

where the same benefits are not made available for the spouses or families of opposite gender employees.

(e) It shall not be a defense under the EPA to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It is unlawful for an employer to have a pension or retirement plan which, with respect to benefits, establishes different optional or compulsory retirement ages based on sex or which otherwise differentiates in benefits on the basis of sex.

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§ 1620.12 Wage “rate.”

(a) The term wage “rate,” as used in the EPA, refers to the standard or measure by which an employee’s wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. It further includes the rate at which a draw, advance, or guarantee is paid against a commission settlement.

(b) Where a higher wage rate is paid to one gender than the other for the performance of equal work, the higher rate serves as a wage standard. When a violation of the Act is established, the higher rate paid for equal work is the standard to which the lower rate must be raised to remedy a violation of the Act.

§ 1620.13 “Equal Work”—What it means.

(a) *In general.* The EPA prohibits discrimination by employers on the basis of sex in the wages paid for “equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions * * *.” The word “requires” does not connote that an employer must formally assign the equal work to the employee; the EPA applies if the employer knowingly allows the employee to perform the equal work. The equal work standard does

not require that compared jobs be identical, only that they be substantially equal.

(b) *“Male jobs” and “female jobs.”* (1) Wage classification systems which designate certain jobs as “male jobs” and other jobs as “female jobs” frequently specify markedly lower rates for the “females jobs.” Such practices indicate a pay practice of discrimination based on sex. It should also be noted that it is an unlawful employment practice under title VII of the Civil Rights Act of 1964 to classify a job as “male” or “female” unless sex is a bona fide occupational qualification for the job.

(2) The EPA prohibits discrimination on the basis of sex in the payment of wages to employees for work on jobs which are equal under the standards which the Act provides. For example, where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex but receives a lower rate of pay than the person replaced, a prima facie violation of the EPA exists. When a prima facie violation of the EPA exists, it is incumbent on the employer to show that the wage differential is justified under one or more of the Act’s four affirmative defenses.

(3) The EPA applies when all employees of one sex are removed from a particular job (by transfer or discharge) so as to retain employees of only one sex in a job previously performed interchangeably or concurrently by employees of both sexes. If a prohibited sex-based wage differential had been established or maintained in violation of the EPA when the job was being performed by employees of both sexes, the employer’s obligation to pay the higher rate for the job cannot be avoided or evaded by the device of later confining the job to members of the lower paid sex.

(4) If a person of one sex succeeds a person of the opposite sex on a job at a higher rate of pay than the predecessor, and there is no reason for the higher rate other than difference in gender, a violation as to the predecessor is established and that person is entitled to recover the difference between his or her pay and the higher rate paid the successor employee.

(5) It is immaterial that a member of the higher paid sex ceased to be employed prior to the period covered by the applicable statute of limitations period for filing a timely suit under the EPA. The employer's continued failure to pay the member of the lower paid sex the wage rate paid to the higher paid predecessor constitutes a prima facie continuing violation. Also, it is no defense that the unequal payments began prior to the statutory period.

(c) *Standards for determining rate of pay.* The rate of pay must be equal for persons performing equal work on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions. When factors such as seniority, education, or experience are used to determine the rate of pay, then those standards must be applied on a sex neutral basis.

(d) *Inequalities in pay that raise questions under the Act.* It is necessary to scrutinize those inequalities in pay between employees of opposite sexes which may indicate a pattern of discrimination in wage payment that is based on sex. Thus, a serious question would be raised where such an inequality, allegedly based on a difference in job content, is in fact one in which the employee occupying the job purportedly requiring the higher degree of skill, effort, or responsibility receives the lower wage rate. Likewise, because the EPA was designed to eliminate wage rate differentials which are based on sex, situations will be carefully scrutinized where employees of only one sex are concentrated in the lower levels of the wage scale, and where there does not appear to be any material relationship other than sex between the lower wage rates paid to such employees and the higher rates paid to employees of the opposite sex.

(e) *Job content controlling.* Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under an evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute. Conversely,

although the point values allocated to jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is unequal when the statutory tests of the equal pay standard are applied. Job titles are frequently of such a general nature as to provide very little guidance in determining the application of the equal pay standard. For example, the job title "clerk" may be applied to employees who perform a variety of duties so dissimilar as to place many of them beyond the scope of comparison under the Act. Similarly, jobs included under the title "stock clerk" may include an employee of one sex who spends all or most of his or her working hours in shifting and moving goods in the establishment whereas another employee, of the opposite sex, may also be described as a "stock clerk" but be engaged entirely in checking inventory. In the case of jobs identified by the general title "retail clerk", the facts may show that equal skill, effort, and responsibility are required in the jobs of male and female employees notwithstanding that they are engaged in selling different kinds of merchandise. In all such situations, the application of the equal pay standard will have to be determined by applying the terms of the Act to the specific facts involved.

§ 1620.14 Testing equality of jobs.

(a) *In general.* What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. It should be kept in mind that "equal" does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an