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The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution From Maine

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THE UNENFORCED PROMISE OF EQUAL PAY ACTS:
A NATIONAL PROBLEM AND POSSIBLE SOLUTION FROM MAINE

Elizabeth J. Wyman, Esq.

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THE UNENFORCED PROMISE OF EQUAL PAY ACTS: A NATIONAL PROBLEM AND POSSIBLE SOLUTION FROM MAINE

Elizabeth J. Wyman, Esq.*

I. INTRODUCTION

Equal pay for women is a concept that has been around for a long time. It was during World War I that women were first guaranteed pay equity in the form of regulations enforced by the War Labor Board of 1918. The Board's equal pay policy required manufacturers, who put women on the payroll while male employees were serving in the military, to pay those women the same wages that were paid to the men.¹ The National War Labor Board continued that trend through World War II.² Shortly after the war, states began enacting statutes that required employers to pay female workers the same wage rates for male workers for work that was either "equal" or "comparable" to the work of men.³ The distinction between "equal work" and "comparable work" in these statutes makes a crucial difference in the standard of proof, as will be discussed below:⁴

In 1963, after considerable delay and wrangling, the United States Congress passed the Equal Pay Act as part of the Fair Labor Standards Act.⁵ The federal law prohibits discrimination in the payment of wages based on sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."⁶

Almost forty years later, neither the federal Equal Pay Act nor the state statutes have done much to solve the wage disparity that exists between men and

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¹ See infra Part I.C.


³ In an Introductory Note to the final volume of the War Labor Reports, the editors stated that "[t]he principle of equal pay for equal work regardless of race, color, creed, or sex was applied by the Board in a number of cases, and special attention was paid to the social and economic necessity of correcting substandard living." 28 WAR LABOR REPORTS, at ii (1946). General Order No. 16 of the National War Labor Board provided:

Adjustments which equalize the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations and adjustments in accordance with this policy which recognize or are based on differences in quality or quantity of work performed may be made without approval of the National War Labor Board.

21 WAR LABOR REPORTS, at Ivii (1945).

⁴ See infra Part I.C.


women. According to data released after the 2000 census, the average American woman working full time earns 76% of what the average American man earns. This is an increase from the 63% reported in 1979, the first year of comparable earnings data. Maine women have fared only slightly better. In 2001, the average Maine woman working full time earned 79.4% of what a man earned in Maine. Poor enforcement of equal pay laws is not the root cause of the continuing wage inequity between men and women. Complex social issues relating to women’s roles in the home and workplace contribute to the failure of women to attain pay equity with men. Nevertheless, better enforcement of laws prohibiting discrimination in the payment of wages on the basis of sex would help diminish the wage gap.

Since 1949, Maine has had an equal pay statute that prohibits employers from discriminating between employees on the basis of sex by paying wages at a rate less than the rate paid to the opposite sex for “equal work,” and since 1965 for “comparable work.” As noted above, several states have similar pay-equity laws, either requiring women to be paid equally for “equal work” or for “comparable work.” Many of these statutes date back to the 1940s and 1950s. Michigan’s statute, which makes payment of women at a wage less than “similarly employed” men a misdemeanor, dates back to 1931. In a 1940 case upholding the constitutionality of the statute, the Michigan Supreme Court noted: “[i]t is a matter of common knowledge that there are great numbers of women employed in manufacturing and that many employers pay their women employees less than they pay their men employees for identical work.”

8. Id.
9. Id. at 15.
10. It is beyond the scope of this article to discuss the various causes of the gender wage gap or the barriers women face in the workplace. The “human capital explanation,” which asserts that women earn less than men because of the division of labor within the family resulting in productivity differences between the sexes, as well as discrimination are the two most frequently cited reasons for the continued wage gap. Linda Levine, The Gender Wage Gap and Pay Equity: Is Comparable Worth the Next Step?, CRS Report for Congress 4-10 (2001). It has long been assumed that “occupational sex segregation” accounts for considerable wage disparity. While studies show that female-dominated jobs generally pay less than male-dominated jobs, the causes of the wage gaps remain in dispute. See David A. Macpherson & Barry T. Hirsch, Wages and Gender Composition: Why Do Women’s Jobs Pay Less?, J. Of Lab. Econ., July 1995, 426. The so-called “glass ceiling” which refers to “barriers to the advancement of minorities and women within corporate hierarchies” has also been the subject of intense study. See Federal Glass Ceiling Commission, A Solid Investment: Making Full Use of the Nation’s Human Capital, Recommendations of the Federal Glass Ceiling Commission 9 (1995).
11. See infra Part II.A.
12. See infra Part II.C.
Passage of the federal Equal Pay Act in 1963 provided further remedy for women workers. The federal statute's requirement that the work be equal in nature makes proving a case under the federal scheme a more difficult undertaking than in Maine and in the other states where the “comparable work” standard provides a less stringent burden of proof.

Even with the lower standard of proof, however, women do not use these state statutes to bring pay-equity claims. In Maine, for example, in the thirty-seven years that the comparable work standard has been a part of the statute, there has not been a single reported case discussing a claim brought pursuant to the statute. In 2001, Maine's Bureau of Labor Standards adopted a set of rules that could enhance enforcement of the equal pay statute.16 The introduction of an administrative claims process, as well as the use of an employer's self-audit to encourage voluntary compliance, may lead to greater enforcement of the law. Maine could, in fact, lead the way for other states to enforce their pay-equity laws.

This Article will compare Maine's equal pay statute to the federal Equal Pay Act, as well as to other states' pay-equity laws. It will discuss how these statutes have been interpreted by courts, how they have been enforced, or not enforced, and explore ways to increase their enforcement. This Article will also discuss the comparable worth doctrine, which is a broader concept than either the equal-pay-for-equal work requirement of the federal Equal Pay Act or the state “comparable work” statutes. This Article will conclude with analysis of Maine's equal pay rules to enforce its own statute and will discuss ways in which Maine's workers and employers can be encouraged to use the rules to decrease the wage gap for women in Maine.

II. EQUAL PAY STATUTES

A. Maine's Equal Pay Law—Past and Present

There is scarce material available on the history of Maine's Equal Pay Statute. The initial bill was titled “An Act to Provide for Equal Pay for Equal Work” and was introduced by Senator Haskell of Penobscot County to the 94th Legislature on January 26, 1949, as a proposed addition to the labor statutes as section 40-A,17 as follows:

No employer shall employ any female in any occupation in this state at salary or wage rates less than the rates paid by that employer to male employees for work of a like or similar character or for work on like or similar operations. Any individual, association or corporation who violates the provisions of this section shall be punished by a fine of not more than $200.

The provisions of this section shall not apply to the state, counties, cities and towns, or to charitable and educational institutions or to those employees whose wage rates are determined by written agreement, resulting from collective bargaining.18

16. Me. Dep't of Labor Reg. 12-170, Ch. 12 (Nov. 19, 2001).
The legislative document for this bill does not have a statement of fact describing the purpose for the proposed legislation. The bill was referred to the legislative Committee on Labor and was sent down for concurrence. The first paragraph of the bill was amended by the Labor Committee in significant fashion:

No employer shall employ any female in any occupation within this state for salary or wage rates less than the salary or wage rates for equal work. However, nothing in this section shall prohibit a variation in salary or wage rates based upon a difference in seniority, experience, training, skill, ability, or difference in duties or services performed, either regularly or occasionally, or difference in the shift or time of the day worked, or difference in availability for other operations, or other reasonable differentiation except difference in sex. Any individual, association or corporation who violates the provisions of this section shall be punished by a fine of not more than $200.21

The Committee's work on the bill meant that a woman would have to prove that her work was "equal" to the work of the men employed by the employer, not as previously introduced in the proposed legislation for work that was "of a like or similar character" or "work on like or similar operations." In addition, the new draft of the bill added significant exceptions to the application of the equal pay law for factors such as seniority or experience, among other things. Again, the legislative document accompanying this new draft of the bill is without a statement of fact, nor are there any surviving notes from the Labor Committee of 1949 to explain these changes to the proposed legislation.22

A final amendment to the bill was made by the Senate, which struck out the last paragraph of the legislation, such that the equal pay act would apply to state and local governments. Again, however, the dearth of comment on the bill makes it difficult to speculate as to why the Senate desired removal of this exception from the final version of the bill. The only testimony regarding the bill pertained to an error that had been made in redraft of the bill, which amendment A apparently solved. This testimony suggests that the Labor Committee intended to strike out this limiting language before it was brought before the Legislature for final action on the bill.

19. Id. In tracking legislative history in Maine, the statement of fact, often found at the end of a legislative document, provides helpful information regarding the intent of the proposed legislation. Franklin Prop. Trust v. Foresite, Inc., 438 A.2d 218, 223 (Me. 1981).


22. The Maine State Archives are the repository for legislative materials of this historical period. A box containing Labor Committee notes from the 94th Legislature did not contain any documents relating to this proposed legislation.


24. Senator Hopkins presented Senate Amendment A and moved for its adoption, testifying as follows:

Mr. President and members of the Senate, in explanation I will say that somewhere between the clerk of the committee, the Revisor of Statutes, the signer of the report and the chairman of the committee, there was an error made in the redraft of the bill and the amendment brings the bill to consistency with the action of the committee.

1 Legis. Rec. 1142 (1949). One day later Representative Sharpe similarly testified in the House that "[t]his Senate Amendment 'A' is merely to correct an error which was made in the re-draft of this bill. The Amendment is consistent with the action of our committee and I move its adoption." Legis. Rec. 1217 (1949). The motion to adopt the Senate Amendment prevailed, and the amendment was adopted. Id.
The bill was passed by the 94th Legislature on April 22, 1949, in the following final text:

Sec. 40-A. Wage rates for equal work; penalty; exception. No employer shall employ any female in any occupation within this state for salary or wage rates less than the salary or wage rates paid by that employer to male employees for equal work. However, nothing in this section shall prohibit a variation in salary or wage rates based upon a difference in seniority, experience, training, skill, ability, or difference in duties or services performed, either regularly or occasionally, or difference in the shift or time of the day worked, or difference in availability for other operation, or other reasonable differentiation except difference in sex. Any individual, association or corporation who violates the provisions of this section shall be punished by a fine of not more than $200.

This version of the law remained in effect until 1965, when the Legislature introduced a bill that renewed the concept of “comparable work.” The bill as it was first proposed would have amended the first sentence of the statute to read: “[n]o employer shall employ any female in any occupation within this State for salary or wage rates less than the salary or wage rates paid by that employer to male employees for equal or comparable work.” There is no statement of fact accompanying this bill to explain why the Legislature wanted to replace the “equal work” requirement with the broader “comparable work” standard. The bill was subsequently amended to expand what was meant by “comparable work” and to fine tune the exceptions to the equal pay rule:

No employer shall discriminate between employees in the same establishment on the basis of sex, by paying wages to any employee in any occupation in this State at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility. Differentials which are paid pursuant to established seniority systems or merit increase systems, or difference in the shift or time of the day worked, which do not discriminate on the basis of sex, are not within this prohibition. No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of this section.

