Massachusetts Equal Pay Law: Major Impacts on Insurance Agencies With Mass. Employees

Overview

A new Massachusetts law, set to go into effect on July 1, 2018, could have major consequences for insurance agencies that have employees located in Massachusetts, regardless of location or primary state of organization. The Massachusetts Equal Pay Law requires employers to provide the same compensation to male and female employees who are based in Massachusetts, and who perform comparable work. For purposes of the law, a "Massachusetts-based" employee is any employee who performs the majority of his or her work activities in Massachusetts. Compliance with the new law is not straightforward, and many insurance agencies will need to drastically alter their business practices in order to comply. For one thing, employers cannot lower any employee's wages in order to bring themselves into compliance with the new law.

A claim can be made under the law if, for example, a female employee demonstrates that she is paid less than any male employee performing "comparable work." The law defines comparable work broadly as work that requires substantially similar skills, effort and responsibility, and is performed under similar working conditions. Determining the types of jobs that will be considered "comparable" is not intuitive, and successful plaintiffs will be entitled to double-damages (calculated based on the gap between the plaintiff's pay and the pay received by an employee of a different gender performing comparable work), attorneys' fees, and costs. Of great concern is the fact that violations of the Equal Pay Law may give rise to other wage and hour law violations that may expose certain company executives to personal liability for alleged damages.

The Massachusetts Attorney General has recently released guidelines for interpretation of the law, and one guideline specifically addresses insurance brokers. The guideline expressly states that insurance brokers selling different lines of insurance for the same employer may be engaged in comparable work if, despite subject-matter differences, general skill-levels are common across the job functions. The focus of this analysis is not on employees' job titles, but rather on the actual job functions of the employees. Any insurance agency that pays any Massachusetts-based female insurance producer less than any comparable male insurance producer (or vice versa) is therefore at risk of a lawsuit, even if the two employees sell different lines of insurance requiring entirely different subject matter knowledge. For purposes of this rule, if the only employees performing work comparable to the work performed by the Massachusetts-based employee at issue are located in another state, it may be necessary to evaluate the wages of those out-of-state employees to ensure that the Massachusetts-based employee is paid equally (or that any disparities are justified under the law).

Permissible Pay Variations

The new law carves out six "Permissible Pay Variations" that a company may rely upon to justify paying different compensation to employees of different genders. The six Permissible Pay Variations are as follows:

1. A Seniority System. This must be a standard, metric-based compensation plan, that is applied to all employees equally, that rewards seniority.
2. A Merit System. This must be a standard, metric-based compensation plan that is applied to all employees equally, that rewards merit as measured through uniformly-applied criteria. End-of-year merit bonuses based on informal, subjective standards do not constitute a "merit system" under this standard. A bonus plan that awards bonuses based on objective criteria (e.g., the volume of insurance premiums generated or the number of new clients developed by an employee) would be permissible.
3. A Production System. Wages under the system must be based on a pre-determined, pre-defined plan that awards compensation based on quantity or quality of production, sales or revenue (e.g., a commission). Many insurance agencies will be able to attribute differences in wages to differences in the

commissions earned by their various employees. Note, however, that the commission rates paid to employees must be established as part of a comprehensive plan, and commission rates for comparable work must be the same, even if the actual commissions earned are not. Setting commission rates, sales targets and other variables related to earning a commission on an employee-by-employee basis could result in a pay difference that would be a breach of the new law.

4. The Geographic Location of the Comparable Employees. To the extent employees work in regions with different costs of living, a difference in pay might be justified. However, determining whether the pay variation complies with the law will require a statistical analysis that normalizes for the differences in cost of living between the various regions where employees are employed. For insurance agencies with employees located throughout Massachusetts, or who have out-of-state employees who perform employment functions that are comparable to Massachusetts-based employees, this could be a fact-intensive analysis.
5. Variations in Pay Based On the Education, Training or Experience Levels Among Comparable Employees. Although training, education and experience are relevant factors to explain differences in compensation, to the extent that two comparable jobs can be performed with the same level of education, training or expertise, the mere fact that one employee has more education, training or experience may not be sufficient to justify a pay variation. As the insurance industry is highly regulated, insurance agencies might justifiably pay different wages based on the credentials held by individual employees.
6. Variation in Pay Based on Differing Travel Requirements Among Comparable Employees. Note that this refers to travel for work-related functions, not differences in commuting times, distances or expenses. To the extent that an insurance agency compensates its employees for work-related travel, the agency should carefully track this additional compensation.

The foregoing Permissible Pay Variations are limited, in that they do not cover many pay variations that might occur for reasons other than gender bias. For example: an employer hires a male employee for a job function in 2016, at a certain pay rate that reflects the 2016 labor demand for that job function. In 2017, the employer hires a female employee for a comparable job function at a higher pay rate that reflects an increased 2017 labor demand for the job function. Even though the pay differential between the two employees can be explained by changes in market demand, and not gender bias, a violation of the new law occurs because labor demand is not one of the six enumerated Permissible Pay Variations.

Safe Harbor

We note that the law does have a “safe-harbor” for employers. An employer’s liability arising from a violation of the law can be eliminated or significantly reduced if: (a) the employer, within the previous three years before a claim is filed against it, has conducted a good faith “self-evaluation” of its pay practices; and (b) if gender-based pay disparities are identified through such a self-evaluation, the employer has made reasonable progress toward eliminating gender-based pay disparities.

Whether a self-evaluation is “reasonable in detail and scope” depends on the size and complexity of an employer’s workforce. For employers with small, clearly defined job categories and basic pay structures, a simple analysis that compares compensation averages between male and female employees might be sufficient to identify pay disparities. For employers with large workforces and complicated pay structures, the self-evaluation may require a complex, multi-variable statistical analysis to evaluate whether pay variations among male and female employees are permissible or violate the law.

Whether or not an employer has made sufficiently “reasonable progress toward eliminating disparities” will depend on how much time has passed, the nature and degree of the employer’s progress as compared to the scope of the disparities identified, and the size and resources of the employer. In order for the employer to show that it has made reasonable progress, an employer will have to demonstrate that the steps it is taking will eliminate the disparities in a reasonable amount of time.

If an employer’s self-evaluation is found to be insufficient in detail or scope, but was nonetheless conducted in good faith, and the employer has made reasonable progress toward eliminating identified pay disparities, the employer will not be subject to the law's liquidated damages (double-damages) provision. The employer will still have to pay the affected employee unpaid wages and attorneys' fees and costs.

Summary

Insurance agencies are at particular risk under the new Massachusetts Equal Pay Law because the guidelines issued by the Massachusetts Attorney General have put them on notice that the state is inclined to take a broad view of the job functions that constitute comparable work in the insurance agency context. It is therefore essential for insurance agencies to ensure that any pay variations between employees of different genders, even employees selling different lines of insurance, fall within one of the Permissible Pay Variations. Given the significant threat of costly litigation for violations, all insurance agencies with Massachusetts employees should, prior to July 1, 2018, conduct a self-evaluation that is consistent with the law.

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