

# THE PLIGHT OF PLUTO:

## SAME PLANET, DIFFERENT PAY?

### The Federal Equal Pay Act: Equal Pay for Equal Work

#### What is the Equal Pay Act?

The Equal Pay Act of 1963), which was passed as an amendment to the FLSA, requires employers to pay employees equally for doing the same work – in other words, equal pay for equal work.

#### Who is covered?

Virtually all workers are covered by the EPA, which is applicable to local and federal governments, as well as most private employers.

#### What are the elements of an EPA claim?

To successfully raise a claim under the EPA, an employee must show that the employee and an employee of another sex are: (1) working in the same place; (2) doing equal work; and (3) receiving unequal pay.

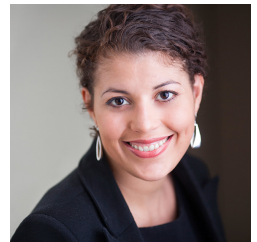
An employer can defeat a claim under the EPA if it can show that the wage disparity has a legitimate basis—i.e., that the higher earner has more seniority or more experience.

#### How do we determine “equal work”?

Two positions do not have to be *identical* for courts to consider them substantially equal. In other words, when two employees are actually doing the same work, it is irrelevant if they have different titles or job descriptions—the important factor is whether the duties performed are *equivalent*. In general, courts look at whether the positions at issue require the

same level of skill, effort, and responsibility and are performed under the same or similar conditions.

- Skill: The experience, ability, education, and training required to perform the job. Importantly, the skills at issue are those that are required *for the job*, not what skills the individual employees may have.
- Effort: The amount of physical or mental exertion needed to perform the job.
- Responsibility: The degree of accountability required in performing the job.
- Working conditions: This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.
- Establishment: The prohibition against compensation discrimination under the EPA applies only to jobs *within an establishment*. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. There are, however, circumstances under which physically separate places of business may be treated as one establishment.



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## What are factors other than sex?

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or another factor other than sex.

In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower-paid employee(s) must be increased.

## What is "equal pay"?

The EPA requires that employers pay workers at the same rate, but that does not mean that employees must receive the same *total* compensation. For example, it is not a violation of the EPA if one worker earns more because they are more productive.

In addition to equal wages, the EPA requires that employees doing equal work receive equal fringe benefits, such as health and life insurance coverage, retirement plans, pretax medical/dependent-care savings accounts, and use of company-owned equipment. The EPA also applies to benefits like vacation time, profit sharing, and bonuses.

## What's the difference between the EPA and Title VII?

The EPA was passed one year before Title VII of the Civil Rights Act of 1964. Both the EPA and Title VII prohibit wage discrimination based on gender, but Title VII goes beyond ensuring equal pay for equal work, and also prohibits discrimination in all aspects of employment (hiring, firing, promotion, etc.). Title VII also prohibits other forms of discrimination, including race, color, religion, and national origin.

Unlike Title VII, a plaintiff can file a lawsuit under the EPA without first filing an administrative charge with the Equal Employment Opportunity Commission (EEOC) and, also unlike Title VII, the EPA does not require that any disparity in pay be intentional. As a result, EPA claims can be easier to win.

## What damages are available under the EPA?

An employee can recover the difference between what the employee was paid and a colleague of a different sex was paid during the two-year period preceding the date on which the plaintiff filed the lawsuit. The EPA does not offer compensatory damages, though a plaintiff can request double the amount of lost wages as a penalty against the employer.

## The Oregon Equal Pay Act: Equal Pay for Equal Work

### What is the Oregon Equal Pay Act?

The Oregon Equal Pay Act (OEPA), passed in 2019, prohibits discriminatory wage rates based on sex.

### Who is covered?

All employers with one or more employees performing work in the state of Oregon are covered by the OEPA, as are all employees who perform work in the state of Oregon.

### What are the elements of an EPA claim?

Under ORS 652.220, it is an unlawful employment practice for an employer to:

- discriminate between employees on the basis of sex (or any other protected class) in the payment of wages or other compensation for work of comparable character; or
- pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.

