

Implications of the Act to Establish Pay Equity

by Robert P. Rudolph, Esq.

On August 1, 2016, Governor Baker signed *An Act to Establish Pay Equity* to ensure equal pay for comparable work performed by Massachusetts employees. While the act represents a significant step forward for equal pay, provides for increased transparency, precludes screening job applicants based on wage or salary history and encourages employers to be proactive about pay equality, it also presents new ground for litigation.

The act provides that “no employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work.” Comparable work means “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed using similar working conditions.” Job title and/or job description do not determine comparability. The act specifically allows for variations based on seniority, merit, productivity, geographic location, education, training, experience or travel.

The act prohibits employers from restricting employees from inquiring about, discussing and disclosing wages with other co-workers. It also prohibits employers from seeking the salary of a prospective employee or from a current or former employer, except after a formal written offer of employment.

The term “comparable work” is likely to open the door to litigation, as employees will likely argue the meaning of “comparable” in its broadest terms. Employers who rely on subjective performance evaluations in deciding wage increases may also be met with new litigation.

However, the act provides shrewd employers an opportunity to limit exposure to claims for gender-based wage discrimination. The act includes an affirmative defense to liability for an employer that “has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation.” An employer’s self-evaluation may be of the employer’s own design, so long as it is reasonable in detail and scope.

Employers found to violate the act are liable for the employee’s unpaid wages, an equal amount of liquidated damages, costs and attorneys’ fees. The statute expressly authorizes one or more employees to bring a class action lawsuit against an employer for an alleged violation. The act takes effect on July 1, 2018.