INSIDE THE LAW

Winter 2017

CONTENTS

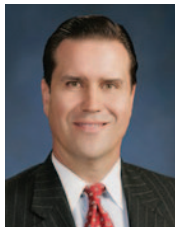
Fletcher Tilton PC
Attorneys at law

Worcester · **Framingham** · **Cape Cod** | www.fletchertilton.com

Find us on Facebook Connect with us on LinkedIn

MASSACHUSETTS PASSES PAY EQUITY ACT

By Joseph T. Bartulis, Esq.
508-459-8214 | jbartulis@fletchertilton.com



Most employers have been focusing on the changes to the Exempt Employee Classifications for overtime that were to have gone into effect on December 1, but another important act was also signed into law this year. It is called the Massachusetts Pay Equity Act. Although the Pay Equity Act will not go into effect until July 1, 2018, employers should familiarize themselves with the law and take whatever actions may be necessary to ensure they are compliant with the law by that date. Here are the key elements of the Pay Equity Act.

SAME PAY FOR "COMPARABLE WORK"

The cornerstone of the Pay Equity Act is its requirement that both men and women be paid the same rate for "comparable work." This "comparable work" standard is different from the standard in the federal Equal Pay Act, which requires equal pay for the "same work." As to what constitutes "comparable work," the statute defines that phrase as work which is "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." The law does not provide further guidance on how it defines "substantially similar" in the context of "comparable work."

PAY VARIATIONS ALLOWED UNDER CERTAIN CIRCUMSTANCES

Assuming a man and woman perform "comparable work," an employer may still pay those two workers different rates if there are distinguishing characteristics between the two employees and those distinguishing characteristics are among those specifically enumerated in the Pay Equity Act. The act allows employers to pay employees differently, based on the following factors:

- Seniority
- Merit
- Production, sales, or revenue quantity or quality
- Geographic location
- Differences in education, experience, or training (so long as reasonably related to the job being performed)
- Differences in amount of job-related travel

EMPLOYEES MAY OPENLY DISCUSS WAGES

Under the Pay Equity Act,

- Massachusetts employers may no longer prohibit employees from discussing or disclosing their wages among themselves.
- Employees are not *required* to provide their pay information to another employee who may ask.
- Employers are not obligated to provide information about one employee's pay to another employee or any other third party.
- Employers may prohibit their human resources staff from disclosing employee pay information.

The act prohibits employers from requesting prior or current wage information from prospective employees or applicants.

EMPLOYERS MAY NOT ASK ABOUT SALARY HISTORY

- Most important, the act prohibits employers from requesting prior or current wage information from prospective employees or applicants. (There has been some discussion about how this provision will make it difficult for employers to determine the proper rate of pay needed to attract a prospective employee without overpaying.)
- However, if an applicant volunteers what he or she earns, the prospective employer can request verification of that information.

COURT ACTIONS

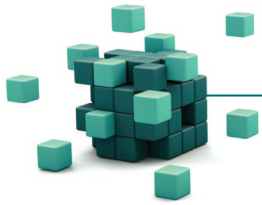
Other discrimination claims brought in Massachusetts generally require that a person first bring the case before the Massachusetts Commission Against Discrimination (MCAD). But the Pay Equity Act allows both employees and applicants to bring wage disparity cases directly to court without first having to

exhaust administrative remedies at the MCAD. The statute of limitations for cases brought under this act is three years from the date of the alleged violation. Also unlike other discrimination claims, the Pay Equity Act contains an affirmative defense for employers to defend pay inequity claims. For an employer to avail itself of the affirmative defense 1) the employer must have conducted a self-evaluation of its pay practices within the three years immediately preceding the filing of the case; and 2) assuming any gender pay disparities were found, the employer must be making reasonable progress toward eliminating those pay gaps. Employers that have not conducted self-evaluations will not be subjected to any negative inference in the court case for not having done so.

The remedy to correct pay disparities is not to reduce the wages of a higher-paid male. The statute contemplates such action and expressly prohibits employers from doing so. The statute does not provide any guidance regarding how an employer should conduct its self-evaluation or how quickly the progress must be made. All that is required is that the progress be reasonable. The statute allows, but does not require, the Attorney General's Office to generate regulations regarding the self-evaluation protocols and other aspects of the Act. As of this writing, the Attorney General has not indicated whether any such regulations or guidance will be forthcoming. If the employee or applicant prevails in a pay disparity suit, the possible remedies include the unpaid wages, liquidated damages equal to the amount of the unpaid wages, reasonable attorney's fees, and certain other costs.

