

## Massachusetts Passes Legislation Aimed at Correcting Gender-Related Pay Imbalances

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By Barry A. Guryan, Susan Gross Sholinsky, Nancy L. Gunzenhauser, Ann Knuckles Mahoney, and Alyssa Muñoz\*

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Massachusetts will join [California](#) and [New York](#) in attempting to close the pay gap between men and women in the workplace. The Massachusetts Legislature unanimously passed a pay equity [law](#) (“Pay Equity Law”) that was signed by Governor Charlie Baker on August 1, 2016. The Pay Equity Law will become effective on July 1, 2018.<sup>1</sup>

### Pay Equity for Comparable Work

The Pay Equity Law completely replaces the current equal pay law and attempts to provide greater clarity regarding the state’s stance on equal pay. Under the Pay Equity Law, it will be unlawful for employers to discriminate based on gender in wages, including all forms of remuneration, and to pay an employee less than an employee of the opposite gender for “comparable work.” The current law on pay equality in Massachusetts bars employers from discriminating based on gender for work of “like or comparable character.” The Pay Equity Law attempts to refine this concept by defining “comparable work” as “work 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.”<sup>2</sup> Further, the Pay Equity Law will prohibit employers from reducing any employee’s pay in order to comply with the law.

The Pay Equity Law also offers further protections for both employees and employers. The current law only allows for pay variations between employees of opposite sexes for comparable work based on seniority. The Pay Equity Law will allow greater flexibility for employers by permitting pay variations between employees of different genders who perform comparable work when the pay difference is due to:

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<sup>1</sup> Based on earlier versions of the bills leading to the Pay Equity Law, there have been conflicting news articles regarding the effective date of the Pay Equity Law. The office of Massachusetts State Senator Daniel A. Wolf confirmed that July 1, 2018, is the effective date.

<sup>2</sup> “Working conditions” is defined as “the 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 a job.”

- a seniority system, provided that an employee's parental, family, or medical leave, including leave due to a pregnancy-related condition, does not reduce seniority;
- a merit system;
- a system that measures earnings by quantity or quality of production or sales;
- geographic location;
- education, training, or experience to the extent that such factors are reasonably job-related; or
- travel, if the travel is a regular and necessary part of the job.

### **Pay Transparency**

The Pay Equity Law includes a pay transparency provision that will make it unlawful for employers to prohibit employees from inquiring about, discussing, or disclosing their wages with each other. However, employers may prohibit human resources staff, supervisors, or any other employee whose job involves access to other employees' compensation information from disclosing such information without prior written consent from the employees in question. Further, the Pay Equity Law contains an anti-retaliation provision that, among other prohibited practices, will bar retaliation against an employee who has disclosed his or her wages, or inquired about or discussed the wages of another employee.

### **Restrictions on Inquiring About Applicants' Salary History**

Applicants are also protected by the Pay Equity Law. Employers will be prohibited from screening applicants by requiring that an applicant's prior salary or wage history meet certain criteria. Further, employers cannot seek or confirm the wage or salary history of an applicant unless (i) the applicant voluntarily discloses the information or (ii) an employment offer with compensation has been negotiated and made to the applicant.

### **Violations**

Actions by applicants or employees under the Pay Equity Law must be brought within three years of the alleged violation. Similar to the federal Lilly Ledbetter Act, employees may claim a continuing violation based on each allegedly unfair payment of wages or provision of benefits or other compensation. Actions can be brought by applicants or employees, on their own behalf or on behalf of others similarly situated, and by the Massachusetts Attorney General. Further, a plaintiff will not be required to first file a charge with the Massachusetts Commission Against Discrimination.

An employer found to have violated the equal pay provision of the Pay Equity Law will be liable for the employee's unpaid wages, including benefits or other compensation; an equal amount of liquidated damages; and costs and reasonable attorneys' fees.

### **Voluntary Audits as an Employer's Affirmative Defense**

Significantly, the Pay Equity Law will provide employers with an affirmative defense in actions alleging gender discrimination in compensation. To take advantage of this defense, an employer will need to (i) have completed a self-evaluation of its pay practices within the three years prior to the commencement of litigation, and (ii) demonstrate that reasonable progress has been made toward rectifying any identified gender-based wage differentials. An employer may design the self-evaluation on its own, provided that the self-evaluation is reasonable in detail and scope relative to the employer's size.<sup>3</sup>

While a voluntarily audit is recommended, employers will not be subject to any penalty for not engaging in a self-evaluation. To further encourage such affirmative steps by employers, however, the Pay Equity Law provides that evidence of a self-evaluation or remedial steps taken pursuant to the self-evaluation will *not* be considered admissible evidence of a violation that occurred (i) prior to the self-evaluation, (ii) within six months thereafter, or (iii) within two years thereafter, provided that an employer demonstrates that it developed and implemented a good faith plan to address any gender-based wage differentials.

### **Impermissible Defenses**

Employers are not permitted to use either (i) an employee's previous wage or salary history or (ii) an agreement with the employee to work for less than the employee would otherwise be entitled to under the Pay Equity Law, as a defense to any action brought under the law.

### **What Massachusetts Employers Should Do Now**

In anticipation of this legislation being implemented, employers should do the following:

- With the assistance of counsel, to preserve confidentiality and privilege, consider conducting an evaluation of pay methodology and job titles, as well as determining which jobs will be deemed "comparable" for purposes of the Pay Equity Law.
- Document progress made toward eliminating wage differentials based on gender for comparable work.
- Review existing policies and training materials and then update them as

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<sup>3</sup> If an employer conducts an audit that is found to be unreasonable in detail and scope, the employer may not use the audit as a defense but will not be liable for liquidated damages.

necessary regarding the anti-retaliation and pay transparency provisions of the Pay Equity Law.

- Work with recruiters, human resources professionals, and other employees and managers involved in the recruiting and hiring processes to ensure compliance with the restrictions on inquiring into the compensation history of prospective employees.
- Review application materials to ensure that they do not improperly request the prior compensation history of applicants for jobs in Massachusetts.
- Ensure that human resources professionals and supervisors are aware of, and receive training on, the Pay Equity Law, including the anti-retaliation and pay transparency provisions.

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For more information about this Advisory, please contact:

**Barry A. Guryan**  
Boston  
617-737-3538  
bguryan@ebglaw.com

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

**Nancy L. Gunzenhauser**  
New York  
212-351-3758  
ngunzenhauser@ebglaw.com

**Ann Knuckles Mahoney**  
New York  
212-351-5521  
aknuckles@ebglaw.com

*\*Alyssa Muñoz, a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's New York office, contributed to the preparation of this Advisory.*

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