



# Considerations for Urgent Care Operators on Equal Pay Legislation and Enforcement

**Urgent message:** As we see a shift to an overwhelming female workforce in urgent care, it is essential that urgent care operators understand the conditions of, and develop policies to be compliant with, employment laws requiring equal pay among genders.

ALAN A. AYERS, MBA, MAcc

## Introduction

Many urgent care centers already pay the same hourly rate for all advanced clinical practitioners (PAs and NPs), but that “commoditizes” the work and eliminates any leverage an owner may have for individuals who have greater experience, credentials, or tenure with the organization. It also creates complexity related to current market wages, such as the issue of whether everyone’s pay must be increased the next time someone is hired at a higher rate.

This topic is especially important to urgent care centers where the workforce is predominately female. Today, 74% of physician assistants,<sup>1</sup> 90% of nurse practitioners,<sup>2</sup> and 90% of medical assistants<sup>3</sup> are women. (See **Figure 1**.) This is a change from when the workforce consisted primarily of physicians. Further, only 25% of emergency medicine physicians are female, and about 38% of new emergency medicine residents are women. As a result, the percentage of women in emergency medicine will continue to rise for some time.<sup>4</sup>

In this changing environment, urgent care operators must be aware of employment law concerning equal pay so they can take steps to assure compliance and prevent litigation.

## What Is the Equal Pay Act?

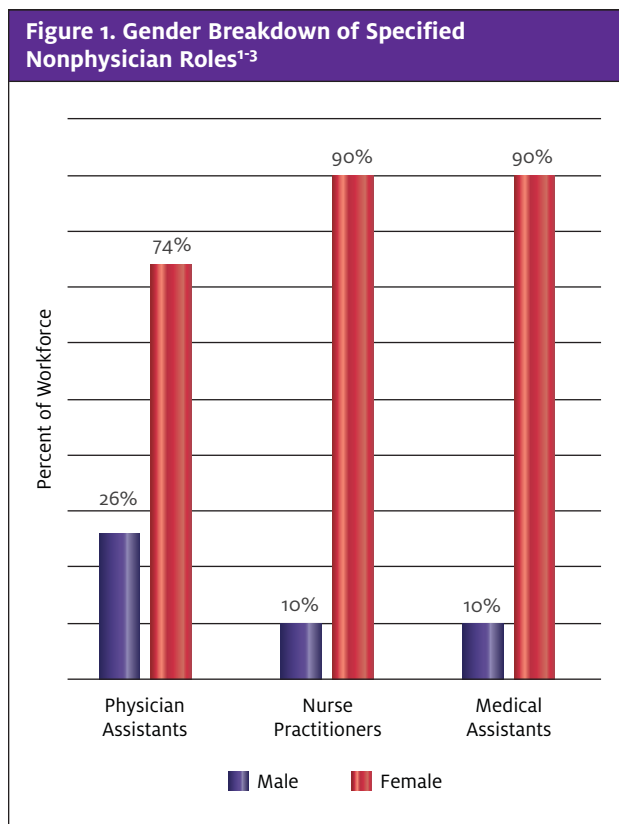
The Equal Pay Act of 1963<sup>5</sup> amended the Fair Labor Standards Act,<sup>6</sup> designed to abolish wage disparity based on sex. The Act was signed into law on June 10, 1963, by President John F. Kennedy. The Fair Labor Standards



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Act (FLSA) established minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.<sup>6</sup> The Equal Pay Act prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.<sup>5</sup>

Alan A. Ayers, MBA, MAcc is President of Experity Networks and is Senior Editor, Practice Management of *The Journal of Urgent Care Medicine*. The author has no relevant financial relationships with any commercial interests.



### To Whom Does the Equal Pay Act Apply?

The Equal Pay Act applies to all employers regardless of how many workers they employ. The law regulates the conduct of state, local, and federal governments, as well as most private employers.<sup>7</sup>

The Equal Pay Act—which is not gender-specific—does not require an intent to discriminate; thus, the fact that an employer did not know its actions were discriminatory is irrelevant. The remedies for an employee who successfully sues under the federal law are back pay and penalties.<sup>8</sup> Once an Equal Pay Act plaintiff proves their prima facie case, the burden of proof switches to the employer to prove the pay difference is the result of one of the four statutory exceptions.<sup>9-11</sup>

Those exceptions are found in settings where payment is made under a seniority system; a merit system; a system in which earnings are determined “by quantity or quality of production”; or a system “based on any other factor other than sex.”<sup>5</sup> Further, the law does not allow for an employer to “fix” a meritless wage differential by lowering the earnings of the more highly compensated employee.<sup>5</sup>

In addition to the federal law, many states also have

similar protections for employees and, in some cases, are more restrictive than the federal law in terms of the defenses that an employer can submit.

For example, since 1949, the California Equal Pay Act has prohibited an employer from paying its employees less than employees of the opposite sex for equal work.<sup>12</sup> California’s amended Equal Pay Act prohibits an employer from paying any of its employees wage rates that are less than what it pays employees of the opposite sex, or of another race, or of another ethnicity for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”<sup>13</sup>

### How Can an Employer Assure Their Compliance with the Equal Pay Act?

To comply with the Equal Pay Act, an employer can’t pay a person of one gender who’s doing the same or substantially the same work as another employee of the opposite gender less money. Thus, an employer treats men and women equally by placing employees in positions in the same location that require equal skill, effort, responsibility, and job duties to be performed under similar working conditions.<sup>14</sup>

However, satisfying those requirements may be difficult for small businesses because of the fact that many employees regardless of gender perform more than one job or function. In these cases, the employer should document the reasons employees are doing the jobs and being paid the wages. Along the lines of the “four exceptions” described previously, a business owner can accomplish this by the following steps:

- Ensuring there’s a seniority system in place
- Adhering to a seniority system
- Implementing a merit system
- Measuring quantity and quality of production and including the results in employee earnings or wage incentive plans
- Any other factors or reasons not based on sex<sup>11</sup>

### Practical Considerations

#### Pregnancy

Federal laws prohibit compensation discrimination on the basis of pregnancy.<sup>15-17</sup> These laws also prohibit compensation discrimination on the basis of race, color, national origin, religion, sex (including pregnancy, childbirth and related medical conditions, transgender status, gender identity, sexual orientation, and sex stereotyping), age (over 40), marital status, political affiliation, and disability.<sup>18</sup>

## Need-based pay

An urgent care owner may offer a father with three children and a stay-at-home wife a higher pay rate than other providers in the same role because he “needs” the money. Or an urgent care owner retains a poorly performing employee, a single mother of a child with special needs, despite separating other providers whose performance wasn’t quite as problematic. However, if those employers receiving less pay can make a prima facie case of wage discrimination, the urgent care may be found liable for damages. In fact, the claimant may have an open-and-shut case if the employer openly admits that pay for some employees is based on need rather than objective criteria.<sup>19</sup>

Again, to bring a claim under the Equal Pay Act, an employee must show that two employees are receiving different wages for performing substantially equal work in the same establishment and under similar working conditions.<sup>20</sup>

## Takeaway

Urgent care owners should implement and adhere to a seniority system and a merit system. They should measure the quantity and quality of an employee’s work, and not consider any factors or reasons that are not based on sex.<sup>21</sup> ■

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## The Equal Pay Act of 1963—An Excerpt

### SEC. 206. [Section 6]

#### (d) Prohibition of sex discrimination

(1) 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 (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: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

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