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LABOR AND EMPLOYMENT LAW

OCTOBER 2015

Stronger New York Pay Equity Law to Take Effect in January 2016

New York employers take notice: an amendment to New York's equal pay law (S.1/A.6075) was signed by Governor Cuomo on October 21, 2015. The law amends Labor Law Section 194, which prohibits pay differentials based on gender in jobs requiring "equal skill, effort and responsibility" which are "performed under similar working conditions." The bill was passed by the Assembly in April, and by the Senate in January, and the changes are significant.

The amendment to Labor Law Section 194 is one of eight laws aimed at gender equality issues that Cuomo signed last week. Of interest to employers, several of the other laws also touch on employment issues. Those other laws:

- Extend the prohibition on sexual harassment to all employers, including those with less than four employees (S.2 / A.5360);
- Allow employees to obtain attorneys' fees when they prevail in sex discrimination lawsuits (S.3 / A.7189);
- Add "familial status" to the list of protected traits under the New York State Human Rights Law (S.4 / A.7317); and
- Add a requirement to the Human Rights Law that employers must provide reasonable accommodations to all pregnant employees, not just those with a pregnancy-related disability (S.8 / A.4272).

The laws are slated to take effect on Tuesday, January 19, 2016.

The premise of the pay equity amendment is simple and appealing: the same day's pay for the same day's work. At first glance, this is not big news. The state labor law and federal law already require equal pay without regard to gender. However, this law tightens and strengthens Section 194 in ways that will undoubtedly impact many New York workplaces.

First, under existing law, an employer can defend a pay discrimination claim by showing that the difference in pay is justified by a seniority system, a merit system, a system measuring earnings based on quantity or quality of work, or "***any other factor other than sex***." This catch-all was viewed by many as a loophole and hindered the success of many pay discrimination claims. The new law replaces the "any other" defense with the following: "a bona fide factor other than sex, such as education, training, or experience." This bona fide factor must be job-related and consistent with business necessity. Notably, the burden is on the employer to prove the existence of this bona fide factor; it is not on the complaining employee to prove discriminatory motive (as in other types of employment discrimination litigation).

As any employer can attest, many factors other than sex go into compensation decisions. Under the old law (and still under federal law), these other factors typically held up to the test of "any other factor other than sex." It is not clear which factors will hold up under the new law. For example, are market forces still a defense? In a competitive market for talent, an employer might pay a new hire more than employees currently performing the same job simply because the market demands it. Perhaps the candidate has an offer from a competitor that the employer must match to attract the candidate. Often, internal compensation lags behind external market. Whether market forces will be considered "a bona fide factor other than sex, such as education, training, or experience" remains to be seen.

Moreover, even if an employer establishes a "bona fide factor" to justify a gender pay difference, an employee can still prevail under the new law by showing that: (a) the bona fide factor has a disparate impact on one sex; (b) alternative employment practices exist that would serve the same business purpose and not produce the pay differential; and (c) the employer refused to adopt the alternative practice. The lack of clarity over what will be considered a "bona fide factor" will undoubtedly result in a wave of litigation.

Second, the Pay Equity Act gives employees the right to openly inquire about, disclose and discuss their wages. Employers cannot prohibit these conversations. Rather, the employer may only establish and distribute a written policy containing "reasonable workplace and workday limitations on the time, place and manner" for pay discussions. The law states that an example of a reasonable limitation would be a rule that an employee may not disclose a co-worker's pay without the co-worker's permission. The law contains some recognition that certain employees must still maintain confidentiality of pay information: an employer may prohibit an employee with access to other employees' pay information as part of their job from disseminating that information to others who do not have the same access.

This right to openly discuss pay is new to New York law, but it is consistent with the National Labor Relations Board's position that an employee's right to openly discuss wages is protected by the National Labor Relations Act.

Third, the law contains dramatically higher penalties than other state employment discrimination and wage/hour laws. Employers who are found to have willfully violated the Equal Pay Act are subject to liquidated damages in the amount of 300% of the wages owed. In other words, in addition to making the employee whole for any unlawful difference in pay, there is an additional potential penalty of ***three times*** those wages. Other provisions of the New York Labor Law provide for liquidated damages of "only" 100%.

As stated above, the law takes effect on January 19, 2016. Therefore, employers should act quickly to evaluate any potential exposure. Now is the time to review pay rates to ensure any gender differences can be justified based on the factors in the statute. Consider whether these factors are job-related and consistent with business necessity. Additionally, employers should review their written policies, particularly confidentiality policies, to ensure they do not contain restrictions on the right to share or discuss compensation information, and revise as necessary. Similarly, supervisors should be made aware that they may not prohibit conversations about pay. Finally, consider the pros and cons of adopting a new policy setting reasonable limits on the time, place and manner of pay discussions.

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