

HR Insights

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Understanding the New MA Pay Equity Law and How to Prepare

Governor Baker signed the *An Act to Establish Pay Equity* (S. 2119) on August 1, 2016, which amended the current Massachusetts Equal Pay Act to ensure equal pay for comparable work for virtually all Massachusetts employees. The new law (which we refer to as the MA Pay Equity Law) is intended to help close the wage gap between men and women performing comparable work. Although the new law is not effective until July 1, 2018, it is important to understand now how the law impacts your business so that you can plan and budget accordingly. This issue of HR Insights provides an overview of the law, HR practice implications, and action items for consideration.

Employers Subject to the Pay Equity Law

The MA Pay Equity Law applies to almost all employers and employees in Massachusetts except for:

- Under age 18 private domestic workers
- Farm laborers working in agriculture
- Individuals working in a social club, fraternal, charitable, educational, religious, scientific, or literary association, no part of the net earnings of which enures to the benefit of any private individual

Major Provisions of the Law

There are three major provisions of the MA Pay Equity Law, which:

- Require equal pay for comparable work, although some compensation differences are allowed
- Bar asking job applicants and their current and former employers for a compensation history
- Bar employers from prohibiting employees from disclosing or discussing compensation

An employer cannot contract with an employee to avoid complying with these provisions or by any other means exempt itself from complying with the law.

Comparable Work

Under existing law, an employer cannot discriminate based on gender in pay for comparable work. The MA Pay Equity Law takes existing law a step further by defining comparable work. The law requires equal pay (defined as all forms of remuneration for employment) for comparable work with variations in compensation allowed based on:

Comparable work means work that is substantially similar in terms of skill, effort, and responsibility, and that is performed under similar working conditions.

- A seniority system, provided seniority is not reduced because of a pregnancy-related leave or a protected parental or FMLA leave
- A merit system
- A system that measures earnings by quantity or quality of production, sales, or revenue
- The geographic location of a job
- Education, training, or experience to the extent these factors reasonably relate to the job
- Travel, provided the travel is a regular and necessary part of the job

When determining whether work is comparable, working conditions include the environment and other similar circumstances typically considered when setting pay, such as shift differentials, physical surroundings, and hazards. In addition, the law specifically states that comparability cannot be determined by job titles and job descriptions alone.

HR Practice Implications

There are no regulations yet, but the law suggests that employers must analyze jobs broadly to identify potential pay equity issues. We recommend analyzing jobs with attention to skill, effort, responsibilities, and working conditions; updating job descriptions accordingly; and grouping similar jobs into job classes to prepare for a self-audit. In addition, because the law defines compensation broadly, employers should review all their pay practices, including merit increases, incentive/bonus plans, equity plans, etc. to ensure compliance. Finally, employers should review any data that will be used to identify potential pay equity issues to ensure its accuracy, including an employee's base pay, bonuses, incentive pay, equity awards, etc.

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Compensation History

An employer cannot ask a job applicant or an applicant's current or former employer for compensation history, and the employer cannot require an applicant's pay history meet certain criteria. However, if an applicant voluntarily discloses his or her pay history, the employer can confirm or allow the applicant to confirm the history but only after the applicant voluntarily discloses the history or after an employment offer with compensation has been negotiated and made to the applicant.

HR Practice Implications

Employers should review all pre-employment and hiring practices and procedures to ensure compliance plus provide HR staff and hiring managers training. For example, an employer may need to revise job applications and train staff to ensure compensation information is not asked for during job interviews or as part of a reference check. In addition, we suggest considering implementing the changes before the new law takes effect. Maintaining the practice of obtaining compensation histories may cause pay equity issues later after the law takes effect.

Employees Must Be Allowed to Disclose and Discuss Compensation with Each Other

An employer cannot require, as a condition of employment, that employees refrain from inquiring about, discussing, or disclosing information about either an employee's own pay or about another employee's pay. This requirement does not obligate the employer, however, to disclose an employee's compensation to another employee or to a third party. An employer may prohibit a human resources employee, a supervisor, or any other employee whose job allows access to other employees' compensation information from disclosing information without prior written consent from the employee whose information is requested, unless the information is a public record.

HR Practice Implications

To ensure compliance, employers should review their employee handbooks, policies, employment agreements, bonus plans, and other documents to remove any language that restricts employees from inquiring about, discussing, or disclosing information about their own pay or others' pay.

Employees' Right to Take Legal Action

An employee or a group of employees have the right to take legal action against an employer for gender based discrimination in compensation for and on their own behalf or on behalf of similarly situated employees. A job applicant has the right to seek legal action if an employer violates the provisions concerning compensation history. Unlike current law, an employee or job applicant is not required to file a discrimination charge first with the Massachusetts Commission Against Discrimination (MCAD).

To take legal action, a job applicant or employee must do so within three years after the date of the alleged violation of the MA Pay Equity Law. The three-year period starts tolling when any of the following happens:

- A discriminatory compensation decision or other practice is adopted
- An employee becomes subject to a discriminatory compensation decision or other practice
- An employee is affected by the application of a discriminatory compensation decision or practice, including each time wages are paid resulting in whole or in part from the decision or practice

Retaliation Prohibited

The law prohibits employers from retaliating in any way against any employee who:

- Opposed any act or practice that violates the law
- Made or indicated an intent to make a complaint or has filed an action
- Testified or is about to testify, assist, or participate in an investigation or proceeding
- Disclosed the employee's wages or inquired about or discussed the wages of another employee

HR Practice Implications

It will be important to provide training on the new law for HR staff, managers, and supervisors, which should include making it clear that retaliation in any way is prohibited.

