

# Pay Discrimination Concepts Under the Equal Pay Act and Title VII



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by  
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## AUTHOR

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Bachman writes for Forbes.com on employment discrimination issues. Best Lawyers named Bachman to its “Top Lawyers in America” list for 2020, Washingtonian magazine selected Bachman as a Top Lawyer in Whistleblower Law, and the ABA Journal honored Glass Ceiling Discrimination Blog as one of the best legal blogs in the country.

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Before joining Zuckerman Law, Bachman served as Deputy Special Counsel, Litigation and Legal Affairs, at OSC from 2014 to February 2017.

Prior to that, he worked for five years as a Special Litigation Counsel and Senior Trial Attorney in the Civil Rights Division of the Department of Justice. Previously, Bachman was a partner in a Washington, DC civil rights law firm. Bachman began his career as a public defender and served as lead or co-counsel in numerous jury trials.

Zuckerman Law is privileged to partner with our clients to help combat illegal pay discrimination. Although these cases can be challenging, an experienced and diligent legal team and their client can achieve important relief for the client, as well as broader relief for other victims of discrimination in the workplace. *U.S. News* and *Best Lawyers*<sup>®</sup> have named [Zuckerman Law](#) a Tier 1 firm in Litigation – Labor and Employment in the Washington DC metropolitan area.

If you have suffered unlawful conduct in the workplace, email us at [ebachman@zuckermanlaw.com](mailto:ebachman@zuckermanlaw.com) or call us at (202) 769-1681.

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## INTRODUCTION

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Equal pay for equal work—a simple concept with a complicated past and an uncertain future.

Congress first passed the Equal Pay Act (EPA) in 1963, and it “prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for ‘equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.’” *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (quoting 29 U.S.C. § 206(d)(1)).

“The median salary for women working full-time is about 80 percent of men’s,” the Washington Post reported in a fascinating, in-depth analysis of the gender wage gap. “That gap, put in other terms, means women are working for free 10 weeks a year.” Put another way, the average employer stops paying female employees in October of each year, after which, the female employee is theoretically working for free.

Variations of course exist on the wage gap across jobs and industries, and not all women receive even 80% of a man’s pay. African-American women, for example, [earn \\$0.61](#) cents to every dollar white men earn.

A commonly heard explanation for the gender wage gap, [as discussed in The Atlantic](#), is that men and women “tend to choose different careers, so much so that researchers have a term for it: ‘gender occupational segregation.’” The argument goes that, “because of this occupational sorting, the most commonly mentioned figure of the gender-gap debate—that an American woman only earns 79 cents for every dollar a typical American man makes—is indeed too simple.”

But, as pointed out in *The Atlantic*, researchers have analyzed the wage gap and controlled for many of the key variables that could be impacting the gap, including geography, experience, job titles, and the over-representation of men in highly compensated jobs.

And, *The Atlantic* notes, “the striking thing is that even after adjusting for so many factors, there’s still a statistically significant pay gap.” Indeed, “[t]he fact that a gap remains at all after such adjustments shows that the problem defies any simple explanation.”



## WHAT IS THE EQUAL PAY ACT?

The EPA became law in 1963 and was designed to eradicate the “long-held, but outmoded social view that a man should be paid more than a woman for the same work.” *Belfi*, 191 F.3d at 135. As a result, an employee may win their unequal pay case even if they do not prove their employer intended to discriminate against them. See *Ryduchowski v. Port Auth. of New York & New Jersey*, 203 F.3d 135, 142 (2d Cir. 2000). Significantly, the employer must prove not just that proffered reasons could explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.

The Equal Pay Act requires that men and women receive equal pay for equal work in the same workplace. According to the [Equal Employment Opportunity Commission \(“EEOC”\)](#), “[t]he jobs need not be identical, but they must be substantially equal.” And a court will look to the content of the job you do, not the job title, to decide if the jobs are “substantially equal.” The EPA covers all kinds of pay, including:

- salary,
- overtime pay,
- bonuses,
- stock options,
- vacation and holiday pay,
- reimbursement for travel expenses, and
- benefits.

