

Pay equity law fertile ground for litigation

Proactive employers allowed to assert affirmative defense

By Pat Murphy



Employment lawyers see the state's new pay equity law as a balanced measure that opens the door to recovery by plaintiffs while providing smart employers the opportunity to limit their

Christina L. Lewis exposure to claims for gender-based wage discrimination when the measure goes into effect in 2018.

Gov. Charlie Baker signed "An Act to Establish Pay Equity" earlier this month. The law's key provision broadens the definition of "comparable work," effectively removing what lawyers say had been a virtually insurmountable barrier for plaintiffs attempting to prove a pay discrimination claim.

"This comparable work definition focuses exclusively on skill, effort, responsibility and working conditions," Rebecca G. Pontikes said. "It will go a long way to eradicating the pay disparity in jobs that are traditionally held by women versus those that are traditionally held by men."

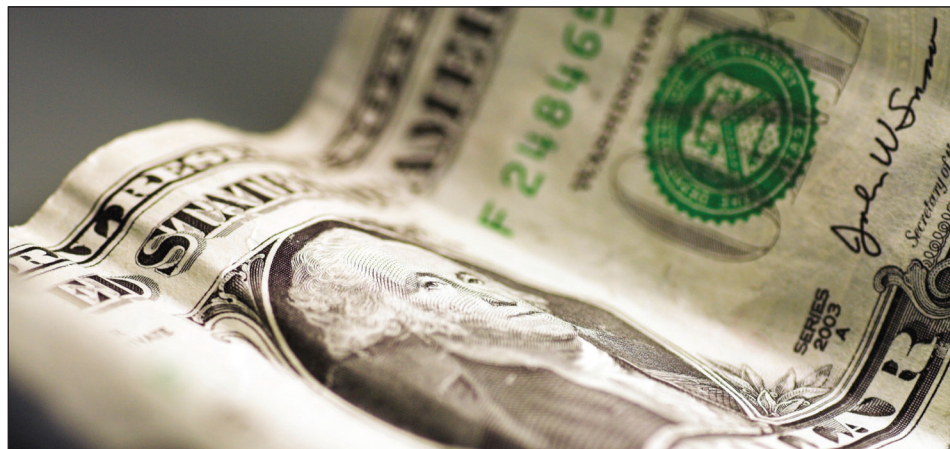
The Boston employment attorney was part of the Massachusetts Equal Pay Coalition's two-year effort to convince the Legislature to pass the measure.

While Pontikes welcomed the new definition for comparable work, defense lawyer Christina L. Lewis highlighted the statute's recognition of an affirmative defense for employers that take the initiative to eliminate unfair pay disparity in their workplaces.

"A lot of savvy employers will take advantage of this," predicted Lewis, who heads the labor and employment practice group at Hinckley Allen's Boston office.

'Comparable work' redefined

The Pay Equity Act provides that no employer "shall discriminate in any way on the basis of gender in the payment of wages ...



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

The statute specifically allows for variations in wages based on factors such as seniority, productivity, education and experience.

The law replaces the Massachusetts Equal Pay Act, G.L.c. 149, §105A. The Supreme Judicial Court in 1995 and 1998 rulings in *Jancey v. School Committee of Everett* enunciated a two-part test for determining comparable work under the MEPA.

The *Jancey* line of cases first requires a determination of whether the duties of the two jobs at issue have key common characteristics. If they do, there must be a determination that the jobs involve comparable skill, effort, responsibility and working conditions in order to conclude that the employees in the two jobs must receive equal pay.

The two-part *Jancey* test made it extremely difficult for plaintiffs to win pay equity claims, said Lori A. Jodoin, who represents employees in her practice at Boston's Rodgers, Powers & Schwartz.

"Under the old law, it got down to the point where you pretty much had to have exactly the same job title," Jodoin said. "It was very narrow."

The Pay Equity Act dispenses with the two-part test from *Jancey*, defining comparable work simply as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."

John P. McLafferty, an employer-side attorney at Day Pitney in Boston, said he has little doubt that the meaning of comparable work will generate the most litigation under the new law.

"The change in terminology was intentional by the drafters of this statute and was designed to ensure comparable pay under a broader sampling of similar jobs," McLafferty said. "Speaking with some of my colleagues on the plaintiffs' side, I already know they're thinking about how to look at certain jobs to broaden the view of what is comparable."

For example, McLafferty said, a plaintiff might try to argue that the skill set, effort and responsibility of a management-level engineer are comparable to that of a management-level accountant, such that they should be compensated similarly.

"We're going to see some of those efforts to try and bring jobs together, particularly where there are substantial differences in compensation because that's where the money is going to be," McLafferty said.