ORS 652.220(1)(a)-(b).

## What is “work of comparable character”?

“Work of comparable character” is defined as “work that requires substantially similar knowledge, skill, effort, responsibility, and working conditions in the performance of work, regardless of job description or job title.” ORS 652.210(13).

Oregon Administrative Rule (OAR) 839-008-0000(17), further “define[s] or describe[s]” these conditions as follows (with no single factor being determinative):

- knowledge considerations may include but are not limited to: certifications, licenses, and certificates; education; experience; and/or training;
- skill considerations may include but are not limited to: ability, agility, coordination, creativity, efficiency, experience, and/or precision;
- effort considerations may include but are not limited to: amount of physical or mental exertion needed; amount of sustained activity; and/or complexity of job tasks performed;
- responsibility considerations may include but are not limited to: accountability, decision-making discretion or impact of employee’s exercise of their job functions on the employer’s business; amount, level, or degree of significance of job tasks; autonomy or extent to which the employee works without supervision; extent to which the employee exercises supervisory functions; and/or extent to which an employee’s work or actions expose an employer to risk liability; and
- working condition considerations include the following: work environment; hours of work; time of day; physical surroundings; and/or potential hazards.<sup>1</sup>

OAR 839-008-0010(1)(a)-(e).

<sup>1</sup> OAR 839-008-0010(1)(e) further breaks down each of these “working condition” sub-definitions.

## What are bona fide factors related to the position in question?

An employer may also pay employees for work of comparable character at different compensation levels if the difference in compensation levels is “based on a bona fide factor that is related to the position in question” and is based on:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production;
- workplace locations (including cost of living, desirability of worksite location, access to worksite location, minimum wage zones, and/or wage and hour zones);
- travel, if travel is necessary and regular for the employee;
- education (including substantive knowledge acquired through relevant coursework, as well as a completed certificate or degree program);
- training (on-the-job and otherwise);
- experience (relevant to the position); and/or
- any combination of these factors (if the combination of factors accounts for the entire compensation differential).

ORS 652.220(2)(a)(A)-(I); OAR 839-008-005.

## What is “equal pay”?

The OEPA requires that employers pay workers at the same rate, but that does not mean that employees must receive the same total compensation. For example, it is not a violation of the OEPA if one worker earns more because they are more productive.

In addition to equal wages, the EPA requires that employees doing equal work receive equal fringe benefits, such as health and life insurance coverage,



retirement plans, pretax medical/dependent-care savings accounts, and use of company-owned equipment. The EPA also applies to benefits like vacation time, profit sharing, and bonuses.

It is also important to note that an employer cannot *reduce* the wages of any employee to equalize pay.

### What about the EPA?

An employee can bring claims under both the OEPA and the EPA. Importantly, the “comparable” work standard under the OEPA is more inclusive than the “equal work” standard under the EPA. See *Smith v. Bull Run Sch. Dist. No. 45*, 80 Or App 226, 229, 722 P2d 27 (1986); *Bureau of Labor & Indus. v. City of Roseburg*, 75 Or App 306, 309 n.2, 706 P2d 956 (1985).

### What damages are available under the OEPA?

Under ORS 652.220(6), the amounts owed to an employee because of the failure of the employer to comply with the requirements of the statute are the “unpaid wages.” However, the devil is in the details—the spectrum of damages available under the OEPA depends on how the employee seeks redress.

ORS 659A.820; ORS 659A.870(4).

- Final order issued by the Oregon Bureau of Labor and Industries (BOLI): If an employee prevails at BOLI, BOLI’s order will require the employer to pay for the lesser of: (1) the two-year period immediately preceding the filing of the BOLI complaint, *plus* the period of time from the date the complaint was filed through the date the final order is issued; or (2) the period of time the complainant was subject to an unlawful wage differential by the employer *plus* the period of time from the date the complaint was filed through the date the final order is issued.

