

# Human Resources BRIEF



## Equal Pay for Equal Work

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One of the most discussed topics in labor and employment law is the subject of equal pay for women and men. It is a central focus of the Biden Administration and was highlighted on Equal Pay Day on March 24, 2021, when President Biden stated “my administration is going to fight for equal pay. It’s about justice, it’s about fairness, it’s about living up to our values, who we are as a nation. Equal pay makes all of us stronger.” Besides the obvious focus on striving towards equality, this statement also means that employers need to be prepared for increased compliance scrutiny regarding equal pay during the Biden administration’s time in the White House.

In honor of Equal Pay Day on March 15, 2022, this brief will analyze the background of pay disparity inequities as well as the compliance risks for organizations that do not address the issue. It will also look at the value of pay audits as a means to determine if a problem exists in an organization and how to rectify the issue if necessary.

### Background

Based on the [Global Gender Gap Report 2020](#) that was drafted by the World Economic Forum, the United States sits at a concerning 53rd amongst developed countries when it comes to equal pay. As a result of this and other factors, Equal Pay Day became a focus in the United States each year to highlight these inequities. Interestingly, Equal Pay Day is usually not on the same day each year. The date is determined based on the number of days into the new year an average woman would have to work in order to equal the pay an average man received during the previous calendar year. The good news this year is that Equal Pay Day occurred nine (9) days earlier than last year; the bad news is that women had to work all of 2021 plus until March 15, 2022, in order to make the same amount of money as a man did in 2021.

Based on recent studies, women earn 82 cents for every dollar earned by men regardless of job type, seniority, location, industry, years of experience, etc. (otherwise known as the “uncontrolled pay gap”). In other words, the uncontrolled pay gap measures the median salary for men in all jobs as roughly 18% higher than the median salary for women in all jobs. This equates to approximately an \$850,000 deficit over a woman’s entire 40-year career compared to a man with a career of similar length.

## Compliance Concerns

Besides the obvious substantive pay issues and morale concerns associated with women being paid less than men in an organization, there are other more technical negative impacts associated with pay gaps in the workplace for an organization. The most significant is the potential to violate the Equal Pay Act of 1963 (EPA), Title VII of the Civil Rights Act of 1964 (Title VII) and the Lilly Ledbetter Fair Pay Act of 2009 (FPA).

## Equal Pay Act

Let's first assess liability under the EPA. The EPA prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions. All forms of compensation under the EPA are covered, including but not limited to, salary, overtime pay, bonuses, company cars, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. Wages must be paid in the same form which means that an employer can't pay a higher hourly wage to a male employee and then attempt to equalize the difference by periodically paying a bonus to a female employee. If there is an inequality in wages between men and women who perform substantially equal jobs, employers must raise wages to equalize pay but may not reduce the wages of other individuals.

In order to assess whether the EPA is potentially implicated, it is necessary to more critically analyze the components that make up an EPA claim.

**Same Establishment:** The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is generally considered a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. That being said, there are some circumstances in which physically separate places of business may be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment. This is infinitely more likely nowadays due to employees working remotely from various locations, including home offices.

**Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job. The focus is not on what general skills the employee may have but specifically on what skills they have that are necessary to meet the requirements of the job.

**Effort:** The amount of physical or mental exertion needed to perform a job.

**Responsibility:** The degree of accountability required to perform the job. Some factors include (1) the extent to which an employee works without supervision; (2) the extent to which the employee exercises supervisory functions and (3) the impact of the employee's exercise of his or her job functions on the employer's business.

**Working Conditions:** This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

"Equal" work does not mean identical jobs; rather, they must be "substantially equal" in overall job content, even if the position titles are different. In order to be considered substantially equal, the job duties must be "closely related" or "very much alike." Thus, minor differences in the job duties, or the skill, effort, or responsibility required for the jobs, will not render the work unequal. An employer may have a defense if compensation is based on a seniority system, merit system, systems which measure earnings by quantity or quality of production, or any legitimate factor other than sex.

## **Title VII Pay and Benefits Discrimination Based on Sex**

Both the EPA and Title VII prohibit sex discrimination in compensation but despite the considerable overlap of the two statutes, they are not identical. Title VII prohibits discrimination in compensation and other terms and conditions of employment, so it is broader than the EPA. Title VII also prohibits discrimination in compensation or other aspects of employment based on race, color, religion, or national origin, while the EPA is more targeted in that it only prohibits sex-based differentials in substantially equal jobs in the same establishment. Due to this narrower EPA standard, not all compensation practices that violate Title VII also violate the EPA, but a practice that violates the EPA also will likely violate Title VII. As a result, an employer should analyze the two statutes separately to determine compliance.

## **Lilly Ledbetter Fair Pay Act**

The Lilly Ledbetter Fair Pay Act was signed by President Obama on January 29, 2009. It overturned the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, where the Court held by a 5-4 vote that Ledbetter did not file a charge of pay bias within the statutory 180/300-day time limit.

The Act now allows individuals to file charges of alleged pay discrimination under Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) without regard to the normal 180/300-day statutory charge filing period. The law declares that an unlawful employment practice occurs when:

- (1) A discriminatory compensation decision or other practice is adopted;
- (2) An individual becomes subject to the decision or practice;
- (3) An individual is affected by application of the decision or practice, including each time there is a payment of compensation.

