

50 Shades of Pay: Tales of Forbidden Deeds Under the Equal Pay Laws

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PRESENTATION

50 Shades of Grey

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

The Federal Equal Pay Laws

- There are two:
 - the Federal Equal Pay Act
 - equal pay claims alleging pay discrimination under Title VII



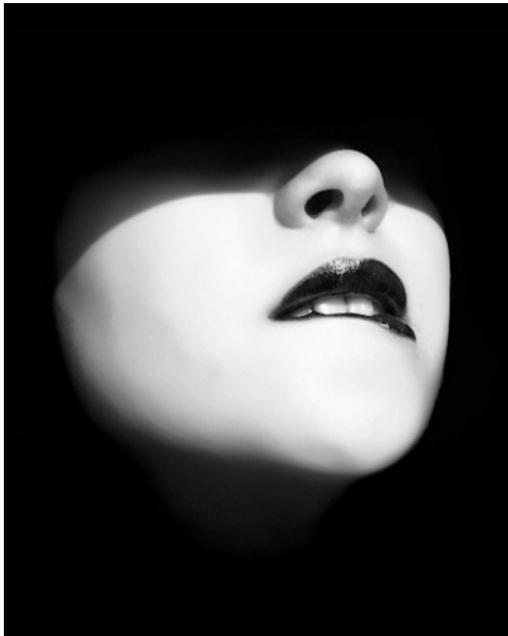
The Federal Equal Pay Act – What Is It?

- Part of the Fair Labor Standards Act
- Became law 50 years ago April 9
- Prohibits employers from discriminating on the basis of sex by paying lower wages to employees of one sex than to employees of the other for performing equal work
- Allows a direct right of action
- EPA claims are different from Title VII pay discrimination claims



The Equal Pay Act and Title VII's Equal Pay Protections – What's Different?

- EPA applies to companies that employ just one employee
- EPA only applies to pay differential between employees of different genders.
- EPA permits you to go straight to court without first filing a complaint with an administrative agency.



What's Different? (Continued)

- EPA has a longer statute of limitations (normally 2 years after the discriminatory act; 3 years if the employee's actions were willful and intentional).
- EPA requires jobs being compared to be “substantially equal,” whereas Title VII requires them to be “similar.”
- EPA only allows you to compare jobs at the same location.
- EPA allows liquidated damages in the form of double back pay, but it doesn't allow punitive damages.



SOL for Title VII Pay Claims Was Recently Clarified by the Lilly Ledbetter Fair Pay Act of 2009

Lilly Ledbetter law amended Title VII to state that the 300 day* statute of limitations for filing an equal pay claim alleging pay discrimination “resets” with each new paycheck containing a discriminatory payment.

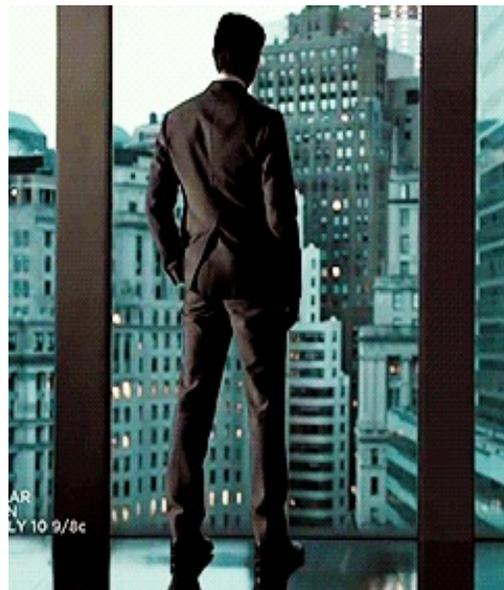
*Note that the statute of limitations for filing Title VII claims is just 180 days in cases in jurisdictions where there is no state or local agency that enforces laws prohibiting employment discrimination on the same basis as Title VII.

The Equal Pay Act and Title VII's Equal Pay Protections – What's the Same?

