

FYI[®] Alert

For Your Information[®]

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Massachusetts Enacts Expansive Equal Pay Law

On August 1, Massachusetts Governor Charlie Baker signed into law one of the most far-reaching equal pay laws in the country. The Act to Establish Pay Equity is intended to significantly expand the commonwealth’s Equal Pay Act by increasing wage transparency and closing the wage gap between men and women. To minimize potential exposure to pay equity claims, employers should consider whether they have wage disparities that need to be addressed before the law takes effect on July 1, 2018.

Background

The [Massachusetts Equal Pay Act](#) (MEPA) requires both public and private employers to provide equal pay for men and women “for work of like or comparable character or work on like or comparable operations” unless wage differentials are based on seniority. However, it does not define “comparable.” Courts have construed the term narrowly, and fashioned a two-part test to determine whether the work of two jobs is “comparable” and requires equal pay. First, the actual job duties must have “important common characteristics” and second, the two jobs must require comparable skill, effort, responsibility and working conditions.

Pay Equity Act

On August 1, Massachusetts Governor Charlie Baker signed into law [An Act to Establish Pay Equity](#). The new law makes three key changes to MEPA, intended to increase wage transparency and close the gender pay gap.

First, the law expands the definition of “comparable work” to include any work that is “substantially similar” in content and requires “substantially similar” skill, effort and responsibility performed under similar working conditions (including reasonable shift differentials). While the new law generally prohibits gender-based pay disparities, it allows for wage variations based on: seniority (provided seniority is not reduced by time on leave for pregnancy-related conditions or protected parental, family and medical leave); a merit system; a system that measures earnings by quantity or quality of production, sales or revenue; geographic location; education, training or experience if reasonably job-related; and travel, if that is a regular and necessary condition of the job. Notably, employers cannot rely



solely on job titles or descriptions to determine whether work is comparable, or use pay cuts that eliminate wage differentials solely to comply with the new law.

Second, the new law prohibits employers from requesting or requiring an applicant's current pay or salary history prior to a job offer. Once an employment offer that includes salary has been made, employers may seek or confirm a prospective employee's wage or salary history. This provision effectively prevents employers from using salary in applicant screening, evaluating an applicant's candidacy, or formulating a job offer. If, however, an applicant voluntarily offers salary information at any stage of the hiring process, a prospective employer may take steps to confirm or allow the prospective employee to confirm it.

Comment. Massachusetts employers will have to review their job applications and hiring practices to determine what, if any, changes they may have to make to comply with the new prohibition on requesting or requiring wage disclosures. Multistate employers that use standard applications will also want to consider whether any changes may be needed to ensure compliance.

Third, the legislation aims to promote pay transparency by making it unlawful for an employer to prohibit employees from discussing wages with their coworkers. While existing federal law provides similar protections, the new law clarifies that employees can ask about, discuss or disclose their own or other employees' wage information without retribution by their employer. It also creates a private right of action when an employer violates this provision.

There are, however, certain limitations on wage disclosures. Employers may prohibit managers and supervisors from disclosing information about the employer's pay practices or salary grids. Further, an employer may bar an employee whose job responsibilities provide access to other employees' wage information (such as human resources employees) from disclosing nonpublic information without the employee's written authorization.

Enforcement

The law also enhances MEPA's enforcement scheme and extends the statute of limitations for equal pay claims from one to three years. Under the new law, a violation occurs each time a discriminatory compensation decision or practice is adopted or an employee gets a paycheck affected by such a decision or practice.

Unlike other workplace discrimination claims under Massachusetts law, employees will not be required to file a complaint with the Massachusetts Commission Against Discrimination or the attorney general's office before filing a private action in court. Employees who bring suit will be entitled to the amount of unpaid wages, an equal amount in liquidated damages, and attorneys' fees, if they prevail. The attorney general may also bring an action on behalf of one or more employees for unpaid wages.

Targeting the Gender Wage Gap

The Massachusetts law reflects a growing emphasis on pay equity from coast to coast. California, New York and Maryland recently enacted broad equal pay laws. (See, for example, our [December 18, 2015 For Your Information](#).) At the federal level, the Equal Employment Opportunity Commission has proposed the expansion of EEO-1 reporting by employers with at least 100 employees (including federal contractors) to require wage data as part of the annual filing. (See our [For Your Information](#) publications from [February 26](#) and [July 19, 2016](#).)

Employer Self-Evaluations

The new law also incentivizes employers to proactively evaluate their pay practices. Employers that have completed “self-evaluations” of their pay practices within the past three years and can show “that reasonable progress has been made towards eliminating compensation differentials based on gender” may use those evaluations as an “affirmative defense” to a pay equity claim. Importantly, neither an employer’s self-evaluation nor remedial steps taken can be used against the employer to prove a violation that occurred before the evaluation was completed, within six months thereafter, or within two years thereafter if the employer has developed and begun implementing a plan to address gender-based wage differentials.

As long as the self-evaluation is “reasonable in detail and scope” given the employer’s size, employers may design their own evaluation. Alternatively, employers may use templates or forms to be issued by the attorney general’s office, which is charged with administering the statute. Because the new law does not provide a standard for determining the reasonableness of an employer’s self-evaluation or progress in eliminating pay disparities, employers will have to look to the attorney general’s office and the courts for guidance.

More to Come?

The new law also created a special commission to analyze the causes and effects of pay disparities based on race, color, religious creed, national origin, gender identity, sexual orientation, genetic information, ancestry, disability and military status. The commission is charged with submitting initial findings to the legislature by January 1, 2019.

In Closing

The new law requires men and women to be paid equally for “substantially similar” work, and imposes broader equal pay obligations on employers. Massachusetts employers and multistate employers with operations in the commonwealth will want to review their employment applications, personnel policies and pay practices to ensure compliance.

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