

Podcast

Massachusetts New Pay Transparency Law Addresses Pay Gaps

By Matthew J. Camardella & Brian E. Lewis

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On July 31, 2024, Massachusetts joined other states in mandating pay transparency by requiring pay range information in all job postings and advertisements for employers with more than 25 employees. The disclosure requirements will commence on October 29, 2025 (one-year after the effective date of the law).



Transcript

INTRO

On July 31, 2024, Massachusetts joined other states in mandating pay transparency by requiring pay range information in all job postings and advertisements for employers with more than 25 employees. The disclosure requirements will commence on October 29, 2025 (one-year after the effective date of the law). On this episode of We get work™, we discuss the Massachusetts pay transparency law, wage data reporting requirements, the law's no-retaliation provision, and why employers should start preparing now for the changes to come.

Our hosts today are Matt Camardella, principal and co-leader of the Affirmative Action, OFCCP, and Government Contract Compliance Group in the Long Island office, and Brian Lewis, principal in Jackson Lewis' Boston office.

Matt and Brian, the question on everyone's mind today is, What must employers do to prepare for and comply with the new Massachusetts law, and how does that impact my business?

CONTENT

Matthew J. Camardella

Principal and Affirmative Action, OFCCP and Government Contract Compliance Co-Leader

Welcome, everyone. It's a pleasure to have the opportunity to speak to you about Massachusetts' new pay transparency law.

My name is Matt Camardella. I'm a principal here at Jackson Lewis and a

member of the firm's Pay Equity Resource Group. I have the pleasure today of speaking with my fellow principal, Brian Lewis, who is resident in our Boston office, about the requirements of this new law.

Brian, like many states that have taken steps to help address the stubborn gender and racial wage gaps in this country, Massachusetts recently enacted a statute aimed at enhancing pay transparency. With this new law, An Act Relative to Salary Range Transparency — you know, they really need to come up with a better name for this statute — Massachusetts has jumped on the pay transparency bandwagon. Coupled with the Massachusetts Equal Pay Act, the state is at the forefront of the battle against pay inequality.

So let's jump in, Brian. Governor Healey signed this bill into law on July 31, 2024. From my initial review of the statute, it appears there are two main requirements here. Can you tell us what they are?

Brian E. Lewis

Principal

Sure, Matt, and thanks for having me on. I'm looking forward to talking about this with you during this podcast. As you indicate, there are two primary requirements here under the law.

One is a disclosure of pay ranges, which specifically means when companies or employers are posting positions, the employers are going to be required to disclose the annual salary range or the hourly wage range that the employer reasonably and in good faith expects to pay for the position. So that's the disclosure of pay range. And that's a traditional pay transparency law that we've been seeing across the country in a number of states. And as you said, Massachusetts is now just sort of jumping on the bandwagon.

I should note when we talk about this, not only are these salary range postings required to be done for applicants, they're also required to be done when a company is posting for a promotion or a transfer within the organization. Or, for that matter, even if an employee at a company simply wants to know the information, they are allowed to ask about the salary range for their own job position in the company. So, it's more expansive than just posting for applications. So that's the first piece, this disclosure of pay ranges.

The second piece is a little more unusual, and I know you're going to talk a little bit about it

later in the podcast: There's also now going to be a requirement for employers in Massachusetts to report wage data to the state. This is a little unique. These are reports that are EEO-1 type reports, EEO-4 type reports, and I know in your practice you spend a lot of time with this, so we'll talk a little bit about that later.

Camardella

Yes, I sure do and am happy to chat about it a little bit later on. So, two main

sets of requirements here under the law — does this law apply to all employers in Massachusetts?

Lewis

Luckily, no. It only applies to larger employers. Under the statute, employers that are covered are only those employers that employ 25 or more employees in the Commonwealth of Massachusetts. That's actually a really important distinction because a lot of times the law doesn't give us that information, but this law does. And that's important because now an out-of-state company or an out-of-state employer that has a minimal presence in Massachusetts is not covered by the law. Simply having employees in Massachusetts doesn't make you covered. You need to have 25 or more.

