

OFFICE OF THE ATTORNEY GENERAL

AN ACT TO ESTABLISH PAY EQUITY: OVERVIEW AND FREQUENTLY ASKED QUESTIONS

This guide provides information on an Act to Establish Pay Equity, Chapter 177 of the Acts of 2016, which will update and replace M.G.L. c. 149, § 105A, effective July 1, 2018. This guide does not constitute legal advice.

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## OVERVIEW OF THE LAW

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In 1945, Massachusetts became the first state in the country to pass an equal pay law. But the gender pay gap persists in Massachusetts and across the country. In Massachusetts, on average, women working full time earn only 84.3% of what men earn.<sup>1</sup> The gap is even larger for some women of color.<sup>2</sup>

On July 1, 2018, an updated equal pay law will go into effect in Massachusetts, providing more clarity as to what constitutes unlawful wage discrimination and adding protections to ensure greater fairness and equity in the workplace. The statute, [Chapter 177 of the Acts of 2016, \*An Act to Establish Pay Equity\*](#), amends the Massachusetts Equal Pay Act, [M.G.L. c. 149, § 105A \(“MEPA”\)](#).

### Equal Pay for Comparable Work

MEPA generally provides that “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.” The law defines “comparable work” as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

MEPA permits differences in pay for comparable work only when 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.

Importantly, MEPA makes clear that employees’ salary histories are not a defense to liability. Moreover, an intent to discriminate based on gender is not required to establish liability under the law.

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<sup>1</sup> U.S. Bureau of Labor Statistics, *BLS Reports: Highlights of Women’s Earnings in 2016* (August 2017), Table 3 (comparing median earnings), available at <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf>.

<sup>2</sup> *Id.* at 3-4; see also National Partnership for Women & Families, *Fact Sheet: Massachusetts Women and the Wage Gap* (April 2017), available at <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2017-ma-wage-gap.pdf>.

### Affirmative Defense

An employer that violates MEPA generally will be liable for twice the amount of the unpaid wages owed to the affected employee(s)—the differential between the employee’s wages and the wages paid to an employee of a different gender performing comparable work—plus reasonable attorneys’ fees and costs. However, the law provides a complete defense for any employer that, within the previous three years and before an action is filed against it, has conducted a good faith, reasonable self-evaluation of its pay practices. To be eligible for this affirmative defense, the self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any impermissible gender-based wage differentials that its self-evaluation reveals.

Employers are not required to conduct self-evaluations and will not be penalized for choosing not to do so.

### Other Key Provisions

MEPA also adds several key protections for employees and job applicants:

- Employers may not prohibit employees from disclosing or discussing their wages.
- Employers may not seek the salary or wage history of any prospective employee before making an offer of employment that includes compensation, and may not require that a prospective employee’s wage or salary history meet certain criteria.
- Employers may not retaliate against any employee who exercises his or her rights under the law.

Employees whose rights under MEPA have been violated have three 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.

## **FREQUENTLY ASKED QUESTIONS**

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### **SECTION 1: COVERED EMPLOYERS**

#### **Q: Which employers are covered by MEPA?**

MEPA covers nearly all employers in Massachusetts, including state and municipal employers, irrespective of size. It does not apply to the federal government as an employer.

#### **Q: Does MEPA apply to employers located outside of Massachusetts?**

Yes, if they have employees with a primary place of work in Massachusetts.

### **SECTION 2: COVERED EMPLOYEES**

#### **Q: Which employees are covered by MEPA?**

For purposes of MEPA, an “employee” is defined as “any person employed for hire by an employer in any lawful employment . . .,” with very limited exceptions for babysitters and other domestic workers under age eighteen, agricultural workers, and employees of social clubs and similar associations. M.G.L. c. 149, § 1. This definition covers the vast majority of employees, including full-time, part-time, seasonal, per-diem, and temporary employees.

#### **Q: Does MEPA apply to government employees?**

Yes. MEPA applies to state and municipal employees. It does not, however, apply to employees of the federal government.

#### **Q: Does MEPA apply to employees who live or work outside of Massachusetts?**

MEPA will apply to employees with a primary place of work in Massachusetts. It does not matter where an employee lives.

For most employees, the location where they do most of their work for their employer is their primary place of work.

1) If the employee spends work hours traveling outside Massachusetts (making deliveries, engaging in sales, etc.) but returns regularly to a Massachusetts base of operations before resuming a new travel schedule, Massachusetts is the primary place of work.

2) If an employee is constantly switching locations of work, the primary place of work may be determined by assessing the state in which the employee spent the plurality of his or her working time over the previous year. For new employees, employers should make a reasonable assessment of the primary place of work.

- 3) If an employee telecommutes through an arrangement with his or her employer to a Massachusetts worksite, Massachusetts is the primary place of work even though the employee does not physically spend those telecommuting hours in Massachusetts.
- 4) It is not necessary for an employee to spend 50% of the employee's working time in Massachusetts for it to be the employee's primary place of work.
- 5) If an employee permanently relocates to Massachusetts, the employee's primary place of work will become Massachusetts on the first date of actual work in Massachusetts.

