

Massachusetts Employers Take Notice

#METOO MOVEMENT

Perhaps no social awareness story has generated more publicity in recent memory than the #METOO movement. In January, PS&H Employment Lawyer, Michael Gamboli joined Juli Parker, Assistant Dean of Students, Director of the Center for Women, Gender & Sexuality at the University of Massachusetts, Dartmouth and Andre Silva, a Representative from the Massachusetts Commission Against Discrimination to lead a *Good Morning SouthCoast!* discussion on the topic.

#METOO has become so ubiquitous not only on social media but all forms of media that it is almost difficult to define or explain. Some might argue it is the paradigm of the power of social media activism and protest, while others would argue its true value is not in advocating activism but rather in education – to simply make society aware of the shocking prevalence of sexual harassment and assault that exists in our society. Whether the intent is to spur people to action or simply shine a light on this problem, the vehicle used to do so appears to be the same – focusing on celebrities / famous athletes / politicians. Perhaps now that the public is starting to have its fill of the daily identification of another celebrity harasser/victim, the light is beginning to shine where it is needed most; in the workplace.

Sexual harassment in the workplace is not a new problem. But, in large part thanks to #METOO, employers are now talking about it – a lot – and realizing that it still needs to be addressed. The most effective first step is simple: training. Not training to “check a box” that it happened so you can show the Equal Employment Opportunity Commission (EEOC) when you get sued. Rather, real training to educate and inform and, most importantly, to provide managers with the tools to identify conduct that, if unchecked, could lead to a harassment claim. This type of “real” training – in person, with qualified trainers in an interactive setting, using examples that actually are tailored to the business – is in fact specifically mentioned, in detail, in the EEOC-issued Proposed Guidelines on Sexual Harassment.

Training not only educates but it empowers – both the potential victims as well as the managers whose job it is to monitor, “issue spot” and address inappropriate conduct. Providing employees with these tools is the first step to opening up the lines of communication so that potentially disastrous situations can be addressed and resolved well before the situation gets out of hand.

EVALUATE WAGES AND COMPLY NOW OR RISK PAYING MORE LATER

Another issue that Massachusetts employers need to be aware of is the law entitled An Act to Establish Pay Equity (the “Law”) that will go into effect on July 1, 2018. The Law represents a significant change to the scope of legal obligations regarding how employers determine and pay salaries to employees in comparable positions. The Massachusetts Office of the Attorney General is expected to publish regulations in the upcoming months to provide guidance to employers regarding the Law.

We urge our clients and friends to begin the process of preparing a compliance strategy without delay. After July 1, 2018, employers will no longer be able to lower an employee's pay in order to avoid violating the law. In other words, after July 1, 2018, if an employer is paying a man and a woman a different rate for a comparable job and it does not have one of the enumerated reasons set forth below to do so, the employer would then be forced to provide a raise to the lower-paid employee. If the employer deals with compliance now, it may adjust the higher-paid employee's rate accordingly to avoid giving anyone a raise.

Legitimate Reasons for Paying Employees Differently will Violate the Law.

General anti-discrimination laws already prohibit employers from discriminating against employees, in terms of wage rates, based on gender. The Law greatly expands this concept. The Law prohibits employers from

paying male and female employees differently for comparable work *unless* such wage variations are based upon one of the following reasons:

- A seniority system, provided that seniority is not reduced due to pregnancy or protected parental, family or medical leave;
- A merit system;
- A system measuring earnings by quantity or quality of production, sales or revenue;
- The geographic location of the job;
- Education, training or experience that is “reasonably related” to the job performed; or
- Travel that is “a regular and necessary condition of the particular job”.

Importantly, many common reasons for paying employees differently will no longer be allowed. For example, an employer can no longer pay a man more because the man demanded a raise or was hired at a higher rate because he was paid more at his prior job. Similarly, the mere fact that an employee is the owner’s daughter will not be an adequate reason for paying her more than another male employee performing a comparable job.

Another issue under the Law is what constitutes positions that are “comparable”. The Law defines “comparable work” to include work that: (i) requires “substantially similar skill, effort, and responsibility”; and (ii) is performed under “similar working conditions.” Job titles or descriptions alone do not determine comparability. The regulations will likely provide further guidance as to this concept, as well as the concept of how much of a difference in wages constitutes a wage variation under the Law.

Affirmative Defense for Employers.

The Law provides an employer with an affirmative defense to a claim under the Law if, within the previous three (3) years and *prior* to commencement of suit, the employer conducts a good faith self-evaluation and can demonstrate “reasonable progress” toward eliminating gender based wage differentials for comparable work. An employer that undertakes a good faith self-evaluation that is not reasonable in detail or scope will not be entitled to an affirmative defense. Nonetheless, if they can demonstrate that reasonable progress has been made towards eliminating gender based wage differentials, they will not be liable for double damages, only the amount of unpaid wages. Again, during the evaluation process, if there are gender-based pay differences, employers may not reduce the wages of an employee in order to eliminate the wage differential after the effective date, but instead must raise the compensation of the other affected employees to correct the violation.

Changes to Hiring Practices.

Under the Law, employers will be prohibited from screening job applicants based on the history of their wages, benefits or other compensation. In fact, the employer cannot even ask the applicant (or the applicant’s former employer) how much money the applicant made at their prior job. This change will mean employers must eliminate this commonly asked question on their job application to avoid liability under the Law.

Significant Penalties for Non-Compliance.

Employers will face serious consequences for failure to comply with these requirements of the Law. An aggrieved employee and/or applicant may commence suit individually or on behalf of other similarly situated individuals. They will not be required to first file a complaint with the Massachusetts Commission Against Discrimination (“MCAD”). Employees will have three (3) years from the date of the alleged violation to file a lawsuit, instead of only one (1) year. The Attorney General may also bring a lawsuit against an employer on behalf of the Commonwealth. Damages may be up to twice the amount of the affected employee’s unpaid compensation (the difference between the employee’s wage and the wage received by an employee of a different gender performing comparable work), plus payment of reasonable attorneys’ fees and costs.

Conclusion.

It is our recommendation that employers: (i) start to plan for increased costs in salaries and legal fees for compliance; and (ii) enter into employment contracts only in limited circumstances after careful review and consideration. If you have any questions regarding the Law and the significant impact it may have on your

business, please don't hesitate to contact us.

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