THE NEW MASSACHUSETTS EQUAL PAY LAW: 100 YEARS IN THE MAKING

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On August 1, 2016, sweeping amendments to our state's equal pay statute were signed into law making Massachusetts once again a leader in the fight for pay equity. The bill, which passed unanimously in both the House and Senate, was the product of bipartisan efforts in the Legislature, with support from the Attorney General's office, advocacy groups and the business community coming together to strengthen our equal pay statute. Once enacted, the amended Massachusetts Equal Pay Act ("MEPA"), M.G.L. c. 149, § 105A, became the most comprehensive pay equity law in the country, containing provisions not seen in any other state's equal pay law. We were the first state to ban requests for salary history in the hiring process, which has now been followed by a number of cities and states. We were also the first state to include in its statute an affirmative defense to liability if the employer conducts a self-evaluation of its pay practices and can show that it has made reasonable progress toward eliminating any gender-based wage differentials. The new statute, which goes into effect July 1, 2018 has already served as a model for other states to strengthen their pay equity laws, and marks a major step forward for the Commonwealth to provide important tools to help close the gender wage gap.

I. History of Comparable Work Legislation

It has been at least 100 years since our federal government recognized that women should get equal pay for equal or comparable work. The two world wars of the 20th century, which mobilized women into the workforce, also sparked governmental steps towards equal pay for women. During World War I, when women stepped in to fill the jobs of men sent to fight in Europe, the National War Labor Board issued a statement mandating equal pay: "If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work." Quoted in "Present Economic Status of Women," New York Times (Oct. 6, 1918). In 1942, as Americans (primarily men) were again being deployed in World War II and women were taking over their jobs, President Franklin Roosevelt reconstituted the National War Labor Board within the Department of Labor (which was led by Frances Perkins, the first female cabinet secretary) and again mandated that women holding jobs that men otherwise filled must be paid the same as the men. The concept of equal pay for comparable work was developed to pay women fairly in gender-segregated jobs, those "job classifications to which only women have been assigned in the past," and also when the job was comparable though not identical to a job performed by men, based upon job evaluations. The War Labor Board encouraged employers to conduct a "job evaluation" stating that "a study of job content and job evaluation should afford the basis for setting "proportionate rates for proportionate work." This situation arose where the job had to be modified (for example to reduce heavy lifting) for a woman to perform it – thus creating a comparable job. The rules provided:

> Where the plant management, in order to meet the necessity of replacing men by women, has rearranged or lightened the job, perhaps with the employment of

> helpers to do heavy lifting or the like, a study of job content and job evaluation should afford the basis for setting "proportionate rates for proportionate work." Such questions require a reasonable determination, by collective bargaining or arbitration, of the question whether, or how far, the newly arranged job is of equal quantity and quality with the old job.

National War Labor Board Press Release, No. B 693, June 4, 1943, in "Chapter 24: Equal Pay for Women," *The Termination Report of the National War Labor Board: Industrial Disputes and Wage Stabilization in Wartime*, January 12, 1942-December 31, 1945, vol. I, 290–291. http://historymatters.gmu.edu/d/5144/.

The War Labor Board was clear that equal pay for equal work was not the only goal, but that an employer needed to go further by conducting job evaluations to ensure that employers were paying men and women fairly throughout the plant:

> Whether a job is performed by men or women, there may be a dispute over correctness of its wage rate in relation to rates for other jobs in the same plant. These are the so called intra-plant inequality cases. Their discrimination should not be related to the "equal pay for equal work" question; they should be determined on the basis of maintaining or developing a proper balance of wage rates for various jobs based upon job evaluation.

Id.

The first federal legislation calling for equal pay for equal work was introduced during the war by one of the few women in Congress. In 1944, Representative Winifred Stanley, a Congresswoman and an attorney from Buffalo, New York, introduced HR 5056, a bill entitled "Prohibiting Discrimination on the Basis of Pay." Congresswoman Stanley was looking to the future, to post-war America, to ensure that women would receive equal pay for equal work even after the war ended. Her bill did not pass, and Congress would not enact the Equal Pay Act until almost 20 years later in 1963. Instead, it was Massachusetts that led the way on equal pay.

