Attorney General Issues Guidance on Massachusetts Equal Pay Act

BY ANTHONY J. DRAGGA • MARCH 19, 2018

The July 1, 2018 implementation date for the amendments to the Massachusetts Equal Pay Act (MEPA) is less than four months away. The amendments approved in 2016 will bring about substantial changes to the definition of "comparable work," employer defenses, and prohibited employer practices, such as salary history inquiries. In the face of much anticipation, the Massachusetts Office of the Attorney General recently released an Overview and Frequently Asked Questions (the "Guidance") concerning the extensive changes to MEPA.

The Guidance helps to answer some of the many questions raised by the amendments to MEPA. The Guidance is particularly significant, as the Supreme Judicial Court previously has held that other Attorney General interpretations of laws that the Attorney General is charged with enforcing are entitled to substantial deference.

OVERVIEW OF MEPA

MEPA prohibits employers from paying different wages to employees of different genders who perform comparable work, unless variations are based on one or more of six statutory factors. Wages are defined as "all forms of remuneration for employment."

In order to comply with the law, employers must determine which employees perform "comparable work" to each other. MEPA defines "comparable work" as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions. The Guidance further defines these terms, explaining that "substantially similar" means that skill, effort, and responsibility "are alike to a great or significant extent, but are not necessarily identical or alike in all respects." An employer may not determine comparability based on job titles alone. The Guidance defines the key terms for determining "comparable work" as follows:

- "Skill" includes "such factors as experience, training, education, and ability required to perform the jobs."
- "Effort" is described as "the amount of physical or mental exertion needed to perform a job."
- "Responsibility" is explained as encompassing "the degree of discretion or accountability involved in performing the

essential functions of a job, as well as the duties regularly required to be performed for the job."

- "Working conditions" mean "environmental and other similar circumstances customarily taken into account in setting salary or wages." These can include physical surroundings and hazards. Working conditions may include the day or time of work, such as the types of scheduling differences that are taken into account in establishing shift differentials.

In addition, the Guidance sets forth six statutory factors that employers may use to explain wage differentials between employees of different genders who perform comparable work:

1. a seniority system;
2. a merit system;
3. a system which measures earnings by quantity or quality of production, sales, or revenue;
4. the geographic location in which a job is performed;
5. education, training or experience to the extent those factors are reasonably related to the job; or
6. travel, if the travel is a regular and necessary condition of the job.

MEPA also includes two other restrictions on employers – (1) employers generally may not seek salary or wage history from prospective employees, and (2) employers generally may not prohibit employees from discussing their pay or that of co-workers.

ENFORCEMENT AND POTENTIAL LIABILITY

The Guidance states that employers violating MEPA may be liable for the amount by which the employee was underpaid, double damages, and attorneys' fees and costs. Underpaid employees may bring a civil claim with the attorney general or in court. A three-year statute of limitations applies.

SELF-AUDITS AND AFFIRMATIVE DEFENSES FOR EMPLOYERS

Employers may have a "complete defense" to MEPA claims if they have conducted a legally sufficient self-audit of their pay practices within three years before the claim is filed. To qualify for this affirmative defense, the self-audit must be reasonable in detail and scope, and the employer must establish reasonable progress was made towards eliminating any impermissible gender-based wage variations discovered in the audit. Self-audits that are deficient but done in good faith will not provide a complete defense to MEPA claims but can prevent liability for double damages.

The Guidance explains that whether an evaluation is "reasonable in detail and scope" depends on the "size and complexity of an employer's workforce," in light of factors including "whether the evaluation includes a reasonable number of jobs and employees," and is "reasonably sophisticated." If disparities are not yet eliminated, the employer must show that they will be "in a reasonable amount of time."

The Guidance includes helpful appendices, which provide (1) a basic guide for conducting self-evaluations, (2) a pay calculation tool, and (3) a sample checklist to consult when assessing whether existing policies and practices comply with MEPA. The Guidance notes that "the complexity of the analysis required will vary significantly depending on the size, make-up, and resources of each employer," and thus the steps are "intended only as general guidelines."

CONCLUSION

Even with the interpretations in the Guidance, the practical application of these sweeping reforms will continue to be

challenging. With July 1, 2018 fast approaching, employers should consult with legal counsel about their options in connection with MEPA's self-evaluation process and what type of analysis is most appropriate for their organizations.

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