SUGGESTIONS FOR MASSACHUSETTS EMPLOYERS

While July 1, 2018 may seem like a long way off, identifying and correcting any pay disparities may take a long time. With that in mind, employers should begin preparing for the law sooner rather than later by doing a pay practice audit of their organization. Although there is language in the statute affording protections for employers that act in good faith when conducting their self-evaluation, we suggest employers consider having their attorney assist with the audit so that the findings of the audit are protected by the attorney-client privilege. This way, the findings are not subject to disclosure in a legal proceeding, which constitutes a potentially valuable protection for employers. Next, we suggest that employers review and analyze their pre-employment practices, including applications, interview questions, etc. to make sure that they do not, on July 1, 2018, contain any requests for current wage information that the new law will prohibit. In addition, employers may wish to re-think their methodology for determining the ideal rate-of-pay offers they make to prospective employees, since asking for their salary history will no longer be permitted. **FT**



FLETCHER TILTON BUILDING BLOCKS

First in a series of articles about how to avoid construction litigation

PAYMENT BOND CLAIMS ON PUBLIC CONSTRUCTION PROJECTS

By Adam C. Ponte, Esq.
508-459-8012 | aponte@fletchertilton.com

Those of us in the construction business, whether as a project owner, general contractor or subcontractor/supplier, know all too well that payment claims or set-off claims are to be expected throughout a project's life cycle. Despite the best efforts of a general contractor that timely submits requisitions, or a subcontractor that timely and properly completes its work, monetary claims permeate even the best-run construction projects. This article focuses on public construction projects in Massachusetts, and the critical rules surrounding claims made on the project payment bond. Knowledge of these rules is particularly helpful for the general contractors that provide the bond and the subcontractors and suppliers that seek claims under said bond.

I. THE PAYMENT BOND STATUTE FOR PUBLIC CONSTRUCTION PROJECTS

In Massachusetts, a general contractor is ordinarily required to issue a payment bond to the project owner if the construction project's value exceeds $25,000. (See M.G.L. c. 149, § 29). The law also requires that the bond must cover at least 50% of the total contract price. Prior to 2010, general contractors were required to furnish bonds when the project value exceeded $2,000 for local governments or $5,000 for contracts with the state. Presently, however, $25,000 is the threshold requirement for all public construction projects when determining whether a payment bond is required. This threshold covers all construction projects where a local government or the state is the project owner. (See Changes to Municipal Procurement Laws, July 27, 2010, http://www.mass.gov/ig/publications/guides-advisories-other-publications/changes-to-municipal-procurement-laws-july-2010.html).

II. SUBCONTRACTORS AND SUPPLIERS, AT ALL LEVELS, ARE COVERED BY THE PAYMENT BOND STATUTE

Under M.G.L. c. 149, § 29, all subcontractors and suppliers on a public construction project that meets the minimum threshold value are entitled to assert claims against the project's payment bond. If you are a second, third or even a fourth level subcontractor, and you have not been timely and fully paid, then you may seek payment under the bond. General contractors and subcontractors all must be aware of the critical notice requirements under the law. Failure to abide by these requirements could be fatal to a subcontractor's claims on the payment bond, or, conversely, the ultimate defense for a general contractor to avoid payment obligations under the bond.

All subcontractors and suppliers on a public construction project that meets the minimum threshold value are entitled to assert claims against the project's payment bond.

A. FIRST-LEVEL SUBCONTRACTOR

A "first level" or "first tier" subcontractor is a contractor that has a direct contract with the general contractor. If the general contractor on a public construction project has failed to pay a first-level subcontractor within 65 days after payment was due, the subcontractor may immediately bring an action in the Massachusetts Superior Court to assert claims against the payment bond.

B. SECOND LEVEL AND LOWER LEVEL SUBCONTRACTORS

A "second level" or "second tier" subcontractor, or any lower-level subcontractor, is a contractor that does not have a direct contract with the general contractor. Any second level or lower level subcontractor must give written notice of its claim on the payment bond within 65 days after the date on which the subcontractor last performed work on the project. If the subcontractor fails to give the general contractor clear and explicit written notice within 65 days of completing its work, the subcontractor likely is foreclosed from bringing any payment bond claims.

Under M.G.L. c. 149, § 29, the written notice of a claim on the bond must, at a minimum, state: (i) the monetary amount claimed; (ii) an explicit identification of the subcontractor making the claim; and (iii) an explicit identification of the party that received the labor or materials from the aggrieved subcontractor.

