Scribbles Squibs* #61 (April 20, 2018):

IS YOUR COMPANY READY FOR THE NEW MASSACHUSETTS PAY-EQUITY STATUTE THAT TAKES EFFECT ON JULY 1, 2018?

By Massachusetts Construction Attorney Jonathan Sauer

I. INTRODUCTION.

Massachusetts has had some form of equal pay law since 1945. In August of 2016, a new law was passed addressing pay equity that doesn't take effect until July 1, 2018. This law is tougher and stronger than existing law and Massachusetts employers would do well to study it and make their best efforts to conform their behavior and practices to its requirements, which will not be easy for the reasons to be discussed in this Squib.

The concept underlying this statute already has a special relationship with construction. As an example, for much public work, an employer (contractor) is required to have a certain percentage of female employees working for it. Similarly, a general contractor employer will be required to have a certain percentage of female-owned businesses working on its public projects. Public work would seem to make unnecessary this type of statute because, outside of the issue as to how one classifies a particular employee, that employee must be paid the prevailing wage irrespective of his/her gender. But, even here, 'classification' may have some room for interpretation, particularly for those subcontractors/general contractors pursuing the often dangerous strategy of trying to minimize the amount of prevailing wages which have to be paid. And, apart from this, a contractor employer will have to protect itself with regards to pay equity for its female employees who will not be paid the prevailing wage, such as home office personnel and female workers on private construction projects.

While I see myself, first and foremost, as a contracts attorney, specializing in construction contracts, I nonetheless see these issues within the overall context of business law. Construction is, after all, nothing but a specific business subset and it will be the rare construction business which will succeed without following general good business practices, which will relatively uniformly apply to any particular group of service businesses, of which construction is only one form of.

So, what this Squib will address is to summarize some of the basis provisions of this law, point out to some possible issues in the statute that are likely to cause problems and then close with some final remarks.

II. KEY PROVISIONS OF THIS STATUTE.

Preliminarily, when trying to understand what a statute's – particularly, a *new* statute's - requirements are, there is no substitute for simply reading the statute through several times. They are, after all, written in English even if, as legal writing, English that is somewhat convoluted. Therefore, for any reader who would like a copy of this new statute, simply send us an email and we'll provide you with a complete copy of this new statute.

The basic idea of this statute is that women performing 'comparable work' to work being performed by men should be paid the same wages. Sounds simple enough. And, fair enough. But, as with many things in this life, the devil is in the details.

For one thing, 'comparable work' doesn't necessarily mean that both jobs under review have the same job title. The statute defines 'comparable work' thusly: " 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." So, the work performed by a male 'janitor' and that performed by a female 'head hotel housekeeper' may actually be 'comparable work' for the purposes of pay equity irrespective of job titles.

Under the statute, differences in the wages paid to men and women will not be prohibited if the differences are legitimately based upon any of the following six criteria:

(1) If the difference in wages is based on a system that rewards seniority, provided that time spent on pregnancy-related conditions and under 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.

Under this statute, an employer who is paying a wage differential in violation of the statute cannot reduce the wages of any employee solely in order to achieve apparent compliance with this law. This is another way of saying that if a male is currently paid a higher wage than a female worker, the male's wages cannot be reduced to the female employee's wages to achieve an ostensible equality without there being a violation of this statute.

An employer who violates this section of the statute shall be liable to the employee in the amount of the employee's unpaid wages, and, for an additional equal amount of 'liquidated damages'. In other words, the employee will receive double damages. An agreement between an employer and an employee to work for less than the wage an employee is entitled to under this section shall not be a defense to an action. The court shall award in addition to the judgement awarded to the plaintiff, reasonable attorneys' fees and court costs to be paid by the defendant employer. And, the attorney general can also bring an action on behalf of one or more employees and, if successful, the costs and attorneys' fees shall be paid to the commonwealth.[1]

There is a three year statute of limitations within which to bring claims under this statute.

Under this law, it is now against the law for an employer to ask a prospective employee about that employee's prior wage or salary history. A prospective employer can seek to confirm that wage or salary history after an offer of employment has been made with compensation already negotiated but only with the employee's written permission.

