

EMPLOYMENT LAW COMMENTARY

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MASSACHUSETTS PASSES GENDER EQUITY LAW – A HARBINGER OF THINGS TO COME?

By [Ashley Nakamura](#)

On August 1, 2016, Massachusetts became the first state to pass a law barring employers from asking applicants to disclose their salary history before offering a job. Proponents of Massachusetts' bipartisan legislation hope this law will remediate the nationwide gender pay gap; according to data compiled by the U.S. Census Bureau, women are paid 79 cents for every dollar that men earn.¹ The Massachusetts law, which will go into effect in July 2018, aims to reduce that gap by preventing employers from “low-balling” female applicants — who traditionally have earned less than their male counterparts — during salary negotiations by offering them a wage based on their previous salary. Similar laws have been contemplated or introduced in multiple states, including California, and may hint at the beginning of a nationwide trend.

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BACKGROUND: MASSACHUSETTS' LAW IS YEARS IN THE MAKING

Massachusetts' law rose out of a 1989 lawsuit brought by a group of female cafeteria workers at a public school who claimed that they did work comparable to that performed by the school's male custodians, but were paid just over half of what the men earned. The cafeteria workers sued under Massachusetts' Equal Pay Act in effect at the time, which prohibited employers from paying female employees less than male employees for work of "like or comparable character." The court considered whether the cafeteria workers' and custodians' duties required comparable skill, effort, responsibility, and working conditions, and found the work was indeed comparable under this standard. The Court ruled in favor of the female cafeteria workers.²

The victory was short lived. In a 1995 decision, the Massachusetts Supreme Court overturned the decision, finding that the trial court applied an incorrect and overbroad standard to compare the women's work against the men's. Instead, the Court ruled that in order for two jobs to be "comparable," they must be similar in substantive content.³ Three years later, the trial court ruled against the women, finding that because the substantive work performed by a cafeteria worker was dissimilar to work performed by a custodian, the two jobs were not comparable.⁴

In 1998, the same year that the cafeteria workers lost in court, Massachusetts state senator Pat Jehlen co-sponsored an equal pay bill with a more flexible definition of "comparable" work. After years of failed bills, Jehlen's bill was included in the comprehensive pay equity legislation that passed unanimously in both legislative branches and was signed into law by Republican Governor Charlie Baker on August 1, 2016. The legislation had overwhelming support from the state's business sector, including support from the Greater Boston Chamber of Commerce and the Alliance for Business Leadership.

WHAT DOES MASSACHUSETTS' LAW DO?

Massachusetts' legislation introduces sweeping changes to pay equity law. The new law's most

newsworthy provision bars employers from requiring applicants to provide their salary history before receiving a formal job offer. Employers are also barred from preventing their employees from discussing their salaries with each other. The law broadens the definition of "comparable" work and narrows the acceptable reasons for pay disparities: for example, bona fide merit or seniority systems; geographic location; or education, training, or experience, to the extent reasonably related to the job in question.

The law encourages employers to correct compensation disparities internally by creating a three-year affirmative defense from liability. During the three-year period, employers must complete a self-evaluation of their pay practices and demonstrate "reasonable progress" in eliminating pay disparities. Evidence of a self-evaluation or remedial steps taken to correct wage disparities may not be used against the employer in a wage discrimination action.

IS CALIFORNIA NEXT?

California's Fair Pay Act

On January 1, 2016, California's Fair Pay Act (FPA) went into effect. Described as one of the "toughest equal pay laws in the country,"⁵ the FPA broadens already-existing state law that prohibits employers from paying women less than men for the same jobs. Like Massachusetts' law, the FPA mandates that employers cannot pay employees less than those of the opposite sex for "substantially similar work," even if the employees have different titles and work at different sites, and bars employers from prohibiting employees from discussing their salaries with each other. Unlike Massachusetts' law, however, the FPA does not specifically list acceptable reasons for pay disparities. Instead, the FPA provides that a wage differential for substantially similar work is permitted if the differential is due to seniority, merit, a system that measures production, or a "bona fide factor other than sex." This final catch-all category — which the Massachusetts legislature considered but rejected as overbroad — must be job-related, consistent with a business necessity, and not based on or derived from a sex-based factor.

Salary History Bar Vetoed...

Unlike the Massachusetts law, however, California's FPA does *not* prohibit employers from asking an applicant about his or her salary history. On October 11, 2015, Governor Brown vetoed the companion bill to the FPA which would have prohibited employers from asking applicants their salary in a job interview.⁶ In vetoing AB 1017, Governor Brown stated that the bill "broadly prohibits employers from obtaining relevant information with little evidence that this would assure more equitable wages," and urged the legislature to give the Fair Pay Act a "chance to work."

