

MSADA Webinar: Pay Equity and Criminal History

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Presented by:

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Agenda

- **An Act to Establish Pay Equity**

- Effective July 1, 2018
 - Amends MA Fair Pay Act
 - Effort to try to eliminate gender “pay gap”
 - Requires men and women to be paid the same for “comparable” work

- **An Act Relative to Criminal Justice Reform**

- Effective October 13, 2018
 - Impacts inquiries MA employers can make about criminal backgrounds

An Act to Establish Pay Equity

- “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...”
- “Comparable” work:
 - substantially similar skill, effort, and responsibility; and
 - performed under similar working conditions.
- Job title or job description alone does not determine comparability.

What is included in “wages”?

- Broadly defined
- Includes all forms of remuneration
 - commissions, bonuses, profit sharing, deferred compensation, paid time off, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits
- Benefits plans excluded for purposes of calculating wages but employers should ensure all employees performing comparable work have same opportunity to participate on same terms

Lawful Reasons for Disparities

- System rewarding **seniority**, provided seniority is not reduced due to pregnancy or protected parental, family, or medical leave;
- **Merit** system;
- System measuring earnings by **quantity or quality** of production, sales, or revenue;
- **Education, training, or experience** to the extent reasonably related to the position;
- **Geographic location** in which a job is performed; or
- **Travel**, if regular and necessary for the business.

Massachusetts Pay Equity Law

- Cannot ask about salary/wage history
- Cannot prohibit or discipline employees for discussing wages
- Agreements and salary history no defense
- No retaliation
- Strict liability – no showing of intent necessary
- Expressly permits class action lawsuits
- Employers can be liable for double damages and attorneys' fees
- Extends 1 year statute of limitations to 3 years

Pay Audit as an Affirmative Defense

- MA Pay Equity Law provides employer affirmative defense – excuse from liability – if, within previous 3 years and prior to filing of legal action against it, employer:
 - completed a **good-faith self-evaluation**, reasonable in detail and scope, of its pay practices; and
 - can demonstrate **reasonable progress** in eliminating gender-based compensation differentials
- Employer that undertakes self-evaluation **not** reasonable in detail and scope, but **can** demonstrate reasonable progress in eliminating gender-based compensation differentials, not entitled to affirmative defense but only liable for amount of unpaid wages, not double damages

Reasonable scope and detail

- Depends on “**size**” of employer and “**complexity**” of workforce
- Relevant factors
 - Does evaluation include “reasonable” number of jobs and employees?
 - Does evaluation take into account “all reasonably relevant and available information”?
 - Is evaluation “reasonably sophisticated” in analysis of potentially comparable jobs, compensation, and 6 permissible reasons for pay disparities?
- Self-evaluation must have included the employee(s) or job(s) at issue

Reasonable scope and detail

- Guide to self-evaluations provides some advice for how to calculate whether men and women are paid equally
 - For small groups of employees performing comparable work, compare average wages earned by men and women to identify disparities (Pay Calculation Tool)
 - Statistical analysis may be necessary when number of employees in grouping exceeds 30 or the pay structure is “complex”
 - Consider whether outliers should be included in grouping
 - Consider conducting one-on-one comparisons
- Guide suggests: “Employers should consult with legal counsel about their options and what type of analysis is most appropriate.”

Reasonable progress

- Factors considered
 - How much **time** has passed since self-evaluation
 - **Nature and degree** of progress as compared to scope of disparities identified
 - **Size and resources** of employer
- Employer must demonstrate steps it takes will eliminate disparities in “reasonable” amount of time

Reasonable progress

- Adjust salaries or wages so employees performing comparable work paid equally
- Cannot *reduce* the wages of an employee to comply with the law
- *No requirement that employers pay employees retroactively to compensate for historical disparities to take advantage of defense*
 - However, employee might still have a claim under the federal Equal Pay Act or Title VII

Credit for trying

Guidance states that “whether or not an employer is eligible for an affirmative defense does not necessarily turn on whether a court ultimately agrees with the employer’s analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on **whether the self-evaluation was conducted in good faith and was reasonable in detail and scope.**”

