

One Minute Memo®



Massachusetts Governor Signs Stringent Pay Equity Requirements, Effective in 2018

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Seyfarth Synopsis: On August 1, 2016, Massachusetts Governor Charlie Baker signed a bill that will amend the Commonwealth's pay equity law effective in 2018. The changes will make the law one of the most stringent in the country and will impose new restrictions on employers' pay and hiring practices.

On August 1, 2016, Massachusetts Governor Charlie Baker signed into law major changes to the Massachusetts Equal Pay Act, Mass. General Laws c. 149 section 105A. As previously discussed [here](#), the House and Senate passed different versions of the amendment, which were resolved in committee. The new law will take effect in 2018 and will be enforced by the Massachusetts Attorney General's Office. Employees also will have a private right of action.

New Justifications for Wage Differentials

The existing Massachusetts pay equity statute requires "equal pay" for "equal work." The new law, in contrast, will prohibit differences in pay for "comparable work," which is defined as work that is "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." This "comparable work" standard will expand employers' obligations to ensure equal pay across different jobs in ways that are difficult to predict, as the standard is vague and will have to be applied by courts in litigation after the new law takes effect. While the Attorney General may promulgate regulations to interpret the term, she is not required to do so, and there is no timetable for any such regulations to be issued.

Under the new law, an employer can avoid liability for a wage differential between employees of opposite genders only if it can establish that the difference is based on one of the following factors:

- a system that rewards seniority; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority
- a merit system;
- a system which measures earnings by quantity or quality of production, sales, or revenue;
- 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; and
- travel, if the travel is a regular and necessary condition of the particular job.

As with the definition of “comparable work,” these terms are each amenable to a range of interpretations. For example, it remains to be seen how detailed or regimented an employer’s practices must be in order to qualify as “a system that rewards seniority” or a “system which measures earnings by quantity or quality.” An employee’s previous wage or salary history is not a defense to a claim of wage discrimination, and unlike federal law, the Massachusetts statute has no catchall defenses for wage differentials based “any factor other than sex.”

The new law also prohibits employers from reducing the wages of any employee in order to eliminate wage differentials.

“Wages” are defined broadly to include “all forms of remuneration for employment.”

Wage Disclosures and Requests

In one of its most unique provisions, the new law will prohibit Massachusetts employers from requesting the compensation history of a prospective employee prior to making an offer, unless the prospective employee has “voluntarily” disclosed such information. This makes the Massachusetts statute one of the most aggressive in a recent wave of state-level pay equity laws. This provision will require employers to revise job applications that request prior compensation information. At a minimum, such applications will have to note that providing such information is voluntary.

When it takes effect, the new law also will make it unlawful for employers to prohibit employees from discussing or disclosing their own or other employees’ wages.

New Self-Evaluation Defense

The new law creates an affirmative defense to wage discrimination 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 new law contains no information on what is required to establish that an audit is “reasonable” or what constitutes “reasonable progress” in remediating any disparities revealed by such audits. These standards are likely to be addressed in the courts after the effective date of the new law and may also be the subject of guidance from the Attorney General.

Evidence of an employer’s self-evaluation or remedial steps undertaken in accordance with the new law is not admissible as evidence of any violation of *Massachusetts* law in some circumstances.

While the new self-evaluation defense may have advantages, it also creates risks. Any evaluation used to substantiate a defense under state law might be used against a company in litigation under federal law, which provides no similar defense. Thus, we recommend employers seeking to take advantage of this defense under state law work closely with legal counsel in conducting any audit.

Damages

As with the existing law, employers who violate the new law will be liable for unpaid wages, an equal amount as liquidated damages, and attorneys' fees. However, employers will be liable for damages over a longer period of time, as the new law extends the statute of limitations from the existing one-year period to three years after the date of the alleged violation. A pay violation occurs each time an employee is paid.

Next Steps for Employers

Employers should begin now to prepare for enforcement of the new law in 2018 by:

- Consulting with legal counsel, such as [Seyfarth Shaw's Pay Equity Group](#), about whether to conduct a pay equity audit;
- Revising their employment applications;
- Revising any policies that prohibit discussions of wages; and
- Training hiring managers, human resources professionals, and any managers that make decisions about compensation to ensure compliance with the new law.

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Seyfarth Shaw LLP One Minute Memo® | August 1, 2016

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