EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

Massachusetts Attorney General Releases Guidance for Employers on New Pay Equity Law

April 2, 2018

By Susan Gross Sholinsky, Nancy Gunzenhauser Popper, and Alyssa Muñoz*

The Office of the Massachusetts Attorney General ("AG") recently issued an Overview and Frequently Asked Questions document ("Guidance") for the Massachusetts Pay Equity Law ("Law"), which will go into effect on July 1, 2018.

The highly anticipated Law, which was the first salary history inquiry ban passed into law in the United States,[1] amends the Massachusetts Equal Pay Act ("MEPA"). The Law clarifies the MEPA by defining "comparable work," providing a safe harbor for employers that conduct self-evaluations of pay practices, and offers additional protection to employees by prohibiting employers from asking applicants about their salary history.

The Guidance is intended to help employers navigate the Law by providing greater detail on its provisions and various examples in advance of the Law becoming effective. Additionally, the AG's website will include a dedicated webpage that supplies (i) an overview of the MEPA, (ii) a pay calculation tool to help employers identify and calculate potential wage gaps between male and female employees, and (iii) access to webinars and events that give employers an opportunity to ask questions about the Law.

Topics Covered in the Guidance

The following topics are addressed by the Guidance (each of these topics will be discussed in greater detail below):

- Which employers and employees are covered under the MEPA
- The definition of "comparable work" and other key terms
- The definition of "wages"

---

[1] Subsequently, several other salary history inquiry bans have been signed into law, and some have already become effective.

- Permissible variations in pay under the Law
- How the Law restricts discussions of wages
- A prohibition on seeking salary history
- Liability for an employer that violates the MEPA
- An affirmative defense available to employers that conduct self-evaluations

Employers and Employees Covered Under the MEPA

The Guidance confirms that nearly all Massachusetts employers, irrespective of size (including state and municipal employers), are covered under the Law, with a limited exception applying to the federal government. The Law also requires that multistate employers ensure that the employees within the same geographic area within Massachusetts are paid equally for performing comparable work. In addition, if the only employees performing work comparable to the Massachusetts employee are located in a different state, it may be necessary to compare the wages of those employees to make sure that they are paid equally or, if there are disparities, that those disparities are justified under the Law.

As for employees, the MEPA applies to full-time, part-time, seasonal, per-diem, and temporary employees. A limited exception exists for babysitters and other domestic workers, workers under age 18, agricultural workers, and employees of social clubs and similar associations. Additionally, the Law will apply to employees with a primary place of work in Massachusetts, regardless of where the employee lives. For most employees, the primary place of work will be determined by the location where they perform the majority of work for their employer.[2] This includes employees who travel outside Massachusetts but return regularly between trips, employees who frequently switch locations of work but "spent the plurality of [their] working time" in Massachusetts over the previous year, and employees who telecommute to a Massachusetts worksite.

Definition of "Comparable Work" and Other Key Terms

Under the Law, "comparable work" is defined as work that requires substantially similar skill, effort, and responsibility and is performed under similar working conditions. The Guidance defines "substantially similar" as being "alike to a great or significant extent, but are not necessarily identical or alike in all respects."

[2] The Guidance advises that it is not necessary for an employee to spend 50 percent of his or her working time in Massachusetts in order for it to be considered their primary place of work. Additionally, when an employee permanently relocates to Massachusetts, it will be the primary place of work upon the first day of actual work in Massachusetts.

The Guidance also defines several other terms and provides a number of examples for assessing comparable work:

- "Skill" includes such factors as experience, training, education, and ability required to perform the jobs, but it must be measured according to the requirements of the job, not the skills that an employee happens to possess.

- "Effort" refers to the amount of physical or mental exertion needed to perform a job and should take into account job factors that cause or alleviate mental fatigue and stress.

- "Responsibility" considers the degree of discretion or accountability, as well as duties regularly required in performing the essential functions of the job. This can include the amount of supervision the employee receives, whether the employee supervises others, and the extent to which the employee is involved in decision-making activities.

- The term "working conditions" is defined as environmental circumstances considered in determining salary or wages. This may include factors such as the physical surroundings and hazards that employees encounter on the job.

In addition, the Guidance warns employers not to rely on job titles or descriptions alone when determining which positions are comparable.

Definition of "Wages"

"Wages" are defined broadly in the Guidance and include all forms of remuneration for work performed, such as incentive pay,[3] as well as benefits that an employee may choose not to participate in. [4] The important aspect here is that employees performing comparable work are given the same opportunity to participate in incentive pay and benefits, and any distinctions in incentive pay and benefits should not be determined by gender. Further, employers are not permitted to pay an employee an extra bonus in order to make up for a base salary that is lower on the basis of gender, when the two employees perform comparable work.

Variations in Pay Permitted Under the Law

The Guidance confirms that, under the Law, one or more of the following six factors may justify a pay difference between employees performing comparable work:

---

[3] Incentive pay includes commissions, bonuses, profit-sharing, and other production incentives.

