
Proactive Pay Equity Studies Can Shield Mass. Employers

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Over the past two years, California, New York, Maryland, Massachusetts, New Jersey and Washington have all passed legislation to strengthen their equal pay laws.¹ The list of states with equal pay legislation is expected to grow: In 2018 alone, pay equity legislation has been proposed in more than 20 states.²

Amendments to the Massachusetts Equal Pay Act, or MEPA, which take effect on July 1, 2018, are unique for two reasons. First, the amended MEPA will be among the strongest pay equity laws in the U.S. Second, Massachusetts will be the only state that provides a complete affirmative defense to a legal claim for an employer that conducts a good faith self-audit of pay practices and takes steps to remedy gender pay disparities that cannot be explained by factors that are permitted by law.³

While employers will not be penalized for failing to conduct a proactive pay study, given the features of MEPA and other similar pay equity laws around the country, many employers may want to consider a review of their pay practices and compensation data. In this article, we provide a brief summary of the updates to the law, and outline key considerations for employers in determining whether and how to conduct a proactive pay equity analysis.

Updates to the Massachusetts Equal Pay Act

On March 1, 2018, the Massachusetts Attorney General's Office, or AGO, released guidance on the updated MEPA.⁴ The updates to MEPA prohibit gender discrimination in the payment of "wages" to employees doing "comparable work."

According to the AGO guidance, wages include all remuneration for work performed, including base wage or salary, benefits, paid time off, stock options and bonuses, as well as other types of incentive pay.⁵ Comparable work under MEPA is defined as work that requires substantially similar skill, effort and responsibility, and that is performed under similar working conditions.⁶

MEPA permits differences in pay for comparable work only when they are based on:⁷

- a seniority system;⁸
- a merit system;
- a system that measures earnings by quantity or quality of production, sales or revenue;
- geographic location;
- education, training or experience if "reasonably" related to the job; and
- travel requirements.

Under MEPA, a "system" is a plan, policy or practice that is predetermined and pre-defined.⁹ This definition suggests that unless a seniority, merit or earnings system had been prespecified to determine pay, these factors cannot be used post hoc to explain gender pay disparities for comparable work.

Importantly, MEPA makes clear that employees' salary histories are not a defense to liability.¹⁰ In other words, under MEPA, an employer cannot justify gender pay differences for comparable work based on the fact that a female employee was paid less in her previous job.¹¹

The AGO guidance explicitly states that "[n]either changes in a labor market nor other market forces are included among the valid reasons for variations in pay. ..."¹² This statement suggests that if a male employee received a higher starting salary than a female employee performing comparable work because he was hired during a period of economic growth while she was hired during an economic downturn, such changes in market conditions within a particular labor market may not be used to explain differences in pay under MEPA.¹³

In addition, unlike the new California Fair Pay Act, there is no "catch-all" provision in MEPA that would allow employers to point to any bona fide factor other than gender to explain pay disparities. The exclusion of changes in labor market conditions as a permissible factor and the absence of a "catch-all" provision are important differences between MEPA and pay equity laws in other states.

An employer found to have violated MEPA will be liable for twice the amount of unpaid wages owed plus attorneys' fees and costs.¹⁴

Why Perform a Proactive Pay Equity Study?

A key feature of MEPA is the ability of employers to conduct proactive pay equity studies that can serve as an affirmative defense. In particular, MEPA provides a “complete defense to a legal claim” for an employer that conducts a “good faith, reasonable self-evaluation of its pay practices” within three years prior to a lawsuit being filed.¹⁵ For the self-evaluation to be eligible as an affirmative defense, MEPA notes that the employer must show that the self-evaluation is reasonable in detail and scope, and that the employer has made reasonable progress towards eliminating any unlawful gender-based differentials that are found.¹⁶

Broadly speaking, for a proactive pay equity study of this kind, employers should answer the following questions:

- Given the nature of employees’ work, which employees perform comparable work?
- Which personnel and compensation policies at the firm qualify as permissible factors that MEPA outlines as lawful explanations for pay disparities?
- Are there gender differences in pay for employees performing comparable work after accounting for the six permissible factors outlined in the law?

