NY Laws May Prompt Uptick In Pay Equity Claims

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On July 10, 2019, New York Gov. Andrew Cuomo signed into law two bills amending the New York Labor Law, with significant implications for employers in the state. One law implements a statewide prohibition on salary history inquiries and the other amends New York's equal pay law to cover all protected classes and changes the standard for proving an equal pay violation from "equal to" to "substantially similar to."

The key provisions of each new law are described below, followed by the key issues and takeaways for employers. In short, employers should expect an uptick in pay equity enforcement actions and litigation. To potentially avoid and in any event better defend against such litigation, and given new federal reporting requirements, employers should consider conducting privileged pay equity audits. Finally, employers should take the opportunity to review application materials to remove references to salary history and train interviewers to avoid salary history inquiries.

Statewide Salary History Inquiry Prohibition

The first new law amends the NYLL to prohibit the use of salary history in employment decisions, mirroring an existing ban in force in New York City. The law makes it a violation of the NYLL for an employer to rely on or inquire about the salary history of a job applicant as a factor in determining (a) whether to hire the applicant or (b) what salary to offer the applicant.

The law further prohibits employers from (a) seeking, requesting, or requiring the disclosure of salary history of job applicants or current employees as a condition of consideration for employment, an offer of employment or an offer of promotion; (b) seeking, requesting, or requiring the disclosure of salary history of job applicants or current employees from a current or former employer or any of their agents; or (c) refusing to consider for employment, hire, or promote an applicant or current employee who does not provide his or her salary history.

The law does not prohibit an applicant or current employee from voluntarily, and without prompting, disclosing, or verifying wage or salary history, including if the employee seeks to use that information for purposes of negotiating his or her compensation. Relatedly, the law provides that an employer is only allowed to confirm a job applicant's compensation history if, at the time it offers employment to a candidate, the candidate responds by providing salary history to support his or her request for a wage or salary higher than the current offer. The law does allow employers to consider the salaries of their current employees in hiring decisions, for example in making offers of promotion.

Notably, the law creates a new private civil right of action for violations and allows prevailing plaintiffs to recover injunctive relief and reasonable attorney fees.

The law includes a carveout stating that it will not supersede any currently existing federal, state or local law that requires disclosure or verification of salary history information to determine an employee's compensation.

These changes will take effect on Jan. 6, 2020.

Broadened State Equal Pay Law

The second new law expands the equal pay provisions of the NYLL to protect members of all protected classes under the New York State Human Rights Law from receiving less pay than colleagues who are not in the same protected class for doing the same or substantially similar work. These protected classes include age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence–victim status.

Currently, this provision only applies to unequal pay based on sex. While individuals in other protected categories who believed they were unfairly underpaid may have previously been able to seek redress under the NYSHRL by arguing that the underpayment constituted unlawful discrimination, this amendment is significant because it would now allow such individuals to bring a claim for equal pay directly under the NYLL in addition to any applicable discrimination statutes. This development is notable, as the NYLL allows individuals to bring claims for six years, which is double the three-year statute of limitations applicable to discrimination claims under the NYSHRL.

The law also specifically modifies the equal pay standards of the NYLL, which previously only required equal pay for "equal work," to also apply to individuals performing "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Notably, the law does not modify the existing exceptions to the equal pay provisions of the NYLL that allow employers to pay unequal compensation where the difference is based on a seniority system, merit system, production-based system, or "a bona fide factor other than status within one or more protected class or classes, such as education, training, or experience." Any such "bona fide factor" must be job-related and consistent with business necessity.

These changes will take effect on Oct. 8, 2019.

What This Means for Employers

Employers should expect an uptick in claims brought under New York's equal pay law, which is not currently a frequently litigated statute. The equal pay law will likely be used more frequently by plaintiffs lawyers, public interest groups and the government to bring individual and class action litigation.

Currently, the New York equal pay law is limited to claims based upon sex discrimination and significantly constrained by the requirement that a plaintiff demonstrate that he or she performed equal work "on a job the performance of which requires equal skill, effort and responsibility" to a comparator under similar working conditions. Courts have accordingly limited applications of the equal pay law to cases in which a plaintiff and comparator performed the exact job under similar conditions.

