

# HR Insights

## Are You Ready for the MA Equal Pay Equity Act Changes?

Governor Baker signed *An Act to Establish Pay Equity* (the Act) on August 1, 2016. Effective July 1, 2018, the Act updates and replaces existing law, the Massachusetts Equal Pay Act (MEPA), to help close the wage gap between men and women performing “comparable” work. In March of this year, the Office of the Attorney General issued long awaited guidance that includes FAQs, a basic guide on conducting a self-evaluation for determining if there are gender-based wage issues, and a pay calculation tool. This issue of *HR Insights* provides an overview of the law and guidance and an action plan for implementing the changes.

### Three Major Changes

Under MEPA, an employer cannot discriminate based on gender in pay for “comparable work.” The Act makes three major changes to MEPA. It:

- Bars employers from asking job applicants and their current and former employers for a salary history
- Bars employers from prohibiting employees from disclosing or discussing their pay with other employees
- Defines comparable worth, requiring equal pay for comparable work unless a statutory exception under MEPA applies

An employer cannot contract with an employee to avoid complying with these changes or by any other means exempt itself from complying with the law.

### Salary History

An employer cannot ask a job applicant or an applicant’s current or former employer for a salary history, and the employer cannot require an applicant’s salary history meet certain criteria. This includes trying to obtain a salary history through a third party such as a recruitment or job placement service. However, if an applicant **voluntarily** discloses his or her salary history,

the employer can confirm or allow the applicant to confirm the history but only after the applicant voluntarily discloses the history or after an employment offer with pay has been negotiated and made to the applicant. An employer cannot ask applicants to volunteer their salary histories. However, they may ask applicants about their salary requirements and expectations so long as they do not follow up with asking what their requirements and expectations are based on.

### Employees Must Be Allowed to Disclose and Discuss Compensation with Each Other

An employer cannot require, as a condition of employment, that employees refrain from inquiring about, discussing, or disclosing information about either an employee’s own pay or about another employee’s pay. This requirement does not obligate the employer, however, to disclose an employee’s pay to another employee or to a third party. An employer may prohibit a human resources employee, a supervisor, or any other employee whose job allows access to other employees’ pay information from disclosing information without prior written consent from the employee whose information is requested, unless the information is a public record.

### Comparable Work

Comparable work is work that requires **substantially similar skill, effort, and responsibility**, and that is performed under **similar working conditions**. It is important to note here that the definition of comparable work is much broader and inclusive than the “equal work” standard of the federal Equal Pay Act. Therefore, determining whether jobs are comparable requires an analysis of jobs as a whole.

### Substantially Similar Defined

For purposes of identifying comparable jobs, “substantially similar” means that the factors (i.e., skill, effort, and responsibility) are a lot alike – not necessarily the same. Thus, two jobs with minor differences in skill, effort, and responsibility may be comparable jobs.

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## Skills Defined

Skills mean experience, training, education, and the ability required to perform a job – not the skills an employee in the job happens to have.

### Examples:

The FAQs provide the following examples:

- A bookkeeping job requires accounting skills but not customer service experience. Therefore, the bookkeeping job may not be comparable to an account manager job that relies heavily on customer service skills.
- A school's janitorial and food service jobs do not require previous job experience or specialized training. Therefore, the jobs may be comparable even though the substance of the jobs is different.
- Employees selling different types of insurance may require comparable skills unless the types of insurances being sold require "meaningful different levels of knowledge or expertise."

## Effort Defined

Effort refers to the physical or mental exertion required to perform the job. In evaluating jobs, factors causing mental fatigue and stress as well as those alleviating fatigue should be considered.

### Examples:

The FAQs provide the following examples:

- A job requiring an employee to stand all day is not comparable in physical effort to a sedentary office job.
- A janitorial job and a food service job may be comparable in physical effort.

## Responsibility Defined

Responsibility means the degree of discretion or accountability involved in performing the essential functions and regular duties of the job. It includes factors such as the degree to which an employee is supervised, whether the employee supervises others, and the types of decisions that the employee must make to perform the

job. When differences in responsibilities are minor, responsibilities are comparable.