This version of the bill was enacted, again without comment or debate. One could speculate from the timing of this amendment, as well as the language relating to “skill, effort, and responsibility,” that the Legislature was reacting to passage of the federal Equal Pay Act two years earlier in 1963, which provided equal pay for equal work, using very similar language with respect to skill, effort, and responsibility. The adoption of “comparable work” in place of “equal work”
seems to reflect a legislative intent to go beyond the federal Equal Pay Act's "equal work" standard.

In 1983, the Maine Legislature amended the equal pay statute as part of a larger effort to coordinate the way that employers are fined for violation of state labor laws. The last sentence of section 628, which referred to the fine of $200 on employers who violated the equal pay law, was deleted. At the same time the Legislature amended section 626-A, "Penalties," to provide that violation of certain enumerated labor laws would result in a fine of "not less than $100 nor more than $500 for each violation." The current version of the Penalties section provides that an employer who violates any of the provisions of section 628 "is subject to a forfeiture of not less than $100 nor more than $500 for each violation."

In 1996, the Commission To Study Poverty Among Working Parents released a report that included a recommendation that the Department of Labor promulgate rules to enhance enforcement of the equal pay law. In response to this study, the Legislature passed a resolve in 1997, directing the Department to adopt rules in consultation with the Maine Human Rights Commission to implement the provisions of the equal pay law. The Bureau of Labor Standards drafted a first set of rules in 1999. After public hearing on the proposed rules, however, the Bureau withdrew the draft, having concluded in response to comments from the public that the proposed rules would not sufficiently advance enforcement of the equal pay law. The Bureau engaged a private firm to conduct a survey of other jurisdictions, seeking information as to effective methods of enforcing equal pay laws. With greater information in hand, the Bureau drafted a second set of proposed rules and issued them for public comment in March 2001. The rules were well received and were adopted by the agency in July 2001.

Also in 2001, the Legislature again had the opportunity to reexamine section 628. This time the bill purported to "address the manner in which the existing state and federal law requiring equal pay for equal work is implemented and enforced." The bill proposed two changes to the equal pay statute. First, the Legislature enacted an "Equal Pay Day," to be the first Tuesday in April. Second, section 628

33. Id. § 1. The statement of fact section of the L.D. states that the bill "makes the same penalty applicable to violations of several related sections of state labor law. The Department of Labor is also authorized to collect fines incurred due to violations of the wage and medium of payment subchapter of state labor law." Id.
38. Interview with Michael Frett, Director of Bureau of Labor Standards, Maine Dep't of Labor, and William A. Peabody, Deputy Director, Bureau of Labor Standards, Maine Dep't of Labor, in Hallowell, Me. (May 23, 2002).
41. L.D. 489, Concept Draft Summary (120th Legis. 2001).
was amended to add a reporting requirement to occur on Equal Pay Day. At the time this bill was pending in the Legislature, the Commissioner of the Department of Labor wrote a letter to the Joint Standing Committee on Labor pointing out that the Bureau of Labor Standards had received only one complaint under the law since 1965 and that the Bureau had drafted rules regarding enforcement of the equal pay statute.

The statute in its current version reads, in full:

An employer may not discriminate between employees in the same establishment on the basis of sex by paying wages to any employee in any occupation in this State at a rate less than the rate at which the employer pays any employee of the opposite sex for comparable work on jobs that have comparable requirements relating to skill, effort and responsibility. Differentials that are paid pursuant to established seniority systems or merit increase systems or difference in the shift or time of the day worked that do not discriminate on the basis of sex are not within this prohibition. An employer may not discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of this section.

The Department of Labor shall annually report to the joint standing committee of the Legislature having jurisdiction over labor matters on progress made in the State to comply with this section. The report must be issued annually on Equal Pay Day as designated pursuant to Title 1, section 140.

There are no reported Maine cases interpreting the equal pay statute. According to officials at the Bureau of Labor Standards at the Maine Department of Labor, complaints about equal pay are extremely rare, with only one instance in recent years in which the Bureau conducted an investigation. The Bureau's promulgation of rules creating an administrative process for such claims may enhance enforcement of the statute. Before discussing Maine's rules in particular, it is useful to compare Maine's statute with the federal Equal Pay Act, as well as to the equal pay statutes in other states.

B. The Federal Equal Pay Act

The Equal Pay Act (EPA) was passed in 1963, becoming a part of the Fair Labor Standards Act. It provides, in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such

44. Letter from Valerie R. Landry, Commissioner of Maine Department of Labor, to Hon. Betheda G. Edmonds, Senate Chair et al. (April 3, 2001) (contained in Committee File for L.D. 489 (120th Legis. 2001)).
45. 20 M.R.S.A. § 628 (Supp. 2001).
46. There was an Attorney General’s opinion issued shortly after the equal pay law was enacted in 1949, in which the Attorney General advised that teachers were not covered by the statute. Op. Me. Att’y Gen. (1950), reprinted in 1949-1950 Me. Att’y Gen. Ann. Rep. 175. There is a Massachusetts case that cites the Maine statute for the purpose of showing that it is similar to the Massachusetts equal pay law, which establishes a “comparable work” standard. Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 166 (Mass. 1995).
47. Interview with Frett and Peabody, supra note 38.
establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 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 other than sex. 49

In *Corning Glass Works v. Brennan*, 50 the Supreme Court recounted Congress’s purpose in enacting the Equal Pay Act, which was:

[T]o remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry — the fact that the wage structure of “many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.” 51

In *Corning Glass Works*, for example, the employer had paid male inspectors more than female inspectors who were doing the same job for the simple reason that the male inspectors demanded higher pay than what the company had paid to the women who had historically done the job. 52 “That the company took advantage of such a situation may be understandable as a matter of economics,” the Court stated, “but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.” 53

Enforcement of the EPA is in the hands of the federal Equal Employment Opportunity Commission, 54 which has been less than enthusiastic in its pursuit of equal pay claims in recent years. 55 Women seeking redress under the EPA are compelled to file lawsuits on their own. They have not fared particularly well. Despite the fact that the Supreme Court has held that the statute’s “broadly remedial” nature demands “it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve,” 56 the federal courts have interpreted the EPA narrowly, holding plaintiffs to a high burden of proof. Before discussing the difficulties of bringing an EPA claim, it is important to examine the role that Title VII plays in cases of wage discrimination based on gender.

It was only one year following passage of the EPA that Congress passed the landmark Civil Rights Act of 1964, 57 giving employees the right to bring a Title VII claim against employers who discriminated on the basis of sex, race, or national origin. 58 While this latter piece of legislation was under debate, concern

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51. *Id.* at 195 (quoting S. Rep. No. 176, at 1 (1963)).
53. *Id.*
54. 29 C.F.R. § 1620.30(a) (2001).
55. One commentator points out that the EEOC filed seventy-nine EPA cases in 1980. In 1990, the EEOC did not file a single EPA case. Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 Lab. Law 155, 159 (1999). At the time she published her article in 1999, Houghton reported that the EEOC had not been a party to a reported decision in an EPA lawsuit since 1994. *Id.* at 168.
58. *Id.* § 2000e.
arose that the EPA would be rendered a nullity by the broader concept of discrimination set forth in Title VII. In response to a fear that a Title VII plaintiff could press a pay discrimination claim without the need to show “equal pay for equal work” as required by the EPA, Congress enacted the Bennett Amendment, which incorporated the EPA’s four affirmative defenses into Title VII.

In County of Washington v. Gunther, the Supreme Court held that the Bennett Amendment did not import the “equal pay for equal work” standard into Title VII. Rather, a Title VII plaintiff could attempt to prove wage discrimination based on gender without showing that her work is “equal” to that of a male colleague. Since Gunther, the federal courts have explored the ways in which an EPA claim works as compared to a Title VII claim. The courts have settled on a few basic guidelines in analyzing these claims, which are frequently brought as separate claims in the same lawsuit.

First, the courts have held that an EPA claimant has the initial burden of proving her prima facie case, that is, that she is receiving lower pay than a male colleague who is doing “equal work.” Assuming she can get past this hurdle, the burden then shifts to the employer to prove one of the four affirmative defenses (seniority, merit, production measures, or “on any other factor other than sex”). This burden-shifting paradigm is different than that of a Title VII case, in which the plaintiff maintains the burden of proof throughout the case, with the employer only having to set forth a plausibly nondiscriminatory reason for engaging in the conduct that has been alleged to be discriminatory under Title VII.

Second, the courts have consistently held that a Title VII plaintiff must show that the employer acted with discriminatory intent, while an EPA claim does not require a showing of animus. The mere fact that a male colleague performing the same work is paid more is sufficient to prove the case, without the need to show that the employer paid the male worker more because he was male or paid the plaintiff less because she was female. As one district court described the difference between the two statutes: “It is generally acknowledged that Title VII, with its broader approach to discrimination, requires a less-exacting degree of job

60. Id. at 191.
61. Id. at 193.
63. Id. at 179.
64. Id. at 180 (rejecting petitioners’ argument that Bennett Amendment requires Title VII plaintiff bringing wage claim to meet equal pay requirement of the EPA).
66. Id. See also Byrd v. Ronayne, 61 F.3d 1026, 1033 (1st Cir. 1995).
68. Sprague v. Thom Americas, Inc., 129 F.3d 1355, 1364 (10th Cir. 1997); Mitchell v. Jefferson County Bd. of Educ., 936 F.2d 539, 547 (11th Cir. 1991). The requirement of showing discriminatory intent applies in a “disparate treatment” Title VII case in which the plaintiff alleges the employer intentionally discriminated against the plaintiff because of her race, color, sex, religion, or national origin. Cumpiano v. Banco Santander P.R., 902 F.2d 148, 153 (1st Cir. 1990). In contrast, a “disparate impact” case brought pursuant to Title VII does not require a showing of intent, but rather arises as the result of a facially neutral employment practice that has a disproportionately adverse impact on a protected group. McNairn v. Sullivan, 929 F.2d 974, 979 (4th Cir. 1991). This Article focuses on disparate treatment cases and the requisite showing of discriminatory intent.
Differences aside, the one thing that is clear from the cases is that a plaintiff bringing a wage discrimination claim, whether pursuant to the EPA, Title VII, or both (which is usually the case), has her work cut out for her. Many plaintiffs cannot survive a summary judgment motion, being unable to get past the hurdles inherent to an EPA claim, as well as the difficulty of proving discrimination in a Title VII case.

In an EPA case, there are two major obstacles that a plaintiff must overcome. First, she must establish her prima facie case by showing that she is doing "equal work" to that of a male colleague who is receiving higher pay. This is a difficult task. While the federal regulations governing the EPA state that the equal work standard "does not require that compared jobs be identical, only that they be substantially equal," there is little guidance for what "substantially equal" means. The regulations admit that "[w]hat constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined," although the section goes on to state that interpretation of these key terms must be done with consideration for the "broad remedial purpose of the law."

