

Equal Pay Act

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Overview

- ❖ Closing the Gender Gap –
In Massachusetts, the average earnings of women working full time is only 84% of what men earn.
- ❖ Several states already have an Equal Pay law – CA, NY, MD, NJ, and MA
- ❖ Other states have general prohibition under their anti-discrimination laws

Mass. Equal Pay Act

- ❖ First passed in 1945 and amended on August 1, 2016

- ❖ Takes effect July 1, 2018



- ❖ Applies to every size employer
- ❖ Attorney General Guidance issued on:
March 1, 2018

www.mass.gov/ago/equalpay

Achieving 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.*”



What are Wages

Very broad = All remuneration for work performed:

- ❖ Hourly rate or salary
- ❖ Commissions
- ❖ Bonus Payments
- ❖ Profit Sharing
- ❖ Paid Personal Time Off
- ❖ Vacation and Holiday Pay
- ❖ Expense Accounts
- ❖ Car and Gas allowances
- ❖ Retirement Plans
- ❖ Insurance and Benefits
- ❖ Any Incentive pay

What Is Comparable Work?

Centerpiece of the Act – must be substantially similar in:

- ❖ Skill
- ❖ Effort
- ❖ Responsibility
- ❖ Performed under similar working conditions

Must be alike to a great or significant extent – need not be identical in every respect.

Different Job titles

Differing job titles or a job description is not enough!

SKILL - includes experience, training, education and ability to perform.

EFFORT – amount of physical or mental exertion needed (job as a whole).

RESPONSIBILITY – degree of discretion and accountability of essential functions, duties regularly required.

What are Working Conditions?

Environmental and other circumstances such as physical surroundings and any hazards.

- ❖ Elements (outside or in?)
- ❖ Extreme temperatures
- ❖ Noise
- ❖ Regular Co-worker interaction
- ❖ Hazards (chemicals, fumes factory floor)
- ❖ Intensity and frequency (of all the above)

Prohibited Practices – Wage Transparency

- ❖ Cannot ask about a candidate's salary or wage history before making a job offer with compensation!!!!
 - ❖ Cannot prohibit employees from asking or discussing their own salary/wages.
 - ❖ Cannot retaliate
-
- Edit job applications or on-line ads
 - Train all employees who interview
 - Edit handbook policies to comply



Permissible Variations in Pay

Variations in wages are permitted if based on:

- ❖ a **seniority** system (provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority);
- ❖ a **merit** system;
- ❖ a system that measure earnings by **quantity** or **quality** of production, sales, or revenue;

Permissible Variations in Pay

- ❖ **geographic location** in which a job is performed;
- ❖ **education, training, or experience** to the extent that 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.

What Is a System?

Defined by the AG Guidelines as “a plan, policy, or practice that is predetermined or predefined; used by managers or others to make compensation decisions; and uniformly applied in good faith without regard to gender.”

In sum, a system must be:

- ❖ **Predetermined or predefined;**
- ❖ **Actually used by management level; and**
- ❖ **Fairly applied.**

Self-Audit Defense

Complete Affirmative Defense

- ❖ “**Good-faith** self-evaluation of its pay practices” that was “**reasonable in detail and scope**”
- ❖ “**Reasonable progress**” towards “**eliminating unlawful pay disparities**”
- ❖ Conducted within the previous 3 years and before lawsuit is filed

When is a Self-Audit reasonable in detail and scope?

- ❖ Depends on the size and complexity of an employer's workforce
- ❖ Relevant factors
- ❖ Must have included the employee(s) or job(s) at issue

Basic Guide to Conducting Self-Audits

- ❖ **Step 1:** Gather Relevant Information.
- ❖ **Step 2:** Identify Comparable Jobs.
- ❖ **Step 3:** Calculate Whether Men and Women Are Paid Equally
- ❖ **Step 4:** Assess Whether Differences in Pay are Justified Under the Law
- ❖ **Step 5:** Remediate Any Gender-Based Pay Differentials
- ❖ **Step 6:** Adjust Pay Practices

Reasonable Progress Towards Eliminating Unlawful Pay Disparities

- ❖ Not enough just to conduct self-evaluation
- ❖ Reasonable progress factors
- ❖ Employers are not required to pay employees retroactively for historical pay disparities
- ❖ Employers cannot reduce the wages of any employee

Partial Defense

- ❖ Good faith evaluation that falls short in terms of “reasonable detail and scope”
- ❖ No liquidated (double) damages
- ❖ Employer will still have to pay the affected employee(s)’ unpaid wages and attorneys’ fees and costs

Are Employers Required to Conduct Self-Audits?

