

An Act to Establish Pay Equity  
Amendment to the MA Equal Pay Act

On August 1, 2016, Gov Baker signed a comprehensive pay equity bill known as “The Act to Establish Pay Equity”, amending the MA Equal Pay Act (MEPA) of 1945. The amended law is in effect as of July 1, 2018.

The original MA law, and laws such as the federal Equal Pay Act or Title VII of the Civil Rights Act, required employers to pay men and women the same for doing the same job. The 2016 amendment of the MA Equal Pay Act takes this further by mandating men and women be paid the same for doing different but comparable jobs. The Act defines “comparable work” as substantially similar in skill, effort and responsibility, performed under similar working conditions.

In early March (2018), the MA Attorney General released an Overview with frequently asked questions to provide guidance on aspects of the Act. The Overview has helped to clarify certain provisions, but has left others open to interpretation. However, the Overview does make clear the important role of an employer’s self-evaluation of pay practices, with reasonable progress toward eliminating pay disparities, in defending against claims under the Act.

The Overview offers insight on what comparable work means and provides some definition of the terms. It is clear that job titles and job descriptions alone cannot be used to determine comparability. Careful analysis of experience, training, education and ability necessary to do the job is required rather than a focus on the employee(s) performing the work.

The amended law does permit differences in pay for comparable work but only when based on:

- A system rewarding seniority (years of service cannot exclude pregnancy, parental, or family leave);
- A merit system providing for variations in pay based on legitimate, job-related criteria;
- A system measuring earnings by quantity or quality of production, sales or revenue;
- The geographic location in which a job is performed if the cost of living or the relevant labor market differs from one location to another;
- Education, training or experience reasonably related to the job in question; or
- Travel, if travel is a regular and necessary part of the job (this would exclude the employee’s regular commute or if the travel is based on the employee’s preference to travel).

Other key provisions include:

- Employers cannot prohibit employees from disclosing or discussing their wages or pay.
  - The Overview states that employers cannot include a requirement that an employee keep his or her wages (or a coworkers’ wages) confidential in an offer letter, employment contract, nondisclosure agreement, employee handbook, or similar document.
  - The MA AGO guidance does state that an employer may prohibit human resources employees, supervisors or other employees whose job responsibilities gives them access to other employees’ compensation from discussing such other employees’ wages. These employees, however, cannot be prohibited from discussing or disclosing their own wages.

- Employers cannot seek wage or salary history during the hiring process, and must remove any questions on current or past pay from employment applications, and cannot ask an applicant to volunteer what he or she has or is currently earning.
  - Employers are prohibited from seeking pay history from an agent, such as a recruiter or staffing company.
  - An employer can lawfully ask prospective employees about “their salary requirements or expectations” but must be careful not to ask any question that elicits specific information from the prospective employee about his or her current or past pay history.
  - Questions on prior volume or quantity of sales by a prospective sales employee are permitted, as long as the inquiry does not touch upon the individual’s earnings from the sales.
  - A discussion on current or past salary history is permissible after an offer of employment with compensation has been made. Negotiation may then occur and the employer may confirm salary history as part of the final vetting process for employment.
- Employers cannot retaliate against employees for asserting their rights.

Guidance in the Overview further clarifies the following:

- MEPA applies to employees with a primary place of work in MA (it does not matter where the employee lives). If the employee telecommutes with his or her employer to a MA worksite, then MA is the primary place of work even though the employee is not physically in MA. It is not necessary for the employee to spend 50% of working time in MA for it to be the employee’s primary place of work.
- Changes within a labor market or other market forces will not justify unlawful pay differentials. This will be challenging given the current labor market with high demand for employees and low unemployment rates.

Employees whose rights under MEPA have been violated have three (3) years from the date of an alleged violation to bring an action in court. A violation occurs when a discriminatory compensation decision is made or other practice is adopted, and each time an employee is affected including each time wages are paid. An employer may be liable for 1) the amount of affected employee wages (amount by which he or she was underpaid), 2) an equal amount of unpaid wages (double damages), and 3) the affected employee’s reasonable attorneys’ fees and other costs.

The overview of the law and frequently asked questions is available on the MA Attorney General’s Office website, and includes a “Pay Calculation Tool” with instructions for employers conducting self-evaluation of pay practices.

<https://www.mass.gov/massachusetts-equal-pay-law>