Here is where this becomes a bit more complicated. And, this has to do with what an employer's liability will be under this act when it has made an effort prior to a claim being made under this statute to establish policies for the payment of equivalent wages.

If the employer has within the previous three years prior to the commencement of an action 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. that can be an affirmative defense raised by the defendant to liability under this act. 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 consistent with standard templates or forms issued by the attorney general.[2]

Now, if an employer can demonstrate that it has completed a self-evaluation 'in good faith' within the previous three years prior to the commencement of an action by an employee under this statute, and can demonstrate that 'reasonable' progress has been made towards eliminating wage differentials but cannot demonstrate that the evaluation was 'reasonable in detail and scope', then the employer shall not be entitled to assert this as an affirmative defense but shall not be liable for liquidated damages under this section.[3]

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.[4]

An employee is under no obligation to pursue any kind of a prior administrative claim or remedy as a prerequisite to filing a suit in court.

An agreement between an employer and an employee under which the employee agrees to work for a lesser wage will not be a defense for the employer in any litigation under this statute.

The Attorney General may issue regulations interpreting and applying this section.[5]

III. COMMENTS ABOUT SELECTED LIKELY ISSUES.

Time and space does not permit a listing and discussion of each issue that is likely to come up. So, we'll look at just a few of what may be the main issues with this statute.

We start with the idea that an employer has to pay male and female workers the same wage for comparable work unless the employer can demonstrate a reason not to pay comparable wages based on one or more of the six differentiating factors set forth above. It would appear that battles under this statute will be fought based on the apparent legitimacy of differences that can be established as to those six grounds. If I were trying to create a justification for not paying comparable wages, I would try to create as many exceptions possible with regard to those six grounds.

And, I would try to pay as much attention as possible to whether or not the activities of the employer are 'reasonable'.

A. The use of the word 'reasonable'.

For better or worse, the word 'reasonable' gets used several times in this statute, some of which examples have been set forth above. An employer's conduct in several regards is supposed to be 'reasonable'. Falling short of what is 'reasonable' will very likely have some difficult consequences for an employer. But, what does that word actually *mean*?

In the law, there are distinctions between a principle of law that is a 'standard' and a principle of law that is a 'rule'. Compliance with a 'rule' is much easier than compliance with a 'standard'. This is because with regard to a 'rule', no discretion is necessary to either understand it or comply with it while with a standard, there are necessarily elements of human judgment to understand it or comply with it. And, that judgment can vary from individual to individual without there being one clear, proper interpretation. Rules are much easier to understand.

Examples of 'rules'. Entering a dwelling place at night without invitation is burglary, a violation of a rule, which is law. Speeding also violates a rule which is law inasmuch as the only factual issue is how fast one is going in comparison with posted speed limits. Selling alcohol or tobacco products to minors is a violation of a rule which is a law. The only issues are what are the ages of those individuals trying to buy these products and then establishing, of course, that a business sold them these products. Not paying prevailing wages also violates a rule, which is a law. Once the classification for any particular worker has been established, the only factual issue is what that person was supposed to be paid as compared with what that person was actually paid.

A standard is much more complicated because it necessarily involves human judgment. For a standard, there is no clear absolute compliance or violation of that standard that can be anticipated in advance of a claimed violation. For a rule, there is.

And, one could take any four individuals and those four individuals could differ in opinion as to what is 'reasonable' and what is *not* 'reasonable' and none of them is clearly right or clearly wrong.

Let there be no misunderstanding. This is a punitive statute providing for punitive damages. Yet, with the word 'reasonable' used so many times in the statute, it is going to be difficult for any particular employer to be confident before a claimed violation that its anticipated compliance with the statute is 'reasonable'. This could have been improved upon greatly by providing some clear indications of what is reasonable and what is not reasonable under the statute, which, I submit, have not clearly been done. And, what is 'reasonable' might have been fleshed out somewhat better with regulations in place interpreting that statute at such point in time that the statute became enforceable. And, of course, having those 'forms and templates' from the Attorney General in place before such time as the statute's effective date would not only allow parties to gauge how 'reasonable' their behavior is but which would have been a great deal *fairer* to employers than is this statute without regulations, without forms and without templates. It's this absence of sufficient definitions and information which make this statute in its current form, a poor statute.

