CLIENT ALERT: Proposed EEO-1 Changes and Wage Equality Legislation on the Horizon

Employers should be aware of a number of efforts on the federal and state level to address the issue of pay inequity in the workplace.

On January 29, 2016, President Obama announced a proposal that the Equal Employment Opportunity Commission ("EEOC") partner with the Department of Labor to annually collect and then publish summary pay data by gender, race and ethnicity. This proposal would affect companies with 100 employees or more. This information would be reported on the EEO-1 forms submitted by these employers each year. The required data would not be individually identifying data but would instead be aggregate wage data. The purpose of this proposal is to help identify discriminatory pay practices. This proposed executive action is likely to be taken in the near future.

The President also announced a renewed push to have Congress take up his Paycheck Fairness Act, which would address gender-based wage disparities and discrimination in the workplace.

These announcements come on the heels of the Massachusetts Senate unanimously voting, on January 28, 2016, to approve a similarly-motivated bill known as "An Act to establish pay equity." This bill, if approved by the House and signed into law, would affect employers throughout the Commonwealth by mandating pay equity for those of different genders completing "comparable work;" a phrase defined by the bill.

While it is very possible that this will not be the final version of the bill, it has considerable support within the Massachusetts legislature.

Some features of this bill employers must know about 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." While this is a broad definition, the bill provides that variations in wages are not prohibited if based upon:

(i) a bona fide 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 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 if 1 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

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particular job in question and consistent with business necessity.

There is a considerable amount of grey area with regard to what will constitute comparable work and what systems will be found to be "bona fide." This could be the focal point of future litigation if this legislation is enacted. It could also be clarified if the Attorney General issues regulations, as the bill empowers her to do at her option.

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

3. **Either the employee or the Attorney General may bring action to enforce the law.** 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.

4. **The bill mandates liquidated damages and 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 attorney's fees and costs.

5. **An employer may not agree with an employee to unequal pay.** The bill is clear that written agreements with regard to pay structure are not a defense to violations of the law.

6. **The statute of limitations is three (3) 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." (emphasis added). Essentially, the statute of limitations will run from the last inequitable paycheck the employee receives.

7. **Wage discussions between employees and between the employer and employees would be subject to the law's requirements.** The bill prohibits employers from requiring employees not to discuss their wages and benefits as a condition of employment; using wage/salary histories to screen employees for positions; requiring employees to disclose wage/salary history to be considered for an offer of employment; seeking from other employers wage/salary history unless the employee has given prior written authorization for an employer to seek this information, after an offer of employment has been provided.

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 over 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 broad class of protected employee actions. Employers would be wise to take note.

9. **There is a safe-harbor-like provision.** Employers who have completed a self-evaluation within the last three years 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.

Conclusion

This proposed executive action and legislation, if acted on/approved could have a significant impact on employers. We will keep you updated of further developments in this area.

If you have questions regarding this pending legislation please contact your Morgan, Brown & Joy attorney.

The bill referenced in this article is Massachusetts Senate No. 2107. It amends Chapter 149 and 151 (pertaining to the payment of wages) of the Massachusetts General Laws.

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This alert was prepared on February 12, 2016.

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