

# EQUAL PAY COMES TO YOUR COMPANY

Thomas P. Brady  
(313) 965-8291  
tbrady@clarkhill.com

CLARK HILL

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## EQUAL PAY ACT (EPA)

- The EPA is a 1963 amendment to the Fair Labor Standards Act
- All employers who are covered by the Fair Labor Standard Act are covered by the EPA
- It prohibits sex-based discrimination in compensation
- It EPA makes it illegal for an employer to pay different wages to employees of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions
- The employer can raise an affirmative defense that the difference in compensation are based on factors other than sex i.e. seniority, merit, earnings measured by quality or quantity

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## EPA STANDARDS

- The EPA prohibits gender-based differentials in wages where the employees perform equal work under similar working conditions that require equal skills, effort and responsibilities
- Unlike the FLSA, the EPA covers executive, administrative and professional employees that are exempt under the FLSA white collar exemptions
- The EPA applies equally to men and women
- Wage comparisons are normally limited to comparing employees in the same facility
- Where hiring, setting pay rates and assigning employment locations are done by a single administrative unit, and the employees frequently interchange work locations and have virtually identical duties performed under similar working conditions the DOL may make the job comparison among the various sites where the employees are located

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# SUBSTANTIALLY EQUAL WORK

- Equal work does not mean identical, but rather, “substantially equal”
- Minor differences in degree or amount of skill or effort or responsibility required for the performance of a job will not render the equal pay standard inapplicable

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## WAGES COVERED

- “Wages” covered by the Equal Pay Act include any form of remuneration for employment, including profit sharing, expense accounts, bonuses, uniform cleaning allowances, hotel accommodations, use of company cars, and gasoline allowances
- Equal wages must be paid in the same medium of exchange. An employer cannot make up for a gender-based differential in the wage rate by giving periodic bonuses to the lower paid employees
- Fringe benefits such as medical, hospital, accident, and life insurance, retirement plans, leave and maternity and pregnancy benefits are considered wages

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## PRIMA FACIES CASE

- An employee is required to prove that the employer paid different wages to employees of the opposite sex:
  - For substantially equal work on jobs;
  - Which required equal skill, effort, and responsibility; and
  - Which were performed under similar working conditions

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# EMPLOYER'S AFFIRMATIVE DEFENSES

- If the employee successfully proves a *prima facie* case, the employer must prove one of the exceptions contained in the Act:
  - Seniority system;
  - Merit system;
  - Quality or quantity of production; and
  - Factor other than sex

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# PAY CLAIMS UNDER OTHER CIVIL RIGHTS STATUTES

- The Equal Pay Act was passed before other federal civil rights acts
- The relationship between the EPA and Title VII remains unclear
- EEOC and some appellate courts hold that any violation of the EPA also is a violation of Title VII
- The reverse is not necessarily true, however, because Title VII covers some types of wage discrimination that are not actionable under the EPA



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## EXAMPLE 1

Carrie is a program assistant with an associates degree. She works as the program assistant for the director of Mental Health Services at the VA in Ann Arbor. She has no educational or training responsibilities.

Tim has a masters degree and seven years of teaching experience at the university level. Tim is the Education Program Specialist. The position provides professional training and continuing education programs to the VA Staff.

Carrie sues claiming that the two job have substantially the same duties.

Does she have a claim?

A. Yes

B. No

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## EXAMPLE 2

Selector-packers inspect glass containers and discard defective containers.

Male selector-packers are paid 10% more than female selector-packers.

The CBA had different job classifications for male and female selector-packers.

Male selector-packers had 16 additional tasks, including lifting packages weighing more than 35 pounds, lifting bulky cartons, and stacking full cartons. Women did not perform these tasks.

Males spent an average of 18% of their total time on work that women were not allowed to perform.

Do the female employees have a claim?

A. Yes

B. No

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## EXAMPLE 3

Summit designs and manufactures molded plastic parts for automobiles. The design department has 18 employees.

Lisa was hired as a detailer to assist designers.

A year after her hire the detailers job was eliminated, and Lisa was promoted to a designer.

Lisa did mostly detailer work after her promotion.

