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Self-Evaluation: A Means to Avoid Liability under the Massachusetts Equal Pay Act

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On July 1, 2018, an updated equal pay law will go into effect in Massachusetts. The new statute amends the Massachusetts Equal Pay Act (the "Act").

The Act makes it illegal for employers to pay employees of one gender less than employees of another gender for comparable work. Employers found liable for violations of the Act are required to pay liquidated damages that are double the amount of unpaid wages, plus attorneys' fees and costs. For this purpose, unpaid wages constitute the difference between the aggrieved employee's wages and the wages paid to an employee of a different gender who performs comparable work. Significantly, an intent to discriminate is not required to establish liability under the law.

The Act provides an affirmative defense to a pay discrimination claim if the employer can show that: a) prior to a lawsuit, it "completed a self-evaluation of its pay practices in good faith" within the last three years; and b) it has made "reasonable progress" towards eliminating illegal pay differentials. The Massachusetts Attorney General recently issued a practical guide on the new law (the "Guide"). Among other information, the Guide identifies the following steps employers should consider taking as part of a self-evaluation.

1. Gather relevant and available information, including but not limited to employee name, gender, performance ratings, licenses/certifications needed, pay, bonus eligibility, etc.
2. Identify comparable jobs based on similar skill, effort, responsibility, and working conditions, etc.
3. Calculate whether employees of different genders are paid equally, using analysis that is appropriate for the size of your business; some larger employers may need to involve outside consultants.
4. Assess whether differences in pay are justified under the law by

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referencing the statute or consulting an attorney.
5. Remediate any disparities by making adjustments in pay.
6. Adjust pay practices, which includes the implementation of preventative measures for the future.

Eligibility for this affirmative defense does not depend 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. Instead, the defense turns on whether the self-evaluation was conducted in good faith and was reasonable in detail and scope, and whether the employer has made reasonable progress toward eliminating any unlawful gender-based wage differentials that its self-evaluation reveals.

Employers should consult with their counsel to determine whether a self-evaluation is warranted. If it is, the attorney could suggest how to design and carry it out in a way that not only potentially shields the employer from liability but also protects certain information from disclosure in litigation (through the attorney-client privilege).

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