Massachusetts New Pay Equity Law

Governor Charlie Baker has signed a new Pay Equity Law which received the unanimous support from the members of the Massachusetts State Senate and House of Representatives. This legislation expands and clarifies the current Massachusetts Law which prohibits employers from discriminating in the payment of wages for like or comparable work on the basis of an employee’s gender. The law will go into effect on July 1, 2018 which will provide state regulators and employers with two years to prepare for the implementation of these new provisions.

The existing law speaks to the issue of comparable work but it does not define the term to provide guidance to employers. The new law states that work will be considered comparable if it “is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.” The work performed shall determine if positions are comparable. A job title or job description alone cannot determine comparability.

The current law allows employers to pay employees of the opposite sex who are conducting comparable work at different rates of pay only if the difference is based on the employee’s seniority. The new law lists several new exceptions which include:

(i) A system that rewards seniority with the employer; provided however that time spent on maternity, family or medical leave shall not reduce seniority;

(ii) A merit system;

(iii) A system which measures earnings by quantity or quality of production, sales, or revenue;

(iv) The geographic location in which the job is performed;

(v) Education, training or experience to the extent such factors are reasonably related to the particular job in question; or

(vi) Travel requirements if they are a regular and necessary condition of the particular job.

An employer who is paying a wage differential in violation of this law will not be allowed to reduce the wages of an employee solely in order to comply with this section.
The new law will prohibit employers from asking an employee about their prior salary history. A premise of the legislation is that employment data shows that female workers are systematically underpaid and they will continue to be underpaid if future offers of employment are based on wages that are perceived to be structurally lower than their male colleagues. The law provides for the following exceptions:

(i) It does not prohibit an employer from ascertaining an applicant’s wage information from publicly accessible sources;

(ii) A potential employee can inquire about the wage to be paid for a particular position. They can ask what an employer is paying their current employees but the employer is not required to disclose that information;

(iii) An employer cannot generally contact the applicant’s prior employer to ascertain their employment payment history but will be allowed to do so if the applicant voluntarily discloses their wage history during the hiring process; and

(iv) An employer may seek or confirm a prospective employee’s wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee.

There is no provision in the law that expressly prohibits an employer from asking a potential employee what their expectations for wages or salary will be if hired for the position. However, it appears this issue will be resolved through future regulatory guidance or litigation.

The law also provides a new defense for employers who are subject to a claim for underpaid wages under this law. Employers that can demonstrate that within the previous 3 years, and prior to the commencement of a claim, that they completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, shall have an affirmative defense against a pay discrimination claim. The employer’s self-evaluation may be of the employer’s own design, if it is reasonable in detail and scope in light of the size of the employer, or may be consistent with the standard templates or forms to be issued by the Attorney General. An employer who does not perform a self-evaluation may not be subject to any negative or adverse inference as a result of not having completed a self-evaluation. This affirmative defense cannot be used when an employer is excused of violating the pay secrecy provisions of the law and for other claims based on the violation of federal law.

The new language does not change the current law that allows for employees acting alone or in a group, or for the Attorney General acting on behalf of employees, to sue an employer for lost wages and attorney’s fees and costs.

The Attorney General is authorized to promulgate new regulations to implement this section but is not required to do so. We will provide members with more information about future regulations if and when they are promulgated. In the meantime, members should consult their human resources counsel if they have any questions regarding the application of this new law.