

The Best Defense is a Good Offense

Conducting Pay Equity Audits under the MA Equal Pay Act



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Our Goals

- Provide you with a good understanding of the new Massachusetts Pay Equity Law and why schools and school systems should care about the law.
- Discuss the basics of a pay equity audit.

Massachusetts Pay Equity Law

- Effective July 1, 2018
- Effort to try to eliminate the “pay gap”
- Generally, requires men and women to be paid the same for comparable work – not as simple as it sounds
- Strict liability – no showing of intent necessary
- Expressly permits class action lawsuits
- Employers can be liable for double damages and attorneys’ fees
- Extends 1 year statute of limitations to 3 years

Massachusetts Pay Equity Law

Two issues that are unlikely to be issues for public schools:

- Restrictions on inquiring into pay/salary history
- Restrictions on preventing employees from inquiring about, discussing or disclosing information about the employee's own wages, or about any other employee's wages

Key provision for all employers:

- Affirmative defense to liability – pay equity audit and reasonable progress in eliminating gender-based compensation differentials

Massachusetts Pay Equity Law

“No employer shall discriminate in any way on the basis of gender in the payment of wages, or 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...”

Important Definitions

“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; provided, however, that a job title or job description alone shall not determine comparability.

What does this definition really mean?

Important Definitions

“‘Working conditions’, shall include the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job.”

Important Definitions

“Wages” includes all forms of remuneration for employment

- Salary
- Overtime pay
- Bonus plans
- Life insurance
- Vacation and Holiday Pay
- Cleaning or gasoline allowances
- Hotel accommodations
- Reimbursement for travel expenses
- Other benefits

Legitimate Bases for Pay Disparities – Affirmative Defenses

- System rewarding seniority, provided seniority is not reduced due to pregnancy or protected parental, family, or medical leave;
- Merit system;
- System measuring earnings by quantity or quality of production, sales, or revenue;
- Education, training, or experience to the extent reasonably related to the position;
- Geographic location in which a job is performed; or
- Travel, if regular and necessary for the business.

Federal Equal Protection Act (EPA)

- Under the EPA, men and women in the same workplace must receive equal pay for “equal work” on jobs that require “equal” skill, effort and responsibility.
- Under the EPA, pay disparities based on *any factor other than sex* are lawful.

Key Differences Between EPA and MA Pay Equity Law

- Massachusetts requires equal pay for “comparable work” – includes work that requires *substantially similar* skill, effort and responsibility.
- A “factor other than sex” is not a justification for pay disparities under MA law.

Why should school systems be concerned about the Massachusetts Pay Equity Law?

- Variations in pay among administrators
- Discretionary decisions on initial pay step for incoming teacher
- Variations in pay among employees performing “comparable work” in different jobs
- Variations in pay among union and non-union members

Does Pay Set By A Union Contract Justify Pay Disparities?

- Under the federal EPA, it does because it is a “factor other than sex.”
- Under the new Massachusetts Pay Equity law, it may not.

Implications for Employers with Unionized Workforces under MA Pay Equity Law

- Status as union member or non-union member alone may not be a justified basis for pay disparities.
- The collective bargaining process itself may not be a justified basis for pay differentials.

Pay Audit as an Affirmative Defense

MA Pay Equity Law provides an employer an affirmative defense - an excuse from liability - if, within the previous 3 years and prior to the filing of a legal action against it, the employer:

- 1) has completed a good-faith self-evaluation, reasonable in detail and scope, of its pay practices; and
- 2) can demonstrate reasonable progress in eliminating gender-based compensation differentials.

Pay Audit as a Means of Limiting Liability

An employer that undertakes a self-evaluation that is *not* reasonable in detail and scope, but *can* demonstrate reasonable progress in eliminating gender-based compensation differentials, will not be entitled to an affirmative defense but will only be liable for the amount of unpaid wages, not double damages.

MA Pay Audit – Required Detail and Scope

“An employer’s self-evaluation may 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, or may be consistent with standard templates or forms issued by the attorney general.”