**Q: Does MEPA require that multi-state employers compare Massachusetts employees to employees in other states?**

MEPA requires that covered Massachusetts employees of different genders be paid equally for performing comparable work, unless a statutory exception applies (see Section 5, below). Generally speaking, multi-state employers should ensure that employees within the same geographic area within Massachusetts are paid equally for performing comparable work, unless excluding out-of-state employees from the analysis is not reasonable under the circumstances. For example, if the only employees performing work comparable to the work performed by a Massachusetts employee are located in another state, it may be necessary to compare the wages of those employees to ensure that they are paid equally (or that any disparities are justified under the law, including by the different geographic locations themselves).

**SECTION 3: DEFINITION OF COMPARABLE WORK**

**Q: What is “comparable work?”**

MEPA defines “comparable work” as work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.<sup>3</sup> “Comparable work” is broader and more inclusive than the “equal work” standard of the federal Equal Pay Act. Determining whether jobs are comparable will require an analysis of the jobs as a whole. It is unlawful under MEPA to pay employees of different genders unequal wages for comparable work, unless a statutory exception applies—which requires a separate analysis (see Section 5, below).

**Q: What does “substantially similar” mean?**

“Substantially similar” means that each of the factors being considered—in this case: skill, effort, and responsibility—are alike to a great or significant extent, but are not necessarily identical or alike in all respects. Minor differences in skill, effort, or responsibility will not prevent two jobs from being considered comparable.

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<sup>3</sup> This definition eliminates the two-part test of comparability set forth in *Jancey v. School Committee of Everett*, 421 Mass. 482 (1995), and *Jancey v. School Committee of Everett*, 427 Mass. 603 (1998).

**Q: What does “skill, effort, and responsibility” mean?**

For purposes of comparing jobs, “skill” includes such factors as experience, training, education, and ability required to perform the jobs. It must be measured in terms of the performance requirements of a job, not in terms of the skills that an employee happens to have. Skills not necessary to perform a particular job are not relevant to determining whether jobs are substantially similar.

For example:

- A bookkeeping job usually requires accounting skills, but does not necessarily require customer service experience. Therefore, a bookkeeping job may not be comparable to a job that relies heavily on customer service skills, such as the job of an account manager.
- In an elementary school setting, janitorial and food service jobs generally do not require previous experience in the field or specialized training, and therefore may require comparable skills, even though the substance of the two jobs is different.
- Employees selling different types of insurance for the same employer may still be performing work requiring comparable skill unless one of the types of insurance requires salespeople to have meaningfully different levels or degrees of knowledge or expertise.

“Effort” refers to the amount of physical or mental exertion needed to perform a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, should be taken into account. “Effort” encompasses the requirements of a job as a whole.

For example:

- A job that requires a person to stand all day likely is not comparable in effort to a sedentary office job. On the other hand, the amount of physical exertion that goes into performing the average janitorial and food service jobs may be substantially similar.

“Responsibility” encompasses the degree of discretion or accountability involved in performing the essential functions of a job, as well as the duties regularly required to be performed for the job. It includes such factors as the amount of supervision the employee receives or whether the employee supervises others, and the degree to which the employee is involved in decision-making such as determining policy or procedures, purchases, investments or other such activities. Minor or occasional differences in responsibilities will not prevent jobs from being comparable.

For example:

- An employee who is responsible for actually signing legal or financial documents and is personally accountable for any errors in those documents may exercise a meaningfully different amount of responsibility than others who simply assist in drafting the documents.
- At a department store, sales clerks generally are not responsible for sweeping the floors. However, the fact that a sales clerk in the housewares department is occasionally asked to sweep up if a customer breaks a glass does not prevent her from being considered comparable to sales clerks in other departments if their duties are otherwise substantially similar.

**Q: How should an employer evaluate the “working conditions” under which work is performed?**

MEPA defines “working conditions” as the environmental and other similar circumstances customarily taken into consideration in setting salary or wages. This includes factors such as the physical surroundings and hazards encountered by employees performing the job.

**Q: What does “physical surroundings and hazards” mean?**

“Physical surroundings” refers to the physical environment where a job is performed, including but not limited to the elements, such as extreme temperatures or noise, regularly encountered by a worker while performing a job, including the intensity and frequency of such elements.

For example:

- A factory floor may constitute a very different working environment than an office. Likewise, jobs performed outdoors in very hot or cold temperatures may not be substantially similar to jobs performed indoors.

“Hazards” refers to the physical hazards that may be encountered by a worker while performing a job, including but not limited to exposure to chemicals or fumes, electricity, heights, dangerous equipment, and other similar factors. Employers should consider the frequency with which workers encounter such hazards and the severity of injury they could cause or the risks they pose.

For example:

- Employees on an assembly line who package products that involve dangerous chemicals and therefore must wear protective equipment face greater hazards than employees who package products that do not involve any chemicals, such that they likely do not perform their jobs under similar working conditions.

**Q: Do working conditions include the day or time shifts are scheduled?**

Yes. A comparison of working conditions can take into account meaningful differences in the days or times shifts are scheduled, to the extent such differences are of the type customarily taken into account in setting wages or salary—commonly referred to as “shift differentials.”

For example:

- Overnight shifts and daytime shifts may impose different burdens on employees and therefore may constitute different working conditions, provided that shifts are not assigned based on gender.

**Q: Can an employer rely on job titles or descriptions to determine which positions are comparable?**

Not necessarily. A determination as to whether two jobs are “comparable” under MEPA should focus on the skill, effort, and responsibility actually required to perform the jobs, irrespective of job

titles or descriptions. While an employer may not rely on job descriptions alone, job descriptions that accurately reflect the skill, effort, and responsibility required to perform jobs may be helpful in identifying which jobs are comparable.

