



TIPS ON AVOIDING WAGE AND HOUR LAWSUITS IN MASSACHUSETTS

Tip #2: Consider Conducting a Pay Equity Audit

Effective July 1, 2018, the Massachusetts Equal Pay Act (the “Act”) requires employers to pay employees of different genders equal wages for comparable work unless the difference in pay is explained by the Act’s enumerated factors. Employers who cannot explain any impermissible wage differentials must take active steps to remediate the disparity in a “timely fashion” according to the Attorney General’s guidance on the Act.

The Act also provides an affirmative defense to Equal Pay claims for an employer that has (1) completed a self-evaluation of its pay practices that is “reasonable in detail and scope in light of the size of the employer” within the three years prior to commencement of the action; and (2) made “reasonable progress” toward eliminating pay differentials uncovered by the evaluation. The Attorney General’s guidance describes “reasonable progress” as taking “meaningful steps” in a “reasonable amount of time” that will be evaluated based on “how much time has passed, the nature and degree of its progress as compared to the scope of the disparities identified, and the size and resources of the employer.” To be eligible for the affirmative defense, employers do not have to pay employees retroactively for historic disparities.

Employers should make an informed decision about whether to conduct an audit. Audits are a valuable exercise when performed properly. They allow employers to identify and alleviate risks, and can be used to substantiate an affirmative defense under some state-level pay equity laws.

However, if not adequately protected, an audit might be used against an employer in litigation under the federal Equal Pay Act or Title VII, which do not provide a similar affirmative defense. Thus, employers should work with counsel in order to protect the assessment process and results with the attorney-client privilege. Without these protections, a self-evaluation (and any wage differentials identified by it) may be discoverable in the event of a lawsuit.

Employers conducting audits should also ensure the audits are as comprehensive in scope as the data allows, based on a methodology vetted by appropriate legal and economic experts. Employers should take special care at the outset of the audit in determining appropriate groups of employees for comparison purposes, and should consider conducting a statistical analysis as well as an individual-level assessment of employee pay.

Counsel with experience and expertise in pay equity matters can play a valuable role in shaping the scope and procedure for an audit to maximize its utility in identifying disparities that may become legal disputes, and to ensure that the work product generated by the audit will make for effective evidence, if it is ever needed for use in court.

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