Changes in Massachusetts Employment Law

September 30, 2016
Agenda

• New Massachusetts Pay Equity Law (Eff. July 2018)
• Transgender Discrimination
• Status of Non-Compete Agreements
New Massachusetts Pay Equity Law

- Statute in effect since 1940s
- Cannot discriminate in pay between the sexes for “work of like or comparable character or work on like or comparable operations”
- No AG enforcement
- Minimal civil litigation
Pay Equity Amendment

• Governor Baker signed final version on August 1, 2016

• New law will take effect July 1, 2018

• The AG’s office may issue regulations prior to July 2018, but there is no clear timeline
Prohibition on Wage Discrimination

• Employers may not

  o “discriminate . . . on the basis of gender in the payment of wages” or

  o pay any person a salary or wage rate less than the rates paid to employees “of a different gender for comparable work”

• Law appears to contemplate that employer must explain the entire differential as to any employee, based on factors enumerated in statute
Prohibition on Seeking Salary History

- Cannot seek wage or salary history from prospective employees
- Prior salary history may be *voluntarily* provided
- Cannot seek salary information from applicant’s prior employer before offer
  - BUT “prospective 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”
- Requests for minimum or desired salary requirements are likely permitted (subject to possible AG regulations)
- Restrictions on former employer providing (as opposed to seeking) wage or salary history are not addressed
Practical Implications of Salary History Prohibition

• If applications request prior wages or salary, must revise
  - Some employers are considering whether to include questions about salary history and designate them as “voluntary.” Unless the AG approves this practice, it is risky
• Employers must train all employees who conduct interviews
• Employers may want to avoid one-on-one interviews where possible to avoid factual issues about conversations
• Damages for violations are uncertain
Pay Transparency Provisions

• Cannot require employees to refrain from discussing or disclosing their compensation or the compensation of others

• Exception for HR employees and supervisors

• Must revise any policies that prohibit such disclosures
Definition of “Wages”

• “Wages” = “all forms of remuneration”

• Wages and benefits must be equal

• Possible preemption for ERISA-covered benefits

• Appears to cover equity compensation
  
  o Interaction with federal securities laws and terms of stock option plans unclear
Self-Evaluations

• New defense to liability based on self-evaluations

• Unique to Massachusetts

• Must have completed evaluation of “reasonable scope and detail” within past 3 years and “demonstrate . . . reasonable progress has been made towards eliminating wage differentials”

• If employer conducts self-evaluation and makes progress but self-evaluation is not “reasonable,” there is no affirmative defense available but also no liquidated damages
Self-Evaluations (cont.)

- Self-evaluations are not admissible in suits under Mass. law as evidence of a violation that occurred:
  1. Prior to the evaluation;
  2. Within 6 months after the evaluation; or
  3. Within 2 years after the evaluation if the employer can demonstrate it has developed and begun implementing “in good faith” a plan to address wage differentials

- Note: there’s no similar “safe harbor” under Federal law or the laws of other states

- Self-evaluations are not a cure-all, but they assist with assessment of exposure and may help curtail enforcement activity
Damages

• Violations may be more costly under the amendment:
  
  o Double damages (no good faith defense)
  
  o Three-year statute of limitations; every pay check constitutes a violation
  
  o Private right of action “by any 1 or more employees . . . on their own behalf, or on behalf of employees similarly situated”
Other Notable Provisions

• Employee’s wage history is not a defense to pay disparity

• Cannot reduce wages of “any employee” solely to comply with the statute

• Employee not required to file MCAD charge to pursue pay discrimination claim

• Retaliation provision extends, among other protections, to employees who have “indicated an intent to make a complaint” or are “about to testify” in pay equity dispute
Definition of “Comparable Work”

• “[R]equires substantially similar skill, effort and responsibility and is performed under similar working conditions”