#### **SECTION 4: DEFINITION OF WAGES**

##### **Q: What is included in “wages” for the purposes of MEPA?**

“Wages” is defined broadly to include all forms of remuneration for work performed, including commissions, bonuses, profit sharing, paid personal time off, vacation and holiday pay, expense accounts, car and gas allowances, retirement plans, insurance, and other benefits, whether paid directly to the employee or to a third-party on the employee’s behalf.

##### **Q: Does “wages” include incentive pay?**

Yes. “Wages” includes all forms of incentive pay, such as commissions, bonuses, profit-sharing, and other production incentives.

##### **Q: Does “wages” include benefits that an employee may choose not to take advantage of?**

With respect to health or life insurance, retirement plans, tuition reimbursement, and other similar benefits that employees may choose not to take advantage of (e.g., because they are covered by a spouse’s plan), what matters is that employees performing comparable work have the same opportunity to participate in benefit programs on the same terms, irrespective of gender—not whether they choose to do so.

##### **Q: Does “wages” include deferred compensation?**

Yes.

##### **Q: May an employer pay employees of one gender a different salary or hourly rate than employees of another gender if the employer makes up the difference with larger bonuses or other benefits?**

No. MEPA prohibits discriminating in any way in the payment of wages on the basis of gender between employees performing comparable work, including paying both lower wages overall and paying lower base salaries or lower hourly rates. Accordingly, paying an employee an extra annual bonus in order to make up for the fact that he or she has a lower base salary than other employees performing comparable work will not satisfy the employer’s obligations under MEPA.



## **SECTION 5: PERMISSIBLE VARIATIONS IN PAY**

### **Q: Under what circumstances may an employer pay different wages to employees of different genders who perform comparable work?**

Determining whether it is lawful to pay employees differently for comparable work requires an analysis that is separate from the analysis of whether jobs are comparable in the first place.

MEPA permits differences in pay for comparable work only when based upon the following:

- (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.

A pay difference will be permissible under MEPA if the entire difference is justified by one of these factors, or by a combination of these factors. MEPA does not recognize any other valid reasons for variations in pay between men and women performing comparable work.

### **Q: What is a “system”?**

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.

### **Q: What is a “system that rewards seniority with the employer”?**

A seniority system is a system that recognizes and compensates employees based on length of service with the employer. The time employees spend on leave due to pregnancy-related conditions and protected parental, family, and medical leave, may not be counted to reduce seniority for purposes of MEPA.

For purposes of MEPA, “protected parental, family and medical leave” means leave protected by statute, including the federal Family and Medical Leave Act, the state Parental Leave Act, the state Pregnant Workers Fairness Act, the state Small Necessities Leave Act, and the state Domestic Violence Leave Law; it does not mean all leave taken for any medical, parental, or family reason.

**Q: What is a “merit system”?**

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.

**Q: What is a “system which measures earnings by quantity or quality of production, sales, or revenue”?**

A system that measures earnings by quantity or quality of production, sales, or revenue is a system that provides for variations in pay based upon the quantity or quality of an employee’s individual production (e.g., piecemeal pay or hours worked) or sales or other revenue generation (e.g., commissions or other revenue-based incentives) in a uniform, reasonably objective fashion.

**Q: When is the geographic location of a job a valid reason for variations in pay?**

Different geographic work locations may constitute a valid reason for variations in pay for comparable work when the locations correspond with different costs of living or differences in the relevant labor market from one geographic location to another.

**Q: When are travel requirements a valid reason for variations in pay?**

It is permissible to pay an employee who travels for work more than an employee who otherwise performs comparable work but does not travel, provided travel is a regular and necessary condition of the first employee’s job. Whether travel is necessary will depend on the circumstances of each job, including whether alternatives, such as remote participation, are options offered by the employer. Travel will not be considered necessary simply because an employee prefers or chooses to do so when alternatives are reasonably available. Regular commuting to or from a work location does not constitute “travel” for these purposes.

**Q: When may an employer pay an employee more based on education, training, or experience?**

Pay differentials are permissible if they are based on education, training, or experience that is reasonably related to the particular job in question. An employee’s education, training, or experience will be reasonably related to his or her job and thus a valid reason for paying that employee more than another employee performing comparable work when, at the time the employee’s salary or wages were determined, a reasonable employer could have concluded that such education, training,

or experience would help the employee to perform the particular job in a more efficient or more effective manner.

For example:

- While an advanced accounting degree is not strictly required for most bookkeeping jobs, an employee with such a degree may be considered of higher value to an employer because accounting skills are relevant to the job.

**Q: May an employer pay employees who perform comparable work differently based on their full-time versus part-time status?**

An employer may pay employees performing comparable work differently based on the number of hours worked provided it does so pursuant to a qualifying “system which measures earnings by quantity or quality of production.” Employees who are actually paid on an hourly basis may be paid more or less based on the number of hours worked pursuant to such a system. In addition, part-time and full-time employees may be paid different hourly rates, or offered different benefits, provided that employees of different genders *within* each category who perform comparable work are compensated at the same rate and offered the same benefits.

Importantly, employers should also ensure that they do not discriminate based on gender in terms of the assignment or availability of part-time versus full-time work.

