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A Closer Look at Massachusetts's Pay Equity Law

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We recently reported on the sweeping pay equity legislation that garnered much attention throughout the most recent legislative session in Massachusetts. After much anticipation, this week Governor Charlie Baker signed the Act to Establish Pay Equity, a significant law that will affect all employers with employees in the state. The final version of the law will go into effect on July 1, 2018, giving employers ample breathing room to analyze and assess their compliance and consider conducting pay equity self-evaluations as outlined in the law.

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- Employers are prohibited from discriminating on the basis of gender in the payment of wages and other compensation for "comparable" work. 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." This arguably broadens prior law, which was interpreted to require work of comparable content *and* substantially similar skill, effort, and responsibility.
- Pay variations are not prohibited if they are based on:
  seniority with the employer (though time spent on leave due to pregnancy, and protected parental, family, and medical leaves may not reduce such seniority);
  a merit-based system;
  a system that measures the quantity or quality of production, sales, or revenue;
  the geographic location where the job is being performed;
  education, training, or experience, to the extent those factors are reasonably related to the particular job; or
  travel, if travel is a regular and necessary part of the job.
- Employers may not reduce the wages of an employee for the sole purpose of complying with the law. (In other words, an employer may not lower the salary of a male employee to make it comparable to that of a female employee in an equivalent position.)
- An employee's previous wage or salary history may not be used as a defense to a claim made under the law.
- The new law does not contain a defense similar to the "bona fide factor other than sex" defense available to employers defending federal claims under the Equal Pay Act of 1963.
- Employers may not prohibit employees from inquiring about, discussing, or disclosing their own wages or another employee's wages (though employers are not obligated to disclose an employee's wages to another employee or a third party). The law, however, 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 are prohibited from seeking the wage or salary history of an applicant from the applicant's current or former employer. However, if the applicant voluntarily discloses the information in writing, the employer may confirm the prior wage or salary or permit the applicant to provide confirming information. In addition, an employer may seek or confirm an applicant's wage or salary history *after* an offer of employment with compensation has been negotiated and made to the applicant.
- Employers may not discharge or otherwise retaliate against an employee because he or she has engaged in certain protected conduct (for example, opposing gender-based wage differentials or participating in an investigation).
- An employer that is defending against an action under the act and that has, within the previous three years and prior to the commencement of the legal claim, completed a self-evaluation of its pay practices in good faith and can demonstrate that it has made "reasonable progress" towards eliminating gender-based wage differentials can offer that as an affirmative defense to claims under the law. The self-evaluation may be of the employer's own design as long as it is reasonable in detail and scope given the size of the employer. (If the evaluation is not reasonable in detail and scope, it

cannot be used as an affirmative defense to a claim, but it can still prevent the employer from being liable for liquidated damages, which are otherwise available under the law.) The self-evaluation defense is unique to Massachusetts and could be an excellent tool to protect companies in the event of litigation down the line.

- A self-evaluation is not admissible as evidence of a violation of the law, provided that the alleged violation of the law occurred (i) *before* the date of the self-evaluation *or* 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 gender-based wage differentials.
- The fact that an employer has not completed a self-evaluation does not subject the employer, under the new law, to a negative inference for not having done so.
- Notably, employers may not enter into agreements with employees to avoid complying with the provisions of the law.
- Employees have multiple options for enforcement under the law, including filing single plaintiff or class-action litigation or pursuing a claim through the state Attorney General. Available damages include unpaid wages, liquidated damages (i.e., doubling of the unpaid wages), and attorneys' fees. Unlike other claims for workplace discrimination under Massachusetts law, plaintiffs will not be required to file with the Massachusetts Commission Against Discrimination prior to filing suit in court.
- The statute of limitations for a claim will be three years after the date of the alleged violation. The law defines "alleged violation" somewhat broadly to include (1) when the alleged discriminatory compensation decision and/or practice was adopted; (2) when the employee became subject to the alleged discriminatory compensation decision and/or practice; or (3) when the employee was affected by the application of the alleged discriminatory pay decision and/or practice, including *each time wages were paid* (when the wages result from the alleged discrimination). This effectively means that the statute of limitations is reset with every paycheck, similar to the extended statute of limitations under the federal Lilly Ledbetter Fair Pay Act of 2009.

Employers with employees in Massachusetts may want to take the following steps in light of the new law:

- Assess whether a self-evaluation in compliance with the law would be appropriate, and consider whether such an audit should be done under the protection of the attorney-client privilege.
- Review existing employment applications and pre-employment inquiries to determine whether they contain wage history questions that will be unlawful under the new law, and consider how best to implement necessary changes.
- Review hiring practices to determine whether human resources, recruiters, or managers are currently seeking wage and salary history from applicants, and consider implementing training programs to change those practices as of the 2018 effective date.
- Consider whether existing handbooks and/or policies will need to be updated to comply with the new law.
- Review existing pay structures to determine whether it is necessary or advantageous to make any systematic changes to the way in which wages and salaries are determined.

- Watch for a sample workplace poster from the Massachusetts Attorney General's Office, which may be distributed prior to the July 1, 2018 effective date. The legislation also authorizes the Attorney General to issue regulations implementing the new law, so additional guidance may become available prior to the law's effective date.

Massachusetts employees are expected to focus on this law, as it has received much attention since it was signed. Although it will not go into effect until July 1, 2018, employees may have questions prior to that time. Employers should become familiar with the requirements of the law and consider how it will impact their workplace practices. Moreover, while July 1, 2018 is a long way off, pay audits can take time to design and conduct, and even more time may be needed to implement any changes, so the 2018 implementation date should be seen as providing employers a good opportunity to review and correct any possible imbalances in their compensation practices.

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