

# CLIENT ADVISORY:

## NEW MASSACHUSETTS LAW MANDATES EQUAL PAY FOR COMPARABLE WORK

Massachusetts Governor Charlie Baker recently signed into law a new Massachusetts statute designed to ensure that male and female employees are paid equally for comparable work. However, the new statute does not become effective until July 1, 2018. The so-called “Act to Establish Pay Equality” (the “Act”) has both a laudable purpose and the potential to create a compliance nightmare for employers.



Existing law already prohibits paying male and female employees differently for the same job. The Act goes further and prohibits pay discrimination between male and female employees performing different but “comparable work.” The Act makes it clear that job titles are not dispositive of what constitutes comparable work. It defines comparable work as work that is substantially similar in terms of skill, effort and responsibility and is performed in similar working conditions. While that may sound reasonable on its face, it is obviously subjective and the potential sanctions that may be levied upon employers who violate the Act are severe.

For purposes of the Act, employee compensation includes all forms of remuneration paid by the employer. However, the Act does provide for some variation in employee compensation for persons performing comparable work, if they are based on the following:

- Seniority, as long as pregnancy or family leave cannot reduce seniority;
- Merit pay;
- A system that measures earnings by quantity or quality of production, sales or revenue;
- The geographic location where the job is performed;
- Education, training or experience, to the extent these factors are reasonably related to the job; or
- Travel that is a regular and necessary condition of the job.

Consequences to employers who violate the Act are substantial. Damages include recovery of unpaid wages resulting from unequal compensation for comparable work, liquidated damages in the amount of the unpaid wages and recovery of attorneys’ fees and costs. The Act gives the Massachusetts Attorney General the right to bring action against an employer and also gives the employees a private right of action to sue their employer, without the need to first exhaust administrative remedies.

In addition to the provisions summarized above, the Act prohibits (i) employers from asking prospective employees about their salary history; (ii) prohibiting employees from discussing salary related matters with other employees; and (iii) lowering the compensation of more highly paid male employees to achieve equal pay for comparable work.

Given the subjective nature of the rules and the severe consequences to violating them, what actions should employers be taking in advance of the effective date?

First, the Act provides an employer with an affirmative defense to claims if they have completed a “self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made toward eliminating wage differentials based on gender for comparable work.” The Act provides no guidelines for this self-evaluation, other than to say that the self-evaluation must be reasonable in detail and scope, given the size of the employer or consistent with templates or forms issued by the

Massachusetts Attorney General (none of which have yet been issued). The defense is only available for the 3-year period immediately following conclusion of the good faith self-evaluation. Accordingly, employers should plan on conducting a self-evaluation every 3-years to ensure the defense remains available. It should also review employee handbooks, offer letters and the like to confirm there are no questions or policies regarding past salary history or prohibitions on discussing compensation among employees.

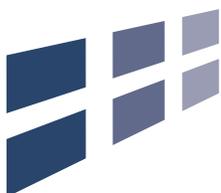
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**WILLIAM F. MILLER**  
Partner

William F. Miller is a Partner with Pannone Lopes Devereaux & West LLC and a member of the Corporate & Business Law Team. He is a highly skilled attorney with more than 30 years of experience who focuses his practice on corporate and business law matters, including mergers and acquisitions, angel, venture capital and private equity financing, commercial contract matters, intellectual property protection and licensing, and entity and investment fund formation. Mr. Miller frequently advises early stage technology companies, manufacturers, service and distribution companies as well as investors in such companies.

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PANNONE LOPES DEVEREAUX & WEST LLC

*counselors at law*