

**LONG & DiPIETRO, LLP**  
ATTORNEYS AT LAW  
175 Derby Street  
Unit 17  
Hingham, MA 02043  
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www.long-law.com

MICHAEL J. LONG  
ROSANN DiPIETRO  
KELLY T. GONZALEZ  
LESLIE C. CAREY

JOSEPH P. LONG  
OF COUNSEL

TELEPHONE (781) 749-0021  
FACSIMILE (781) 749-1121  
email@long-law.com

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**Legal Advisory: Massachusetts Equal Pay Act**

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**I. INTRODUCTION**

Governor Baker signed *An Act to Establish Pay Equity* (“Equal Pay Act,” Act”) into law on August 1, 2016. *See* Chapter 177 of the Acts of 2016. The Act, which will go into effect on July 1, 2018, revises M.G.L. c. 149, § 105A. The primary feature of the Equal Pay Act is that it prohibits employment discrimination in the form of employers paying employees of different genders different rates for “comparable work.”

While c. 149, § 105A, along with federal anti-discrimination laws, have long prohibited employers from engaging in pay discrimination based on gender, the Equal Pay Act defines “comparable work.” The Act also provides additional employee-friendly protections, largely related to the sharing of salary information, designed to decrease the gender-based pay gap that in some cases still persists despite the long-standing prohibition on discriminatory pay practices. Employers face potential liability for double an impermissible wage differential plus attorneys’ fees and costs under the new law, however an employer can limit liability by conducting

reasonable, good faith self-evaluations and demonstrating reasonable progress toward eliminating impermissible wage gaps.

## II. “COMPARABLE WORK”

### A. Definitions Under the Act

The Equal Pay Act states that

[n]o 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.

Equal Pay Act at § 2(b). Of particular import, the Act goes on to define “comparable work” as

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.

*Id.* at § 2(a). The Equal Pay Act defines “working conditions” to “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.

*Id.* The Act defines “wages” as including “all forms of remuneration for employment.” *Id.*

Although employers have long been prohibited from providing different wages for comparable work to people of different genders, no statutory definition of “comparable work” existed prior to the Equal Pay Act.

### B. The Two-Part *Jancey* Test Replaced by the Act

In two related cases decided prior to the Act, where cafeteria workers raised discrimination claims for being paid less than custodians in the Everett Public Schools, the Massachusetts Supreme Judicial Court created a two-part test to determine if the work being performed was comparable. *Jancey v. Sch. Comm. of Everett*, 427 Mass. 603 (1998); *Jancey v.*

*Sch. Comm. of Everett*, 421 Mass. 482 (1995). Under that two-part analysis, it would first be determined “whether the substantive content of the jobs is comparable, that is whether the duties of the jobs have ‘important common characteristics.’” *Jancey*, 421 Mass. at 489. The SJC articulated that, where two positions “are so dissimilar in their substantive content that a reasonable person would regard them as categorically separate,” the jobs are “not ‘comparable.’” *Id.* at 489-90. Once a determination has been made that “the jobs are comparable in substantive content,” the second part of the analysis considers “whether the two positions entail comparable skill, effort, responsibility, and working conditions.” *Id.* at 490. Under this test, positions only require equal pay if the answer to both inquiries is “yes.” In *Jancey*, the cafeteria workers lost, having failed to show that cafeteria and custodian jobs have comparable substantive content under the first prong of the test. *Jancey*, 427 Mass. at 607-08.

Because the *Jancey* test limits the definition of “comparable work” to positions with comparable “substantive content,” it is difficult for plaintiffs to prevail in cases involving discrimination based on disparate wages under that test. The Equal Pay Act replaces the *Jancey* test with the Act’s definition of “comparable work,” outlined above. The Act makes it possible for plaintiffs to prove they perform comparable work even if they perform jobs that differ in “substantive content.” Although the Act’s definition of comparable work does not automatically warrant a finding that custodial and cafeteria work is “comparable,” this broader definition of “comparable work” makes it likely that at least some cafeteria jobs might be “substantially similar” and therefore comparable to at least some custodial jobs, despite being substantively different. The analysis will be fact-dependent.

### **C. Attorney General Guidance**

The work performed and the environment in which the work is performed informs an analysis of whether positions are “comparable.” Job titles and even job descriptions are not necessarily determinative. The Massachusetts Attorney General’s Office has issued relevant guidance, entitled *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, available at:

<https://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf> (rev. March 1, 2018).

### **III. OTHER PROVISIONS OF THE ACT**

#### **A. Reduction of Wages is a Prohibited Method of Compliance**

An employer that determines that it is paying an unfair wage differential may not remedy the situation by reducing the wages of any employee solely to comply with the law. Thus, for example, if an employer determines that it pays certain female employees less than it pays certain male employees doing comparable work, the employer may not reduce the wages of the male employees to meet its obligations under the Equal Pay Act.<sup>1</sup>

#### **B. Permitted Differentials**

The Equal Pay Act carves out six scenarios in which “variations in wages shall not be prohibited.” Equal Pay Act at § 2(b). Specifically, pay differentials across genders for comparable work are permissible if they are based upon:

- A system that rewards seniority with the employer, as long as leaves based on pregnancy-related conditions and protected parental, family and medical leave do not reduce seniority;
- A merit system;
- A system that measures earnings by quantity or quality of production, sales, or revenue;

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<sup>1</sup> If an employer does uncover impermissible wage differentials, wage changes for unionized employees will need to be completed through the appropriate collective bargaining process.