At the same time, the way this law is written, advertising for a position via a website or Indeed.com or one of those job aggregator sites that a Massachusetts applicant will see doesn't implicate the Massachusetts law unless that company has 25 employees in the state. So, it is limited in that way, which I think is really helpful to know.

Camardella

For sure — and somewhat different from some of the other state laws out there. And I believe there's even a higher threshold for the wage-reporting piece. If memory serves, was that a hundred or more employees?

Lewis

It is. The wage reporting piece, and you'll talk a little bit about this later, is the same requirement that employees have to report the federal data. It's the same coverage requirement. We should also note, even if you're posting these jobs on websites or externally, there's certainly other state wage transparency laws that may apply, even though you don't necessarily have to worry about the Massachusetts one. There's always, unfortunately, that patchwork of laws that we're dealing with here.

Camardella

Brian, I'm sure some companies will struggle with this and there'll probably be some companies who either are unaware or ignore it. What are the penalties for non-compliance and is there, importantly, a private right of action under this law?

Lewis

When we talk about private right of action, you mean can someone get sued? Can a company be sued by a disgruntled applicant or employee for failing to comply with this law? And the answer to that question is no, they can't. There is no private right of action under the Massachusetts law.

The enforcement powers under the Massachusetts law for these salary postings is solely found within the Massachusetts Attorney General's office. Now, I don't know if that's a good thing or a bad thing. We deal with the Massachusetts

Attorney General's office a lot of times; they're a very aggressive agency and they take a lot of actions to protect employee rights and sometimes I would suspect some employers would indicate that they're a tough agency to deal with. But they're the ones that have the exclusive right to enforce it.

At the same time, the law limits exactly how they can enforce this and gives a little bit of protection for companies that mess up once or twice. The attorney general is allowed to issue fines for these types of noncompliance. But for the first violation, they're only allowed to give a warning. They can't issue a fine. The second violation, they can issue a \$500 fine. The third violation, they can issue a \$1,000 fine. Once you get to the fourth violation, if you're going to get there, the fines go up very substantially and can be up to \$25,000. But for the first couple of times, the Attorney General's office recognizes that people are going to try to struggle with this law and so they're really going to try to get people into compliance before they really hit them with fines.

Camardella

Well, Brian, let's hope we're not helping any employers who are up to their fourth offense or higher.

Lewis

True.

Camardella

One of the other things that we see in many of this wave of pay transparency laws out there amongst the states are protections for employees or applicants. Are there any protections available to employees or applicants who want to inquire or ask questions about pay ranges?

Lewis

That's a really good question. And that's a really important question and an important distinction. Because when I said before that the Attorney General's office is the exclusive agency that enforces the law and there's no private right of action, that only applies to the actual posting of the job ranges.

For employees or applicants that are asking or wanting to see their wages or wanting to see the salary ranges within the job they're applying for, there are very strong anti-retaliation provisions there in which companies can't retaliate against someone for asking for the information. With that, there is a private right of action. A disgruntled employee or an applicant can bring a suit against the company for that violation. And if they bring that type of action, there's enhanced damages to that, which are greater than the fines that we just talked about. So, you have to be very careful about not retaliating against employees or applicants who want to ask for this information because they will now have a right to get it.

Camardella

All right, I'm following. So, if I were an applicant, for example, who inquired

into the salary range for a particular job I was interested in and I did not get that job, presumably I could bring a claim alleging that the reason I wasn't hired was because I inquired into what the job would pay. And assuming I could prove it, I'd be entitled to some sort of damages in a private right of action.

Lewis

Right. So that's important for the company addressing these laws. It's important today and going forward to make sure their decisions on applicants are made for the right reasons and they're not made for unlawful reasons, and that they're not making any decision saying, "Matt asked us questions about the salary. We're not going to hire him. We're not going to move forward with him" — because that's what would be an unlawful action when this law kicks into effect.