On July 10, 1945, Massachusetts became the first state to pass an equal pay law. Drafted against the backdrop of the National War Labor Board mandate, the Massachusetts Equal Pay Act ("MEPA") required, without exception, equal pay for comparable work. This meant that even if women did not hold the exact position of their male counterparts, if the duties and responsibilities were similar, the women had to be paid the same as the men. In 1947, however, the Legislature amended MEPA to narrow its scope to provide for equal pay for *equal* work. Specifically, the new law stated that women must receive equal pay for "work of substantially the same character or on substantially the same operations." The amendments also included multiple exceptions related to training, education, and experience, among others to allow employers to pay their male and female employees differently.

Four years later, in 1951, the Massachusetts Legislature reversed course again, returning to the original intent of the law, once again requiring equal pay for *comparable* work. The amended statute required that women receive equal pay for "work of like or comparable character or work on like or comparable operations." The state legislature also removed all but

one of the 1947 exceptions, opting only to keep seniority systems as a legitimate reason for pay differences among the sexes.

Massachusetts operated under this equal pay for comparable work model for over 40 years. Then, in 1995, the Massachusetts Supreme Judicial Court issued its opinion in *Jancey v. School Committee of Everett*, 421 Mass. 482 (1995), which significantly narrowed the reach of the statute and created confusion in how the statute should be interpreted and applied. In *Jancey*, female cafeteria workers employed by the Everett public school system who sued the school committee alleging that they were paid less than male custodians who performed comparable work, but received twice as much in wages. The cafeteria workers claimed that their jobs were comparable to the school janitors in terms of skill, effort, responsibilities and working conditions. The Superior Court trial judge agreed and found for the employees. The school committee appealed. On review, the SJC reversed the Superior Court's ruling, finding in favor of the school committee. The SJC rested its finding on the premise that jobs cannot be comparable if their content is dissimilar. The SJC adopted a two-prong test to determine the comparability of two jobs. First, the judge must determine if the two classes of jobs had "important common characteristics." Then, if the jobs did share important common characteristics, the judge had to determine whether the jobs had comparable skills, effort, responsibilities and working conditions. After remand, and the application of the new test, the case returned to the SJC, which issued a second decision, *Jancey v. School Committee of Everett*, 427 Mass. 603 (1998). *Jancey II* once more found in favor of the school committee in a 4 to 3 decision. Notably all four white male judges were in the majority, finding that the first prong of the test was not met because the jobs did not have "important common characteristics." The dissent, written by Chief Justice Margaret Marshall, and joined by the second female justice and the sole African-American justice, concluded that the jobs of the janitors and the cafeteria workers did have "important common characteristics" when those characteristics were viewed more broadly. The dissent characterized the majority's reading of the statute as too narrow and one that effectively equated the comparable work standard with a standard of equal work. With such a restrictive and unclear reading of the term comparable work, the statute became ineffective and was used very little by plaintiffs challenging sex-based wage discrimination.

II. Legislative History of the New Equal Pay Act

After 1998, Massachusetts state legislators unsuccessfully attempted to pass legislation to redefine the term "comparable work" to jettison the 2-prong *Jancey* test in order to bring it back in line with the original intent of the 1951 amendments. I and Deborah Benson, a Boston attorney, who were members of the Women's Bar Association's Legislative Committee, in 2014 formed and co-chaired the WBA Pay Equity Task Force, to come up with a new and more comprehensive approach to amend MEPA to add new tools to combat pay discrimination and to close the gender pay gap. At the time, women working full time in Massachusetts earned 82 cents to the dollar men earned, and women of color earned significantly less. We joined with the Massachusetts Commission on the Status of Women ("MCSW") and the Massachusetts Chapter of the National Organization for Women ("MassNOW") to create the Equal Pay Coalition, led by MCSW Director Jill Ashton, to work on drafting legislation and building a body of supporters to advocate for equal pay legislation. We consulted with Evelyn Murphy, an economist and former Lieutenant Governor, who is head of the Wage Project, a national grass roots

organization aimed at ending wage discrimination. She recommended that we come up with a comprehensive bill that would offer various tools to end the gender wage gap. In looking to other state equal pay laws, we drafted a comprehensive new bill that, in addition to defining comparable work, would add a pay transparency provision, extend the statute of limitations from 1 to 3 years, and would adopt an affirmative defense for an employer who conducted a self-evaluation and took steps to end wage disparities – a provision we found in regulations of the State of Maine, but which also harkens back to the job evaluations recommended by the National War Labor Board during World War II. We worked with MassNOW's Katie Donovan, who was drafting a bill to end requests for salary history in hiring. We found legislative sponsors, Senator Pat Jehlen, who had introduced amendments to the equal pay bill for years, Senator Karen Spilka (who became Chair of the Senate Ways & Means Committee the next session), Representative Ellen Story, who also had been championing equal pay, and Representative Jay Livingstone, a relatively new and a male member of the Legislature. We felt having a male lead sponsor would be helpful in winning support among a predominantly male body. We worked closely in our efforts to come up with an initial draft of a comprehensive bill with Genevieve Nadeau, who soon became first Deputy Chief, and later Chief of the Civil Rights Division of the Attorney General's office. As part of our efforts, we consulted with a wage expert from the University of Massachusetts Boston, Professor Marlene Kim, who had conducted the first national study showing that pay transparency provisions can on average close the gender pay gap by at least 3%.