**Q: May an employer pay salaried employees who perform comparable work differently based on the number of hours they work?**

As above, the answer depends on whether any part of employees’ wages is actually determined based on a system that takes into account the number of hours worked. Employees who are paid on a salary basis for their standard workweek, but whose salaries do not fluctuate based on the precise number of hours actually worked in any given workweek (e.g., “exempt” executive, administrative, or professional employees), generally do not meet this standard. If, however, an employer awards bonuses or other incentives to such employees based on the number of hours worked, those incentives can differ in amount provided they are determined pursuant to a qualifying “system” as defined above.

**Q: May an employer pay employees of one gender less in wages or salary than employees of a different gender based on her wage or salary history?**

No. MEPA specifically provides that an employee’s previous wage or salary history may not be used as a defense to claim of unequal pay. This means that if an employer pays a female sales associate, for example, less than a male sales associate who performs comparable work, the employer cannot justify that pay disparity based on the fact that the female sales associate earned less in her last job.

**Q: Can changes in a labor market justify paying employees of one gender less in wages or salary than employees of a different gender who perform comparable work?**

No. Neither changes in a labor market nor other market forces are included among the valid reasons for variations in pay enumerated in the statute. Therefore, while differences between the labor markets in different geographic locations may justify paying employees in one location higher wages for comparable work than employees in another location, changes within a particular labor market will not.

**Q: Does it matter whether an employer intends to discriminate against employees of one gender by paying them less for comparable work?**

No. Under MEPA, intent is irrelevant. An employer will be liable for paying employees of one gender less than employees of another gender who perform comparable work regardless of whether or not it intended to do so, unless the pay differential can be justified by one of the six factors listed above.

#### **SECTION 6: RESTRICTIONS ON DISCUSSION OF WAGES PROHIBITED**

**Q: May an employer restrict employees' discussions about their wages?**

Employers generally may not prohibit employees from discussing either their own wages or their coworkers' wages or from disclosing wage information to any person or entity. An employer may only prohibit human resources employees, supervisors, or other employees whose job responsibilities give them access to other employees' compensation information from discussing such other employees' wages—unless the information qualifies as a “public record” under M.G.L. c. 4, § 7. However, these particular categories of employees may not be prohibited from discussing or disclosing their own wages.

**Q: May an employee enter into an agreement not to discuss his or her wages?**

No. MEPA prohibits employers from contracting with employees to prevent them from discussing or disclosing wages. That means that employers cannot include a requirement that an employee keep his or her wages (or a coworker's wages) confidential in an offer letter, employment contract, nondisclosure agreement, employee handbook, or similar document.

**Q: Are employers required to publish or otherwise disclose their employees' wages?**

No. MEPA does not impose any affirmative obligation on employers to disclose information about their employees' wages.

## **SECTION 7: SEEKING SALARY HISTORY PROHIBITED**

### **Q: When, if ever, may an employer may ask a prospective employee about his or her wage or salary history?**

Under MEPA employers generally may not seek the salary or wage history of any prospective employee from the prospective employee himself or herself. There are only two very limited situations in which an employer may seek this information: (1) to confirm wage or salary history information voluntarily shared by the prospective employee; or (2) after an offer of employment with compensation has been made to the prospective employee.

Importantly, MEPA's prohibition on employers seeking the salary or wage history of prospective employees means that employers may not seek information on their own or through an agent (e.g., a recruiter or job placement service).

### **Q: May an employer instead seek a prospective employee's wage or salary history from a current or former employer?**

No. Under MEPA employers may not seek the salary or wage history of any prospective employee from a current or former employer except: (1) to confirm wage or salary history information voluntarily shared by the prospective employee; or (2) after an offer of employment with compensation has been made to the prospective employee.

### **Q: May an employer ask prospective employees to volunteer information about their salary or wage history or otherwise suggest that they do so?**

No. MEPA broadly prohibits employers from "seeking" the wage or salary history of a prospective employee from the prospective employee or from a current or former employer.

### **Q: Does the prohibition on seeking a prospective employee's salary history apply to current employees who apply for internal transfer or promotion?**

No. Employers already have this information and therefore need not "seek" it. However, employers should keep in mind that at no time will an employee's salary history—with any employer—justify paying that employee less than an employee of a different gender who performs comparable work.

### **Q: May an employer ask prospective employees about their salary requirements or expectations?**

Yes. Nothing in MEPA prohibits an employer from asking a prospective employee about his or her compensation needs or expectations. However, employers should proceed with caution when asking such questions and ensure that such questions are not framed or posed in a way that is intended to elicit information from the prospective employee about his or her salary or wage history.

For example, employers should avoid asking follow-up questions such as “what is that expectation or need based on” that may be reasonably likely to prompt the prospective employee to disclose his or her salary or wage history.

**Q: May an employer ask a prospective employee about his or her sales or similar performance with another employer?**

An employer may ask a prospective employee about the volume or quantity of his or her previous sales objectives and whether or not he or she met those objectives. Employers may not seek information about a prospective employee’s earnings through sales.

**Q: What if a prospective employee volunteers information about his or her salary or wage history without any prompting?**

MEPA provides that an employer may seek information regarding a prospective employee’s salary or wage history to confirm information “voluntarily disclosed” by the prospective employee. The information will qualify as “voluntarily disclosed” if a reasonable person in the prospective employee’s position would not think, based on the employer’s words or actions, that the employer suggested or encouraged the disclosure.

