

## Acts (2016)

### Chapter 177

#### AN ACT TO ESTABLISH PAY EQUITY

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:*

SECTION 1. Section 1 of chapter 149 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by striking out the definition of “Woman”.

SECTION 2. Said chapter 149 is hereby further amended by striking out section 105A, as so appearing, and inserting in place thereof the following section:-

Section 105A. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:-

“Comparable work”, 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.

“Working conditions”, shall 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.

“Wages”, shall include all forms of remuneration for employment.

(b) No 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; provided, however, that variations in wages shall not be prohibited if based upon: (i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.

An employer who is paying a wage differential in violation of this section shall not reduce the wages of any employee solely in order to comply with this section.

An employer who violates this section shall be liable to the employee affected in the amount of the employee’s unpaid wages, and in an additional equal amount of liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any 1 or more employees for and on their own behalf, or on behalf of other employees similarly situated. Any agreement between the employer and any employee to work for less than the wage to which the employee is entitled under this section shall not be a defense to an action. An employee’s previous wage or salary history shall not be a defense to an action. The court shall, in addition to any judgment awarded to the plaintiff, award reasonable attorneys’ fees to be paid by the defendant and the costs of the action.

The attorney general may also bring an action to collect unpaid wages on behalf of 1 or more employees, as well as an additional equal amount of liquidated damages, together with the costs of the action and reasonable attorneys' fees. Such costs and attorneys' fees shall be paid to the commonwealth. The attorney general shall not be required to pay any filing fee or other cost in connection with such action.

If an employee recovers unpaid wages under this section and also files a complaint or brings an action under 29 U.S.C. section 206(d) which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under this section, or the amounts recovered under federal law, whichever is less.

Any action based upon or arising under sections 105A to 105C, inclusive, shall be instituted within 3 years after the date of the alleged violation. For the purposes of this section, a violation occurs when a discriminatory compensation decision or other practice is adopted, when an employee becomes subject to a discriminatory compensation decision or other practice or when an employee is affected by application of a discriminatory compensation decision or practice, including each time wages are paid, resulting in whole or in part from such a decision or practice.

Notwithstanding the requirements of section 5 of chapter 151B, a plaintiff shall not be required to file a charge of discrimination with the Massachusetts commission against discrimination as a prerequisite to bringing an action under this section.

(c) It shall be an unlawful practice for an employer to:

(1) require, as a condition of employment, that an employee refrain from inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages. Nothing in this subsection shall obligate an employer to disclose an employee's wages to another employee or a third party;

(2) seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or to require that a prospective employee's prior wage or salary history meet certain criteria; provided, however, that: (i) if a prospective employee has voluntarily disclosed such information, a prospective employer may confirm prior wages or salary or permit a prospective employee to confirm prior wages or salary; and (ii) a prospective employer may seek or confirm a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee;

(3) discharge or in any other manner retaliate against any employee because the employee: (i) opposed any act or practice made unlawful by this section; (ii) made or indicated an intent to make a complaint or has otherwise caused to be instituted any proceeding under this section; (iii) testified or is about to testify, assist or participate in any manner in an investigation or proceeding under this section; or (iv) disclosed the employee's wages or has inquired about or discussed the wages of any other employee.

No employer shall contract with an employee to avoid complying with this subsection, or by any other means exempt itself from this subsection; provided, however, that an employer may prohibit a human resources employee, a supervisor, or any other employee whose job responsibilities require or allow access to other employees' compensation information, from disclosing such information without prior written consent from the employee whose information is sought or requested, unless the compensation information is a public record as defined in clause 26 of section 7 of chapter 4.

This subsection shall be enforced in the same manner as subsection (b); provided, however, that an action based on a violation of clause (2) of this subsection may be brought by or on behalf of 1 or more applicants for employment; and provided, further, that in any action brought under this subsection, the plaintiff may

also recover any damages incurred.

(d) An employer against whom an action is brought alleging a violation of subsection (b) and who, within the previous 3 years and prior to the commencement of the action, has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work, if any, in accordance with that evaluation, shall have an affirmative defense to liability under subsection (b) and to any pay discrimination claim under section 4 of chapter 151B. For purposes of this subsection, an employer's self-evaluation may be of the employer's own design, so long as it is reasonable in detail and scope in light of the size of the employer, or may be consistent with standard templates or forms issued by the attorney general.

An employer who has completed a self-evaluation in good faith within the previous 3 years and prior to the commencement of the action, and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work in accordance with that evaluation, but cannot demonstrate that the evaluation was reasonable in detail and scope, shall not be entitled to an affirmative defense, but shall not be liable for liquidated damages under this section.

Evidence of a self-evaluation or remedial steps undertaken in accordance with this subsection shall not be admissible in any proceeding as evidence of a violation of this section or section 4 of chapter 151B that occurred prior to the date the self-evaluation was completed or that occurred either (i) within 6 months thereafter or (ii) within 2 years thereafter if the employer can demonstrate that it has developed and begun implementing in good faith a plan to address any wage differentials based on gender for comparable work.

An employer who has not completed a self-evaluation shall not be subject to any negative or adverse inference as a result of not having completed a self-evaluation.

(e) The attorney general may issue regulations interpreting and applying this section.

SECTION 3. Section 16 of chapter 151 of the General Laws, as so appearing, is hereby amended by inserting after the word "orders", in line 5, the following words:- or notices.

SECTION 4. This act shall take effect on July 1, 2018.

SECTION 5. There shall be a special commission to investigate, analyze and study the factors, causes and impact of pay disparity based on race, color, religious creed, national origin, gender identity, sexual orientation, genetic information as defined in section 1 of chapter 151B, ancestry, disability, and military status. The special commission shall consist of the following 8 members: the secretary of labor and workforce development, or a designee who shall serve as chair; the attorney general, or a designee; 2 members appointed by the speaker of the house of representatives; 1 member appointed by the house minority leader; 2 members appointed by the senate president and 1 member appointed by the senate minority leader.

The commission shall submit its initial findings to the clerks of the house of representatives and senate, the chairs of the house and senate committees on ways and means and the chairs of the joint committee on labor and workforce development not later than January 1, 2019.

Approved, August 1, 2016.

