Legal Update Article

Massachusetts AG's Office Issues Guidance on Equal Pay Law Set to Take Effect in July

By K. Joy Chin, Brian E. Lewis, Samia M. Kirmani & Scott M. Pechaitis

March 5, 2018

Meet the Authors

K. Joy Chin
(She/Her)
Principal
(631) 247-4613
Joy.Chin@jacksonlewis.com

Brian E. Lewis
(He/Him)
Principal
617-367-0025
Brian.Lewis@jacksonlewis.com

On March 1, 2018, the Massachusetts Office of the Attorney General issued its much-anticipated guidance on the state's new pay equity law, set to take effect on July 1, 2018. The Massachusetts pay equity legislation amended the state's Massachusetts Equal Pay Act (MEPA). Among other things, the amendment changed the definition of comparable work, prohibited employers from asking applicants about salary history, and established a safe harbor for employers who conduct pay audits. (For additional information on the law, Massachusetts Governor Signs Tough Pay Equity Bill.)

The Attorney General's Guidance does not have the legal force of a regulation, but it provides clear insight into how the Attorney General's Office views the law and will enforce it.

The Guidance consists of a number of Frequently Asked Questions, a Guide for Employers to Conduct Self-Evaluations of their Pay Practices, and a Sample Checklist for employers to follow when reviewing policies and procedures for compliance with the amended MEPA.

This article discusses some of the key provisions in the Guidance.

Effect on Multi-State Employers and Out-of-State Employees

The Guidance goes further than what the law provides and states that the amended pay law applies to employees with a "primary place of work" in Massachusetts and includes those who work from a Massachusetts base of operations, but travel out of state. The Guidance, however, provides little clarity regarding the meaning of "primary place of work." For example, the Guidance states that employees who telecommute from outside Massachusetts "to a Massachusetts worksite" have a primary place of work in Massachusetts. It does not clarify, however, what that means. For example, the Guidance does not provide an answer as to whether an employee who works for an employer's headquarters in Massachusetts, but works from home in Louisiana (for example) for a supervisor who is also in Louisiana, has a "primary place of work" in Massachusetts or Louisiana for purposes of the amended law.

The Guidance states that multi-state employers must comply with the new pay law if it is "possible" that the prospective employee will be chosen or assigned to work in Massachusetts. This means that all of the law's requirements — including its prohibitions on salary history inquiries — apply to the interview process. This includes even when the interview process is outside of Massachusetts, but there is a possibility the employee will work in Massachusetts. The Guidance further states that employer indecision on the final placement of an employee during the pre-hire stage is not a viable defense.

Comparable Work

The new definition of "comparable work" is work that "requires substantially similar skill,

Samia M. Kirmani
Principal
(617) 367-0025
Samia.Kirmani@jacksonlewis.com

Scott M. Pechaitis
Principal
303-876-2201
Scott.Pechaitis@jacksonlewis.com

Related Services

Affirmative Action, OFCCP and Government Contract Compliance
Construction
Employment Litigation
Energy and Utilities
Entertainment and Media
Financial Services
Government Contractors
Healthcare
Higher Education
Hospitality
Insurance
Life Sciences
Manufacturing
Pay Equity
Real Estate
Retail
Technology
Transportation and Logistics
Wage and Hour

effort, and responsibility." The Guidance notes that this is a broader definition than the "equal work" standard under federal law. The Guidance also cautions employers not to assume that jobs in different business units or departments are not "comparable" unless the jobs, in fact, require different skills, effort, and responsibility.

Under MEPA, differences in pay for comparable work are acceptable *only* when based on one of the following factors:

1. A seniority system (that is not affected by pregnancy, parental, or family leave);
2. A merit system;
3. A system measuring earnings by quantity or quality of production, sales, or revenue;
4. Geographic location;
5. Education, training, or experience (as long as reasonably related to the particular job in question); and
6. Travel that is a regular and necessary part of the job.

The Guidance reviews these factors and provides further information on applying them. For example, the Guidance confirms that commission systems applied in uniform, reasonably objective fashions can account for differences in pay. Likewise, different geographic work locations also may constitute a valid reason for differences in pay.

The Guidance also advises that MEPA is a "strict liability" statute. An employer's intent to discriminate against employees of one gender on the basis of pay is "irrelevant" to the analysis and the differences in pay can be justified only by one of the enumerated factors.

Salary History Inquiries

Under the MEPA, employers are *prohibited* from seeking salary or wage history information from a prospective employee, except in two limited instances:

1. When an employer is confirming wage or salary information that has been voluntarily shared by the prospective employee; and
2. After an offer of employment with compensation has been made.