Interpreting these terms, however, the courts have been reluctant to take a broad approach. Rather, the courts look at the plaintiff's job and the job of the "comparator" male employee to determine whether there is a "substantial identity of job functions." The employer can point to many differences between the plaintiff's duties and those of her comparator to prevent the plaintiff from establishing her prima facie case. If the male worker has more employees to supervise or is responsible for a larger budget or greater market share, the courts have held...

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69. Grigoletti v. Ortho Pharm. Corp., 570 A.2d 903, 909 (N.J. 1990). It is beyond the scope of this Article to explore the differences between the EPA and Title VII and their respective burdens of proof and persuasion. There is an apparent split in the circuits with respect to how the Bennett Amendment has affected gender-based wage discrimination cases. See Rodriguez v. Smithkline Beecham Pharm., 62 F. Supp. 2d 374, 381 (D. P.R. 1999), aff'd 224 F.3d 1 (1st Cir. 2000). For purposes of this Article, it is sufficient to describe the basic differences between an EPA claim and a Title VII claim.


71. In addition, because the EPA is part of the Fair Labor Standards Act, a plaintiff must first ensure that she meets the requirements for bringing a claim under that statute. For example, she must show that the pay discrimination occurred at a single establishment, and she must consider the broad definition of wages found in the act. See Houghton, supra note 55, at 160-61 (citing EPA regulations).

72. 29 C.F.R. § 1620.13(a) (2001).

73. Id. § 1620.14(a).

74. Noel v. Medtronic Electromedics, Inc., 973 F. Supp. 1206, 1210 (D. Colo. 1997) (quoting Nulf v. Int'l Paper Co., 656 F.2d 553, 560-61 (10th Cir. 1981)); Glunt v. GES Exposition Servs., Inc., 123 F. Supp. 2d 847, 856 (S.D. Md. 2000) ("The crucial finding on the equal work issue is whether the jobs to be compared have a 'common core' of tasks, i.e., whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different.").
that the jobs are not substantially equal for purposes of the EPA.75 As one commentator has pointed out, despite the admonition contained in the federal regulations that "insubstantial differences" should not prevent a finding of equal work, the courts have not "reach[ed] beyond comparisons of virtually identical jobs, which in a workforce substantially segregated by gender, provides women with a very limited substantive right indeed."76

One commentator describes the "key to success" for a plaintiff in proving a prima facie case as having "a thorough understanding of the work that everyone at the organization does and an ability to convey this to the court in a manner that will allow it to accurately compare skills, effort and responsibility fairly."77 The cases bear out that plaintiffs who understand how they fit in the workplace have been able to show that their jobs were "substantially equal" to those of male colleagues.

In Garner v. Motorola, Inc.,78 for example, the plaintiff used an expert to show that her job as a software engineer was substantially equal to at least four of her male coworkers and that her responsibilities exceeded those of six other males who had the same job title.79 She was also able to rely on the employer's characterization of job responsibilities for the software engineers on the performance appraisal forms used for all of them.80 Similarly, in McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals,81 the plaintiff used the internal job descriptions for department heads to show that her job responsibilities were not different from those of other department heads.82

The one thing the courts are clear on is that while the term "equal" may encompass such concepts as "substantially equal," "essentially the same," or "sufficiently similar," it is not broad enough to include "comparable." That is because "when Congress enacted the Equal Pay Act, it substituted the word 'equal' for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.'"83

75. In Noel, for example, the plaintiff could not survive summary judgment because she could not show that the "shared" job duties outnumbered the disparate job functions of the male comparators, so that she could not prove to the court's satisfaction the "substantial identity of their job functions." Noel v. Medtronic Electromedics, 973 F. Supp. at 1212. Similarly, in Koster v. Chase Manhattan Bank, N.A., the plaintiff could not show "substantial equality" of her work with that of the comparator because she performed some functions that he did not, and vice versa. 609 F. Supp. 1191 (S.D.N.Y. 1985).

76. Jennifer M. Quinn, Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay for Women, 25 LAW & POL'Y INT'L BUS. 1403, 1439 (1994). See also Houghton, supra note 55, at 167 ("The plaintiff must rely on the court's subjective determination that the jobs are substantially equal and that incidental tasks do not rise to the level of substantial inequality.").

77. Houghton, supra note 55, at 167. The author goes on to describe that a plaintiff's failure to "understand her employer's business or its job classification system," will result in failure of her prima facie case unless her job is exactly the same as her male comparator's job. Id.

78. 95 F. Supp. 2d 1069 (D. Ariz. 2000).
79. Id. at 1075.
80. Id.
82. Id. at 907. See also Lenihan v. Boeing Co., 994 F. Supp. 776, 800 (S.D. Tex. 1998) (plaintiff analyzed forty-one duties assigned to members of her work group to show that all employees were doing substantially equal work).
The second hurdle for an EPA plaintiff is getting past the exceptions set forth in the statute. In analyzing an EPA claim, the courts have held that seniority and merit systems must be based on clearly stated and objective criteria and cannot be used to perpetuate discriminatory patterns of payment.\(^{84}\) The first three defenses are usually not in issue, probably because the criteria of seniority, merit, and productivity are more easily identified and less likely to encourage an EPA claim. In other words, a woman would be less likely to believe that she is entitled to the same rate of pay as a male colleague who is senior to her, has higher output, or has scored higher than her under an objectively applied merit system.

It is the final catch-all defense that has caused the greatest problem for women pressing an EPA claim. This exception allows an employer to show that it has paid the male worker more than the plaintiff because of a “factor other than sex” that justifies the higher payment.\(^{85}\) Commentators have pointed out that the courts’ very general reading of the fourth statutory exception has reduced the effectiveness of the EPA and resulted in its being “the most contentious in litigation and the most pliable to clever defendants.”\(^{86}\)

A wage differential based on education or experience has been found to be an acceptable explanation under the EPA.\(^{87}\) So unless a plaintiff can show that she is paid less than a male coworker who has equal or less education and training, or equal or less experience, her claim is likely to fail. In addition, employers have defended an equal pay claim using the “any other factor” defense by showing that they paid the male comparators more because they commanded a higher salary in their previous jobs.\(^{88}\) Therefore, even though the courts have disapproved of a “market forces” analysis that would allow an employer to pay a man more because he demands more and a woman demands less,\(^{89}\) the courts have allowed the “prior salary” defense wherein the employer can argue just that.\(^{90}\)

In sum, the EPA places too great a burden on women who believe they are being paid less than their male colleagues for doing the same job. The “equal work” requirement of the EPA as well as a broad interpretation of the “factor other than sex” affirmative defense make it too hard for a woman to prevail. Only a


\(^{86}\) L. Tracee Whitley, “Any Other Factor Other than Sex:” Forbidden Market Defenses and the Subversion of the Equal Pay Act of 1963, 2 NU FORUM 51, 60 (1997). Whitely opines that federal courts have largely ignored the Supreme Court’s directive in Corning Glass against the use of market force defenses. Id. at 66.

\(^{87}\) Hutchins v. Int'l Bhd. of Teamsters, 177 F.3d 1076, 1081 (8th Cir. 1999). The affirmative defense that the male worker has additional formal education is only applicable when that superior formal education is actually “relevant and necessary to the job in question.” Glunt v. GES Expasion Services, Inc., 123 F. Supp. 2d 847, 860 (D. Md. 2000).


\(^{89}\) Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F. Supp. 985, 993 (D. N.J. 1996) (“It is not legitimate under the EPA to pay an equally qualified woman less than a man because of her inferior bargaining power in the market as a woman.”). See also Siler-Khodr v. Univ. of Tex. Health Science Ctr. San Antonio, 261 F.3d 542, 549 (5th Cir. 2001) (rejecting University’s market forces argument that it had to pay higher salary to recruit male comparator).

\(^{90}\) At least one circuit has held that the “prior salary” differential “standing alone” cannot defeat an equal pay claim, but must be considered in conjunction with other factors. Lenihan v. Boeing Co., 994 F. Supp. 776, 798 (S.D. Tex. 1998) (citing Irby v. Bittick, 44 F.3d 989, 955 (11th Cir. 1995)).
plaintiff who is doing exactly the same work as a male colleague and has the same level of education and experience as that of a male colleague can hope for success in an EPA case. Almost forty years after its passage, the EPA has done little to promote a solution to the "serious and endemic problem" of wage discrimination for which it was designed.91

C. Other States' Equal Pay Laws

There are thirty-nine states that have statutes that deal specifically with pay equity for men and women.92 The following is a description of the various categories of state statutes.

1. Equal Work States

Seventeen states have statutes modeled on the federal EPA in that they require employers to pay female workers at the same wage rate as male workers for "equal work": California,93 Delaware,94 Florida,95 Georgia,96 Indiana,97 Kansas,98 Minnesota.99

92. The eleven states that do not have a specific pay equity law on their books are Alabama, Alaska, Iowa, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Utah, and Wisconsin. In Alabama, a bill was introduced in the 2002 state legislative session that would have created a statute requiring equal pay for women doing "equivalent" jobs of men, but the bill did not pass. H.B. 295, 2002 Leg., 22d Sess. (Ala. 2002). Alaska used to have an equal pay statute, but it was repealed in 1965, when Alaska enacted its human rights statute. ALASKA STAT. § 18.80.220(a)(1) (Michie 2001). Most, if not all, states have human rights statutes that prohibit discrimination in employment, including the payment of compensation, on the basis of gender, race, ethnic origin, disability, or other protected class. Maine’s human rights statute, for example, prohibits discrimination in the payment of compensation based on race, sex, physical or mental disability, religion, age, ancestry, or national origin. 5 M.R.S.A. § 4572(1)(A) (2002). These more general nondiscrimination statutes provide a means of pressing a wage discrimination claim in states that do not have a specific pay-equity law.

93. CAL. LAB. CODE § 1197.5 (West Supp. 2002).

No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

Id.


No employees shall be paid a wage at a rate less than a rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on: (1) A seniority system; (2) A merit system; (3) A system which measures earnings by quantity or quality of production; or (4) Any other factor other than sex.

Id.

95. FLA. STAT. ANN. § 448.07 (West Supp. 2001).

No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he or she pays 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, except when such payment is made pursuant to: (1) A seniority system; (2) A merit system; (3) A system which measures earnings by quantity or quality of production; (4) A differential based on any reasonable factor other than sex when exercised in good faith.

Id.


No employer having employees subject to any provisions of this chapter shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (1) a 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 other factor other than sex.

Id. Georgia's statute is interesting in that the "declaration of public policy" set forth in the first section of the statute states that discriminating on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for "comparable work in jobs which require the same, or essentially the same, knowledge, skill, effort and responsibility" leads to a number of social ills. Id. § 34-5-1 (emphasis added). The enforcement section of the statute, however, prohibits employers from paying unequal wages between the sexes for "equal work in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions." Id. § 34-5-3.


No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which employees are employed, between employees on the basis of sex by paying to employees in such establishment a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to: (1) a 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 other factor other than sex.

Id.


[N]o employer having employees of both sexes shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate of wages paid to employees of the opposite sex in such establishment for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to: (a) A seniority system; (b) a merit system; (c) a system which measures earnings by quantity or quality of production; or (d) a differential based on a factor other than sex.

Id.


