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CLIENT ALERT: Massachusetts Pay Equity Bill Signed Into Law – By Maura D. McLaughlin

On August 1, 2016, Governor Charlie Baker signed into law "An Act to Establish Pay Equity," designed to ensure that employees of different genders receive equal pay for comparable work. The law, which does not take effect until **July 1, 2018**, advances pay equity through a number of measures including new limits on inquiries about wage and salary history, a definition of "comparable work," penalties for violation of the law, and the ability to avoid or limit liability through a self-evaluation of pay practices.

Among the most notable changes brought about by the pay equity law is the new requirement that employers may not seek information about a prospective employee's wage or salary history, either from the prospective employee or from a prior employer, before making an offer of employment. The offer of employment must, under the statute, include the compensation for the position which has been negotiated by the prospective employee and employer. This requirement is designed to ensure that compensation is based on an employee's qualifications, role in the organization and value to the company, and not tied to a wage or salary history which may keep the employee in a lower pay band going forward. If the prospective employee has voluntarily disclosed information about wage or salary history, an employer may confirm the employee's pay history. If, however, the applicant does not voluntarily provide pay history information it cannot be sought until after an offer with compensation is extended.

The law seeks to make it easier to identify gender-based pay discrepancies by making it unlawful for an employer to prohibit employees from "inquiring about, discussing or disclosing information about either the employee's own wages [which includes benefits and all other forms of compensation], or about any other employee's wages." The act does provide, however, that an employer "may prohibit a human resources employee, a supervisor, or any other employee whose job responsibilities require or allow access to other employees' compensation information, from disclosing such information without prior written consent from the employee whose information is sought or requested, unless the compensation information is a public record" as defined in the Massachusetts Public Records Law. The act also states that an employer is not obligated to disclose an employee's wages to another employee or to a third party.

The pay equity act also endeavors to advance pay equity by providing more clarity about what is "comparable work," for which employees of different genders must receive equal pay (under both the new and existing law, M.G.L. c. 149, § 105A). In the new law, 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; provided, however, that a job title or job description alone shall not determine comparability." The law goes on to define "working conditions" as "the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job."

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The law allows for variations in wages that are based on:

- 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;
- a merit system;
- a system which measures earnings by quantity or quality 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 and consistent with business necessity; or
- travel, if the travel is a regular and necessary condition of the particular job.

If an employer finds a pay disparity between employees of different genders engaged in comparable work, the pay disparity cannot be corrected by reducing the pay of the higher-paid employee. This means that if pay inequity exists the underpaid employees must have their wages increased to correspond with higher-paid employees (rather than a reduction of those being paid a higher wage). Also, as may be expected, an employer and employee may not agree to unequal pay in violation of the law. The act is clear that an agreement between the employee and employer to have the employee work for "less that the wage to which the employee is entitled under this section shall not be a defense" to a claim under this law.

The pay equity act also contains an anti-retaliation provision. Employers are prohibited from retaliating against an employee who has: (i) opposed any act or practice violating the pay equity act; (ii) made or displayed an intent to make a complaint or bring an action under the law; (iii) testified, assisted or participated in an investigation or proceeding under this law, or is about to do so; or (iv) disclosed his or her compensation or has inquired about or discussed the wages of any other employee.

The possible consequences of violating the pay equity law are substantial. An action to enforce the law can be brought by either the Attorney General or by an aggrieved employee, and there is no need to go through any administrative agency prior to filing suit alleging gender-based pay discrimination. Rather, an employee (or the Attorney General) can proceed directly with a lawsuit in court. Moreover, employees may bring complaints not only on their own behalf but also "on behalf of other employees similarly situated." The fact that actions may be brought on behalf of "other employees similarly-situated" should alert employers to the possibility that employees and their counsel will likely be attuned to potential systemic violations affecting multiple employees.

If an employee is successful in a claim, the employee will be entitled to: (a) all wage amounts that should have been paid if the employer was in compliance with the pay equity act; (b) liquidated damages in an amount equal to the unpaid wages awarded; and (c) attorneys' fees and costs.

The statute of limitations, like that of the Massachusetts Wage Act, is three (3) years after the alleged violation of the statute. Employers should note, however, that the statute of limitations begins when a discriminatory pay decision or practice is adopted, when an employee becomes subject to a discriminatory compensation decision or "when an employee is affected by application of a

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discriminatory compensation decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice" (emphasis added). Essentially, the statute of limitations will run from the last inequitable paycheck the employee receives.

There is, however, a welcome opportunity for employers concerned about possible gender-based pay discrepancies to avoid or reduce potential liability by undertaking evaluations of their pay practices. Employers may conduct self-evaluations of pay practices, which can be of "the employer's own design, as long as it is reasonable in detail and scope in light of the size of the employer." In the alternative, employer self-evaluations "may be consistent with standard templates or forms which may be issued by the attorney general." (The act permits, but does not require, the Attorney General to make regulations interpreting the law.) Employers who have completed a self-evaluation within the three (3) years before any action under this law and can demonstrate that (a) the self-evaluation is reasonable in detail and scope in light of the size of the employer and (b) reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work, will have an affirmative defense to liability for wage equality and wage discrimination actions.

The requirement that the self-evaluation be "reasonable in detail and scope in light of the size of the employer" is meaningful: an employer who has undertaken the self-evaluation and can demonstrate reasonable progress toward eliminating wage differentials, but cannot show that the evaluation was reasonable in detail and scope, is not entitled to an affirmative defense. An employer in that circumstance will not, however, be liable for liquidated damages (although still responsible for the actual damages and attorneys' fees).

Even though the law does not take effect until July 1, 2018, employers are advised to take steps to be prepared for compliance, including training personnel involved in recruitment and hiring and about the prohibition on asking salary information prior to offer (and updating related applications and other forms); educating managers about the requirement that employees be allowed to discuss pay and benefits; examination of the positions within the organization that may raise "comparable work" issues; and developing self-evaluations of pay practices.

Maura D. McLaughlin is an attorney at Morgan, Brown & Joy, LLP, and may be reached at 617-523-6666 or at mmclaughlin@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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