

THE MASSACHUSETTS EQUAL PAY ACT

AS AMENDED BY “AN ACT TO ESTABLISH PAY EQUITY”

EFFECTIVE JULY 1, 2018

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On July 1, 2018 the amended Massachusetts Equal Pay Act¹ (“MEPA”) takes effect. The law generally prohibits discrimination on the basis of gender in the payment of wages.

No 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; . . .

MEPA does not require an intent to discriminate based on gender to establish liability under the law.

COMPARABLE WORK:

The new law updates and more clearly defines the term “comparable work” as:

[W]ork 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.

WORKING CONDITIONS:

The definition of the term “working conditions” includes:

[T]he 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 the job.

¹ M.G.L. c. 149 §105A as amended by Ch. 177 of the Acts of 2017, *An Act to Establish Pay Equity*.

Exceptions:

MEPA permits differences in pay for comparable work only when based upon:

- (i) a system that rewards seniority with the employer (provided, however, that **time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority**); (emphasis added)
- (ii) a merit system;
- (iii) a system which measures earnings by quantity or quality of production, sales, or revenue;
- (iv) the geographic location in which the job is performed;
- (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or
- (vi) travel, if the travel is a regular and necessary condition of the particular job.

Unlawful Practices:

MEPA also makes it an unlawful practice for an employer to:

- Prohibit employees from inquiring about, discussing, or disclosing information about either the employee's own wages or another employee's wages;
- **Seek the wage or salary history of a prospective employee before making an offer of employment that includes compensation;**
- Discharge or in any other manner retaliate against any employee who exercises rights under the law, including any employee who has, "disclosed the employee's wages or has inquired about or discussed the wages of any other employee."

Damages:

An employer who violates MEPA generally will be liable for **twice** the amount of the unpaid wages owed to the affected employee(s) – the differential between the employee's wages and the wages paid to an employee of a different gender performing comparable work – plus reasonable attorneys' fees and costs.

A complaint must be brought within three years after the date of the alleged violation. A "violation" includes each time wages are paid, resulting in whole or in part from a discriminatory decision or practice.

Affirmative Defense:

MEPA provides a complete defense for an employer that, within the previous three years and before an action is filed against it, has conducted a good faith, reasonable (in detail and scope) self-evaluation of pay practices and has shown reasonable progress towards eliminating any impermissible gender-based wage differentials that its self-evaluation reveals. The Attorney General has issued guidelines for conducting employer self-evaluations.

CONCLUSION

In 1945, Massachusetts was the first state to pass an equal pay law. Court decisions narrowly interpreted the term “work of like or comparable character or work on like or comparable operations”, which was the standard set out in the original statute. According to the U.S. Bureau of Labor Statistics, on average, women working full time in Massachusetts earn only 84.3% of what men earn.

The Legislature thus amended the Equal Pay Act to broaden the definition of “comparable work” and to make unlawful employer practices which 1) prohibit employees from discussing wages among themselves and 2) ask prospective employees about wage or salary history. Presumably, the latter unlawful practice responds to the fact that salary offers are often based on prior salary and women may have been paid less than men in prior comparable jobs. **NOTE** that, “[A] prospective employer may seek or confirm a prospective employee’s wage or salary history **after** an offer of employment with compensation has been negotiated and made to the prospective employee.”

As with all new employment laws the amended Equal Pay Act is sure to generate litigation. From an employer’s perspective, there are traps for the unwary. For instance, should employers conduct self-evaluations to protect themselves against a lawsuit? If so, what is required for the self-evaluation to be a valid defense? In some circumstances, a self-evaluation might actually be used by plaintiffs as evidence to support their claim, although MEPA includes some protections against this. The AG has produced an Overview and Frequently asked Questions, which provides some guidance.

<https://www.mass.gov/files/documents/2018/05/02/AGO%20Equal%20Pay%20Act%20Guidance%20%285-2-18%29.pdf>

Contact Brooks & DeRensis if you would like further information.