

EXPERT ANALYSIS

New Equal-Pay Obligations for Minnesota Government Contractors

By David Goldstein, Esq.
Little

Minnesota Gov. Mark Dayton, D, celebrated Mother's Day by signing the Women's Economic Security Act, a nine-part law intended to break down barriers for women in the workplace.¹ Of particular importance is a provision amending the Minnesota Human Rights Act to require certain state contractors periodically to obtain a certificate from the Minnesota Department of Human Rights regarding compliance with equal-pay laws.

This requirement will apply to businesses with state contracts or agreements for goods or services² in excess of \$500,000 and with 40 or more full-time employees either in Minnesota or in the state where the company has its primary place of business.

This requirement will not, however, apply to most state contracts regarding insurance, health care or the reimbursement of health care services.

BASIC REQUIREMENTS

Minnesota contractors have long been required to obtain certificates of compliance from the MDHR confirming that their business has filed an affirmative action plan and related reports. Under this new law, covered businesses will be required to obtain a separate equal-pay certificate as well.

In order to do so, a business must pay a \$150 filing fee (in addition to the \$150 fee already required to obtain an affirmative action compliance certificate) and provide the MDHR with a statement signed by the chairperson of the board or chief executive officer of the business, stating:

- (1) "that the business is in compliance with Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Minnesota Human Rights Act, and the Minnesota Equal Pay for Equal Work Law.
- (2) "that the average compensation for its female employees is not consistently below the average compensation for its male employees within each of the major job categories in the EEO-1 employee information report³ for which an employee is expected to perform work under the contract, taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job or other mitigating factors.
- (3) "that the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex.
- (4) "that wage and benefit disparities are corrected when identified to ensure compliance with the laws cited in clause (1) and with clause (2).
- (5) "how often wages and benefits are evaluated to ensure compliance with the laws cited in clause (1) and with clause (2)."

As part of its equal-pay compliance statement, the business is required also to identify and describe the “approach” that it uses to set compensation and benefits (for example, market pricing, satisfaction of prevailing wage requirements or union contract terms, performance pay systems or internal analysis).

When the business has filed the fee and required statement, the MDHR then *must* issue the equal-pay certificate within 15 days of receiving the application. The statute does not give the MDHR discretion to deny a certificate that, on its face, complies with the statute.

The MDHR does, however, have authority separately to audit the company’s compliance.

As part of an audit, a business may be required to provide the following information, which is to be aggregated by EEO-1 category⁴ and limited to those employees expected to perform work under the contract:

- The number of male employees.
- The number of female employees.
- The average annualized salaries paid to male employees and to female employees, in the manner most consistent with the employer’s compensation system, within each EEO-1 category.
- Information on performance payments, benefits or other elements of compensation, in the manner most consistent with the employer’s compensation system, if requested by the commissioner of the MDHR as part of a determination as to whether these elements of compensation are different for male and female employees.
- The average length of service for male and female employees in each EEO-1 category.
- Other information identified by the business or by the commissioner, as needed, to determine compliance with the statement supporting the application for an equal pay certificate.

The Women’s Economic Security Act does not appear to expand or alter the MDHR’s existing authority to audit state contractors or to enforce the laws prohibiting discrimination, with one exception: It purports to give the MDHR authority to audit compensation with respect to non-Minnesota employees who perform work under the state contract.

It is not clear whether this attempt by the state of Minnesota to assert jurisdiction over individuals who do not live or work in the state will be enforceable.

POLICY IMPLICATIONS

The original version of WESA as proposed in the Minnesota House of Representatives would have required certain state contractors to engage in “comparable worth” analyses. The version of the bill signed into law, however, includes no such requirements.⁵ Instead, the new statute simply requires state contractors periodically to compare the compensation paid to women not only vis-à-vis men performing the same jobs, but also within the broader job categories used for EEO-1 reporting.⁶ Such an exercise will reveal the extent to which men and women may tend to be concentrated in different jobs and suggest opportunities to increase pay equity by seeking to recruit and retain women in higher-paying jobs.

Otherwise, WESA’s pay equity provisions do not change existing laws, under which a claim of pay discrimination on the basis of sex fails if the disparity in pay is due to a factor or factors other than sex. These include differences in job duties, supervisors, location of the work, productivity, seniority, education, experience or market conditions.