MA Protections for Pay Equity Audits

Evidence of an audit or remedial steps undertaken are not admissible in any MA Pay Equity Law or Chapter 151B (MA anti-discrimination law) proceeding as evidence of a violation occurring:

- 1) prior to the date the audit was completed,
- 2) within six months thereafter, or
- 3) within two years thereafter if the employer can demonstrate that “it has developed and begun implementing in good faith a plan to address any wage differentials based on gender for comparable work.”

No Protections for Pay Equity Audits under Federal Law

- Massachusetts safe harbor does not provide protection against pay discrimination claims brought under federal law - Equal Pay Act of 1963 (EPA), Title VII of the Civil Rights Act of 1964, or, in the case of government employers, 42 U.S.C. Section 1983.
- Results of a MA Pay Equity Audit may be admissible in a suit alleging claims under federal law.
- Consider conducting a privileged audit with the assistance of counsel. But if the results of the audit are used as defense, you may have waived the privilege.

Goals of a Pay Equity Audit

- Identify potential pay disparities within appropriate job classifications;
- Determine whether there are lawful explanations for those disparities and/or take steps to correct the disparities as appropriate;
- Identify and correct weaknesses in the organization's systems to protect against claims of pay disparity going forward;
- Take advantage of the Massachusetts safe harbor; and
- Identify and correct systemic problems.

Identifying Systematic Problems

- Lack of meaningful standards or guidelines on starting pay rates, increases and other components of compensation;
- Management's exercise of unfettered discretion and wholly subjective decision-making with regard to pay rates;
- Failure to train management on how to make decisions concerning pay rates;
- Failure to document bases for decisions;
- Failure to communicate the criteria used to make pay decisions and the basis for decisions; or
- Use of favoritism as a basis for pay decisions.

Correcting Systemic Problems

- Consider implementing standard pay ranges or guidelines for each position or classification.
- Consider implementing written policies for pay increases so managers know what their authority is and employees know what they may be eligible for.
- Communicate with employees about pay increases and their eligibility.

Correcting Systemic Problems

Document pay decisions at the time they are made:

- Date of the decision;
- Names of the decision-makers;
- Applicable pay range, if any;
- Basis for any objective factors employer considered and relied upon;
- Subjective factors considered and relied upon; and
- Any other bases for a pay decision.

Correcting Systemic Problems

Assess the performance evaluation process and its role in pay decisions.

- Evaluations should include objective and subjective factors, along with guidelines on how to rate employees.
- Managers should be encouraged to provide concrete examples of good or bad performances to support a rating.

Correcting Systemic Problems

Consider training decision-makers on:

- How to make proper pay decisions that comply with organizational policies and the applicable law;
- Relevant and appropriate factors to consider when making pay decisions;
- How to apply any guidelines and exercise discretion appropriately;
- Articulating the bases for decisions;
- Documenting decisions; and
- Communicating pay decisions to the affected employees.

When to Conduct a Pay Audit

- Audits must be conducted within the previous 3 years and prior to the commencement of a lawsuit to qualify for the safe harbor.
- Time is needed to design the audit and gather resources.
- Time is needed to collect and analyze data.
- Time is needed to correct any pay disparities.

Law is effective July 1, 2018

Anatomy of Pay Equity Audit

Step 1: Create a plan

- Identify the team
- Determine the scope
- Set expectations
 - Not a simple data collection exercise
 - Plan, budget and buy-in

Anatomy of Pay Equity Audit

Step 2: Develop an understanding of existing pay practices, including:

- Types of pay decisions made (starting pay, pay increases, bonuses);
- Policies and guidelines applicable to pay decisions;
- Individuals who have the authority to make and approve pay decisions; and
- Criteria upon which decision-makers rely in making pay decisions.