### Examples:

The FAQs provided the following examples:

- An employee responsible for signing legal or financial documents and personally accountable for any errors may not be comparable to those assisting in the drafting of the documents.
- Sales clerks working in a department store are not responsible for sweeping floors. If a sales clerk in a housewares department is occasionally asked to sweep up something a customer broke, the difference is minor enough that the sales job in housewares may still be comparable to the sales jobs in other departments.

## Working Conditions Defined

Working conditions include the environment and other similar circumstances typically considered when setting pay, such as the shift worked, physical surroundings, and hazards.

Meaningful differences in the days or times **shifts** are scheduled are a factor in determining if working conditions for jobs are comparable. The days and times that employees work is considered meaningfully different when shift differentials are paid.

**Physical surroundings** mean the physical environment where the job is performed, including but not limited to the elements such as extreme temperatures or noise.

**Hazards** mean the physical hazards of the job including but not limited to chemicals, fumes, electricity, heights, dangerous equipment, and other factors. Frequency of exposure to hazards should also be considered as well as the severity of injury they could cause or the risks they pose.

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## Examples:

The FAQs provide the following examples:

- A factory floor job may not be comparable to a job in an office setting.
- Jobs performed outdoors in extreme temperatures may not be comparable to jobs performed indoors.
- Employees working on an assembly line packaging a dangerous chemical that requires protective equipment may not be comparable to a job packaging a product not involving chemicals.

## *Relying on Job Titles and Job Descriptions*

The guidance makes it clear as does the law itself that employers should not rely on job titles and job descriptions alone to determine whether jobs are comparable. Rather, employers must consider the skills, effort, and responsibility actually required to perform jobs. That said, the extent to which job descriptions accurately describe the skills, effort, and responsibility required for jobs are helpful tools.

## Pay Defined

When evaluating whether there is any gender-based wage issues with respect to employees in comparable jobs, all forms of remuneration must be considered. MEPA defines pay very broadly. It includes commissions, bonuses, incentive pay, deferred compensation, 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 an employee or to a third party on the employee's behalf.

Regarding benefits plans under which employees may choose to participate, the opportunity to participate in the plans is what counts as "pay," not whether they chose to participate in the plans.

Another point the Guidance provided by the Office of the Attorney General makes is that an employer cannot pay a lower base salary to one gender than what it pays the other gender working in a comparable job and then make up the difference

with a larger annual bonus at the end of the year. Thus, when evaluating whether there are gender-based pay issues, it is important to evaluate each component of remuneration separately.

## Circumstances Under Which Differences in Pay for Comparable Work Allowed

MEPA requires equal pay for comparable work, unless one of the following statutory exceptions apply:

- A seniority system, (i.e., a predetermined plan, policy or practice for making compensation decisions) so long as seniority is not reduced because of a pregnancy-related leave or a protected parental or FMLA leave, that recognizes and compensates employees based on length of service with the employer
- A merit system (i.e., a predetermined plan, policy or practice for making compensation decisions) that compensates employees based on performance as measured through legitimate, job related criteria
- A system that measures earnings by quantity or quality of production, sales, or revenue based on uniform, reasonable objectives such as piecemeal pay or sales commissions
- The geographic location of a job, for example, differences in pay at locations with cost of living or labor market differences
- Education, training, or experience to the extent these factors reasonably relate to the job, for example, paying a bookkeeper with an advanced accounting degree more because of higher value
- Travel that is a regular and necessary part of a job

**The above circumstances are the only exceptions under which differences in pay are allowed for comparable jobs.**

## *Pay for Full-time vs. Part-time Employees*

The FAQs say that an employer may pay full-time and part-time employees performing comparable work differently based on the number of hours worked provided it does so according to a system that measures earnings by quantity or quality of production.

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Employers may pay hourly part-time and full-time employees more or less based on the number of hours they work. In addition, employers may pay different hourly rates or offer different benefits to part-time and full-time employees if employees of different genders within each category performing comparable work are paid the same and offered the same benefits.

Whether salaried employees in comparable jobs may be paid differently based on hours they work depends on whether wages are determined using a system that measures earnings based by quantity or production. If salaries do not fluctuate based on the precise number of hours they work in any given week, then it generally would not meet this standard. However, bonuses or incentives based on a qualifying system that considers hours worked may meet the standard.

