



**KURKER
PAGET**



The Massachusetts Equal Pay Act: *What Employers Need to Know Now*

By Allyson Kurker and Margaret Paget, Kurker Paget LLC and

Kim Keating and Jenn Wendus, Keating Advisors LLC

Last July, the Massachusetts legislature approved an Act to establish pay equity, commonly referred to as the Massachusetts Equal Pay Act (“MEPA”) and codified at Mass. Gen. Laws c. 149 § 105A. The law, which goes into effect on July 1, 2018, amends the current statutory prohibition against gender-based pay inequity by strengthening the protections offered to workers. While we await the Attorney General’s regulations under the new law, employers should nevertheless begin planning for compliance. This article answers some of the most frequently asked questions about the new law, offers employers information about the key components of the law, and provides suggestions for what they can do now to avoid liability when the law goes into effect.

1. *What are the key differences between the current and amended Massachusetts Equal Pay Act?*

Expanding the definition of “comparable work.” Like the current version of the law, the amended Equal Pay Act will prohibit employers from compensating employees differently on the basis of gender when they are performing “comparable work.” The new law, however, defines comparable work as “work that is substantially similar” in “skills, effort and responsibility and performed under similar working conditions.” Under the existing law, courts first require proof that the jobs are comparable in terms of their “substantive content” before moving to the question of whether they are comparable in skills, effort, responsibility and working conditions. By removing this first requirement, it is expected that employees will be able to compare themselves to a broader class of other job roles to prove a violation of the Act.

Affirmative defense available to employers. An employer can defend against liability under the Act if, within the preceding three years *and* prior to the commencement of an action against it, the employer has: (1) completed a self-evaluation of its pay practices, in good faith, and (2) can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation.

Salary history. The new law also prohibits employers from asking job candidates about their salary history, for example during job offer negotiations. Employers cannot condition employment upon an employee’s agreement not to discuss or disclose information about the employee’s wages or those of other employees.

Anti-retaliation. Employers may not discharge or otherwise retaliate against employees who discuss or reveal details of their or anyone else’s compensation to other employees.

Corrective measures. An employer who pays a wage differential in violation of the Act may not correct the disparity by reducing the wages of any employee solely to comply with the law.

2. *What is “comparable work” under the Act and how do I determine which jobs are comparable?*

The new law defines “comparable work” 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. “Working conditions” are defined as including “the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job.”

To determine which job roles might be considered “comparable” under the new Act, employers will need a way to systematically classify all positions within the organization. Classification systems should:

- Distinguish, on a broad basis, the work performed across a group of jobs that are similar in education, experience, responsibilities and competencies to perform the work;
- Define the minimum responsibilities at each level that are critical to each role and to the organization;
- Define similar working conditions or physical requirements.

3. *Does this mean an employer must pay everyone in comparable roles the same?*

No. The law is not a blanket ban on wage differentials. Employers will be permitted to compensate employees differently, so long as they do so on the basis of at least one of six objective and quantifiable factors:

- (1) a seniority system (that does not take into account an employee’s pregnancy or parental-related leave);
- (2) a merit system;
- (3) a system that measures earnings by quantity or quality of production, sales, or revenue;
- (4) geographic location;
- (5) education, training or experience; and
- (6) travel, if it is a regular and necessary condition of the job.

4. *Can employees sue employers for violating the Equal Pay Act?*

Yes. Both employees and the Attorney General may bring suit against employers who violate the Act. Employees may recover up to two times their damages in unpaid wages, as well as their reasonable attorney’s fees and costs. Additionally, employees will have three years (rather than the current one year) to commence a court action under the Act.

5. *We always ask for candidates’ salary history. Is that no longer allowed?*

The Act states that it shall be an unlawful practice for an employer to “seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or to require that a prospective employee’s prior wage or salary history meet certain criteria....” This means that recruiters and hiring managers can no longer ask about salary history when interviewing candidates or negotiating compensation arrangements. If a candidate volunteers such information, however, the employer may seek to confirm this information after making a conditional offer of employment that includes a compensation amount.

The new law will also require hiring managers to state a compensation figure upfront — based on what an applicant’s worth is to the company, rather than on what he or she made in a previous position.

