Countdown to the Massachusetts Equal Pay Act: Will You Be In a Safe Harbor or Rough Waters Come July 1?

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On July 1, 2018, the Massachusetts Equal Pay Act (MEPA) will take effect. MEPA updates and replaces the Massachusetts Pay Equity Act, M.G.L. c. 149, § 105A, which prohibited discrimination on the basis of sex in the payment of wages and compensation. MEPA expands the reach of the law to prohibit discrimination based on gender (not just sex); defines the factors through which prohibited discrimination is to be evaluated and determined, and institutes several new prohibitions on employers in hiring and employment practices.

MEPA applies to all private employers, including those principally located outside of Massachusetts, who have employees with a primary place of work within Massachusetts, and applies to full-time, part-time, seasonal, per-diem and temporary employees. The Office of the Massachusetts Attorney General recently issued guidelines to employers regarding the contours of the law, as discussed below.

The Massachusetts Equal Pay Act

Like the Massachusetts Wage Act, MEPA imposes strict liability on employers found to have violated the law. In other words, employees are not required to show that the employer intended to discriminate based on gender, only that the employer engaged in an impermissible disparate pay practice. Also like the Wage Act, employees who prove a violation of MEPA are entitled to double damages, attorneys' fees and costs.

Under MEPA, employees are entitled to a new three-year statute of limitations each time they are issued a paycheck that violates MEPA. As discussed further below, now is a good time for employers to protect themselves from liability under MEPA by proactively examining their pay practices to ensure compliance.

Common Compensation Practices Prohibited By MEPA

MEPA imposes three strict new limitations on employers:

- Prior to making an offer of employment, employers may not seek the salary or wage history of a prospective employee from the prospective employee or from a current or former employer.
- Employers may not prohibit employees from disclosing or discussing their wages with each other and cannot ask employees to enter into agreements not to discuss wages.
- Employers may not retaliate against an employee who in good faith reports a violation of MEPA, even where the employee's claim is ultimately without merit.

Under MEPA, employers are permitted to ***verify*** wage or salary information once it has been voluntarily shared by a prospective employee, but employers should exercise caution before doing so. Given the significant damages and penalties available under the law, employers should guard against claims that turn on whether the employee indeed "voluntarily" offered prior wage or salary information,

or whether the employer subtly or indirectly elicited that information. A best practice is to ask the prospective employee for her salary requirements or compensation expectations for the posted position.

Practice Tip for Employers Outside of Massachusetts: Employers with offices inside and outside of Massachusetts should educate their human resource professionals that caution should be taken not to inadvertently ask a prospective employee about salary history if there is any chance that the employee may ultimately have a primary place of work in Massachusetts. The fact that the job posting was not specific to Massachusetts, such that the employee could have been placed in an office of the employer in a different state, is not a defense to liability if the employee ultimately ends up working in Massachusetts.

The "Comparable Work" Requirement

MEPA prohibits discrimination on the basis of gender in the payment of "wages" for "comparable work," *i.e.,* work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

What constitutes "comparable work" under the law may be surprising to some employers. "Comparable work" under MEPA is broader than under the Federal Equal Pay Act. It is not defined by job description or title, and completely different categories of jobs may still constitute "comparable work." For example, the Massachusetts Attorney General provides the example of janitorial and food service workers at a school, which may constitute "comparable work" under the law because the jobs do not require previous experience or specialized training.

Similarly, employers may be surprised to learn that "wages" is broader than the employee's hourly rate or base salary, but includes *all* incentive pay including commissions, bonuses, profit-sharing and the opportunity to participate in benefit programs offered by the employer. As a result, employers need to ensure pay equity across all forms of compensation to male and female employees performing "comparable work."

When Can an Employer Lawfully Provide Different Compensation to Male and Female Employees Who Are Performing "Comparable Work"?

Effective July 1, there will be only six circumstances under which employers may justify different pay for male and female employees performing "comparable work":

- A seniority "system" (with the exception that seniority cannot be discounted by time spent on leave due to a pregnancy-related condition or statutorily protected parental, family and medical leave such as FMLA, Parental Leave Act, Pregnant Workers Fairness Act, Small Necessities Leave Act and Domestic Violence Leave Act);
- a merit "system";
- a "system" which 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, if the travel is a regular and necessary condition of the particular job.

With respect to existing female employees hired prior to the enactment of the law whose compensation was based on her salary history, negotiation skills or other factors now unknown due to the passage of time, the employer must still be able to justify a salary difference affecting those existing female employees according to one of the six exceptions outlined in MEPA, or risk liability under MEPA.

Another area where employers may get tripped-up under the new law is with respect to its internal compensation "systems" used to justify pay disparities between male and female employees. The "system" identified by the employer cannot be amorphous. Instead, in order to rely on an exception based on a "system," employers must able to point to an established plan, policy or practice that is: (1) predetermined, and (2) uniformly applied in good faith when making compensation decisions.

How does this law apply to professionals whose compensation is determined, in part, by the number of hours worked (or billed)? Male and female employees who perform "comparable work," and who are paid on a salaried basis which does not fluctuate based on the precise number of hours worked in any given workweek, cannot be paid different salaries. That said, where employers provide bonuses or other incentive compensation directly tied to a qualifying "system" that are based on the total number of hours worked, the amount of the bonuses or other incentive compensation may vary.

The Safe Harbor Provision

In order to incentivize compliance, MEPA includes a strong affirmative defense to employers. Under the safe harbor provision, any employer who: (1) conducts a good-faith, reasonable audit of its pay practices, within the previous three years and before an action is filed against it, and (2) has made reasonable progress in eliminating any prohibited gender-based wage disparities uncovered as a result of the audit, has an affirmative defense to liability under the law. While employers are not required to conduct the audit, prudent employers will do so as soon as possible and before the law goes into effect. The Attorney General has also issued a six stage guide for employers who chose to perform the self-evaluation.

The employment attorneys at White and Williams are available to assist employers with conducting a self-evaluation and policies and practices review. Please contact Scott Casher (cashers@whiteandwilliams.com; 914.487.7343) or Victoria Fuller (fullerv@whiteandwilliams.com; 617.748.5211) for additional information.

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