Camardella

That makes sense. Brian, you've explained quite a bit, but there must be some unanswered questions in this law. From your perspective, what items would you like more clarification on?

Lewis

There are always some holes or some questions we have when we have new legislation that's put in place. A couple of things that just come to mind right away for me are questions like, does this law apply for a Massachusetts employer that is looking for people in a location outside of Massachusetts? Let's say a Massachusetts employer has an office in Florida or an office in Kansas. Does the law apply for those applications? That's sort of an unanswered question, unfortunately, right now.

Another question is what if a Massachusetts employer is looking for people for hybrid work that they don't have to work in Massachusetts, they can work anywhere. They can work in Hawaii, they can work in Puerto Rico, they can work in what have you. There's not clarity, at least now, about how far that law extends.

Camardella

Those are good questions. I don't know that I thought of all those. So, do we expect any additional guidance or clarification from the state on what the law means and how it applies?

Lewis

A couple of things to remember when we're thinking about this: Number one, the law is not kicking into effect for a year. It is not going to become effective until October 2025. Companies and employers have at least a year to prepare for and get ready for this law. The law also says that the Attorney General's office, again I mentioned the enforcement agency here, is required to engage in what's called a public awareness campaign within the next six months. I don't

know what that means, but we shall see. I don't know if that's going to mean they're going to issue regulations, if they're going to issue guidance on their website. In the past, the Attorney General's office has done that. We just don't know exactly what they're going to do now.

Camardella

Brian, all very helpful. Here's a question that I know many employers are struggling with: As we mentioned at the top and throughout so far, several states have passed laws requiring the posting of pay ranges with job openings. Should an employer adhere to a single practice of listing salary ranges in all their job postings? Selectively? What are your thoughts?

Lewis

We get that question a lot, as you can imagine, when this patchwork of these different state laws continues to grow and grow and grow for these multistate employers. I'll give the classic lawyer's answer. It depends.

Each company is going to have to analyze this specifically and how it affects their company. Is the company operating largely in jurisdictions like Massachusetts and others that have these requirements? Is its workforce remote? There are more companies that have really dispersed workforces now, that are all across the country, frankly, all across the globe. If they decided to post these salary ranges now or to be upfront about these laws, will that impact employee relations issues? These are all questions that I can't answer, but companies are to have to think about when they're trying to determine this sort of "one size fits all" approach.

So hopefully I've given you a little bit of information about this law as we're trying to digest it here in Massachusetts. But I do want to now ask you some questions if you don't mind.

Camardella

Wait a second, wait a second. I was told I'd be asking the questions.

Lewis

I know, I know. We're flipping it a little bit here. But this is actually really important. As we talked about before, in addition to the salary posting and the wage posting, there are these wage reporting requirements. And I know you spend a lot of time talking to contractors and other companies about wage reporting requirements. Would being a government contractor impact how a company may look at this law and try to deal with this law?

Camardella

The short answer is yes. And the reason is because the Federal Acquisition Regulation Council, which is the federal agency responsible for creating all types of terms and conditions in federal contracts — so when a business, for example, wants to sell goods or services to the federal government and one of its agencies, they adhere to certain sets of terms and conditions in their

contracts. It's the FAR Council that establishes all those. And they recently proposed requiring federal government contractors to post the salary ranges for all positions that are working on or sufficiently related to the fulfillment of a federal contract. Assuming that this proposed rule becomes finalized and becomes a standard term and condition in federal government contracts, this is really going to push the federal government contractor community towards adopting a uniform policy when it comes to whether or not to post salary ranges with their job openings. That way they don't have to individually assess whether or not they're subject to a requirement in a particular jurisdiction for a particular job opening. It would be much easier to administer for their HR and talent acquisition staffs and avoid just a patchwork of different approaches depending upon the job and its location.

Lewis

That's really insightful and helpful information to think about that for the contractor community.