No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate the employer pays 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, except where such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.

Id.

100. NEB. REV. STAT. ANN. § 48-1221(1) (Michie 2001).

No employer shall discriminate between employees in the same establishment on the
basis of sex, by paying wages to any employee in such establishment at a wage rate less than the rate at which the employer pays any employee of the opposite sex in such establishment for equal work on jobs which require equal skill, effort and responsibility under similar working conditions. Wage differentials are not within this prohibition where such payments are made pursuant to: (a) An established seniority system; (b) a merit increase system; or (c) a system which measures earnings by quantity or quality of production or any factor other than sex.

Id.

101. NEV. REV. STAT. 608.017(1)-(2) (2001).
1. It is unlawful for any employer to discriminate between employees, employed within the same establishment, on the basis of sex by paying lower wages to one employee than the wages paid to an employee of the opposite sex who performs equal work which requires equal skill, effort and responsibility and which is performed under similar working conditions. 2. The provisions of subsection 1 do not apply where wages are paid pursuant to: (a) A seniority system; (b) A merit system; (c) A compensation system under which wages are determined by the quality or quantity of production; or (d) A wage differential based on factors other than sex.

Id.

No employer shall discriminate in the payment of wages as between the sexes, or shall pay any employee in his or her employ salary or wage rates less than the rates paid to employees of the opposite sex for equal work or work on the same operations. However, nothing in this subdivision shall prohibit a variation in rates of pay based upon a marked difference in seniority, experience, training, skill, ability, or difference in duties and services performed, either regularly or occasionally, or difference in the shift or time of the day worked, or difference in availability for other operation, or other reasonable differentiation except difference in sex. A variation in rates of pay as between the sexes is not prohibited where such variation is provided by contract between the employer and the recognized bargaining agent of the employees or, in case there is no such bargaining agent, where such variation is provided by written agreement or contract between the employer and not less than 5 of the employees.

Id.

103. N.Y. LAB. LAW § 194 (McKinney 2001).
No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on (a) a seniority system; (b) a merit system; (c) a system which measures earnings by quantity or quality of production; or (d) any other factor other than sex.

Id.

104. OHIO REV. CODE ANN. § 4111.17 (West 2001).
(A) No employer, including the state and political subdivisions thereof, shall discriminate in the payment of wages on the basis of race, color, religion, sex, age, national origin, or ancestry by paying wages to any employee at a rate less than the rate at which the employer pays wages to another employee for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar conditions. (B) Nothing in this section prohibits an employer from paying wages to one employee at a rate different from that at which the employer pays another employee for the performance of equal work under similar conditions on jobs requiring equal skill, effort, and responsibility, when payment is made pursuant to any of the following: (1) A seniority system; (2) A merit system; (3) A system which measures earnings by the quantity or quality of production; (4) A wage rate differential determined by any other factor than race, color, religion, sex, age, national origin, or ancestry.
Pennsylvania,\textsuperscript{105} Rhode Island,\textsuperscript{106} Vermont,\textsuperscript{107} Virginia,\textsuperscript{108} and Wyoming.\textsuperscript{109} The fact that these state statutes require a showing of “equal work” and contain the same exceptions as the federal EPA make it just as difficult to prove wage discrimination under these statutes as it is under the EPA.

\textsuperscript{105} 43 PA. CONS. STAT. § 336.3 (2001).
No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which, requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a 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 other factor other than sex.

\textsuperscript{106} R.I. GEN. LAWS § 28-6-18 (2001).
No employer shall discriminate in the payment of wages as between the sexes or pay any female in his employ salary or wage rates less than the rates paid to male employees for equal work or work on the same operations; provided, that nothing contained in this section shall prohibit a variation in rates of pay based upon either difference in seniority, experience, training, skill, or ability, or difference in duties and services performed, either regularly or occasionally, or difference in the shift or time of day worked, or difference in availability for other operations or any other reasonable differentiation except difference in sex.

\textsuperscript{107} VT. STAT. ANN. tit. 21, § 495(a)(8) (2002).
(a) It shall be unlawful employment practice . . . [f]or any employer, employment agency, labor organization or person seeking employees to discriminate between employees on the basis of sex by paying wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal skill, effort and responsibility, and is performed under similar working conditions. . . . An employer may pay different wage rates under this subsection when the differential wages are made pursuant to: (A) A seniority system, (B) A merit system, (C) A system in which earnings are based on quantity or quality of production, (D) Any factor other than sex.

\textsuperscript{108} VA. CODE ANN. § 40.1-28.6 (Michie 2001).
No employer having employees shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, 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 other than sex.

\textsuperscript{109} WYO. STAT. ANN. § 27-4-302 (Michie 2001).
No employer shall discriminate, within the same establishment in which the employees are employed, between employees on the basis of gender by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite gender for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions, except where the 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 other than gender.
Eleven states have a statute similar to Maine's, that is, requiring employers to pay women the same wage as men for "comparable work." Those states are Arkansas, Idaho, Kentucky, Maryland, Massachusetts, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and West Virginia.

   (a) No employer shall discriminate in the payment of wages as between the sexes or shall pay any female in his employ salary or wage rates less than the rates paid to male employees for comparable work. (b) Nothing in §§ 11-4-607—11-4-612 shall prohibit a variation in rates of pay based upon a difference in seniority, experience, training, skill, ability, differences in duties and services performed, difference in the shift or time of the day worked, or any other reasonable differentiation except difference in sex.

Id.

   No employer shall discriminate between or among employees in the same establishment on the basis of sex, by paying wages to any employee in any occupation in this state at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility. Differentials which are paid pursuant to established seniority systems or merit increase systems, which do not discriminate on the basis of sex, are not within this prohibition.

Id.

   No employer shall discriminate between employees in the same establishment on the basis of sex, by paying wages to any employee in any occupation in this state at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility. Differentials which are paid pursuant to established seniority systems or merit increase systems, which do not discriminate on the basis of sex, shall not be included within this prohibition.

Id.

   (a) An employer may not discriminate between employees in any occupation by paying a wage to employees of 1 sex at a rate less than the rate paid to employees of the opposite sex if both employees work in the same establishment and perform work of comparable character or work on the same operation, in the same business, or of the same type. . . . Subsection (a) of this section does not prohibit a variation in a wage that is based on: (1) A seniority system that does not discriminate on the basis of sex; (2) A merit increase system that does not discriminate on the basis of sex; (3) Jobs that require different abilities or skills; (4) Jobs that require the regular performance of different duties or services; or (5) Work that is performed on different shifts or at different times of day.

Id.

   No employer shall discriminate in any way in the payment of wages as between sexes, or pay any person in his employ salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations; provided, however, that variations in rates of pay shall not be prohibited when based upon a difference in seniority.

Id.

   No employer may discriminate between employees in the same establishment on the basis of gender, by paying wages to any employee in any occupation in this state at a rate less than the rate at which the employer pays any employee of the opposite gender for comparable work on jobs which have comparable requirements relating to
All twelve comparable work state statutes have some variation on the list of affirmative defenses that employers can assert to defeat an equal pay claim. The

skill, effort, and responsibility. Differentials that are paid pursuant to established seniority systems, job descriptive systems, merit increase systems, or executive training programs, and which do not discriminate on the basis of gender, are not within this prohibition.

Id.

It shall be unlawful for any employer within the State of Oklahoma to willfully pay wages to women employees at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility, except where such payment is made pursuant to a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or a differential based on any factor other than sex.

Id.

No employer shall: (a) In any manner discriminate between the sexes in payment of wages for work of comparable character, the performance of which requires comparable skills. (b) Pay wages to any employee at a rate less than that at which the employer pays wages to employees of the opposite sex for work of comparable character, the performance of which requires comparable skills. (2) Subsection (1) of this section does not apply where: (a) Payment is made pursuant to a seniority or merit system which does not discriminate on the basis of sex. (b) A differential in wages between employees is based in good faith on factors other than sex.

Id.

No employer shall discriminate between employees on the basis of sex, by paying wages to any employee in any occupation in this state at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility, but not to physical strength. . . . Differentials which are paid pursuant to established seniority systems, job descriptive systems, merit increase systems, or executive training programs, which do not discriminate on the basis of sex, are not within the prohibition of § 60-12-15.

Id. at §§ 60-12-15 to 60-12-16.

No employer shall discriminate between employees in the same establishment on the basis of sex by paying any employee salary or wage rate less than the rates such employer pays to any employee of the opposite sex for comparable work on jobs the performance of which require comparable skill, effort and responsibility, and which are performed under similar working conditions. However, nothing in this part shall prohibit wage differentials based on a seniority system, a merit system, a system which measures earnings by quality or quantity or production, or any other reasonable differential which is based on a factor other than sex.

Id.

No employer shall (a) [i]n any manner discriminate between the sexes in payment of wages for work of comparable character, the performance of which requires comparable skills; (b) pay wages to any employee at a rate less than that at which he pays wages to his employees of the opposite sex for work of comparable character, the performance of which requires comparable skills. (2) Subsection (1) of this section does not apply where: (a) Payment is made pursuant to a seniority or merit system which does not discriminate on the basis of sex, (b) a differential in wages between employees is based in good faith on factors other than sex.

Id.
Oklahoma, Oregon, Tennessee, and West Virginia "comparable work" statutes contain a "catch-all" affirmative defense that creates a large opportunity for employers to argue that a "factor other than sex" dictated higher pay for the male comparator. Arkansas, Idaho, Kentucky, Maryland, Maine, Massachusetts, and South Dakota have limited lists of exceptions to the law, giving employers less wiggle room to avoid an equal pay claim.

There is not a great deal of case law interpreting these comparable work statutes. As noted above, there are no reported cases dealing with Maine's equal pay law. The last reported case brought under Kentucky's law was in 1972, when the Sixth Circuit Court of Appeals held that an employee could not be penalized for failing to exhaust her administrative remedies when she did not refer her complaint to the state department of labor. The case does not provide any guidance on how the "comparable work" standard should be interpreted.

Only Maryland, Massachusetts, and Oregon have reported cases discussing the comparable work standard contained in those states' pay equity statutes. In Maryland, the courts recognize that the Maryland Equal Pay Act uses a "comparable work" standard that is different from the "equal work" standard set forth in the federal Equal Pay Act, but they do not draw a distinction when analyzing a claim brought under the state law. Plaintiffs may fare a bit better in Oregon, where the courts recognize that the state statute's "comparable work" standard is "broader" than equal work: "'Comparable' does not require equality but that two items have important common characteristics." In a 1986 case, the Oregon Appellate Court held that "[i]t is not difficult for a plaintiff to make a prima facie case under [Oregon's statute]. Plaintiffs simply had to show that they were performing work comparable to that of male teachers and that they were paid less than male teachers." In these Oregon cases, however, the issue of what constitutes "comparable work" was not squarely before the court, because the plaintiffs had met the higher burden of showing that their work was equal or "substantially similar" to the male comparators.