The initial draft of the bill that was introduced in the House and Senate on January 16, 2015, HD2802, An Act to Establish Pay Equity, (1) defined "comparable work" to reject the 2-prong *Jancey* test and rely solely on whether jobs have comparable skill, effort, responsibilities and working conditions; (2) included a pay transparency provision; (3) included a first-in-the-nation provision restricting the use of salary history requests in hiring; (4) created an affirmative defense for employers who conduct self-evaluation wage audits and then take steps to end gender wage disparities; and (5) extended the statute of limitations from 1 to 3 years to be in line with the state anti-discrimination law. On January 30, 2015 (the deadline for co-sponsors in the state House of Representatives), the Equal Pay Coalition learned that through its advocacy efforts and the hard work of Representatives Livingstone and Story, the house bill had 96 co-sponsors, well over a majority of House members.

The equal pay bill (now numbered H1733 and S983),was referred to the Massachusetts Joint Committee on Labor and Workforce Development, which was co-chaired by Senator Daniel Wolf and Representative John Scibak. The committee held hearings on the bill in July 2015, and reported the bill out favorably, sending it to the Senate Ways and Means Committee, now chaired by Senator Spilka, one of the bill's lead sponsors. The Senate Ways and Means Committee added the key Lilly Ledbetter provision to the bill, to overcome multiple statute of limitations defenses. This provision had been first proposed by the Attorney General's office. The Senate under the leadership of Senate President Stan Rosenberg, made the pay equity bill a priority and scheduled debate on the bill for January 28, 2016. The day before the vote, on January 27, the Greater Boston Chamber of Commerce endorsed the bill. The endorsement of the Greater Boston Chamber of Commerce represented a significant win for the sponsors of the bill signaling that the bill had support in an important segment of the business community. In addition to the Senate President, Senators Jehlen, Spilka and Wolf and their staff were critical in

moving the bill through the Senate and to the Senate floor for a vote. On January 28, 2016, the Senate held its debate on the bill. The bill passed unanimously. After the Senate vote, the bill was reported to the House Ways and Means Committee. In Spring 2016, Representative Pat Haddad, Speaker Pro Tem of the House (the highest ranking female member of the House), worked with a business group that had opposed the bill, the Associated Industries of Massachusetts (AIM), and the Attorney General Office (Genevieve Nadeau, the Chief of the Civil Rights Division), to address AIM's concerns about the bill. The House of Representatives held its debate on the bill on July 14, 2016. Once again, the bill passed unanimously. Governor Charlie Baker signed the bill on August 1, 2016, with an effective date of July 1, 2018. *See* An Act to Establish Pay Equity, Session Laws Chapter 177 of the Acts of 2016, which will be codified at M.G.L. c. 149, § 105A.

III. Provisions of the New Law

The new law contains the following provisions:

1. DEFINES WAGES BROADLY TO COVER ALL COMPENSATION

- Codifies what had been the common law definition of "wages" (*see Jancey I* at 493) to mean all forms of remuneration including benefits. Thus to determine whether employees are paid equally for comparable work, not just their hourly rate or salary must be compared, but also their other forms of compensation including benefits.

2. DEFINES COMPARABLE WORK

The Act defines "comparable work" as:

- Work that involves substantially similar skill, effort and responsibility and is performed under similar working conditions.
- Titles are not controlling.
- Working conditions include environmental factors, physical surroundings, and shift differentials

3. EXEMPTIONS TO EQUAL PAY

In what harkens back to the 1947 version of the law, the statute has been amended to recognize and codify the many nondiscriminatory reasons that employers provide different pay to employees performing the same or similar roles, providing for "variations in wages" based on:

- "A system that rewards seniority with the employer"— provided that time spent on leave due to "a pregnancy-related condition" or "protected parental, family and medical leave" cannot reduce seniority;
- A "merit system";
- A system which measures earnings "by quantity or quality of production, sales, or revenue";
- The geographic location in which a job is performed;

- Education, training or experience to the extent such factors are "reasonably related" to the job; or
- Travel that is "a regular and necessary condition" of the job.

