Labor and Employment Alert: New Massachusetts Pay Equity Law: Equal Pay for Comparable Work (But Not Until 2018)

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In July 2016, Massachusetts joined California, Maryland and New York in enacting an expansive equal pay law. While both the federal Equal Pay Act and the Massachusetts Equal Pay Act (MEPA) already prohibited employers from paying men and women differently because of their gender, the new Massachusetts significantly broadens MEPA's coverage. The law takes effect on July 1, 2018, which provides employers with about two years to ensure their compliance with the new requirements.

Comparable Work

Under MEPA, an employer may not discriminate on the basis of gender in paying wages or benefits or pay any person a salary or wage rate less than the rates paid to its employees of a different gender for "comparable work." The law now broadly defines "comparable work" as "solely" work that is "substantially similar" in skill, effort, and responsibility and performed under similar working conditions (like reasonable shift differentials, physical surroundings, and hazards encountered while performing a job).

Variations in wages or benefits are permitted if based upon: (1) seniority, but the seniority cannot be reduced by leave time for a pregnancy-related condition or protected parental, family, and medical leave; (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) job-related education, training, or experience; or (6) travel, if a regular and necessary condition of the particular job.

Employee Protections for Wage History and Wage Transparency

In addition to expanding the notion of equal pay for comparable work, MEPA now prohibits prospective employers from seeking a job applicant's wage or salary history from the applicant or a current or former employer or from screening applicants based on that

information. The prospective employer may seek or confirm an applicant's wage or salary history after an offer of employment with compensation has been negotiated and made if the applicant provides written authorization to do so.

An employer is further prohibited from requiring that an employee refrain from inquiring about, discussing, or disclosing information about the employee's own wages or about any other employee's wages. But an employer is not required to disclose an employee's wages to another employee or a third party. Finally, employers are prohibited from discharging or retaliating against employees who exercise their rights under MEPA, including by discussing wages or benefits.

Civil Remedies and the Employer's New Affirmative Defense

An applicant or employee may bring an action for a MEPA violation within three years after the date of the violation. Notably, a violation occurs (1) when a discriminatory compensation decision or other practice is adopted; (2) when an employee becomes subject to a discriminatory compensation decision or other practice; or (3) when an employee is affected by application of a discriminatory compensation decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice. An employer who violates MEPA is liable for unpaid wages plus liquidated damages and attorney's fees. Both individual and class actions are authorized under MEPA.

MEPA creates a new affirmative defense to liability if the employer completes a "self-evaluation of its pay practices in good faith" and "demonstrates reasonable progress has been made towards eliminating wage differentials based on gender for comparable work." If the employer establishes both elements, it is entitled to an affirmative defense to claims of liability for wage discrepancies and pay discrimination for three years after completing the self-evaluation. Evidence of a self-evaluation or remedial steps is not admissible as evidence of a violation that occurred before the date of the self-evaluation and is not admissible as evidence of a violation occurring within six months after the self-evaluation or within two years after the self-evaluation if the employer is implementing in good faith a plan to address any prohibited wage differentials. Regardless, an employer who has not completed a self-evaluation is not subject to any negative or adverse inference as a result of not having completed a self-evaluation.

While the law is not effective until 2018, employers should consider reviewing their personnel and payroll policies now in order to comply with its requirements and any regulations the Massachusetts Attorney General may issue. For example, applications will need to be changed to eliminate questions about applicants' wage history. Employers, with the assistance of counsel, also may want to review and remedy pay issues in order to avail themselves of MEPA's affirmative defense.

Contact your Vorys lawyer if you have questions about complying with the MEPA.