



## Okay to limit holiday pay to specific employee class?

### Question

We are in the construction industry. Can hourly clerical personnel be paid holiday pay when the hourly yard and field employees are not?

### Response

Strictly speaking there is no federal or state employment law that prohibits an employer from offering paid holiday benefits to clerical office staff and not to yard or field workers. Indeed, notwithstanding any statutory obligations related to health insurance, employers are generally free to determine which categories of workers receive which benefits or perks, and to our knowledge employers can offer different benefits and perks to employees who work in different capacities, so long as the criteria for doing so is not unlawfully discriminatory (i.e., not based on factors such as age, race, gender, religion, or union status, etc.).

Strictly speaking from an employment law standpoint, seeking to give (or actually giving) some employees (or even just one) better or preferential fringe benefits or other "perks" and not others is not per se unlawful in all cases and is in some cases permitted. To be sure, what you propose is a form of discrimination, but it would not constitute UNLAWFUL discrimination unless the basis for offering the holiday benefits are the clerical employees' membership in a protected class (or the exclusion of the yard/field employees from the benefit is based on their protected class status). For example, if you offered the holiday benefits to Caucasian employees, but did not for a similarly situated Hispanic employee, this could create exposure to a claim for unlawful national origin discrimination (though defensible if there is a legitimate justification). If, however, the basis for offering the proposed enhanced fringe benefits or perks is legitimate and non-discriminatory (i.e., perhaps the offer is necessary to compete in the marketplace with other clerical workers, or in some cases an offer of a particular benefit may be necessary to secure a particularly talented worker, or to reward a certain amount of tenure), then on its face such a policy does not appear to be unlawfully discriminatory (although in cases of any tenure-based perk, these should be provided to all employees who are similarly situated and have been employed at least as long, though admittedly this is not the situation you describe).

Be aware that if a neutral offer of a better or more enhanced benefit to certain individuals (or just one) visits a negative effect on a particular protected group, it, too, could be considered unlawfully discriminatory under a theory of disparate impact. In this regard, if the hourly, clerical team is a homogeneous group (i.e., female) and the hourly field/yard employees are all or primarily outside that classification (i.e., male), then there is at least potential exposure to a claim of unlawful discriminatory disparate impact, though as noted the employer may be able to defend against such a claim if there are reasonable, lawful factors other gender and legitimate business purposes supporting the employer's policy. The best practice, of course, is to simply have uniform paid holiday policies and apply them consistently to all similarly situated employees. Even where an employer's decision to offer better or enhanced benefits, perks, privileges, terms and conditions to one employee or a group of employees is lawful, such action could still create employee relations/morale issues if co-workers (yard/field employees) learn that they do not enjoy the same, and who may become resentful towards the clerical employees who do, and/or to the employer who allowed or offered them. Any new or revised policy should be clearly communicated in advance of its implementation. Want to learn more? Click [here](#) to listen to our podcast on holiday pay practices.