

## Pay equity bill: what lawyers and employers need to know

By Christina L. Lewis



More than 70 years ago, Massachusetts passed a law requiring employers to pay men and women the same wages for “comparable work,” making it the first state in the nation to pass such a law. Over the years, however, a pay gap between men and women has persisted.

Earlier this year, a bill intended to close the pay gap was passed unanimously by the Senate. With the bill now under review by the House Committee on Ways and Means, it’s important to understand the key provisions that attorneys and employers need to know about the bill, listen to what opponents and proponents are saying about it, and consider the bill’s implications for employers in Massachusetts.

### Key provisions for attorneys, employers

While pay equity legislation is not new in Massachusetts, the bill clarifies the existing law and puts restrictions on employers to make the law more effective.

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Most notably, the bill clarifies the definition of comparable work, which courts have defined fairly narrowly over the years. If the measure passes, comparable work will be defined in a broader sense, which proponents hope will ensure that similar jobs have similar pay, regardless of the employee’s gender.

The bill also stipulates that employers are not allowed to ask job applicants about their current salary or their salary history. Prohibiting employers from asking about salary history forces them to set wages based on job requirements, not previous salary.

In addition, the bill states that employees must be permitted to discuss their salaries openly with their colleagues. This is arguably already the case, since employers can’t restrict employees from discussing their wages due to the positions of the National Labor Relations Board. The provision, however, gives employees yet another



forum to pursue relief if employers restrict these conversations.

Although the above provisions place regulations on employers, the bill also would enact a welcome change, as it encourages employers to conduct self-audits, which can help uncover inadvertent pay disparities. Making good-faith efforts to correct pay disparities revealed through the audit process acts as an affirmative defense for employers to any litigation that might be filed against them.

Most employment attorneys would recommend that employers conduct these audits to determine if employees are correctly

classified as exempt or non-exempt; ensure compliance with state and federal law, including the Department of Labor's new overtime regulations; and correct any inadvertent disparity in pay.

### Listening to proponents, opponents

While various groups have voiced their support or opposition, it's important to hear what both sides have to say about the bill.

Proponents are quick to point out that even though Massachusetts was in the forefront of passing equal pay legislation, it hasn't always been effective. A study by the National Partnership for Women & Families indicates that women working full time in Massachusetts make 82 cents for every dollar men make. On average, Massachusetts women working full time lose a combined total of more than \$11 billion each year due to the pay gap, according to the study. Proponents of the bill want that pay gap to narrow as much as possible.

Opponents, on the other hand, believe that existing laws already prevent pay disparity, and they worry that the bill does not afford

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employers sufficient discretion to make pay decisions based on subtle but important differences in employee performance and work product.

Opponents also worry that the bill will cause an increase in litigation. The proposed measure gives the attorney general the right to initiate a cause of action against an employer on the behalf of employees and gives employees the right to initiate a private right of action.

Considering many employers already view Massachusetts's treble damages for wage and hour violations — even when an employer exercises good faith — to be particularly punitive, it would not be surprising if some legislators push for changes to the penalties associated with the bill before it is ultimately passed.

### What the future holds

While the bill will have implications for employers in a variety of industries, the financial

industry may be among the sectors most affected.

That industry, which has seen its fair share of gender discrimination claims on a national level, is a key component of the business community in Massachusetts. Some lawsuits filed against financial companies paint a picture of a largely male-dominated culture that has, at times, encouraged disparity. As a result, the financial industry may be an attractive target for pay disparity litigation.

Employers in the financial sector, and in industries all across the state, will need to take a closer look at their payroll practices to ensure there are no pay disparities for comparable work.

As the legislative session comes to an end in the coming weeks, the bill has gained momentum. House Speaker Robert A. DeLeo has said that he aims to have it passed by the end of July. At the same time, however, DeLeo has expressed his desire to allow proponents and opponents of the bill to make their voices heard.

Regardless of what the future holds for this particular bill, Massachusetts continues to demonstrate its role in leading the conversation around equal pay. **MLW**



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