6. *My employees have been talking with one other about their compensation. I think this is bad for the company. Is there anything I can do about it?*

Under the new Act, employers may not prohibit employees from discussing their own or other employees’ compensation. In any event, the National Labor Relations Act protects employees’ “concerted activity,” so that an employer may not prohibit employees from discussing employee wages and benefits with one another.

7. *If the amended Equal Pay Act does not go into effect until July 2018, is it too soon to plan for compliance?*

No! Employers should consider conducting a self-evaluation of their pay practices before the new Act goes into effect (and someone brings suit) so that they may take advantage of the new law’s affirmative defense to liability.

8. *What do I need to do to prepare my organization for a compensation and benefits self-evaluation?*

At a minimum, employers should gather the following information:

- Up-to-date job descriptions for all roles;
- Accurate employee data, including position, department, salary, last salary increase date and amount, last bonus date and amount, hire date, work schedule (full time or part time), education and experience background, individual characteristics (such as gender), historical performance ratings;
- Organizational charts;
- Current performance management and/or merit system documentation;
- Allocated resources, both in terms of time and financial resources, to conduct the audit and to purchase surveys or hire a consultant.

9. *What are the key elements of a compensation and benefits self-evaluation?*

Although the Attorney General is expected to issue further guidance to employers on how to conduct a self-evaluation that passes legal muster, we recommend that employers take the following three steps when evaluating their own compensation practices:

1. Evaluate Your Compensation System for Industry Competitiveness.

Employers need to know the market rate for every job and ensure that market rates, if adopted, are utilized consistently across the organization. Employers should utilize professionally-tended, published salary surveys that provide employer-reported compensation data to gather market rates for base pay and total cash compensation, where available, for positions. Once relevant market data has been obtained, employers should compare internal pay against the external data to determine how the organization is positioned against its competitive labor market. If salary ranges are in use, employers should also assess those ranges against the available market data to determine the competitiveness of the overall compensation system.

2. **Assess How Raises and Bonuses Are Awarded.** Employers should have a consistent and uniformly applied method of evaluating performance and adjusting compensation. Employers should review their performance management and compensation administration policies and processes to ensure consistency across the organization. If no policies or processes are in place, employers should evaluate how compensation decisions are being made and begin to formalize a consistent approach.
3. **Evaluate Your Compensation System for Internal Equity.** To assess internal equity, employers must first determine which roles are comparable. Employers should then evaluate their current pay practices to determine if there is consistency in pay and benefits for individuals with substantially similar levels of experience and education who hold jobs calling for substantially similar degrees of skill, effort, responsibility and working conditions, even though job titles may be different.

10. *What are the pros and cons of using an outside consultant to perform the self-evaluation?*

PROS:

- **Efficiency.** Few internal HR teams have the bandwidth to devote the time necessary to conduct a thoughtful analysis. HR consultants have the experience and specialized knowledge to work with the internal team to conduct these assessments.
- **Credibility.** An outside consultant will give an employer access to objective market data and up-to-date best practices. An independent consultant offers unbiased, neutral assessments that can be more difficult for internal stakeholders. And, in the event that the employer is sued, the results and recommendations of an independent analysis may put the employer in a stronger legal position.
- **Expertise.** Experienced consultants are adept at developing analytical processes quickly and efficiently. This will reduce the time that employers and managers spend developing processes and implementing their analysis. It also will ensure that there is one company-wide approach to ensuring gender pay equity.

CONS:

- **Lack of in-house expertise.** Outside consultants do not have internal knowledge of the organization and lack in-house expertise.

- **Confidentiality.** It is vital employee data remains safe. Employers should require an outside consultant to enter into a confidentiality agreement.
- **Financial resources.** No doubt, there are upfront costs to conducting a pay equity audit. However, in our experience the benefit of knowing that your pay practices are on solid legal ground, and that your employees have received the message that you care about pay equity, is worth the cost.

11. Are employers required to share the results of the self-evaluation with their employees?

Nothing in the Act requires disclosure of compensation self-evaluations.

Kurker Paget LLC is an employment law firm in Greater Boston that advises and represents employers in a range of employment matters.

Keating Advisors LLC is a human resource consulting compensation firm that specializes in compensation, performance management, and organizational development. Keating Advisors has conducted hundreds of compensation studies for employers from a range of organizations and industries.