While Lisa received a pay raise each year, she was paid less than 13 other designers. Three male designers were paid less than Lisa.

Does Lisa have a claim under the EPA?

A. Yes

B. No

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# COMPARABLE WORTH

- “Comparable worth” (also called pay equity) refers to the reform effort to compensate workers in different job titles the same amount of pay based on the value of their labor to their employer, regardless of the gender predominance of the people working in the different job titles
- “Comparable worth” actions are brought under Title VII or other employment civil rights statute because the EPA requires “substantially equal work”

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## EEO-1 REPORT

- All employers with 100 or more employees and federal contractors with 50 or more employees and contracts of more than \$10,000 must file an EEO-1 report
- A covered employer must file an EEO-1 report annually by September 30
- Employers must maintain a copy of the most recent EEO-1 at each reporting unit
- Classifies employees by race and gender (Hispanic or Latino, White, Black or African American, Native Hawaiian or Other Pacific Islander, Asian, American Indian or Alaska Native and Two or more races)
- Ten job categories: Executive/Senior Official and Managers, First/Mid-Level Officials and Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers and Service Workers

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# NEW EEO-1 REPORTING REQUIREMENT

- Two reporting requirements
  - Ethnicity, race and gender
  - Data on employees' W-2 earnings and hours worked
- In 2016, employers who must file an EEO-1 report on ethnicity, race and gender
- In 2017 employers who must file an EEO-1 report by employers with a 100 or more employees, including Federal contractors, must also file a report on employees' W-2 earnings and hours worked.
- In 2017, Federal contractors who have between 50 and 99 employees only have to file ethnicity, race and gender
- The employer must collect the pay and hours for the previous year in a payroll period during the months of July through September

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# EMPLOYER'S PAY DATA AND HOURS REPORTING

- Employers will report the employees W-2 for the year
- The employer must compute the W-2 as of July through August so that it can report the EEO-1 as of September 30 of the year
- The EEO-1 will collect aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories
- The EEO-1 will collect the total number of hours worked by the employees included in each EEO-1 pay band cell
- The EEOC seeks comment from employers on the approach employers will use to estimate salaried employees hours worked

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## PAY BANDS

Pay bands	Pay bands label
1 .....	\$19,239 and under
2 .....	\$19,240–\$24,439
3 .....	\$24,440–\$30,679
4 .....	\$30,680–\$38,999
5 .....	\$39,000–\$49,919
6 .....	\$49,920–\$62,919
7 .....	\$62,920–\$80,079
8 .....	\$80,080–\$101,919
9 .....	\$101,920–\$128,959
10 .....	\$128,960–\$163,799
11 .....	\$163,800–\$207,999
12 .....	\$208,000 and over



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# HOW WILL THE EEOC USE THE DATA

- The EEOC will perform statistical test as an initial check of the W-2 data
- The EEOC and OFCCP plan to develop a software tool
- Confidentiality
  - Title VII, which forbids “any [EEOC] officer or employee” from making “public in any manner whatever any information obtained by the Commission . . . prior to the institution of any [Title VII] proceeding . . . involving such information
  - The EEOC publishes aggregate EEO-1 data in a manner that does not reveal any particular employer’s data, consistent with Section 709(e). For example, the EEOC has published aggregate EEO-1 data at the national, regional, and industry levels
- It will use the data to target employers

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## WHAT SHOULD YOU DO NOW?

- Document the reason for any pay disparity
  - Is there a disparity in the pay between women and men in the same jobs?
  - Is the work performed by the male and female workers substantially equal?
  - Do the male and female employees' job require equal skill, effort and responsibility?
  - Do males and females perform work under similar working conditions?
- Document Affirmative Defenses
  - Seniority system
  - Merit pay system
  - Differences in quantity or quality
  - Factors other than sex

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## WHAT SHOULD YOU DO NOW?

- Correct all pay disparities that you identify and that you cannot justify under one of the affirmative defenses
- Determine if you have to report wages under the new EEO-1 reporting requirements in 2017
- Begin planning how you will comply with the W-2 reporting requirements for the new EEO-1 report
- Determine if there is a statistically significant difference between what male and female employees are paid in any job categories

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# QUESTIONS?



**Tom Brady**

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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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