

BIG CHANGES TO EQUAL PAY LAWS IN NEW YORK

Hodgson Russ Labor & Employment Alert
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Among the sweeping changes to workplace law passed by the New York legislature this session is a dramatic expansion to the law prohibiting pay discrimination. The new legislation also substantially reduces the standard for establishing that unlawful pay discrimination has occurred. Taken together, these measures are likely to materially increase the quantity of equal pay cases brought against employers, as well as plaintiffs' likelihood of success on those claims.

Currently, New York Labor Law § 194 prohibits pay differentials only based on sex. Once enacted, the amendments will prohibit pay differentials based on **any** characteristic otherwise protected under the New York Human Rights Law, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, military status, and domestic violence victim status. These protections would apply to employees, and also to interns who are covered by the New York Human Rights Law.

To establish an unlawful pay differential under the existing law, an employee has to show that he or she performs work that is "substantially equal" to that of a member of the opposite sex. Under the new legislation, the employee or intern could prevail by showing that he or she is paid less than an individual outside his or her protected classification who performs "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." This reduced threshold of proof, from "substantially equal" to "substantially similar," may make it easier for an individual to prevail in a pay discrimination claim. And the further modification of the standard of comparison to include comparative positions that are substantially similar "when viewed as a composite of skill, effort, and responsibility" may result in claims of pay discrimination based on positions that are not otherwise considered similar.

The legislation does not eliminate what is often the most significant defense for an employer in pay discrimination litigation. Specifically, employers can still pay different rates for legitimate, non-discriminatory reasons such as seniority, merit, quantity or quality of production, or a bona fide factor other than the protected classification (for example, education, experience, or training). This defense, however, is not available where the bona fide factor on which the employer relies is

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based upon a compensation differential related to a protected classification, or which is not job-related and consistent with business necessity. In addition, an individual alleging pay discrimination can overcome the employer's defense by showing that the employer's practices cause a disparate impact based on a protected classification.

This legislation was recently signed into law by Governor Cuomo and, as a result, will take effect on October 8, 2019. In view of the impending changes to the law, New York employers are encouraged to carefully review their compensation policies and practices in close consultations with their counsel.

If you have any questions regarding this new legislation or its impact on employers, please contact one of our Labor and Employment attorneys.

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