EQUAL PAY ACT TO BECOME EFFECTIVE IN JULY 2018

The Massachusetts Equal Pay Act becomes effective on July 1, 2018. It calls for all Massachusetts employers, irrespective of size, to pay men and women the same for comparable work. The new law, which amended G.L. c. 149, Section 105A, provides in pertinent part:

> "No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work."

This is a much broader standard than the federal equal pay law which calls for equal pay for equal work. The new law imposes strict liability, i.e., even if one believes in good faith that they are compliant but are not, one is liable for damages under the bill as enacted. Multiple damages, costs and attorneys' fees are recoverable by the employee, and the employee can sue in state Superior Court to recover these damages. The definition of "wages" is broad-based., i.e., it encompasses "all forms of remuneration for employment." This definition includes all forms of incentive pay, commissions, bonuses, profit-sharing, deferred compensation, vacation pay, retirement pay, insurance, expense accounts, and paid time off. Salary history has no affect under the law.

"Comparable work" is defined under the law as work requiring substantially similar skill, effort, and responsibility, and which is performed under similar working conditions. Minor differences in skill (experience, training, education and ability), effort (physical or mental exertion) or responsibility (degree of discretion or accountability), and working conditions (environment, hazards, shifts) will not prevent two jobs from being considered "comparable" as a matter of law. Also, job titles alone do not establish what may be considered comparable work under the law.

There are several systemic exceptions to the equal pay requirement which include seniority, a merit based system of pay, a system that measures earnings by quantity or quality of production, sales or revenue, the geographic location in which the job is performed, education, training and experience to the extent such are reasonably related to the particular job at issue, and travel requirements. The law defines a "system" as a "plan, policy, or practice that is predetermined or predefined and used by managers and others to make compensation decisions. It must be uniformly applied in "good faith without regard to gender."

These systems are defined as follows. A "seniority system" comprises "a system that recognizes and compensates employees based on length of service with the employer." A so-called "merit system" is "a system that provides for variations in pay based upon employee performance as measured through legitimate, job-related criteria." The Attorney Generals Guidance on the Act offers as an example of a merit system one which consists of a "written performance rating plan or policy that measures employee performance on a set scale from 'unsatisfactory' to 'exceeds expectations' and takes such ratings into account when setting salary. A systems that measures earnings by quantity or quality of "production, sales or revenue" is one allowing for variations in pay "based upon the quantity or quality of an employee's individual production…or sales or other revenue generation." This may include a commission structure of some sort. Pay differential may be allowable if based upon education, training and experience "that is

reasonably related to his or her job and thus a valid reason for paying that employee more than another employee performing comparable work[.]" The example provided by the Guidance is a situation where a bookkeeper has an advanced accounting degree vs. one that does not, as accounting skills are relevant to the job.

Geographic location may justify a pay variation where the cost of living or the relevant labor market differs. Where travel is a regular and necessary condition of one's job, it may justify pay disparities. Regular commuting to or from a work location, however, does not constitute "travel" for purposes of the law. Moreover, employees paid on an hourly basis may be paid more or less based upon the number of hours worked.

Under the law prospective employers may not seek a job applicant's salary history either from the applicant or the applicant's employer. Also, the law specifically states that "an employee's previous wage or salary history may not be used as a defense to a claim of unequal pay." Two very limited exceptions apply here: 1) to confirm wage history voluntarily shared by the prospective employee, and 2) after an offer of employment with compensation has been made to a prospective employee. This proscription means that employers may not seek salary history on their own either through an agent or job placement service company.

There is nothing in the law, however, which prohibits an employer from asking a prospective employee about his or her general compensation needs or expectations. Clearly, such inquiries must be done very done very carefully and succinctly to avoid running afoul of the law.

It is also important to note that under the new law employers "may not prohibit employees from discussing either their own wages or their coworkers' wages or from disclosing wage information to any person or entity." An employer may, however, prohibit human resource and supervisory personnel from discussing other employees' wage information.

The penalties for violation of the law include: (1) the amount of unpaid wages – that is, the amount the employee was underpaid; (2) double the unpaid amount, and (3) recovery of reasonable attorneys' fees and costs. Also, the law contains an "anti-retaliation" provision which prohibits the employer from attempting to "punish" the employee for reporting a violation of the law, or formally or informally complaining about same. Retaliation includes "any threat, discipline, discharge, demotion, suspension, or reduction in employee hours or compensation[.]"

Employers may protect themselves from liability by conducting a good faith self-evaluation of current pay practices within the previous three years. The objective must be to eliminate unlawful pay disparities among employees performing comparable work. Eliminating unlawful gender-based pay disparities means adjusting salaries/wages so that employees performing comparable work are paid the same.

Performing a good faith self-evaluation means that the employer makes a genuine attempt to identify any unlawful and unjustified pay disparities among employees performing comparable work, and to eliminate same. Determining which pay differentials may be acceptable should be done immediately in order to establish an "affirmative defense" to any claims under the law. "A self-evaluation that is conducted so as to achieve certain pre-determined results…or to justify known disparities likely will not qualify as good faith."

The Act provides a complete defense to any employer "that has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an action is filed against it." Whether a self-evaluation is reasonable under the law will depend upon the size, scope and complexity of the employer's workforce. Eliminating illegal pay disparities means adjusting pay for comparable work. The law does not allow and employer to reduce wages in order to do so. Retroactive pay for historical disparities is not required under the law.

The Attorney General's Guidance states: "Employers should consult with legal counsel about their options and what type of analysis is most appropriate for their organizations."

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