“If there is an inequality in wages between men and women,” the EEOC dictates that “employers may not reduce the wages of either sex to equalize their pay.”

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## HOW DO YOU PROVE PAY DISCRIMINATION UNDER THE EPA?

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To establish a *prima facie* case under the Equal Pay Act, the plaintiff must show that:

1. she was “doing substantially equal work on the job, the performance of which required substantially equal skill, effort, and responsibility as the jobs held by members of the opposite sex”;
2. “the job was performed under similar working conditions”; and
3. she was “paid at a lower wage than members of the opposite sex.”

*Cornish v. District of Columbia*, 67 F. Supp. 3d 345, 360-61 (D.D.C. 2014) (citations omitted).

Once the EPA claimant has met that burden, the employer has the burden of demonstrating the applicability of one of the four affirmative defenses identified in the EPA:

1. a bona fide seniority system,
2. a merit system,
3. a system which measures earnings by quantity or quality of production,  
or
4. a differential based on any factor other than sex.

See 29 U.S.C. § 206(d)(1).

## HOW DOES THE EPA RELATE TO TITLE VII AND OTHER ANTI-DISCRIMINATION LAWS?

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Title VII also makes it illegal to discriminate based on sex in pay and benefits.

If you have an Equal Pay Act claim, you thus may also have a claim under Title VII of the Civil Rights Act of 1964 (“Title VII”). 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.



### Major Differences Between EPA and Title VII Pay Discrimination Claims

Although Title VII and the EPA have many similarities, they also have notable distinctions that may affect your potential lawsuit (all of the points below assume the claim is against a private employer):

- Under the EPA, you are not required to file an [EEOC Charge of Discrimination](#) before going to court, but you must file a charge for a Title VII pay discrimination claim;
- Unlike the EPA, no requirement exists under Title VII to prove that your job is substantially equal to that of a higher-paid male employee, nor under Title VII must you work in the same establishment as the male comparator;
- In an EPA claim, your employer will have to meet a more demanding burden of **proof** (not just a burden of **production** like in a Title VII claim) to establish its EPA defense (seniority system, merit system, production-quota system, or any factor other than sex);
- If you prove your employer willfully violated the EPA, you may receive liquidated damages;
- Title VII's anti-discrimination provisions cover more protected characteristics (race, gender, religion, etc.) than the EPA, which is limited to gender-based differences.

## WHO IS CONSIDERED A SIMILARLY SITUATED EMPLOYEE?

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The precise characteristics of a similarly situated employee depend on the specific legal claim and the court in which you file your case.

Generally, however:

to be similarly situated to another employee, [the plaintiff] must show that the employee is **directly comparable in all material respects**.

*Brown v. Illinois Dep't of Natural Resources*, 499 F.3d 675, 682 (7th Cir. 2007) (citation omitted). If your case is a class action, rather than an individual complaint, then a different take on the “similarly situated employee” may apply.

To figure out if one of your co-workers qualifies as a “similarly situated employee,” a court will carefully review the particular facts in your case. Each EPA claim involves a unique workplace environment, but some common questions that courts ask to see if you have identified a similarly situated employee are:

- Do you share the same supervisor?
- Do you perform very similar job tasks and responsibilities (both the number and weight) as the other person?
- Do you have similar job performance evaluations and disciplinary history?
- Is your experience level (including supervisory experience) the same as the other person?

Most courts do not require an exact match on these criteria, but the more comparable you are to the other person, the more likely a court will deem them a “similarly situated employee.”

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## WHAT IS THE SALARY NEGOTIATION DEFENSE?

The EPA is intended to help close the gender wage gap, and an ongoing question regarding the EPA is whether a difference in the salaries of a man and woman performing substantially equivalent jobs can be legitimately explained by the man's negotiation of a higher salary. As discussed below, courts are split on this issue, and this "salary negotiation" defense will likely continue to be debated in future EPA cases.

This has been called into question by a recent Harvard Business Review study that, on average, women and men ask for raises at the same rate, but men are more likely to receive a raise from these negotiations.

