



Massachusetts Employers Receive Guidance On Equal Pay Law

THE LONG-ANTICIPATED DOCUMENT RAISES AS MANY QUESTIONS AS IT ANSWERS

Insights

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Massachusetts Attorney General Maura Healey just issued much-anticipated and long-awaited guidance regarding the amended Massachusetts Equal Pay Act (MEPA), which is scheduled to take effect on July 1, 2018. As most know by now, the law will prohibit employers from paying employees of a different gender at different rates provided they are doing “comparable work,” and will also bar inquiries about salary history. The guidance, issued on March 1, is intended to help employers to comply with the new law. Unfortunately, employers are likely to find that the guidance raises as many questions as it answers.

In particular, the guidance does not provide significant illumination on the critical issue of what constitutes “comparable work.” And although the guidance provides useful input on how to conduct pay audits in order to take advantage of the law’s affirmative defense, a principal takeaway for larger employers is that you may have to engage statisticians to conduct a complicated analysis of your workforce in order to avail your company of the defense. In short, with just four months to go before the law becomes effective, Massachusetts employers are now under pressure to conduct complicated audits if they want to avoid the prospect of costly pay equity litigation.

The Guidance Document, Summarized

The guidance is presented in the form of short responses to “Frequently Asked Questions.” The questions asked and answered include:

- Which employers are covered by MEPA?
- What is the meaning of key terms, such as “comparable work”?
- What constitutes “wages”?
- What are lawful justifications for variations in pay?
- Can salary history justify pay disparities?
- How does the self-evaluation defense work?

Who Is Covered By The State Pay Equity Law

According to the guidance, all employers in Massachusetts (with the noted exception of the federal government) are covered by the law, irrespective of their size. Employers located outside of

Massachusetts are also covered if the employer has employees with a primary place of work in Massachusetts.” **Critically, any employee with a “primary place of work” in Massachusetts is covered by the law, even if the employee lives outside of Massachusetts.**

The guidance defines “primary place of work” for “most” employees as the “location where they do most of their work for the employer.” The guidance provides some examples to help employers try to determine an employee’s “primary place of work,” but the test is far from clear.

For example, the guidance states that employees telecommuting from outside the state to a Massachusetts worksite have a primary place of work in Massachusetts. This raises the question of what it means to “telecommute to” a Massachusetts worksite. What if, for example, an employee works out of their home in Ohio while reporting to a supervisor in New York, but connects to the employer’s server in Massachusetts? Does the fact that the employee connects to the employer’s server in Massachusetts mean Massachusetts is the primary place of work?

The guidance also provides, without further explanation, that “if an employee permanently relocates to Massachusetts, the employee’s primary place of work will become Massachusetts on the first day of actual work in Massachusetts.” What if, however, the employee performs most of his work in Rhode Island? As written, the guidance suggests that such an employee could still be covered by MEPA.

How The Term “Comparable Work” (Among Others) Is Defined

The state statute defines “comparable work” as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions. The guidance interprets “substantially similar” to mean that all of those factors must be “alike to a great or significant extent, but are not necessarily identical or alike in all respects” in order for work to be comparable. Although the guidance provides some commentary on how to evaluate these factors, it raises as many questions as it answers.

The guidance further provides:

- “Skill” includes factors such as experience, training, education, and ability to perform the job in question. It must be measured in terms of the performance requirements of a job, not in terms of the skills an employee happens to have. Skills not necessary to perform a particular job are not relevant in determining whether jobs are substantially similar.
- “Effort” refers to the amount of physical or mental exertion needed to perform a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, should be taken into account. “Effort” 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, investments, or other such

activities. Minor or occasional differences in responsibilities will not prevent certain jobs from being comparable.

- “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 and meaningful shift differentials.

The guidance also gives a number of examples of what would, and would not, be considered substantially similar skill, effort, responsibility, and working conditions. While this information and the examples are helpful, the test for identifying which employees are performing comparable work for purposes of evaluating gender disparities in compensation is still far from clear.

For example, there is no guidance on how an employer is supposed to measure the physical or mental exertion needed to perform a job, or what factors “which alleviate fatigue” should be taken into account. Further, there are also no standards for evaluating what levels or types of responsibility are “comparable.”

The examples suggest that employees working in different departments or business units could be performing comparable work, even if they have different job titles. This issue goes to the very heart of the new law, and, unfortunately, leaves employers in a quandary about how to compare totally different jobs in light of the statute, which itself is vague. The upshot, unfortunately, is likely to be extensive and costly litigation about whether disparate jobs are really comparable.