As amended, the equal pay law will set a far lower standard for plaintiff employees to prevail. It will only require plaintiffs to show that they perform "substantially similar" work to a comparator. While a plaintiff currently needs to identify a comparator in his or

her *same* position to sustain a violation of the equal pay law, such plaintiff after the law takes effect will instead be able to identify a comparator performing work requiring *similar* skill, effort and responsibility as his or her own.

Of further note, the application of the equal pay law to *all* protected classes covered by the NYSHRL — age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence–victim status — represents a huge expansion of the equal pay law's coverage. Additionally, the equal pay law's six-year statute of limitations relative to the NYSHRL's three-year statute of limitations will allow plaintiffs to bring claims that would otherwise have been time-barred under the NYSHRL. Taken together, the expanded scope and longer statute of limitations will provide for more potential plaintiffs and greater potential damages.

New York joins other states and the federal government in focusing on pay equity. Since 2016, California,[1] New Jersey,[2] Massachusetts,[3] Maryland,[4] and Washington[5] (among other states) have passed robust pay equity laws or amendments to existing laws which, to varying degrees, have also expanded coverage to "substantially similar" work and protected classes beyond sex. Not to be outdone, the U.S. Equal Employment Opportunity Commission is for the first time requiring employers with more than 100 employees to report W-2 wage information within 12 pay bands and the total hours worked for all employees grouped by sex, race/ethnicity, and job category on Form EEO-1 by Sept. 30, 2019.

Given that many employers will already be required to collect segmented pay data and are facing increased liability for pay disparities, now is an opportune time for them to consider conducting privileged pay equity analyses. Employers who have recently conducted pay equity analyses on the basis of sex should also consider conducting analyses looking at each class protected by New York's expanded equal pay law.

Statistical pay equity analyses conducted at the direction of legal counsel allow employers to identify nondiscriminatory factors that may explain pay differences, assess their legal risks, and make any desired pay adjustments. Accordingly, they provide employers an opportunity to affirmatively address potential liability, avoid disputes and, if they can't be avoided, provide a factual defense.

In fact, Massachusetts' Equal Pay Act provides an explicit affirmative defense for employers who have, within the previous three years before an action is filed, conducted a "good faith, reasonable self-evaluation of [their] pay practices" and shown "reasonable progress toward eliminating any impermissible gender-based wage differences that [the] self-evaluation may reveal." While New York has not created an analogous affirmative defense, employers who conduct privileged pay equity analyses will be much better equipped to defend against, or avoid, the anticipated increase in pay equity litigation.

Finally, the new salary history inquiry prohibition means that all New York state employers should apply practices currently in place to comply with analogous prohibitions in New York City and Albany, Suffolk and Westchester counties. Employers should omit inquiries into prior pay from applications, interview guides/evaluation forms, hiring materials, training materials and handbooks. Hiring paperwork should not include any requests for salary history information, even if it specifically states that disclosure is voluntary or includes a disclaimer that New York residents or applicants for jobs located in New York do not have to answer.

Furthermore, employers should train interviewers and other personnel involved in the hiring process to not inquire into prior pay (and to not run searches of public records for this information), and should also ensure that recruiting/staffing agencies do not inquire about, provide or rely on wage history. Instead, employers should ask applicants about their compensation expectations and objective measures of past productivity or performance (for example, revenue generated or sales figures).

Taken together, the New York bills are just the latest, albeit significant, manifestation of an increased national focus on pay equity. Employers in New York and elsewhere should act now to understand pay disparities and to avoid liability under rapidly expanding state and local laws.

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[1] https://www.dir.ca.gov/dlse/california_equal_pay_act.htm

[2] https://nj.gov/labor/equalpay/equalpay.html

[3] https://www.mass.gov/service-details/learn-more-details-about-the-massachusetts-equal-pay-act

[4] https://www.dllr.state.md.us/labor/wages/equalpay.shtml

[5] http://www.lni.wa.gov/WorkplaceRights/Wages/PayReq/EqualPay/default.asp