

# #PayMeToo

## Is Equal Pay Liability Lurking in Your Company's Future?

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### Unequal Pay

- Does pay disparity exist between the plaintiff and just one similarly situated employee of the opposite sex?
- Do the employees being compared have substantially similar duties?
- Can the employer show that the disparity is due to a reason other than gender?

➤ “Even a dollar’s difference based on sex violates both Title VII and the Equal Pay Act.”

King v. Acosta Sales & Mktg.



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## Unequal Pay

- Is there a difference in pay – Why?
- A legitimate reason for pay disparity is one based on a reason other than gender (or other protected classification).



## Unequal Pay

- Laws that can be used to pursue claims for discriminatory unequal pay:



- EQUAL PAY ACT
- TITLE VII
- SECTION 1981
- ADEA
- ADA

## Unequal Pay

- Equal Pay Act – What Plaintiff Must Prove:
  - Pay disparity
  - As compared to a male who performs substantially similar duties
- Substantially similar? It's not the title or the job description that controls. Instead, do they share a "common core" of tasks?



## Unequal Pay

- The Equal Pay Act's power – the EMPLOYER bears the burden of proving that gender isn't the reason the female receives less pay.



## Unequal Pay

- What is your proof?
  - Hiring documentation
  - Performance standards and scores
  - Notes showing the reasons for pay decisions
  - Decision-maker testimony



## Unequal Pay



- Equal Pay Act – Available Damages
  - Amount of pay difference
  - Liquidated damages
  - Attorney's fees and costs

## Unequal Pay

- Knowledge is your defense.
- Proof: You reasonably attempted to ascertain the requirements of the EPA and acted in good faith.
- Result? No liquidated damage award.



## Unequal Pay

- Other laws prohibit pay inequity.
- Under these laws, the plaintiff must prove an intent to discriminate.
- Available Damages?
  - Amount of pay difference
  - Compensatory damages
  - Punitive damages
  - Attorney's fees and costs



## Unequal Pay



- A legitimate reason for a pay difference may weaken over time.
- What to do?
  - Conduct an audit and periodically repeat the process, looking for pay differences that are no longer meaningful.

## Unequal Pay

- Be aware: Salary history bans
  - Salary history bans prohibit inquiry on an application form or at an interview as to what pay the applicant earned from prior employers.



## Unequal Pay



- Does using past pay information in deciding how much to offer put the employer at risk for liability?
- The case against Google
- *Rizo v. Yuvino* (9<sup>th</sup> Cir. Apr. 9, 2018)

## Unequal Pay

- A good offense is the best defense.
  - Review pay practices
  - Review pay scales
  - Comply with new salary history ban laws
  - Review hiring process
  - Make necessary improvements and adjustments



## Unequal Pay



- Knock, knock – an employee pays HR a visit to ask about her pay. Now what?
- Investigate
- Discuss
- Decide course of action
- Respond

## Questions?



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