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New York State Assembly Passes Pay Equity Legislation

On April 27, 2015, the New York State Assembly unanimously passed an act amending the pay equity provisions of the New York Labor Law (the “Act”). The Act had already passed the Senate in January of this year and, in a statement released on the 27th, Governor Cuomo indicated he planned to sign the Act into law.¹

The Act amends N.Y. Labor Law § 194, which currently states that employees of the opposite sex within the same establishment must be paid equally for equal work. The performance of such work must require equal skill, effort, and responsibility, and must be performed under similar working conditions. There are, however, exceptions to this rule, “where payment is made pursuant to a differential based on: a. a seniority system; b. a merit system; c. a system which measures earnings by quantity or quality of production; or d. any other factor other than sex.”

The Act specifically revises exception (d) to now read, in part, “a bona fide factor other than sex, such as education, training, or experience.” The amended subsection (d) further notes that this “bona fide factor” cannot “be based upon or derived from a sex-based differential in compensation” and must be “job-related” to the position in question and “consistent with business necessity”. The Act defines “business necessity” as “a factor that bears a manifest relationship to the employment in question”; however, the Act does not provide additional guidance on what constitutes a “manifest relationship”.

Amended subsection (d) further provides that the “bona fide factor” exception will not apply if an employee can demonstrate (a) that the employer has a particular employment practice which causes a disparate impact on the basis of sex; (b) that there is an alternative employment practice which would serve the same business purpose, but not cause such a differential; and (c) that the employer has refused to adopt such alternative practice. The Act, however, is unclear as to how an employee would demonstrate an employer’s refusal to adopt an alternative practice and whether the employee would have to propose such an alternative process to the employer in

¹ <https://www.governor.ny.gov/news/statement-governor-cuomo-assembly-passage-fair-pay-legislation>

the first instance to satisfy the requirements of this portion of the subsection.

The Act also provides some guidance on when employees may be deemed to work in the “same establishment” for the purposes of Labor Law § 194. Specifically, the Act states that if employees “work for the same employer at workplaces located in the same geographical region”, they will be deemed to work in the same establishment. The geographical region may not be larger than a county, and takes into consideration such factors as population distribution, economic activity, and the presence of municipalities.

Additionally, the Act states that employers cannot prohibit an employee from discussing, inquiring about, or disclosing the wages of the employee or another employee. Employers may, however, adopt a written policy, distributed to all employees, which establishes reasonable workplace and workday limitations on when and where such discussions, inquiries, and disclosures may occur. For example, the Act notes that an employer may prohibit an employee from discussing or disclosing the wages of another employee without such employee’s prior permission. An employer may raise the employee’s failure to adhere to such a written policy as an affirmative defense to any claims made against the employer under the Act, provided that any adverse action taken against the employee was for a violation of the policy and not for an otherwise compliant inquiry, discussion, or disclosure of wages. Employers who adopt such policies must nonetheless be mindful of any contrary provisions in collective bargaining agreements, as well as other applicable state and federal laws, including the National Labor Relations Act, which requires that employees be able to discuss their wages and terms and conditions of employment. Importantly, nothing in this new Act *requires* an employee to disclose his or her wages to colleagues involuntarily. Moreover, the Act makes clear that employers may prohibit employees with access to wage information of other employees as part of his or her job from disclosing these wages to individuals (whether employees or not) who do not otherwise have access to this information. As drafted, the statute does not appear to prohibit such personnel from responding to a complaint or charge, or participating in an investigation, hearing, or other legal action, either on behalf of the employer or in their own capacity as an employee.

The Act also amends the damages available under of Labor Law § 198(1-a), to provide for liquidated damages of up to 300% of the total wages due for a willful violation of Labor Law § 194.

The Act requires the Commissioner of Labor to promulgate certain standards prior to the Act taking effect. Additionally, and somewhat outside the scope of the issue of pay equity, the Act mandates that the Department of Labor and the Division of Human Rights make training available to assist employers in generating policies, procedures, and their own trainings on discrimination and harassment in the workplace. This training would include, but is not limited to, issues relating to pregnancy, familial status, pay equity, and sexual harassment.

The Act is scheduled to take effect 90 days after it is signed by Governor Cuomo. It is worth noting that, on April 27, the Assembly also passed the NY State Fair Pay Act, which would, among other things, prohibit discrimination in wages on the basis of sex, race, and/or national origin. This bill is currently before the State Senate for review. We will continue monitoring this legislation and will provide updates as they become available. Because pay disparities are receiving closer legislative and administrative scrutiny, employers may wish to examine their payroll practices for unintended discrepancies that could be attributed to impermissible factors including sex. Please contact Kristina Grimshaw at (212) 758-7792, or any other attorney at the Firm, if you would like more information on the Act or guidance in reviewing your payroll practices.

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