



e-Alert: BSO Musician's Pay Equity Lawsuit Takes Center Stage in Massachusetts

It made headlines in all the Boston and national newspapers. Elizabeth Rowe, principal flutist with the Boston Symphony Orchestra, last summer filed a lawsuit against the BSO, alleging she was paid less annually — to the tune of \$70,000 — than the principal oboe player, a male. The gender-centric suit was filed on July 2, 2018, just one day after a law amending the Massachusetts Equal Pay Act (MEPA) took effect.

Background

As a bit of background, Governor Charlie Baker had signed a bill amending MEPA in 2016, which would become law on July 1, 2018; under the new law, pay variances between people of different genders performing comparable work are only acceptable under [six clearly defined criteria](#). The term “comparable work” is the key to the new pay equity law; under the amendment, it's defined as work that requires “substantially similar skill, effort, and responsibility” and is performed under “similar working conditions.”

Under the old pay equity act, employers could “discriminate” with regard to pay if employees work was not the same, i.e., if an apple was not an apple, but under the new pay equity law you are comparing apples and oranges and bananas, because “substantially similar” doesn't mean identical or alike in every respect. While there is clear guidance laid out in this new law, questions rightfully remain in the minds of many employers — and employment attorneys — about how this new law will play out, which many of us in the industry had hoped would be cleared up by this lawsuit.

Ultimately, the true measure of the amended Equal Pay Act won't be determined until courts begin issuing decisions in cases involving gender pay discrimination — and it appears such a decision won't be made in the Elizabeth Rowe lawsuit any time soon. In December 2018 the Rowe and the BSO went into mediation to solve the case without further litigation. The case was dismissed, according to documents filed at Suffolk County Superior Court on Thursday.

What does this mean for Massachusetts employers?

Bottom line? With this case coming to a settlement agreement, Massachusetts employers have no further clarification on what comprises comparable skill, effort, responsibility, and working conditions. The question of whether playing the flute is similar to playing the oboe unfortunately will not be illuminated with this case; Rowe's lawyer, Elizabeth Rodgers, was quoted saying “the matter has been resolved to the mutual satisfaction of the parties.”

Next steps for employers

While we have no clarity from this case; make no mistake; violating equal pay laws can result in a lawsuit. To become, and remain compliant with equal opportunity laws, you must be able to justify differentials in pay between employees. And word to the wise — keep records for a minimum of three years detailing employee wages, job descriptions, and reasons for compensation. Here are some steps you can take so you can defend yourself against a pay equity suit:



1. Conduct a self-evaluation.
2. Make sure the self-evaluation is conducted in good faith and is reasonable in detail and scope.
3. Review your employment applications and preemployment inquiry forms to ensure they no longer require or ask about salary history. The new law prohibits employers from asking applicants to reveal salary history and from seeking the applicant's salary history from a current or former employer.
4. 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. And be aware that questions about salary expectations cannot be designed to obtain information about an applicant's salary history.

How can HR Knowledge help?

We offer several options for our clients, depending on their resources. Those willing to do the heavy lifting themselves can still lean on us for support and take advantage of our self-assessment tool kit and as-needed guidance. Others who may not have the time, resources, or expertise to do an in-house self-assessment can turn to us for more support. Whatever your situation is, we can assist you in conducting a pay-practice assessment; please [contact us](#) for more information.