**Q: May an employer seek a prospective employee’s salary or wage history from public sources?**

MEPA does not prohibit employers from learning of an employee’s wage or salary history through public sources. However, regardless of the source of the information, employers should keep in mind that at no time will an employee’s salary history justify paying that employee less than an employee of a different gender who performs comparable work. Thus, if an employer uses publicly available information to set an employee’s wages or salary lower than that of other employees performing comparable work, it could violate MEPA.

**Q: May an employer screen prospective employees based on their previous salary or wages?**

No. MEPA specifically prohibits employers from requiring that a prospective employee’s wage or salary history meet certain criteria.

**Q: Does a multi-state employer have to comply with MEPA if it searches for or screens employees nationally without knowing where a particular prospective employee might ultimately be assigned to work?**

If it is possible that prospective employees will be chosen or assigned to work in Massachusetts (or to have Massachusetts as their primary place of work), employers should take care to ensure that they do not ask questions or seek information that violates MEPA. The fact that an employer initially was unsure where an employee would be located is not a defense to liability under the law.

## **SECTION 8: RETALIATION PROHIBITED**

### **Q: May an employer retaliate against an employee who complains or reports a violation of MEPA?**

No. Retaliation is illegal. An employer may not retaliate against an employee for exercising or attempting to exercise rights under MEPA, including: formally or informally complaining or inquiring about an alleged violation of the law; communicating with any person, including coworkers, about any violation of the law; testifying or otherwise participating in an administrative or judicial investigation or other proceeding regarding an alleged violation of the law; or informing another person of that person's potential rights under the law.

### **Q: What constitutes retaliation?**

Retaliation includes any threat, discipline, discharge, demotion, suspension, or reduction in employee hours or compensation, or any other adverse action against any employee for exercising or attempting to exercise any right guaranteed under MEPA. Retaliation can include adverse actions taken against an employee during or after employment (e.g., giving an unwarranted negative reference), and need not occur in the workplace. Unlawful retaliation can be any action that would have the effect of dissuading a reasonable person from making a complaint or otherwise exercising his or her rights under MEPA.

### **Q: Does MEPA protect an employee if he or she mistakenly, but in good faith, reports a violation of the law?**

Yes.

## **SECTION 9: LIABILITY AND ENFORCEMENT**

### **Q: What are the consequences for an employer that violates MEPA?**

An employer that pays an employee less than its pays to employees of a different gender performing comparable work may be liable for: (1) the amount of the affected employee's unpaid wages (i.e., the amount by which he or she was underpaid); (2) an equal amount of unpaid wages (i.e., double damages); and (3) the affected employee's reasonable attorneys' fees and other costs if he or she is awarded any judgment in his or her favor.

An employer that violates one of the other provisions of MEPA—e.g. the anti-retaliation provision—may also be required to pay any damages actually incurred by the affected employee (or applicant).

**Q: How is MEPA enforced?**

An employee (or applicant) who believes his or her rights under MEPA have been violated may file a claim in court on his or her own behalf, or on behalf of other similarly-situated employees.

An employee (or applicant) may also file a complaint with the Attorney General's Office. The Attorney General's Office will review all complaints and determine whether further action by the office is appropriate. If the office decides further action is appropriate, the Attorney General may file a claim in court on behalf of one or more employees or applicants.

**Q: Are employees or applicants required to file a complaint with the Attorney General's Office before filing in court?**

No.

**Q: Are employees or applicants required to make or submit a complaint to their employer before filing in court?**

No.

**Q: Are employees or applicants required to file a complaint with the Massachusetts Commission Against Discrimination (MCAD) before filing in court?**

No. The MCAD does not investigate or adjudicate alleged violations of MEPA. The MCAD does, however, have jurisdiction over intentional gender discrimination claims under M.G.L. c. 151B ("Chapter 151B"). It is possible that an employee with a MEPA claim may also have a claim under Chapter 151B. Any claim alleging a violation of Chapter 151B must be filed with the MCAD before that claim can be filed in court.

If an employee believes that he or she has been paid less as a result of intentional discrimination (or that the employer has a discriminatory policy that resulted in unequal pay) and wishes to pursue a claim based on that theory, the employee may pursue a claim under Chapter 151B. The claim must be filed with the MCAD within 300 days of the last discriminatory act.

**Q: How long does an employee or applicant have to file a claim under MEPA?**

An employee or applicant (or the Attorney General) has three (3) years from the date of an alleged violation of MEPA to file a claim in court. For purposes of unequal pay claims, a violation occurs: (1) when a discriminatory compensation decision or other practice is made; (2) when an employee becomes subject to a discriminatory compensation decision or other practice, or (3) when an employee is affected by the application of a discriminatory compensation decision or other practice, including each time wages are paid (i.e., each time a paycheck is issued). Compensation "practices" include the adoption or implementation of policies or plans that govern, in whole or in part, how much employees will be paid.



**Q: Does filing a complaint with the Attorney General’s Office or the MCAD extend the three-year statute of limitations for filing a claim in court?**

No. MEPA claims must be filed in court within three years of an alleged violation whether or not a complaint is first filed with the Attorney General’s Office. Similarly, an employee who ultimately wishes to pursue a Chapter 151B claim in court (after first filing with the MCAD) must do so within three years of the last alleged violation.

