Massachusetts Courts Might Soon Provide Lessons On What Defines "Comparable Work"

Insights
12.18.18

Do a flutist and an oboist for the Boston Symphony Orchestra (BSO) perform comparable work? What about an Executive Director in the Office of Language Learners and an Executive Director in the Office of Human Capital for the Boston public school system? These are the essential questions that courts in Massachusetts are currently grappling with under the new Massachusetts Equal Pay Act (MEPA), which requires businesses to pay men and women equally for "comparable work."

We are starting to see the first lawsuits filed under the MEPA; first against the BSO, and then another against the Boston public school system. In the case filed against the BSO, which has gained a tremendous amount of publicity in Massachusetts and beyond, a top flutist for the BSO brought a lawsuit in Suffolk Superior Court accusing the organization of paying her substantially less than her closest male counterpart in the orchestra. According to the female flutist, she is paid approximately $70,000 less than what the BSO's principal oboist is paid, despite the fact they both lead woodwind sections as endowed chairs. According to the BSO, however, the flutist and oboist are not performing comparable work because the oboe is more difficult to play. This argument signals that a battle of the experts may be on the horizon, which could have broad implications for the classical music world. The female flutist is currently seeking more than $200,000 in unpaid wages, as well as other damages and costs. The case is scheduled for mediation this month, but if it cannot be resolved it could end up being decided by a Massachusetts jury.

In the Boston public schools case, two female administrators claim that the public school system has a practice of paying female Executive Directors over 30 percent less than their similarly situated male counterparts. The lawsuit was filed on November 23 in Suffolk Superior Court. Both of the female administrators suing the Boston public school system work in the Office of Language Learners and argue that their annual salaries of $107,000 were far below what men made in "comparable" positions in other departments, including the Office of Human Capital. While we are less likely to see a battle of the experts in this case, a ruling on whether employees with same job title in different departments within a public system are performing comparable work could also have broad implications for educational institutions, particularly in Massachusetts.

The fate of the plaintiffs' claims in these cases is likely to turn on how broadly or narrowly courts interpret the meaning of the phrase "comparable work" under the new pay equity statute. The MEPA defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions. Under the law:

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- "Skill" includes factors such as experience, training, education, and ability to perform the job in question;
- "Effort" refers to the amount of physical or mental exertion needed to perform a job, and it encompasses the requirements of a job as a whole;
- "Responsibility" encompasses the degree of discretion or accountability involved in performing the essential functions of the job, as well as the duties regularly required to be performed for the job; it includes factors such as the amount of supervision the employee receives, whether the employee supervises others, and the degree to which the employee is involved in decision-making, such as determining policies or procedures, purchases, or other such activities; and
- "Working conditions" are the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including the physical surroundings and hazards encountered by employees performing the job.

These two cases are being closely watched by attorneys on both sides of the debate—and should also be monitored by employers. As cases under the Massachusetts statute begin to gain traction, it is a good time to consider conducting a privileged self-evaluation for purposes of taking advantage of the Act's "safe harbor." The safe harbor provides an affirmative defense to wage discrimination claims for 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, and takes "meaningful steps" toward eliminating unlawful pay disparities identified through the self-evaluation. To be eligible for the defense, the Act provides that the self-evaluation must be "reasonable in detail and scope," and the employer must show "reasonable progress" towards eliminating any unlawful gender-based wage differentials identified by the self-evaluation. If you have questions about how best to take advantage of this provision of the law, contact the author of this post, any member of our Boston office, or any member of our Pay Equity Practice Group.

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