

LABOR CABINET
Department of Workplace Standards
(Amended at ARRS Committee)

803 KAR 1:026. Equal pay provisions, meaning and application.

RELATES TO: KRS 337.420-337.433

STATUTORY AUTHORITY: KRS 337.420(3), 337.425(4)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.425 authorizes the Commissioner of the Department of Workplace Standards to promulgate administrative regulations necessary or appropriate to carry out the provisions of KRS 337.420 to 337.433. This administrative regulation establishes requirements relating to application of the equal pay provisions set forth in KRS 337.420 to 337.433.

Section 1. Definitions.

- (1) "Employer" is defined by KRS 337.420(2).
- (2) "Establishment" means a distinct physical place of business that is physically separate from other places of business.
- (3) "Wage rate" is defined by KRS 337.420(3).

Section 2. Application of Provisions in General.

- (1) Application to employers. The prohibition against discrimination in wages on the basis of sex contained in KRS 337.423 shall apply to every employer within the state.
- (2) Application to establishments.
 - (a) The prohibition against discrimination in wages on the basis of sex shall apply within the same establishment.
 - (b) If an employer has more than one (1) establishment in which he or she employs employees, there shall not be any comparison between wages paid to employees in different establishments.
- (3) A wage rate shall encompass all payments made to or on behalf of the employee as remuneration for employment, including fringe benefits, such as:
 - (a)
 1. Vacation and holiday pay;
 2. Premium payments for work on Saturdays, Sundays, holidays, or regular days of rest; and
 3. Pension benefits, insurance benefits, and other fringe benefits paid as compensation for employment.
 - (b) Payments made by an employer to an employee that do not constitute compensation for employment, such as payments related to maternity and reasonable payments for reimbursable expenses of traveling on the employer's business, shall not constitute wages to be compared for equal pay purposes.

Section 3. Male Jobs and Female Jobs.

- (1) If an employee of one (1) sex is hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the newly assigned employee's wage rate with that of the replaced former employee shall be required, whether or not the job is performed concurrently by employees of both sexes.
- (2) A prohibited sex-based wage differential shall exist if all employees of one (1) sex are removed from a particular job by transfer or discharge so as to retain employees of only one (1) sex in a job previously performed interchangeably or concurrently by employees of both sexes.
 - (a) The employer's obligation to pay the higher rate for the job shall not be avoided or evaded by confining the job to members of the lower paid sex.

(b) The employer shall increase the wage rate to the higher rate paid for the job when performed by employees of the opposite sex.

Section 4. Inequalities in Pay.

(1) Inequalities in pay between employees of the opposite sexes that may be a violation of KRS 337.423 shall include the following situations:

(a) The employee:

1. Occupies a job that purportedly requires a higher degree of skill, effort, or responsibility; and
2. Receives the lower wage rate;

(b) Employees of only one (1) sex are concentrated in the lower grades of the wage scale, and there is no material relationship other than sex between the lower wage rates paid to the employees and the higher rates paid to employees of the opposite sex; or

(c)

1. A particular establishment tends to pay for the same work:
 - a. All persons of one (1) sex at the lowest rate of the range; and
 - b. Employees of the opposite sex at the highest rate of the range; and
2. No specific factor or factors other than sex are associated with the difference in pay.

(2) Differentials in entrance rates shall not constitute a violation of KRS 337.423 if the factors taken into consideration in determining which rate is to be paid each employee are applied equally to men and women.

Section 5. Equality and Inequality of Pay in Particular Situations.

(1) Overtime work. Overtime premiums shall be a part of wages for purposes of KRS 337.423.

(a) It shall not be a prohibited wage rate differential if:

1. Male and female employees perform comparable work during regular hours, but:
 - a. Employees of only one (1) sex continue working overtime into another work period; and
 - b. Work performed during this later period is compensated at a higher rate, if it is required by law or is the customary practice of the employer; or
2. Male and female employees are performing equal work in an establishment during regular hours, but:
 - a. Only some of these employees continue working into an overtime period; and
 - b. Payment of a higher wage rate is paid for the overtime, if employees, whether male or female, are paid for the actual overtime hours worked.