- Wage claim under ORS 652.230: If an employee files a civil action for unpaid wages under ORS 652.230, the employee can recover: (1) the amount of the unpaid wages to which the employee is entitled for the one-year period preceding the commencement of the action; and (2) an additional amount as liquidated damages of an equal amount. ORS 652.230(1)(a)–(b). If the employee prevails, the individual is also entitled to reasonable attorney fees. ORS 652.230(2).
- Civil rights claim under ORS 659A.885: A court may order back pay in an action only for the two-year period immediately preceding the filing of the action, as well as prevailing party costs and reasonable attorney fees. ORS 659A.885(1). An employee can also recover prevailing party costs and reasonable attorney fees, both at trial and on appeal. *Id.* In addition to back pay and attorney fees/costs, an employee may also be entitled to punitive damages,<sup>2</sup> if: (1) they can show by clear and convincing evidence that the employer has engaged in fraud, acted with malice, or acted with willful and wanton misconduct; or (2) the employer has been found to have previously violated ORS 652.220. Finally, the employee is entitled to statutory damages (\$200 or the amount of compensatory damages, whichever is greater), as well as prejudgment interest.<sup>3</sup> ORS 659A.885(4), (5).

<sup>2</sup>The employer may file a motion to disallow an award of compensatory and punitive damages if (1) the employer has conducted a good-faith pay-equity analysis within last three years, and (2) has made “reasonable and substantial progress toward eliminating unlawful wage differentials.” ORS 652.235(1)(a) (b).

<sup>3</sup> This is not explicit, but prejudgment interest is permitted in other wage claims and, thus, is likely permitted under the EPA as well.

## The Washington Equal Pay and Opportunities Act

### What is the Washington Equal Pay and Opportunities Act?

The Washington Equal Pay and Opportunities Act (EPOA) prohibits gender pay discrimination and promotes fairness among workers by addressing business practices that contribute to income disparities between genders.

### Who is covered?

All employers doing business in Washington are required to comply with the EPOA, including private and public employers. All employees working in Washington are protected by the law.

### What does the EPOA say?

- It is an unlawful employment practice for an employer to discriminate in any way in providing compensation based on gender between similarly employed employees. Discrimination does not include a differential in compensation based in good faith on bona fide job-related factors. RCW 49.58.020.
- An employer may not, on the basis of gender, limit or deprive an employee of career advancement opportunities that would otherwise be available. RCW 49.58.030(2).
- An employer may not prohibit an employee from discussing the employee's wages or the wages of any other employee. RCW 49.58.040.
- An employer may not seek the wage or salary history of an applicant for employment or require that an applicant's prior wage or salary history meet certain criteria. RCW 49.58.100.
- Upon request of an applicant for employment after the employer has offered the applicant a position, the employer must provide the minimum wage or salary for the position for

which the applicant is applying. RCW 49.58.110(1).

### What does "similarly employed" mean?

Employees are "similarly employed" if they work for the same employer, the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative of whether employees are similarly employed. RCW 49.58.020(2).

### What are "bona fide job-related factors" that could warrant a pay differential?

An employer may pay similarly employed employees differently if the differential in compensation is based in good faith on a bona fide job-related factor or factors that:

- are consistent with business necessity;
- are not based on or derived from a gender-based differential; and
- account for the entire differential; more than one factor may account for the differential.

Bona fide factors include but are not limited to:

- education, training, or experience;
- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a bona fide regional difference in compensation levels.

RCW 49.58.020(3)(a)-(b).

### What is "equal pay"?

The EPOA requires that employers pay workers at the same rate, but that does not mean that employees must receive the same total compensation. For example, it is not a violation of the EPOA if one worker earns more because they are more productive.

Additionally, employers can give bonuses to individual employees so long as they are available to all employees performing similar work on an equal and nondiscriminatory basis.

**What happens if an employee or job applicant files a complaint under the EPOA?**

Employees and job applicants who believe their rights under the EPOA have been violated may file a complaint with the Washington Department of Labor & Industries (L&I), or they may initiate a lawsuit.

If the employee files a complaint with L&I, possible outcomes may include paying back wages owed, providing career advancement opportunities, changing company policies, or job reinstatement. Additionally, if L&I determines a violation has occurred, it may order payment of damages to the employee plus 1% interest per month. L&I may also order payment of a penalty payable to L&I of up to \$500 for a first violation and up to \$1,000 or 10% of damages for repeat violations.

