's is sunk right? Not likely. The EPA only applies to violations that occur within the same "establishment." Offices and locations that are geographically and operationally distinct will not be treated together for violations.

What should I do:

Good: Pay all employees in the same position the same wage – including all forms of fringe benefits unless there is some reason to justify the difference.

Better: If you use a seniority or merit system, memorialize it in writing and follow it religiously. Set merit raise promotions for certain projects in motion with a writing to the employees involved. Prepare written notes for all discretionary bonuses awarded by position. Be careful that benefit packages for positions are offered to all persons in those positions. Be wary of changing benefit packages with new employees to avoid risk of accidental EPA claim.

Best: Create job descriptions and use them to identify positions with similar responsibilities and evaluate differences to make sure they justify the price difference in wage, if any. Memorialize in writing all reasons for paying the sexes differently in any position. Follow the exceptions or identify the duties that make the distinction in writing.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**