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Think You Can Verify Salaries? Think Again: Massachusetts Passes Comprehensive Pay Equity Law, Bans Pay History Inquiries

On August 1, 2016, Massachusetts joined a growing state and federal trend by passing a comprehensive [“pay equity” law](#). Indeed, the focus on equitable pay has been a major priority for the Obama Administration since 2009, when President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 just after taking office. Since that time, the federal government has enacted several laws aimed at closing the pay gap for women and minorities, and many states have passed pay equity/pay secrecy laws, including Connecticut, Maryland, California, and New York.

The Massachusetts law goes into effect January 1, 2018, and imposes strict guidelines on employers in regards to applying equitable compensation, limiting the right of employees to discuss compensation, and restricting employers from inquiring about the pay history of job applicants until after making an offer of employment with compensation (this provision is the first of its kind passed by any state). Below are some of the highlights of the new law:

- **Pay Equity** — Employers are prohibited from discriminating on the basis of gender in compensation or paying employees less than the compensation paid to employees of a different gender performing comparable work. Variation in compensation is not prohibited in limited circumstances, including if based on a bona fide seniority system (provided pregnancy-related, parental, family, and medical leaves do not reduce seniority), merit system, or system measuring earnings by quality/quantity of production or sales; geographic location; education, training, or experience (if reasonably related to the job and consistent with business necessity); or travel (if regular and necessary condition of job).
- **Pay Secrecy** — Employers are prohibited from requiring employees to refrain from inquiring about, discussing, or disclosing their own or other employees' compensation information (with an exception for certain human resource personnel).
- **Compensation History Inquiries** — Employers are prohibited from screening job applicants based on their compensation history, such as requiring that information satisfy minimum/maximum criteria or requesting/requiring disclosure as a condition of being interviewed or considered for employment (including making such requests directly to the job applicants' current/former employer). However, employees may provide a prospective employer with confirmation of prior compensation after the employer makes an offer of employment with compensation.

The law calls for steep penalties, including unpaid wages and compensation, liquidated damages in an amount equal to any unpaid wages, a \$1,000 fine, and reasonable attorneys' fees and costs. The provisions of this law are closely related to many federal laws, including the Equal Pay Act of 1963 (prohibits gender-based discrimination in pay), Title VII of the Civil Rights Act of 1964 (prohibits gender discrimination), and the National Labor Relations Act (allows employees to discuss compensation). The law also provides for recovery by or on behalf of one or more "similarly situated" employees, which could invite class action litigation.

Interestingly, the law provides guidance as to how employers should resolve current pay differentials. First, employers who are paying a wage differential in violation of the pay equity provisions are prohibited from reducing the pay of employees to comply with the law. Second, the law provides an affirmative defense to claims made under the pay equity provisions where an employer has done a self-evaluation of its pay practices in good faith and can demonstrate reasonable progress towards eliminating unlawful gender-related compensation differentials within the three years prior to the claim. The law does not provide a detailed description as to what constitutes an acceptable self-evaluation; rather, it states that the evaluation must be reasonable in detail and scope in light of the employer's size and "consistent with standard templates or forms issued by the attorney general." The Massachusetts attorney general has yet to issue any standard templates or forms contemplated by the new pay equity law.

Massachusetts employers may wish to perform a self-evaluation of pay-related practices with the assistance of legal counsel and under the protection of attorney-client privilege and, if disparities are uncovered, to begin remedying them. Not only will such a self-evaluation aid in legal compliance and defense of future claims, fairness in compensation can also boost employee relations, ideally making unionization and employment litigation less attractive to employees.

For more information, or if you have questions about how the issues raised in this legal update affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's [Labor, Employment, Benefits + Immigration Group](#):

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