If the employee files a civil lawsuit, they may be awarded damages, interest, statutory penalties, costs, and attorney fees.

# FEDERAL EQUAL PAY ACT (EPA), OREGON EQUAL PAY ACT (OEPA), AND WASHINGTON EQUAL PAY AND OPPORTUNITIES ACT (EPOA)

## SUMMARY COMPARISON

	Federal Equal Pay Act (EPA)	Oregon Equal Pay Act (OEPA)	Washington Equal Pay and Opportunities Act (EPOA)
<b>What is it?</b>	<ul style="list-style-type: none"><li>The EPA requires employers to pay employees equally for doing the same work—in other words, equal pay for equal work.</li></ul>	<ul style="list-style-type: none"><li>The OEPA prohibits discriminatory wage rates based on sex or any other protected characteristic.</li></ul>	<ul style="list-style-type: none"><li>The EPOA prohibits gender pay discrimination and promotes fairness among workers.</li></ul>
<b>Who is covered?</b>	<ul style="list-style-type: none"><li>Virtually all workers are covered by the EPA, and it is applicable to most private employers and government entities.</li></ul>	<ul style="list-style-type: none"><li>All employers with one or more employees performing work in Oregon, and all employees who perform work in Oregon.</li></ul>	<ul style="list-style-type: none"><li>All employers doing business in Washington, and all employees working in Washington.</li></ul>
<b>What is equal work?</b>	<ul style="list-style-type: none"><li>Courts look at whether the positions require the same level of skill, effort, and responsibility and are performed under the same or similar conditions.</li></ul>	<ul style="list-style-type: none"><li>Work of “comparable character” is work that requires substantially similar knowledge, skill, effort, responsibility, and working conditions, regardless of job description or job title.</li></ul>	<ul style="list-style-type: none"><li>Employees are “similarly employed” if the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions.</li></ul>

# FEDERAL EQUAL PAY ACT (EPA), OREGON EQUAL PAY ACT (OEPA), AND WASHINGTON EQUAL PAY AND OPPORTUNITIES ACT (EPOA)

## SUMMARY COMPARISON, CONT.

	Federal Equal Pay Act (EPA)	Oregon Equal Pay Act (OEPA)	Washington Equal Pay and Opportunities Act (EPOA)
<b>When are pay differentials permitted?</b>	<ul style="list-style-type: none"><li>• Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or another factor other than sex.</li></ul>	<ul style="list-style-type: none"><li>• The “bona fide factors” that permit pay differentials include: a seniority system, a merit system, a system that measures earnings by productivity, workplace location, travel, education, training, and/or experience.</li></ul>	<ul style="list-style-type: none"><li>• The “bona fide job-related factors” that permit pay differentials include: education, training, experience, a seniority system, a merit system, a system that measures earnings by productivity, and workplace location.</li></ul>
<b>What is equal pay?</b>	<ul style="list-style-type: none"><li>• Compensation includes all forms of pay, including: salary, bonuses, stock options, profit sharing, vacation/holiday pay, reimbursement for travel expenses, and benefits.</li></ul>	<ul style="list-style-type: none"><li>• Compensation includes wages, salary, bonuses, benefits, fringe benefits, and equity-based compensation.</li></ul>	<ul style="list-style-type: none"><li>• Compensation includes all wages and benefits provided by an employer to an employee, including salaries, hourly rates, commissions, and non-discretionary bonuses.</li></ul>
<b>What damages are available?</b>	<ul style="list-style-type: none"><li>• The difference between what the employee was paid and a colleague of a different sex was paid during the two-year period preceding the date on which the plaintiff filed the lawsuit.</li></ul>	<ul style="list-style-type: none"><li>• A court may order back pay for the two-year period immediately preceding the filing of the action, as well as prevailing party costs and reasonable attorney fees.</li></ul>	<ul style="list-style-type: none"><li>• If the employee files a civil lawsuit, they may be awarded damages, interest, statutory penalties, costs, and attorney fees.</li></ul>



