

Massachusetts Passes Pay Equity Act

By Joseph T. Bartulis, Esq.

Most employers have been focusing on the changes to the Exempt Employee Classifications for overtime that were to have gone into effect on December 1, but another important act was also signed into law this year. It is called the Massachusetts Pay Equity Act. Although the Pay Equity Act will not go into effect until July 1, 2018, employers should familiarize themselves with the law and take whatever actions may be necessary to ensure they are compliant with the law by that date. Here are the key elements of the Pay Equity Act.

SAME PAY FOR “COMPARABLE WORK”

The cornerstone of the Pay Equity Act is its requirement that both men and women be paid the same rate for “comparable work.” This “comparable work” standard is different from the standard in the federal Equal Pay Act, which requires equal pay for the “same work.” As to what constitutes “comparable work,” the statute defines that phrase as work which is “substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.” The law does not provide further guidance on how it defines “substantially similar” in the context of “comparable work.”

PAY VARIATIONS ALLOWED UNDER CERTAIN CIRCUMSTANCES

Assuming a man and woman perform “comparable work,” an employer may still pay those two workers different rates if there are distinguishing characteristics between the two employees and those distinguishing characteristics are among those specifically enumerated in the Pay Equity Act. The act allows employers to pay employees differently, based on the following factors:

- Seniority
- Merit
- Production, sales, or revenue quantity or quality
- Geographic location
- Differences in education, experience, or training (so long as reasonably related to the job being performed)
- Differences in amount of job-related travel

EMPLOYEES MAY OPENLY DISCUSS WAGES

Under the Pay Equity Act,

- Massachusetts employers may no longer prohibit employees from discussing or disclosing their wages among themselves.
- Employees are not *required* to provide their pay information to another employee who may ask.

- Employers are not obligated to provide information about one employee’s pay to another employee or any other third party.
- Employers may prohibit their human resources staff from disclosing employee pay information.

EMPLOYERS MAY NOT ASK ABOUT SALARY HISTORY

- Most important, the act prohibits employers from requesting prior or current wage information from prospective employees or applicants. (There has been some discussion about how this provision will make it difficult for employers to determine the proper rate of pay needed to attract a prospective employee without overpaying.)
- However, if an applicant volunteers what he or she earns, the prospective employer can request verification of that information.

COURT ACTIONS

Other discrimination claims brought in Massachusetts generally require that a person first bring the case before the Massachusetts Commission Against Discrimination (MCAD). But the Pay Equity Act allows both employees and applicants to bring wage disparity cases directly to court without first having to exhaust administrative remedies at the MCAD. The statute of limitations for cases brought under this act is three years from the date of the alleged violation. Also unlike other discrimination claims, the Pay Equity Act contains an affirmative defense for employers to defend pay inequity claims. For an employer to avail itself of the affirmative defense 1) the employer must have conducted a self-evaluation of its pay practices within the three years immediately preceding the filing of the case; and 2) assuming any gender pay disparities were found, the employer must be making reasonable progress toward eliminating those pay gaps. Employers that have not conducted self-evaluations will not be subjected to any negative inference in the court case for not having done so.

The remedy to correct pay disparities is not to reduce the wages of a higher-paid male. The statute contemplates such action and expressly prohibits employers from doing so. The statute does not provide any guidance regarding how an employer should conduct its self-evaluation or how quickly the progress must be made. All that is required is that the progress be reasonable. The statute allows, but does not require, the Attorney General’s Office to generate regulations regarding the self-evaluation protocols and other aspects of the Act. As of this writing, the Attorney General has not indicated whether any such

regulations or guidance will be forthcoming. If the employee or applicant prevails in a pay disparity suit, the possible remedies include the unpaid wages, liquidated damages equal to the amount of the unpaid wages, reasonable attorney's fees, and certain other costs.

SUGGESTIONS FOR MASSACHUSETTS EMPLOYERS

While July 1, 2018 may seem like a long way off, identifying and correcting any pay disparities may take a long time. With that in mind, employers should begin preparing for the law sooner rather than later by doing a pay practice audit of their organization. Although there is language in the statute affording protections for employers that act in good faith when conducting their self-evaluation, we suggest employers consider having their attorney assist with the audit so that the findings of the audit are protected by the attorney-client privilege. This way, the findings are not subject to disclosure in a legal proceeding, which constitutes a potentially valuable protection for employers. Next, we suggest that employers

review and analyze their pre-employment practices, including applications, interview questions, etc. to make sure that they do not, on July 1, 2018, contain any requests for current wage information that the new law will prohibit. In addition, employers may wish to re-think their methodology for determining the ideal rate-of-pay offers they make to prospective employees, since asking for their salary history will no longer be permitted. **FT**

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