

LABOR & EMPLOYMENT

>>ALERT

NEW YORK STATE BANS SALARY HISTORY INQUIRIES AND EXPANDS EQUAL PAY PROTECTIONS

On July 10, 2019, Governor Cuomo signed into law two bills aimed at reducing pay inequity based on gender and other protected characteristics, continuing the legislature's recent push to pass aggressive new protections for New York employees.

SALARY HISTORY LAW

Under the new legislation, which takes effect on January 6, 2020, employers may not inquire about (from the applicant directly or from their former employer) or rely upon an applicant's wage or salary history in determining the applicant's compensation or whether to make them an offer or interview them for a position. Employers also may not require salary history from a current employee as a condition to be interviewed or as a condition for a promotion. Employers will also face liability for retaliating against an applicant or current employee in any way for refusing to provide compensation history or filing a complaint with the state's Department of Labor (DOL) alleging a violation of the salary history ban.

New York's salary history ban does not prevent applicants or current employees from voluntarily, and without prompting, disclosing their own compensation history to employers for purposes such as negotiating higher compensation for themselves. And when an applicant or current employee does voluntarily

THE BOTTOM LINE

New York's new laws prohibit employers from inquiring about job applicants' salary history, or from paying employees in any protected class less for substantially similar work. Employers should consider providing new training to human resources professionals and hiring managers regarding best practices for compliance with the new restrictions.

disclose their compensation history to support a demand for higher compensation than was offered by the employer, the employer is not barred from confirming such information.

The state's new ban goes further than similar laws enacted by some other jurisdictions, including New York City, by covering an employer's current employees who are under consideration for an internal transfer or promotion. It is unclear whether the new law will include a carve-out for deferred compensation. Under New York City's law, the city's Commission on Human Rights has clarified that employers may ask an applicant if they will have to forfeit deferred compensation or unvested equity from their current employer, and may request documentation to verify

the applicant's representations and consider such information in making the applicant an offer. Employers should be on the lookout for guidance from the state DOL addressing, among other issues, the statute's application to current employees and deferred compensation.

PAY EQUITY LAW

State lawmakers also passed a law, which will take effect on October 8, 2019, expanding the existing prohibition of pay discrimination based on sex. Under current law, the New York Equal Pay Act prohibits employers from paying an employee a lower rate than someone of the opposite sex for "equal work" that is performed under similar working conditions. The new legislation

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prohibits unequal pay on the basis of any protected characteristic, not just sex. This includes age, race, sexual orientation, gender identity or expression, or any other status that is protected from discrimination under the New York employment laws. The legislation also lessens the burden on employees seeking to prove wage discrimination by changing the current “equal work” standard. New York employers will soon be subject to liability when compensating employees disparately for merely “substantially similar work” performed under similar working conditions.

The new pay equity legislation will still maintain the four exceptions employers can utilize to avoid liability. Employers will not be found liable where unequal pay for substantially similar work is based on a:

- 1) Seniority system;
- 2) Merit system;
- 3) System which measures earnings by quantity or quality of production; or
- 4) Bona fide factor unrelated to protected class status (such as education, training or experience) that is job-related and consistent with business necessity.

ACTION STEPS

New York employers should review:

- >> Their hiring and pay practices and begin preparing to comply with:
 - The state’s new ban on inquiring about job applicants’ salary history; and
 - An expanded pay equity requirement that will cover all protected classes and prohibit unequal pay for “substantially similar” work.
- >> Any employment applications, job interview guidelines, pre-employment questionnaires and information requested from staffing agencies and recruiters to determine if any modifications are necessary; and
- >> Employees’ compensation to ensure that any pay disparities are justifiable under the state’s new more employee-friendly standard.

FOR MORE INFORMATION

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