A Massachusetts case provides the most definitive statements on the "comparable work" standard. In *Jancey v. School Committee of Everett*, female cafeteria workers brought a complaint against the school committee, alleging violations

121. See supra notes 84-89 and accompanying text.
122. See supra note 46 and accompanying text.
123. Mitchell v. Mid-Continent Spring Co. of Ky., 466 F.2d 24, 27 (6th Cir. 1972).
124. Id.
128. In Smith, the plaintiffs, female teachers, proved their work was equal to the male teachers in their district. Id. In *City of Roseburg*, the plaintiff, who was Transit Coordinator for the City, did work that the Commissioner of the Bureau of Labor and Industries found was "substantially similar" to other division heads, who were paid at a higher level on the wage scale. Bureau of Labor & Indus. v. City of Roseburg, 706 P.2d at 959. The court acknowledged that the test applied by the Commissioner for "substantially similar work" was a stricter test than "comparable work." Id.
of the Massachusetts antidiscrimination act, the state and federal equal pay laws, as well as various constitutional claims. The cafeteria workers, who had always been female, proved that the custodian workers, who had always been male, were paid twice what the cafeteria workers were paid. The trial court determined whether the cafeteria workers' jobs were comparable in character to the custodians' jobs by assessing whether the work required comparable skill, effort, responsibility, and working conditions, and determined that the jobs were comparable. The Supreme Judicial Court of Massachusetts concluded that the trial judge had "applied the wrong standard in deciding that the work of the two groups was of comparable character." The court concluded that

in applying the broader "comparable" standard, the statute requires a two-part analysis. First, the judge must determine whether the substantive content of the jobs is comparable, that is, whether the duties of the jobs have, "important common characteristics..." To ignore job content when applying the "comparable" standard is to attempt the impossible task of comparing disparate concepts. In other words two positions that are so dissimilar in their substantive content that a reasonable person would regard them as categorically separate are not "comparable."

It is only when a determination is made that the jobs are comparable in substantive content, that the second inquiry is appropriate – whether the two positions entail comparable skill, effort, responsibility, and working conditions. If the answer to both inquiries is "Yes," then employees in the two positions must receive equal pay.

By establishing a two-part analysis that goes beyond the actual language of the Massachusetts Equal Pay Act, the Jancey court set a very high standard for plaintiffs to meet when attempting to prove that their work is comparable to that of the male comparators. One commentator criticized the opinion, noting that the court "callously disregarded the statute's language when it created the two-part comparable work standard." This reviewer further noted that:

The Jancey court failed to acknowledge that the Massachusetts legislature's refusal to adopt FEPA's equal work standard indicates an intent not to narrowly confine MEPA to situations involving "substantially similar" job content... MEPA merely requires a more liberal comparison of the jobs' characteristics rather than focusing solely on their content. By requiring the positions in question to possess "important common characteristics," the Jancey decision effectively negates the comparable worth theory's objective of preventing male and female segregated occupations, and implicitly strips MEPA of its intended coverage.

Two Massachusetts practitioners observed that Jancey limited Massachusetts state equal pay claims "only to relatively blatant instances of discriminatory payment of

130. Id. at 164-65.
131. Id. at 165.
132. Id. at 166.
133. Id.
134. Id. at 167-68 (citing Bureau of Labor & Indus. v. City of Roseburg, 706 P.2d 956, 959 n.2 (Or. Ct. App. 1985)).
136. Id. at 315-16 (footnotes omitted).
wages across gender lines." Women workers in Massachusetts will not read Jancey as an encouragement to bring a claim under that state's equal pay act. Indeed, as the only case setting forth a standard for interpreting comparable work, Jancey is discouraging to all potential claimants in states with comparable work statutes.

3. "Same" or "Similar" States

Six states have statutes that do not specify that the work must be "equal" or "comparable," but do use other terms to describe the standard. Three of those states, Arizona, Missouri, and Montana, can be grouped with the "equal work" states in that they require a showing that the work in issue is the "same" for the female worker as the male comparator. Three other states, Illinois, Michigan, and California, have statutes that use "similar work" or "substantially similar work" as the standard. The statutes from Arizona, Missouri, and Montana are as follows:

**Arizona:**

No employer shall pay any person in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work, provided that nothing herein shall prohibit a variation of rates of pay for [male and female] seniority, length of service, ability, skill, difference in duties or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith.

**Missouri:**

No employer shall pay any female in his employ at wage rates less than the wage rates paid to male employees in the same establishment for the same quantity and quality of the same classification of work, provided that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties or services performed, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, or factors other than sex, when exercised in good faith.

**Montana:**

It is unlawful for the state or any county, municipal entity, school district, public or private corporation, person, or firm to employ women in any occupation within the state for compensation less than that paid to men for equivalent service or for the same amount or class of work or labor in the same industry, school, establishment, office or place of employment of any kind or description.

**Illinois:**

No employer shall discriminate between employees on the basis of sex or mental or physical handicap, except as otherwise provided by this Act by paying wages to employees at a rate less than the rate at which he pays wages to employees for the same or substantially similar work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a 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 other factor than sex or mental or physical handicap.
gan, and Washington use the term "similar" when describing the work, therefore putting them more in the "comparable work" camp. Michigan, Montana, and Washington are interesting in that they have criminal statutes, making violation of the statute a misdemeanor. In Michigan and Washington an individual who has had her rights violated also has the right to bring a civil action.

4. Policy Statement States

Four states, Colorado, Connecticut, Hawaii, and New Jersey do

Any employer of labor in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes who are similarly employed, shall be guilty of a misdemeanor. No female shall be assigned any task disproportionate to her strength, nor shall she be employed in any place detrimental to her morals, her health or her potential capacity for motherhood. Any difference in wage rates based upon a factor other than sex shall not violate this section.

Any employer in this state, employing both males and females, who shall discriminate in any way in the payment of wages as between sexes or who shall pay any female a less wage, be it time or piece work, or salary, than is being paid to males similarly employed, or in any employment formerly performed by males, shall be guilty of a misdemeanor.

Id. The statute further provides a civil cause of action to recover wages lost due to discrimination. Id.

144. In St. John v. Gen. Motors Corp., 13 N.W.2d 840, 841 (Mich. 1944), the Michigan Supreme Court held that "[i]f plaintiff has suffered financial damage by reason of defendant's noncompliance with the mandatory provisions of the statute applicable to claimants' employment then civil action may be maintained." Id. at 841. The Washington state statute provides: [i]f any female employee shall receive less compensation because of being discriminated against on account of her sex, and in violation of this section, she shall be entitled to recover in a civil action the full amount of compensation that she would have received had she not been discriminated against.


145. Colo. Rev. Stat. Ann. § 8-5-102 (West 2001) ("No employer shall make any discrimination in the amount or rate of wages or salary paid or to be paid his employees in employment in this state solely on account of sex thereof.").

No employer shall discriminate in the amount of compensation paid to any employee solely on the basis of sex. Any difference in pay based on sex shall be deemed a discrimination within the meaning of this section, provided nothing herein shall be deemed to prevent the operation of employment practices which recognize length of service or merit rating as a factor in determining wage or salary rates.

No employer shall discriminate in any way in the payment of wages as between persons of different races or religions or as between the sexes; provided that nothing herein shall prohibit a variation of rates of pay for employees engaged in the same classification of work based upon a difference in seniority, length of service, substantial difference in duties or services performed, difference in the shift or time of day worked, or hours of work.

No employer shall discriminate in any way in the rate or method of payment of wages
not specify a standard of work, but merely prohibit wage discrimination based on sex. Without the requirement of a showing that the work is "equal" or even "comparable" to the male comparators, these state statutes are more in the nature of policy statements. It could be argued that the equal pay statutes in these four states are the broadest of all such laws and the easiest to prove. There are few reported cases in these jurisdictions to show that women are taking advantage of the broad language.\textsuperscript{149}

In New Jersey, the state's Supreme Court described the New Jersey Equal Pay Act as "dormant," which was "explained in part by the circumstance that other legislative schemes have been invoked to supplement its protective measures and assure its societal goals."\textsuperscript{150} There are two federal cases in which a plaintiff added a New Jersey Equal Pay Act claim to her federal EPA and Title VII claims. In these cases, similar to the Maryland cases cited above,\textsuperscript{151} the court simply imported the federal EPA standard into the state statute claim without acknowledging that the New Jersey statute does not require a showing of "equal work" or even "comparable work."\textsuperscript{152} This is hardly encouraging for New Jersey women who want to bring claims under what appears to be a broad statutory scheme. When courts fail to interpret broad state statutes broadly, women will not see the courts as a place to go to vindicate their rights.

5. Bringing a State Law Claim

Despite the rather discouraging interpretation of state equal pay statutes to date, women who bring such claims are, for the most part, compelled to bring those claims in court. That being the case, there are reasons why a woman might find it preferable to bring a claim pursuant to a state equal pay law as opposed to a federal EPA claim.

First, with the exception of the eleven states that do not have a specific pay-equity statute, a plaintiff bringing an action pursuant to an equal pay statute will not be required to exhaust administrative remedies, such as she would be required to do in bringing most employment discrimination claims.\textsuperscript{153} While an individual seeking recovery pursuant to the federal EPA is not required to bring a complaint with the Equal Employment Opportunity Commission, she will lose the support of

\textit{Id.}

\textsuperscript{149} In Colorado and Hawaii, there are no reported cases showing how the courts would interpret their statutes.


\textsuperscript{151} \textit{See supra} note 125 and accompanying text.


\textsuperscript{153} Bass v. Great W. Savs. & Loan Ass'n, 130 Cal. Rptr. 123, 125 (Cal. Ct. App. 1976) (plaintiff was not required to exhaust administrative remedies prior to bringing a claim pursuant to the state's equal pay statute).
that agency if she fails to do so. If she intends to file a Title VII action in conjunction with her EPA claim, which most plaintiffs do, she must file either with the EEOC or her state’s human rights commission first. In addition, state human rights statutes usually contain similar limitations on court actions if the claimant fails to pursue her claim administratively before filing in court.

Second, many of the states have a process that requires the state department of labor to step in when it receives a complaint, conduct an investigation, and in some cases, bring an action on behalf of the plaintiff. Having the state act on behalf of the complainant is far less threatening than a plaintiff having to bring a complaint on her own or file a lawsuit.

In Connecticut, one of the policy statement states, for example, a woman can bring a claim pursuant to the equal pay law found in the labor statutes or pursuant to the Human Rights Act. If she brings her claim pursuant to the human rights provision, however, she must exhaust that administrative process before she can bring a civil action. If she brings her claim directly to the labor department she does not have to exhaust administrative remedies; the statute specifically gives her a private right of action independent of the labor department. She may prefer to have the labor department pursue the claim, especially considering the broad right of inspection given to the agency. In addition, she may assign her wage claim “in trust” to the commissioner, who is empowered to bring a legal action against her employer on her behalf. Being one step removed from the legal action and having the state act on her behalf provide crucial support to a woman who is reluctant to bring an action herself.


Individuals are not required to file an EPA charge with EEOC before filing a private lawsuit. However, charges may be filed with EEOC and some cases of wage discrimination also may be violations of Title VII. If an EPA charge is filed with EEOC, the procedure for filing is the same as for charges brought under Title VII. However, the time limits for filing in court are different under the EPA, thus, it is advisable to file a charge as soon as you become aware the EPA may have been violated.

