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OPINION

MEPA self-evaluations contain pitfalls for employers

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On March 1, the Attorney General's Office issued guidance on a 2016 amendment to the Massachusetts Equal Pay Act that will take effect on July 1. And while most employers are eager to comply with the upcoming changes, they need to think carefully, at this 11th hour, about whether and how to conduct the self-evaluation of their pay practices that the AG's guidance encourages.

The statute, as highlighted by the guidance, provides two incentives for self-evaluations. The first is that employers might obtain a "complete defense" to MEPA claims and an "affirmative defense" to pay-related discrimination claims under Chapter 151B if they conduct self-evaluations before an adverse claim is made. The AG explains this as follows:

"MEPA provides a complete defense to a legal claim for any employer that has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an action is filed against it. … If an employer is eligible for an affirmative defense under MEPA, it will also have an affirmative defense to liability for pay-related discrimination claims under Chapter 151B."

Such a defense could be valuable. It could allow an employer to defeat a claim under MEPA or Chapter 151B, even if, in fact, there had been wage discrimination, by proving that it conducted a reasonable and good-faith evaluation of its pay practices and made "reasonable progress" toward eliminating the gender-based pay differentials.

But the devil may be in the details. A self-evaluation may not be "reasonable" unless it is extensive. The AG suggests four pages of "steps that employers should consider undertaking as part of a comprehensive self-evaluation."

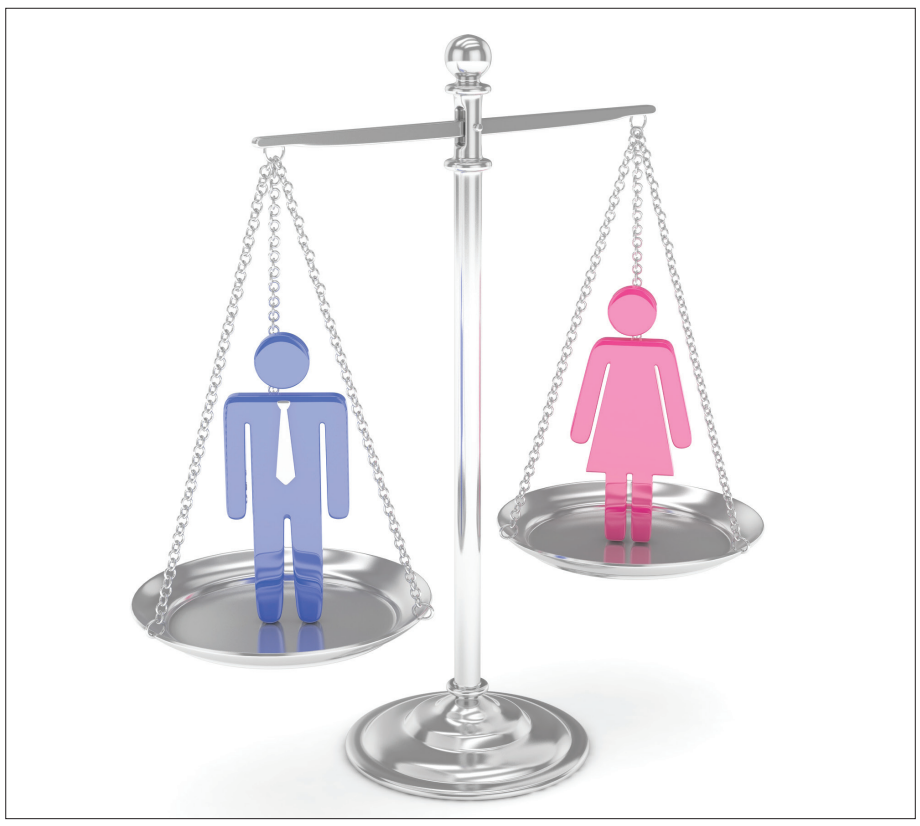
And even the first of the six steps, by itself, is considerable. It involves gathering information that "likely includes, but is not necessarily limited to" the following data for each current and former employee for the past year (if it exists): (a) name/employee ID; (b) gender; (c) primary work location; (d) work type (full time, part time, temporary, etc.); (e) exempt/non-exempt status; (f) date(s) of hire; (g) job title; (h) job code/grade/band; (i) date in most recent job code/grade/band; (j) division/department/business unit; (k) job function/family; (l) supervisor; (m) performance ratings; (n) highest level of education; (o) special licenses, certifications, etc.; (p) pay type (salary, hourly, etc.); (q) annualized salary or hourly rate; (r) shift differential; (s) bonus eligibility; (t) eligible benefit plans/programs; (u) bonus paid; (v) hours worked/type (regular, OT, etc.); and (w) total compensation.

