

THE ROAD TO PAY EQUITY IN MASSACHUSETTS: DON'T ASK – DON'T TELL

By Barry J. Waters and Jennifer A. Corvo

Massachusetts was the first state to pass an equal pay act in 1945. On Monday, August 1, 2016, Massachusetts made history once again by enacting the first state law banning an employer's inquiry into a job applicant's salary history before it makes a job offer.

The new Pay Equity Act also significantly revamps existing state law. The bill passed both the House and the Senate unanimously. It goes into effect on July 1, 2018.

Job Interviews

The new law will prohibit employers from requesting salary history during a job interview. This provision of the law aims to eliminate the continuing effect of the historically lower wages and salaries paid to women, as employers tend to set salaries for new hires using the applicant's previous salary. The employer may not seek or confirm a prospective employee's wage or salary history until after "an offer of employment has been negotiated and made to the prospective employee." The law does not prohibit an employer from verifying prior wage or salary information prior to making a job offer if a prospective employee "has voluntarily disclosed such information."

In addition to this groundbreaking provision, the new law substantially expands and delineates the existing Massachusetts Equal Pay law.

Discussions about Compensation

Employers will be prohibited from requiring that employees refrain from inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages.

An employer may prohibit a human resource employee, a supervisor or other employee whose job responsibilities require or allow access to other employees' compensation information from disclosing such information without prior written consent from the employee whose information is sought or requested.

Definition of "Comparable Work"

The statute provides that comparable work is "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions". However, the law also expressly acknowledges that "working conditions" may differ based on shifts, physical surroundings and hazards encountered by employees performing a job.

For Questions About Labor and Employment Matters, Please Contact:

Michael Colgan Harrington, Chair
mharrington@murthallaw.com

Susan J. Baronoff
sbaronoff@murthallaw.com

Emily G. Brown
ebrown@murthallaw.com

Jennifer A. Corvo
jcorvo@murthallaw.com

Donald Griffith II
dgriffith@murthallaw.com

Lissa J. Paris
lparis@murthallaw.com

Rachel Faye Smith
rfsmith@murthallaw.com

Sonia Macias Steele
ssteele@murthallaw.com

Barry J. Waters
bwaters@murthallaw.com

Kristen L. Zaehring
kzaehring@murthallaw.com

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Recognized Pay Differentials

The law prohibits discrimination on the basis of gender in the payment of wages for comparable work unless the variation is based upon:

- A Merit system;
- A Seniority system, as long as time spent on leave due to pregnancy-related condition and protected parental, family and medical leave does not reduce seniority;
- A system which measures earnings by quantity or quality of production, sales or revenues;
- Geographic location;
- Education, training, or experience to the extent such factors are reasonably related to the particular job in question; or
- Travel, if the travel is a regular and necessary condition of a particular job.

No Retaliation

The law prohibits an employer from discharging or otherwise retaliating against an employee for: 1) opposing any act or practice prohibited by the statute; 2) making or indicating an intent to “make a complaint” or initiating a legal proceeding; 3) testifying or participating in an investigation or proceeding; or 4) disclosing or discussing wages.

Liquidated Damages and Attorney’s fees

A successful plaintiff is entitled to recover unpaid wages and liquidated damages in an amount equal to the unpaid wages (double damages). The plaintiff may also recover reasonable attorney’s fees.

Affirmative Defense

An affirmative defense is available to any employer who, within the previous three years, completes a self-evaluation of its pay practices, in good faith, and can demonstrate reasonable progress has been made to eliminate gender-based pay differentials for comparable work. An employer may design its own review, provided that it is reasonable, or may conform to templates, forms, and guidance that the Attorney General will provide.

If an employer has undertaken this effort but cannot demonstrate that the evaluation “was reasonable in detail and scope,” it is not entitled to an affirmative defense but shall not be liable for liquidated damages.

Direct Court Action

A plaintiff bringing an action under this statute is not required to file a charge of discrimination with the MCAD first.

Statute of Limitations

The statute of limitations has been expanded from one year to three years after the date of an alleged violation, and “a violation occurs when a discriminatory compensation decision or other practice is adopted, when an employee becomes subject to a discriminatory compensation decision or practice or when an employee is affected by application of a discriminatory compensation decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice.”

Take Away:

- This new statute is complex and is fraught with opportunities for plaintiff’s lawyers.
- An evaluation of pay practices is essential before the law takes effect.

If you have any questions on Labor and Employment issues, please contact:

Barry J. Waters at (203) 772-7719 or bwaters@murthallaw.com

Jennifer A. Corvo at (860) 240-6066 or jcorvo@murthallaw.com