Id.

155. Id.

156. In Maine, for example, an aggrieved individual seeking to bring an employment discrimination action pursuant to the Maine Human Rights Act must file a complaint with the Maine Human Rights Commission and, if the case is not resolved, request the Commission to issue a right-to-sue letter. 5 M.R.S.A. § 4612(6) (2002). If the claimant does not proceed through the Commission’s administrative process, she will be denied civil penal damages, compensatory damages, and punitive damages, as well as attorney’s fees if she prevails in court. Id. § 4622(1).

157. In Maine, for example, the state’s Bureau of Labor Standards upon receiving a complaint must conduct an investigation and determine whether there is “reasonable cause” to believe wage discrimination has occurred. Me. Dep’t of Lab. Reg. 12.170 § III(F)(1) & (2) (Nov. 19, 2001). See discussion infra Part IV. Among other states that allow or require the state agency to investigate a complaint and act on behalf of a complainant are Kentucky, New Jersey, North Dakota, and Ohio. KY. REV. STAT. ANN. § 337.427(4) (Banks-Baldwin 2002); N.J. STAT. ANN. § 34:11-56.4 (West 2002); N.D. CENT. CODE § 34.06.1-05 (2001); OHIO REV. CODE ANN. § 4111.17(D) (West 2002).


One would think that the greatest advantage that many of these states offer to women is that the standard of proof will not be as high as it is in federal court. For women in the states listed above that have a “comparable work” or “similar work” standard and in the states that do not set a standard at all, it should be easier to prove an equal pay claim than under the federal EPA. As discussed above, however, the courts interpreting these broader state statutes seem uncomfortable with standards beyond “equal work.” The Jancey case in Massachusetts, for example, sets a very high standard for plaintiffs to bring an equal pay claim, despite the fact that the state law in issue is one of the broadest in the country. 161

This could be one reason why women in these states are not bringing more equal pay cases. Officials in states with a “comparable work” or “policy statement” statute report that they do not receive complaints on which to act. 162 Even if they do receive calls from women complaining that they are not receiving equal pay, some states take the position that the state human rights commission is better equipped to handle such a case and refer the callers to those entities. 163

The courts’ failure to uphold state equal pay law claims suggests that there is a need to find a more welcoming forum. The states’ administrative processes could be the best solution for women seeking to bring equal pay claims. Kentucky and Maine are the only “comparable work” states that have regulations governing their equal pay statutes. Kentucky’s regulations, however, are almost a mirror image of the federal regulations governing the EPA, without provision for bringing an administrative claim. 164 Maine is the only “comparable work” state that provides an administrative process for bringing an equal pay claim. 165 Before discussing Maine’s administrative process, however, it is useful to touch briefly on the concept of “comparable worth,” which goes far beyond what was intended in the federal EPA as well as the state statutes.

161. See supra notes 129-37 and accompanying text.
162. A representative of Colorado’s Department of Labor and Employment is not aware of any complaints having been processed under its equal pay statute. E-mail from Dick Hernandez, Colo. Dept. of Labor and Employment (May 1, 2002, 11:22 A.M.) (on file with author). In Maryland, the Division of Employment Standards has not received a complaint in at least seven years. Telephone Interview with Richard Sebeck, Md. Div. of Employment Standards (June 14, 2002). According to a Labor Compliance Officer in Oklahoma, there has not been a complaint in seven years. Telephone Interview with Deborah Metheney, Okla. Dept. of Labor (June 13, 2002).
163. In Idaho, for example, the statute specifies that the Human Rights Commission will enforce the statute. IDAHO CODE § 44-1701 (Michie 2000). According to Fred Fromme, an investigator with the Human Rights Commission, the agency has not had a complaint in two years. Telephone interview with Fred Fromme, Idaho Human Rights Comm’n (July 18, 2002). In Illinois, the Fair Labor Standards Division refers wage discrimination claims to the state’s Human Rights Commission or the United States Department of Labor. Telephone interview with Mary Nagle, Dir. of Fair Labor Standards Div. of the Ill. Dept. of Labor (June 19, 2002). The Kentucky Division of Employment Standards has seen very few complaints and generally refers discrimination claims to the human rights commission. Telephone Interview with Marjorie Arnold, Ken. Div. of Employment Standards (June 21, 2002).
165. Nebraska, an “equal work” state, also has a regulatory scheme that allows an equal pay claimant to bring a claim through the administrative process. See NEB. ADMIN. CODE 139 § 003 (2002). This Article focuses on the broader “comparable work” standard among state laws and therefore does not discuss the “equal work” state statutes in detail. Women in states that provide an administrative process for bringing an equal pay claim, even under the stricter “equal work” standard, would probably find the process easier and might fare better than they would in court.
III. THE COMPARABLE WORTH DOCTRINE

There is perhaps no more controversial theory in the equal pay arena than that of "comparable worth," which has been defined as [a] theory holding that compensation for job classifications filled chiefly by women should be the same as for those classifications filled chiefly by men if the jobs, albeit dissimilar, are regarded as having equal value. According to this theory, workers' salaries should be calculated on a scale of socioeconomic value that transcends traditional supply and demand.166

Comparable worth advocates propose throwing out the market system of setting wages and replacing it with a system of objective job evaluation that would rank all jobs or key positions in a workplace to allow a comparison among jobs in terms of skill, effort, responsibility, and working conditions.167 "Employers would then raise the wages of workers in all jobs or in female-dominated jobs deemed to be underpaid on the basis of the evaluation (i.e., jobs having wages below other jobs with the same total scores on the attributes included in the evaluation)."168 It is easy to see why the comparable worth approach to wage setting has been so controversial.169 Indeed, efforts to pass comparable worth legislation in the United States Congress during the 1980s and 1990s failed.170

Comparable worth has not fared well as a legal theory in the pay equity battle. In American Federation of State, County, and Municipal Employees v. Washington,171 the Ninth Circuit Court of Appeals concluded that [t]he State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII, notwithstanding that the Willis study deemed the positions of comparable worth. Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees.172

In American Nurses' Ass'n v. Illinois,173 the plaintiffs brought suit against the state alleging that it paid workers in predominantly male jobs higher than workers in predominantly female jobs without there being any justified difference in the

167. Judge Posner has described comparable worth as "not a legal concept, but a shorthand expression for the movement to raise the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs." Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 719-20 (7th Cir. 1986). The opinion provides a thorough historical and cognitive analysis of the comparable worth theory. Id. at 719.
169. As Levine comments: the amount of controversy over comparable worth relates to its being about more than wages. In the view of some individuals, comparable worth "challenges basic cultural assumptions about the relative value of the activities of different groups in society." It also "would redistribute not only economic resources, but also labor market power to women workers."
Id. at 17 n.46 (quoting Ronnie J. Steinberg, A WANT OF HARMONY: PERSPECTIVES ON WAGE DISCRIMINATION AND COMPARABLE WORTH, in COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 24-25 (Helen Remick ed., 1984)).
170. Levine, supra note 10, at 15.
171. 770 F.2d 1401 (9th Cir. 1985).
172. Id. at 1408.
173. 783 F.2d 716 (7th Cir. 1986).
“relative worth” of the jobs.\textsuperscript{174} The court vacated summary judgment against the plaintiff class but was skeptical of its ability to prove that the State of Illinois was liable under Title VII on the ground it had failed to implement the results of a comparable worth study.\textsuperscript{175}

Several governmental entities have embraced comparable worth in the wage-setting of public employees with mixed results. For example, while Minnesota’s comparable worth program for state employees has resulted in an increase to women’s pay of 12%, Iowa’s comparable worth initiative resulted in only a 1.4% increase in wages for female state workers.\textsuperscript{176} In 1987, the Canadian province of Ontario enacted the Pay Equity Act, requiring private employers to apply comparable worth principles in establishing pay rates for male and female employees.\textsuperscript{177} A recent study of the effect of the law revealed disappointing results. The majority of smaller businesses (those with between ten and fifty employees)\textsuperscript{178} were not complying with the law.\textsuperscript{179} Women who worked for the businesses that complied with the law actually saw their incomes decrease slightly.\textsuperscript{180} From 1988 to 1998, there was not a significant decline in the gender wage gap, leading to the conclusion that the Pay Equity Act of 1987 had failed in its mission.\textsuperscript{181}

It is beyond the scope of this Article to provide a full analysis of the comparable worth doctrine. What is important, however, is to understand that “comparable worth” is not the same concept as “comparable work.” As set forth above, comparable worth embraces a radical departure from the market-based system of setting wages in order to create wage parity in male and female dominated occupations. This goes beyond the concept of “comparable work,” which is the legal standard set forth in several state statutes, including Maine’s, for a woman to assert that she is entitled to equal pay.

Putting the concepts on a spectrum, it could be said that the “equal work” standard set forth in the federal EPA and the majority of state statutes is on the conservative side of the spectrum of laws that provide a woman with the right to equal pay. A plaintiff must prove that her job is essentially identical to the job of a male comparator in order to succeed in her claim; any deviation between the jobs will likely mean that her claim will fail.

On the opposite side of the spectrum lies “comparable worth,” which is not concerned with whether men’s jobs and women’s jobs are substantively similar. Rather, the theory proposes that society place a value on every job, and jobs that are considered equally valuable should be paid the same. A secretary, for example, could be paid the same wage as a truck driver if there has been an objective determination that the skill, effort, responsibility, and working conditions for these two

\begin{itemize}
  \item \textsuperscript{174} Id. at 718.
  \item \textsuperscript{175} Id. at 730.
  \item \textsuperscript{176} Levine, supra note 10, at 22.
  \item \textsuperscript{178} The law does not apply to businesses with fewer than ten employees. Id. at 4.
  \item \textsuperscript{179} Id. at 8-9. Among the reasons for the noncompliance were confusion about the law, administrative costs of establishing a pay-equity plan, and lack of male comparators in an organization. Id.
  \item \textsuperscript{180} Id. at 21.
  \item \textsuperscript{181} Id. at 11. Proponents of comparable worth had predicted that the Ontario law would cause women’s wages to rise, leading to a decrease in the pay gap between men and women. Id.
\end{itemize}
very disparate jobs are similar and are considered to have equal value to their employer and to society as a whole.

The “comparable work” standard lies in the middle of this spectrum. A woman who claims that she is not being paid equal wages for work that is comparable to a male coworker is not required to meet the high standard of “equal work.” Nor can she rely on a theory that her employer should value the “worth” of her work as highly as a male coworker who is performing a very different job than she is. Rather, she must prove that the work she does is comparable to the male comparator. Differences in the jobs will not necessarily be fatal to her claim.

Exactly how to meet the comparable work standard remains largely unanswered. With the exception of the Massachusetts court\textsuperscript{182} that discussed comparable work, there is very little guidance as to how to support a claim for equal pay for comparable work. Maine’s rules governing its equal pay law provide employers and employees with some guidelines on how a claim for equal pay would be analyzed and resolved.