For more information about MCAD complaints, visit: <https://www.mass.gov/file-a-complaint-of-discrimination>.

**SECTION 10: AFFIRMATIVE DEFENSE FOR EMPLOYER SELF-EVALUATIONS**

**Q: How does the affirmative defense work?**

MEPA provides a complete defense to a legal claim for any employer that has conducted a good faith, reasonable self-evaluation of its pay practices within the previous three years and before an action is filed against it. To be eligible for this affirmative defense, the self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any unlawful gender-based wage differentials that its self-evaluation reveals. The employer bears the burden of proving that it has met these standards.

Whether or not an employer is eligible for an affirmative defense does not necessarily turn on whether a court ultimately agrees with the employer’s analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on whether the self-evaluation was conducted in good faith and was reasonable in detail and scope (see below).

If an employer is eligible for an affirmative defense under MEPA, it will also have an affirmative defense to liability for pay-related discrimination claims under Chapter 151B.

**Q: What constitutes a “good faith” self-evaluation?**

A good faith self-evaluation is one that an employer conducts in a genuine attempt to identify any unlawful pay disparities among employees performing comparable work. This good faith requirement applies to both an employer’s analysis of which jobs are comparable and to its analysis of pay differentials. A self-evaluation that is conducted so as to achieve certain pre-determined results (i.e., to find no disparities) or to justify known disparities likely will not qualify as good faith.

Employers that do not necessarily know why certain compensation decisions were made (e.g., because those decisions were made years ago) may still take advantage of the affirmative defense if: (1) a good faith self-evaluation demonstrates that any pay disparities then existing between employees performing comparable work are justified by one of the six factors discussed in Section 5 of this guidance; or (2) the self-evaluation identifies unlawful pay disparities and the employer makes reasonable progress toward eliminating those disparities.

**Q: When is a self-evaluation “reasonable in detail and scope”?**

Whether a self-evaluation is reasonable in detail and scope will depend on the size and complexity of an employer’s workforce. Relevant factors include whether the evaluation includes a reasonable number of jobs and employees; whether the evaluation takes into account all reasonably relevant and available information; and whether the evaluation is reasonably sophisticated in its analysis of potentially comparable jobs, employee compensation, and the application of the six permissible reasons for pay disparities discussed in Section 5 of this guidance. In addition, in order to qualify for an affirmative defense to a legal claim alleging a violation of MEPA or Chapter 151B, the self-evaluation must have included the employee(s) or job(s) at issue.

**Q: What constitutes “reasonable progress” toward eliminating pay disparities?**

In order to qualify for an affirmative defense to a legal claim alleging a violation of MEPA, an employer must take meaningful steps toward eliminating any unlawful pay disparities identified through a timely self-evaluation (one conducted within the previous three years and prior to the commencement of a legal action).

Whether or not an employer has made sufficiently reasonable progress toward eliminating disparities will depend on how much time has passed, the nature and degree of its progress as compared to the scope of the disparities identified, and the size and resources of the employer. In order to show that it has made reasonable progress, an employer will have to demonstrate that the steps it is taking will eliminate the disparities in a reasonable amount of time.

**Q: What does it mean to eliminate unlawful pay disparities?**

For purpose of MEPA’s affirmative defense, eliminating unlawful pay disparities means adjusting employees’ salaries or wages so that employees performing comparable work are paid equally (keeping in mind that MEPA does not permit an employer to *reduce* the wages of any employee solely in order to comply with the law). Although employers may choose to pay employees retroactively to compensate for historical disparities, MEPA does not require them to do so in order to take advantage of the affirmative defense.

**Q: What if an employer’s self-evaluation is insufficient?**

If an employer’s self-evaluation is found to be insufficient in detail or scope, but was nonetheless conducted in good faith, and the employer has made reasonable progress toward eliminating identified pay disparities, the employer will not be required to pay liquidated damages (double-damages) to an affected employee or employees. The employer will still have to pay the affected employee(s)’ unpaid wages and attorneys’ fees and costs.

**Q: Can a self-evaluation be used against an employer in court?**

Evidence that an employer has conducted a self-evaluation or taken remedial steps as a result is not admissible in court to show a violation of MEPA or Chapter 151B in the following circumstances: (a) when the alleged violation occurred before the date the self-evaluation was completed; (b) when the alleged violation occurred within 6 months after the self-evaluation was completed; or (c) when the alleged violation occurred within 2 years after the self-evaluation was completed, if the employer can show that it has developed and begun implementing in good faith a plan to address any gender-based wage differentials that it revealed.

Employers should develop and implement a remedial plan as soon as practicable upon completion of the self-evaluation (if it revealed unlawful disparities). If an employer waits longer than 6 months to take remedial action, it risks having the self-evaluation used as evidence against it if an employee files a claim.

**Q: Are employers required to conduct self-evaluations?**

No.

**Q: Will an employer be penalized if it chooses not to conduct a self-evaluation?**

No. An employer that chooses not to conduct a self-evaluation will not be subject to any negative or adverse inference in connection with a legal claim alleging a violation of the law.