The study found that when there is very little transparency on how to achieve a raise, men are paid more than women.

The salary negotiation defense is an aspect of the employer's affirmative "catch all" defense. In *Dreves v. Hudson Group Retail LLC*, 2013 WL 2634429, at \*\*7-8 (D. Vt. June 12, 2013), the employer raised several defenses to Dreves's equal pay claims, including that it paid the male successor more because he negotiated for the higher salary. The employer argued that the difference in Dreves's and the male successor's pay was driven by negotiations, a justification based solely on factors other than sex. *Id.* at 8.

The court, however, rejected this argument and held, "there is simply no basis for the proposition that a male comparator's ability to negotiate a higher salary is a legitimate business-related justification to pay a woman less." *Id.* "To hold otherwise," the court stated, "would eviscerate the federal and Vermont equal pay provisions." *Id.*

### [Other Courts Take Different Approaches To Salary Negotiation Defense](#)

Various federal courts have offered different takes on the "salary negotiation" defense. For example, in *Muriel v. SCI Arizona Funeral Services, Inc.*, 2015 WL 6591778, at \*3 (D. Ariz. Oct. 30, 2015), the court distinguished Dreves and found that pay negotiations and prior salary could reasonably explain the pay difference between plaintiff and her male replacement. Unlike in *Dreves* where the employer had offered the male successor a base salary that was more than two thousand dollars greater than Dreves's salary at the time, SCI Arizona Funeral Services' first offer to the male replacement was a few thousand dollars less than what they were paying Muriel at the time, and the male replacement negotiated a salary that ended up exceeding

Muriel's only because he would have had to take a \$3,000 pay cut to accept SCI's original offer. *Id.* Finding this situation constituted an “acceptable business reason for using prior salary as a base for determining salary,” the court found that there was no violation of the EPA. *Id.*

In repeated studies, the social cost of negotiating for higher pay has been found to be greater for women than it is for men. Men can certainly overplay their hand and alienate negotiating counterparts. However, in most [published studies](#), the social cost of negotiating for pay is not significant for men, while it is significant for women.

This raises questions about the legitimacy of using prior salary to calculate future salary. If women are paid less than their male counterparts as soon as they join the workforce, and women have less bargaining power, basing future salary on prior salary could potentially cement the gender pay gap where it is now. Thus, the ongoing debate about whether salary negotiations can serve as a valid defense to an Equal Pay Act claim will continue to be a key issue to watch in future cases.

## WHAT STEPS CAN I TAKE TO COMBAT DISCRIMINATORY PAY PRACTICES?

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If you believe your company\*\* is paying you less than similarly situated men, what can you do? If you want to preserve your ability to challenge this pay practice in court, you should consider the following options:

- Talk with an experienced employment lawyer to discuss your options;
- If possible, file a written complaint with the appropriate internal supervisor about your concerns. Follow your company's policy for submitting internal complaints; and



- You may also want to file a [charge of discrimination with the Equal Employment Opportunity Commission \(EEOC\)](#). Their website has helpful information on how to file the complaint. Depending on where you live, your complaint must be filed within 180 or 300 days of the discriminatory act. If you have any questions about whether the EEOC is the right place to file, use their [online assessment center](#), which will help you decide if the EEOC is the *correct* agency.

\*\* If you are a federal government employee or a state or local (city, county) government employee, different complaint filing procedures may apply. The EEOC's handy [online assessment tool](#) provides information on how to file a complaint.

## REMEDIES FOR PAY DISCRIMINATION

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If you win your case at trial or settle with the company beforehand, several types of remedies may be available. For example:

- **Back pay**—the difference between what you should have been paid and what the company actually paid you;
- **Compensatory damages**—damages for emotional distress, reputational harm, etc. that you suffered as a result of the company's refusal to pay you equally (available under Title VII but NOT the EPA);
- **Punitive damages**—damages to punish the company if it acted with malice or reckless indifference (available under Title VII but NOT the EPA); and/or
- **Attorney's fees and litigation expenses**

Importantly, different federal, state, and local laws may apply to your case and may allow different types and amounts of damages (Title VII, for example, has a cap on the amount of compensatory and punitive damages you can recover).

