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Massachusetts Enacts Comprehensive Pay Equity Law

On Aug. 1, 2016, Massachusetts Governor Baker signed into law the “Act to Establish Pay Equity.” The new law is intended to address the gender wage gap by strengthening the pay disparity prohibitions under existing law. The Pay Equity Act also provides employers the opportunity to assert an affirmative defense to wage claims based on the employer’s good faith self-evaluation of its pay practices. The new law does not go into effect until July 1, 2018, but particularly in light of the affirmative defense, employers should consider a self-evaluation study in advance of 2018.

Definition of Equal Pay for Comparable Work

The Pay Equity Act amends Massachusetts General Laws Chapter 149, Section 105A to provide a definition of “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.” The new law also specifies that “a job title or job description alone shall not determine comparability.”

Permissible Wage Variations

While the Act prohibits wage disparities on the basis of gender, the new law specifies that certain wage variations are permissible. Specifically, the Pay Equity Act provides that variations in wages are not prohibited if based on any of the following factors:

- (1) a seniority system (provided that time spent on pregnancy leave or protected parental or family and medical leave shall not reduce seniority);
- (2) a merit system;
- (3) a system which measures earnings by quantity or quality of production, sales, or revenue;

(4) the geographic location in which a job is performed;

(5) education, training, or experience to the extent that such factors are reasonably related to the job in question;
or

(6) travel that is a regular and necessary condition of the particular job.

Employer Prohibited Conduct

The Pay Equity Act contains important provisions affecting hiring practices. The new law prohibits employers from requesting an applicant's salary history or seeking salary history from the applicant's current or former employer. Employers may, however, confirm compensation history after a job offer with compensation has been made. In addition, employers may confirm salary history if the applicant voluntarily discloses such information.

The Pay Equity Act seeks to promote transparency by making it unlawful for an employer to forbid employees from inquiring about or discussing information concerning the employee's own wages or other employees' wages.

Attorney General Enforcement and Private Right of Action

The Pay Equity Act grants to the Massachusetts Attorney General the authority to bring an enforcement action on behalf of one or more employees. In addition, employees are granted a private right of action which allows for recovery of: (i) damages equal to unpaid wages; (ii) liquidated damages equivalent to unpaid wages; and (iii) costs and attorneys' fees. Under the new law, the statute of limitations is increased from one to three years, and employees are not required to file a claim with the Massachusetts Commission Against Discrimination as a prerequisite to initiating a court action.

Self-Evaluation Affirmative Defense

The Pay Equity Act creates an affirmative defense for employers that engage in a good faith self-evaluation of their pay practices to detect pay disparities. To utilize the affirmative defense, the employer must demonstrate that reasonable progress has been made toward eliminating wage differentials based on gender for comparable work. The affirmative defense is available if the employer has completed the self-evaluation within the three (3) year period prior to the initiation of a claim against the employer. The Massachusetts Attorney General is authorized to issue regulations interpreting and applying the affirmative defense provision.

Next Steps for Massachusetts Employers

The Pay Equity Act does not go into effect until July 1, 2018. Massachusetts employers should consider reviewing their employment application procedures and documentation now to ensure compliance. In addition, employers should consider a self-evaluation of their pay practices. It is expected that the Massachusetts Attorney General will issue regulations or other guidance with respect to the self-evaluation affirmative defense.

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