ML STRATEGIES

Massachusetts Attorney General Issues Guidance on Pay Equity Law

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Back in July 2016, the Massachusetts legislature passed an Act to Establish Pay Equity (**Mass. Gen. Laws c. 149 § 105A**, referenced herein as the "Law"), which amends the Massachusetts Equal Pay Act ("MEPA") and serves to bolster gender-based pay inequity protections provided to employees and to generally address gender pay inequality in the Commonwealth. When the Law goes into effect on July 1, 2018, it will be widely-regarded as one of the most expansive pay equity laws in the United States.

On March 1, 2018, the Massachusetts Attorney General issued long-anticipated guidance on the amendments to MEPA, available **here** (the "Guidance"), which provides useful information and insight to employers, including several concrete examples and guidelines designed to assist employers in evaluating their existing policies and complying with the updated MEPA.

This post reviews the key provisions of the Law against the backdrop of the new Guidance, and offers strategies and tips to help employers proactively plan for the Law.

Key Provisions of the Law and the Guidance

Who are covered employees? Whether an employee is covered by the Law will turn on his or her "primary place of work." The Guidance indicates that the Attorney General will take an expansive view of what it means to have a "primary place of work" in Massachusetts. In addition to employees who report to work at a Massachusetts location, the Law will apply to the following categories of employees:

- an employee who travels for work if he or she regularly returns to a Massachusetts "base of operations" before resuming business travel;
- employees who "telecommute" even if they are not physically present in Massachusetts, so long as the employee's telecommuting work arrangements are made through a Massachusetts work site; and
- employees who relocate to Massachusetts effective on their first day of actual work in Massachusetts.

Tip: *Employers should review their employee roster and, if necessary, speak with managers of employees who travel for work or telecommute, to identify their employees who will be covered by the Law.*

What constitutes "comparable work"? The Law fundamentally expanded MEPA's definition of "comparable work" in the context of pay discrimination, prohibiting employers from discriminating "in any way on the basis of gender in the payment of wages" and from "pay[ing] any person […] a salary or wage rate less than the rates paid to employees of a different gender for comparable work." "Comparable work" is defined by the statute as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." The Law explicitly notes that a job title or job description alone does not determine comparability. Thus, "comparable work" is not limited to employees who have the same job title, and this vague definition likely means that employers will face difficulty determining which jobs to compare for purposes of complying with the Law.

Endeavoring to provide some much needed clarity, the Guidance expands on this "comparable work" definition by focusing on the "substantially similar" language of the statute. For positions to have "substantially similar" skill, effort and responsibility does not mean that those factors must be identical, but rather that these factors be alike *to a great or significant extent*. The Guidance defines each of the three factors – "skill, effort and responsibility" – as:

- "Skill" is defined as including factors such as experience, training, education and the ability required to perform the job. The Guidance notes that skill must be measured in terms of the relevant performance requirements of a job, and not in terms of general skills that an employee happens to have.
- "Effort" is defined as the amount of physical or mental exertion needed to perform a job.
- "Responsibility" is defined as the degree of discretion or accountability involved in performing the essential functions of a job, as well as the duties regularly required to be performed for the job. It includes factors like the amount of supervision the employee receives or administers and the degree to

which the employee is involved in decision-making.

The Guidance also provides useful examples regarding determining whether jobs are substantially similar based on these factors. For example:

- a bookkeeping job and an account manager job may not be comparable, where the account manager position requires customer service skills not necessary for bookkeeping;
- a job that requires an employee to stand all day is likely not comparable to a sedentary office job; and
- an employee responsible for signing documents may have greater responsibility than one simply tasked with drafting said documents.

The Guidance further notes that "similar working conditions" would exclude meaningful differences in the days and times an employee's shifts are scheduled, or shift differentials (*i.e.* overnight and daytime shifts may constitute different "working conditions" as they impose different burdens on employees – provided shifts are not assigned based on gender) as well as exposure to things like hazardous chemicals or dangerous equipment.

