

# **Guidance on the Amended Massachusetts Equal Pay Act - Webinar**

**Goodwin  
March 27, 2018**

**Jennifer Merrigan Fay**

**Robert M. Hale**

**Bradford J. Smith**

**Christopher Erath, Ph.D., BLDS, Inc.**



**GOODWIN**

# Massachusetts Equal Pay Act

---

- On July 1, 2018, significant amendments to the Massachusetts Equal Pay Act (“MEPA”) will take effect.
- On March 1, 2018, the Massachusetts Attorney General issued its interpretation of the amended MEPA (“Guidance”).
- MEPA currently prohibits employers from paying different amounts to employees of different genders who perform “comparable work,” but the current standard is narrow.
- The upcoming MEPA amendments broaden the scope of “comparable work,” significantly limit available justifications for pay differentials, bar certain inquiries in hiring and prohibit employers from limiting most employee communications about compensation.

# Agenda

---

- Review key aspects of MEPA, as interpreted by the Attorney General.
- Discuss how to establish the self-evaluation affirmative defense.
- Identify recommended changes in policies and practices.

# Massachusetts Attorney General Guidance

---

- Attorney General Guidance is available at [www.mass.gov/ago/equalpay](http://www.mass.gov/ago/equalpay).
- The Guidance is not a regulation. Other Attorney General interpretations that are not regulations have been accorded “substantial deference.”
- The “substantial deference” standard is subject to the interpretation being “reasonable.”
- Some positions taken in the Guidance and discussed here may be subject to challenge.

## Covered Employees

---

- “Employees” include the vast majority of employees, including full-time, part-time, **seasonal**, per-diem, and **temporary** employees.
- Employees are covered if they have a “**primary place of work** in Massachusetts.”
- **Telecommuters** are considered to be Massachusetts employees if they primarily telecommute to a Massachusetts worksite.
- If an employee relocates to Massachusetts, compensation needs to be reviewed even if it is a lateral move.
- Multi-state employers generally need only assess whether employees within the same geographic area **within Massachusetts** are paid equally for performing comparable work, unless excluding out-of-state employees from the analysis is not reasonable under the circumstances.

## Equal Pay

---

- According to the Guidance, equal means the **same**, not close.
- “Wages” is defined **broadly** to include all forms of remuneration for work performed, including:
  - commissions,
  - bonuses,
  - profit sharing,
  - deferred compensation,
  - paid personal time off, vacation and holiday pay, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits, whether paid directly to the employee or to a third-party on the employee’s behalf.
- Stock options and other forms of equity grants are not specifically addressed in MEPA or the Guidance.

## Comparable Work

---

- No employer shall “pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work.”
- The law defines “comparable work” as work that requires:
  - requires substantially similar **skill**,
  - requires substantially similar **effort**,
  - requires substantially similar **responsibility**, and
  - is performed under **similar working conditions**.

## Comparable Work (continued)

---

- **Substantially similar:** “Alike to a **great or significant extent**, but not necessarily identical”
- **Skill:** **Experience, training, education, and ability** required to perform jobs
- **Effort:** Amount of **physical/mental exertion** needed to perform a job
- **Responsibility:** Degree of **discretion/accountability** involved in performing job
- **Working Conditions:** **Environmental circumstances** such as physical surroundings and hazards



## Differentiating Factors and Equal Pay

---

- If jobs are comparable, an employer must pay men and women equally, unless the differences are based on one or more of the following factors:
  - (i) a **system** that rewards seniority with the employer
  - (ii) a merit **system**;
  - (iii) a **system** which measures earnings by quantity or quality of production, sales, or revenue;
  - (iv) the **geographic location** in which a job is performed;
  - (v) **education, training or experience** to the extent such factors are reasonably related to the particular job in question; and/or
  - (vi) travel, if the travel is a **regular and necessary** condition of the particular job.

## Differentiating Factors and Equal Pay (continued)

---

- What is a “**system**” ?
  - a plan, policy, or practice
  - predetermined or predefined
  - used by managers or others to actually make compensation decisions; and
  - uniformly applied in good faith without regard to gender.

## Differentiating Factors and Equal Pay (continued)

---

- May market data be used to justify pay differentials?
  - Generally no, neither changes in a labor market nor other market forces are valid reasons for variations in pay.
  - **Narrow exception**--Employers may use market data when there are pay differences based on relevant labor market from one **geographic location** to another.