The goal of this statute should be to assist employers in paying comparable wages. Without this level of detail and information referenced above, the statute looks more like a vehicle for punishing employers rather than in supporting and assisting them. If Massachusetts does not at least sustain the appearance of being more pro-business, the problems of comparable wages will be lessened as jobs go to other states. States which have a greater pro-business interest and appreciation of their employment of their citizens. Who don't treat business, as Massachusetts often has/does, as being the bogeyman.

Please note that I am not saying there is anything wrong with the *idea* of this statute. I support the *idea* of the statute. But, I cannot support the sloppy *execution* of this statute. Because, this statute is not sufficiently clear and fair to the employers against whom it will be enforced and who will literally have to pay for its deficiencies.

For a punitive statute such as this one, one should be able to look at a book, a law, a regulation or a form and have a very good idea up front *before a claimed violation* that particular conduct either meets the requirements of a statute or doesn't. And, that does not exist here.

This is particularly so as, reportedly, there are only similar statutes nation-wide in New York and California and these are also recent statutes.

Massachusetts has a statute describing how statutes are to be interpreted:

M.G.L.A. 4 § 6

§ 6. Rules for construction of statutes

> "In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:. . .
> Third, Words and phrases shall be construed according to the **common and approved usage of the language**; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.
> Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter." (Emphasis added)

Is there a 'common and approved usage' as to the meaning of the word 'reasonable'? There isn't and, with regard to this statute, there can't be.

So, what is the meaning of the word 'reasonable'? What would be a 'reasonable' definition of the word 'reasonable'?

Looking quickly at Massachusetts judicial definitions, the cases I have seen only define 'reasonable' in the context of what is 'reasonable doubt', a standard purely applicable to claimed violations of crimes. Now, this statue is not a criminal statute. It is a civil statute. But, since 'reasonable doubt' only has meaning within criminal law, that definition is not likely to be of much use to us here.

What level of conduct is reasonable? What level is unreasonable? This very uncertainty defines a standard. And, a standard is something where different people looking at the same facts could come to different conclusions.

Was one driver whose car struck another car negligent? One jury could say 'yes'. Another jury could say 'no'. The decision depends on the application of human judgment. And, as we have seen more than once, the application of human judgment can be wrong. And, human judgment seems to be something that is exercised after the fact, not before the fact. It hardly serves as a vehicle for planning and plotting one's course.

The point I am trying to make is that this statute has certain consequences flowing from the word 'reasonable'. But, *what* is reasonable with regard to this statute? That is something that appellate courts will decide, in time, as cases wend their ways through the court system. Realistically, we won't start getting appellate definitions of the word 'reasonable' within the context of this statute for at least five years and, for decisions of any number, much longer than that. Until then, one court (judge) may find an employer's conduct to be 'reasonable' while another court (judge) might find that this same conduct to be 'unreasonable'.

Unlike the Legislature, I would like to offer some ideas as to how to arrive at a wage equality program that a court would after the fact see as being 'reasonable'.

In my view, good lawyers are conservative. If it were me, I would try to define what is 'reasonable' as might be agreed to by several individuals familiar with this area of the law and then go some distance *beyond* that definition. So, if an employer considers performance or activity at the level of "1X" to be 'reasonable', then I would try for performance at the level of '2X' or '3X'. In another words, if an employer honestly thinks that a certain wage equality plan is 'reasonable', he or she would do well to go well *beyond* just what it is that he or she feels meets that definition, particularly until such point in time as we have help from the courts or through an amendment to this statute as to what constitutes 'reasonable'. Because, as we have discussed, the use of the word 'reasonable' necessarily will require a certain amount of subjective evaluation of what one has done. And, to be on the happy side of such a determination, an employer should do more than it thinks constitutes a bare minimum if only to come out on the 'reasonable' side as will be determined by those who are likely to be tough on employers.