## Penalties for Violating the Law

An employer that violates MEPA is liable to employees for unpaid compensation and liquidated damages (i.e., double damages) equal to the unpaid compensation plus reasonable attorney fees. Employees may seek legal action and so can the Attorney General.

Agreements between an employer and employee to be paid less than the compensation to which an employee is entitled is not a defense to legal action. In addition, an employee's previous salary history cannot be a defense.

## Self-Evaluation of Pay Practices

Under MEPA, an employer has a complete defense to a legal claim if it conducts a good faith, reasonable self-evaluation of its pay practices within the previous three years and before the legal action was filed. To be eligible for the defense, the employer must also demonstrate that the self-evaluation was reasonable in detail and scope and that the employer made reasonable progress towards eliminating gender-based pay differences discovered in the self-evaluation.

The self-evaluation can be of the employer's own design or based on the self-evaluation guide and pay

calculation tool issued by the Office of the Attorney General. The design must be reasonable in detail and scope considering an employer's size and complexity of its workforce. If the self-evaluation fails to be sufficient even though conducted in good faith, and if the employer made progress toward eliminating pay disparities, then the employer will not be required to pay liquidated damages.

An employer cannot reduce compensation of any employee to remediate a gender-based pay equity issue. An employer can only increase compensation to remediate pay issues.

An employer that has not completed a self-evaluation is not subject to any negative or adverse inference because of not having completed a self-evaluation.

## Action Plan

PS&A strongly recommends that employers prepare for implementing MEPA. For this reason, we have developed an action plan, which follows this page, to assist clients and friends in implementing the changes to MEPA.

**IMPORTANT NOTE:** This issue of *HR Insights* is meant to provide useful information, insights, and action items to help employers prepare for complying with MEPA. While we hope that our readers find this issue of great value, it is not a substitute for legal advice. We encourage all our readers to seek their own legal advice in preparing for complying with MEPA.

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## Action Plan for Implementing MEPA

### I. Review current pre-employment and hiring practices, processes, and forms

- Review job applications and revise as necessary to eliminate any request for salary history
- Review and revise the interview process to ensure salary history is not requested
- Review and revise reference and background checks to ensure salary history is not requested
- Ensure job postings do not contain language asking applicants to provide salary history
- Train HR staff and hiring managers on new processes to ensure salary history is not requested and how to handle salary history that is voluntarily shared by a job applicant

### II. Implement the new requirement that employers cannot prohibit employees from inquiring about, discussing, or disclosing information about their own or others' pay

- Review and revise documents as needed to comply with the new requirement, including a review of the following documents: employee handbooks, confidentiality policies, confidentiality and nondisclosure agreements, employment agreements, and incentive, equity, and bonus plans
- Train HR staff and managers regarding the requirement, including how to manage and respond to discussions among employees and respond to requests from employees for pay information

### III. Audit all compensation policies, practices, and programs to ensure compliance with MEPA

- Review policies and practices for pay increases to ensure practices are objective and consistently applied
- Review all compensation programs to ensure they do not include any provisions that do not comply with MEPA and that they are administered objectively and consistently applied
- Review pay philosophy and practices to ensure compliance, for example, identify any practices or provisions that are contrary to equal pay for comparable work or the definition of comparable work under MEPA
- Train HR staff and managers regarding changes

### IV. Consider conducting a self-audit to identify gender-based pay equity issues and creating a plan to remediate

- Discuss with attorney and if proceed with audit, conduct it through your attorney to preserve attorney-client privilege with respect to any findings
- Update job descriptions, focusing on skill, effort, responsibility, and working conditions
- Gather data, including employee name, date of hire, gender, work location, department, employment category, job code, job title, exempt/nonexempt classification, grade/band, job family, supervisor, performance ratings, education, pay, pay basis (hourly/salaried), shift, shift differential, bonus eligibility, eligible benefits, bonuses paid, hours worked, total compensation
- Looking at jobs broadly, group jobs that are substantially similar in terms of skill, effort, responsibility, and working conditions into job groupings
- For each job group, compare pay (base pay and other compensation) based on gender and identify whether men and women are paid equally
- Determine whether differences in pay meet one or more of the statutory exemptions
- Develop a specific plan for remediating any pay equity issues with a time table and budget required
- Report results to senior management and recommendations and cost for remediating issues