

May 19, 2014

Minnesota Imposes New Obligations on State Government Contractors

By David Goldstein

Minnesota Governor Mark Dayton celebrated Mother's Day by signing the Women's Economic Security Act (WESA), a nine-part law intended to break down barriers for women in the workplace.¹ Of particular importance to state contractors is a provision amending the Minnesota Human Rights Act to require certain state contractors to obtain periodically a certificate from the Minnesota Department of Human Rights (MDHR) 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 40 or more full-time employees either in Minnesota or in another state where the business has its primary place of business. This requirement will not, however, apply to most contracts with the state regarding insurance, health care, or the reimbursement of health care services.

Basic Requirements

As a condition of doing business with the state, contractors have long been required to obtain certificates of compliance from the MDHR confirming that the contractor has filed an affirmative action plan and related reports. Under this new law, covered businesses will now be required to also obtain a separate equal pay certificate.

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

1. 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. 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

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://www.littler.com/publication-press/publication/minnesota-womens-economic-security-act-becomes-law>.

2 As initially signed into law, an equal pay certificate was to be 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.

employee information report 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. the business does not restrict employees of one sex to certain job classifications and makes retention and promotion decisions without regard to sex;
4. wage and benefit disparities are corrected when identified to ensure compliance with the laws cited in clause (1) and with clause (2); and
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).

Upon filing 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 to separately 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 category and limited to just those employees expected to perform work under the contract:

1. number of male employees;
2. number of female employees;
3. 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;
4. 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 as part of a determination as to whether these elements of compensation are different for male and female employees;
5. average length of service for male and female employees in each EEO-1 category; and
6. 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.

With one exception, this legislation does not appear to expand or alter the MDHR’s existing authority to audit state contractors or to enforce the laws prohibiting discrimination. The one exception is that the legislation 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 House version of this legislation would have required certain state contractors to engage in “comparable worth” analyses. The final version of the bill that has been signed into law includes no such requirements.³ Instead, the new statute simply requires state contractors

3 “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., <http://www.beta.mmb.state.mn.us/pay-equity>.

Although the concept of comparable worth has been around for 30 or 40 years, it has been generally criticized by economists and rejected by policymakers. Minnesota is one of the only jurisdictions to ever implement any form of comparable worth policy, having adopted in 1984 a law requiring local governments to “establish equitable compensation relationships” by December 31, 1991. In explaining how comparable worth works, Minnesota’s Department of Management and Budget offers the example of a delivery van driver position (mostly held by men) which has a Job Evaluation Rating of 117 points and a clerk typist position (mostly held by women) which also has a Job Evaluation 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 one of equal pay for equal work.

to compare periodically the compensation being paid to women not only vis-à-vis men performing the same jobs, but also within the broader job categories utilized for EEO-1 reporting.⁴ 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 existing laws, a claim of pay discrimination on the basis of sex fails if the disparity in pay is due to a factor other than sex. Such factors may include, among other things, 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 account factors "such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors."

In terms of enforcement procedures, elements of a claim, methods of proof, defenses, and remedies, the Minnesota legislature has no authority to make changes to Title VII or the federal Equal Pay Act and the WESA does not make any changes in these areas to Minnesota's Human Rights Act or equal pay statute.⁵

Action Items

Although the legislation does not change the substantive obligations of employers, it does impose 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 the laws barring discrimination), requiring the chairman of a company's board or CEO to personally represent that the company is in compliance may be viewed as problematic even by companies that are confident they are complying with all applicable laws.

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

Finally, equal pay certification remains a very hot topic at the Minnesota state capital. Both 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 that their voices are heard in the event the legislature revisits this issue after the November election.

[David Goldstein](#) is a Shareholder in Littler's Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, or Mr. Goldstein at dgoldstein@littler.com.

4 The EEO-1 categories are (1) executives and senior officials and managers, (2) first level officials and managers, (3) professionals, (4) technicians, (5) sales workers, (6) administrative support, (7) craft workers, (8) operatives, (9) laborers and helpers, and (10) service workers.

5 In a May 7 letter to members of the Women's Economic Security Act Conference Committee, the MDHR Commissioner confirmed that the "Administration, as I have previously testified in both the House and Senate, interprets the proposed language in the bill only to ensure contractors comply with equal pay laws."