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New York Expands Protections for Women with Passage of Women's Equality Act

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On October 21, 2015, Governor Cuomo signed into law five bills that will provide greater protection for women in the workplace. These bills, which are part of the Women's Equality Act, strengthen New York's equal pay statute, expand protection for victims of sexual harassment, provide for recovery of attorneys' fees in employment discrimination cases where sex is the basis of discrimination, prohibit discrimination based on familial status, and require employers to provide reasonable accommodations to pregnant employees. All of these new laws will take effect on January 19, 2016.

NY Law Requiring Pay Equity Provides Greater Protections

New York State Labor Law currently provides that men and women must receive equal pay for equal work unless the employer can show that the differential is based on: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; (d) or any factor other than sex.¹ This mirrors the Federal Equal Pay Act.²

The bill signed by the Governor (S. 1 / A. 6075) amends the statute to strengthen the prohibitions against unequal pay and make it easier to prove a violation. First, the employer can no longer rely on "any factor other than sex" to justify a difference in pay between a man and a woman doing the same job. Instead, the employer must show that the difference is based on "a **bona fide** factor other than sex, such as education, training and experience." The *bona fide* factor cannot be based upon or derived from a sex-based differential in compensation and it must be job-related and consistent with business necessity. "Business necessity" is defined as a factor that bears a manifest relationship to the employment in question. In addition, this exception will not apply if the employee demonstrates that the employer uses a practice that (a) causes a disparate impact on the basis of sex, (b) that an alternative employment practice exists that would serve the same business purpose and not produce such differential, and (c) the employer has refused to adopt such alternative practice.

1 N.Y. Labor Law, § 194.

2 29 U.S.C. §206(d).

Second, the amended statute clarifies that differentials in pay are prohibited even if two employees whose pay rates are being compared work in different physical locations, provided the locations are in the same geographic region no larger than a county.

Third, employers can no longer prohibit employees from sharing wage information with other employees. This will enable employees to learn whether their co-worker who is doing the same job is being paid more. Employers may have written policies that establish reasonable workplace and workday limitations on the time, place and manner for discussion about wages, including prohibiting an employee from disclosing the wages of another employee without such employee's permission. However, those policies must be consistent with standards to be promulgated by the Commissioner of Labor and consistent with all other state and federal laws, including the National Labor Relations Act.

Fourth, the amended statute increases the amount of liquidated damages from 100% of the amount of unpaid wages to 300%. So, individuals who were paid unequal wages will now be entitled to liquidated damages of up to three times the amount of unpaid wages.

Discrimination in Employment Based on Familial Status is Now Prohibited

The New York State Human Rights Law (NYSHRL), which prohibits discrimination in employment, has been amended to include a prohibition against discrimination in employment based on familial status.³ "Familial status" means: (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with: (1) a parent or another person having legal custody of such individual or individuals, or (2) the designee of such parent.⁴ This means that individuals will be able to bring a claim under the NYSHRL alleging they were denied employment or a promotion or terminated or subjected to different terms and conditions of employment because of such familial status.

Employees of Small Businesses are now Protected from Sexual Harassment

The NYSHRL currently does not apply to employers with fewer than four employees.⁵ However, it is estimated that more than 60% of New York's private employers have fewer than four employees. The bill signed by the Governor amends the statute to protect all workers from sexual harassment regardless of the size of the workplace. It is not clear whether this means that a claim of sex *discrimination*, as opposed to sexual harassment, will lie in a workplace of fewer than four employees. However, the four-employee minimum continues to apply to other claims of discrimination or harassment.

Attorneys' Fees now Available for Claims of Sex Discrimination

The NYSHRL does not currently provide for an award of attorneys' fees to the prevailing party with respect to any employment discrimination claims. The amended statute now provides for an award of reasonable attorneys' fees for claims of discrimination based on sex.⁶ An employer will be responsible for attorneys' fees only if the employer has been found liable for having committed an unlawful discriminatory practice. Note that Title VII and the New York City Human Rights Law already provide for an award of attorneys' fees to the prevailing party with respect to any claim of discrimination, including sex discrimination claims.

Reasonable Accommodations for Pregnant Employees are now Required

The NYSHRL has been amended to require employers to perform a reasonable accommodation analysis for employees with pregnancy-related conditions and to provide a reasonable accommodation unless it would create an undue hardship. A pregnancy-related condition is defined as a medical condition related to pregnancy or childbirth, provided that the employee will be able to perform the job if the accommodation is offered. The statute specifies that a pregnancy-related condition is to be treated as a temporary disability for the purposes of the statute and the Division of Human Rights regulations. In short, the pregnancy accommodation requirement is consistent with the reasonable accommodation requirements for disabled employees under the NYSHRL. Note that the amendment codifies the requirement currently in the regulation that an employee must cooperate in providing medical or other information to verify the existence of a disability or pregnancy-related condition.

³ Currently, the law protects against familial status discrimination in housing, but not employment.

⁴ N.Y. Exec. Law, § 292 (26).

⁵ N.Y. Exec. Law, § 292(5).

⁶ The amendment also provides for attorneys' fees with respect to claims of credit discrimination based on sex.

The requirement to provide reasonable accommodations to pregnant employees is not new for employers in New York City. The New York City Human Rights Laws was amended effective January 30, 2014 to require employers with four or more employees to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, unless the employer can prove that the accommodation would cause an undue hardship.

Similarly, the EEOC's Guidance on Pregnancy issued in 2014 makes it clear that an employee with limitations caused by pregnancy-related impairments may be entitled to a reasonable accommodation under the Americans with Disabilities Act.

Practical Advice/Tips

Pay Equity. The revisions to the NY equal pay statute are the biggest change for employers. Assuming differences in pay between men and women doing the same job are not based on seniority, merit system or quality/quantity of work, employers will now have to show that the difference is justified by business necessity and that there is no alternative that will serve the same business purpose and not produce a differential. This is a much stricter and more difficult standard. Employers should consider conducting a pay analysis of its jobs in light of this new standard to ensure they are compliant with the statute, particularly given that liquidated damages for violating the statute are 300% of the amount of back pay due.

Familial Status. New York employers should review and revise their handbooks and policies to include familial status as a protected category, and educate decision-makers that they cannot consider an employee's familial status and obligations as a basis for employment decisions.

For employers subject to Title VII (more than 15 employees) and/or the New York City Human Rights Law (more than three employees), the other amendments will have little impact as Title VII and the NYCHRL currently protect employees from sexual harassment, provide for recovery of attorneys' fees for sex discrimination claims, and require accommodations for pregnant employees.