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# Employers: time to take another look at pay equity law

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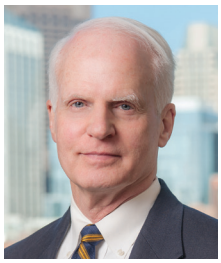

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On Aug. 1, the governor of Massachusetts signed into law Senate Bill 2119, entitled "An Act to Establish Pay Equity." That enactment amended the state's existing statute focusing narrowly on wage discrimination and wage differences as they relate to gender.

The enactment also generated extensive fanfare, having resulted from a bill that passed unanimously by both legislative branches.

Once the initial news coverage faded, however, public discussion about the implications of the new law for the state's employers dropped off markedly. That probably was because employers who read the press releases and news summaries figured out quickly that, despite all the fanfare, they generally faced no immediate change in their situations. After all, the new law will not even take effect until July 1, 2018.

Also, a second circumstance that may have contributed to lulling employers into a degree of complacency was that the Pay Equity Act's two key concepts, "gender nondiscrimination in compensation" and "equal pay for comparable work," already were part of the Massachusetts statutory scheme.

However, there are good reasons for employers to step back and reconsider the new law soon. Significant changes, while not immediate in effect, are taking place. And there are preparations for 2018 that employers should consider taking now, or at least in the next year or so, before the new law becomes effective, to ensure their compliance or, at the very least, place their pay practices in the most defensible of positions in the event an adverse claim is made.

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Moreover, one other aspect of the new law should recapture the attention of Massachusetts employers: liability under the Pay Equity Act, as well as under related laws, can be severe if a violation occurs.

There are three primary points that employers should understand now.

**1. The Pay Equity Act has four primary prohibitions, and three of them are new.**

Probably the most significant part of the Pay Equity Act is its coupling of a ban on gender discrimination with a requirement of "equal pay for comparable work." In the words of the statute, "[n]o employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work."

That by itself, however, is little more than a restatement of present law as set forth already in the Pay Equity Act's precursor statute and the state's Fair Employment Practices Act, or FEPA.

In the Pay Equity Act, however, there is greater specificity written right into the statute about some of the circumstances in which variations in wages can be allowable. According to the act, variations in wages are not prohibited if based on any of the following:

- a system that rewards seniority with the employer, provided 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 that 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; or
- travel that is a regular and necessary condition of the job.

Another change, and perhaps the one on which employers will be required to focus soonest and most, is that the Pay Equity Act sets forth three brand new, explicitly proscribed "unlawful practices." They are:

- requiring an employee (other than a human resources employee, supervisor or other employee whose job responsibilities provide access to other employees' compensation information) to refrain from inquiring about, discussing or disclosing information about the wages of himself, herself or any other employee;
- seeking the wage or salary history of a prospective employee from the prospective employee or a current or former employer, or requiring that a prospective employee's prior wage or salary history meet certain criteria (except when a prospective employer is seeking or confirming a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee); or
- retaliating against an employee because he or she opposed something made unlawful by the act, complained or participated in a proceeding or investigation related to the act, disclosed his or her own wages, or inquired about or discussed the wages of another employee.

The Pay Equity Act also defines, at least somewhat, three key terms. The first is that "comparable work" is "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." But the statute does not, in turn, define "substantially." As a result, litigation about the definition is guaranteed.

Second, the act defines "working conditions" to include "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." In other words, when "environmental and other similar circumstances" are different, they necessarily can justify different wages.

Finally, "wages" are defined by the act to include "all forms of remuneration for employment."

**2. Employee rights under the Pay Equity Act will be enforceable by either the employee or the attorney general, and in either situation, sanctions for violation will be significant.**

Notwithstanding the ambiguity inherent in at least two of the three statutory definitions discussed above, employers proven to have violated the Pay Equity Act will be liable to their employees for both unpaid wages and "an additional equal amount" of liquidated damages.

Further, when liability is found, the court "shall" award to the plaintiff "reasonable attorneys' fees to be paid by the defendant and the costs of the action."