(b) A prohibited wage rate differential shall occur if men and women receive the same straight-time rates for work subject to the equal pay standards, but:

1. Employees of one (1) sex receive an overtime premium rate of twice the straight-time rate; and
2. Employees of the opposite sex receive only one and one-half (1 1/2) times the straight-time rate for overtime.

(2) Special assignments. If an employee is required to perform an additional task outside regular working hours, it shall not justify payment of a higher wage rate to that employee for all hours worked. Employees who are assigned a different and unrelated task to be performed outside the regular workday may be paid at a different rate of pay for the time spent in performing this additional duty if the rate is commensurate with the task performed.

(3) Vacation or holiday pay. Vacation or holiday pay shall be considered as remuneration for employment included in wages. A wage rate differential shall occur if:

(a) Employees of one (1) sex receive vacation pay for a greater number of hours than employees of the opposite sex;

- (b) The work is subject to KRS 337.423; and
- (c) There is no specified exception to the wage rate differential pursuant to KRS 337.423(1).
- (4) Contributions to employee benefit plans.
 - (a) If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, a wage differential prohibited by KRS 337.423 shall not result from these payments, even though the benefits that accrue to the employees are greater for one (1) sex than for the other.
 - (b) The fact that an employer making unequal contributions for employees of opposite sexes in the situation described in paragraph (a) of this subsection shall not be considered a wage rate differential prohibited by KRS 337.423, if the resulting benefits are equal for the employees.
- (5) Commissions. The establishment of different rates of commission for different types of merchandise shall not be a violation of the equal pay provisions if the factor of sex provides no part of the basis for the differential.
- (6) Head of household. Head of household status shall not bear any relationship to the requirements of the job or to an employee's performance on the job. If a differential in pay exists because an employee of one (1) sex is head of a household and the other employee of the opposite sex is not, the differential shall be considered to be based on the factor of sex.

Section 6. The Equal Pay for Equal Work Standard; Generally.

- (1) In accordance with KRS 337.423, an employer shall be prohibited from paying employees of one (1) sex wages at rates lower than employees of the opposite sex for comparable work on jobs with comparable skills, efforts, and responsibilities required for performance. Application of the equal pay standard:
 - (a) Shall not be dependent on job classifications or titles.
 - (b) Shall be dependent on actual job requirements and performance.
- (2) In accordance with KRS 337.423, jobs with comparable requirements shall be compared in applying the equal pay for equal work standard.
 - (a) Jobs that require comparable skill, effort, and responsibility in their performance shall not be required to be identical in every respect. Jobs shall be scrutinized as a whole and over a full work cycle.
 - (b) Inconsequential differences in job content shall not be a valid excuse for payment of a lower wage to an employee of one (1) sex than to an employee of the opposite sex, if the two (2) employees are performing comparable work on essentially the same jobs in the same establishment.
 - (c) In determining whether job differences are so substantial as to make jobs unequal, whether and to what extent significance has been given to these differences in setting the wage levels for the jobs shall be considered.
 - (d) In determining whether differences in job content are substantial in order to establish whether or not employees are performing comparable work, the amounts of time that employees spend in the performance of different duties shall not be the sole criteria.
- (3) In order for the equal pay standard to apply, an analysis of the following shall be conducted:
 - (a) Comparable skill in performance.
 - 1. Skill shall:
 - a. Include factors, such as experience, training, education, and ability; and
 - b. Be measured in terms of the performance requirements of the job.
 - 2. If employees are required to have the same skill in order to perform either of two (2) jobs, the jobs shall require comparable skill, even if the employee in one (1) of

the jobs does not exercise the required skill as frequently or during as much of the working time as the employee in the other job. Possession of a skill not needed to meet requirements of the job shall not be considered in making a determination regarding comparability of skill.

3. The efficiency of the employee's performance in the job shall not be considered in evaluating skill.

(b) Comparable effort in performance.

1. Effort requires measurement of the physical or mental exertion needed for the performance of a job.

2. Jobs may require comparable effort in their performance even though the effort may be exerted in different ways on the two (2) jobs. Differences only in the kind of effort required to be expended in this situation shall not justify wage differentials.