We can only hire as judges imperfect human beings, each with attitudes and opinions which will reflect their own experiences and their own views. And, let's face it. In Massachusetts, more likely than not, those attitudes and opinions are likely to be *liberal.*

B. The award of attorneys' fees to successful claimants under certain circumstances.

Massachusetts follows the 'American Rule' for the award of attorneys' fees, meaning that one does not collect them if successful unless they are provided for in the contract at issue or by statute, such as is the case under *this* statute. Without the application of either of these situations, the award of attorneys' fees in civil actions is done by describing them as 'costs'. And, the *statutory* attorneys' fees that can be awarded as costs to a victorious party are either $1.25 or $2.50! There are statutes expressly providing for this! Within the lower trial court – the district court – this statute is M.G.L.A. C. 261 § 26 and, for the superior court, this statute is M.G.L.A. C. 261 § 23.

When I look at an attorneys' fee provision, the last thing I am thinking about is that some attorney will try a case and win it, whether it is myself or someone else. The last statistic I have seen concerning civil trials in the superior court is that only about one percent of civil matters actually goes through a complete trial. So, more likely than not, the resolution of the case will be through some form of settlement.

So, the consideration of attorneys' fees will mostly – but not exclusively – deal with what happens with attorneys' fees if a matter gets settled. The party who will be getting paid may insist on them as a condition of settlement. In addition, I consider it to be prudent to evaluate any particular case as if it were going to be tried with a judgment issuing. Because, one never knows if any particular case will settle and, for that matter, at what point in the action the matter will settle. The longer a case is pending without resolution, the more likely that a party will insist on attorneys' fees as part of a settlement.

When I see a provision providing for attorneys' fees, it should be, in my view, a factor in any potential defendant's thinking that in terms of potential *exposure*, it may have to pay two lawyers in any particular matter: its own attorney and the plaintiff's attorney. In other words,

with such a statute, any evaluation of the potential liability of a defendant has got to be looked at *really hard.*

C. The use of the words 'liquidated damages' in this statute makes absolutely no legal sense.

This statute doesn't say women who recover under this statute will recover double *damages*. What it says is that they will recover an amount of money equal to the amount of damages they have suffered, to be paid as 'liquidated damages'. So, whether you say potato and I say potahto, they both amount to the same thing: the Plaintiff recovers double damages. As we know in construction, liquidated damages is an expression with a very specific meaning, applicable to the issue of 'delay damages', which wouldn't seem to have any application to the underpayment of wages.

Why doesn't the Legislature just say 'double damages' rather than 'liquidated damages'? Remember the old saw that two things you don't want to see made are laws and sausages. I've been involved with seeing how particular laws get passed. Some individual or interest group decides that it would like a law saying thus and so. So, they prepare the law and try to find a legislator to sponsor the law, someone to shepherd it through the legislative process. When the mechanics' lien law was substantially rewritten in 1996, the individual legislator doing this was a lawyer. And, after meeting with him for an hour or so, I came to the conclusion that he really didn't understand mechanics' liens very well.

So, why did the Legislature say 'liquidated damages' rather than 'double damages'? Who knows?

D. This law was passed on August 1, 2016 but not effective until July 1, 2018, nearly two years later.

Most laws that are enacted become official, enforceable laws within 90 days of their passage. For certain laws deemed to be of an emergency nature, they can go into effect on the very date of their passage.

For this particular law, the Legislature gave the business community almost two years to evaluate its practices as measured against the statutory requirements and to then come into compliance with the same.

This long period of time could very well be a double-edged sword, however. While the business community most likely appreciated having nearly two years to bring themselves into compliance, what this is likely to mean for particularly the first group of cases to go into litigation is that the judges are not going to be particularly sympathetic to businesses which they find have fallen short of the statutory mark because of the fact that they had nearly two years to come into compliance. I would expect these early results to be somewhat on the harsh side.

Massachusetts is a liberal state, more interested in the rights of individuals against businesses than might be the case in many other states. There will be a lot of judgments under

this law for double damages and attorneys' fees for successful claimants. This law should be taken *very* seriously.

A lot of HR consultants and lawyers specializing in this type of work are going to do very well under this law. It would seem more prudent to make an investment using these outside experts *before* any particular employer's program goes into the court system, where it is likely that it will be evaluated with a pro-employee attitude. Ben Franklin, a pretty smart guy, coined the expression that an ounce of prevention is worth a pound of cure. I submit that this is especially so with a punitive statute such as this one. Be willing to spend the money on developing a 'reasonable' plan. It will probably save you money in the long run.

