



## **e-Alert: Action Required**

### **MA Attorney General Issues Guidance on New Pay Equity Law**

#### **Overview**

The Massachusetts Attorney General's Office has issued formal Guidance on amendments to the Massachusetts Equal Pay Act (MEPA). The amended equal pay law, An Act to Establish Pay Equity, takes effect July 1, 2018.

This new law, which we initially summarized [here](#), aims to close the wage gap between male and female employees. It broadens the definition of comparable work and prohibits employers from paying different wages to different genders for performing comparable work. The law also imposes restrictions on employers from asking job applicants about their salary or salary history and prohibiting employees from discussing their pay with other employees.

As explained in our previous e-alert, under the statute, jobs that are comparable are those that require substantially similar skill, effort, and responsibility and are performed under similar working conditions. Pay differences between employees of different genders for comparable work can only be justified based on six factors: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, sales, or revenue, (4) geographic location, (5) education, training, or experience related to the job or (6) travel, if a regular and necessary part of the job. Any other basis for a pay differential is not permissible, for example, relying on market considerations.

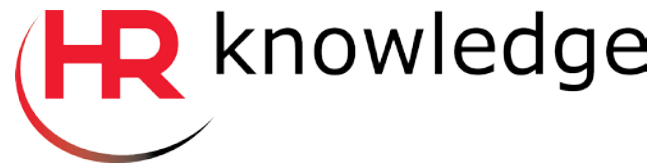
**Once this law goes into effect, it will be among the strictest and most progressive pay equity laws in the country.**

#### **Who must comply with this new law?**

All nonfederal employers with employees who primarily work in Massachusetts, regardless of size, must comply with the MEPA. Employers outside of Massachusetts will need to comply if they have Massachusetts-based employees. Similar to the Earned Sick Time Law, all employees are covered regardless of their status, so covered employees can be full-time, part-time, seasonal, per diem, or temporary. Massachusetts must be the primary place of work, even for employees who do not spend most of their time working there. For example, an employee who travels or works out of state, but regularly returns to a job site in Massachusetts, would be covered under the law, as well as an employee who telecommutes from another state to a Massachusetts work site.

#### **What the Guidance explains**

The Guidance, which can be found [here](#), clarifies many parts of the MEPA. One of the most important areas is the affirmative defense for employers who conduct good faith and reasonable self-evaluations of their pay practices. To qualify for this affirmative defense, the self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress toward eliminating any unlawful gender-based wage differentials that its self-evaluation reveals. Employers bear the burden of proving that they have met these standards, through their documentation of the self-evaluation process. Whether or not an employer is eligible for an affirmative defense does not necessarily turn on whether a court ultimately



agrees with the employer's analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather on whether the self-evaluation was conducted in good faith and was reasonable in detail and scope.

### **Self-evaluations strongly recommended**

While employers are not required to conduct self-evaluations, in almost all cases doing so is recommended to reduce their risk under this new law. Given the three-year look back, employers may protect their organization from pay equity claims if they conduct adequate self-evaluations and take action to remediate any gender-based pay differentials.

The Guidance sets forth general guidelines including steps that employers should consider undertaking as part of a comprehensive self-evaluation, keeping in mind that the complexity of the analysis required will vary significantly depending on the size, makeup, and resources of each employer. Therefore, what is reasonable for a small business with few categories of jobs may not be reasonable for a larger or more complex organization. Even with this Guidance, interpretations and practical application will be challenging for employers.

### **Next steps for employers**

1. Conduct a self-evaluation now, especially if you will be making salary changes or determinations in the next three months.
2. Make sure the self-evaluation is conducted in good faith and is reasonable in detail and scope.
3. The new law allows you to use a "safe harbor" defense against claims if a self-assessment was completed within the three years prior to the legal action. Therefore, it is *imperative* that you conduct an assessment of your current compensation practices and make reasonable progress toward equal pay, to protect yourself from claims under the new law.
4. Review your employment applications and preemployment inquiry forms to ensure they no longer require or ask about salary history.
5. Train anyone involved in the interview and recruitment process to ensure interviewers are careful in how they ask for and use any information about salary history. Questions about salary expectations cannot be designed to obtain information about an applicant's salary history.

### **How can HR Knowledge help?**

While employers can conduct their own self-evaluation, many don't have the time, resources, or expertise to do so in-house. HR Knowledge can assist you in conducting a pay-practice assessment; please [contact us](#) for more information.

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