WESA’s pay equity provisions are consistent with established principles that authorize businesses, in reviewing differences in compensation between female and male employees, to take into

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account factors “such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors.”⁷

In terms of enforcement procedures, elements of a claim, methods of proof or defenses and remedies, the Minnesota Legislature has no authority to make changes to Title VII or the federal Equal Pay Act.

WESA does not make any changes to the Minnesota’s Human Rights Act or to the state’s equal-pay statute with regard to enforcement procedures, elements of a claim, methods of proof, defenses or remedies.⁸

ACTION ITEMS

Although the legislation does not change the substantive obligations of employers, it imposes new administrative costs and will require employers to provide sensitive compensation data to the MDHR, creating potential concerns regarding the security of that data.

In addition, while most businesses devote substantial attention to compliance with all applicable laws (including laws barring discrimination), requiring the chairperson of a company’s board or the CEO personally to represent that the company is in compliance may be viewed as problematic, even by companies confident they are complying with all applicable laws.

Given the additional burdens that arise under WESA, some companies may conclude that a contract with the state of Minnesota is not worth the administrative costs.

CONCLUSION

Equal-pay certification remains a hot topic in the Minnesota capital. Supporters and opponents of the legislation have vowed to seek further changes to the law in future sessions. Employers that care about this issue will want to stay informed regarding future proposals and make sure their voices are heard if the Legislature revisits WESA after the November election.

NOTES

¹ For a general overview of the new law, see Shirley Lerner and David Goldstein, *Minnesota Women’s Economic Security Act Becomes Law*, LITTLER ASAP (May 16, 2014), available at <http://bit.ly/1lCHbzY>.

² As initially signed into law, an equal-pay certificate was required in connection with any “contract or agreement” with the state in excess of \$500,000. Only days later, the law was amended to apply only to contracts or agreements for goods or services. Therefore, businesses receiving grants from state agencies or entering into agreements with the state that are not for goods or services will not be required to obtain an equal-pay certificate.

³ The act refers to the “EEO-1 employee information report.” This presumably means the Employer Information Report EEO-1, commonly known as the EEO-1 Report. Employers with 100 or more employees are required to file annually an EEO-1 report with the U.S. Equal Employment Opportunity Commission’s EEO-1 Joint Reporting Committee. The reported data is also made available to the Office of Federal Contract Compliance Programs. The form requires employers to report the number of employees in each of 10 different job categories (see note 4 below) by race and sex. Federal contractors with prime or first-tier contracts of \$50,000 or more and 50 or more employees are also required to file the report.

⁴ The EEO-1 categories are executives and senior officials and managers; first level officials and managers; professionals; technicians; sales workers; administrative support; craft workers; operatives; laborers and helpers; and service workers.

⁵ “Comparable worth” goes beyond the idea of “equal pay for equal work” and replaces free labor markets with systems under which all jobs are evaluated and given points according to the level of knowledge and responsibility required to do the job. Employers must then adjust employees’ compensation whenever women are consistently paid less than men for jobs with similar points. See, e.g., Minn. Dep’t of Mgmt. & Budget, Pay Equity Resources, <http://bit.ly/1ilJjob>. Although the concept of comparable worth has been around for 30 or 40 years, it has generally been criticized by economists and rejected by policymakers. Minnesota is one of the only jurisdictions ever to implement any form of comparable worth policy, adopting in 1984 a law requiring local governments to “establish equitable compensation relationships” by Dec. 31, 1991. In explaining how comparable worth works, Minnesota’s Department of Management and Budget offers the example of a delivery van driver (a position mostly held by men), which has a job evaluation rating

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of 117 points, and a clerk typist (a position mostly held by women), which also has a rating of 117 points. The drivers in this example are paid \$1,900 per month and the typists are paid \$1,400 per month. Under Minnesota's law, a covered employer would have to increase the monthly pay of the typists to match that of the drivers. *Id.* By contrast, Title VII and other laws prohibiting discrimination in pay permit comparisons only between individuals holding the same jobs, the idea being equal pay for equal work.

⁶ See note 4, *supra*.

⁷ Women's Economic Security Act, Sec. 6, subd. 2(a)(2).

⁸ In a May 7 letter to members of the Women's Economic Security Act Conference Committee, the MDHR commissioner confirmed that the "administration ... interprets the proposed language in the bill only to ensure contractors comply with equal-pay laws."



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