If the subcontractor has not been fully paid for its project work within 65 days after payment was due, and said subcontractor had provided explicit notice of the bond claim within 65 days of last performing its work, then the subcontractor may file suit in the Massachusetts Superior Court to assert claims on the payment bond.

C. ONE YEAR STATUTE OF LIMITATIONS

Any and all subcontractors and suppliers, on any level, must bring an action to assert claims on the payment bond within one year of last performing on a public construction project. The one year statute of limitations will be calculated from the date which the subcontractor or supplier last performed on or furnished materials to the project. The project's overall substantial completion date or last date on which the general contractor furnished work is irrelevant to this analysis.

III. CONCLUSION

It is important to understand the rules surrounding payment bond claims on public construction projects. Knowing your rights or duties under M.G.L c. 149, § 29 could make the difference, depending on your role, in building a defense against a subcontractor's inappropriate claims, or in creating leverage against a general contractor who has not fully paid you as a subcontractor for properly completed work. **FT**

PLEASE COME TO THE PRINCIPAL'S OFFICE

An unusual day in the life of an FT attorney

By Samantha McDonald, Esq.
508-459-8026 | smcdonald@fletchertilton.com

Earlier this year, I was invited to participate in the Principal for a Day program run by the Worcester Educational Collaborative, an independent non-profit advocacy group that facilitates private partnerships with Worcester Public Schools to "enhance the quality of public education in Worcester and the quality of our common life." I found the experience to be enlightening and personally moving.

I was invited to shadow Dr. Susan O'Neil, then-principal of Worcester Arts Magnet School (WAMS), which serves approximately 400 children, from age 3 through sixth grade. I recalled what I thought a principal did when I was in elementary school: sit in the office and mete out punishments to children who did not obey the rules. The reality was very different.

The arts magnet schools in the district incorporate the arts into most areas of education, tying together what can seem like disparate disciplines. Children receive a more integrated education because they are shown the connections between music and math, painting and history. At WAMS, the children receive education in visual arts, music, dance and drama every week. I saw adorable wee 3-year-olds singing and learning proper breathing, and fifth graders teaching the hot dance move "the Dab" to their teacher in a dance class.

Dr. O'Neil was a bundle of energy and in constant motion, walking through the school and talking to children and staff. She knows the name and the back story of every child and made a specific effort to introduce me to a boy, about 8 years old, who wants to be a lawyer. When she excused the boy from class to meet me in the hallway, Dr. O'Neil explained who I was, and the boy offered me a handshake. When asked why he wants to be an attorney, he was direct and articulate: "I want to help other people fix their problems so they are not in trouble with the police." His composure, ability to interact with adults and manners are all taught or reinforced at WAMS. Later, I learned that his family is homeless; he knows no lawyers. Dr. O'Neil knew the boy had a goal and made the effort to connect him with me so he could meet an attorney in person and she could reinforce the concept of education as a way to a better life.

Dr. O'Neil worked tirelessly so that the school could provide programming well beyond its budget, including before- and after-school programming, tutoring, special classes, homework help, and clubs. A grant she obtained from the Metropolitan Opera provided a professional opera singer to teach the kids vocal techniques. Dr. O'Neil made sure that, in addition to receiving a stellar education, children were fed and clothed; were taught confidence, manners and respect; and knew that responsible adults cared for them and provided stability.

The dedication, skill and stability of the WAMS staff are reflected in the statistics:

- WAMS has an out-of-school suspension rate of 0.02% compared with 2.9% for the district elementary schools as a whole.
- WAMS is a Title I school, meaning at least 40% of the students qualify for free lunch based on annual household income at or below $31,590 for a family of four. Despite dealing with a predominantly poverty-affected student body, WAMS manages to be a Level 1 school in a district rated Level 4. The levels range from 1 to 5, with 1 being the best.

The Worcester schools are faced with significant challenges. For example, at North High,

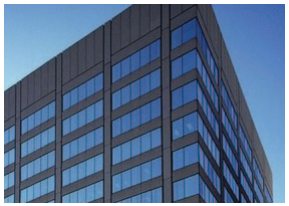
- 88% of the students live in poverty.
- English is a second or third language for about one-third of the students.
- 33 foreign languages are spoken at the school.
- Many students are new to the U.S. and require assistance with learning American customs and expectations.

