

Massachusetts Enacts New Pay Equity Law

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On August 1, 2016, Massachusetts Governor Charlie Baker signed a new pay equity act (the “Act”) into law. The Act, which goes into effect on July 1, 2018, is designed to close the wage gap between men and women. Although Massachusetts already had a pay parity law that prohibits wage discrimination, the Act provides greater clarity on what constitutes unlawful pay discrimination and imposes new rules and restrictions on employers.

First, the Act clarifies what it means to discriminate against workers who perform “comparable work” to others. While the current statute prohibits pay discrimination where workers perform “comparable work,” it does not define that term. Under the Act, comparable work is defined to be work that requires “substantially similar skill, effort and responsibility and is performed under similar working conditions.” The Act, however, does not define “substantially similar,” so that term will still be subject to interpretation by either the Attorney General’s Office or courts.

Second, whereas seniority was the only stated basis for paying variable wages under the old law, the Act recognizes six justifications for pay disparities where workers perform comparable work. Variations in pay are permissible under the Act if based upon: (1) a seniority system, provided that job-protected leave does not reduce seniority; (2) a merit system; (3) a system measuring quality or quantity of production, sales or revenue; (4) geographic location of where the job is performed; (5) education, training, or experience to the extent these factors reasonably relate to the job at issue; and (6) travel, if travel is a regular and necessary condition of the job.

Third, the Act includes new prohibitions on what employers may ask prospective employees about their wage history. Under the new law, employers may not seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or require that applicants meet certain salary criteria to be eligible for a job. This provision, however, includes an important caveat: prospective employees may authorize a prospective employer to verify salary history, and prospective employers may confirm salary history after an offer with compensation has been negotiated and made to a prospective employee.

Fourth, the Act makes it unlawful for employers to prohibit employees from discussing or disclosing information about their own wages, or the wages of other employees.

Fifth, the Act establishes an affirmative defense for employers who have audited their pay practices within the prior three years. Specifically, employers who voluntarily evaluate their pay practices and “demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work,” have an affirmative defense to pay discrimination claims, so long as the evaluations were reasonable in detail and scope. At the same time, the law prohibits courts from drawing an adverse inference against employers who have not done a voluntary audit.

Sixth, the Act enhances the enforcement scheme of the previous law. The statute of limitations has been extended from one year to three years. The new law also allows employees to go directly to court with their pay discrimination claims without first bringing a complaint to the Massachusetts Commission Against Discrimination or the Attorney General’s Office.

Pay equity has been a topic of significant interest of late both locally and nationally. Massachusetts Attorney General Maura Healey in particular has made pay equity a priority of her office and has been using her enforcement powers to audit employer pay practices to detect and address discrimination. Accordingly, employers should expect that the Attorney General’s scrutiny of discriminatory pay disparities will only increase when the Act goes into effect. Now more than ever, employers should take time to review and evaluate their compensation practices to identify and remedy discriminatory pay disparities, and to take advantage of the new affirmative defense

discussed above. They should also review hiring practices to ensure that they are not making impermissible inquiries into the pay histories of prospective employees. They also should review employee handbooks and other policies to ensure that they do not inhibit employees from discussing their compensation, as such a prohibition not only violates the Act, but also federal labor law.

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