Tip: *Employers should begin analyzing their current compensation structures, with a specific focus on how and why they calculate differences in pay for certain positions. Determining comparators is an art, not a science, and can require an in-depth analysis of the skill, effort and responsibility for each position held by employees.*

What are the Exceptions for Pay Inequities? Although the Law's prohibition on unequal compensation based on gender is quite comprehensive, it does contain critical exceptions for pay inequities that were unavailable under the previous version of MEPA. Under the updated MEPA, an employer is not liable if it can demonstrate that pay differentials are based on: (1) a bona fide seniority system (provided that time spent on a pregnancy-related leave or protected parental, family or medical leave shall not reduce an employee's seniority); (2) a bona fide merit system; (3) a bona fide productivity system (such as quantity or quality of production or sales); (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 and consistent with business necessity; or (6) travel, if the travel is a regular and necessary condition of the particular job.

The Guidance explains that a pay difference will only be permissible under MEPA if the *entire difference* is justified by one of the above factors, or by a combination of those factors. MEPA does not recognize any other valid reasons for variations in pay between men and women performing comparable work. Moreover, an intent to discriminate based on gender is not required to establish liability under the law.

The Guidance goes on to define "bona fide" seniority, merit and productivity systems, noting that a "system" is a plan, policy or practice that is predetermined or predefined, used by managers to make compensation decisions and uniformly applied in good faith without regard to gender:

- A "bona fide" seniority system is defined as a system that recognizes and compensates employees based on length of service with the employer, excluding time spent on leave due to pregnancy-related conditions and protected parental, family and medical leave (*e.* leave taken pursuant to the FMLA, the MA Parental Leave Act, the MA Pregnant Workers Fairness Act, the MA Small Necessities Leave Act and the MA Domestic Violence Leave Law).
- A "bona fide" merit system is defined as a system that provides for variations in pay based upon employee performance as measured through legitimate, job-related criteria (*e.* annual performance ratings are takin into account in setting salaries for the following year).
- A "bona fide" productivity system is defined as a system that measure earnings by quantity or quality of production, sales or revenue in a uniform, reasonably objective fashion (*e.* piecemeal pay, commissions, etc.).

In addition, the Guidance states that neither changes in a particular labor market nor "other market forces" are included among the valid reasons for variations in pay set forth in the statute.

Tip: *Employers will be well-served to review job descriptions (including required skills and education) to ensure that they accurately reflect the actual jobs. In addition, employers should review any written policies relating to seniority, merit-based or productivity-related compensation and ensure that they comply with the Law.*

Inquiries relating to Salary History Prohibited. The Law makes clear that employees' salary histories are not a defense to liability. Indeed, when the updated MEPA goes into effect in July 2018, Massachusetts will become the first state to ban employers from asking job applicants about their salary history prior to making a job offer. Importantly, the Law prohibits employers from seeking salary/wage history from a prospective employee on their own or through an agent (like a recruiter or headhunter). Employers may still inquire about a prospective employee's salary requirements or expectations, though employers should proceed with caution when asking such questions to ensure they are not framed in a

way intended to elicit about the applicant's salary history.

The Guidance references two very limited situations in which an employer may seek salary history information: (1) to confirm wage or salary history information voluntarily shared by the prospective employee (which should be documented by the employer at the time the information is voluntarily shared) or (2) after an offer of employment – with compensation – has been made to the prospective employee.

Tip: *Employers, at a minimum, should review their job application forms and other similar documentation to eliminate any questions concerning the applicant's salary history. Employers should also train their Human Resources or hiring personnel (including recruiters and headhunters) so that they are aware of this new restriction and do not violate it during the interview process.*

Restrictions on Discussing Wages Prohibited. Additionally, under the Law, employers may not prohibit employees from disclosing or discussing their wages, benefits or other compensation, and the Law further prohibits retaliation against any employee who exercises his or her rights under the law. According to the Guidance, an employer may still prohibit Human Resources employees, supervisors and other employees whose job responsibilities give them access to other employees' compensation information from discussing such other employees' wages (unless such wages are a public record), but these categories of employees may not be prohibited from discussing or disclosing their own wages. Employers may not enter into agreements with employees preventing them from disclosing their wages and, thus, an employer cannot require – via offer letter, handbook, employment contract, non-disclosure agreement or otherwise – that an employee keep his or her wages confidential.

Tip: *Employers should ensure that employee handbooks and other policies do not have language that either explicitly or implicitly prohibits employees from discussing their wages, benefits, or other compensation.*

Enforcement. The Law may be enforced by the Attorney General or one or more employees. Unlike a typical employment discrimination claim, an employee need not file first with the Massachusetts Commission Against Discrimination or the Attorney General – the aggrieved employee (and/or the Attorney General's office) may go directly to court. Damages include double the employee's unpaid wages, benefits or other compensation, as well as attorneys' fees. However, an employee cannot collect double recovery under MEPA and its federal counterpart, 29 U.S.C. section 206(d). If an employee recovers under both MEPA and federal law for the same violation, the employee must return to the employer any amounts recovered under MEPA or federal law, whichever is less.

