SEYFARTH SHAW

Management Alert

Massachusetts House Passes Pay Equity Bill; Final Law Expected Soon

By Barry Miller, Daniel Klein, and Hillary Massey

Seyfarth Synopsis: *On July 14, 2016, the Massachusetts House of Representatives passed its own version of a pay equity bill after the Senate passed its version in January. The two versions will now go to committee to be reconciled for presentation to the Governor, likely by the end of this month.*

The Massachusetts House of Representatives unanimously passed a pay equity bill on July 14, 2016. A conference committee will now resolve the differences between the House version and the Senate version, which was approved in January (also unanimously). The final version will be presented to Governor Charlie Baker for signature. Although Governor Baker has not indicated his position, he is expected to sign the law, especially in light of the fact that employer groups including Associated Industries of Massachusetts support the House version, with the Greater Boston Chamber of Commerce supporting the Senate version.

Similarities Between House and Senate Versions

The general goal of the law is clear -- making it illegal for employers to pay employees different wages based on their gender -- and the two versions have much in common. For example, both would:

- become effective July 1, 2018;
- prohibit wage discrimination for "comparable work";
- prohibit employers from reducing the pay of any employee in order to comply with the law;
- require employers to permit employees to talk with each other about wages;
- permit wage differentials based on:
  - a seniority system,
  - a merit system,
  - a system that measures earnings by quantity or quality of production or sales,
  - geographic location in which a job is performed,
  - education, training or experience to the extent such factors are reasonably related to the particular job in question, or
  - travel, if the travel is a regular and necessary condition of the particular job;

- provide a defense (under state law) for employers that complete "reasonable" self-audits "in good faith" and make "reasonable progress" toward addressing wage gaps;
- prohibit retaliation; and
- be enforced by the Massachusetts Attorney General's Office, in addition to providing employees with a private right of action.

Among these changes, the "comparable work" standard is particularly significant. Historically, both the existing Massachusetts pay equity statute and the federal Equal Pay Act have been construed to require "equal pay" for "equal work," and have not permitted employees to pursue complaints by comparing themselves to employees in other jobs with similar duties or qualifications. The comparable work standard expands employers' obligations to ensure equal pay across different jobs, and while it remains to be seen how this requirement will be applied, it is almost certain to result in litigation over which distinct positions within an employer's workforce are "comparable."

The good faith defense provided by both pending bills is also new and unique. The legislation provides no definition or standards for "reasonable" audits or "reasonable progress" in remediating any disparities revealed by such audits. This may also be the subject of litigation in the years following the law's effective date.

Differences to be Reconciled

The differences between the House and Senate versions are significant, and it remains to be seen where the final version will land. For example, the Senate bill prohibits employers from seeking prior salary information from prospective employees and from following up on such information, even if volunteered by the applicant. The House version contains exceptions for voluntarily-offered information. Either of these provisions would create restrictions on Massachusetts employers in the hiring process that are more stringent than in any other state.

The justifications for wage differentials are also different in a way that may be meaningful. For example, while the Senate version permits differences based on "bona fide" seniority and merit systems, the House version omits the qualifier "bona fide," arguably sparing employers some additional burden of proving that their compensation systems are legitimate, in addition to showing that they are gender-neutral.

Finally, while both versions establish an affirmative defense for employers who complete a reasonable self-evaluation within 3 years prior to litigation and demonstrate reasonable progress toward eliminating differentials, the House version further provides that employers who can demonstrate the existence of an evaluation and progress, but not that the evaluation was reasonable in detail and scope, are not liable for liquidated damages.

Recommendations for Employers

In light of the impending law, we recommend that employers:

- designate a pay equity champion to stay abreast of the developments in the law;
- consult with legal counsel about the risks and rewards of conducting a self-audit (while the rewards may be obvious, possible risks include that the results of the audit will be used against the company in litigation under the federal Equal Pay Act); and
- once the law is final, revise hiring and pay practices to ensure compliance with the law.

If you would like further information, please contact your Seyfarth attorney, Barry Miller at bmiller@seyfarth.com, Daniel Klein at dklein@seyfarth.com, or Hillary Massey at hmassey@seyfarth.com.

www.seyfarth.com