Why Your Company Will Be in Violation of the Massachusetts Equal Pay Law on July 1st – And How to Fix It

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As described in our prior publications, an *Act to Establish Pay Equity in Massachusetts* (the "Equal Pay Law") will go into effect on **July 1, 2018**. In basic terms, the Equal Pay Law requires Massachusetts employers to pay the same compensation to men and women performing "comparable" work. The Equal Pay Law contains a complex regulatory structure that ***fundamentally changes*** the way employee compensation is regulated in Massachusetts and contains severe penalties for violations.

Despite the unparalleled breadth of the Equal Pay Law and widely publicized anticipation of its effective date, many employers continue to hold misconceptions about what the law means for them. On March 1, 2018, the Massachusetts Attorney General published *Guidelines* that offer technical interpretations of the Equal Pay Law to help employers comply with the law.

WHAT YOU DON'T KNOW ABOUT THE LAW (AND SHOULD)

I. IT IS NOT REALLY ABOUT GENDER DISCRIMINATION AT ALL.

While a purpose of the Equal Pay Law is to bridge the gender gap with regard to wages, whether or not gender is the reason for pay differences is actually irrelevant under the law. This is a strict liability law that prohibits employers from paying men and women differently unless the reason fits within the six permissible reasons in the statute. In other words, if you think your company is safe because you know it would never consider gender when setting pay, you are one hundred percent wrong.

The following hypothetical illustrates the point:

In 2016, a female job applicant applies for a dog grooming position at a pet shop. The 2016 labor market for pet groomers is "soft," owing to a lull in dog ownership and a surplus of trained dog groomers. After an interview process, the pet shop offers the applicant a job at a minimum wage compensation rate. The applicant accepts the position, without negotiation. Between 2016 and 2018, dog ownership spikes, and the demand for competent dog groomers increases substantially. In 2018, in response to this market change, the pet shop decides to hire an additional dog groomer. After testing the job market, the pet shop discovers that it must offer a compensation rate well-above minimum wage to attract competent applicants. The pet shop ultimately hires a male applicant, at a compensation rate that exceeds the rate the shop is paying to its existing female dog groomer. 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 Equal Pay Law occurs because labor demand is not one of the six enumerated permissible pay variations. This concept is discussed further below.

II. YOU (AND ANY REASONABLE PERSON) WOULD NOT GUESS WHAT COMPARABLE WORK MEANS UNDER THE STATUTE.

The core provision of the Equal Pay Law provides that "No employer shall . . . pay any person in its employ a salary or a wage rate less than the rates paid to its employees of a different gender for comparable work," unless a statutory exemption applies. So what is comparable work?

The Equal Pay Law defines "comparable work" broadly as work that requires substantially similar skills, effort, and responsibility, and is performed under similar working conditions. Under this standard, two jobs, *that relate to entirely different subject matters or disciplines*

, may be considered "comparable," so long as the skill, effort, responsibility, and working conditions of the jobs are otherwise similar.

For example, as suggested in the *Guidelines*, 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. As another example, a public school cafeteria worker may be "comparable" to a janitor if both job functions require the same general skill-levels (according to the *Guidelines*). Prior to the *Guidelines*, a reasonable person probably would have limited comparisons to jobs in the same department or of the same subject matter. Now this broad definition of "comparable work" will require tracking compensation rates across disciplines and departments for many employers, and comparing pay of employees whose job functions are not obviously related.

III. THE PERMISSIBLE VARIATIONS IN PAY ARE VERY NARROW.

As previously mentioned, an employer avoids a "pay equity" discrimination claim only if it can prove that pay variations between male and female employees can be attributed to one or more of the following six "permissible pay variations":

1. A Seniority System – a pre-determined, pre-defined compensation plan that rewards seniority.
2. A Merit System – a pre-determined, pre-defined plan that awards compensation based on employee performance, as measured through uniformly applied, legitimate criteria that are job related. End-of-Year merit bonuses based on informal, subjective standards do not constitute a "merit system" under this standard.
3. A Production System – a pre-determined, pre-defined plan that awards compensation based on quantity or quality of production, sales, or revenue (e.g., a commission).
4. The Geographic Location of the Comparable Employees – a different location alone will not be enough. The employer will have to show the pay difference makes sense given the cost of living differences or other differences between the two locations.
5. Variations in Pay Based on the Education, Training, or Experience-Levels Among Comparable Employees – these elements must however, be related to the job. So the employer who wants to support education and thus pays employees more if they have a doctorate degree violates the law unless that degree relates to the job.
6. Variation in Pay Based on Differing Travel Requirements Among Comparable Employees. Commuting (*i.e.*, longer travel time to work based upon where the employee lives) is not a valid reason to pay differently.