- The geographic location in which the job is performed;
- Education, training, or experience to the extent such factors are reasonably related to the job in question; or
- Travel, if the travel is a regular and necessary condition of the job.

### **C. Additional Employee Protections**

In addition to requiring equal pay for comparable work, the Equal Pay Act contains a number of additional provisions aimed at protecting employees.

First, the Equal Pay Act makes it unlawful for an employer to prohibit employees from inquiring about, discussing, or disclosing their own wages or other employees' wages.<sup>2</sup> *Id.* at § 2(c). This provision should have little effect on school districts, where most employees' salaries are public and/or set by collective bargaining agreements.

Second, the Equal Pay Act makes it unlawful for employers to inquire about the wage or salary history of a prospective, current, or former employee, or to require that a prospective employee's prior wages or salary history meet certain criteria. *Id.* If an employee or prospective employee has voluntarily disclosed that information, the employer is permitted to confirm it. Employers may also confirm salary history after an offer of employment with compensation has been made to the employee and negotiated. *Id.*

Third, like most anti-discrimination laws, the Equal Pay Act makes clear that it is unlawful to retaliate against an employee for opposing an unlawful action, filing a complaint, testifying or participating in an investigation or proceeding, or disclosing or discussing employees' wages.

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<sup>2</sup> This provision does not require an employer to disclose an employee's wages to another employee or third party.

Finally, the Equal Pay Act also makes it unlawful for an employer to attempt to contract with an employee to avoid complying with these requirements or otherwise exempt itself. A narrow exception exists for certain employees whose jobs require access to other employees' salary information, such as supervisors and human resources employees. *Id.*

#### **IV. LIABILITY / PENALTY FOR VIOLATING THE ACT**

An employer who violates the Equal Pay Act is liable to the affected employees in the amount of twice the employee's unpaid wages, plus reasonable attorneys' fees and costs.

"Unpaid wages" refers to the differential in wages – the amount the affected employees were paid less than an employee of a different gender performing comparable work for higher pay. Thus, if affected employees were paid \$100 less than employees of a different gender doing comparable work, the employer is liable for \$200 per affected employee ( $\$100 \times 2$ ), plus reasonable attorneys' fees and costs.

An employee can recover by bringing a court action on behalf of herself, or on behalf of similarly-situated employees, and need not file a complaint at the Massachusetts Commission Against Discrimination as a prerequisite. Job applicants can bring suits for violations of the Equal Pay Act (*e.g.*, an employer asking impermissible questions about a job applicant's salary history). The Attorney General can also bring an action on behalf of one or more employees.

There is a three-year statute of limitations on claims. Neither an employee's salary history nor an employee's agreement to accept the wages paid serves as a defense for violation of the Equal Pay Act. Intent to discriminate based on gender is not required to establish liability. Employers can take steps to limit their liability, however, as discussed below.

## **V. SELF-AUDIT AND CORRECTIVE MEASURES**

Although the potential liability for Equal Pay Act violations can be high, the Act itself provides employers with some mechanisms to mitigate potential risk. In particular, the Act provides employers with an affirmative defense to liability for pay discrimination claims if the employer, within the previous three (3) years prior to the commencement of the action, has both (1) “completed a self-evaluation of its pay practices in good faith” and (2) “can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work,” if any were found during the self-evaluation. *Id* at § 2(d). As noted above, wage differentials cannot be resolved by reducing the wages of higher-paid employees.

Employers are permitted to design their own self-evaluation “so long as it is reasonable in detail and scope in light of the size of the employer” or is consistent with standard templates issued by the Attorney General. If the self-evaluation is not reasonable in detail and scope, the employer is not entitled to an affirmative defense, but is not liable for liquidated damages (double the unpaid wages) if (a) the self-evaluation was done in good faith within the previous three years and (b) the employer can demonstrate reasonable progress toward eliminating wage differentials based on gender for comparable work. *Id*. Employers not completing a self-evaluation do not face any negative or adverse inferences. *Id*.

## **VI. TAKEAWAY**

The Equal Pay Act requires employers to provide equal pay for “comparable work” across genders, subject to some gender-neutral exceptions. Whether work is “comparable” is determined by a factual analysis within the context of the Act’s definition of “comparable work.” An employer has an opportunity to limit liability under the Act by conducting reasonable, good faith self-evaluations and making a showing of reasonable progress toward eliminating

impermissible wage differentials. Counsel should be consulted regarding specific circumstances and questions.

**This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.**