CLIENT ALERT: Pay Equity Bill Passes MA House of Representatives

Efforts toward passing a bill establishing gender-based pay equity in Massachusetts took a major step forward on July 14, 2016, when the Massachusetts House of Representatives unanimously passed its version of "An Act to establish pay equity." The Massachusetts Senate had voted unanimously on January 28, 2016, to approve a similar bill; a client alert discussing passage of the bill in the Senate appears here. Assuming that the House and Senate are able to resolve the remaining differences in the bill and the bill is signed into law, Massachusetts employers would need to ensure pay equity for employees of different genders engaged in "comparable work;" a phrase defined by the bill. Some key features of this bill, as passed in the House, for employers to note are:

1. Equal pay for comparable work. The bill mandates equal pay for men and women performing "comparable work." It defines comparable work as "work that is substantially similar in content and 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 House bill, unlike its Senate counterpart, specifically includes "environmental" circumstances among the factors to be taken into account when reviewing whether working conditions are similar for purposes of the "comparable work" analysis.

While the definition of "comparable work" is broad, the bill provides that variations in wages are not prohibited if those variations are based on:

i. 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;

ii. a merit system;

iii. a system which measures earnings by quantity or quality of production or sales;

iv. the geographic location in which a job is performed if one geographic location has a lower cost of living based on the federal bureau of labor statistics consumer price index; or

v. education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity.

The House version of the bill omits the earlier versions' reference to the systems in items (i)-(iii) above needing to be "bona fide." While this would appear to eliminate possible confusion arising from questions about what is a "bona fide" system, employers may feel certain that the validity of any seniority, merit, or production-based system will be tested if there is reason to believe that such system is not genuine but rather a way to try to hide pay equity violations.

2. Employers may not correct pay disparities by reducing the pay of an employee. The bill specifically prohibits employers from reducing the compensation of employees to comply with its

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mandates. This means that if pay inequity exists the underpaid employee must have their wages increased to match the higher-paid employee rather than a reduction of those being paid a higher wage.

3. An action to enforce the law can be brought by either the Attorney General or by employees, for themselves and/or others. The bill provides that an "[a]ction to recover such liability may be maintained in any court of competent jurisdiction by any 1 or more employees for and on their own behalf or on behalf of other employees similarly situated." Additionally, it provides that "[t]he attorney general may also bring an action to collect unpaid wages on behalf of 1 or more employees…" The employee will not be required to go through any administrative agency prior to filing suit alleging gender based pay discrimination. 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 may be on the hunt for systemic violations affecting multiple employees.

4. The bill mandates liquidated damages and attorneys' fees. The bill requires that an employer found to violate the law shall be liable for unpaid wages, an equal sum of liquidated damages and the employee's attorneys' fees and costs.

5. An employer may not agree with an employee to unequal pay. The bill 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.

6. The statute of limitations is three years, but… The statute of limitations, like the failure to pay wages statute, is three (3) years, however, employers should note 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 discriminatory compensation decision or practice, including each time wages, benefits or other compensation are paid, resulting in whole or in part from such a decision or practice." Essentially, the statute of limitations will run from the last inequitable paycheck the employee receives.

7. The law addresses wage discussions between employees and between the employer and employees/prospective employees. Under the bill, employers: (a) may not prohibit employees from discussing their wages and benefits as a condition of employment; (b) may not require employees to disclose wage/salary history to be considered for an offer of employment; and (c) may not seek from other employers the prospective employee's wage/salary history unless (i) the employee has voluntarily disclosed salary history or (ii) an offer of paid employment has been extended.

The House version omits the prohibition in the Senate version on using wage/salary histories to screen employees for positions, and does not require an employee to make written authorization for a prospective employer to confirm the employee's prior wage or salary history once an offer of paid employment has been made.

8. There is an anti-retaliation provision. Employers would be prohibited from retaliating against employees who take action to seek redress from unequal pay or cooperate with an investigation or

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action regarding unequal pay allegations. The specific language of the bill prohibits retaliation against those who:

i. opposed any act or practice made unlawful by this section;

ii. made or is about to make a complaint or has caused or is about to cause to be instituted any proceeding under this section;

iii. testified or is about to testify, assist or participate in any manner in an investigation or proceeding under this section; or

iv. disclosed such employee's wages, benefits or other compensation or has inquired about or discussed the wages of any other employee. This language creates a broad class of protected employee actions.

Both the House and Senate versions provide that an employer may prohibit a human resources employee 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). The House version adds supervisors to the list of employees who can be prohibited from disclosing salary information.

9. There is a safe-harbor-like provision. Employers who have completed a self-evaluation within the three (3) years before any action under this law and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation would have an affirmative defense to liability for wage equality and wage discrimination actions. These self-evaluations are left to the employer to design, so long as they are reasonable in detail and scope in light of the size of the employer. The House version further provides that 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 in scope is not entitled to an affirmative defense, but will not be liable for liquidated damages.

10. The law would take effect in 2018. The Senate version of the bill provides that the law would take effect on January 1, 2018; the House version has an effective date of July 1, 2018.

While the differences between the House and Senate versions remain to be resolved, there are enough areas of similarity that it appears likely that a pay equity bill will pass the Legislature and be signed into law in the near future. Employers would do well to begin examination of the positions in their workforce that may raise "comparable work" issues and review wage information connected to these jobs.

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