...Then Reintroduced

On January 16, 2016, California's State Assembly introduced a bill nearly identical to the bill Governor Brown vetoed last October. In its initial form, A.B. 1676 would not only prohibit employers from inquiring about an applicant's compensation history, but also require employers to provide pay scale information to applicants, upon "reasonable request." Proponents of A.B. 1676 argued that the legislation was necessary to eliminate the discriminatory gender pay gap and achieve pay equity, citing research indicating that basing an employee's compensation off of their previous salary disadvantages women, who have traditionally earned less than male counterparts.⁷

Several prominent pro-business interest groups opposed A.B. 1676 in its original form, including the California Chamber of Commerce, the League of California Cities, the Agricultural Council of California, and multiple city chambers of commerce.⁸ Opponents of A.B. 1676, echoing Governor Brown's arguments in favor of vetoing the previous iteration of the bill, argued that was unnecessary and premature, given the recent implementation of California's Fair Pay Act. Opponents also argued that, according to EEOC guidance, basing compensation on an applicant's prior salary was already a questionable and disfavored practice.⁹ On July 2, 2016, the State Assembly passed A.B. 1676 and sent it to the State Senate for review.

CA State Senate Guts Salary History Bar

The State Senate drastically amended A.B. 1676; instead of barring employers from requesting an

applicant's salary history, the bill now simply clarifies that prior salary, by itself, cannot justify any disparity between male and female employees.¹⁰

What Result?

In its amended form, A.B. 1676 faced considerably less opposition than its original form¹¹ and is likely to pass the State Senate without incident. If that happens, the Assembly and Senate must reconcile their differing versions of the bill, after which the bill will head to Governor Brown's desk for signature. Given the business lobby's strong opposition to the original version of the bill banning employers from requesting an applicant's salary history — coupled with the fact that Governor Brown vetoed a substantially similar bill less than a year ago — it seems likely that the Senate's milder version of A.B. 1676 will prevail.

TAKEAWAYS FOR EMPLOYERS

Even if California's bill prohibiting employers from requesting applicants' salary histories fails — which seems likely as this Commentary goes to print — legislative initiatives intended to close the gender pay gap are gaining support across the country. On August 10, New York City introduced legislation that would bar employers from seeking applicants' job history.¹² This suggests that Massachusetts' new legislation — rather than representing an anomalous outlier — may encourage states and municipalities to enact similar legislation.

In anticipation of legislation banning employers from inquiring into applicants' salary history — particularly in California, where this legislation has been introduced twice — employers should take steps to ensure that their hiring practices comply. Below are some hiring tips a proactive employer should consider:

- *It's ancient history!* Give consideration to stopping asking potential employees about their salary history. Not only may these inquiries create and maintain gender-based wage disparities, they may leave you vulnerable to an employment discrimination lawsuit. Note that this does not prevent an applicant from volunteering this information.

- *Leave a paper trail.* Under Massachusetts' new legislation, employers are permitted to pay employees performing comparable or substantially similar work different wages, but they must have legitimate, non-gender-based reasons for doing so. Acceptable reasons can include an employee's level of education or training, or bona fide merit or seniority systems. If you pay two employees performing comparable or substantially similar work two different wages, make sure you have a record to explain why.
- *Consider "comparable."* Both the California and Massachusetts gender equity laws broadened the definition of "comparable" or "substantially similar" work; employers cannot claim safe harbor simply because one job has a substantively different job description from another. In both

states, the critical issues are whether the skill, effort, responsibility, and working conditions are comparable or similar. Take a second look at your current wage structure to confirm that there are no wage discrepancies between jobs that are comparable or similar under this broader definition.

This is an area that is likely to receive continuing scrutiny and employees would be wise to address these issues proactively.

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1 U.S. Census Bureau Report, "Income and Poverty in the United States: 2014," by Carmen DeNavas-Walt and Bernadette D. Proctor, issued Sept. 2015. http://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf?eml=gd&utm_medium=email&utm_source=govdelivery.

2 *Jancey v. Everett School Committee*, 59 Fair Empl. Prac. Cas. (BNA) 1314, 1328 (Mass. Super. Ct. 1992).

3 *Jancey v. School Committee of Everett*, 421 Mass. 482, 488 (1995).

4 *Jancey v. School Committee of Everett*, 427 Mass. 603, 604 (1998).

5 Patrick McGreevy and Chris Megerian, *California Now Has One of the Toughest Equal Pay Laws in the Country*, LOS ANGELES TIMES, October 6, 2015, available at <http://www.latimes.com/local/political/la-me-pc-gov-brown-equal-pay-bill-20151006-story.html>.

6 See CA A.B. 1017.

7 A.B. 1676 Assembly Committee on Labor and Employment Hearing Report, dated April 20, 2016, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1676.

8 *Ibid.*

9 *Ibid.*; citing EEOC Compliance Manual, December 5, 2000 (stating, "[p]rior salary cannot, by itself, justify a compensation disparity.>").

10 A.B. 1676 Senate Floor Analysis, dated August 3, 2016, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1676.

11 See *ibid.*

12 See Int 1253-2016, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=ID%7cText%7c&Search=salary+history>.

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