

## Massachusetts Passes Comprehensive Pay Equity Legislation

This August, Governor Charlie Baker signed S.2119, An Act to Establish Pay Equity, into Massachusetts law, one of most comprehensive pay equity laws in the United States. The law will go into effect on July 1, 2018.

The new law establishes a definition for comparable work, promotes salary transparency, prohibits employers from seeking salary history from prospective employees, and encourages companies to conduct audits to detect pay disparities.

### *Definition of Comparable Work*

While the federal Equal Pay Act requires that men and women receive equal pay for equal work, Massachusetts' law has always required equal pay for "comparable" work. The new law provides a definition of "comparable work" and provides a number of factors that allow for variations in wages.

Under the new law, "comparable work" is defined as work that is substantially similar in that it requires substantially similar skill, effort and responsibility, and is performed under similar working conditions. Job title or description alone is not determinative of comparability.

In addition, while the current law provides that variations in wages is not prohibited when based on seniority, the new law provides a number of additional factors that allow for variations in wages, including:

- ◆ seniority, provided that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority;
- ◆ a merit system;
- ◆ a system which measures earnings by quantity or quality of production, sales, or revenue;
- ◆ geographic location in which a job is performed;
- ◆ education, training or experience to the extent such factors are reasonably related to the particular job in question; or

- ◆ travel, if the travel is a regular and necessary condition of the particular job.

Importantly, an employer cannot reduce the wages of any employee solely in order to comply with the law.

### *Salary Transparency*

The new law prohibits policies or practices that ban employees from inquiring about, discussing or disclosing information about either their own wages, or about any other employee's wages. The law does not require an employer to disclose an employee's salary to another employee or third party, and allows employers to prohibit human resources employees, supervisors, or other employees with access to compensation information from disclosing such information in the absence of written authorization from the affected employee.

Employers may also not discharge or otherwise retaliate against an employee who has inquired about another employee's compensation, or engaged in certain protected conduct (participating in an investigation or opposing gender-based wage differences).

### *Prohibitions on the Use of Salary History*

The pay equity law is the first in the nation to make it unlawful for an employer to seek the salary or wage history of a prospective employee (or from the prospective employee's former employer) during the hiring process. Companies should revise any applications that request such information and train all interviewers not to seek such information during the hiring process.

However, the law does allow employers to confirm prior wages or salary of a prospective employee if that person has voluntarily disclosed the information or after an offer of employment.

### *Audit of Pay Practices*

Massachusetts will also be the first state to specifically provide protection in the general laws for

businesses if they conduct a good faith audit of pay practices and undertake steps to correct pay discrepancies. An employer shall have an affirmative defense to liability under M.G.L. c. 149, section 105A(b) and to any pay discrimination claim under M.G.L. c. 151B, section 4 if it has completed a self-evaluation of its pay practices within the previous three years prior to the commencement of the action, and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any existed.

While the new law does not provide guidelines for how the self-evaluation must be conducted, it must be “reasonable in detail and scope in light of the size of the employer” or “consistent with standard templates or forms issued by the attorney general.” If the self-evaluation is found not to be reasonable, an employer is not entitled to the affirmative defense, but cannot be liable for liquidated damages.

This provision of the new law provides that evidence of a self-evaluation or remedial steps taken will not be admissible evidence of a pay equity or pay discrimination claim under Massachusetts law in certain circumstances. A self-evaluation is not admissible as evidence of a violation of the law, provided that the alleged violation of the law occurred before the date of the self-evaluation or either (i) within six months after the self-evaluation or (ii) two years after the evaluation if the employer can show that it has developed and begun to implement, in good faith, a plan to address wage differentials. The fact that an employer has not completed a self-evaluation does not subject the employer to a negative inference for not having done so.

However, the law does not provide that such evidence cannot be used to support a claim of discrimination or pay equity violation under federal law or under the law of another state. Therefore, it is critical that employers involve counsel in order to protect the self-evaluation process from discovery.

*This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the Massachusetts Act to Establish Pay Equity, please contact Joe Laferrera or Elisa Filman at (617) 350-6800 or email us at [joe.laferrera@gesmer.com](mailto:joe.laferrera@gesmer.com) or [elisa.filman@gesmer.com](mailto:elisa.filman@gesmer.com).*

## *Penalties*

Under the new law, there are multiple options for enforcement. The law allows both employees and Massachusetts’ Attorney General the right to sue, and to bring claims on behalf of themselves and other “similarly situated” employees (i.e., class actions). Successful claimants may be awarded unpaid wages, liquidated damages for 100% of the amount of the unpaid wages (i.e., doubling of the unpaid wages), and attorneys’ fees and costs. Notably, unlike other claims for workplace discrimination, employees will not be required to file with the Massachusetts Commission Against Discrimination or the Equal Employment Opportunities Commission prior to filing suit in court, and claims under the new law are subject to a three year statute of limitations.

The Act also incorporates language from the federal Lily Ledbetter Fair Pay Act, which provides that a violation occurs for statute of limitation purposes when “an employee is affected by application of a discriminatory compensation decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice.” This means that even if the original compensation decision or practice occurred more than three years ago, the statute of limitations – and the viability of a claim by an employee – is renewed with each new paycheck.

## *So What Should Employers Do?*

While the law does not go into effect until July 1, 2018, employers should begin to review their policies and compensations practices, prepare for a self-evaluation or pay audit, and review existing employment applications and pre-employment inquiries. Employers should review employee handbooks and policies and consider implementing training programs relating to hiring practices to ensure compliance with the new law. In preparing for a pay audit or self-evaluation, we recommend that employers involve counsel to protect the process by the attorney-client privilege and work product doctrine.



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