Anatomy of Pay Equity Audit

Step 3: Collect the data

- Remuneration data
- Job duties and responsibilities
- Data that would justify pay disparities

Step 4: Determine which employees are doing “comparable work”

- Skill
- Responsibility
- Effort
- Working conditions

Anatomy of a Pay Equity Audit

Step 5: Analyze pay data

- Simple calculation
 - Calculate the average pay for each job grouping or pay grade and identify disparities.
 - Often a starting point of in an analysis, but not necessarily determinative

Simple Calculation Example

Job Category	Average Female Salary	Average Male Salary	Dollar Difference	Percentage Difference
Cafeteria Staff	\$32,499	\$31,043	\$456	1.4%
Facilities Engineers	\$31,566	\$38,238	\$6,672	20%
Fundraising/ Development	\$83,224	\$84,027	\$803	>1%
Office Admin.	\$95,623	\$92,640	\$2,983	3%
Teaching Staff	\$105,222	\$123,060	\$17,838	14.5%
Senior Staff	\$117,347	\$128,851	\$11,504	9%

Anatomy of a Pay Equity Audit

Cohort Analysis: Addresses whether it appears that compensation differences between men and women can be explained by differences other than sex, such as seniority, job title, education, etc.

- Common next step after simple calculation
- Useful when examining compensation levels for a small number of employees

Sample Cohort Analysis

	Person A	Person B
Gender	Male	Female
Job category	Teacher	Teacher
Salary grade	8	8
Job function	Elementary School Teacher	High School English Teacher
FT/PT	FT	FT
Exempt	Yes	Yes
Years with school district	11	8
Years of relevant experience	13	18
Performance evaluations	Good	Good
Degrees related to position	Masters in Teaching	Masters in Literature
Union member	Yes	No
Salary	\$92,000	\$87,000

Anatomy of Pay Equity Audit

Step 5: Analyze pay data

- Multiple regression analysis: statistical analysis that accounts for the differences in pay between genders based upon “control factors” (i.e., organizational and individual characteristics).

Multiple Regression Analysis

- The regression then measures the compensation differences between genders after accounting for their differences among the control factors.
- The analysis provides information on which employees are paid statistically significantly above or below their expected values.

Multiple Regression Analysis

- A common measure by which statistical significance is determined is the “standard deviation.”
- A difference between actual and expected compensation that is more than 1.96 standard deviations would have less than a 5% probability of occurring by random chance, and is thought of by most courts as statistically significant.

Multiple Regression Analysis

- Extremely useful in working with a lot of data and/or comparing large numbers of employees.
- Typically Involves engaging outside statisticians to assist in building models and running calculations.
- The challenge with performing a regression analysis is often that the information needed to conduct the analysis is not available in existing databases or is incorrect.



Sample Multiple Regression Analysis

PREPARED BY FISHER & PHILLIPS LLP



Salary Regression Analysis All Employees, Part-Time Total Salaries Converted To Full-Time Equivalent

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Job Group - 1.1 : Executive/Senior Level Officials and Managers (18 Employees)

	Employees	Avg Salary	Significant?	Std Dev
Male	9	\$320,677		
Female	9	\$189,602	Yes	-2.81
White	17	\$255,542		
Minority	1	\$248,288	No	0.41
White	17	\$255,542		
Hispanic	1	\$248,288	No	0.41
Black	0	\$0	No	0.00
Asian	0	\$0	No	0.00
American Indian	0	\$0	No	0.00
Hawaiian/Pac. Islander	0	\$0	No	0.00
Two or More	0	\$0	No	0.00

Model Explanation

The following independent variables were included in the models for this group: [Race/Gender] and [Hire Date].

Any compensation disparity shown on this report does not establish impermissible compensation practices or a lack of good faith affirmative action efforts. It is merely an attempt to apply good faith efforts to conduct a compensation assessment utilized by OFCCP as part of an affirmative action program.

Plan Year: 08/26/2016 - 08/25/2017

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Anatomy of Pay Equity Audit

Step 6: Evaluate and Document Bona Fide Factors to Justify Differences

- System rewarding seniority;
- Merit system;
- System measuring earnings by quantity or quality of production, sales, or revenue;
- Education, training, or experience to the extent reasonably related to the position;
- Geographic location in which a job is performed; or
- Travel, if regular and necessary for the business.

Anatomy of Pay Equity Audit

Step 7: Develop an action plan to remedy unjustified disparities

- Determine how and when disparities will be remedied
- Train managers
- Update existing policies and handbooks
- Develop a communications plan

Questions?



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