[4] Benefits include health or life insurance, retirement plans, tuition reimbursement, and other similar benefits that employees may choose not to take advantage of (e.g., because they are covered by a spouse's plan).

- a seniority system that is not obstructed by leaves of absence for pregnancy-related conditions or protected parental, family, and medical leaves;

- a merit system;

- a system that measures earnings by quantity or quality of production, sales, or revenue;

- the geographic location where a job is performed;

- education, training, or experience to the extent that such factors are reasonably related to the particular job in question; or

- travel, if it is a regular and necessary condition of the job.

An employer may pay employees performing comparable work differently based on the number of hours worked but may not discriminate based on gender in terms of the assignment or availability of part-time versus full-time work. The Guidance cautions employers that intent is irrelevant under the MEPA. Therefore, unless one or more of the six factors above apply, an employer may face liability for the differential in pay on the basis of gender.

Restrictions on Discussion of Wages

Under the MEPA, employers may not prohibit employees from discussing their own wages or their coworkers' wages, or from disclosing wage information to any person or entity. However, an employer may prohibit human resources employees or supervisors who have access to other employees' compensation information as part of their job responsibilities from discussing other employees' wages. Employers are also prohibited from contracting with employees to prevent them from discussing or disclosing wages. The Guidance further confirms that the MEPA does not impose any affirmative obligation on employers to disclose information about their employees' wages.

Salary History Inquiry Ban

Under the Law, employers generally may not seek salary or wage history directly from a prospective employee or from his or her current or former employer. The Guidance notes that there are only two limited situations in which an employer may ask for this information:

- to confirm wage or salary history information that is voluntarily shared by the prospective employee, or

- after an offer of employment with compensation has been made to the prospective employee.

The Guidance provides that employers are permitted to ask a prospective employee about his or her compensation needs or expectations but should do so with caution so that their question is not framed in a way that attempts to "seek" information from the prospective employee about his or her salary or wage history. Also, the Guidance confirms that an employer may ask a prospective employee about his or her previous sales history or objectives but may not seek information about the individual's earnings through sales.

The prohibition on seeking a prospective employee's salary history does not apply to current employees applying for an internal promotion or transfer. However, the Guidance specifies that at no time may an employee's salary history, with any employer, justify paying that employee less than an employee of a different gender who performs comparable work.

Liability for MEPA Violations

The potential damages for an equal pay claim under the MEPA include:

- the amount that the affected employee was underpaid,
- an equal amount of unpaid wages (i.e., double damages), and
- the affected employee's reasonable attorneys' fees and other costs if awarded a favorable judgment.

Additionally, an employer that violates the anti-retaliation provision or one of the other provisions of the MEPA could be required to pay damages incurred by the affected employee or applicant.

Affirmative Defense for Employer Self-Evaluations

The Guidance explains that, under the MEPA, an employer may have a "complete defense" to a legal claim if it has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an employee files the action. To be eligible, the self-evaluation must be reasonable in detail and scope, as well as show reasonable progress towards eliminating any unlawful gender-based wage disparities that the self-evaluation reveals. The employer bears the burden of proving that it met these standards.

In addition, the Guidance provides that an employer's eligibility for the affirmative defense is more likely to turn on whether the self-evaluation was reasonable in detail and scope and conducted in good faith, rather than whether the court agrees with the employer's comparable work analysis. According to the Guidance, a "good faith" self-evaluation is one that an employer does "in a genuine attempt to identify any unlawful pay disparities among employees performing comparable work."

A self-evaluation is considered "reasonable in detail and scope" depending on the "size and complexity of an employer's workforce." Relevant factors to consider will include "whether the evaluation includes a reasonable number of jobs and employees" and engages in a "reasonably sophisticated" analysis. To show that it has made "reasonable progress," an employer must "take meaningful steps toward" correcting the identified disparities in a reasonable amount of time.

In addition to an overview of the Law and frequently asked questions, the Guidance has an appendix section that includes "Self-Evaluations—A Basic Guide for Employers" and a "Sample Checklist—Policies & Practices Review" that employers may find helpful.

What Massachusetts Employers Should Do Now

The Law goes into effect on July 1, 2018. In the meantime, Massachusetts employers should do the following:

- Thoroughly review the Guidance and the AG's online resources, including the sample checklist and pay calculator.

- Advise third parties engaged in recruiting on your behalf, such as recruiters and headhunters, of the requirements of the Law, and ensure that they will comply with it when performing recruiting activities on your behalf.

- When reviewing and/or revising your current policies and procedures, take into consideration such issues as next steps needed to implement a method of self-evaluation appropriate to your business, best practices in terms of privilege, and how to address the possibility of remediation.

- Review and, if necessary, revise and disseminate existing policies on wage transparency or confidentiality to ensure compliance with the Law.

- Provide training to management, human resources staff, recruiters, and compensation partners on the requirements of the Law.

****

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy Gunzenhauser Popper
New York
212-351-3758
npopper@ebglaw.com

**Alyssa Muñoz, a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed significantly to the preparation of this Advisory.*

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.