

## CLIENT ALERT: What Employers Need to Know About the Attorney General's Guidance on Massachusetts Equal Pay Act - By Tracy Thomas Boland and Maura McLaughlin

In August 2016, Governor Baker signed into law the Massachusetts pay equity act, which takes effect July 1, 2018 and amends the existing Massachusetts Equal Pay Act ("MEPA"). On March 1, 2018 the Massachusetts Attorney General issued much-anticipated guidance about the statute in the form of frequently asked questions, a guide to performing the self-evaluation which can provide a defense to liability under the law, and a checklist for review of policies and practices which may assist employers in coming into compliance. A link to the guidance appears [here](#).

The guidance is not binding law but provides valuable information for employers preparing for the July 1, 2018 effective date. MBJ's [prior client alert issued at the time of the act's passage](#) provides a detailed overview of the statute. This alert highlights new information found in the recent guidance. All of the information available on the act and the guidance will be addressed in more depth at our [upcoming firm seminar](#).

### **New (and in some cases surprising) notes from the FAQs**

While employers should review the guidance in full, some of the notable highlights include:

- **Part-time and full-time employee compensation:** According to the guidance, part-time and full-time employees may be paid different hourly rates and/or offered different benefits, as long as employees of different genders within each category who perform comparable work are compensated at the same rate and offered the same benefits.
- **Pre-hiring questions about expected salary:** The law prohibits questions about salary history as part of the hiring process. The guidance offers some nuance, explaining that employers may ask candidates about salary requirements or expectations, so long as the question is asked in a way that is not intended to elicit information about wage history. For example, if the candidate provides a dollar figure, the interviewer should not follow up with "What do you base that on?" Asking about wage expectations carries some risk, given the law's blanket prohibition on seeking wage or salary history. The courts may have to sort out whether such a question crosses a line and indirectly seeks information on salary history (if, for example, a candidate is likely to answer a question about "salary requirements" based on what the candidate earned at prior employment).
- **Job interview questions about sales volume:** Employers may ask candidates about the volume or quantity of the candidate's previous sales objectives and success in meeting those objectives. Employers cannot ask about the candidate's earnings through sales.
- **Employees with primary place of work in Massachusetts:** The law applies to employees

with a primary place of work in Massachusetts, including those who telecommute to a Massachusetts workplace from outside the Commonwealth, even if the employee is not physically present during those telecommuting hours.

- **Definition of “wages”:** The definition of “wages” is intended to capture all forms of compensation, including: salary, commissions, and bonuses, profit sharing, paid time off, vacation and holiday pay, expense accounts, automobile and fuel allowances, retirement plans, insurance and benefits.
- **Employee benefits as “wages”:** With respect to optional benefits in which some employees may elect not to participate, such as health insurance, retirement plans and tuition reimbursement, the test will be whether the benefits are equally available to employees regardless of gender.

### **Self-evaluations for affirmative defense**

The AG’s guidance offers more insight into the self-evaluations of pay practices, which can provide a complete defense to claims brought under MEPA. To set up the defense:

- Employers must have conducted a “good faith” self-evaluation of pay practices within the past 3 years and before a claim is brought and that is reasonable in detail and scope in light of the size of the employer; and
- Employers must demonstrate “reasonable progress” toward eliminating gender-based wage differentials.

The affirmative defense does not necessarily depend on whether a court ultimately agrees with the employer’s determinations about which jobs are “comparable” or whether pay differentials are justified by one of the law’s exceptions. Instead, the availability of the defense depends on whether the employer’s evaluation was conducted in good faith and was reasonable in detail and scope. In other words, the effort an employer puts into the evaluation may matter more than whether the employer gets it all right.

