

**HOUSE . . . . . No. 4509**

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**The Commonwealth of Massachusetts**

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House of Representatives, July 13, 2016.

The committee on Ways and Means to whom was referred the Senate Bill to establish pay equity (Senate, No. 2119), reports recommending that the same ought to pass with an amendment striking out all after the enacting clause and inserting in place thereof the text of House document numbered 4509 [Representative Holmes of Boston dissenting].

For the committee,

**BRIAN S. DEMPSEY**

# HOUSE . . . . . No. 4509

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Text of an amendment recommended by the committee on Ways and Means to the Senate Bill to establish pay equity (Senate, No. 2119). July 13, 2016.

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## The Commonwealth of Massachusetts

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In the One Hundred and Eighty-Ninth General Court  
(2015-2016)  
\_\_\_\_\_

By striking out all after the enacting clause and inserting in place thereof the following:-

1           SECTION 1. Section 1 of chapter 149 of the General Laws, as appearing in the 2014  
2 Official Edition, is hereby amended by striking out the definition of “Woman”.

3           SECTION 2. Said chapter 149 is hereby amended by striking out section 105A, as so  
4 appearing, and inserting in place thereof the following section:-

5           Section 105A. (a) As used in this section, the following words shall have the following  
6 meanings unless the context clearly requires otherwise:

7           “Comparable work”, shall mean work that is substantially similar in that it requires  
8 substantially similar skill, effort and responsibility and is performed under similar working  
9 conditions; provided, however, that a job title or job description alone shall not determine  
10 comparability.

11           “Working conditions”, shall include the environmental and other similar circumstances  
12 customarily taken into consideration in setting salary or wages, including, but not limited to,  
13 reasonable shift differentials, and the physical surroundings and hazards encountered by  
14 employees performing a job.

15           “Wages”, for purposes of this section, shall include all forms of remuneration for  
16 employment.

17           (b) No employer shall discriminate in any way on the basis of gender in the payment of  
18 wages, or pay any person in its employ a salary or wage rate less than the rates paid to its  
19 employees of a different gender for comparable work; provided, however, that variations in  
20 wages shall not be prohibited if based upon: (i) a system that rewards seniority with the  
21 employer; provided, however, that time spent on leave due to a pregnancy-related condition and  
22 protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a  
23 system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the  
24 geographic location in which a job is performed; (v) education, training or experience to the  
25 extent such factors are reasonably related to the particular job in question; or (vi) travel, if the  
26 travel is a regular and necessary condition of the particular job.

27           An employer who is paying a wage differential in violation of this section shall not  
28 reduce the wages of any employee solely in order to comply with this section.

29           An employer who violates this section shall be liable to the employee affected in the  
30 amount of the employee’s unpaid wages, and in an additional equal amount of liquidated  
31 damages. Action to recover such liability may be maintained in any court of competent  
32 jurisdiction by any 1 or more employees for and on their own behalf, or on behalf of other  
33 employees similarly situated. Any agreement between the employer and any employee to work  
34 for less than the wage to which the employee is entitled under this section shall not be a defense  
35 to an action. An employee’s previous wage or salary history shall not be a defense to an action.

36 The court shall, in addition to any judgment awarded to the plaintiff, award reasonable attorneys'  
37 fees to be paid by the defendant and the costs of the action.

38 The attorney general may also bring an action to collect unpaid wages on behalf of 1 or  
39 more employees, as well as an additional equal amount of liquidated damages, together with the  
40 costs of the action and reasonable attorneys' fees. Such costs and attorneys' fees shall be paid to  
41 the commonwealth. The attorney general shall not be required to pay any filing fee or other cost  
42 in connection with such action.

43 If an employee recovers unpaid wages under this section and also files a complaint or  
44 brings an action under 29 U.S.C. § 206(d) which results in an additional recovery under federal  
45 law for the same violation, the employee shall return to the employer the amounts recovered  
46 under this section, or the amounts recovered under federal law, whichever is less.

47 Any action based upon or arising under sections 105A to 105C, inclusive, shall be  
48 instituted within 3 years after the date of the alleged violation. For the purposes of this section, a  
49 violation occurs when a discriminatory compensation decision or other practice is adopted, when  
50 an employee becomes subject to a discriminatory compensation decision or other practice or  
51 when an employee is affected by application of a discriminatory compensation decision or  
52 practice, including each time wages are paid, resulting in whole or in part from such a decision  
53 or practice.

