

MACRS Fall Conference 2018

Current Topics: Executive Director Employment Contracts & Services of Private Investigators

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Private Investigators

- As with any vendor, selection and monitoring of private investigators is an important decision
- This selection process is typically delegated to the Executive Director
- The Executive Director should be able to document the steps he or she took to secure a competent and qualified investigator at a reasonable rate of compensation

Private Investigators

- When might you decide to use a private investigator?
 - Whenever fraud is suspected
 - Random program as protection against fraud
 - Other

Private Investigators

- Who should hire the investigator?
 - If litigation is not anticipated, the investigator can be retained by the Executive Director
 - If litigation is ongoing or anticipated, it may be wise to have Board counsel hire the investigator

Private Investigators

- Why might you want counsel to be the one to actually retain the investigator, even if the Executive Director does the due diligence and tentative selection?
 - Is there a privilege?
 - How might it be broken?
- Must the results be shared with the subject of the investigation?
 - When and under what circumstances?

Executive Director Contracts

- There are a number of issues to consider when hiring an Executive Director
- This is one of the key responsibilities of the Board
- The hiring of an Executive Director is a fiduciary decision
- Thus the normal fiduciary principles should be followed, including due diligence.
- This applies to the selection of the person chosen and to the compensation and benefits to be paid

Executive Director Contracts

- It is always wise to have a succession plan in place for such a key position, or at least for an interim replacement in the event of an emergency.
- With a larger pension system, the Board may have one or more internal candidates to consider

Executive Director Contracts

- Before advertising or interviewing for the job, prepare a job description that describes the essential job duties and the qualifications you are looking for
- Ensure that the qualifications are
 - Reasonably related to the actual job, and
 - Do not unnecessarily screen out candidates of protected classes

Executive Director Contracts

- Consider where you will place notices of the job opening
- Adhere to the open meeting law in interviews
- Remember that there are many new restrictions on what may and may not be asked in interviews
- There are also restrictions on tests that may be given before an offer of employment is made
- At the end of the presentation I'll focus on the new Massachusetts Equal Pay Act and what you can and cannot ask

Executive Director Contracts

- Again make sure you comply with the open meeting law before a final vote
- Once you have determined your selection, you will then need to finalize his or her compensation and benefits package.
- Some Boards may wish to extend a contract of employment while others may not; some candidates may require it as well
 - Regardless, the basic terms should be documented in writing

What Are Some of the Key Provisions?

- Duties of the Position
 - E.g., Entire Time and Effort
- Reporting
- Salary and how paid
- Vacation
- Sick leave
- Personal leave
- Health Insurance
- Dental, vision, other insured benefits

Key Provisions, cont'd.

- Life insurance
- Holidays
- Business Expense Reimbursement
 - Board approval, receipts
- Participation in the system
- Term of agreement

Key Provisions, cont'd.

- Causes for Termination
 - Death
 - Disability
 - Resignation
 - Involuntary Termination
 - “Cause”
- Indemnification
- Dispute Resolution
- Notices
- Amendments

- Bottom line, it is a policy judgment each Board will have to make
- Usually the larger Boards may choose to issue contracts for the Executive Director, while many smaller Boards do not
- All provisions are negotiable
- Get qualified assistance in negotiating the agreement – if you have hired the right person, he or she will be with you for a long time and you want to make sure you have reached a true meeting of the minds.

Massachusetts Equal Pay Act

- Became effective July 1, 2018
- Replaces current MA Pay Equity Act
 - Does not replace other laws (ex., state and federal anti-discrimination laws also prohibit different treatment on the basis of “protected status”, which includes gender)
- Significant new requirements and terms

Regulations

- The Massachusetts Attorney General has authority to issue regulations interpreting MEPA
- On March 1, AGO issued “Overview and Frequently Asked Questions” on MEPA

MEPA Coverage

- Nearly all Massachusetts employers
- Private employers regardless of size
- State and municipal employers including retirement boards
- Does not apply to Federal government as employer

MEPA: Basic Rules

- Prohibits discrimination on the basis of gender in the payment of “wages”.
- Prohibits employers from paying salaries or wage rates less than the rates paid to its employees of a different gender who perform “comparable work”.
- Permits differences in pay for “comparable work” only when based on recognized reasons.
- Affords employers a window of opportunity to self-correct without certain MEPA penalties.

MEPA: Basic Rules (Cont'd)

- MEPA prohibits certain actions by employers
 - Employers may not seek the pay of any prospective employee before making an offer that includes pay
 - Employer may not require a prospective employee's pay history meet any certain criteria
 - Employers may not prohibit an employee from “inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages.”
- Prohibits retaliation for protected conduct

Comparable Work Triggers Equal Pay

Comparable work

“Work that is substantially similar in that it requires substantially similar skill, effort and responsibility, and is performed under similar working conditions...”

AGO Guidance

- To be comparable, must work be “equal”? No.
- Does “substantially similar” require a job be identical or alike in all respects? No, “minor differences in skill, effort or responsibility will not prevent two jobs from being considered comparable.”

Job Titles and Job Descriptions

Comparable work

“ ... a job title or job description shall not be determinative of comparability.”

Quiz?

- Is a job title determinative of comparable work? No
- Can individuals with different job descriptions perform comparable work? Yes
- AGO: may not rely on job descriptions alone, although accurate job descriptions may be helpful in determining whether work is comparable.

Defining Salary or Wage Rates...

- How to evaluate whether you have different salary or wage rates :

Wages “shall include all forms of remuneration for employment”

Quiz

Which of the following may be included in wages?

- Base rate - yes
- Bonus - yes
- Commission - yes
- Paid time off - yes
- Deferred comp - yes
- Etc.

Prohibited: Seeking Salary History

- An employer may not seek the compensation history of an applicant, including through an agent
- May **confirm** prior wage/salary history in two circumstances:
 1. “if a prospective employee has voluntarily disclosed such information”; and
 2. “after an offer of employment with compensation has been negotiated and made to the prospective employee”

May an Employer Ask for Salary Needs or Expectations?

- AGO Guidance: No direct prohibition on an employer asking for salary expectations/needs...
- **But** the AGO states that employers should:
 - Proceed with caution;
 - Be aware of how questions are asked;
 - Be aware of follow up questions posed or questions framed in a way to seek pay history.

Pay History and Pay Differences

- Can pay differences amongst different genders be based upon pay history?
 - AGO Guidance: No
- Can pay differences amongst different genders be based upon labor market conditions at hire?
 - AGO Guidance: No

Affirmative Defense & Damages

Affirmative defense available to employer if, within prior 3 years, it has completed self-evaluation of pay practices and can demonstrate self evaluation and “reasonable progress” in eliminating compensation differentials based on gender for comparable work

- Self evaluation must be good faith and reasonable
- “reasonable in detail and scope”
- Genuine attempt to identify pay disparities
- Make “reasonable progress toward eliminating any pay disparities”

Self Evaluation

- Personalize to meet your organization's needs, size, industry, etc.
- AGO provides guidance and tool to assist employers in performing audit
- Don't forget to review policies, hiring practices, etc. at same time

Questions?



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