

MASSACHUSETTS
HIGHTECHNOLOGYCOUNCIL

Dedicated to Growth... Committed to Action

January 27, 2016

Dear Senator:

The Massachusetts High Technology Council (the “Council”) is committed to eliminating gender-based discrimination in pay and compensation and stands ready to help develop and implement workable solutions to the gender pay gap dilemma. For the reasons enumerated below, however, the Council must oppose [Senate Bill 2107, an Act to Establish Pay Equity](#), and we respectfully urge you and your Senate colleagues to reject the legislation when it comes before the Senate for consideration on January 28.

Senate Bill 2107 is misguided in its approach, notwithstanding the noble intentions of its sponsors and supporters. The legislation is a classic example of a well-intended proposal that is highly likely to result in unintended consequences, including creating impediments to economic success and fair compensation for the female employees it purports to protect and empower.

It is important for all stakeholders to remember that gender-based discrimination in pay is already prohibited under Massachusetts law. Section 105A of Chapter 149 of the Massachusetts General Laws provides that “[n]o employer shall discriminate in any way in the payment of wages as between the sexes, or pay any person in his employ salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations.” These Massachusetts prohibitions reinforce and supplement an existing federal ban on gender-based pay discrimination found in the Fair Labor Standards Act. These laws appropriately prohibit discrimination by employers in setting pay differentials and the Council supports their strict enforcement. As explained in more detail below, Senate Bill 2107 goes much further and would severely impact employers’ ability to utilize pay differentials at all to compensate and reward employees.

Senate Bill 2107 would make it exceedingly difficult and risky for employers to reward any employee, female or male, through commissions and other merit-based or performance-based compensation systems. The bill provides that no employer may “pay any person in its employ wages, benefits or other compensation less than it pays to employees of the opposite gender for work of like or comparable character or work on like or comparable operations; provided, however, that variations in wages, benefits or other compensation shall not be prohibited when based upon a difference in seniority.” The bill does include other safe harbors for “*bona fide*” merit-based pay, but imposes on employers a high burden of proof to establish that any compensation differentials fit within these safe harbors which are open to subjective definition and interpretation. Any pay differentials that do not fit within these safe harbors are presumed to be discriminatory, again placing the burden of proof on the employer to disprove discriminatory intent. By elevating the level of risk associated with merit-based compensation

systems, the law could actually discourage an employer from paying more to a woman employee who is higher-performing than a male counterpart and *vice versa*.

Unlike existing Massachusetts anti-discrimination law and the laws of many other states, Senate Bill 2107 would create a private right of action for any alleged violation. Employers that utilize merit-based compensation systems would face significant risk of frequent and frivolous lawsuits by aggressive plaintiffs' attorneys challenging employer compensation systems and individual employee decisions.

The legislation includes other provisions that would impose unworkable burdens and restrictions on employers, impediments that are not faced by employers in other states, including a prohibition on obtaining salary history information from prospective employees, a tool that is widely and legitimately used by employers to set employee compensation.

Existing Massachusetts labor laws already create a high level of complexity, cost and risk for employers. Senate Bill 2107's private right of action would only exacerbate this anti-competitive dynamic to the detriment of job creation and economic growth in the Commonwealth.

The Council believes that far greater opportunities to close wage gaps exist where employers and policymakers work together to encourage and empower employers to adopt policies and practices that help them optimize the value they derive from their engagement of women employees who make up a critical component of the Commonwealth's supremely-talented workforce. The Council and its members are committed to education and elevating awareness about career options for women in the tech sector. We look forward to pursuing opportunities to partner with you and your legislative colleagues to advance these important initiatives.

Senate Bill 2107 would impose compensation models that are incompatible with the success of private sector entities that thrive on their ability to differentiate employees based on merit and performance. Our state's innovation economy depends on the creativity, flexibility and high performance of our talented workforce. This legislation would have significant negative impacts on Massachusetts' innovation economy employers and would provide no meaningful additional protections to employees. Indeed, it could very well harm the employees it seeks to protect. For these reasons, we respectfully urge you to reject and oppose Senate Bill 2107.

Sincerely,

Mark J. Gallagher
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Mass. High Technology Council