

Massachusetts AG Issues Guidance for Employers on How to Conduct Self-Evaluations of Gender Pay Gaps under Updated Equal Pay Act

Attorney General Maura Healey recently provided some much-needed guidance to employers on what will qualify as an acceptable 'self-evaluation' and 'reasonable progress' under the updated Equal Pay Act, which goes into effect on July 1, 2018.

WHAT YOU NEED TO KNOW

As recently amended, the Massachusetts Equal Pay Act (the "Act") makes it illegal for employers to pay employees of one gender less than employees of another gender for comparable work. However, the Act provides employers with an affirmative defense to such a pay discrimination claim if the employer can show that: a) prior to a lawsuit, it "completed a self-evaluation of its pay practices in good faith" within the last three years; and b) it has made "reasonable progress" towards eliminating illegal pay differentials.

The new guidance helps clarify how an employer must conduct the self-evaluation in order to qualify for the affirmative defense:

- **"Reasonable in Detail and Scope."** The guidance states that a compliant self-evaluation will be "reasonable in detail and scope." While there is no clear standard, the guidance suggests that three factors will be important: 1) whether the evaluation compares a "reasonable" number of employees across the company; 2) whether the evaluation includes "all reasonable relevant and available information"; and 3) whether the evaluation is "reasonably sophisticated" in how it examines "potentially comparable jobs," compensation levels, and other relevant data.
- **"Good Faith."** The evidence must show that the employer made "a genuine attempt to identify any unlawful pay disparities." A pantomimed self-evaluation with a pre-determined conclusion will not qualify.

The guidance also details what will qualify as "reasonable progress" toward eliminating pay differentials. The Attorney General's office will look to the following factors in measuring "reasonable progress":

- The amount of time that has elapsed since the company's latest self-evaluation;
- The "nature and degree" of the progress made since the self-evaluation, "as compared to the scope of the disparities identified";
- How well-resourced the company is overall, in terms of its ability to progress quickly; and
- Whether the employer will be able to eliminate any remaining pay disparities within "a reasonable amount of time."

WHAT YOU NEED TO DO

Companies should first determine whether they currently have pay disparities for which they could be liable under the updated Act. If so, companies should confer with counsel about how to plan and execute a self-evaluation that complies with the Attorney General's guidance. As mentioned above, the Attorney General's office will only credit self-evaluations that are reasonably robust, extensive, sophisticated, and conducted in good faith. Especially for business entities of any complexity, we recommend outside financial and legal assistance that can provide independence, credibility, and expertise. Assistance may also be needed to ensure reasonable progress in light of any self-evaluation. Employers are not legally required under the Act to conduct a self-evaluation. But a sophisticated, thorough, and well-done self-evaluation, paired with reasonable progress, could prevent, or at least minimize the cost of, a lawsuit.

FOR MORE INFORMATION

If you have questions about these developments, please contact Greg Keating, chair of the Whistleblower Defense and Labor, Employment and Benefits Practice Groups, or one of the listed attorneys.

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