- ❖ Self-audits are optional!
- ❖ No penalty for choosing not to conduct a self-audit

Strict Liability

- ❖ Intent is irrelevant
- ❖ No defenses available other than those set forth in the statute.
- ❖ *Salary History is not a defense.*

Enforcement/Penalties

Employees can file a complaint with the Attorney General or a lawsuit.

Liability includes:

- ❖ Difference in pay
- ❖ 100% penalty – double damages
- ❖ Attorneys' fees
- ❖ Costs
- ❖ Interest

New violation each pay period. Three year statute of limitations.



Questions?

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AMENDED MASSACHUSETTS EQUAL PAY ACT GOES INTO EFFECT JULY 1, 2018

By Walter M. Foster, Esq., Caitlyn M. Bosworth, Esq., Rachel E. Moynihan, Esq.

Effective **July 1, 2018**, Massachusetts joins a growing number of states around the country moving to close the gender wage gap by implementing the Massachusetts Equal Pay Act. The Act applies to every employer and ensures equal pay for “comparable work” among men and women. With it comes significant changes in the way employers hire, recruit, develop and implement compensation practices in the workforce. For example, the new law prohibits employers from seeking salary history and will likely require changes to job applications. Multistate employers will need to consider how to comply with Massachusetts obligations that may differ from other states.

This Alert highlights some key provisions of the new law including:

- Equal pay for comparable work that is “substantially similar”;
- Factors that may legally justify variations in wages;
- Prohibition against salary history inquiries and secret pay policies;
- Self-Evaluation audits as a defense; and
- Penalties for violations of the law.

Recently, the Massachusetts Attorney General’s Office, which enforces the Act, issued long-awaited guidance that clarifies some obligations under the law.

Equal Pay for Comparable Work

The Act requires equal pay for comparable work and prohibits employers from relying solely on a job title or job description to determine whether work is comparable. “Comparable work” is defined as work that is substantially similar in that it requires substantially similar skill, effort and responsibility, and is performed under similar working conditions. Any gender-based variance is prohibited, however, the Act does permit differences under certain, limited circumstances discussed below.

Legal Variations Permitted

Wage variations are permitted if based on:

- seniority system (provided, however, that time spent on leave because of pregnancy-related conditions and protected parental, family, and medical leave, shall not reduce seniority);
- merit based system – must be based on legitimate, job-related criteria;
- system that measures earnings by quantity or quality of production, sales, or revenue
- geographic location in which a job is performed;
- education, training, or experience to the extent that 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.

Salary History Inquiries Prohibited

Employers can no longer ask candidates for information about their prior compensation, nor can they seek such information from any current or former employer. Employers can instead ask candidates what they would like to get paid for the position. However, employers should proceed with caution in doing so, and should not ask follow-up questions that might prompt the candidate to disclose his or her salary history. Employers can also ask about the volume or quantity of a candidate's prior sales objectives and whether or not she or he met those objectives, as long as the questioning does not include asking about the candidate's past earnings through sales. Employers may only confirm past salary prior to offering employment if a prospective employee voluntarily discloses such information. The prohibition does not apply to current employees who seek an internal transfer or promotion. Absent a candidate's voluntary disclosure, no such inquiries are permitted.

In addition, internal policies prohibiting discussion of salaries between and among existing employees are prohibited.

Self-Evaluation Audits

Employers that engage in a good-faith self-evaluation of their pay practices and can demonstrate that reasonable progress has been made toward eliminating pay disparities based on gender, are protected against any and all liability and damages so long as the audit was performed and completed in the three years prior to any lawsuit. If the self-evaluation is not reasonable in detail and scope, but meets all other requirements, the employer has a partial defense that allows it to escape liability for liquidated damages. Simply cutting pay of men to equalize the pay scale is not permitted.