Imagine trying to determine a new student's proper grade level when you are utterly unfamiliar with educational standards in his or her place of origin. Imagine trying to communicate with a student who speaks no English. Imagine trying to provide a safe, respectful and welcoming environment when students do not speak the same language or share culture or customs. Imagine trying to do all this with little money and for a student body whose parents cannot afford to contribute.

What can be done to help these deserving students?

Donate money to the principal's fund, help a student pay for college education, take in students as interns or volunteer as a mentor. Find the name and contact information of any principal at www.worcesterschools.org and ask him/her how you can best help. Learn more at www.wecollaborative.org. Worcester Public Schools' motto is "TEAM - Together Everyone Achieves More." Join their team!

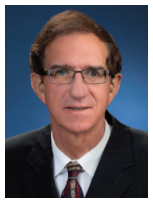
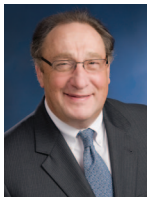
FT



FIRM NEWS

ATTORNEYS RECOGNIZED BY BEST LAWYERS® FOR 2017



Richard Barry, Jr.
Trusts & Estates

Phillips Davis
Corporate Law

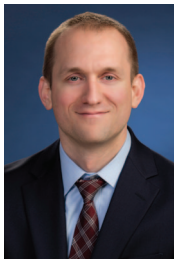
Mark Donahue
Real Estate

Dennis Gorman
Trusts & Estates
Tax Law

Frederick Misilo
Elder Law

Five Fletcher Tilton attorneys have been designated as *Best Lawyers* based on an exhaustive peer-review evaluation. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in Best Lawyers is considered a singular honor. *Corporate Counsel* magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

FLETCHER TILTON WELCOMES ATTORNEY JESS OYER TO THE FIRM

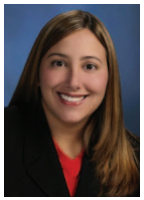


Attorney Jess Oyer joined Fletcher Tilton PC this fall as part of the firm's litigation department. Jess graduated from The George Washington University Law School in Washington, DC in 2011. While in law school, Jess worked both in the Office of the General Counsel for the U.S. Dept. of Energy and for U.S. Magistrate Judge Beshouri.

Jess works out of the firm's Worcester office and can be reached at 508-459-8019 or joyer@fletchertilton.com

ATTORNEYS ON THE 2016 SUPER LAWYERS® LIST



Richard Barry, Jr.

Mark Donahue

Robert Dore, Jr.

Marisa Higgins
(Rising Star)

William Jalkut

Samantha McDonald
(Rising Star)

Six Fletcher Tilton attorneys have been selected for recognition by *Super Lawyers*, including two *Rising Stars*. Each candidate is evaluated annually on 12 indicators of peer recognition and professional achievement.

Rising Stars must be less than 40 years old or in practice for less than 10 years. While up to 5% of the lawyers in the state are named to Super Lawyers, no more than 2.5% are named to the Rising Stars list.

LITIGATION ATTORNEYS TINSLEY AND PONTE DEFEAT ABUTTER'S EFFORT TO STOP CLIENT'S CONSTRUCTION PROJECT


Patrick Tinsley

Adam Ponte

Patrick C. Tinsley (an Officer at the firm) and Adam C. Ponte (an Associate at the firm) recently defeated an effort by an abutting condominium association to block any further construction activity by the firm's client.

The client was in the midst of renovating a building in Boston's Back Bay neighborhood. The building shared a party wall with the abutter's condominium association. The abutter filed a lawsuit in the Suffolk County Superior Court alleging that the client's construction activity was damaging a party wall. The abutter requested an emergency injunction designed to stop the project in its tracks. Attorneys Tinsley and Ponte, on short notice, presented expert testimony by engineers refuting the allegations and submitted evidence that all construction was compliant with city permits. Following a multi-day hearing, the presiding judge rejected the abutter's claims and the project will now proceed to completion.

FletcherTilton PC
Attorneys at law

The Guaranty Building
370 Main Street, 12th Floor
Worcester, MA 01608-1779

UPCOMING SEMINARS

Jan. 24

SPECIAL NEEDS PLANNING - COMPLEX PROBLEMS, SIMPLE SOLUTIONS
Topic Focus: Mental Illness
Time: 6:00 p.m.
Location: Framingham, MA

Jan. 31

SPECIAL NEEDS PLANNING - COMPLEX PROBLEMS, SIMPLE SOLUTIONS
Topic Focus:
Developmental Disabilities
Time: 12:00 p.m.
Location: Framingham, MA

For more details, visit our website: FletcherTilton.com/seminars-events