Massachusetts Attorney General Releases Guidance on Equal Pay Act

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The Massachusetts Attorney General (the "AG") recently released her long-awaited guidance regarding the 2016 overhaul of the Massachusetts Equal Pay Act (the "Act"), which takes effect on July 1, 2018. (For a summary of the Act's key provisions, click here.) The Act, which, among other things, prohibits employers from paying employees of different genders differently for comparable work, has left employers with many questions as to how its provisions would be interpreted and enforced. While the AG's guidance does not provide the concrete interpretation of the Act many employers were hoping for, it does give employers greater clarity on many of the Act's more ambiguous provisions. In particular, the guidance shows that the AG will interpret the terms of the Act broadly and highlights the important role employer self-evaluations of pay practices will play in defending against claims under the Act.

Covered Employees

While the Act provides that employees who have a "primary place of work" in Massachusetts are subject to the Act, it was unclear at the time of the Act's passage how that statutory term would apply to employees with non-traditional working arrangements, such as employees who travel extensively, telecommute, or work in multiple locations. The guidance provides further explanation as to how the AG will apply the law in these scenarios, offering an expansive view of what it means to have a "primary place of work" in Massachusetts.

According to the AG, an employee who travels for work has a "primary place of work" in Massachusetts if he or she returns regularly to a Massachusetts "base of operations" before resuming his or her business travel. Similarly, a telecommuting employee whose work arrangements are made through a Massachusetts work site will be covered by the Act, even if the employee is not physically present in Massachusetts while telecommuting. The guidance also explains that an employee will be covered if he or she spends a plurality of his or her time in the Commonwealth; Massachusetts does not need to be the place where the employee does a majority of his or her work for the Act to apply. Finally, the AG will deem employees who permanently relocate to Massachusetts to have a primary place of work in Massachusetts on their first day of actual work in Massachusetts.

Comparable Work

The concept of "comparable work" is the centerpiece of the Act, but the statute's definition of the term as work that requires "substantially similar skill, effort, and responsibility" is far from precise. Accordingly, the AG's guidance endeavors to provide more clarity as to what "comparable work" means.

According to the AG, "substantially similar" means "alike to a great or significant extent," but does not mean "identical or alike in all respects." As such, "[m]inor differences in skill, effort, or responsibility will not prevent two jobs from being considered comparable."

"Skill," the AG explains, includes the "experience, training, education, and ability required to perform the job." For example, the AG opines that janitors and food service staff in a school setting may require comparable skills, even if the jobs are substantively different, because neither job requires prior experience or specialized training. Moreover, skill is measured only by skills that are necessary to the job, not the skills an individual employee happens to have.

"Effort" means the amount of physical and mental exertion required to perform the job. Thus, according to the AG, a job that requires standing all day and an office job where workers spend their day seated do not require substantially similar effort, but two jobs involving substantively different work, such as janitorial and food service jobs, may be comparable because they often require the same amount of physical exertion. Effort also looks to job factors that cause mental fatigue or stress.

"Responsibility," the AG provides, is to be measured by the degree of discretion or accountability in a job, and includes factors such as how much supervision the employee receives or gives others and how much the employee is involved in decision-making. For example, a job that requires an employee to sign legal or financial documents may not be comparable to a job that merely requires employees to draft such documents without being personally accountable for errors contained in them.

When comparing working conditions, the AG advises that the physical surroundings to be considered include the elements regularly encountered by a worker while performing a job, such as extreme temperatures and noise, and the intensity or frequency of those elements. The AG also advises that an employer should consider the frequency with which workers come across workplace hazards such as chemicals, fumes, electricity, heights, dangerous equipment and other factors, and the severity of injuries that these hazards could cause. Importantly, the guidance affirms that shift differentials are permissible under the Act where they are based on meaningful differences between the days and times of scheduled shifts.

Permissible Variations in Pay

The AG's guidance clarifies the six permissible bases for pay differentials that are set forth in the Act. According to the AG:

- A "system that rewards seniority with the employer" must recognize and compensate employees based on length of service with the employer.
- A "merit system" must provide for variations in pay based on legitimate, job-related criteria.
- A "system that measures earnings by quantity or quality of production, sales, or revenue" is a system that provides for variations in pay based upon the quantity or quality of the employee's individual production (e.g. piecemeal pay or hours worked) or sales and other revenue generation (e.g., commissions) in a uniform, reasonably objective fashion.
- The geographic location of the job may constitute a valid reason for variation in pay if the cost of living or the relevant labor markets differ from one location to another.
- Employee travel will justify a pay differential if it is a regular and necessary condition for the job. Variations in pay based on travel are not permitted where there are alternatives to that travel, the travel is part of an employee's regular commute, or the travel is based on the employee's preference to travel.
- Education, training, and experience will justify variations in pay if they are reasonably related to the job in question and, at the time the employee's wages were determined, a reasonable employer could have concluded the skills would be valuable in the particular job.