54 Notwithstanding the requirements of section 5 of chapter 151B, a plaintiff shall not be  
55 required to file a charge of discrimination with the Massachusetts Commission Against  
56 Discrimination as a prerequisite to bringing an action under this section.

57 (c) It shall be an unlawful practice for an employer to:

58 (1) require, as a condition of employment, that an employee refrain from inquiring about,  
59 discussing or disclosing information about either the employee's own wages, or about any other  
60 employee's wages. Nothing in this subsection shall obligate an employer to disclose an  
61 employee's wages to another employee or a third party;

62 (2) seek the wage or salary history of any prospective employee from the prospective  
63 employee or any current or former employer; provided, however, that (i) nothing in this  
64 paragraph shall prohibit a prospective employee from voluntarily disclosing his or her wage or  
65 salary history; (ii) a prospective employer may require a prospective employee to confirm prior  
66 wages or salary, or to permit the prospective employer to do so, if the prospective employee has  
67 voluntarily disclosed such information; ; and (iii) a prospective employer may seek or confirm a  
68 prospective employee's wage or salary history after any offer of employment with compensation  
69 has been made to the prospective employee;

70 (3) discharge or in any other manner retaliate against any employee because the  
71 employee: (i) opposed any act or practice made unlawful by this section; (ii) made or indicated  
72 an intent to make a complaint or has otherwise caused to be instituted any proceeding under this  
73 section; (iii) testified or is about to testify, assist or participate in any manner in an investigation  
74 or proceeding under this section; or (iv) disclosed the employee's wages or has inquired about or  
75 discussed the wages of any other employee.

76 No employer shall contract with an employee to avoid complying with this subsection, or  
77 by any other means exempt itself from this subsection; provided, however, that an employer may  
78 prohibit a human resources employee, a supervisor, or any other employee whose job  
79 responsibilities require or allow access to other employees' compensation information, from

80 disclosing such information without prior written consent from the employee whose information  
81 is sought or requested, unless the compensation information is a public record as defined in  
82 clause 26 of section 7 of chapter 4.

83 This subsection shall be enforced in the same manner as subsection (b); provided,  
84 however, that an action based on a violation of clause (2) of this subsection may be brought by or  
85 on behalf of 1 or more applicants for employment; and provided, further, that in any action  
86 brought under this subsection, the plaintiff may also recover any damages incurred.

87 (d) An employer against whom an action is brought alleging a violation of subsection (b)  
88 and who, within the previous 3 years and prior to the commencement of the action, has both  
89 completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable  
90 progress has been made towards eliminating wage differentials based on gender for comparable  
91 work, if any, in accordance with that evaluation, shall have an affirmative defense to liability  
92 under subsection (b) and to any pay discrimination claim under section 4 of chapter 151B. For  
93 purposes of this subsection, an employer's self-evaluation may be of the employer's own design,  
94 so long as it is reasonable in detail and scope in light of the size of the employer, or may be  
95 consistent with standard templates or forms issued by the attorney general.

96 An employer who has completed a self-evaluation in good faith within the previous 3  
97 years and prior to the commencement of the action, and can demonstrate that reasonable progress  
98 has been made towards eliminating wage differentials based on gender for comparable work in  
99 accordance with that evaluation, but cannot demonstrate that the evaluation was reasonable in  
100 detail and scope, shall not be entitled to an affirmative defense, but shall not be liable for  
101 liquidated damages under this section.

102 Evidence of a self-evaluation or remedial steps undertaken in accordance with this  
103 subsection shall not be admissible in any proceeding as evidence of a violation of this section or  
104 section 4 of chapter 151B that occurred prior to the date the self-evaluation was completed or  
105 that occurred either (i) within 6 months thereafter or (ii) within two years thereafter if the  
106 employer can demonstrate that it has developed and begun implementing in good faith a plan to  
107 address any wage differentials based on gender for comparable work.

108 An employer who has not completed a self-evaluation shall not be subject to any negative  
109 or adverse inference as a result of not having completed a self-evaluation.

110 (e) The attorney general may issue regulations interpreting and applying this section.

111 SECTION 3. Said section 16 of said chapter 151, as so appearing, is hereby further  
112 amended by inserting after the word “orders”, in line 5, the following words:- or notices.

113 SECTION 4. This act shall take effect on July 1, 2018.