• Eliminates reference to “character” or “characteristics” of the job

• Defines “working conditions” relatively broadly, to include “the circumstances customarily taken into consideration in setting salary or wages”
Factors That May Explain Differentials

• Enumerated list of specific defenses:
  o Seniority system (but time spent on maternity leave cannot reduce seniority)
  o Merit system
  o System which measures earnings by quantity or quality of production, sales, or revenue
  o Geographic location, or requirement that employee travel for the job
  o Education, training or experience “to the extent such factors are reasonably related to the particular job in question”

• No catchall (like “factor other than sex” in federal law)
Overview of a Pay Equity Audit
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Step 1: Identify the Work Team

• Pay equity analysis is usually not an “all hand on deck” exercise

Legal Counsel (Internal and External)
HR Leadership
Possible others (key business partners, D&I)
Compensation Leadership
HRIS Leadership
Labor Economist/IO Psychologist
Step 2: Establish Attorney-Client Privilege

- Partner with internal and external counsel
- Implement privilege protocol
- Limit the work team to key, “need to know” participants
- Mark all documents as “Privileged and Confidential”
Step 3: Pay Analysis Groupings

• Critical to any pay equity study
• Groupings versus ‘controls’ – which is better?
• Examples:
  • “Pooled” analysis – analyze all employees together
  • Exempt / Non-Exempt Status
  • Line of Business (Divisions)
  • Job Grade/Level
  • Job Grade (controlling for Function or Department)
  • Job Function (controlling for grade)
  • Band / Job Function / Job Family
  • Job Title
• Key Consideration: The groups should mirror your company’s pay practices to the greatest extent possible.
Step 3: Pay Analysis Groupings
A Middle Path?

• **Separate** Employees by Job Family
  • Human Resources, IT, Sales, Operations, etc.

• But **control** for:
  • Grade/Band (“Responsibility”)
  • Performance ratings over multiple years (“Skill”)
  • Working conditions (e.g., Night Shift, Weekend workers)
  • Geographic location
  • Measures of Seniority
  • Education Levels / Occupational Licenses
  • Actual Productivity (piece-rate or sales workers)
Step 4: Gather Initial Data

What is Required?

• Job Information
  • Organizational Position (Business, Division, Department etc.)
  • Type of Work (Job Family/Function)
  • Job Level (grade, band, sub-band, etc.)
  • Job Title
  • FLSA Exempt Status
  • Differential Pay? (Shift, weekend, lead, etc.)

• Employee Information
  • Demographic Data (Gender, Race/Ethnicity, DOB)
  • Compensation Information (Base Pay, Bonus, LTI, etc.)
  • FT or PT Status; typical work hours for PT workers
  • Performance Ratings, preferably over several years
  • Hire Date, Rehire Date, Acquisition Date, Position (Grade) Start Date
  • Work Location (or Cost of Living Factor)
  • Employee Type (Intern, Temp, Seasonal, or Regular)
Step 5: Conducting the Analysis and Interpreting the Results

• As long as the job groups are large enough for valid analysis, your counsel and expert will likely prepare a multi-variate regression analysis.

• An advantage of using regression analysis is that it isolates the effect of each control variable on pay.
  • e.g., a regression would estimate the effect of experience on salary separately from the effect of job grade on salary.

• Some factors should not have any effect on pay
  • An employee’s Zodiac sign.

• Gender or Race/Ethnicity are included to see if there is any relationship with pay (after accounting for grade, seniority, etc.)
  • Ideally, the correlation between gender and pay is the same as the effect of the Zodiac sign: zero.