An employee has three (3) years from the date of an alleged violation of MEPA to file a claim. For purposes of unequal pay claims, a violation occurs: (1) when a discriminatory compensation decision or other practice is made; (2) when an employee becomes subject to a discriminatory compensation decision or other practice; or (3) when an employee is affected by the application of a discriminatory compensation decision or other practice, including each time wages are paid (*i.e.* each time a paycheck is issued).

Affirmative Defense for Employer Self-Evaluations. The Law expressly provides a complete defense for employers that, within the previous three years and prior to the filing of a lawsuit by an employee, have performed a good-faith, reasonable evaluation of their compensation practices and can show that "reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation." (Note that when eliminating pay differentials, wages can only be increased – an employer may not decrease the pay of any employee in order to comply with the law). The employer bears the burden of proving that any self-evaluation conducted was reasonable in detail and scope and that the employer has made reasonable progress towards fixing gender-based differentials. If the self-evaluation is not deemed to be "reasonable in detail and scope," but meets the statute's other requirements, the employer will enjoy a partial defense and will not be liable for double damages.

Whether an evaluation is "reasonable in scope and detail" will depend on the size and complexity of an employer's workforce, looking at factors like whether the evaluation includes a reasonable statistical sampling of jobs and employees, whether the evaluation takes into account relevant information and whether the evaluation is reasonably sophisticated in its analysis. The Guidance contains a **basic guide for conducting self-evaluations**, including a link to the Attorney General Office's **pay calculation tool** and a checklist for employers to review their internal policies and practices. Importantly, the Guidance states that any self-evaluation conducted by an employer must have addressed the employee or job at issue in order for the employer to make use of the self-evaluation as an affirmative defense to a claim under the Law or the Massachusetts anti-discrimination statute.

Considerations for Deciding Whether or Not to Complete a Self-Evaluation

The decision for an employer over whether to complete a self-evaluation should be carefully considered, as it is a significant undertaking with respect to time, money (both for conducting the evaluation and the resulting wage increases) and human capital resources. While the self-evaluation defense could be critical in the event of a pay equity claim, the employer must be prepared to reckon with the results of such an audit. Also, the Law specifically provides that an employer who has not completed a self-evaluation will not be subject to any negative or adverse inference as a result of not having completed a self-evaluation. Any employer contemplating such an audit also should consider whether it could or should be subject to the attorney-client privilege. Note that nothing in the statute requires the disclosure of compensation self-evaluations to employees.

Should an employer opt to perform a proactive self-evaluation/pay audit, the employer may want to consider hiring an outside consultant to perform the self-evaluation for purposes of efficiency, credibility (an independent neutral analysis offers a more unbiased viewpoint) and outside expertise. A labor economist experienced in statistics is an employer's best friend in conducting these self-evaluations to determine pay inequities. However, some drawbacks to using an outside consultant include a lack of in-house expertise, confidentiality issues and expending financial resources.

At a minimum, employers should gather (1) up-to-date job descriptions; (2) accurate employee data (including salary and bonus amounts, hire date, work schedule, education and experience, individual characteristics and historical performance ratings); (3) organizational charts; (4) current performance management/merit system documentation; and (5) names of potential resources for conducting a self-evaluation in order to be at-the-ready should a decision to conduct a self-evaluation/pay audit be made.

Conclusion

The Guidance gives employers a sneak peek at how the Attorney General will construe and enforce the Law. Although the current federal administration has seemingly slowed down the enforcement of the federal gender pay equity law (by, for example, suspending indefinitely the EEOC's initiative to include pay data by gender in EEO-1 reporting requirements), it is likely that the Massachusetts Attorney General's Office – and the plaintiffs' bar – will vigorously enforce MEPA beginning on July 1, 2018. In the interim, employers should carefully review their compensation policies and practices and any handbooks and other employment-related contracts to make sure they are compliant with the Law. Employers may also benefit from consulting with their counsel to decide whether conducting a self-evaluation makes sense for their organization and how best to go about conducting any such self-evaluation.

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