## APPENDIX A: SELF-EVALUATIONS—A BASIC GUIDE FOR EMPLOYERS

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Employers seeking to undertake a self-evaluation for purposes of asserting an affirmative defense to claims brought pursuant to the amended Massachusetts Equal Pay Act, [M.G.L. c. 149, § 105A](#) (“MEPA”), should ensure that the self-evaluation is reasonable in scope and detail based on their own individual circumstances. What is reasonable for a small business with few categories of jobs may not be reasonable for a larger or more complex organization. Below are steps that employers should consider undertaking as part of a comprehensive self-evaluation. However, the complexity of the analysis required will vary significantly depending on the size, make-up, and resources of each employer. The steps outlined below are intended only as general guidelines.

### Step 1: Gather Relevant Information.

Gather data and other information necessary to performing a thorough self-evaluation. Such information likely includes, but is not necessarily limited to, the following for each current and former employee for the past year (if it exists):

- |  |   |
|--|---|
| a. Name/employee ID                                  | l. Supervisor                             |
| b. Gender  | m. Performance ratings                    |
| c. Primary work location                             | n. Highest level of education             |
| d. Work type (full-time, part-time, temporary, etc.) | o. Special licenses, certifications, etc. |
| e. Exempt/non-exempt status                          | p. Pay type (salary, hourly, etc.)        |
| f. Date(s) of hire                                   | q. Annualized salary or hourly rate       |
| g. Job title   | r. Shift differential                     |
| h. Job code/grade/band                               | s. Bonus eligibility                      |
| i. Date in most recent job code/grade/band           | t. Eligible benefit plans/programs        |
| j. Division/department/business unit                 | u. Bonus paid                             |
| k. Job function/family                               | v. Hours worked/type (regular, OT, etc.)  |
|  | w. Total compensation                     |

Additional information also may be relevant depending on a particular employer’s compensation policies and practices. For example, if an employer takes job-related training or individual production or sales into account in determining employee compensation, that information should be gathered as well.

### Step 2: Identify Comparable Jobs.

Identify which positions in the organization are comparable. Create job groupings based on the skill, effort, and responsibility required to perform the job. Also consider working conditions, such as the physical surroundings, hazards encountered, and the time of day work is performed. While job titles and descriptions may be useful, they alone do not determine comparability. Similarly, do

not assume that jobs in different business units or departments are not comparable unless they in fact require different skill, effort, and responsibility.

### **Step 3: Calculate Whether Men and Women Are Paid Equally.**

Within each comparable job grouping, calculate whether men and women are compensated equally. MEPA specifically recognizes that what qualifies as a sufficient self-evaluation will vary depending on the size of the employer. Accordingly, how this calculation (and other parts of the evaluation) are performed will vary from employer to employer. The following are intended only as general guidelines and should be used only as a starting point for determining whether employees performing comparable work are paid equally. Alternative approaches that are based on valid methodologies used or recommended by professional economists or statisticians, for example, may also be permissible so long as they are consistent with MEPA.

- For an organization with small, clearly defined groupings of comparable jobs and relatively simple pay structures, a simple analysis comparing the average wages earned by men and women in comparable jobs may be sufficient to identify where there are disparities. Such employers may be able to conduct this analysis themselves or can download the [AGO's Pay Calculation Tool](#) and follow the [Instructions](#) to complete this calculation.
- When the number of employees in a particular grouping of comparable jobs exceeds 30 or the pay structure is complex, a more detailed analysis likely is necessary. While not necessarily required by the statute, in many cases, conducting a statistical analysis will be the best way for employers to determine whether there are differences in pay between men and women in comparable jobs after controlling for other factors. In most cases, conducting such a statistical analysis will constitute good faith with respect to this step of any employer's self-evaluation of its pay practices.
- Employers should also consider outliers—employees whose compensation is significantly above or below the average—and determine both whether these employees should be included in the overall analysis of a particular job grouping and whether they are being paid in compliance with MEPA.
- Employers should also consider conducting one-to-one comparisons between male and female employees within the same comparable job grouping. Though there are a number of lawful reasons for paying employees within the same comparable job grouping differently (see Step 4, below), for purposes of complying with MEPA, each male employee within a comparable job grouping is a potential comparator for the female employees (and vice versa). It is not sufficient, therefore, to compare a female employee only to the “average” male employee performing comparable work.

Employers should consult with legal counsel about their options and what type of analysis is most appropriate for their organizations.

#### **Step 4: Assess Whether Differences in Pay Are Justified Under the Law.**

If your analysis identifies a gender-based pay differential(s), determine whether the differential can be explained by one (or more) of the six permissible factors specifically enumerated in MEPA. They are:

- (i) a system that rewards seniority with the employer;
- (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; and
- (vi) travel, if the travel is a regular and necessary condition of the particular job.

Where possible, consider assigning a numeric value to each factor that is relevant to your organization. For example, a merit system might be represented by performance ratings on a scale from 1 to 10.

- For smaller comparable job groupings (those with up to 30 employees), employers should look at similarly-situated male and female employees within each group to assess whether any differentials in pay are explained by these permissible factors. Such employers may be able to conduct this analysis themselves or can use the simple worksheet included with the [AGO Pay Calculation Tool](#) as a starting point.
- For larger comparable job groupings, a multi-variable regression analysis may be the most appropriate method of accounting for each of these factors and determining whether there are any gender-based differentials in pay that are not otherwise explained.
- All employers should be mindful of outliers—employees whose compensation is significantly above or below that of others performing comparable work—and determine whether paying those employees more or less is defensible under the statute.

