

Massachusetts Attorney General Provides Guidance On Equal Pay Law

5 min read

Mar 23, 2018

Recently, the Massachusetts Attorney General, Maura Healey, [issued guidance](#) to assist employers in complying with the state's Equal Pay Act ("MEPA"), which goes into effect on July 1, 2018. The 30-page guidance is comprehensive, offering an overview of the law, responses to frequently asked questions, a self-evaluation for employers, and a sample checklist of policies and practices. Due to its length and breadth, the guidance should be reviewed by employers in full. However, we note the following important aspects:

MEPA provides that "No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of different gender for comparable work." MEPA applies to employers located outside of Massachusetts as long as the employer has employees with a primary place of work in Massachusetts. Residency of an employee is irrelevant. Importantly, there are few exceptions to the types of employees covered under MEPA and there is no minimum number of employees that employers must have to trigger MEPA, unlike other Massachusetts discrimination laws. Further, intent to discriminate based on gender is not required to establish liability under MEPA.

Comparable Work Defined

MEPA defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions." The AG Guidance explains "substantially similar" means that each of the factors being considered – "skill, effort, and responsibility – are alike to a great or significant extent." The factors do not need to be identical or alike in all respects for two jobs to be considered comparable. Additionally, the AG Guidance explains that an employer cannot necessarily rely upon job titles or descriptions to determine which positions are comparable. However, job descriptions that accurately reflect the skill, effort and responsibility required to perform the jobs may be helpful in making the determination.

Wages Defined

The AG Guidance makes clear that "wages" is defined broadly to include "all forms of remuneration for work performed, including 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 close a gap in base salary with annual bonuses.

There are, however, several, defined permissible variations in pay. An employer may pay different wages to employees for comparable work based only on the following: rewarding seniority, provided that time spent on pregnancy, parental or family leave does not reduce seniority, merit system, geographic location, education, training or experience which relates to the job in question, and travel. Employers should note that the AG Guidance defines "system" as being a plan, policy, or practice that is predetermined or defined use to determine compensation, which is uniformly applied in good faith.

Wage Discussions and Salary History

MEPA prohibits employers from preventing employees from discussing their own wages or their coworkers' wages. However, an employer can prohibit human resources employees and supervisors from discussing other employees' wages. These particular categories of employees may not be prohibited from discussing their own wages.

Under MEPA, employers (or their agents, including recruiter or job placement service) may not seek the salary or wage history of any prospective employee from the prospective employee or their former employer. MEPA carves out two narrow exceptions in which an employer may seek this information: (1) to confirm wage or salary history information voluntarily shared by the prospective employee; or (2) after an offer of employment with compensation has been made to the prospective employee. Employers may still ask prospective employees about their salary requirements or expectations and whether they met sales expectations. However, the AG Guidance warns that questions concerning prospective employees' salary requirements must not be framed or posed in a way that is intended to elicit information about salary, wage, or commission histories.

Liability and Enforcement

An employee or prospective employee who believes their rights have been violated may file a claim in court and/or may file a complaint with the Attorney General's Office. An employee does not need to file a complaint with the Attorney General's Office, their employer or the Massachusetts Commission Against Discrimination ("MCAD") before proceeding with their complaint in court. The employee or prospective employee must file their claim in court within three (3) years of the date of the alleged violation.

An employer who has been found to have violated MEPA is liable for the twice amount of the affected employee's unpaid wages, and reasonable attorneys' fees incurred by the employee.

Employers' Affirmative Defenses

Employers are not required to conduct self-evaluations. However, a good faith, reasonable self-evaluation of an employers' pay practices within the previous three years and before an action is filed against it, is a complete defense to a legal claim.

The employer has the burden of proving the self-evaluation was in good faith, i.e. a genuine attempt to identify any unlawful pay disparities among employees performing comparable work and reasonable in detail in scope. Whether an evaluation is reasonable in detail in scope will depend on the size and complexity of an employer's workforce. Relevant factors include "whether the evaluation includes a reasonable number of jobs and employees; whether the evaluation takes into account all reasonably relevant and available information; and whether the evaluation is reasonably sophisticated in its analysis of potentially comparable jobs, employee compensation, and the application of the six permissible reasons for pay disparities." Finally, to the extent that pay disparities are found, which do not fall within one of the six permissible reasons, the employer must show reasonable progress toward eliminating pay disparities, meaning, adjusting employees' salaries or wages. MEPA does not permit an employer to reduce the wages of any employee solely in order to comply with the law.

Self-evaluations are not admissible evidence to show a violation of MEPA or Chapter 151B if: (1) the alleged violation occurred before the date of the self-evaluation was completed; (2) the alleged violation occurred within 6 months after the self-evaluation was completed; or (3) the alleged violation occurred 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.

Next Steps for Employers

The AG Guidance provides a comprehensive review of MEPA and further includes specific checklists concerning policies and procedures and a basic guide to self-evaluations. Thus, in advance of the implementation of MEPA, employers should work with counsel and their human resource departments to review and revise handbooks, policies, and training programs to comply with MEPA. Additionally, employers should determine whether to begin a self-evaluation or remediation plan.

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Topics

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