

Employer Tips For New York Equal Pay Compliance

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On Oct. 21, 2015, New York Gov. Andrew Cuomo signed the Achieve Pay Equity Bill in order to help strengthen New York's Equal Pay Act. Despite having an equal pay law for a number of years, in New York, full-time working women still earn \$8,275 less than full-time working men. The equal pay law was amended for the purpose of remedying the detrimental effects of wage disparities. The amendments took effect on Jan. 19, 2016.

Overview of Amendments to New York Equal Pay Laws

Prior to the amendments, New York Labor Law Section 194 required employers to provide equal pay to men and women in the "same establishment" for "equal work," defined as work requiring "equal skill, effort and responsibility" and which is "performed under similar working conditions." Employers were able to defend wage differentials if they were based on, inter alia, any other factor other than sex.

While not retroactive, the amendments make several important changes to New York's equal pay act, most of which expand the ways in which employees may claim sex-based pay discrimination and limit the ways in which employers may defend against such claims.

First, the amendments define and expand the definition of "same establishment." Prior to the amendments, "same establishment" was not defined in the statute. Some courts looked to federal law and used comparators from a distinct physical place of business. The amendments add a statutory definition of "same establishment." Now, "employees shall be deemed to work in the same establishment if the employees work for the same employer at workplaces located in the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities." [1] Thus, a comparison of employee wages may go beyond a single location. In other words, courts can consider disparities in wages among workplaces

located in the same geographic area. It remains to be seen, however, how much flexibility employers will have in determining what constitutes the “same establishment.”

Second, the amendments eliminate the defense for wage differentials based on “any other factor other than sex,” and replace it with a more limited defense based on “a bona fide factor other than sex, such as education, training or experience.”[2] The employer bears the burden of showing that such “bona fide factor” is not based on “sex-based differential[s] in compensation,” and is “job-related” and “consistent with business necessity.”[3] “Business necessity” is “a factor that bears a manifest relationship to the employment in question.”[4] Even if an employer satisfies its burden, a defense based on “a bona fide factor other than sex” will not be allowed if an employee can prove (1) the employer’s business practice “causes a disparate impact on the basis of sex,” (2) “an alternative employment practice exists that would serve the same business purpose and not produce such differential,” and (3) the employer “refused to adopt such alternative practice.”[5] In short, the amendments place a greater burden on employers to justify wage differentials.

Third, the amendments provide for greater pay transparency among employees. Under New York law, employers are now barred from prohibiting employees from “inquiring about, discussing or disclosing” their wages or the wages of other employees.[6] This provision is intended to make it easier for workers to discover whether their wages are unequal to their male counterparts. An employer may, in a written policy, “establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages.”[7] An employee, however, is not required to disclose his or her wages.[8]

The amendment essentially creates a new cause of action against employers within New York Labor Law Section 194. Employees can now bring a lawsuit against an employer if the employer prohibits an employee from discussing or inquiring about wages of other employees. Employees can also presumably challenge an employer’s written policy regarding the “time, place and manner for inquiries about, discussion of, or the disclosure of wages” if the policy is not reasonable.

Fourth and finally, the amendments increase the amount of liquidated damages from 100 percent to 300 percent “of the total amount of the wages found to be due for a willful violation.”[9] For all other violations, liquidated damages remain at 100 percent of total amount of wages found to be due.

Practical Tips for Employers

With the recent amendments, it is important for employers to understand the current legal landscape and ensure their policies are in compliance with the law. We recommend that employers with employees based in New York consider the following actions.

1. Analyze and update employment practices and policies.

First and foremost, employers should review and analyze their current employment policies and practices to ensure they are in compliance with the law. Most important, employers should be aware of the new pay transparency provision in the amendments. The law was amended to forbid employers from prohibiting employees from sharing wage information.[10] In order to comply with this new provision, employers should review their employment and compensation policies and ensure there is no policy that prohibits an employee’s ability to inquire, discuss or disclose wages.

If an employer still wishes to have a policy in place regarding this issue, it may provide a written policy to

all employees that “establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages.”[11] We recommend that employers work with legal counsel to ensure that all compensation decisions are made based on permissible factors. It would also be wise for employers to review and update any arbitration agreements to ensure they include equal pay claims.

2. Train managers and supervisors regarding new policies.

After updating the company’s policies, the next important step is to train managers. Specifically, all managers, and those in a supervisory role, need to be aware of updated policies regarding compensation decisions and compensation disclosures. Those in charge of making compensation decisions need to understand what factors are allowed to play a role in determining an employee’s compensation.

3. Document rationale for compensation decisions and differentials.

The amendments increase an employer’s burden to justify its compensation decisions. If there are disparities in wages, it is important to account for and document the rationale for the discrepancies. In litigation, an employer will face the burden of justifying any pay differentials, including by explaining how compensation decisions were made and identifying the legitimate basis for the differentials. We expect courts to apply ever increasing scrutiny on the factors employers use to justify wage differentials. Having a fulsome record to justify differentials is thus imperative.

4. Audit the current compensation system in a privileged setting.

Employers should consider auditing their current compensation system in a privileged setting. Outside counsel will be able to offer an objective perspective on a company’s compensation framework and better determine whether a company is at risk. The audit should focus on determining if there are differentials within the company’s compensation system that are not in compliance with the law, including what factors are driving compensation. Given the new, expanded definition of “same establishment,” the audit should not be confined to one location. While there is not a one-size-fits-all approach as to how to proceed, it might be useful to take a staged approach. Each company could focus on one group of employees whose job requires “equal skill, efforts and responsibility” and are “performed under similar working conditions.” A staged approach will help identify the most efficient and effective way for a company to analyze its compensation scheme.

Once the employer has completed its audit, it is important to review the results of the audit with outside counsel to determine how best to proceed if there are any discrepancies. Going forward, it would also be helpful to have human resources or the legal department involved in the compensation process. That way, there will be an additional party involved to help vet compensation decisions and monitor for any significant gender discrepancies.

5. Retain all employment and payroll documents.

Section 195 of the New York Labor Act mandates that employers shall “establish, maintain and preserve for not less than six years contemporaneous, true and accurate payroll records” for each week, the hours worked, the basis and rate of pay, gross wages, deductions, allowances, and net wages for each employee.[12] Moreover, it is important to document and maintain all employment and compensation records in case a dispute arises with an employee. If a problem ever does arise, it will be important to

have contemporaneous records.

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[1] N.Y. Lab. Law § 194(3) (McKinney 2016).

[2] Id. § 194(1)(d).

[3] Id. § 194(1)(d)(i)-(ii).

[4] Id. § 194(2).

[5] Id. § 194(1)(d)(A)-(C).

[6] Id. § 194(4)(a).

[7] Id. § 194(4)(b). The employer's policy shall not "apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job function discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless the disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including investigation conducted by the employer." Id. § 194(4)(d).

[8] Id. § 194(4)(c).

[9] Id. § 198(1)(a).

[10] Id. § 194(4).

[11] Id. § 194(4)(b).

[12] Id. § 195(4).