Admissibility of pay audit and remedial steps

- Evidence of audit or remedial steps undertaken not admissible in MEPA or Chapter 151B (MA anti-discrimination law) in certain circumstances
- MA affirmative defense not available under federal law - Equal Pay Act or Title VII
- Evidence of audit or remedial steps may be admissible in suit alleging claims under federal law.
- Strongly recommend conducting audit with assistance of counsel

Anatomy of Pay Equity Audit

Step 1: Gather Relevant Data

- Name/employee ID
- Gender
- Primary work location
- Work type (full-time, part-time, temporary, etc.)
- Exempt/non-exempt status
- Date(s) of hire
- Job title
- Job code/grade/band
- Date in most recent job code/grade/band
- Division/department/business unit
- Job function/family
- Supervisor
- Performance ratings
- Highest level of education
- Special licences, certifications, etc.
- Pay type (salary, hourly, etc.)
- Annualized salary or hourly rate
- Shift differential
- Bonus eligibility
- Eligible benefit plans/programs
- Bonus paid
- Hours worked/type (regular, OT, etc.)
- Total compensation

Anatomy of Pay Equity Audit

Step 2: Identify comparable jobs

Step 3: Calculate whether men and women are paid equally

Step 4: Assess whether differences in pay justified under the law

Step 5: Remediate any gender-based pay differentials

Anatomy of Pay Equity Audit

Step 6: Adjust pay practices

- Attempt to determine reason(s) for unjustified disparities
- Remedy practices and policies causing unjustified disparities
- Remove salary history questions from hiring documents
- Update policies and other employment documents to remove restrictions on discussing wages
- Train hiring personnel and those making compensation decisions

Applications

- As of July 1, 2018, Massachusetts employers cannot ask about wage/salary history on applications
 - Can still ask about desired wage/salary, but be careful
- Since 2010, Massachusetts employers cannot ask about criminal background history on applications
 - June 5, 2018 Boston Globe:
 - ***AG warns 21 employers they violated ban on asking about criminal convictions; 3 are fined***

Questions about Criminal Background

- Massachusetts employers **can ask** employees/applicants:
 - Convicted of **felony**?
 - Convicted of a **misdemeanor within past 5* years**?
 - other than first conviction for: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of peace
 - Completed a **period of incarceration within past 5* years** for any misdemeanor
 - other than first conviction for: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of peace
 - If yes, convicted more than 5* years ago for any offense?
 - other than first conviction for: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of peace
- *As of October 13, 2018, 5 years becomes **3 years**
 - *An Act relative to criminal justice reform (S.2371)*

Questions about Criminal Background

- Massachusetts employers **cannot ask** about:
 - Arrest, detention, or disposition regarding any violation of law in which **no conviction resulted**
 - **First convictions for certain misdemeanors**: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of peace
 - Conviction of misdemeanor where date of conviction or completion of any period of incarceration resulting therefrom, whichever is later, occurred **5* or more years prior** to the date such inquiry, unless convicted of any offense within 5* years immediately preceding inquiry
- *As of October 13, 2018,
 - 5 years becomes **3 years**
 - cannot ask applicants/employees about **sealed or expunged criminal records**

Criminal Background Screens

- If you conduct 5 or more criminal background investigations, you must
 - Maintain written criminal offender record information policy providing you will
 - Notify applicant of potential adverse decision based on criminal offender record information
 - Provide a copy of criminal offender record information and policy to applicant
 - Provide information concerning process for correcting criminal records
- If you use DCJIS CORI database, no liability for negligent hiring practices or discriminatory failure to hire based on DCJIS CORI if information is erroneous, provided decision made within 90 days of receipt and CORI requirements followed

Criminal Background Screens

- Before taking adverse action against applicant/employee based on CORI from DCJIS or any other source, must:
 - Comply with applicable federal and state laws and regulations
 - Notify subject of potential adverse employment action
 - Provide copy of CORI or criminal history information
 - Identify source of information
 - Provide copy of CORI Policy, if any
 - Identify information in CORI or criminal history information that is basis for potential adverse action
 - Provide opportunity to dispute accuracy
 - Provide copy of DCJIS information regarding process for correcting CORI
 - Document everything

Thank You



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