# Retaliation

---

- MEPA prohibits an employer from discharging “or in any other manner” retaliating against an employee for:
  - Opposing any act or practice made unlawful by MEPA
  - Filing or expressing an intent to file a MEPA complaint
  - Participating in an investigation or legal proceeding under MEPA
  - Sharing wage information or inquiring about or discussing others’ wages

## Enforcement

---

- A male or female employee who asserts a MEPA violation may file a **complaint in court**
  - on **his or her own behalf**, or
  - on **behalf of similarly situated employees**.
- An employee may also file a **complaint with the Massachusetts Attorney General's office**, which may file a complaint in court on behalf of one or more affected employees.
- An employee or the Attorney General has **three years** from an alleged violation **to file a claim in court**.

## Liability

---

- An employer that violates MEPA may be liable for:
  - The amount of the affected employee's **unpaid wages** (i.e., the amount by which he/she was underpaid);
  - An equal amount of unpaid wages (i.e., **double damages**);
  - Reasonable **attorneys' fees**/costs.

## Affirmative Defense

---

- MEPA provides a **complete** defense to a legal claim for any employer that has conducted a **good faith, reasonable self-evaluation** of its pay practices within the previous **three years** and **before an action is filed** against it.
  - The self-evaluation must be **reasonable in detail and scope**; and
  - the employer must show **reasonable progress** towards eliminating any unlawful gender-based wage differentials that its self-evaluation reveals.
  - The employer bears the burden of proving that it has met these standards.

## Affirmative Defense (continued)

---

- Important considerations:
  - According to the Guidance, “whether or not an employer is eligible for an affirmative defense does not necessarily turn on whether a court ultimately agrees with the employer’s analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on whether the self-evaluation was conducted in **good faith** and was **reasonable in detail and scope.**”



## Affirmative Defense (continued)

---

- Important considerations (continued):
  - **good faith** means an employer makes a genuine attempt to identify any unlawful pay disparities among employees performing comparable work
  - **reasonable detail and scope** which will depend on the size and complexity of an employer's workforce
  - if an employer is eligible for an affirmative defense under MEPA, it will also have an **affirmative defense to liability for pay-related discrimination claims under Chapter 151B.**
  - in order to qualify for an affirmative defense to a particular legal claim, the self-evaluation must have included the **employee(s) or job(s) at issue.**

## Self-Evaluation Process Preparation

---

- **Assemble a team**, including compensation personnel, human resources personnel, and legal.
- **Engage counsel.**
- Particularly if large groups of employees performing comparable work are expected, consider engaging a **statistician.**
- Evaluate existing compensation system.
  - Job descriptions
  - Salary/pay bands
  - Consistency of performance evaluation/rating system
- Identify and collect the necessary data.

## Attorney-Client Privilege

---

- The Guidance specifically recommends that employers work with counsel on MEPA issues.
- The attorney-client privilege enables employers to have **more open communications** when engaging in compliance efforts.
- Employers should take steps to decrease the likelihood of an inadvertent waiver:
  - **Engagement letter**
  - **Protocols** regarding documentation and communications
- Potential consequences if the privilege is lost.

## Comparable Job Groupings

---

- Substantially similar skill, effort and responsibility, and performed under similar working conditions
- Comparability must be determined in **good faith**.
- Comparability is **an employer-specific** determination.
- Factors to consider using, include:
  - **Exempt/non-exempt**
  - **10 EEO-1 categories:**
    - Executive/Senior Level Officials and Managers
    - First/Mid Level Officials and Managers
    - Professionals
    - Technicians
    - Sales Workers
    - Administrative Support Workers

## Comparable Job Groupings (continued)

---

- 10 **EEO-1** categories:
  - Craft Workers
  - Operatives
  - Laborers and Helpers
  - Service Workers
- Manager/non-manager
- Required license/certification
- Required education/degree
- Required years of experience
- Client facing v. internal
- Decision-making authority, including financial impact of decision
- Degree of oversight to which job is subject

## Analyzing Pay Differentials within a Job Group

---

- The **Guidance** offers only “**general guidelines**,” with the recognition that they are “**only a starting point**”
- According to the Guidance, “**alternative approaches** that are based on **valid methodologies** used or recommended by **professional economists or statisticians**” may also be used.

# Analyzing Pay Differentials through Statistical Analysis

---

- Guidelines state that “[f]or larger job groupings, a **multi-variable regression analysis** may be the most appropriate method” to account for the six differentiating factors.
- **Sizes of job groups** affect the utility of statistical analysis.
- Utility of statistical analysis when job groups are smaller depends upon whether other data sources exist to **validate statistical impact** of factors. For example, other data sources could come from:
  - **Historical information** concerning pay adjustments
  - **Combining job groups** that involve similar relative weighting of factors (e.g., experience, performance ratings).