3. The occasional or sporadic performance of an activity that may require extra physical or mental exertion shall not alone be sufficient to justify a finding of unequal effort.

4. A wage rate differential based on differences in the degree or amount of effort required for performance of jobs shall be applied uniformly to men and women.

(c) Comparable responsibility.

1. Responsibility shall be the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise comparable jobs shall cover a wide variety of situations.

2. If one (1) employee of a group performing jobs that are comparable in other respects, is required from time to time to assume supervisory duties for reasons such as the absence of the regular supervisor, payment of a higher rate to the employee may be based on the additional responsibility required to perform the job.

Section 7. Exceptions to Equal Pay Standards.

(1) In accordance with KRS 337.423(1), the following differentials shall be exceptions to the standard requiring that employees doing comparable work be paid equal wages, regardless of sex. Differentials paid pursuant to an established:

(a) Seniority system; or

(b) Merit increase system.

(2) If an employer relies on the excepting language to exempt a differential in pay from the operation of the equal pay provisions, the employer shall be required to demonstrate that the wage rate differential is based on a factor other than sex if it appears that the payments are for jobs requiring comparable skill, effort, and responsibility.

(3) A showing that a wage differential is based on a factor other than sex, so as to be exempt from the KRS 337.423, shall be incomplete without a showing that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. If male employees who work forty (40) hours each week and female employees who work thirty-five (35) hours each week are performing comparable work on jobs; the job performance requires comparable skill, effort, and responsibility; and the employees are paid weekly salaries for this work, a differential in the amounts may be justified based on a difference in hours of work. If the difference in salaries paid is too great to be accounted for by the difference in hours of work, then it shall be necessary to show some factor, other than sex, as the basis for the unexplained portion of the wage differential.

(4) Application of exceptions.

(a) Shift differentials, incentive payments, production bonuses, performance and longevity raises, and similar payments shall not result in equal pay violations if applied without distinction to employees of both sexes.

(b) "Red circle" rates. The term "red circle" rate shall mean certain unusual, higher than normal wage rates that are maintained for various reasons.

1. If an employer wishes to transfer a long-service employee, who can no longer perform their regular job because of ill health, to different work that is now being performed by employees of the opposite sex, this may result in a red circle rate. Under the "red circle" principle, the employer may continue to pay the employee his or her present salary, which is greater than that paid to the employees of the opposite sex, for the work both will be doing. Maintaining an employee's established wage rate despite a reassignment to a less demanding job shall be a valid reason for the differential, even if other employees performing the less demanding work would be paid at a lower rate because the differential is based on a factor other than sex.

2. If wage rate differentials have been or are being paid on the basis of sex to employees performing comparable work, rates of the higher paid employees shall not be "red circled".

(c) Temporary reassignments.

1. An employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for the regular job is higher than the rate usually paid for the work to which the employee is temporarily reassigned, the employer may continue to pay the employee the higher rate under the "red circle" principle.

2. An employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. The employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is temporary.

3. If a piece rate is paid to employees of the opposite sex who perform the work to which the employee in question is reassigned, failure to pay that employee the same piece rate paid to the other employees shall constitute discrimination on the basis of sex.

4. Failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be temporary shall be an indication that sex, rather than the temporary nature of the assignment, is the real basis for the wage differential. Failure to pay the higher rate for a period longer than one (1) month shall raise questions as to whether the reassignment was, in fact, intended to be temporary.

(d) Training programs. Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. The employee in training status may be performing comparable work with nontrainees of the opposite sex whose wage rates may be unequal to those of the trainee. If the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential may be considered to be attributable to a factor other than sex, and a violation of the equal pay standard shall not result.

(e) Temporary and part-time employees.

1. The payment of different wage rates to permanent employees, as compared with temporary employees that may be hired during the holiday season, shall not be a violation of the equal pay provisions, even if comparable work is performed by both groups of workers.

2. The payment of a different wage to employees who work only a few hours a day, as compared with employees of the opposite sex who work a full day, shall not be a

violation of the equal pay provisions, even if both groups of workers are performing comparable work in the same establishment.

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