If a proactive pay equity study reveals gender pay differences, employers must take steps to identify and to start implementing necessary changes in their compensation structure to eliminate these differences for the self-evaluation to be eligible as an affirmative defense under MEPA. Each step in the proactive pay study presents challenges to employers that will require expertise in statistics and labor economics.

Challenges in Defining Comparable Work

There is no general rule that can be applied to identify comparable work groups under MEPA. While considering job title may be a useful start, defining comparable work groups based on job titles alone may not be sufficient.¹⁷ Instead, under MEPA, what matters for the identification of comparable work is whether the jobs require similar effort, skill and responsibility, and are performed under similar working conditions.

Under this standard, positions with similar job titles may not be comparable. The AGO guidance provides an example of two assembly line workers with similar job titles working at the same firm.¹⁸ To the extent these two employees work on different parts of the assembly line, work at different stages of the manufacturing process and/or experience different levels of exposure to hazards, they may not be performing comparable work according to MEPA’s definition.¹⁹

Similarly, positions with different titles may be considered comparable under MEPA. For example, a cafeteria worker and a custodian have different titles and roles. To the extent their positions require similar skills, effort, responsibility and working conditions, they may be performing comparable work.²⁰

The task of determining comparable work becomes more complex with greater variation in employees and for employees with multifaceted job responsibilities. In these

contexts, economic expertise is required to develop a methodology that can systematically categorize employees in consideration of multiple factors that are part of MEPA's definition of comparable work.

Challenges in Determining Equal Pay

There is also no cookie-cutter approach for firms to determine if they are meeting equal pay standards, particularly for firms in which one or more permissible factors may account for some or all of the differences in compensation across workers conducting comparable work. Assessing equal pay requires economic and statistical expertise to evaluate the nuances of an employer's pay system, and the implications of pay systems for compensation, within the context of the permissible factors allowed under MEPA.

First, under MEPA, evaluating gender differences in total compensation is not sufficient. The AGO guidance states that unequal base compensation (i.e., base salary or hourly rate) cannot be made up with bonuses or other perks.²¹ It is unclear whether this statement implies that gender parity in each and every individual component of total compensation is required to comply with MEPA.

However, what is clear is that pay equity evaluation based on total compensation alone may not be sufficient. This poses particular challenges to firms with complex pay structures or components of pay that may be difficult to value, such as stock options or profit-sharing. Additional complications can result in situations where different compositions of pay were negotiated between the employee and the employer at the time of hiring.

Second, MEPA requires gender equality not only in the compensation actually paid to employees, but also in the compensation options that are offered to employees.²² For example, an employee may decline to take advantage of benefits such as health or life insurance, retirement plans or tuition reimbursement. These benefits would not be included in the valuation of the total compensation received by that employee, and may result in disparities in the value of total compensation. The AGO guidance suggests that a pay equity study must consider whether these compensation options were available to all employees, and whether differences observed in total compensation are the result of an employee's choice.

Third, employers need to conduct careful analyses of whether any of the permissible factors can explain gender pay differences. The AGO guidance suggests that before any factor can be used to explain gender pay disparities, the relevance of these factors to the job must first be determined. For example, pay differentials are permissible based on education, training or experience only if they are "reasonably related to the particular job in question."²³ This implies that before any given permissible factor can be included in a compensation model, its relevance to the work and impact on performance may first need to be evaluated.

Similarly, before geographic location can be used as an explanatory factor for pay disparities, the relation between location and differences in cost of living or in the relevant labor market may need to be assessed.²⁴ Such evaluations of the relevance of the six

permissible factors may themselves require statistical analysis, and the results may also vary across different comparable work groups within the same firm.