#### **Step 5: Remediate Any Gender-Based Pay Differentials.**

Employers should take steps to remediate in a timely fashion any differentials in pay between men and women performing comparable work that are not justified by one or more of the permissible factors listed in the statute. In most cases where remediation is necessary, this will require adjustments in pay for some or all employees within a comparable job group. Such adjustments may follow a simple formula—e.g., providing all affected employees that same amount or percentage increase—or they may be more targeted. Keep in mind that employers may not reduce the wages of any employee solely in order to comply with MEPA.

Employers should develop and implement a remedial plan as soon as practicable upon completion of the self-evaluation. If an employer waits longer than six months to take remedial action, it risks having the self-evaluation used as evidence against it if an employee files a claim.

**Step 6: Adjust Pay Practices.**

Employers that identify unjustified pay differentials between men and women performing comparable work should attempt to determine the reason(s) for such differentials—e.g., supervisor discretion, starting salaries, raises over time, etc.—and take steps to prevent them in the future. Among other things, employers should consider implementing objective standards for setting starting salaries or hourly rates, and for applying raises and other adjustments. Employers should also consider making changes to job titles, descriptions, codes/bands/grades, etc. in order to better align job groupings. Finally, employers should consider conducting some form of self-evaluation on a regular basis (e.g., annually) to ensure that disparities do not recur over time.

## APPENDIX B: SAMPLE CHECKLIST—POLICIES & PRACTICES REVIEW

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This checklist is intended as a sample to guide employers in conducting a review of their existing policies and practices as they prepare for implementation of the amended Massachusetts Equal Pay Act, [M.G.L. c. 149, § 105A \(“MEPA”\)](#). This checklist does not qualify as a self-evaluation for the purposes of asserting an affirmative defense to a claim brought under the statute, nor does it set forth steps that employers are required to take under this law. This checklist is provided for informational purposes only.

1. Do you have an employment application form (either on paper or online) that requests salary history, including, for example, an applicant’s current salary? Yes / No
  - MEPA prohibits seeking wage or salary history information on an application. All forms should be revised to eliminate any request for this information.
2. Do you have a policy or practice of seeking salary history from job applicants during interviews or at other points during the hiring process? Yes / No
  - Employers should review all training manuals or other guides and revise them to remove any reference to such inquiries before an offer of employment with compensation is made.
  - In addition, all employees with hiring and interviewing responsibilities should receive training on the requirements of MEPA.
3. Do you have a policy or practice of taking an employee’s wage or salary history into account in setting starting compensation? Yes / No
  - MEPA makes clear that an employee’s wage or salary history will not be considered a valid basis for paying him or her less than an employee of a different gender performing comparable work.
4. Do you have a policy or practice of prohibiting employees from inquiring about, discussing, or disclosing wage information? Yes / No
  - Employers should review all employee handbooks and policies, applications, offer letters, nondisclosure agreements, and other similar documents to ensure there are no provisions that prohibit employees from inquiring about, discussing or disclosing information about either their own wages, or about other employees’ wages.
  - Employers should train all managers, supervisors, payroll and human resources employees on MEPA and the appropriate response to such inquiries.
  - Employers should identify all employees who will not be permitted to discuss other employees’ wages because their job responsibilities require or allow access such



information, and make sure those employees understand the restrictions that apply to them.

5. Do you have job titles and written descriptions for each position within your organization? Yes / No

➤ While MEPA does not require that you have job titles and written descriptions, they may—if drafted appropriately—be a useful tool in assessing which positions are comparable. Such descriptions should take into account the skill, effort and responsibility required of each position, as well as the working conditions under which each is performed.

6. Do you have a plan or policy that rewards an employee's length of service? Yes / No

➤ Employers should review policies and practices to ensure that any seniority system does not reduce seniority for time spent on leave due to a pregnancy-related condition or statutorily protected parental, family, or medical leave. Any such system should be applied in a uniform, gender-neutral way.

7. Do you have a plan or policy that provides for differences in employee pay, including bonuses or other incentives, based upon performance or merit ratings? Yes / No

➤ Any merit system should be based upon employee performance as measured against uniformly reviewed, legitimate, job-related criteria independent of gender-based factors. Employers using such a system should conduct regular employee evaluations or reviews.

8. Do you have a plan or policy pursuant to which you pay employees based on the quantity or quality of production, sales, or revenue? Yes / No

➤ A system that measures earnings by quantity or quality of production, sales, or revenue should quantify these factors and compensate for them in a uniform, objective, and gender-neutral fashion. This will not qualify as a permissible basis for paying employees performing comparable work differently unless the employer actually has such a system and has made compensation decisions in accordance with that system.

9. Do you pay employees performing comparable work differently based upon their work locations? Yes / No

➤ Geographic location is a permissible basis for pay differentials, provided that the different locations correspond with meaningfully different costs of living or differences in the relevant labor market from one geographic location to another. Employers should consider reviewing geographic pay differentials and conducting relevant research to ensure such differentials are consistent with this standard.

10. Do you have a policy or practice of paying employees who travel more than other employees who perform comparable work? Yes / No

- Travel is a permissible basis for pay differentials provided it is a regular and necessary condition of a particular job. Employers should consider conducting an audit to ensure that any employees paid on this basis are in fact traveling regularly and that doing so is necessary to the job.

## APPENDIX C: AN ACT TO ESTABLISH PAY EQUITY

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*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