for subrogation. The obligations undertaken in an indemnity clause may require the firm to take steps that impede the firm's, and therefore the insurer's, ability to defend otherwise covered claims. Similarly, an indemnification clause can render meaningless the subrogation clause. Either instance may vitiate coverage.

Indemnification clauses often expand the lawyers' potential liability to include otherwise uncovered acts or situations. While this may appear to provide more protection for the client, the reality is that most firms are organized as limited liability companies, and few have sufficient assets from which to recover a sizable judgment. Even large firms will not have adequate assets to make good an indemnification claim arising from a multi-million (or billion) dollar transaction. Instead, firms rely on professional liability insurance, which uniformly excludes coverage for contractually assumed liabilities. Clients who aggressively attempt to collect on an uncovered indemnity agreement may find themselves doing so in bankruptcy court.

Some firms and their clients have successfully agreed to limit the scope of indemnity provision to losses "to the extent that they are covered by the firm's malpractice insurance policy," or employing language that voids the indemnification agreement if it invalidates the firm's professional liability insurance. However, there is no case law as yet regarding whether such limitation language will be effective if the underlying indemnity provision is in the agreement, so that any such proposed solution is not yet certain to succeed. Remember also that attorneys remain liable for their negligence, even in the absence of an indemnification provision.

Common Interest

Clients and lawyers share a common interest—creating a relationship where each understands what is expected, and that promotes the ability of both parties to function in an effective and stable manner. Small tweaks to these two OCG provisions can provide the benefits clients desire without creating unintended and damaging consequences for both lawyer and client.

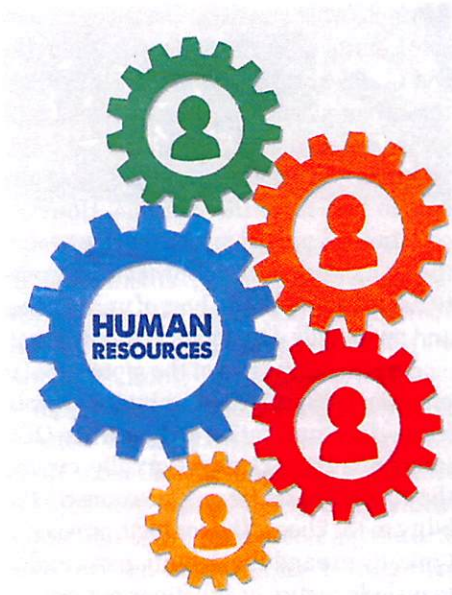
Employment and Labor Law

Massachusetts Strengthens Pay Equity Law and Passes Pregnant Workers Fairness Act

By Christopher A. Callanan

Last August, Massachusetts Governor Charlie Baker signed a comprehensive pay equity bill entitled "An Act to Establish Pay Equity" which creates significant liability for employers who permit disparity in pay based on gender. The Pay Equity Act establishes a private right of action and prohibits employers from asking prospective employees about wage and salary history during interviews. The law becomes effective July 1, 2018.

This August, Governor Baker signed the Pregnant Workers Fairness Act, prohibiting workplace discrimination related to pregnancy or nursing and requiring reasonable accommodations for expectant and new mothers. The law becomes effective April 1, 2018.



Private Right of Action for Pay Disparities

The Pay Equity Act prohibits discrimination "in any way on the basis of gender in the payment of wages" and prohibits paying any person a salary or wage rate less than rates paid to employees of a different gender for comparable work. The act defines "comparable work" as work that is substantially similar in that it requires substantially similar skill, effort, responsibility, and is performed under similar working conditions; provided however, that a job title or job description alone shall not determine comparability.

The act identifies the following permitted exceptions to pay inequities between genders: seniority with the employer (so long as leave due to pregnancy or protected family and medical does not reduce seniority); a merit system; a system which measures earnings by quantity or quality of production, sales or revenue; the geographic location where the job is performed; education, training, or experience to the extent such factors are reasonably related to the particular job in question; and travel if travel is a regular and necessary condition of the job.

The statute provides a private right of action on the part of any aggrieved employee to recover unpaid wages plus an additional equal amount in liquidated damages, reasonable attorneys' fees and

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costs. An aggrieved employee may sue on her own behalf and on behalf of all others similarly situated. The statute specifically permits bringing suit without first bringing a charge of discrimination with the Massachusetts Commission Against Discrimination. There is a three year statute of limitations.