The act also provides that an employee will be able to recover such liability from an employer by bringing a civil action in any court of competent jurisdiction. And the action can be brought either on the employee's own behalf or on behalf of the employee and others similarly situated.

Moreover, the period of limitation for such claims no longer will be one year. Instead, under the Pay Equity Act, an employee will be able to bring his or her action within three years of the alleged violation.

Two other points about enforcement also are significant. First, the attorney general, too, can bring a civil action to collect an employee's unpaid wages and liquidated damages and to recover costs of the action and reasonable attorneys' fees.

Second, simply as a matter of procedure, it will be easier for a plaintiff to go to court to enforce a gender discrimination claim under the Pay Equity Act than it is to enforce a claim under FEPA.

With discrimination claims, FEPA requires generally that the employee first file an administrative claim with a state agency and then wait 90 days before he or she can remove the claim from the agency to file a civil action in court.

The Pay Equity Act, however, does not require that. The act instead provides that "[n]otwithstanding the requirements of [FEPA], a plaintiff shall not be required to file a charge of discrimination with the Massachusetts commission against discrimination as a prerequisite to bringing an action under this section."

There are preparations for 2018 that employers should consider taking now, before the new law becomes effective, to ensure their compliance or, at the very least, place their pay practices in the most defensible of positions in the event an adverse claim is made.

**3. The Pay Equity Act provides substantial incentive to employers to undertake pre-claim, self-evaluation and remediation measures now, before the new law takes effect in 2018.**

According to the Pay Equity Act, an employer will have an affirmative defense in court to liability for a claim of gender pay discrimination or failure to provide "equal pay for comparable work" if the employer can show that it satisfied two prerequisites prior to the commencement of the employee's action and within the previous three years.

First, the employer must show that it, in good faith, completed a self-evaluation of its pay practices.

Second, the employer must show that "reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation."

Another key point is that any employer qualifying for this affirmative defense will be allowed to use it also to defend against analogous gender discrimination claims under the FEPA. That is a significant positive development in the law for employers, because the opportunity for that type of affirmative defense to a FEPA claim does not exist presently.

The prospect of acquiring an affirmative defense thus provides a significant incentive for employers to conduct good-faith self-evaluations now, or at least within the next year or so, even though the Pay Equity Act does not become effective until 2018.

According to the act, such self-evaluation will be adequate for purposes of obtaining the affirmative defense if the self-evaluation satisfies either of two criteria. The self-evaluation must be either (1) of the employer's own design, so long as it is reasonable in detail and scope in light of the size of the employer; or (2) consistent with standard templates or forms to be issued by the attorney general. The AG so far has not issued these templates or forms.

There also is an incentive under the Pay Equity Act for employers to conduct self-evaluations now, even if they have concerns that the self-evaluations might be viewed later as less than reasonable in detail and scope. Although an employer will not have an affirmative defense if the self-examination is not reasonable in detail and scope, the employer nevertheless will be exempted from having to pay liquidated damages on a claim, as long as it can show that, in accordance with its less-than-perfect self-evaluation, it made "reasonable progress" toward eliminating wage differentials based on gender for comparable work.

Finally, according to the Pay Equity Act, an employer will not have to worry, at least as a matter of Massachusetts law, that the self-examination will be used as evidence against the employer. The Pay Equity Act instead provides as follows:

"Evidence of a self-evaluation or remedial steps undertaken in accordance with this subsection shall not be admissible in any proceeding as evidence of a violation of this section or section 4 of chapter 151B that occurred prior to the date the self-evaluation was completed or that occurred either (i) within 6 months thereafter or (ii) within 2 years thereafter if the employer can demonstrate that it has developed and begun implementing in good faith a plan to address any wage differentials based on gender for comparable work."

Thus, there are multiple reasons why employers should look closely at their pay practices and undertake self-evaluative and, if necessary, remedial measures now and in the next year, even though the new law does not become effective until 2018. NEIH