# Analyzing Pay Differentials without Statistical Analysis

- Determine and quantify how each of the six differentiating factors impacts pay.
- For example, demonstrate that an employee with a record of superior merit ratings receives a larger salary increase, and measure how much of the wage differential can be accounted for by the results of this performance rating system.
- Perform this analysis for each of the six differentiating factors.
- Be mindful of significant differences in skill or responsibility that may become apparent as this analysis is conducted, and be prepared to subdivide into separate job groups.



## The Pay Calculation Tool

---

- The Appendix to the Guidance is a spreadsheet called the “Pay Calculation Tool.”
- The Guidance says that the Pay Calculation Tool may be used “as a **starting point**” for employers with “small, clearly defined job groupings of comparable jobs and relatively simple pay structures,”
  - Creates “average pay” data
  - The Guidance has been clear that measuring average pay is not sufficient to comply; individualized comparisons still must be made.

# Remediation

---

- Employers must take **meaningful steps** within six months
- Develop plan to **increase pay** for employees who perform comparable work to employees of a different gender and who are paid less for any reason other than one of or more of the six factors; disparities must be eliminated “in a **reasonable amount of time.**”
  - MEPA does **not permit an employer to reduce** the wages of any employee solely in order to comply with the law
  - Remedial plan may also include:
    - revised job descriptions that address skill, effort and responsibility,
    - adopting more formal “systems” for seniority, merit and measuring earnings by quantity or quality of production, sales, or revenue.

## Timing of Self-Evaluation

---

- For maximum protection, an employer should conduct its first MEPA self-evaluation **prior to July 1, 2018**.
- For purposes of the affirmative defense, self-evaluations should be repeated **at least every three years**, although the Guidance recommends “some form of self-evaluation” be conducted **annually**.
- A **supplemental process** should be developed as well since to qualify for an affirmative defense, the self-evaluation must have included the employee(s) or job(s) at issue.

# Pay Transparency

---

- The gender pay gap has been largely attributed to a secrecy around pay and workplace cultures that discourage open dialogue about compensation.
- Some state laws bar employers from prohibiting their employees from discussing pay or compensation issues. The National Labor Relations Act has been construed to bar such restrictions to the extent that they would apply to non-supervisory or non-managerial employees.

# Pay Transparency

---

- Check policies including in handbooks and HR internal policies relating to pay.
- Review agreements for broad-based confidentiality provisions including:
  - Nondisclosure Agreements
  - Offer Letters
  - Bonus Award Document
  - Retention Agreements

## Salary History Inquiries

---

- An employer **may not** seek the salary or wage history of any prospective employee (including through a recruiter) except:
  - to confirm wage or salary history information voluntarily shared by the prospective employee; or
  - after an offer of employment with compensation has been made to the prospective employee.
- An employer **may** ask a prospective employee about his or her compensation **needs or expectations**.
  - Employers should proceed with caution when asking such questions and ensure that such questions are not framed or posed in a way that is intended to elicit information from the prospective employee about his or her salary or wage history.
- Obtaining pay data through **public sources is not prohibited**.

## Summary of Action Steps

---

- Companies that conduct pay equity self-evaluations for purposes of MEPA should take the following steps:
  - Engage counsel and document steps to establish that the attorney-client privilege will apply.
  - Be sure the entire leadership team is on board.
  - Review job descriptions to ensure that they can be used effectively in the self-evaluation process.
  - Gather data appropriately.
  - Consider using a professional statistician, particularly when job groups exceed 30 employees.
  - Take proper remedial measures.

## Summary of Action Steps (continued)

---

- Organize and conduct a self-evaluation for completion by June 30, 2018.
- Document considerations that affect compensation, particularly for those factors affecting compensation that depend on the existence of a system--(i) seniority, (ii) merit and (iii) quantity or quality of production, sales or revenue.
- Review policies and agreements and revise as appropriate to comply with the pay transparency standard. Inform HR and supervisory employees of the pay transparency standard.
- Review job application forms to ensure that salary or other compensation history information is not requested.
- Advise HR and other employees who conduct interviews of the need to refrain from asking about compensation history.



## Summary of Action Steps (continued)

---

- When conducting background checks through consumer reporting agencies, request that any compensation history information be excluded from the report.
- Direct recruiters to comply with applicable laws, including laws to which the employer is subject. Review contracts with recruiters to ensure that they are solely responsible for their own violations.
- Obtain written authorization before providing a reference for a former employee, especially in connection with any request for compensation information.

# **Guidance on the Amended Massachusetts Equal Pay Act - Webinar**

**Goodwin**

**March 27, 2018**

**Jennifer Merrigan Fay**

**Robert M. Hale**

**Bradford J. Smith**

**Christopher Erath, Ph.D., BLDS, Inc.**



**GOODWIN**