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Massachusetts Attorney General Issues Guidance on Updated Pay Equity Law

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The Massachusetts Office of the Attorney General recently issued guidance on the new amendments to the Massachusetts Equal Pay Act ("MEPA"), effective July 1, 2018. Although the guidance is extremely detailed and should be reviewed in full, employers should take note of the following details:

- *Coverage*

The MEPA and amendments are substantial in scope, covering "nearly all" Massachusetts employers and the "vast majority" of employees, including full-time, part-time, seasonal, per-diem and temporary employees, with few exceptions. There is no minimum number of employees that employers must have to trigger MEPA coverage. State and municipal employers are covered by the law, while employees of the federal government are excluded.

The law covers any employee whose "primary place of work" is in Massachusetts; residency is not a dispositive test. Massachusetts is an employee's primary place of work if they "do most of their work" within the state, and thus, according to the guidance, includes: (1) traveling employees who return regularly to Massachusetts between trips; (2) employees who "spent the plurality" of their time in Massachusetts over the prior year; and (3) employees who telecommute to a Massachusetts work location, despite not being physically present in Massachusetts. If an employee relocates, Massachusetts will be considered the primary place of work upon the first date of actual work within the state.

- *The "Comparable Work" Analysis*

Under the MEPA, employers are expected to take a holistic approach to analyzing whether two employees of different genders perform "comparable work." A determination based on job title or description alone will be insufficient. However, job descriptions that "accurately reflect the skill, effort, and responsibility" may be informative to the overall analysis. Employees' jobs may be considered "substantially similar" if they "are alike to a great or significant extent." It is not necessary for the jobs to be completely identical to be comparable.

Multi-state employers are generally expected to compare the wages of their Massachusetts employees to employees performing comparable work "within the same geographic area within Massachusetts…unless excluding out-of-state employees from the analysis is not reasonable under the circumstances." For instance, if the only other employees performing a comparable role are located outside of Massachusetts, it may be necessary to compare their wages to the Massachusetts employee's wages. However, it bears noting that geographic location is a mitigating factor that multi-state employers may depend upon to justify wage differences.

- *Determining Equal Wages*

"Wages" under the MEPA includes "all forms of remuneration for work performed." This includes incentive pay and deferred compensation, as well as "commissions, bonuses, profit sharing, paid personal time off, vacation and holiday pay, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits, whether paid directly to the employee or to a third-party on the employee's behalf." Employers are not permitted to "make up" differences in unequal base wages of employees performing comparable work with other forms of remuneration, such as bonuses.

- *Employee Wage Discussions and Inquiries*

Employers may not formally or informally restrict employee discussion of or inquiry into their own wages or those of other employees. In particular, employers may not include terms requiring an employee keep their (or their colleagues') wages confidential in employment documents such as in an offer letter, employment contract, nondisclosure agreement, handbook, etc.

- *Employee Wage History*

An employee's salary history is specifically precluded from serving as a basis for unequal pay. Employers may only ask a prospective employee about wage or salary history to confirm information voluntarily shared by the employee, or after an offer of employment has already been made. The MEPA does not prohibit employers from asking prospective employees about their desired compensation, so long as it is not a disguised attempt to elicit wage history information. Note that multi-state employers who recruit nationally are expected to comply with MEPA's wage history restrictions if Massachusetts may ultimately become the prospective employee's primary place of work. Uncertainty as to the employee's ultimate assignment will not be a defense to MEPA noncompliance.

- *Enforcement & Liability*

Employees seeking to enforce their rights under the MEPA may: (1) file a claim in court on behalf of themselves or other similarly-situated employees; and/or (2) file a complaint with the Attorney General's Office ("AGO"). Employees have three years "from the date of the alleged violation" to file a claim in court. Employees are *not* required to lodge complaints with their employer, the Attorney General's Office, or the Massachusetts Commission Against Discrimination ("MCAD") before bringing an MEPA claim to court.

An employer found liable under the MEPA will be required to pay double damages (i.e. twice the amount of the employee's unpaid wages), and attorneys' fees are recoverable if a judgment is awarded to the plaintiff.

- *The Self-Evaluation Affirmative Defense*

An employer may have a defense if it participated in a "good faith" self-evaluation of comparable jobs and pay practices. Whether the self-evaluation was done in "good faith"—i.e. whether it was "reasonable in detail and scope"—will be determined on a case-by-case basis. If pay inequities are identified, an employer must "take meaningful steps," constituting "reasonable progress," towards rectifying the inequities, a determination which will be largely fact-dependent.

Self-evaluations and remedial steps taken by employers are inadmissible as evidence to prove an MEPA *or* Chapter 151B violation when the alleged violation occurred: (1) "before the date the self-evaluation was completed;" (2) "within 6 months after the self-evaluation was completed;" or (3) "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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The Attorney General's guidance provides comprehensive details with respect to numerous contours of the law (including specific checklists and self-evaluation tools in the appendices). Accordingly, as July 2018 approaches, it is essential for employers to work with counsel to review and revise handbooks and other policies, to consider best practices for training managers or other individuals performing interviews, and to discuss how and whether to begin a self-evaluation, pay equity study or remediation plan.

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