As I mentioned before, the other piece of the Massachusetts law is this wage reporting requirement. And I'm familiar with the idea that they seem very similar to those EEOC requirements that I know there's been a lot of discussion of over the past five to ten years. Am I wrong? Is this similar to what the EEOC is sort of asking companies to do?

Camardella

You're not wrong. If you feel like you're reliving a nightmare, you're not. You may remember a few years back that the EEOC in fact was requiring employers as part of their annual EO1 reporting requirements to report not just on the race and gender of its employee populations, but also wage data, what was called Component Two of the EO1.

That was short lived. It only lasted for two years and it was rescinded during the Trump administration. It's also similar, frankly, to what California and Illinois are already requiring of employers in their states. But recently, the EEOC, which is now controlled by a majority of Democratically appointed members, has been talking about resuscitating Component Two. And while it may look somewhat different and take a slightly different form, we're anticipating that the new iteration of Component Two will similarly ask for some sort of annual reporting of wage data broken down by race and gender demographics in different categories. At the same time, Brian, there is an election coming up, as you know, and the outcome certainly could impact the direction the EEOC follows here.

Lewis

Well, it sounds like this is just more regulation and more burden on companies. How much of a burden do you think this will be for companies in Massachusetts with this new state law that they're dealing with?

Camardella

It won't be insignificant. But I think at the end of the day, the burden is really going to depend on the size of the employer and how robust their systems are. If wage data can't be easily queried out of their HRIS, you can imagine what a nightmare it might be if they have to pull individual payroll records for hundreds of employees at a time.

Lewis

Another question that came up, Matt, is once the employer submits this data to the state, what's going to happen to it? Do we know what's going to happen to the data? Is it going to be available publicly? Do we know?

Camardella

The law is actually pretty explicit, and it does seem the data is going to be made available. The law speaks to publicly sharing on a state website aggregated data by industry. However, it also appears that the individual employer data will not be made available to the public. Moreover, there's a provision in the law that exempts this data explicitly from being deemed a public record that could be requested by the public as part of a request for information.

Lewis

That's really good news. I'm sure a lot of companies are going to be happy to hear that their data is not going to be splayed across the internet for all to see.

With all this data that these companies are gathering and pulling together and reporting, what should they be doing with this data? Should they be trying to address these issues proactively?

Camardella

That's our strong recommendation, Brian. And it has been for some time. As you know, Massachusetts already has one of the strongest pay equity laws in the country, making it easier to bring claims of pay discrimination and harder for employers to defend them.

On the bright side, though, MEPA, as the law is known, does provide a safe harbor for employers who undertake their own pay equity analysis. Specifically, what the law allows is for employers to assert an affirmative defense to a claim of pay discrimination if they undertook a reasonable analysis within the last three years and either remedied the issues or didn't identify any.

So that protection, coupled with the fact that many employers in the state of Massachusetts are now going to have to report their wage data to the government, really is a strong incentive for an employer to perform some sort of pay evaluation, pay equity analysis.

But look, a word to the wise here: As with any self-critical analysis, something could be used against you should it become a matter of public record. Employers should really undertake every effort to do this type of analysis under the direction of counsel to help maintain privilege and prevent it from being discoverable by either the state, the federal government or private litigants.

Lewis

Yes. I know a number of companies have undertaken this type of analysis, pay equity analysis, over the past five years or so and found really helpful information either way when they've done it. Like you said, either number one, they have some issues they need to address or number two, it just reinforces the fact that they are doing things well and doing things the right way regarding pay equity. So, I completely concur with the idea of a pay equity analysis and, if you can, under the guise of attorney-client privilege.

Camardella

Couldn't agree more.

Lewis

This is all very helpful, Matt. I really do appreciate you spending a little bit of time talking with me about this new law and what we recommend for companies and employers to do.

Camardella

Well, Brian, it was great chatting with you as well. Thanks for sharing your insights. And that pretty much is all the time we have today, so I hope we can do this again soon.

Lewis

Me too. Thanks so much.

OUTRO

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