

# **KROKIDAS & BLUESTEIN**

## **ATTORNEYS**

### **EMPLOYMENT LAW CLIENT ALERT**

#### **NEW MASSACHUSETTS PAY EQUITY LAW EFFECTIVE JULY 1, 2018: WHAT EMPLOYERS SHOULD KNOW**

##### Overview

On July 1, 2018, amendments to the Massachusetts Equal Pay Act (“MEPA”) will take effect. As amended, MEPA will prohibit employers from discriminating “in any way on the basis of gender in the payment of wages, or paying 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.” MEPA will also make it unlawful for an employer to:

- Prohibit employees from discussing or disclosing information about their own or other employees’ wages;
- Seek the wage or salary history of a prospective employee from the prospective employee or his or her current or former employer before making an offer of employment with compensation that has been negotiated; and
- Require that a prospective employee’s prior wage or salary history meet certain criteria.

##### Who Must Comply?

All employers (including non-profit and out-of-state employers), regardless of size, who employ individuals with a primary place of work in Massachusetts, are required to comply with MEPA. Guidance released by the Attorney General clarifies that this includes employers of employees who do not reside in Massachusetts and employers whose employees “telecommute through an arrangement with his or her employer to a Massachusetts worksite.”

##### What is “Comparable Work”?

With limited exceptions, MEPA prohibits employers from paying men and women who perform “comparable work” differently. “Comparable work” is “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions.” Skill, effort, and responsibility are “substantially similar” if they “are alike to a great or significant extent” even though they may “not necessarily [be] identical or alike in all respects.”

## What are “Wages”?

Wages include “all forms of remuneration for work performed, including commissions, bonuses, profit sharing, 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.” Employers cannot “make up for” lower salary or hourly rates by paying a larger bonus or other benefits.

## Are There Any Exceptions?

MEPA recognizes that certain circumstances might justify variations in pay between men and women. In particular, pay discrepancies are permissible if the differences are based upon:

- (1) A system that rewards seniority or longevity with the employer, except that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave must be counted in determining such seniority or longevity;
- (2) A merit system;
- (3) A system which measures earnings by quantity or quality of production, sales, or revenue;
- (4) The geographic location in which a job is performed;
- (5) Education, training or experience to the extent such factors are reasonably related to the particular job in question; or
- (6) Travel, if the travel is a regular and necessary condition of the particular job.

## What Can Employers Do to Protect Themselves?

An employer will have an affirmative defense to a claim of a MEPA violation if: (1) it conducts a good faith self-evaluation, which is reasonable in detail and scope; and (2) it can demonstrate that it has made reasonable progress toward eliminating any unlawful gender-based wage differentials that the self-evaluation has revealed. The reasonableness of the self-evaluation will depend on the size and complexity of the employer’s workforce, including the number of jobs and employees, whether the evaluation took all reasonably relevant and available information into account, and whether the evaluation was reasonably sophisticated in its analysis of job comparability, employee compensation, and the applicability of the six exceptions. It is important to note that an employer cannot reduce the pay of employees in order to eliminate wage gaps.

Employers should conduct a self-evaluation at least once every three years and should consider engaging an attorney to assist with the process, which, among other things, will bring the investigation and results under the protection of attorney-client privilege. While MEPA includes some prohibitions against introducing the self-evaluation materials as evidence in a proceeding, such prohibitions may not apply to actions brought under federal statutes or common law.

### What Should Employers Do Next?

Employers should revise their employment applications and interview protocols to eliminate any inquiries regarding salary history. Employers should also consider conducting a self-evaluation to identify any unlawful wage gaps.

If you have any questions about MEPA or would like assistance in conducting a self-evaluation, please contact Attorneys Paul Holtzman at [pholtzman@kb-law.com](mailto:pholtzman@kb-law.com) or Allison Belanger at [abelanger@kb-law.com](mailto:abelanger@kb-law.com).

FA\0001\504984.1