According to the guidance, the following factors are central to whether a self-evaluation will support the defense:

- **Good faith:** The evaluation must be in “good faith.” Only going through the motions to create an audit showing no pay discrepancies or justifying known disparities will not qualify as good faith.
- **Reasonable in detail and scope:** The evaluation must be “reasonable in detail and scope.” What is reasonable in detail and scope depends on the employer’s size, make-up and resources. Key considerations are whether the evaluation considers all “reasonably relevant and available information” and “whether the evaluation is reasonably sophisticated” in analyzing potentially comparable jobs, employee compensation, and the application of the six permissible reasons for pay disparities. There is no statutory obligation to include all positions in the evaluation. The guidance, however, states that the self-evaluation must have included the employees or jobs at

issue in the claim for the defense to be available.

- **Reasonable progress toward eliminating disparities:** An employer must show that it has made “reasonable progress toward eliminating gender-based pay disparities.” This means employers do not immediately have to fix all identified gender-based gaps in pay. Factors to be considered include “how much time has passed [between identifying and fixing the disparity], the nature and degree of [the] progress as compared to the scope of the disparities identified, and the size and resources of the employer.” An employer can show reasonable progress if its efforts “will eliminate the disparities in a reasonable amount of time.” Note: reasonable efforts to eliminate gender-based pay gaps will need to involve steps toward ensuring that wages of employees performing comparable work are equal going forward, but an employer does not need to pay retroactively to make up for past inequality to take advantage of the affirmative defense.

### Basic Guide to Self-Evaluations

The AG has provided a “Basic Guide for Employers” providing guidelines for conducting self-evaluations. A self-evaluation must be tailored to the employer’s particular circumstances, but the “Guide” walks through the steps an employer should consider, including:

- Gathering relevant information, such as employee identifier, gender, and all information needed to evaluate total employee compensation, pay differentials, and reasons for pay decisions;
- Identifying comparable jobs, based on statutory factors;
- Calculating whether employees of different genders are paid equally, through individual or small grouping comparisons or more complex statistical analysis;
- Assessing whether differences in pay are justified under the law, looking at the **six statutory exceptions** and conducting data analyses as needed;
- Remediating any gender-based pay differentials, “as soon as practicable”; and
- Adjusting pay practices, including such steps as determining why pay differentials are occurring and taking steps to prevent future occurrences, and making changes to better align job groupings.

The AG has also provided a “Pay Calculation Tool,” a series of spreadsheets designed to help employers assess whether employees performing comparable work are being paid equally. The guidance cautions that this tool will not inform employers conclusively if they are in compliance with MEPA, and is intended for use only for comparable position groupings involving 30 or fewer employees and relatively simple pay structures. Before starting to input data, employers will need to determine which positions are comparable under the new law in terms of skill, effort, responsibility and working conditions. Employers can then enter data including job title and grouping, gender, part-time/full-time status, and pay information, following the instructions in the guidance. The tool is designed to calculate wage gaps between male and female employees both in terms of the average hourly rate paid to employees of different genders and also the percentage of female employees below the median hourly rate (as compared to male employees who also fall below). After this calculation is completed, the final worksheet in the tool guides employers in reviewing whether the pay variations can be explained by one of the six permissible exceptions in the statute.

The guidance suggests that employers consider conducting some form of self-evaluation on a regular basis, such as annually. The guidance also cautions that with respect to understanding pay differentials, employers “should consult with legal counsel about their options and what type of analysis is most appropriate for their organizations.”

### **Policies and Practices Review**

A self-evaluation that will create an affirmative defense must include an understanding of both any gender-based wage gaps that may exist and also the policies and practices that might have contributed to the disparity. The guidance contains a “Sample Checklist – Policies & Practices Review” to aid employers in reviewing policies and practices that could create liability under MEPA. This checklist reminds employers to check for and eliminate any MEPA-prohibited practices, such as seeking a candidate’s salary history either in writing or in discussions before an offer is made, taking wage history into account in setting starting compensation, and prohibiting employees from discussing wage information. The checklist also offers practical steps for compliance, including revising policies, application forms, and job descriptions, and training for hiring and human resources personnel, supervisors and managers.

The guidance contains many more important concepts about complying with MEPA. Please join us at our breakfast seminar on April 5 and/or contact your MBJ attorney with any questions.

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