Further, according to the AG, "[a]dditional information also may be relevant depending on a particular employer's compensation policies and practices." For example, "if an employer takes job-related training or individual production or sales into account in determining employee compensation, that information should be gathered as well."

And in certain situations, according to the AG's suggestion, a larger employer must do a statistical analysis to satisfy the good-faith requirement.

The second incentive for self-evaluations is that a self-evaluation insufficient to establish a defense nevertheless might be determined to be inadmissible as evidence against the employer. The AG explains this as follows:

"Evidence that an employer has conducted a self-evaluation or taken remedial steps as a result is not admissible in court to show a violation of MEPA or Chapter 151B in the following circumstances: (a) when the alleged violation occurred before the date the self-evaluation was completed; (b) when the alleged violation occurred within 6 months after the self-evaluation was completed; or (c) when the alleged violation occurred within 2 years after the self-evaluation was completed, if the employer can show that it has developed and begun implementing in good faith a plan to address any gender based wage differentials that it revealed."



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> Self-evaluations under the new Massachusetts Equal Pay Act could serve as a Trojan horse for other possible wage discrimination claims under other applicable laws.

The two incentives thus are substantial. But employers should weigh three other considerations before launching into the type of self-evaluation that the AG suggests.

First, employers should consider that MEPA and Chapter 151B are only parts of a larger, more complex statutory regime in which employees also can bring other statutory claims on the basis of similar facts, and that MEPA does not extend self-evaluation protections to employers when those other claims are made.

MEPA self-evaluations thus could serve as a Trojan horse for other possible wage discrimination claims under other applicable laws.

Title VII of the Civil Rights Act of 1964, the federal Equal Pay Act, and nondiscrimination laws of other states are illustrative. Any of those bodies of law could provide a separate basis for a pay discrimination claim without providing for a self-evaluation defense.

The AG's guidance thus could lull an unwary employer into a false sense of security. That is because the guidance focuses on MEPA and Chapter 151B in isolation, without mentioning other potential claims that might be overlooked by employers in a well-intentioned, 11th-hour rush to ensure compliance with a set of Massachusetts rules taking effect on July 1.

Second, there is no guarantee that a MEPA self-evaluation would be inadmissible in any court. The risk that a prejudicial self-evaluation might be admitted could be particularly profound in a Title VII or Equal Pay Act case, or in a lawsuit in another state conducted under that state's nondiscrimination laws.

Further, as is noted above, the self-evaluation has to meet certain criteria even in the context of MEPA and Chapter 151B claims to be inadmissible.

Third, while MEPA might create a defense and place limits on admissibility in the context of two particular types of Massachusetts claims, it says nothing about "discoverability." That, even by itself, is troublesome. The Massachusetts Rules of Civil Procedure generally allow for discovery of any matter "relevant to the subject matter involved in the pending litigation." And even when materials are inadmissible at trial, they nevertheless are discoverable by the opposing party if they appear "reasonably calculated to lead to the discovery of admissible evidence."

Federal Rules of Civil Procedure operate in similar fashion, allowing discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." And they, too, emphasize that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."

It thus is conceivable in any civil action that a MEPA self-evaluation would be discoverable even if it is not admissible, and if it is discoverable, it could provide a detailed roadmap to prosecuting and proving a pay disparity claim.

None of the above, by itself, is intended to suggest that an employer should refrain from a MEPA self-evaluation. Disparate treatment on the basis of gender is unlawful. Pay differentials need to be scrutinized. And unwarranted pay differences should be corrected.

But any employer considering a self-evaluation in the manner suggested by the AG's Office should do so with eyes wide open, keeping the Trojan horse analogy in mind. MLW

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