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Massachusetts State Legislature Takes Action on Major Employment Reform as Legislative Session Ends

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In the final weeks before the end of the legislative session, the Massachusetts House and State both addressed major pieces of labor and employment legislation. However, although the legislature passed **S.2119**, an Act to establish pay equity, and **S.2407**, an Act relative to transgender anti-discrimination, much of the legislation that business leaders had been anticipating was left unfinished as lawmakers adjourned their formal session on the night of Sunday, July 31.

Pay Equity

On Monday, August 1, Governor Baker signed Bill **S.2119** (the "Equal Pay Act") to establish pay equity. Both chambers of the legislature compromised on a bill which they passed on July 23, well before the end of the formal legislative session.

Pay equity legislation has long been a topic of discussion in the Massachusetts Legislature, but this enacted legislation, many say, is the most comprehensive version yet. The new law establishes that employers may not discriminate in any way on the basis of gender in the payment of wages, including benefits or other compensation, subject to a number of exceptions. The law espouses equal pay for "comparable" work, which will be determined based on a variety of factors and not merely by job title or description. Variations in wages and other compensation will be permitted if based upon: (i) a bona fide system that rewards seniority with the employer; but time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave shall not reduce seniority; (ii) a bona fide merit system; (iii) a bona fide system which measures earnings by quantity or quality of production or sales; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or (vi) travel, if the travel is a regular and necessary condition of the particular job.

Another key feature of the new law prohibits employers from asking prospective employees about their salary history, or from seeking out salary histories from any current or former employer. Prospective employees may still voluntarily offer information about their salary histories. Massachusetts is the first state to enact such a provision.

The law also defines other unlawful practices including (1) requiring as a condition of employment that an employee refrain from inquiring about, discussing, or disclosing information about either the employee's own wages or about any other employee's wages, and (2) retaliating against any employee who opposes any act or practice made unlawful in this pay equity bill.

Finally, the law increases the criminal penalty for wage discrimination from $100 to $1,000 and requires that employers post notification of wage discrimination laws in the workplace.

All of these provisions will take effect on January 1, 2018.

***EMPLOYER TAKEAWAY*:** Although the new law does not take effect for nearly two years, Employers should consider beginning to adjust their pay and hiring practices now so that they are in full compliance by the time the law becomes effective. For example, employers should ensure that job applications and interview processes do not request salary information. Unlike inquiries into a prospective employee's criminal history (i.e. "ban the box"), this law prohibits questions regarding salary history at all stages of the hiring process. Employers should revise any hiring paperwork requiring disclosure of pay history and conduct appropriate training for all individuals involved in the hiring process.

In addition to the increased fine, this law also increases the statute of limitations for an employee to bring a claim under the Equal Pay Act from one year to three years. However, employers can assert an affirmative defense to any claim of noncompliance if they have completed a "self-evaluation" of their pay practices within the past three years. This is a highly recommended approach to effectively address the new requirements of the Act and protect employers as they navigate the transition to ensure equal pay in

their workforce.

The implications of violating this Act also trigger state and federal anti-discrimination statutes (i.e. gender discrimination in hiring and pay practices) and overlap with the broader federal National Labor Relations Act (i.e. prohibiting employers from restricting the ability of employees, though notably not supervisors, from discussing the terms and conditions of their employment, including wages).

Transgender Anti-Discrimination

On July 7, both the House and the Senate passed Bill **S.2407**, an Act relative to transgender anti-discrimination. The bill was signed by Governor Baker the next day.

The law seeks to strengthen current anti-discrimination laws by banning any public accommodation from discriminating on the basis of gender identity. Massachusetts law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Additionally, the new law requires that any public accommodation that lawfully segregates or separates access based on a person's sex—such as public bathrooms—grant admission based on the person's gender identity. Under this Act, a "public accommodation" is defined as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public" and includes, without limitation, hotels, restaurants, hospitals, and retail stores.

The legislation tasks the Attorney General with issuing regulations and guidance on referring any person whose assertion of a gender identity is for an improper purpose to an appropriate law enforcement agency.

The major provisions in this law will take effect on October 1, 2016.

***EMPLOYER TAKEAWAY*:** This law does not distinguish between public and private employers, but instead focuses on the nature of the establishment. Employers should seek legal counsel to determine whether they are considered a "public accommodation" under the Act, and those who do fall under this classification should conduct sensitivity trainings to ensure awareness of these new requirements.

Non-Compete Agreement Reform

While both the House and the Senate passed versions of non-compete reform, the gulf between the two bills proved impossible to bridge before the end of the legislative session.

Back in late June, the House passed **H.4434**, an Act relative to the judicial enforcement of noncompetition agreements, which included a number of provisions that have long been discussed as the necessary components of non-competition reform. The bill restricted the length of the non-compete period to 12 months, but carved out a two-year maximum duration in the event that an employee breaches a fiduciary duty to the employee or steals employer property. Non-compete agreements could no longer be applied to laid-off employees and a wide range of hourly workers earning less than a certain level of pay. The bill also asserted that to be valid, any non-competition agreement needs to be in writing and signed, and that employers must provide prior notice so that the employee has the right to consult with counsel before signing.