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Penalties for Violating the Law

An employer that violates the MA Pay Equity Law is liable to employees for unpaid compensation and liquidated damages equal to the unpaid compensation plus reasonable attorney fees. As noted above, employees may seek legal action and so can the Attorney General.

Agreements between an employer and employee to be paid less than the compensation to which an employee is entitled is not a defense to legal action. In addition, an employee's previous compensation history cannot be a defense.

Self-Evaluation of Pay Practices

An employer against whom an action is brought has an affirmative defense to liability and any pay discrimination claim if the employer:

- Completed a self-evaluation of its pay practices in good faith within the previous three-year period and before the action was brought
- Can demonstrate that it has made reasonable progress based on the self-evaluation towards eliminating gender based compensation differences for comparable work

The self-evaluation can be of the employer's own design or based on standard templates or forms published by the Attorney General (which to date have not been published). If the self-evaluation is not based on templates or forms provided by the Attorney General, the design must be reasonable in detail and scope considering an employer's size. If not, the employer will not be entitled to an affirmative defense but will not be liable for liquidated damages.

Conducting a self-evaluation and taking remedial steps to address gender based compensation differences for comparable work cannot be used as evidence that an employer violated the MA Pay Equity Law, if the alleged violation happened before the self-evaluation was completed, or within six months thereafter, or within two years thereafter if the employer can demonstrate it

developed and began implementing in good faith a plan to address pay differences for comparable work.

An employer cannot reduce compensation of any employee as a way to remediate a gender based pay equity issue. An employer can only increase compensation to remediate pay issues.

An employer that has not completed a self-evaluation is not subject to any negative or adverse inference because of not having completed a self-evaluation.

HR Practice Implications

We recommend completing a self-evaluation to help limit potential liability and to create a specific and thoughtful plan and budget for addressing any pay issues. We also recommend reviewing progress in achieving the plan at least annually. PS&A has developed a model for helping clients conduct self-evaluations using job analysis and job evaluation methodologies and financial modeling. Regardless of whether you conduct your own self-evaluation or hire PS&A or another consultant, we recommend conducting self-evaluations working through an attorney to take advantage of client attorney privilege protections.

Action Items for Consideration

PS&A strongly recommends that employers consider acting now to prepare for the MA Pay Equity Law. To this end, the following page of this issue of *HR Insights* provides a list of action items for consideration.

IMPORTANT NOTE: This issue of HR Insights is meant to provide useful information, insights, and potential action items to help employers prepare for complying with the MA Pay Equity Law. While we hope that our readers find this issue of great value, it is not a substitute for legal advice. We encourage all our readers to seek their own legal advice in preparing for compliance with the new law.

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MA Pay Equity Law: Action Items for Consideration

I. Review current pre-employment and hiring practices, processes, and forms

- Review job applications and revise as necessary to eliminate any request for compensation data
- Review and revise the interview process to ensure compensation data is not requested
- Review and revise reference and background checks to ensure compensation data is not requested
- Ensure job postings do not contain language asking applicants to provide compensation data
- Decide when to implement the changes – before or when the law becomes effective
- Train HR staff and hiring managers on new processes to ensure compensation data is not requested and how to handle compensation data voluntarily shared by a job applicant

II. Implement the new requirement that employers cannot prohibit employees from inquiring about, discussing, or disclosing information about their own or others' pay

- Review and revise documents as needed to comply with the new requirement, including a review of the following documents: employee handbooks, policies such as confidentiality policies, confidentiality and nondisclosure agreements, employment agreements, and Incentive, equity, and bonus plans
- Decide when to implement – before or when the law becomes effective
- Train HR staff and managers regarding the requirement, including how to manage and respond to discussions among employees and respond to requests from employees for compensation information

III. Audit all compensation policies, practices, and programs to ensure compliance with new law

- Review policies and practices for pay increases to ensure practices are objective and consistently applied
- Review all compensation programs to ensure programs do not include any provisions that do not comply with the new law and that they are administered objectively and consistently applied
- Review compensation philosophy and practices to ensure compliance, for example, identifying any practices or provisions that are contrary to equal pay for comparable work or the definition of comparable work under the new law
- Decide when to implement changes – before or when the law becomes effective
- Train HR staff and managers regarding changes

IV. Conduct a self-audit to identify potential gender based pay equity issues and create a plan to remediate

- Update organizational charts for clear view on career paths and job levels
- Analyze jobs broadly with attention to skill, effort, responsibility, and working conditions
- Update job descriptions based on job analysis
- Looking at jobs broadly, group jobs that are substantially similar in terms of skill, effort, responsibility, and working conditions into job classes
- Review pay and other data to be used in self-evaluation to ensure accuracy
- For each class of jobs, compare pay (base pay and other compensation) based on gender
- If pay equity issues identified, develop a specific plan for remediating the issue with time table and budget required
- Decide when to conduct the self-evaluation – before or when the law becomes effective
- Report results to senior management and any recommendations and cost for remediating issues