- The “Affirmative Defenses” are the same.
- The Equal Pay Act prohibits employers from discriminating on the basis of sex by paying lower wages to employees of one sex than to employees of the other for performing equal work.
 - ❖ “except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex.”
- 29 U.S.C. § 206(d)

Let's Summarize:

- Pay differentials between employees of different genders in the same job are illegal
- unless the employer can prove they are based on seniority, merit, quantity or quality of production, or any other factor other than sex

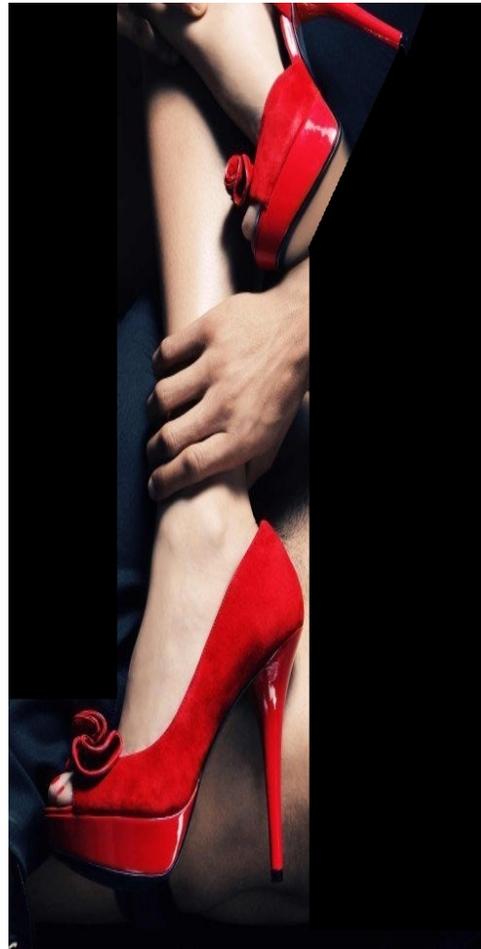


Burden of proof under the EPA:

- employer must prove by a preponderance of the evidence that the pay disparity actually resulted from the proffered reason (seniority, merit, quantity or quality of production, or any other factor other than sex)



How do Pay Differentials Come to Exist in the Real World?



There's a **BIG** Catch:

- Employers do not establish the catch-all affirmative defense by showing that “market forces” led to the pay disparity.
- Example: The fact that one employee asked for more money, and you really needed him or her, won't save you from an EPA claim if another employee of the opposite sex with a substantially equal job at the same location gets left behind.



Case Study One:

Tatiana Irons is a hardworking and loyal employee of Silver Enterprises Holdings, Inc., the company founded and controlled by wealthy entrepreneur and CEO Chris Silver. Tatiana arrives at work one day to learn that a mysterious newcomer, Peter Slayton, has been hired into her department. Tatiana and Peter have much in common – the same job title, similar education backgrounds and work experience – but the intrepid Peter has somehow convinced the impetuous Mr. Silver to hire him at a salary that is higher than Tatiana's!

Case Study One Redux:

- Fact Change One: What if the higher-paid newcomer is female and the long-term employee is male?
- Fact Change Two: What if both employees are the same gender?
- Fact Change Three: What if one employee is transgender?
- Fact Change Four: What if the employees are the same gender, but different races?

Case Study Two:

Dr. Green determines that he needs to hire another nurse to assist him with his practice. He hired the mighty Jason Traylor. Dr. Green views young Jason's brawn as an asset, as it will enable him to lift patients when necessary. Lifting patients is sometimes a struggle for his current nurse, the petite and shy Leila Williams. Taking advantage of the nursing shortage, Jason says he won't accept less than \$31 per hour, which Dr. Green has little choice but to offer. Demure Leila is an experienced nurse and a loyal and longtime employee. She makes just \$27 per hour.

Case Study Three:

Elena Lincoln-Douglas is the head of the leather goods department for Silver Enterprises. She is ready to promote one of her direct reports to the position of Assistant Department Head – a position that comes with a substantial raise. She must choose between two employees who were hired out of the Washington State graduating class of 2010 on exactly the same day. Both employees are excellent, but Elena has become very fond of Gia de Matteo, who has joined the all-female affinity group at the Company – called the “Dagny Taggart Salon” – that Elena has founded. This is really the only distinguishing factor between Gia and the male candidate, Tate Tavanagh. What to do, the normally decisive Lincoln-Douglas debates?

Tools for Escaping Pay Differential Problems

- Pay audits
- Establishing and enforcing pay ranges for specific positions
- Exercising care with hiring and raise decisions
- Good decision-making and good documentation



What Can Employers Do to “Fix” a Pay Differential?

- There are limits.
- If there is an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.



Know what it's time for now?

- —BDS&M
- —D/S
- —BDBCGB
- Q&A