Perhaps the biggest misconception about the exceptions is the one for merit. The exception applies to a merit system. An employer with no system that believes one employee is better than the other based upon their retroactive subjective assessment does not fall within a permissible exception.

IV. ACCORDING TO THE GUIDELINES, EMPLOYERS VIOLATE THE LAW EVEN IF OVERALL THEIR PAY PRACTICES RESULT IN EQUAL PAY.

An interesting part of the *Guidelines* is that the Attorney General has taken the position that looking at average pay amongst individuals in a position is not enough, and that a one-to-one comparison of men and women in the same position is needed.

The outcome of this interpretation yields a bizarre result. Imagine an employer has four recruiters, two menand two women. The baseline rate for the position is $16 per hour and because of that baseline, Joe and Janeare both paid $16. Sally is paid $20 an hour because she is a tough negotiator and threatened to walk out ifnot paid the higher wage. Doug is paid $20 because he is dating the owner's daughter. Under the statute, the Company could face – and lose – a lawsuit by Joe, because Sally is paid a higher wage because of a factor (negotiating skill) that is outside of the six enumerated permissible pay variations AND a lawsuit by Jane, because Doug is paid a higher wage because of a factor (nepotism) similarly outside the permissible pay variations. Given the odd result, employers may see challenges to the *Guidelines* in future cases.

V. THE ATTORNEY GENERAL SAYS BEING PAID THE SAME MEANS EXACTLY THE SAME (IN BOTH THE MANNER AND THE AMOUNT).

The Equal Pay Law requires pay to be the same amongst men and women and defines pay to include all forms of remuneration offered to an employee for work performed, including commissions, bonuses, profit sharing, deferred compensation, paid personal time off, vacation, holiday pay, expense accounts, car and gas allowances, retirement plans, health insurance, and other benefits, whether accepted or not, and whether paid directly to the employee or to a third-party on the employee's behalf.

As was stressed in a recent webinar presentation by the Attorney General, the "same" means "exactly the same". In other words, close does not count – $15.00 will not be considered "the same" as $15.50.

In addition, in order for pay rates to be "equal" under the Equal Pay Law, the pay rates must be equivalent in terms of total remuneration (*equivalent with respect to the total value of the remunerations offered*) and component breakdown (*equivalent with respect to the value of each remuneration component offered*). Accordingly, if two comparable employees share the same total compensation rate, but the breakdown of their base salaries and bonuses differ, there is a pay variation between the employees for purposes of the Equal Pay Law.

Thus, employers need to understand they cannot wait until the end of the year and just pay bonuses to equal things out.

WHAT TO DO ABOUT THE LAW

Before throwing your hands up in despair, there is some good news. The Equal Pay Law provides a "safe-harbor" for employers. An employer is immune from liability from an Equal Pay Law claim if: (i) the employer, within the previous three years before an action is filed against it, conducts a good faith "self-evaluation" of its pay practices that is reasonable in detail and scope; and (ii) if impermissible pay disparities are identified through such a self-evaluation, the employer demonstrates reasonable progress toward eliminating such disparities. For purposes of this standard:

- A "good faith" self-evaluation is one that an employer conducts in a genuine attempt to identify any unlawful pay disparities among employees performing comparable work. This good faith requirement applies to both an employer's analysis of which jobs are comparable and to its analysis of pay differentials. A self-evaluation that is conducted as a sham (*i.e.,* to find no disparities) or to justify known disparities likely will not qualify as good faith.
- Whether a self-evaluation is "reasonable in detail and scope" depends on the size and complexity of an employer's workforce. For some employers, a non-statistical analysis will be enough, but in all cases employers are advised to consult with counsel to increase the chances that their efforts are found to be reasonable. 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 comparators are permissible or violate Equal Pay Law standards.
- 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 its progress as compared to the scope of the disparities identified, and the size and resources of the employer. In order 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 required to pay liquidated damages (double-damages) to an affected employee or employees but will still have to pay the affected employee(s)' unpaid wages and attorneys' fees and costs.

Employers of all sizes should seriously consider how to implement the safe harbor provisions. In addition to providing a defense or partial defense to a claim, taking such steps may make it less likely the employer is picked as a target for a class action lawsuit by the slew of plaintiffs' firms circling to find their next employer victim.

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The Partridge Snow & Hahn Employment Law Team is fully conversant with the Equal Pay Law, and is available to assist employers in connection with the "self-evaluation" assessment contemplated by the Equal Pay Law. In addition, the Firm has partnered with professional economists and labor statisticians to assist employers that require such services.

Please contact our Employment Law Team at 617-292-7900.

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