## WHAT SHOULD I DO IF I'M RETALIATED AGAINST FOR COMPLAINING ABOUT UNEQUAL PAY?

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Retaliation is, unfortunately, an all too common phenomenon at work.

Title VII and other anti-discrimination laws prohibit an employer from taking an adverse employment action against an employee for reporting discrimination at work or taking an action to remedy discrimination, such as filing a discrimination complaint or testifying in another employee's discrimination lawsuit.

The scope of retaliatory adverse actions is broad. Prohibited retaliation includes firing, reduction in pay, denial of a promotion, or **any action that might dissuade a reasonable worker from opposing discrimination.**

The anti-retaliation provisions in anti-discrimination laws are critical because they protect employees who raise concerns about discrimination in the workplace while also making it costly for employers to punish employees for bringing their concerns to light. If an employer retaliates against an employee for complaining about discrimination or exercising a right to combat discrimination (e.g., filing a discrimination lawsuit), strong anti-retaliation provisions allow plaintiffs to go to court for redress. There are even examples of cases where plaintiffs have prevailed on their retaliation claims where there has not been sufficient evidence to support a claim of discrimination. *See Strothers v. City of Laurel, Maryland*, 895 F.3d 317 (4th Cir. 2018).

## WHAT IS AN EEOC DISCRIMINATION CHARGE AND WHAT DEADLINES APPLY TO FILING ONE?

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The EPA does not require that a plaintiff file a charge of discrimination with the EEOC before commencing a lawsuit in court. The time limit for filing a case in court under the EPA is within two years of the discriminatory pay practice (or three years if the violation is willful).

Pay discrimination claims under Title VII, however, do require the plaintiff to file an EEOC charge of discrimination first. A Title VII pay discrimination charge must be filed with the EEOC within 180 or 300 days (depending on what state you live in) of the discriminatory pay practice.

Prohibited retaliation includes firing, reduction in pay, denial of a promotion, or any action that might dissuade a reasonable worker from opposing discrimination.

**NOTE I:** The Lilly Ledbetter Fair Pay Act extends the statute of limitations for discriminatory compensation claims by clarifying “that a discriminatory compensation decision . . . occurs each time compensation is paid pursuant to the [discriminatory decision].” Pub. L. No. 111-2, 123 Stat. 5 (2009).

**NOTE II:** You are allowed to file an EEOC Charge of Discrimination for an EPA claim as well, but filing a charge with the EEOC does not extend the two-year time frame for filing an EPA lawsuit.



If you are considering filing a Title VII discrimination claim, or another employment discrimination claim, you need to know about EEOC discrimination charge filing process. Generally, someone who believes they have been discriminated against at work must first file an [EEOC discrimination charge](#) before they can file an employment discrimination lawsuit under Title VII of the 1964 Civil Rights Act in federal court (different procedures may apply for a state law claim or claims under different federal laws). It is often worthwhile, and it is always protected activity, to address pay discrimination by using mechanisms outside the formal legal process, like an internal human resources hotline or complaint system. You may also want to speak with a lawyer before filing an EEOC charge because many procedural hurdles exist, which may limit the type of claims you can file in court as well as the damages you can receive.

If you decide to file an EEOC discrimination charge, the [EEOC’s website](#) contains valuable information on how to do so. Depending on what state you live in, your charge of discrimination must be filed within 180 or 300 days of the discriminatory act.

Note: Different requirements apply depending on whether your employer is a private company, state or local government, union, or the federal government, and it is important to follow those specific requirements.

## ARBITRATION AGREEMENTS: WHY DO THEY MATTER?

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Many employees do not even realize that, when they were hired, they signed an agreement to arbitrate any claims against the company, thereby waving their right to try their claims before a jury.

When parties agree to arbitrate, it generally means they've agreed not to file a case in court. Instead, their legal dispute will be heard by a private, neutral third party (the arbitrator). The arbitrator will hear each side's evidence and arguments and then make a ruling. The arbitrator's decision is generally binding on the parties. Arbitration can take many different forms, so it's important to know what rules apply if you have signed an arbitration agreement at your job.

