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New Massachusetts Pay Equity Law

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On Monday, August 1, 2016, Governor Baker of Massachusetts signed into law a bill strengthening protections against gender-based discrimination in the pay provided to employees for "comparable work". The statute (the "Pay Equity Law") will become effective on July 1, 2018. Although equal pay is currently required under both federal and Massachusetts law, the new law establishes a definition for "comparable work" and puts in place a series of employee-friendly restrictions on an employer's ability to use and control compensation information.

What is new in the definition of "comparable work"?

Current Massachusetts legislation prohibits an employer from discriminating, based on gender, in the payment of wages for comparable work, although the meaning of "comparable work" has generally been left open to interpretation. The Pay Equity Law, however, defines "comparable work" as work requiring a substantially similar skill set, effort, and responsibility and which is performed under similar working conditions (which include the circumstances customarily taken into consideration in setting salary or wages, such as reasonable shift differentials and a position's physical surroundings and hazards). Whether work is "comparable" may not be determined by a job title or job description alone. The new law also expands the concept of wages to include all forms of remuneration for employment, suggesting that it may include benefits and other forms of compensation such as incentive equity and participation in nonqualified deferred compensation plans.

The law also limits the concept of "comparable work" by outlining that compensation differentials may be permissible if based on:

1. A system rewarding seniority, provided that seniority is not reduced due to pregnancy or protected parental, family, or medical leave;
2. A merit system;
3. A system measuring earnings by quantity or quality of production, sales, or revenue;
4. The geographic location in which the work is performed;
5. Education, training, or experience to the extent reasonably related to the position; or
6. Travel, if regular and necessary for the business.

Employers should consider evaluating, using the new statutory definitions, which positions within their organization may involve "comparable work," and review compensation information of employees within those positions for any disparities, particularly between employees of different genders. An employer that discovers a violation of the new rules may not reduce the compensation of any employee as a form of remediation but instead must raise the compensation of the other affected employee(s) to correct the violation.

How does the new law affect current company policies regarding compensation?

The Pay Equity Law makes it unlawful under state law to prohibit employees from disclosing their current compensation information or discussing their or another employee's compensation (though restrictions are permissible on employees whose jobs require or allow access to other employees' compensation information). Such prohibitions generally are already unlawful with respect to non-supervisory, non-managerial employees through the

National Labor Relations Act. However, in light of this change, we recommend reviewing employee handbooks and policies and removing prohibitions on employee compensation disclosures, which are often found in confidentiality provisions. Such restrictions should not be included in any new employment agreements, offer letters, or incentive equity awards and we recommend consulting with counsel regarding existing agreements that contain such provisions.

The law will also restrict a prospective employer's ability to request and use a job applicant's current and historical compensation information. A prospective employer may not request that either the applicant or a current or prior employer disclose such information and may not require that a job applicant's compensation history meet certain criteria. A job applicant may, however, voluntarily disclose compensation information, at which point the prospective employer may use the information for further compensation negotiations. After such disclosure by the job applicant, or following a negotiated offer of employment that includes compensation information, a prospective employer may seek to confirm such compensation history. Notably, though, the law provides that an employee's previous wage or salary history is not a defense to an action for discriminatory pay. We recommend updating and implementing human resources policies regarding requests for and use of job applicant compensation information before the new law takes effect, as such policies may lead to impermissible disparities in pay between comparable positions, and further liability down the road.

What penalties might an employer face for violation of the new law?

Violation of the Pay Equity Law generally leaves an employer liable in the amount of twice the affected employee's unpaid compensation (the gap between the employee's pay and the pay received by an employee of a different gender performing comparable work), plus an award of reasonable attorneys' fees and costs. A job applicant may also recover any damages caused by an employer's impermissible inquiry into, or use of, the applicant's compensation history. An employee or job applicant may bring an action on his or her own behalf or on behalf of other similarly situated employees or applicants.

The statute of limitations will run for three years from a violation. Similar to current federal law, violations under the new statute may occur both when a discriminatory pay practice is adopted or a discriminatory pay decision is made and when an employee is affected by application of the discriminatory pay practice or decision, including each time that disparate compensation is paid to the employee.

What next steps should an employer consider to address potential gender parity pay claims?

The Pay Equity Law provides to an employer an affirmative defense if, within the previous three years and prior to the filing of a legal action against it, the employer has completed a good-faith self-evaluation, reasonable in detail and scope, of its pay practices and can demonstrate reasonable progress in eliminating gender-based compensation differentials. An employer that undertakes a self-evaluation that is *not* reasonable in detail and scope, but *can* demonstrate reasonable progress in eliminating the gender-based compensation differentials, will not be entitled to an affirmative defense but will only be liable for the amount of unpaid wages (and not liable for double damages). You may contact a Ropes & Gray Labor & Employment advisor to discuss whether an audit is the right approach for your organization.

Again, the Pay Equity Law will come into effect on July 1, 2018. Although the new law builds on existing legislation, many areas may compel changes to current practices, and others may be challenging to navigate. We therefore recommend taking a proactive approach, well prior to July 1, 2018, to ensuring your compensation practices are compliant.

If you have questions concerning these important changes, or the various approaches to them, please reach out to Jenny Cooper, Amber Sommer, or your Ropes & Gray labor & employment advisor.