Penalties and Damages

Employers who violate the law can be sued, and if found liable, must pay any unpaid wages plus an additional amount equal to 100% of the unpaid wages as liquidated damages. In addition, the Act subjects employers to costs, interest and reasonable attorneys' fees which can add up quickly. Aggrieved employees must bring suit within three years of any violation and can either file a claim with the Attorney General or go directly to court. The Act also allows class actions for similarly situated employees. A violation occurs at each pay period the offending pay disparity is made, making it easier for employees to file claims.

Conclusion

Employers should immediately review their hiring, recruitment, and compensation practices and policies to make sure they are compliant with the Act. While the Attorney General's guidance is not binding law, it provides employers with greater clarity on many areas, demonstrates how the law may be interpreted broadly, and highlights the important role employer self-evaluations will play in defending against claims under the Act.

MASSACHUSETTS PREGNANT WORKERS FAIRNESS ACT GOES INTO EFFECT APRIL 1, 2018

By Walter M. Foster, Esq. and Caitlyn M. Bosworth, Esq.

On July 27, 2017, the Massachusetts Pregnant Workers Fairness Act (“PWFA”) was signed into law and takes effect **April 1, 2018**. The PWFA requires Massachusetts employers to provide pregnant women and new mothers with reasonable accommodations for their pregnancies and any conditions related to their pregnancies to enable them to perform the essential functions of the job, unless doing so would cause the employer undue hardship. The PWFA also adds pregnancy, or a condition related to pregnancy, to the list of protected categories under the Commonwealth’s anti-discrimination statute making it unlawful for an employer to discriminate against, refuse to hire, or terminate an individual due to pregnancy or pregnancy-related conditions.

Duty to Provide Reasonable Accommodations

Under the PWFA, an employer must provide reasonable accommodations for an employee’s pregnancy and related conditions (related conditions can include, without limitation, lactation, or the need to express breast milk for a nursing child) unless an employer can demonstrate that the accommodation would impose an undue hardship. The PWFA identifies such reasonable accommodations as including (but not limited to):

- More frequent or longer paid or unpaid breaks;
- Time off to attend to a pregnancy complication or recover from childbirth with or without pay;
- Acquisition or modification of seating or equipment;
- Temporary transfer to a less strenuous or hazardous position;
- Job restructuring;
- Light duty;
- A private non-bathroom space for expressing breast milk;
- Assistance with manual labor; and
- Modified work schedules.

Interactive Process and Required Documentation

After an accommodation request is made an employer is required to engage in a timely, good faith and interactive process to determine an effective reasonable accommodation that will enable the employee to perform the essential functions of her job. An employer may require medical documentation about the need for certain reasonable accommodations, however, an employer **may not** require documentation for the following accommodations:

- More frequent restroom, food and water breaks;
- Seating;
- Limits on lifting over 20 lbs.; and
- Private non-bathroom space for expressing breast milk.

Other Prohibited Conduct

The PWFA also prohibits employers from:

- Taking adverse actions against pregnant protected employees who receive or request a reasonable accommodation such as failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority and benefits when the need for reasonable accommodation ceases.
- Requiring pregnant protected employees to accept an accommodation that the employee does not wish to accept, if that accommodation is not necessary for the employee to perform the essential functions of the job.
- Denying an employment opportunity to an employee if the denial is based on the need of the employer to accommodate conditions related to pregnancy.
- Requiring pregnant protected employees to take leave if another reasonable accommodation may be provided without undue hardship.
- Absent a showing of hardship, refusing to hire a worker who is covered, if the person is capable of performing the essential functions of the job with a reasonable accommodation.

Written Notice Requirement

The PWFA required employers to have distributed written notice to existing employees of their rights under the PWFA in an employee handbook, pamphlet or by other means by April 1, 2018. After that date, written notice must be provided to new employees at the commencement of employment, and to employees who notify their employers of pregnancies or conditions related to their pregnancies within 10 days of such notification.

Recommendations

Employers should review their policies and employee handbooks and revise them as needed to ensure they comply with the PWFA, confer with employment counsel regarding notices required by the PWFA, and conduct trainings for managers and other supervisors on the new protections.