# EQUAL PAY

**Your employer must pay you the same amount as other people doing similar work.**



- ▶ It's illegal for your employer to pay you less than someone else because of your gender, race, veteran status, disability, age, color, religion, national origin, marital status, sexual orientation, or pay history.
- ▶ Different pay may be allowed if there is system based on bona fide factors including one or more of the following: seniority, merit, a system that measures earnings by quantity or quality of production, workplace location, travel, education, training, or experience.
- ▶ You're also protected during the **hiring process**:
  - » Employers cannot ask for your salary/pay history before they make an offer of employment
  - » Employers cannot screen job applicants based on current or past salary/pay history
  - » Employers cannot determine compensation for a job based on the pay history of a potential new employee (not including internal transfers)
- ▶ If you need to, you can file a complaint at [oregon.gov/boli](https://oregon.gov/boli). You could get back pay or the pay difference you are owed.

## CONTACT US

If your employer isn't following the law or something feels wrong, give us a call. The Bureau of Labor and Industries is here to enforce these laws and protect you.

Call: 971-673-0761

Email: [help@boli.state.or.us](mailto:help@boli.state.or.us)

Web: [oregon.gov/boli](https://oregon.gov/boli)

Se habla español.



**21**  
**22** **OREGON LAWS**  
Protect You At Work



# Equal Pay and Opportunities Act

The Equal Pay and Opportunities Act (RCW 49.58) prohibits gender pay discrimination and promotes fairness among workers by addressing business policies and practices that contribute to income disparities between genders.

Both employees and job applicants have rights under this law.

## Employee Rights

### Equal Pay

Your employer cannot pay you less than other similarly employed employees because of your gender. Employees are “similarly employed” if they work for the same employer; the performance of their job requires similar skill, effort, and responsibility; and their jobs are performed under similar working conditions. Differences in pay for similar jobs may be acceptable only in certain circumstances not related to gender.

### Equal Career Advancement Opportunities

Your employer cannot limit or deprive you of career advancement opportunities because of your gender.

### Open Wage Discussions

Your employer cannot prohibit you from discussing wages. Your employer also cannot take an adverse action against you for inquiring about, disclosing, comparing, or otherwise discussing your wages with other employees, or for asking your employer about your wages or lack of career advancement opportunities.

### Wage and Salary Range Disclosure

Your employer must provide you with the wage scale or salary range of a new position after a job offer is made for an internal transfer or promotion, upon your request. If a wage scale or salary range does not exist, your employer must provide you the minimum pay rate expectation set by the employer prior to posting the position. Note: This only applies to employers with 15 or more employees.

### Retaliation

Your employer cannot retaliate against you for exercising your rights under this law, or for aiding or encouraging another employee to exercise his or her rights under the law.

## Job Applicant Rights

### Wage and Salary History Privacy

Employers cannot seek or request your wage or salary history when you are applying for a job. This includes questions on job application forms, even if the question is optional. However, an employer may confirm your wage or salary history if you voluntarily disclose the information or after you are offered a position and negotiated compensation.

Employers also cannot require that your prior wage or salary history meet certain criteria, such as requiring that you have previously earned a minimum specified amount, to consider you for a job.

### Wage and Salary Range Disclosure

Employers must provide you with the minimum pay rate or salary of the position that you are applying for, if you request the information after you are offered the job. Note: This only applies to employers with 15 or more employees.

## Think Your Rights Have Been Violated?

You can file a complaint with the Washington State Department of Labor & Industries (L&I) if you think your rights were violated. *Equal Pay and Opportunities Act Complaint* form: [www.Lni.wa.gov/go/F700-200-000](http://www.Lni.wa.gov/go/F700-200-000).

You also have the right to take civil legal action against your employer. If a civil complaint is filed in court, L&I cannot investigate your complaint.

## Contact Us

Call: 1-866-219-7321

Email: [esgeneral@Lni.wa.gov](mailto:esgeneral@Lni.wa.gov)

Web: [www.Lni.wa.gov/EqualPay](http://www.Lni.wa.gov/EqualPay)