E. There is an additional advantage for employers who have their the plan of self-evaluation prepared in consultation with an attorney or approved by an attorney.

Under certain circumstances, the adequacy of an employer's self-evaluation might be 'discoverable' in some form of subsequent litigation under another statute such as, for example, the prosecution of a case against the employer under a federal statute. If, however, an employer has the plan of self-evaluation approved by an attorney or developed by an attorney, then issues relating to that plan might not be 'discoverable' in future litigation, as they should be protected by the attorney-client privilege.

IV. CONCLUSION.

About fifty years ago, Good Housekeeping published a groundbreaking article, "Women Are People, Too," written by Betty Friedan.

Women *are* people, too. It's only right that women earn equal pay for comparable work. And, make no mistake in thinking that there won't be many awards under this statute for double damages and attorneys' fees because there will be *plenty* of awards.

As a business lawyer, I hope that this goal of equal pay can be achieved with as little litigation as possible. To achieve this goal will require businesses to be more pro-active on this issue than they may have been in the past on other issues. They have to put mechanisms in place to accomplish this goal *now,* as, ready or not, this statute will represent an enforceable law only two months from now.

In short, businesses have to be in a position to convince courts down the road by what they do today that their plans and procedures for equal pay for women are (hopefully, more than) 'reasonable'.

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* A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data

problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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[1] Since assistant attorneys' general are employees of the state, paid on the basis of a salary, how will attorneys' fees payable to the Commonwealth be figured? Would they be figured on how much time and effort the assistant AG put

into the case, thus reimbursing the Commonwealth for an equivalent amount of salary? Or, would the attorneys' fees to be paid to the Commonwealth be based on some formula attempting to make the amount of those attorneys' fees payable based on what a comparable amount of attorneys' fees would be paid to a private attorney? Not answered under the statute. There may be similar provisions under the General Laws as to this issue, although I cannot remember every having seen one.

[2] Query: how would an employer have any idea as to how to comply with this statute on its own? Within the United States, reportedly, there are only similar programs in two other states, New York and California, and they are both recent statutes, also. So, suggesting that an employer develop a self-evaluation plan of 'its own design' seems rather sophomoric. And, although an employer can pattern its self-evaluation program based on 'templates or forms provided by the attorney general', there is no obligation on the part of the attorney general under this statute to develop and provide any such templates or forms. For that matter, the statute is silent as to *when* such 'templates or forms' will/would be issued. Wouldn't it be *fairer* to have the templates and forms and, for that matter, comprehensive governing regulations already prepared so that at such time as the statute becomes binding, the employers would have a maximum chance of complying with that statute? Put another way, it almost looks as if the Legislature in its rush to get this statute passed, didn't care that the various aids and assistances the state *could* give employers to help them comply with it are, for some reason, *unimportant.*

[3] So, if the employee does not recover any 'liquidated damages' but does recover some unpaid wages, does that mean that the employer will not have to pay the employee's attorneys' fees? The statute is not clear.

[4] OK. So, the employer has not completed a self-evaluation under this statute. So, presumably, this could not be commented upon by plaintiff's counsel in making, for example, closing statements to a jury, as evidence of wage inequality. Or, a plaintiff's attorney also might not be entitled to a jury instruction that a failure to complete such a self-evaluation is some evidence of wage inequality bias on the part of the employer. However, if the employer has *not* conducted such a self-evaluation, what would be the evidence that the employer's conduct complied with this statute? Since the concept of this self-evaluation only arises under this statute, it is more than likely that an employer would not otherwise have previously performed a self-evaluation, as there would have been no point to it.

[5] The word 'may' is permissive, not mandatory. Put another way, there is no requirement for the Attorney General to issue regulations with regard to this statute. Yet, many statutory schemes have extensive regulations published in the Code of Massachusetts Regulations (CMR) or within unpublished regulations. For a potential expensive (to businesses) statute such as this one, which had no time imperative requiring a hasty enactment, not to have such resources, in addition to not having AG-approved forms and templates, in place on the first day the statute is to take effect – if not sooner - seems inexcusable. As is oft-repeated, no one said life is fair. So, for businesses who are the target of this statute, remember that when the going gets tough, the tough get *drafting* (their *reasonable* plans for wage equality).