4. PAY TRANSPARENCY

- Bans any "pay secrecy" policy or practice which would prohibit employees from "inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages."
- This does not require an employer or employee to disclose wage information.

5. STATUTE OF LIMITATIONS

- Extends statute of limitations from 1 to 3 years.
- Lilly Ledbetter provisions: the statute of limitations arises when a discriminatory act occurs, or when employee has notice of the discriminatory act, or when a discriminatory practice has a negative effect on an employee. The statute of limitation is also reset for each pay check.
- This provides important protections to individuals who believe they are being paid in a discriminatory manner. The Lilly Ledbetter provision is significant because it tolls the statute of limitations, which under the old statute started to run the moment the discriminatory decision was made, or when the employee had notice of the act. Significantly, the provision overturns by legislation *Silvestris v. Tantasqua Regional School District*, 446 Mass. 756 (2006). In *Silvestris*, the SJC ruled that female teachers who alleged that they were paid less than their male colleagues had failed to state a claim because the statute of limitations had run. Their MEPA action accrued when the teachers had reason to believe that they had received less credit for prior work experience thus receiving lower pay than their male colleague, but they had failed to file within the requisite time period. The court also ruled that the continuing violation doctrine did not apply to unequal compensation claims. Under the Lilly Ledbetter provision of the new amendments to MEPA, each paycheck resulting from the original discriminatory compensation decision or other practice would trigger a new filing period, and therefore, would revive claims that otherwise would have been time barred.
- The MEPA amendment makes it clear that there is no administrative filing requirement, specifically that MEPA claims need not be filed at the Massachusetts Commission Against Discrimination.

6. RESTRICTIONS ON REQUESTING SALARY HISTORY IN HIRING

- An employer cannot seek or confirm an applicant's salary history unless an applicant voluntarily discloses compensation OR
- there has been an offer of a job with compensation made.
- Massachusetts became the first state in the country to restrict the use of salary history in hiring. Since the law was signed in August 2016, as of the writing of this article, at least three states (California, Delaware and Oregon), Puerto Rico and several jurisdictions (including New York City, Philadelphia, Pittsburgh, New Orleans, and San Francisco) have enacted laws restricting the use of salary history in hiring. California and Oregon also prohibit setting wages based on salary history. There are

also executive orders, like New York state's, that prevents state entities from asking about salary history to a job applicant until after an offer with compensation has been make.

- Note that the City of Philadelphia's salary history ban has been challenged by the Chamber of Commerce on First Amendment grounds. That lawsuit, which is being closely monitored by other jurisdictions, is currently pending.

7. DEFENSE FOR EMPLOYERS WHO CONDUCT SELF-EVALUATIONS

- An employer that completes a "self-evaluation of its pay practices in good faith" and "can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work" is entitled to an affirmative defense to liability against a claim of wage discrepancy and to any claim of pay discrimination under M.G.L. c. 151B for a period of three years following the completion of the self-evaluation.
- The Act also provides that "evidence of a self-evaluation or remedial steps undertaken in accordance with [the Act]" will not be admissible evidence of a violation of the Act or M.G.L. c. 151B.
- To get the affirmative defense, the evaluation must be reasonable in detail and scope in light of the size of the employer, or may be consistent with template or forms issued by the Office of the Attorney General.
- If an employer has conducted a self-evaluation, and taken steps to end pay disparities, but the evaluation is not reasonable in detail and scope, the employer will not have an affirmative defense, but will not be liable for liquidated damages.

WHAT CAN EMPLOYERS DO NOW?

- Train managers and employees about the new law's provisions.
- Review job descriptions and make sure that employees are properly paid based on skill, effort, responsibility and working conditions, not titles but job functions.
- Evaluate pay practices, conduct self-evaluations, take steps to end pay disparities.
- Employers cannot lower salaries or compensation to equalize wages.
- Review confidentiality policies governing compensation and amend Employee Handbooks and offer letters, and other policies to end pay secrecy practices.
- Train HR and hiring managers to stop asking about salary history in the hiring process before an offer is made with compensation, and remove from employment applications any questions seeking wage data.
- Set a salary range for each position and set new salaries according to the salary range as well as other factors such as education, experience, training, etc., rather than prior salary.