The statute provides an affirmative defense to an employer who can establish that in the three years prior to the action, has completed a self-evaluation of its pay practices and can demonstrate that reasonable progress has been made towards eliminating wage disparity based on gender for comparable work. The evaluation can be of the employer's own design so long as it is reasonable in detail and scope in light of the size of the employer. An employer who can demonstrate a self-evaluation in good faith within the previous three years and can demonstrate making reasonable progress toward eliminating wage differentials based on gender but cannot demonstrate that the evaluation was reasonable in detail and scope shall not be entitled to an affirmative defense, but shall not be liable for liquidated damages. An employer who has not conducted a self-evaluation within three years of commencement of the action is not subject to a negative or adverse inference as a result.

Inquiring About a Prospective Employee's "Wage or Salary History" Is Prohibited

The act prohibits prospective employers from seeking wage or salary history from a prospective employee or their current or former employer in Massachusetts. Because the statute broadly defines employers as "any person acting in the interest of an employer directly or indirectly" it also precludes third party agents like recruiters from asking employment applicants or their current or former employers for their wage or salary history. The act also prohibits an employer from requiring that its employees refrain from discussing or exchanging information about pay.

Since the act broadly defines "wages" as "*all forms* of remuneration for employment," *any* questions concerning past compensation are off limits including questions about hourly wages or salary; questions concerning components of prior compensation (such as bonuses, commissions, 401K plans, and even vacation time); and questions concerning compensation structure.

Under the act, if a prospective employee voluntarily discloses their wage or salary history, a prospective employer may confirm this information or permit a prospective employee to do so. Otherwise, a prospective employer may seek or confirm wages or salary history only after an offer of employment with compensation has been "negotiated and made" to the prospective employee.

The act prohibits employers in Massachusetts from asking wage or salary history questions and prospective employees in Massachusetts from being the recipients of such questions. Therefore, an out-of-state employer (or anyone acting on their behalf) cannot ask a prospective employee located in Massachusetts about their wage or salary history. Additionally, an employer (or anyone acting on their behalf) located in Massachusetts cannot inquire about the wage or salary history of a prospective employee even if that individual is located outside of Massachusetts.

The act permits an aggrieved employee to bring suit on her own behalf or on behalf of all others similarly situated within three years. The act states that in addition to the remedies set forth above (unpaid wages, an equal amount in liquidated damages, reasonable attorney fees, and costs) a plaintiff may "also recover any damages incurred" as a result of improper inquiry.

Lastly, the act prohibits any form of retaliation for opposing or complaining about any violation of the conduct made unlawful under the act or for engaging in any activity protected by the act.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act adds as an additional protected class under the existing Fair Employment Practices Act (Mass. Gen. L. c. 151B): "pregnancy, childbirth, or a related condition, including but not limited to the need to express breast milk for a nursing child." The act prohibits an employer from denying reasonable accommodations for any condition related to pregnancy, childbirth, or related conditions unless an employer can demonstrate undue hardship. Under the existing provisions of Chapter 151B, aggrieved employees may file a charge of discrimination at the Massachusetts Commission Against Discrimination (MCAD) within 300 days of the discriminatory act. Employees can choose to remain at the MCAD for an administrative hearing with a potential award of back pay, front pay, emotional distress, and reasonable attorney fees or they may opt to pursue a jury trial in the Superior Court to recover actual damages (back pay, front pay, and emotional distress), reasonable attorney fees, and a punitive award.

The act includes as reasonable accommodations for pregnancy, childbirth, or related conditions: more frequent or longer breaks, time off to recover from childbirth, acquisition or modification of equipment, seating, transfer to a less strenuous or hazardous position, job restructuring, light duty, break time, private non-bathroom space for expressing breast milk, assistance with manual labor, or modified work schedules. Employers bear the burden of establishing "undue hardship," which is defined as an action requiring significant difficulty or expense. The factors included in that analysis are the nature and cost of the accommodation, the overall financial resources and size of the employer, and the effect of an accommodation on the expenses and resources of the employer. Employers are required to engage in a timely and good faith interactive process with the employee to determine effective reasonable accommodations.

Conclusion

Given the potential exposure created by the Pay Equity statute and the protections afforded by conducting a self-evaluation of pay practices, it behooves any Massachusetts employer to take time now to evaluate its compensation programs and interview practices before the act becomes effective on July 1, 2018. Given the specific circumstances protected by the Pregnant Workers Fairness Act, employers should be careful to ensure that expectant and new mothers are treated fairly and provided with reasonable accommodations.