

# Massachusetts Equal Pay Act Increasing Employee Liability for Gender Based Pay Inequities

By Dave Robinson on October 26, 2016



In August, Governor Charlie Baker signed the comprehensive pay equity bill into law which was unanimously passed by both the Massachusetts House and Senate (the “Equal Pay Act”). The new law amends Massachusetts’ equal pay law, which was originally passed in 1945. The bill is designed to better define comparable work and to ensure that men and women receive equal pay for comparable work. The new law will go into effect January 1, 2018.

The new law defines “comparable work” as work that is “substantially similar” in terms of skill, responsibility, and working condition. Pay may be different under certain circumstances, including but not limited to seniority, geographic location, experience, education, training, or a pay formula based on sales. However, employers must look at the tasks performed by the employees rather than merely relying on job descriptions in order to determine comparability of work. Employers who discover pay disparities between employees of different genders engaging in comparable work are barred from reducing the higher-paid employee’s salary to comply with the new law.

The new law prohibits employers from asking prospective employees or their current or former employers to provide prospective employee’s salary histories. The Equal Pay Act also prohibits policies preventing employees from discussing their salaries. Employers cannot fire or retaliate against employees who inquire about other employee’s pay. However, employers are not required to disclose employees’ wages to other employees.

Employees that are discriminated against on the basis of gender in the payment of wages for comparable work are entitled to double damages (i.e., twice the difference in wages), plus attorney’s fees and costs. Unlike other claims of discrimination, employees are not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination as a prerequisite to bring a claim. The lookback period for wages is three years and each paycheck is considered a new claim. Employees are permitted to sue on behalf of themselves or other “similarly situated” employees. Additionally, an enforcement action can be brought by the Attorney General against an employer.

However, the Equal Pay Act provides an employer a “safe harbor” affirmative defense if it (1) conducts self-evaluations of their pay practices and (2) demonstrates reasonable progress in eliminating pay disparities based on gender for comparable work. This affirmative defense does not apply to claims based on pay secrecy and salary history, pay discrimination under federal law, or pay equity violations in other states. Employers have a three-year exemption from liability subsequent to the completion of their self-evaluations. Employees cannot use their employers’ self-evaluation and any steps taken by the employer to close a gap in pay as evidence of a violation of pay equity. The new law does

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not provide guidance as to how self-evaluations must be conducted other than stating that self-evaluations must be reasonable in detail and scope or consistent with forms issued by the Attorney General.

Although the law does not go into effect until January 1, 2018, it is critical for employers to start now in evaluating their pay practices and make the required changes to comply with the new law. Similar to other employment statutes, Employers are required to notify employees of the new law by placing copies of it in conspicuous areas in the workplace similar to other employment notices.

Employers should also take advantage of the Act's "safe harbor" provision by conducting a comprehensive self-evaluation to identify and work toward eliminating any pay disparities between employees who perform comparable work, which, if executed properly, will provide a three-year immunity to claims.

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