• Regression analyses inform you of whether there are differences, on average, in pay between females and males after accounting for all factors included in the model.
  • Be careful of how you interpret the results from a regression model.
Step 6: The Deeper Dive

• What if some employee groups show significant pay differences? Does this mean you have a pay equity problem?
• Not necessarily—Consider whether there are other legitimate business factors that should have been captured. Note that it is not clear whether all factors here will pass muster under new law—consult your attorney!
  • Education
  • Licenses, Occupational Certificates (e.g., CPA, IT certification)
  • Disciplinary issues
  • Number of direct and indirect reports
  • Unique prior experience outside Company
  • Performance differences over a sustained period of time
  • Red circling/grandfathering
  • Internally promoted into position or externally hired?
Step 7: Refine and Update the Analysis

- Collect additional data for all employees in the adverse groups – not just the “outlier” employees.
- Re-estimate the regression analyses, incorporating the new factors. Are there still statistically significant pay differences? Are there still ‘outliers’ who are paid much higher or lower than predicted?
  - If so, a “root cause” study may be appropriate. It determines whether the existing pay disparities are a result of starting pay at hire or whether the pay differences arose over the course of employees’ careers. Be careful—this may be an explanation, but not a legal excuse.
- If pay equity issues persist, then consider making changes to employees’ pay (i.e., remediation).
Step 8: Remediation Considerations

- Which employees should receive an adjustment?
  - Only protected group members?
  - Only protected group members that are “underpaid”? What about underpaid males/whites?
  - Should some employees be excluded from consideration? (Low performers, new hires)

- How “deep” is the remediation?
  - Is the goal to lower the average pay difference to zero?
  - Or is the goal to lower it to less than statistical significance?

- Is there a limit to the pay adjustments?
  - Should there be a maximum adjustment? A minimum adjustment?

- How will the pay adjustments be calculated?
  - Should they be individually tailored? Or is a common adjustment amount/percent sufficient?
  - How about a hybrid solution that gives larger adjustments to top-performing employees?

- When will the adjustments be made?
  - Will the remediation be folded into an annual merit raise process, perhaps unbeknownst to employees?
  - Or will it be a stand alone, off-cycle adjustment?
Step 9: Follow-Up and Monitoring

• In years past, advice to clients was to conduct pay equity studies every 2-3 years.
  • The legal and regulatory environments have changed dramatically in the past year. Consider making these studies an annual exercise.

• The White House Pay Equity Pledge asks companies to commit to:
  • Annual pay analyses, across occupations.
  • Review hiring and promotional processes.

• Monitor factors and policies that can (eventually) lead to pay disparities:
  • Are performance ratings similar between demographic groups?
  • Do your policies regarding promotional pay changes cause pay disparities to persist? (e.g., no pay change can exceed 10%).
  • Do you have policies with respect to setting and negotiating starting pay?
Recommendations for Employers

• Consider whether and how to conduct a self-evaluation

• Revise employment applications

• Train HR employees and managers involved in hiring or compensation decisions

• Revise policies that prohibit discussions about wages
Transgender Discrimination
Transgender Public Accommodations Bill

• Since 2011, Massachusetts law prohibits transgender discrimination in employment

• New law prohibits discrimination against transgender persons in places of public accommodation (including restroom and locker room)

• New law takes effect October 1, 2016
2011 Transgender Rights Law

- Added “gender identity” as a protected characteristic to anti-discrimination laws in employment, housing, etc.
- “Gender identity” is defined broadly (sincerely held assertion)
- Applies to employers with at least 6 employees
- New law takes effect October 1, 2016
- Employers should have made employees aware, updated policies, etc.
Status of Non-Compete Agreements
2016 Legislative Session

• New law was not passed; laws regarding non-competition agreements remain unchanged

• Sticking point was garden leave requirement (Senate bill required full pay for duration of the noncompete period; House bill required 50% pay or other agreed upon compensation)
Non-Compete Agreements: What Now?

• The legislative process starts over in 2017

• Closer to passage every year (Chamber of Commerce, etc. now support some type of legislation)

• Industry/employer groups seem to support legislation limiting non-competes to 1 year with some type of garden leave
Non-Compete Agreements: Current Status

• Enforceable as long as necessary to protect a legitimate business interest, reasonable in duration, etc.

• Must be supported by consideration