The statutory standard for comparable work is clear enough for judges and juries to apply, said Terence P. McCourt, chairman of Greenberg Traurig's labor and employment group. But McCourt added that the issue is likely to be the subject of much litigation.

"These cases will be very fact-intensive, and therefore the litigation tends to be expensive because it's difficult to obtain a summary judgment when the facts are in dispute," McCourt said.

Affirmative defense

The Pay Equity Act expressly provides for 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.”

The provision was meant to encourage employers “to take a look at what’s going on in their own houses and do something about it,” Pontikes said.

If an employer wants to protect itself, it can advantage of the new affirmative defense, conduct pay equity studies, and take reasonable steps to make sure it is treating its employees fairly gender-wise, Jodo-in said.

“I think it’s going to be a really powerful defense,” she added.

McCourt said he expects the attorney general to issue regulations that will provide a “roadmap” to employers on how to conduct a self-evaluation.

“Based on that roadmap, employers would be well-advised to conduct this kind of study,” he said. “It’s important both to determine whether there are disparities in their workforce and because of the potential availability of the affirmative defense.”

As long as an employer develops a good-faith program to start rectifying any differentials that turn up in the audit process, the statute’s language suggests that that will be a defense to liability, Lewis said.

Claims that women and men are performing comparable work but not being paid the same will most often arise in the context of class-action litigation, Lewis said, adding that she expects to see a lot of litigation focused on whether a wage disparity is based on a factor allowed under the statute, such as a “bona fide merit system.”

That could be a problem for the small employer that relies on subjective performance evaluations in deciding wage increases.

“They may not even have a scoring system or any sort of weighted measuring system,” Lewis said. “That is not likely to qualify as a bona fide merit system. You’re going to have to have something that’s more documented and more objective than that.”

Lewis said wage and hour litigation is the fastest growing area in her practice, and she expects litigation under the Pay Equity Act to reflect that trend, particularly in light of the remedies authorized by the statute.

“There’s liquidated damages — twice

whatever the back wages are — and then there’s attorneys’ fees and costs that can be recovered as well,” Lewis said. “So it’s an attractive piece of legislation for plaintiffs’ attorneys, there’s no question.”

Salary history

With the enactment of the Pay Equity Act, Massachusetts became the first state to prohibit employers from asking applicants about



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their salary history before a job offer is made. In addition, the statute makes it an unlawful practice for an employer to prohibit employees from sharing wage information with co-workers.

McLafferty said the prohibition on asking for salary histories has caught the employers he has spoken to by surprise.

“We’re telling employers that they need to revise their application forms to remove those questions and train their hiring managers not to make those inquiries,” he said.

McLafferty said he expects that, in some cases, information on salary history will inevitably come out in the interview process, leading to litigation over whether the information was genuinely volunteered by the applicant or unlawfully elicited by the employer in violation of the statute.

Lawyers should expect litigation over interview questions that appear to violate the spirit if not the letter of the law, according to Amanda M. Baer, an employer-side attorney with Mirick O’Connell in Westborough. For example, Baer said that she has seen employers wondering in online forums whether they can ask an applicant for a preferred salary range.

“A lot of times that’s going to give insight into one’s salary history,” Baer said. “It’s not clear, and I would anticipate some litigation about that.”

Baer added that employers need to be mindful that third-party recruiters that work for them may be considered employees under the act, so they need to make sure their

recruiters do not ask prohibited questions.

While some employers may be uncomfortable with the change in the law, Pontikes said there are legitimate reasons for protecting salary history.

“It’s very important that employers can no longer require disclosure of salary as a pre-condition of an offer of employment because you may have been discriminated against at one place; you shouldn’t have that

salary history continue to dog you your entire career,” Pontikes said.

Brian J. MacDonough, who represents executives and professionals in employment matters at Sherin & Lodgen, said he does not anticipate much litigation over the provisions regarding salary disclosures.

According to the Boston lawyer, prohibiting inquiries into a job applicant’s salary history and ensuring the free flow of wage information within the workplace are more likely to have a gradual, long-term impact in eradicating discriminatory pay practices.

“I don’t think in the immediate future there’s going to be litigation just solely over whether somebody was asked or not asked [about their salary history],” MacDonough said.

Boston attorney Juliet A. Davison also questions how important the ban on asking for salary histories will be in the long run.

“Employers have in mind what they want to pay for a particular position,” she said. “There’s going to be a salary negotiation, so the employee is going to have to chime in in terms of what they’re looking for, and the employee can volunteer that information.”

Davison finds more significant the law’s provision allowing claims to be filed in court without first having to go to the Massachusetts Commission Against Discrimination.

“It’s quite remarkable that there’s no administrative hurdle that the employee has to jump over in order to bring this claim,” she said. **MLW**



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