

Labor & Employment Alert June 2018

Massachusetts Pay Equity Act Becomes Effective July 1, 2018

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Signed by Governor Baker on August 1, 2016, the Massachusetts Pay Equity Act (“MEPA”) is scheduled to become effective on Massachusetts employers on July 1, 2018. This new law amends Chapter 149, s. 105A of the General Laws, which already prohibits discrimination in the payment of wages on the basis of sex for “like or comparable” work.” Although federal and state law already prohibits discriminatory pay practices on the basis of sex/gender, MEPA clarifies certain definitions and includes additional restrictions and protections. MEPA applies to nearly all employers in Massachusetts, including private employers (regardless of size), and state and municipal employers (MEPA does not apply to the federal government).

In anticipation of MEPA becoming effective, the Massachusetts Attorney General’s Office (“AGO”) has issued guidance, including frequently asked questions, and checklists on how to complete a self-evaluation (discussed below) and how to make sure employers are in compliance with MEPA. This guidance can be found at <https://www.mass.gov/massachusetts-equal-pay-law>.

Notable Provisions

“Comparable Work” Requires Equal Pay – Similar to current law, MEPA prohibits discrimination in pay, including benefits or other compensation, “on the basis of gender” and prohibits the payment to any person “a salary or wage rate less than the rates paid to employees of a different gender for comparable work.” MEPA defines “Comparable Work” broadly 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.”

Employers need to be aware that the definition of “comparable work” under MEPA is much broader and more inclusive than the “equal work” standard under the federal Equal Pay Act. This distinction must be taken into account when conducting the self-evaluation (discussed below). As an example of the breadth of MEPA’s definition of “comparable work”, the AGO Guidance states that “[i]n an elementary school setting, janitorial and food service jobs generally do not require previous experience in the field or specialized training, and therefore may require comparable skills, even though the substance of the two jobs is different.”

Permissible Variations – MEPA makes certain variations permissible where the difference in pay is based on: (1) “a system that rewards seniority with the employer” (provided that time

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spent on leave due to a pregnancy-related condition as well as “protected parental, family and medical leave,” does not reduce seniority); (2) “a merit system”; (3) “a system which measures earnings by quantity or quality of production, sales or revenue”; (4) “the geographic location in which a job is performed”; (5) “education, training or experience” (but only to the extent such factors are reasonably related to the particular job in question and consistent with business necessity); or (6) travel where such travel is a “regular and necessary condition of the particular job”. These are the **only** permissible variations for different pay for comparable work.

Salary History – In perhaps one of the most notable changes, MEPA prohibits employers from screening job applicants based on their prior wages/compensation and specifically prohibits employers from asking prospective employees or former employers for any type of salary/compensation history. MEPA allows a prospective employer to confirm prior wages with a past employer after an offer of employment with compensation has been made to the employee. MEPA also allows an employer to confirm prior wages with a past employer if the employee voluntarily provides salary history that is not requested. In any event, employers must be particularly careful not to encourage or solicit this information from prospective employees.

Discussion of Wages – MEPA makes it an unlawful practice to prohibit employees from “inquiring about, discussing, or disclosing” an employee’s own wages or the wages of other employees. Employers should note that in many contexts, employers are already prohibited from limiting the discussion of wages amongst and between employees. MEPA provides an additional protection and right of action to employees on this basis.

Affirmative Defense – MEPA provides employers an affirmative defense to claims brought under MEPA and M.G.L. c. 151B, §4 if, within the previous 3 years and prior to the commencement of the action, the employer has “both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work, if any, in accordance with that evaluation.” Keep in mind that MEPA prohibits employers from lowering an employee’s wages to address a pay difference.

MEPA states that the self-evaluation may be of the employer’s “own design,” but must be “reasonable in detail and scope in light of the size of the employer.” The AGO guidance cited above includes guidance on how to perform a self-evaluation and an Excel tool for collecting and evaluating relevant pay data. Keep in mind that, while this self-evaluation provides an affirmative defense to claims under MEPA and M.G.L. c. 151B, § 4, it does not similarly do so for other claims and could be admitted as evidence against the employer in some situations.

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Though all employers must come into compliance with MEPA by July 1, 2018, employers should make sure to consult with counsel about whether a self-evaluation for affirmative defense purposes is right for your organization and how best to accomplish compliance and the self-evaluation.

Damages – Like the current law, MEPA provides a **private right of action** in court for employees to sue for double damages and attorneys’ fees. The Attorney General may also bring an enforcement action. Unlike some other types of actions, no other intervening administrative agencies need to be contacted prior to initiation of a court action.

Next Steps for Employers

With the effective date of MEPA less than one month away, employers should consult with counsel and should consider taking the following actions before the effective date:

- Review current hiring and pay practices for compliance;
- Update employment application forms to remove requests for salary/compensation history;
- Update and review handbooks, relevant policies, etc.;
- Provide additional training for recruiters/staff;
- Determine if conducting a self-evaluation of pay practices is the right choice for your organization.

Stay tuned for additional information and updates.

If you have any questions about this issue, please contact Kathryn Murphy, Sarah Spatafore, or the attorney responsible for your account, or call (617) 479-5000.

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