

Employment Law Alert: New Minimum Wage Rate

New Minimum Wage for MA, and Year-End Bonuses & the MA Equal Pay Act

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New Minimum Wage Rate for Massachusetts Employees Effective January 1, 2020

With the new year comes a new minimum wage rate for Massachusetts non-exempt employees. As of January 1, 2020 the minimum wage rate is now \$12.75 per hour, and \$4.95 per hour for tipped employees. Employers with Massachusetts-based non-exempt employees should update their payroll provider to reflect the increase – and be sure to use the new rate when calculating any earned overtime.

The change comes from a 2018 bill signed by Governor Baker that gradually increases the minimum wage rate until it reaches \$15.00 per hour in 2023 (\$6.75 per hour for tipped employees).

A New Year's Reminder: Discretionary, End-Of-Year Bonuses and the Massachusetts Equal Pay Act

The end-of-year, discretionary bonus is the most common form of incentive compensation. Executed well, the discretionary bonus provides employers with a flexible mechanism to reward employee success. Executed poorly, even a well-intentioned discretionary bonus may result in significant employment law liability.

The recent passage of the **Massachusetts Equal Pay Act**, M.G.L. c. 149, §105A (the “Act”), complicates the compliance landscape that applies to discretionary bonuses. As January bonus season kicks into gear, employers are well-served to understand the restrictions that the Act imposes on discretionary bonuses.

In general, the Act regulates the type of compensation structures employers may apply to their Massachusetts employees. (The Act applies to any employer that employs workers in Massachusetts, including employers that are headquartered outside of Massachusetts.) The core requirement of the Act is the so-called *Equal Pay for Comparable Work Mandate* – the requirement that employers must avoid compensation structures that result in different pay rates for male and female employees who perform “comparable” job functions in Massachusetts. In other words, unless an exemption applies (as discussed below), under the Act, an employer must compensate comparable male and female Massachusetts employees **exactly the same**. The Act defines “comparable” job functions as job functions that require substantially similar skill, effort, and responsibility, and that are performed under similar working conditions.

The Act provides six limited exemptions to the Equal Pay for Comparable Work Mandate. Under this exemption scheme, a pay difference between comparable male and female employees does *not* violate the mandate if the pay variation is the result of one or more of the following:

1. 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);
2. a merit system;
 3. a system which measures earnings by quantity or quality of production, sales, or revenue;
 4. the geographic location in which a job is performed;
 5. education, training or experience to the extent such factors are reasonably related to the particular job in question; or
 6. travel, if the travel is a regular and necessary condition of the particular job.

Discretionary bonuses – *year-end, performance bonuses that are provided to employees at the option of the employer* – that result in pay variations between comparable male and female employees *violate* the Act *unless* the discretionary bonus qualifies for the “Merit System” exemption.

The Act does not expressly define the requirements of the Merit System exemption. However, the Massachusetts Attorney General has published formal guidelines interpreting the Act that provide as follows:

A “system” is a plan, policy, or practice that is predetermined or predefined; used by managers or others to make compensation decisions; and uniformly applied in good faith without regard to gender.

A “merit system” is a system that provides for variations in pay based upon employee performance as measured through legitimate, job-related criteria.

For example:

An employer that has a written performance rating plan or policy that measures employee performance on a set scale from “unsatisfactory” to “exceeds expectations” and takes employees’ ratings into account in setting a portion of their salaries the next year likely has a qualifying merit system.

An Act to Establish Pay Equity: Overview and Frequently Asked Questions (Office of the Attorney General), p. 9. Based on the Attorney General’s assessment of the Merit System exemption, it appears that:

- Pay differences among different-gendered, comparable employees that result from variations in performance-based bonuses *violate* the Act if the performance bonuses are based on informal criteria, with reference to intangible contributions, that cannot be easily, uniformly applied.
- Pay differences among different-gendered, comparable employees that result from variations in performance-based bonuses are *permitted* under the Act if the performance bonuses are based on uniform, lock-step formulae that reference ratings or metrics that are measured in formal performance evaluations.

As such, in light of the Act and based on the Attorney General’s guidelines, it is suggested that employers adhere to discretionary performance bonus structures for their employees that meet the requirements of a “Merit System” – that is, a discretionary bonus that is formula-based, and calculated by reference to ratings/metrics measured in a formal performance evaluation.

For more information, please contact **Matthew Mitchell**.