Pay Equity Becomes Law In Massachusetts

Insights
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On August 1, 2016, Massachusetts Governor Charlie Baker signed into law a comprehensive pay equity bill entitled The Act to Establish Pay Equity (the Act). This new law is part of a growing trend of state legislation aimed at the gender wage gap, with similar measures passing in California and New York in the past year. The Act will become effective on July 1, 2018, giving employers time to evaluate their pay practices and make necessary changes to comply with the law.

This Alert addresses the key provisions of this new law, including:

- Equal pay for "comparable work" and the factors which may legally justify "variations in wages";
- Prohibition on "pay secrecy policies" and rules for using salary history in the hiring process;
- Penalties for non-compliance; and
- "Self-evaluations" of compensation practices as a defense to liability.

Beyond Pay Discrimination—Equal Pay for "Comparable" Work
News of pay equity law leaves many employers scratching their heads—"I thought pay discrimination was already illegal?" Under the federal Equal Pay Act, Title VII of the Civil Rights Act, and Massachusetts' state discrimination law, M.G.L. ch. 151B, employers are already required to pay men and women the same for doing ***the same job***. However, the new Act goes further, requiring that men and women be paid the same for doing different but ***comparable jobs***.

The Act adopts the definition of "comparable work" from the Equal Pay Act, defining it as work that involves substantially similar skill, effort and responsibility and is performed under similar working conditions. Employers must look carefully at the duties actually performed by the employees rather than relying on "job descriptions alone" to determine comparability. While gender-based wage disparities are prohibited, The Act provides does allow for "variations in wages" based on:

- "a system that rewards seniority with the employer"—provided that time spent on leave due to "a pregnancy-related condition" or "protected parental, family and medical leave" cannot reduce seniority;
- a "merit system";
- a system which measures earnings "by quantity or quality of production, sales, or revenue";
- the geographic location in which a job is performed;

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- education, training or experience to the extent such factors are "reasonably related" to the job; or
- travel that is "a regular and necessary condition" of the job.

The Act also provides that employers cannot lower the compensation of employees "solely in order to comply" with the law, leaving open the possibility of wage cuts motivated at least in part by other factors.

Moving Toward Pay Transparency

The Act also bans any "pay secrecy" policy or practice which would prohibit employees from "inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages." However, just because an employee asks about other employees' compensation does not mean that employers are required to respond. The Act explicitly states that employers ***are not*** obligated to disclose an employee's wages to another employee or a third party. Employers cannot discharge or otherwise retaliate against an employee who has inquired about another employee's compensation or otherwise "opposed any act or practice made unlawful" under the Act.

The Act also includes significant changes to how an employer may use salary history in the hiring process. The Act provides that employers may not seek a prospective employee's salary history from the prospective employee or their current or former employer; it does not, however, prohibit employers from gathering information about a prospective employee's compensation from other publicly available sources. The Act also leaves open the possibility that a prospective employee may "voluntarily" disclose their salary history, and the employer may then "confirm" that salary history with the employee's former employer, but only after either the prospective employee has voluntarily disclosed wage or salary history, or after an offer of employment with compensation has been negotiated and made to the prospective employee.

Penalties For Non-Compliance

Employers found to be in violation of the Act face steep penalties. The Act grants both employees and the Massachusetts Attorney General the right to sue, and successful claims can win unpaid wages, liquidated damages for 100% the amount of the unpaid wages, plus attorneys' fees and costs. The Act also explicitly provides that employees may proceed on behalf of themselves and other "similarly situated" employees, opening the door for costly class actions.

The Act excludes pay equity claims from key requirements that apply to pay discrimination claims. Unlike pay discrimination claims under Title VII and M.G.L. c. 151B, employees can proceed directly to court; plaintiff employees need not file an administrative charge with the Equal Employment Opportunity Commission or the Massachusetts Commission Against Discrimination. Additionally, claims under the Act are granted a longer statute of limitations--three years rather than the 300 days for pay discrimination claims under Title VII and M.G.L. ch. 151B. The Equal Pay Act has a two or three year statute of limitations depending on whether the violation is willful. The Act also

incorporates language from the Lily Ledbetter Fair Pay Act, which provides that a "violation" occurs for statute of limitation purposes "each time wages are paid, resulting in whole or in part from a [discriminatory compensation] decision or practice". In other words, even if the original "discriminatory compensation decision or practice" occurred more than three years ago, the statute of limitations—and the litigation risk—is renewed with each new paycheck.

Self-Evaluations As A Defense For Employers

The Act does provide employers with an opportunity to defend against these costly claims. An employer that completes a "self-evaluation of its pay practices in good faith" and "can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work" is entitled to an affirmative defense to liability against a claim of wage discrepancy and to any claim of pay discrimination under M.G.L. c. 151B for a period of three years following the completion of the self-evaluation. The Act also provides that "evidence of a self-evaluation or remedial steps undertaken in accordance with [the Act]" will not be admissible evidence of a violation of the Act or M.G.L. c. 151B. The Act does not set out guidelines for how the self-evaluation must be conducted, only that it must be "reasonable in detail and scope in light of the size of the employer" or "consistent with standard templates or forms issued by the attorney general." Even where an employer's self-evaluation is found not to be reasonable under this standard, the employer is still exempted from the award of liquidated damages.

While these provisions provide key protections to employers who take steps to evaluate their compensation practices and remedy gender-based discrepancies, there are limitations to these protections. This affirmative defense does not extend to claims based on the Act's pay secrecy and salary history provisions, claims of pay discrimination under federal law, or pay equity violations under the laws of other states.

Conclusion

Although the Act does not go into effect until July 1, 2018, employers should start evaluating their compensation practices and preparing to conduct a self-evaluation to protect against costly litigation. Employers should consult counsel in making these preparations. While the Act provides that evidence of a self-evaluation or remedial steps taken to remedy any wage gap will not be admissible evidence of a pay equity or pay discrimination claim under Massachusetts law, it could still be used as evidence of a federal pay discrimination claim or a pay equity violation under the law of another state. Therefore, it is essential that employers involve counsel so that their self-evaluation process is protected by the attorney client privilege and work product doctrine. Employers should plan to conduct these self-evaluations on a regular schedule to ensure continued protection. Additionally, employers should examine their use of salary history in their hiring practices and make appropriate changes to comply with the Act.

The Massachusetts Attorney General "may", but is not required to, adopt regulations to effectuate this law, including issuing templates and forms for self-evaluations. We will provide an update if these regulations include additional obligations or clarifications regarding the new law.

If you have any questions about this new law or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Boston office at 617.722.0044.

This Legal Alert provides an overview of a specific new Massachusetts law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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