A big difference exists between filing your case publicly in court versus proceeding in arbitration. For example:

- Unlike in court, no jury of your peers will decide your case in arbitration (instead, a private, third-party individual—often paid for by the employer—will rule on the case);
- Arbitration generally occurs in private with strict confidentiality rules in place that often prevent any party from publicizing the findings of the arbitrator and settlement details (in court, on the other hand, most proceedings are part of the public record);
- The discovery phase, in which you develop the facts necessary to prove your case, is usually much more limited in arbitration; and
- To the extent that an appeals system exists in arbitration, it is usually much more difficult to appeal the outcome of arbitration, than it is to appeal a decision made in court.

Many employees do not even realize that, when they were hired, they signed an agreement to arbitrate any claims against the company, thereby waving their right to try their claims before a jury.

## **PARTNERS AND EXECUTIVES: ARE THEY EMPLOYEES OR EMPLOYERS?**

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One of the more hotly debated topics is whether partners and [executives](#) should be viewed as the employer versus the employee when they suffer discrimination at work. This matters a great deal because if s/he is deemed an employer, then the executive will not be covered by [Title VII of the 1964 Civil Rights Act's](#) (and most other federal laws') anti-discrimination provisions. And this legal question is increasingly playing out in corporate boardrooms, medical practices, and law firms around the country.

A typical scenario involves a high-level manager, executive, or law firm partner who is paid less than a similarly situated male executive and then seeks shelter from the discrimination through a Title VII lawsuit. Often the defendant company will file a motion to dismiss the case on this threshold issue because if the plaintiff is not an “employee” then they may not sue under Title VII.

In *Clackamas Gastroenterology Associates v. Wells*, 548 U.S. 440 (2003), the Supreme Court outlined the standard measuring whether a person is an “employee” covered by federal anti-discrimination laws, such as Title VII, the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).

The key factor is how much, or how little, control the individual has over their work, compensation, and workplace decisions.

The Supreme Court settled on a six-factor test to assess if a person holding a high-level position should be considered an “employee” including:

- Whether the company can hire or fire the individual or set the rules and regulations of their work;
- The extent to which the company supervises the individual's work;
- Whether the individual reports to someone higher in the company;
- The extent to which the individual is able to influence the company;

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- Whether the individual shares in profits, losses, and liability of the company.

*Id.* at 1680. None of these factors is decisive; instead, they should be viewed as a whole. For example, a junior partner at a professional services firm who plays a minimal role in the management of the firm can be deemed an employee under Title VII.



## KEY TAKEAWAYS

If you believe you are being paid less than a similarly situated male employee in your job, this may be a violation of the Equal Pay Act, Title VII of the 1964 Civil Rights Act, or related statutes.

To prove your case, though, you will need to do more than point to the general wage gap that exists between men and women in this country, or even within your industry or company. Instead, you will need to point to evidence showing that, as compared to a man in your company making more money, you have:

- The same/similar level of skill and experience doing this type of job;
- To give a generally equal amount of effort (mental or physical) to do the job;
- Similar job duties and responsibilities; and
- Job performance that is generally as good.

Because differences exist between your rights under the EPA and Title VII, you should consult with an experienced employment lawyer to discuss your legal options, including possibly filing an EEOC Charge of Discrimination (for your Title VII claim).

The type of evidence you'll need will of course vary and depend on the particular law(s) under which you are suing the company.

If you believe you are being paid less than a similarly situated male employee in your job, this may be a violation of the Equal Pay Act, Title VII of the 1964 Civil Rights Act, or related statutes.

**Zuckerman Law** represents victims of employment discrimination and whistleblower retaliation, and we can discuss your matter with you during a confidential consultation.



To learn more about your rights, call Zuckerman Law at 202-769-1681  
[ebachman@zuckermanlaw.com](mailto:ebachman@zuckermanlaw.com) | [www.zuckermanlaw.com](http://www.zuckermanlaw.com)