IV. MAINE’S EQUAL PAY RULES

As described above in Part II.A, the impetus for adopting rules to enforce Maine’s equal pay law was a 1996 study of poverty among working families in Maine.\textsuperscript{183} It did not escape the Commission To Study Poverty Among Working Parents that Maine has had a statute on its books since 1949 that ensures equal pay and which has gone largely unenforced.\textsuperscript{184}

The rules that were adopted in 2001 by the Bureau of Labor Standards established two major initiatives designed to enhance enforcement of the equal pay law. First, the rules set forth an administrative complaint process for a woman to press a claim for equal pay through the Bureau of Labor Standards. Second, the rules established a self-audit process for employers to determine if they are in compliance with the statute, and if done correctly, to obtain a presumption of compliance. These initiatives will be described in turn. In addition, the rules provide a definition section that establishes the meaning of terms that are important in the equal pay arena, such as “effort,” “job classification,” “responsibility,” “seniority system,” and “wages,” among other things.\textsuperscript{185}

A. Bringing a Complaint

The rule provides that an “aggrieved party” who believes she has been discriminated against in violation of Maine’s equal pay law may file a written com-


\textsuperscript{183}. See supra notes 35-37 and accompanying text.

\textsuperscript{184}. Commission To Study Poverty Among Working Parents, Report to the 117th Legislature 19 (Nov. 5, 1996). Strengthening enforcement of Maine’s equal pay law was just one of the recommendations made by the Commission, which was established to investigate “the extent to which poverty exists among working families, how poverty among working or underemployed parents contributes to the need for greater public assistance expenditure, and how economic development efforts and other public and private sector initiatives could reduce poverty.” Id. at 1.

\textsuperscript{185}. Code Me. R. § 12-170, ch. 12 (2001). The full text of the rules is appended to this Article.
plaint with the Bureau of Labor Standards. The Bureau will then determine if the facts, as alleged, state a claim for relief under the act. If the Bureau determines there is no claim, it will issue a dismissal with information on how the aggrieved party can pursue a private action; if the Bureau determines there are sufficient facts on which to base a claim, it will conduct an investigation. First, however, the Bureau must give the employer written notice of the complaint.

An important caveat to this notice provision is that an aggrieved party who wishes to prevent her employer from learning who has made the complaint can obtain confidentiality. The rule provides:

Where an aggrieved party requests confidentiality, the Bureau must make every effort to prevent the identity of the aggrieved party from becoming known to the employer except when doing so might compromise the Bureau’s ability to conduct its investigation. In such cases, the Bureau will advise the aggrieved party of its need to reveal his or her identity and, thereafter, allow that party an opportunity to withdraw the complaint before notification is given to the employer.

The Bureau will conduct its investigation to determine if “reasonable cause exists to believe that discrimination has occurred.” The employer is given an opportunity to respond to the complaint. The Bureau’s investigation “may include the examination of evidence probative of unlawful wage differentials such as a showing of pay differentials between employees with comparable skill, effort, and responsibility; and/or a showing that jobs within the employer’s workforce are segregated by gender.” The Bureau may hold hearings and has the right to subpoena witnesses and records.

The Bureau’s investigation will result in a finding of “reasonable cause” or “no reasonable cause.” If there is a finding of “no reasonable cause,” the Bureau will dismiss the complaint, issuing a notice explaining the employee’s right to bring a civil action against the employer. In the event of a finding of reasonable cause, the Bureau may determine whether it wants to obtain a “voluntary compliance agreement” with the employer or refer it to the Attorney General’s office to commence a civil action against the employer. The rule also provides the parties with the right to settle the case, including class-wide relief.

**B. Employers’ Self-Evaluation and Presumption of Compliance**

Subsection V of the rules provides employers with the opportunity to examine their businesses and determine if they are in compliance with Maine’s equal pay

186. *Id.* § III(A).
187. *Id.* § III(B).
188. *Id.*
189. *Id.* § III(C).
190. *Id.*
191. *Id.* § III(D).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* § III(F)(1), (2).
196. *Id.* § III(F)(2). The Bureau must issue a similar notice if it initially determines that the complaint fails to state facts to support a claim for relief, resulting in dismissal of the complaint. *Id.* § III(B).
197. *Id.* § III(F)(1)(a), (b).
198. *Id.* § III(G).
The primary means of doing such an evaluation involves the establishment of a “job evaluation plan as a means of determining the value of jobs within the establishment.” Such a plan must be free of gender bias, allow for comparison of all jobs within the entity, and “[f]ully and accurately measure the skill, effort, and responsibility of each job based on the actual work performance requirements of the jobs evaluated.”

Once the employer has established such a plan, it must apply it to all “or a significant sample” of jobs within the organization, focusing on jobs that are predominantly held by one gender. The rule goes on to require the employer to create a “job classification structure where jobs of equal value” are placed or grouped together. The employer must then determine the base pay differential between jobs that are occupied by one gender to those that are occupied by the other gender “in order to identify any wage rate discrimination.” If the employer finds discrimination, it must remedy any base pay differential, without reducing the pay of any employee or class of employees.

Assuming an employer can meet the requirements of subsection V, the employer is entitled to a presumption of compliance with the equal pay law. The rule goes on to provide that the presumption “may be strengthened” when it can be shown that the employer’s self-evaluation process was done in communication with all the employees within the establishment.

C. Where Does Maine Go from Here?

Maine’s rules are an excellent first step in establishing an administrative process that might actually encourage employees to bring claims and employers voluntarily to come into compliance with the equal pay statute. The administrative process provides the Bureau of Labor Standards with the key roles of investigating and resolving claims. The employee who brings a complaint is assured of as much confidentiality as can be afforded in the process. The rules provide an opportunity for negotiated resolution but retain the process for testimonial hearing and formal resolution with the right to appeal. In short, the rules have created a process that will allow employees to bring claims and employers to defend claims in an atmosphere that is less intimidating than court.

Moreover, the rules' emphasis on employer self-evaluation and the creation of a presumption are innovative attempts to create incentives for employers to comply with the equal pay law. The rules are lacking in specifics as to how employers should create a job-evaluation plan that will measure the skill, effort, and respons-

199. Id. § V(A)(3).
200. Id. § V(A)(3)(a)-(c).
201. Id. § V(A)(4).
202. Id. § V(A)(5).
203. Id. § V(A)(6).
204. Id. § V(A)(7).
205. Id. § V(A).
206. Id. § V(B).
207. A party affected by the Bureau’s decision has fifteen working days to appeal to the Commissioner of the Maine Department of Labor or the affected party can wait fifteen days, after which time the Bureau’s decision becomes final agency action. Id. § III(H). A final agency action, whether of the Bureau’s decision or the Commissioner’s decision on appeal, can be appealed to court pursuant to the Administrative Procedures Act. 5 M.R.S.A. § 11001(1) (2002).
sibility of each job within an organization. Although employers may find this lack of specific guidance frustrating, it is probably wise for the Bureau not to attempt to establish rigid job-evaluation approaches. In a state such as Maine with many small business owners, one size would not fit all. Maine employers should have flexibility in determining how to establish a job-evaluation system. Many would resort to the use of consultants, which could result in higher compliance rate. In Ontario, for example, employers who used experts to assist in establishing a plan to comply with the 1987 comparable worth law had a higher level of success in bringing about pay equity.208

As good as the rules are in setting forth a system for dealing with pay-equity claims, they will not be effective until employees and employers are aware of them and are willing to use them. The Bureau of Labor Standards has featured the equal pay law on its compliance posters for Maine employers. It must do more, however, to ensure that employees are aware of their right to bring a claim and also aware that there is an administrative process that makes bringing a claim less onerous than filing a lawsuit.

The Bureau should also do more to educate employers about the law and encourage them to engage in the self-evaluation process, emphasizing the presumption that results from a properly conducted job evaluation. Perhaps it is unrealistic to expect employers to engage in a self-evaluation process at present, as there have been very few claims in the past, and there seems to be little threat that claims will increase any time soon. If outreach efforts do not encourage employers to engage in the job evaluation process, the Bureau could consider using a random audit system to ensure compliance, much as it does in the child-labor context.209 There is nothing in the law or the rules that would prevent the Bureau from taking an active role in ensuring that employers understand their obligation to pay women equally for work that is comparable to their male colleagues.

V. CONCLUSION

It seems clear that the problem is not that there are not enough pay-equity laws on the books in this country. Rather, the problem is that the federal and state laws requiring a woman to show that her work is equal to that of a male colleague and providing a catch-all exception for not paying equal wages do little to help women obtain pay equity. The laws in states such as Maine that provide the easier "comparable work" statute also have not encouraged large numbers of women to bring claims for equal pay, nor have the courts upheld those rights with enthusiasm.

In addition to the lack of support from the courts, one reason that women do not bring pay equity claims under the state laws is their lack of awareness of these laws. It could be surmised that women who live in a "comparable work" state also have not encouraged large numbers of women to bring claims for equal pay, nor have the courts upheld those rights with enthusiasm.

208. BAKER & FORTIN, supra note 177, at 8.
these states to encourage women to bring these claims. Maine’s law has gone largely unnoticed since it was enacted in 1949. The 1996 Commission To Study Poverty Among Working Families discovered the law, resulting in a brief resurgence of interest. Since the rules went into effect in November 2001, however, the Bureau of Labor Standards has not seen an increase in claims.

Another reason for the lack of complaints is that it is a risky proposition for a woman to register any kind of discrimination complaint against her employer. In studying the Ontario comparable worth pay-equity law, which is applied to the private sector, the authors noted:

There is a sense in which the entire structure of the Ontario legislation is motivated by the failure of previous complaint-based pay equity laws to have any bite. In these programs, employees must register a complaint to trigger a comparison of male and female jobs and any consequent awards. Fears that most employees would be too intimidated to register a complaint led to criticism that these sorts of policies were impotent.

In short, even if it were easier to bring a claim or prove a case of wage discrimination, few women will register a complaint if they perceive that doing so will risk their jobs and possibly taint their careers. In Maine, the process has become easier for women, with the rules setting forth a user-friendly administrative process as well as the assurance of anonymity. Nevertheless, it still requires that a woman take affirmative action against her employer, which is not an easy thing to do.

Although the laws must provide remedies for women who are brave enough to bring a claim, in enforcing these statutes the states must not be wholly reliant on a complaint process to uncover noncompliance. The lack of incentives as well as the lack of punitive measures have thus far created an environment in which employers are free to pay male employees more than female employees doing equal or comparable work in the United States. Getting employers to play a role in complying with the law, whether through voluntary efforts or through an investigatory audit process, is key to furthering enforcement of pay-equity laws.

With rules that provide an easier process for women bringing complaints and a more encouraging reason for employers to comply with the law, Maine has taken positive steps to bring its equal pay statute to life. Perhaps other states, particularly those with a comparable work standard in their statute, will follow Maine’s lead and enact rules that encourage compliance with their pay-equity statutes. Such efforts could perhaps help shorten what has turned out to be a very long journey toward pay equity for women in this country.