The Guidance makes clear that MEPA permits asking a prospective employee about salary requirements or expectations. Employers may ask these questions during the interview process, but the Guidance cautions that employers must ensure the questions are not "framed or posed in a way that is intended to elicit information from the prospective employee about his or her salary or wage history." The Guidance also confirms that an employer may ask a prospective employee about his or her sales history (but may not ask about the individual's earnings through sales). In addition, the Guidance confirms that an employer may obtain information about a prospective employee's salary or wage history through public records. We caution employers, however, that when considering these practices, they understand that an employee's pay requirements, expectations, or pay history will not justify a pay disparity.

Availability of Employer Affirmative Defense for Self-Evaluation

Under the amended MEPA, employers may establish an affirmative defense against liability if the employer has (1) conducted a reasonable and good faith self-evaluation of its pay practices within the previous three years and before an employee files an action, and (2) the employer can show reasonable progress toward eliminating any unlawful discriminatory wage differentials discovered through the self-evaluation. Employers bear

the burden of proving they have met these two requirements.

The Guidance defines a "good faith" self-evaluation as an evaluation conducted "in a genuine attempt to identify any unlawful pay disparities among employees providing comparable work." It further states that the determination of whether a self-evaluation is reasonable in detail and scope depends on the size and complexity of the employer's workforce. In addition, the Guidance states that "reasonable progress" toward eliminating pay disparities requires an employer to take "meaningful steps toward eliminating any unlawful pay disparities, taking into account how much time has passed since the self-evaluation, the nature and degree of the progress as compared to the scope of the disparities identified, and the size and resources of the employer."

The Guidance notes that if an employer's self-evaluation is found to be insufficient in detail or scope, but nonetheless was conducted in good faith and the employer has made reasonable progress toward eliminating pay disparities, the employer will not be required to pay liquidated damages to any affected employees.

Guide to Self-Evaluation and Pay Calculation Tool

An appendix to the Guidance contains an outline of general considerations and steps employers could take to conduct a basic self-evaluation of pay.

The Guidance offers helpful tips for employers to consider when conducting self-evaluations, including:

- Do not assume jobs in different business units or departments are not comparable unless they in fact require different skills, effort, and responsibility.
- In many cases, pay groups with at least 30 employees need advanced, statistical analyses.
- Consider outliers — employees whose compensation is significantly above or below the average — should they be included in the overall analysis and, if so, are they being paid in compliance with MEPA?
- Each male employee within a pay group is a potential comparator for each female employee (and vice versa). It is not sufficient to compare a female employee only to the "average" male employee performing comparable work.
- Remedial adjustments should be made as soon as possible. If an employer waits longer than six months to take remedial action, it risks having the self-evaluation used as evidence against it if an employee files a claim.
- Employers should consult with legal counsel to determine what type of analysis is most appropriate for their organizations.

The AG also published a downloadable Pay Calculation Tool with Instructions. The Guidance cautions that this Tool is intended for small group comparisons and that larger or complex pay groups likely require more advanced statistical analyses. The Pay Calculation Tool is an Excel spreadsheet that allows employers to enter employee information, assign pay groups and see how each employee's base salary and total compensation compare to the average in the group. The Tool also provides spaces for the user to insert eligible explanatory factors (*i.e.,* years of service, performance, location, and so on) to help in evaluating whether the employee's "pay gap" is justified.

Next Steps

The Guidance provides helpful information for employers seeking to understand the AG's

interpretation of the new law, especially those considering embarking on evaluations of pay practices and those revising their hiring processes to comply with the new law.

However, the Guidance does not contain a clear "one size fits all" answer on how the AG expects employers to analyze pay to avoid exposure under MEPA. Rather, the Guidance provides only a "starting point" and notes that "the complexity of the analysis required will vary significantly depending on the size, make-up, and resources of each employer."

While the Pay Calculation Tool appears helpful to organize relevant data for a proactive self-evaluation, employers should take care in how they use it. Unless protected by the attorney-client privilege, the reports created using the Tool likely would be discoverable in litigation and government investigations, including investigations by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP), which do not recognize the affirmative defense under MEPA. Plaintiffs' attorneys also may seek copies of these reports to try to buttress other types of discrimination or favoritism claims. Therefore, employers should be cautious and consult with counsel before attempting to use the AG's Pay Calculation Tool or conducting any self-evaluation. In a later article, we will discuss further considerations for conducting a proactive pay analysis and using the Pay Calculation Tool.

If you have questions about how to prepare for the new law and ensure compliance with its provisions, do not hesitate to contact a member of the Jackson Lewis Pay Equity Resource Group.