Further, the AG clarifies that a "system" is a "plan, policy or practice that is predetermined or predefined; used by managers or others to make compensation decisions; and uniformly applied in good faith without regarding to gender." In other words, ad hoc explanations for pay differentials will not pass muster under the Act.

Importantly, the AG plainly states that changes within a labor market or other market forces will not justify unlawful pay differentials. Nor will the fact that the employer lacked the intent to discriminate based on sex be a defense to a claim that the Act has been violated.

Prohibition on Seeking Pay History

The AG's guidance confirms that the Act's prohibition on seeking the pay history of prospective employees will be broadly interpreted. Employers cannot avoid the prohibition by obtaining pay history information from an agent, such as a recruiter or staffing company, nor can they request that prospective employees "volunteer" information about their pay history. Moreover, multistate employers who search for employees nationally cannot ask about applicant pay history if there is a possibility that the individual will be chosen or assigned to work in Massachusetts.

However, the AG guidance indicates that certain compensation-related inquiries are still permissible. First, an employer may still ask a prospective employee about their salary requirements or expectations without violating the Act. Second, an employer may ask about the prior volume or quantity of previous sales by a prospective employee in a sales field, as long as the inquiry does not touch upon the individual's earnings from the sales. Third, an employer may consult public sources to learn about an employee's pay history.

Affirmative Defenses for Employers

Finally, the AG's guidance provides some explanation of the affirmative defenses to liability available to employers. Under the Act, an employer has a complete defense to liability if it can show that it undertook a "good-faith self-evaluation of its pay practices" that was "reasonable in detail and scope" within the previous three years and before an action is filed and that it has made "reasonable progress" towards "eliminating unlawful pay disparities." If the self-evaluation is not "reasonable in detail and scope" but meets all other requirements, the employer has a partial defense that allows it to escape liability for liquidated damages. Although still somewhat amorphous, the AG elaborates on the key statutory language:

- **Good faith**: To be in "good faith," the self-evaluation must be conducted in a genuine attempt to identify unlawful pay disparities. A self-evaluation conducted to achieve pre-determined results or justify disparities is not a good faith self-evaluation.
- **Reasonable in detail and scope**: Whether an evaluation is reasonable in detail and scope will depend on the size and complexity of the employer's workforce, looking at factors such as (1) whether the evaluation includes a reasonable number of jobs and employees; (2) whether the evaluation takes into account relevant information; and (3) whether the evaluation is reasonably sophisticated in its analysis of comparable jobs, employee compensation, and the permissible reasons for pay disparities set forth in the Act. The guidance also provides useful templates and checklists to guide employers in conducting reasonable self-evaluations, including a Pay Calculation Tool employers may use to detect pay disparities within comparable job classifications. These documents make clear that some level of statistical analysis is necessary for a self-evaluation to be reasonable in the eyes of the AG.
- **Reasonable progress**: Reasonable progress, for the purposes of the affirmative defense, means that the employer has taken meaningful steps toward eliminating unlawful pay disparities. Such a determination will depend on (1) how much time has passed since the evaluation; (2) the degree of progress made compared to the scope of the problems identified, and (3) the size and resources of the employer.
- **Eliminating unlawful pay disparities**: The AG interprets this phrase to mean adjusting employee's pay so that employees performing comparable work are paid equally, but eliminating unlawful pay disparities does not require employers to pay employees retroactively for historical disparities.

Importantly, the guidance states that a self-evaluation must address the employee or job at issue in order for the employees to make use of the affirmative defense to a claim under the Act or the Massachusetts anti-discrimination statute.

Conclusion

While some provisions of the Act remain vague, the AG's guidance answers many of the questions employers have had since the passage of the Act, and gives employers a preview of how the AG will enforce it. As we advised in our previous alert on this topic, Attorney General Maura Healey has made pay equity one of her top priorities, so employers should expect robust enforcement efforts beginning on July 1, 2018. In the meantime, employers should take advantage of the time before the Act goes into effect to review their compensation and handbook policies to make sure they are compliant with the Act. Moreover, employers will want to consult with their counsel to determine whether conducting a self-evaluation makes sense for their organization and, if so, to begin taking steps to design and conduct a self-evaluation that can potentially shield them from liability under the Act.

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