

NEW MASSACHUSETTS EQUAL PAY LAW IMPOSES NEW REQUIREMENTS ON EMPLOYERS

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Massachusetts new pay equity law ("MEPA") went into effect July 1, 2018, providing more clarity as to what constitutes unlawful wage discrimination.¹ The law prohibits employers from paying employees of a different gender at different wage rates provided they are doing "comparable work," and also bars inquiries about salary history.

An employer who violates MEPA is generally liable for twice the amount of the unpaid wages owed to the affected employee(s) - the differential between the employee's wages and the wages paid to an employee of a different gender performing comparable work - plus reasonable attorneys' fees and costs.

The new law imposes significant responsibility on all Massachusetts employers to ensure equal pay for different genders for comparable work. The law broadens the definition of wages and equal work, extends the statute of limitations for bringing actions for pay discrimination, and demands greater transparency

in pay practices.

However, while the new law imposes substantial new obligations on employers, it also provides employers a "safe harbor" allowing them to take proactive steps and conduct a self-evaluation to protect them from equal pay claims in the future by potentially serving as a "safe-harbor" defense.

WHAT IS COMPARABLE WORK?

The meaning of "comparable work" is expressly defined in the statute. Employers will still be prohibited from paying employees of different sexes unequally for comparable work. However, job titles and duties will no longer be a determinative factor. Instead, the comparable work analysis will focus much more broadly on similarity of skill, effort, and responsibility, and working conditions required for positions, even where the job titles and duties of those positions are different.

¹The statute, **Chapter 177 of the Acts of 2016**, An Act to Establish Pay Equity, amends the Massachusetts Equal Pay Act, **M.G.L. c. 149, § 105A** ("MEPA").

EXCEPTIONS FOR WAGE DIFFERENTIALS

MEPA does permit differences in pay for comparable work when based upon:

1. 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 and medical leave, shall not reduce seniority);
2. a merit system;
3. a system which measures earnings by quantity or quality of production, sales, or revenue;
4. the geographic location in which a job is performed;
5. education, training, or experience to the extent such factors are reasonably related to the particular job in question; or
6. travel, if the travel is a regular and necessary condition of the particular job.

Employees' salary histories are not a defense to MEPA liability – indeed, under the new law an employer is prohibited from asking a prospective employee his or her salary or wage history. Moreover, an intent to discriminate based on gender is

not required to establish liability under the law.

WHO IS COVERED?

All employers in Massachusetts (with the exception of the federal government) are covered by the new 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.” For example, any employee with a “primary place of work” in Massachusetts is covered by the law, even if the employee lives outside of Massachusetts. For example, employees telecommuting from outside the state to a Massachusetts worksite have a primary place of work in Massachusetts.

HOW ARE “WAGES” DEFINED?

“Wages” are broadly defined to include all forms of remuneration, including salary, commissions, bonuses, profit sharing, paid time off, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits.

DEFENSES: THE SELF-EVALUATION SAFE HARBOR

MEPA provides a defense to wage discrimination claims for any employer that, within the previous three years and before

an action is filed against it, has conducted a good faith, reasonable self-evaluation of its pay practices. To be eligible for this affirmative defense, the self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any impermissible gender-based wage differentials that its self-evaluation may reveal.

Employers are not required to conduct self-evaluations and will not be penalized for choosing not to do so.

NEXT STEP FOR EMPLOYERS

Employers should conduct a self-evaluation pay audit now to protect themselves against costly litigation, especially if they will be making salary changes or determinations. The pay audit “safe harbor” requires employers to conduct an assessment of their current compensation practices and make reasonable progress toward equal pay, in order to protect themselves from claims under the new law.

Employers should also review their employment applications and pre-employment inquiries to ensure they no longer require or ask about salary history.

If you have any questions or seek further guidance regarding the new equal pay law, or other employment law matters, please call

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