What Is Included In The Definition Of “Wages”

The guidance defines “wages” broadly to include all forms of remuneration, including commissions, bonuses, profit sharing, paid time off, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits. The guidance also provides that employers may not pay employees of one gender a different salary or hourly rate than employees of another gender doing comparable work, even if the employer makes up the difference with larger bonuses or other benefits.

What Can Serve As Lawful Justifications For Variations In Pay

The guidance makes clear that the only lawful justifications for pay disparities between employees of different genders who perform comparable work are the following:

- a system that rewards seniority with the employer (provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family, or medical leave cannot reduce seniority);
- a merit system;
- a system which measures earnings by quality and quantity of production, sales, or revenue;
- the 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; or

- travel, if the travel is a regular and necessary condition of the particular job.

Noticeably absent from this list is the catch-all “any reason other than gender” defense that exists under the federal Equal Pay Act and most other state equal pay laws. **As a result, permissible variations in pay are much more limited in Massachusetts than in most of the rest of the country.**

For example, under MEPA, the fact that one employee is a member of a union whose remuneration is subject to a collective bargaining agreement is **not** a lawful justification for differences in compensation or benefits between that employee and a non-union member of a different gender who performs comparable work. Under the federal Equal Pay Act, such differences have generally been found to be lawful because the disparity is based on a reason other than gender. Because there are many unionized employers in Massachusetts, this omission from the statute will likely prove problematic.

Whether An Employer Can Use Salary History To Justify A Current Pay Disparity

The unequivocal answer to this question is “no,” even if a prospective employee volunteers the information. Employers are not permitted to ask applicants for salary history information, nor can employers justify pay disparities based upon salary history. The guidance makes clear, however, that employers can ask prospective employees about salary expectations, so long as such questions are not framed in a way that is intended to elicit information about salary or wage history.

The guidance also contains a warning for multistate employers. If an employer searches for or screens employees nationally without knowing where the prospective employee might ultimately be assigned, and the employee ultimately has a primary place of work in Massachusetts, the fact that the employer did not know where the employee would be located is not a defense to liability under the salary history provisions of MEPA. Salary history questions asked during that hiring process would be deemed in violation of Massachusetts state law.

An Explanation Of The Self-Evaluation Defense

MEPA provides a 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 a timely self-evaluation. To be eligible for the defense, the statute says 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.

According to the guidance, whether an evaluation is “reasonable in detail and scope” depends on the “size and complexity of an employer’s workforce” in view of several factors, including “whether the evaluation includes a reasonable number of jobs and employees,” and whether it is “reasonably sophisticated” in its analysis of potentially comparable jobs, employee compensation, and the

application of the six lawful justifications for pay disparities listed above. No further guidance is provided.

However, the guidance appears to give a cut-off for the type of analysis that must be conducted:

When the number of employees in a particular grouping of comparable jobs exceeds 30 or the structure is complex, a more detailed analysis likely is necessary. While not necessarily required by the statute, in many cases, conducting a statistical analysis will be the best way for employers to determine whether there are differences in pay between men and women in comparable jobs after controlling for other factors. In most cases, conducting such a statistical analysis will constitute good faith with respect to this step of any employer's self-evaluation of its pay practices.

What constitutes "reasonable progress toward eliminating pay disparities is similarly non-specific. The guidance explains that "reasonable progress" will depend on "how much time as passed, the nature and degree of the progress as compared to the scope of the disparities identified, and the size and resources of the employer." However, the guidance offers no standards by which consider such factors.

One potential positive note for employers is that the 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." **However, this statement does not echo any language in the statute.** Therefore, it is by no means clear that the employer will actually be eligible to take advantage of the defense just because the analysis is conducted in good faith and reasonable in detail and scope.

What Immediate Next Steps Do Massachusetts Employers Need To Take?

The new law goes into effect in just a few short months. We have been advising employers for more than a year to conduct pay audits to protect their organizations against costly litigation. The takeaway from the Attorney General's guidance is that there are very few clear answers about the statute's meaning, and that employers should urgently conduct pay audits before the statute becomes effective.

The Attorney General's Office has published a checklist and a pay calculator intended to assist employers with conducting self-audits. However, employers should use caution before using these tools to conduct an audit without the guidance of an attorney.

Additionally, if the audit process and the results are not adequately protected by the attorney-client privilege, they could be discoverable and used against an employer in litigation under the federal Equal Pay Act or Title VII, which do not provide a similar defense. Employers should also identify and make any necessary changes in hiring documentation and practices to comply with the new law

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Join Cheryl Pinarchick and Monica Snyder on Friday, March 9, 2018, at 12:30 p.m. ET for a time-sensitive webinar designed to parse the much anticipated guidance regarding compliance with the Massachusetts Equal Pay Act ("MEPA"), released by Attorney General Maura Healey on March 1, 2018.

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

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