210. See supra notes 162-63.
211. See supra notes 177-81.
APPENDIX

12-170 Chapter 12: Rules Relating to Equal Pay

I. Definitions.

As used in this chapter and in interpreting 26 MRSA § 628, unless the context clearly requires otherwise, the following terms have the following meanings:

A. "Aggrieved party" means any individual, group, or organization, including current or former employees, or a labor union, who has been injured, or whose members have been injured, by a practice alleged to violate 26 MRSA § 628 and these rules.

B. "Bureau" means the Department of Labor, Bureau of Labor Standards.

C. "Director" means the Director of the Bureau of Labor Standards.

D. "Effort" means the physical or mental exertion required for the performance of a job. Effort encompasses the total requirements of a job. Working conditions must be considered in making a determination of the degree of effort necessary to do a job to the extent reasonable and necessary.

E. "Employee" means every person who may be permitted, required, or directed by any employer to engage in any employment in consideration of direct or indirect gain or profit.

F. "Employer" means an individual, partnership, association, corporation, legal representative, political subdivision of the State, trustee, receiver, trustee in bankruptcy, and any express company or common carrier by rail, motor, water, or air doing business or operating within the State.

G. "Establishment" means an industrial or commercial facility or place of business. An entity operated by the same employer shall be considered a single establishment for purpose of this chapter even though it may operate at different physical locations, where employees at these separate locations are engaged in functionally similar operations and there is a substantial degree of central authority for establishing personnel rules and approving wage rates.

H. "Job classification" means one or more positions sufficiently similar with respect to duties and responsibilities so that the same descriptive title may be used with clarity to designate each position allocated to the class; the same general qualifications are needed for performance of the duties of the class; the same tests of fitness may be used to recruit employees; and the same schedule of pay can be applied with equity to all positions in the classification under the same or substantially the same employment conditions.
I. "Merit increase system" means an established, bona fide, uniform, and objective system which rewards an employee with promotion, pay increases, or other advantages on the basis of competence.

J. "Responsibility" means the degree of accountability and reliability required in the performance of a job, with emphasis on the importance of the job obligation, including but not limited to, coordination of information, organization, and the well being of individuals.

K. "Seniority system" means a system that gives preference to workers based on years of service. For example, a worker with more years of service may be paid more for performing a particular job than an employee with fewer years of service in that same job.

L. "Skill" means the performance requirements of the job including, but not limited to, such factors as experience, training, education, ability, human relations, and communication. In reviewing the skill level of a position class, the efficiency of any individual employee's performance in the job is not, in itself, a factor in evaluating skill.

M. "Wages" means all payments made to or on behalf of an employee as remuneration for employment. The term wages includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, or profit sharing. An expense account, monthly minimum, bonus, uniform cleaning allowance, board or lodging, use of company car, gasoline allowance, vacation and holiday pay and premium pay for work on weekends, holidays or other days, or hours in excess or outside of the employee's regular days or hours of work are also considered remuneration for employment under this chapter.

II. Equal Pay for Jobs with Comparable Requirements.

A. An employer shall not discriminate between employees within the same establishment on the basis of gender by paying wages to any employee in any occupation at a rate less than the rate paid to an employee of the opposite gender for comparable work on jobs with comparable requirements related to skill, effort, and responsibility.

B. Nothing in subsection A shall prohibit the payment of different wages to employees where such payment is made pursuant to any of the following:

1. A seniority system;

2. A merit increase system; or

3. A difference in the shift or time of day worked.
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Nonetheless, the preceding systems or circumstances must not be found to discriminate on the basis of gender.

III. Complaint Process

A. Any aggrieved party who believes that he or she has been discriminated against in violation of 26 MRSA § 628 may file a complaint with the Bureau of Labor Standards. The Bureau must provide the aggrieved party with a complaint form on which the aggrieved party shall state in writing the facts upon which the complaint is based and the harm suffered. The aggrieved party stating that the facts presented are true to the best of her or his knowledge must sign this form. The form should be sent to the Bureau's Wage and Hour Division. [Note: the address of the Wage and Hour Division is 45 State House Station, Augusta, ME 04333-0045.]

B. If the Bureau determines that the facts provided by the aggrieved party do not state a claim upon which relief can be granted under this chapter, it may dismiss the complaint but must keep confidential the name of the aggrieved party and employer involved. Written notice of any such dismissal must be given to the aggrieved party. The notice must also advise the aggrieved party of his or her right to bring a civil action under 26 MRSA § 628, how such action may be brought, the deadlines for filing such action, and any available attorney fees, should the aggrieved party prevail. The Bureau will not pursue an investigation following such dismissal unless new evidence is presented which, on review, supports the merits of the claim. The Bureau will not accept a new case nor reopen a previously reviewed case that is the subject of a civil action.

C. As soon as practicable, the Bureau must, except in those complaints dismissed under subsection B, provide written notice to the employer against whom allegations have been made that a complaint has been filed, along with such information as is reasonably sufficient for the employer to understand and respond to the complaint. Where an aggrieved party requests confidentiality, the Bureau must make every effort to prevent the identity of the aggrieved party from becoming known to the employer except when doing so might compromise the Bureau's ability to conduct its investigation. In such cases, the Bureau will advise the aggrieved party of its need to reveal his or her identity and, thereafter, allow that party an opportunity to withdraw the complaint before notification is given to the employer.

D. With respect to all complaints, except those dismissed under subsection B, the Bureau must conduct an investigation and determine if reasonable cause exists to believe that discrimination has occurred in violation of this chapter. The investigation shall include a request that the employer respond to the complaint, a review of the employer's self-evaluation, if any, including a determination of whether the self-evaluation meets the requirements of this chapter, and any relevant wage and personnel information. The investigation may include the examination of evidence probative of unlawful wage differentials such as a showing of...
pay differentials between employees with comparable skill, effort, and responsibility; and/or a showing that jobs within the employer's workforce are segregated by gender. As part of the investigation, the Bureau may hold fact-finding hearings as it deems necessary. Such hearings will be limited in scope to those issues that the Bureau believes to be in question. The Bureau has the right to subpoena the records of the employer and to interview witnesses under oath in the same manner as provided for under the Maine Administrative Procedure Act (5 MRSA § 8001 et seq.). The hearings may include an opportunity for both sides to present evidence and witnesses. If a party presents witnesses, a cross-examination will be allowed. Any follow up examination, if allowed, will be solely at the discretion of the hearing officer.

E. In the course of any investigation pursuant to this chapter, the Bureau will consider as confidential any and all information received, and may not divulge such information except as allowed in 26 MRSA § 3. Unless the parties agree otherwise, any negotiated settlement will be confidential.

F. At the conclusion of its investigation, the Bureau must make one of the following findings:

1. Reasonable Cause found. If the Bureau determines that there is reasonable cause to believe that discrimination has occurred under this chapter it may:
   a. Seek a voluntary compliance agreement signed by the employer that eliminates the unlawful practice and provides appropriate relief to the aggrieved party; or
   b. Refer the complaint to the Attorney General, informing the Attorney General of the relevant facts and recommending the commencement of a civil enforcement action.

2. No Reasonable Cause found. If the Bureau determines that there is no reasonable cause to believe that discrimination has occurred under this chapter the complaint will be dismissed.

Whenever a determination is made under this subsection, a written notice must be provided to the parties stating the action taken, the findings of fact, and the conclusions of law supporting that action. The notice must also advise the aggrieved party of his or her right to bring a civil action under 26 MRSA § 628, how such action may be brought, the deadlines for filing such action, and any available attorney fees should the aggrieved party prevail.

G. Prior to the issuance of a reasonable cause determination made under subsection F, the parties may settle the complaint on mutually agreeable terms. Such an agreement will not affect the processing of a complaint made by any other
aggrieved party, the allegations of which are like or related to the individual allegations settled.

Nothing in this subsection prevents the parties and the Bureau from agreeing to class-wide relief, provided that the Bureau determines that:

1. The aggrieved party is an adequate representative of the class; and
2. The proposed settlement fairly compensates the class as a whole and remedies the discrimination.

All members of the class must be notified in advance of, and be given an opportunity to comment on, the proposed settlement. Any member may withdraw from the class and continue to pursue relief in a private action.

H. Any person affected by a determination of the Director may appeal that determination to the Commissioner of Labor by filing a written notice with the Commissioner stating the specific grounds of that person’s objection within 15 working days from the issuance of the determination. After the 15 working days the determination is a final agency action.

IV. Presumption of Compliance.

A. Where an employer, charged under this chapter with unlawful discrimination, has completed a self evaluation which meets the standards set forth in Section V and can also make an affirmative showing that progress is being made towards removing or preventing wage differentials based on gender, in accordance with that evaluation, including implementing any required remediation plan, the Bureau will then presume that the employer has not engaged in gender discrimination in violation of this chapter.

B. In such cases, the Bureau must give the aggrieved party an opportunity to rebut this presumption through evidence which reasonably demonstrates that, notwithstanding the employer’s self-evaluation, the employer has violated this chapter. In meeting the burden of overcoming this presumption the aggrieved party may provide all relevant information including, but not limited to, evidence that:

1. The employer’s job analysis devalues attributes associated with jobs occupied predominantly by members of one gender and/or over-values attributes associated with jobs occupied predominantly by members of the other gender;

2. Notwithstanding non-discriminatory basic pay rates, periodic raises, bonuses, incentive payments, or other forms of remuneration differ between jobs occupied predominantly by members of one gender; or
3. The job the aggrieved party occupies was not adequately evaluated.

4. A job evaluation process has been completed and, if necessary, a remediation process is in progress or has been completed, but the self-evaluation has not been reviewed and updated at reasonable intervals to adjust for changes in the work environment over time.

C. An employer wishing to avail themselves of this presumption must produce documentation describing the self-evaluation process in the detail necessary to show that they have met the standards under Section V, subsection A.

V. Employer Self-Evaluation.

A. In order to be eligible for the presumption of compliance in accordance with Section IV, the self-evaluation must:

1. Clearly define the establishment in accordance with Section I, subsection G;

2. Analyze the employee population to identify possible areas of pay discrimination;

3. Establish a job evaluation plan as a means of determining the value of jobs within the establishment. The plan must:

   a. Be free of any gender bias;

   b. Allow for the comparison of all jobs; and

   c. Fully and accurately measure the skill, effort, and responsibility of each job based on the actual work performance requirements of the jobs evaluated;

4. Apply the job evaluation plan to all or a significant sample of jobs, focusing on those that are predominately occupied by one gender;

5. Create a job classification structure where jobs of equal value are placed in the same level or grouping;

6. Determine the base pay differential between jobs that are predominately occupied by one gender to those predominately occupied by the other gender, in order to identify any wage rate discrimination; and

7. Remedy any base pay differential identified in subsection 6. In order to meet this standard, such remediation may not reduce the pay of any employee or class of employees.
B. The presumption of compliance may be strengthened where, throughout the self-evaluation, including any needed remediation, the employer maintains communication with and keeps employees apprised of the established process. The method and procedure for that communication may vary according to the size and organizational structure of the establishment. However, any method or procedure chosen should be adequate to reach all employees at the establishment.