By eliminating the normal 180/300-day charge filing period for pay discrimination claims, the statute allows the filing of charges alleging pay discrimination with the issuance of each paycheck impacted by alleged past discrimination. In other words, an employee hired 10 years ago may now challenge her starting pay on the ground that each current paycheck is impacted by that 10-year-old discriminatory decision.

Due to the expansion of the timeframes associated with filing a valid claim, this statute has led to an increase in pay discrimination claims in Federal courts. For employers, this required a renewed diligence in record retention and pay policies as well as the consideration of conducting internal self-audits to determine if recent pay decisions were putting the employer at risk based on the new standards.

## Conducting a Pay Equity Audit

Now that some of the risks are apparent regarding pay inequities in the workplace, what can an employer do to avoid the risks of costly litigation and potential damages from discriminatory practices? The most effective approach to avoid these potential concerns is to conduct an internal pay equity audit of existing pay practices to determine if a problem exists, assess potential existing liability, and make changes towards compliant policies to avoid future liabilities. There are several best practices employers can follow to obtain the best outcomes when conducting a pay equity audit.

### Plan Ahead

Employers should not just begin auditing their pay practices and data without a clear plan for what is to be accomplished. The first step for any audit is to determine the goals. Is the goal to limit legal risks? Is the goal to respond to shareholder requests for a pay gap analysis? Is the goal to simply pay employees equitably? Before taking any further steps, these questions must be asked first.

A key component of answering these questions is to get buy-in from senior management. Their focus may be different than the focus of Human Resources, and the financial costs associated with an audit can be significant, so all internal stakeholders need to be on the same page before beginning the audit so there is no waste of time or resources. It is also necessary to comprise the team that will be on the front lines of conducting the audit itself. This team should include Human Resources personnel, Finance or Payroll personnel, and Legal Counsel. Legal counsel is a necessity due to the need to establish the attorney/client privilege in order to retain the argument for protection of potentially harmful audit results during litigation discovery.

### Review the Organizations' Pay Practices and Policies

Once the goals are known and the internal team is set, the next step is to assess existing historical and current pay practices and policies. It is necessary to determine what the methodology for analyzing pay is and assessing if there is a valid non-discriminatory reason for any pay disparities. What types of compensation exist within the organization? What criteria is utilized for making pay decisions? How much discretion do decision-makers have?

### Collect Relevant Data

To conduct the audit, the correct data must be collected. This data generally includes job title, department, job grade or level, hire date, gender, job location, hours worked over the past year, base wage or salary, overtime pay, and bonuses and other forms of compensation. Besides the foregoing, employers may want to also collect information like performance scores or ratings, level of education if tied to the job and years of experience in the field or industry. Sometimes this data isn't easily accessible so this stage can be time-consuming and labor-intensive.

## Determine Which Employees Perform “Comparable” Work

In order to assess possible liability under Federal and State laws, employers must assess which employees will be considered “comparable” for purposes of assessing risk. It is recommended in this stage to work closely with legal counsel to assess the various legal standards applicable to the employer at the Federal and State level so that the appropriate information can be obtained and analyzed. Determining whether jobs are comparable generally requires looking at the job as a whole and while job descriptions and titles may be helpful, they certainly do not determine comparability on their own.

## Analyze the Data

Once the employees are properly categorized, the data can be analyzed. The purpose is to assess whether men and women in the same categories are paid equally based on the standards set for the audit. For smaller and simpler categories, a comparison of average pay or a cohort analysis might be sufficient. For larger or more complex categories, a full-blown statistical analysis might be necessary. Again, the help of a legal expert is invaluable at this stage, both to protect the results of the data as well as to determine what type of analysis to conduct. If a more complex analysis is warranted, legal counsel may recommend the hiring of a statistician to conduct the analysis properly.

## Take Corrective Action to Correct Pay Disparities

If pay inequities are found and there is not a clear basis for such disparities, employers should correct those areas of concern. This often requires changes to compensation, but as noted above, that does not mean employers can reduce compensation to rectify the situation. It requires employers to bring lower paid employees up to the level of higher paid employees. If the changes can be rolled into annual pay increases, that is a good time to make the adjustments. Communication in this stage is key both so that front-line managers understand why the adjustments are being made as well as conducting training to make sure that the historical inequities do not resurface in the future due to manager mistakes.

## Conclusion

Inequities in pay based on gender create morale issues in a workplace and will ultimately lead to a loss of talented employees as they seek pay that properly reflects their worth to an organization. Beyond those obvious concerns, equal pay is fast becoming one of the highest liability risk areas for employers in the world of labor and employment law. Without question, rectifying pay disparities within an organization has numerous benefits for the employer in the immediate future and for the long-term goals of the organization.

The first step in the process is to understand that a potential problem exists and formulate a plan to rectify existing issues. To do that, employers must know the laws that apply to their organization, the standards associated with those laws, and what the best practices are for correcting any disparities that exist. Employers that take these positive steps towards equal pay will have a happier, more loyal, and less litigious workforce, which is something that everyone can benefit from.