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Governor Baker Signs Pay Equity Legislation

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On August 1, 2016, Governor Baker signed Senate Bill 2119, “An Act to Establish Pay Equity into law (the “Act”). This Act amends Chapter 149, s. 105A of the General Laws, which currently prohibits discrimination in payment of wages on the basis of sex for “comparable” work.” Although federal and state law already proscribes discriminatory pay practices on the basis of sex/gender, the Act clarifies certain definitions and includes additional restrictions and protections. The Act goes into effect July 1, 2018.

Notable Provisions

“Comparable Work” Requires Same Pay – Similar to current law, the Act prohibits discrimination in pay, including benefits or other compensation, “on the basis of gender” and prohibits the payment to any person “a salary or wage rate less than the rates paid to employees of a different gender for comparable work.” The Act defines “Comparable Work” broadly as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability.”

Exceptions – The Act makes certain exceptions where the difference in pay is based on: (1) “a bona fide system that rewards seniority with the employer” (provided that time spent on leave due to a pregnancy-related condition as well as “protected parental, family and medical leave,” does not reduce seniority); (2) “a bona fide merit system”; (3) “a bona fide system which measures earnings by quantity or quality of production or sales”; (4) “the geographic location in which a job is performed”; (5) “education, training or experience” (but only to the extent such factors are “reasonably related to the particular job in question and consistent with business necessity”); or (6) travel where such travel is a “regular and necessary condition of the particular job”.

Discussion of Wages – The Act makes it an unlawful practice to prohibit employees from “inquiring about, discussing, or disclosing” an employee’s own wages or the wages of other employees. Employers should note that in many contexts, employers are already prohibited from limiting the discussion of wages amongst and between employees. This Act provides an additional protection and right of action to employees.

Salary History – In perhaps one of the most notable changes, the Act prohibits employers from screening job applicants based on their prior wages/compensation and specifically prohibits employers from asking prospective employees or former employers for any type of

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salary/compensation history. The Act allows a prospective employee to provide a written authorization to a prospective employer to confirm prior wages with a past employer, but only after an offer of employment with compensation has been made to the employee.

Affirmative Defense – The Act provides employers an affirmative defense to allegations of pay discrimination on the basis of gender if the employer, within the previous 3 years and prior to the commencement of the action, has “both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation.” The Act states that the self-evaluation may be of the employer’s “own design,” but must be “reasonable in detail and scope in light of the size of the employer.” The Act also references “standard templates or forms issued by the attorney general” relative to the self-evaluation, which suggests additional guidance/interpretation may be forthcoming.

The Act provides that said self-evaluation or remedial steps shall not be admissible in any proceeding as evidence of a violation that occurred “prior to the date the self-evaluation was completed or within 6 months thereafter.”

Damages – Like the current law, the Act provides a private right of action in court for employees to sue for double damages and attorneys’ fees. The Attorney General may also bring an enforcement action. Criminal fines for violations may also apply.

Next Steps for Employers

Although the law does not go into effect until July 1, 2018, this is an excellent opportunity to review hiring and pay practices for compliance with current law (which also prohibits pay discrimination), keeping in mind the additional protections that will be provided by the Act. Employers should consult with counsel and should consider taking the following actions before the effective date of the Act:

- Review current hiring and pay practices for compliance;
- Update employment application forms to remove requests for salary/compensation history;
- Update and review handbooks, relevant policies, etc.;
- Provide additional training for recruiters/staff;
- Conduct a self-evaluation of pay practices to determine if any remedial actions should be undertaken.



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We expect further guidance and interpretation from the Attorney General as to multiple aspects of this law, including conducting self-evaluations. Regulations may also be issued. Stay tuned for additional information and updates.

If you have any questions about this issue, please contact Kier Wachterhauser or the attorney responsible for your account, or call (617) 479-5000.

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