The House version also included a number of provisions that business leaders supported. **H.4434** would have allowed courts to reform or alter non-compete agreements to ensure that both parties are treated fairly and that intellectual property is properly safeguarded, while the corresponding Senate version (summarized below) did not allow courts to do so. Moreover, the effective date in the House's final version of the bill was pushed back from July 1 to October 1, 2016 to give employers time to amend and update contracts, although the bill did not apply retroactively to contacts signed prior to that date.

On July 14, the Senate passed its version of non-compete agreement reform, a bill with major differences from the draft passed by the House. The Senate's bill, **S.2418**, would have limited the duration of non-compete agreements to just three months, rather than the 12-month limit proposed by the House. The bill would also have required businesses to pay workers their full prorated salary for the duration of their non-compete period (i.e. a garden period).

Senator Spilka proposed a number of amendments that, if passed, would have helped close the gap between the House and Senate versions. However, the amendments were not adopted by the Senate. Many in the business community saw the Senate's bill as a major step backward from meaningful non-compete reform, while the House bill was considered a good compromise between businesses who value non-compete agreements in contracts and those in the Commonwealth calling for more dramatic reform.

A number of provisions that business leaders considered essential were left out of the Senate version, even though they were present in the House version. Many in the private sector are opposed to limiting the duration of non-compete agreements to any less than one year, and supported the House's proposal to allow the non-compete period to extend to a second year should an employee unlawfully take property belonging to the employer.

Further, business leaders were ready to accept a garden leave provision that would require the employer to pay 50% of the employee's prorated salary, as long as the legislation left employers and employees free to negotiate an alternate mutually-agreed upon compensation, like in the House version. The Senate version, which requires 100% pay and does not provide this negotiating freedom, was problematic.

Other key differences between the House and Senate versions remained, including the appropriate treatment of independent contractors and the criteria used to determine whether non-compete agreements are enforceable against workers. The Senate version would have made non-compete agreements unenforceable against anyone making less than two times the median salary in the Commonwealth—approximately $130,000—while the House version did not have such a limit.

As ML Strategies has previously reported, non-compete reform has long been a subject of discussion in the state legislature. In the summer of 2014, Governor Patrick sought sweeping reform, proposing a ban on all non-compete agreements and new laws prohibiting workers from taking intellectual property when they joined a new business. Reform took on new life this March when Speaker DeLeo expressed strong support for new non-compete legislation in a speech to the Greater Boston Chamber of Commerce.

The lack of reform now leaves employers in the Commonwealth with more freedom to negotiate non-competition agreements with their employees and prospective employees. However, it is likely that the state legislature will address non-compete agreements again in the near future, as many legislators are passionate about reform.

***EMPLOYER TAKEAWAY*:** Although non-compete legislation has not yet been enacted in Massachusetts, enforcement of non-competes under current law continues to require employers to carefully consider the facts and circumstances of the employee's position and the employer's business in drafting non-competes and other restrictive covenants that are carefully drafted, to ensure that they are reasonable in scope and duration and no broader than necessary to protect the employer's legitimate business interests. In addition, employers should continue to monitor legislative developments, as non-competition legislation is likely to be taken up again in a future legislative session.

Credit Checks Reform

While **S.2425**, an Act regulating the use of credit reports by employers, passed in the Senate on July 12, the House did not take up the legislation, and ultimately no reform to credit checks occurred in this legislative session.

Reform originally gained momentum in the spring when a group of state legislators led by Senator Barrett began to push for legislation that would restrict the use of credit reports in hiring and promotions. In interviews with local news outlets, Senator Barrett suggested he was concerned not only for those with poor credit scores who were applying for jobs and trying to get back on their feet, but also for those whose credit reports might be erroneous.

The final version of the bill that passed the Senate included a number of exemptions from the ban on credit checks: for example, positions that involve fiduciary responsibility to the employer with authority over assets of more than $6,000, positions that require a national security clearance, and executive or managerial positions that are exempt from minimum wage and maximal hour requirements at financial institutions were all exempt.

While the Senate passed the bill in a 39-0 vote, the bill did not leave the House Ways and Means Committee.

Senator Warren has filed legislation similar to Senator Barrett's in the United States Senate, so reform is also up for discussion at the federal level. Eleven other states have passed laws limiting the use of credit checks, so there is potential for some national support. The more likely scenario, however, is that a Credit Check reform bill comes back on the table during the next legislative session in the Massachusetts Legislature.

***EMPLOYER TAKEAWAY*:** While the state law did not pass, employers should continue to be mindful of the requirements imposed by the federal Fair Credit Reporting Act when conducting credit checks on job applicants and employees.

Wage Theft

The Senate also passed Bill **S.2434**, an Act to prevent wage theft and promote employer accountability. The legislation would have made companies partially liable if their contractors violated wage theft laws. The bill also would have given the Attorney General the right to issue a stop work order against any person or entity who commits a wage theft violation, and also against any entity that shares officers or principals with the entity against whom the stop work order was issued.

However, similar to the reform of credit checks, a bill addressing wage theft did not appear before the House.

***EMPLOYER TAKEAWAY*:** Although this Act did not pass, employers should be aware of the strict requirements and severe penalties associated with a violation of the Massachusetts Wage Act, which can

include treble damages and attorneys' fees.

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

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