Once the relevance of the permissible factors is determined, then statistical analysis — including, but not limited to, multivariate regression analysis — will be required to determine if men and women within comparable work groups receive equal pay, controlling for any relevant factors and accounting for any differences in compensation structures that may exist across comparable work groups.

Lastly, conducting a pay equity study by comparing average compensation alone may not be sufficient. Under MEPA, each male employee within the same comparable work group can be a potential comparator for a female employee.²⁵ Therefore, a regression analysis designed to detect average gender differences in pay may not be sufficient to comply with MEPA. In addition to assessing average pay disparities by gender, a more granular compensation analysis may be necessary as well. The AGO guidance also recommends that employers identify outliers (e.g., employees whose compensation is substantially below or above the average compensation) within each comparable work group. Statistical expertise will be required to systematically identify outliers, and to assess their impact on the overall pay equity analysis.

Conclusion

In response to rising social awareness and pressure to combat gender pay disparities, an increasing number of states are passing new equal pay laws. Recent updates to MEPA places pay equity laws in Massachusetts among the strongest in the U.S. However, the ability of firms to conduct proactive pay audits as an affirmative defense under MEPA may offer employers the opportunity to substantially reduce the risk of future litigation.

Economic and statistical analysis can play an important role in conducting a good faith proactive pay equity analysis that can guide appropriate remediation and withstand the scrutiny of the court in the context of litigation.

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Endnotes

- 1 See Seyfarth Shaw, "The New U.S. Pay Equity Laws: Answering the Biggest Questions," 2016, available at http://www.seyfarth.com/dir_docs/publications/PayEquityBrochure.pdf; see also, Littler Mendelson PC, "New Pay Equity Law in Washington State," *Lexology*, April 16, 2018, available at <https://www.lexology.com/library/detail.aspx?g=9889781a-d656-4d01-9b47-7d65066e1c05>.
- 2 Martin Berman-Gorvine, "Pay Equity Movement Pushing Employers to Self-Audit," *Bloomberg BNA*, March 19, 2018, available at <https://www.bna.com/pay-equity-movement-n57982089996/>.
- 3 AGO guidance, p. 3.
- 4 Office of the Attorney General, "An Act to Establish Pay Equity: Overview and Frequently Asked Questions," March 2018, available at <https://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf> ("AGO guidance").
- 5 AGO guidance, p. 8.
- 6 AGO guidance, pp. 2 and 5. The definition of comparable work in MEPA is broader than the "equal work" standard in the federal Equal Pay Act, which is defined as "jobs that require substantially equal skill, effort and responsibility and that are performed under similar working conditions within the same establishment." (emphasis added) U.S. Equal Employment Opportunity Commission, "Facts about Equal Pay and Compensation Discrimination," 2017, available at <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>.
- 7 AGO guidance, p. 2.
- 8 For the purposes of MEPA, the time employees spend on leave due to pregnancy-related conditions and protected parental, family and medical leave, may not be counted to reduce seniority. See AGO guidance, p. 9.
- 9 AGO guidance, p. 9.
- 10 AGO guidance, p. 11. In addition, MEPA stipulates that employers cannot prohibit employees from discussing or disclosing wages, and employers cannot seek salary or wage histories from prospective employees before making an employment offer. Even if an employee voluntarily disclosed information on salary history, this information cannot be used to justify differences in pay.
- 11 AGO guidance, p. 11.
- 12 AGO guidance, p. 12.
- 13 AGO guidance, p. 12.
- 14 AGO guidance, p. 18. An employee or applicant (or the AGO) has three years from the alleged violation of MEPA to file a claim.
- 15 AGO guidance, p. 3.
- 16 AGO guidance, p. 3.
- 17 AGO guidance, pp. 7-8.
- 18 AGO guidance, p. 7.
- 19 AGO guidance, p. 7.
- 20 AGO guidance, p. 6.
- 21 AGO guidance, p. 8.
- 22 AGO guidance, p. 8.
- 23 AGO guidance, p. 10.
- 24 AGO guidance, p. 10.
- 25 AGO guidance, Appendix A, ii.

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