

THE DAILY RECORD

Labor & Employment: NY expands workplace protections based on gender

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Recently, Governor Andrew Cuomo introduced various regulations and signed several bills aimed at protecting both women and the transgender community against discrimination in New York State. Specifically, on Oct. 21, he signed a collection of bills, referred to as the Women's Equality Act, which aim to strengthen and expand protections for women in the workplace.

Effective Jan. 19, 2016, the new laws' protections range from strengthening the requirement that women receive equal pay to subjecting all employers, regardless of size, to the prohibition of sexual harassment, to requiring covered employers to provide reasonable accommodations for pregnant employees. Additionally, Governor Cuomo directed the New York State Division of Human Rights (Division) to issue regulations that expand the State's Human Rights Law (HRL) protections against discrimination to cover transgender status, gender identity and gender dysphoria.

New equal pay protections

The most expansive bill the governor signed, the Achieve Pay Equity bill, effects four substantive changes concerning sex-based pay differences to New York Labor Law (NYLL) § 194 – the State's counterpart to the federal Equal Pay Act.

The first amendment to NYLL § 194 strengthens the prohibition against unequal pay between male and female employees performing comparable work. Under the current law, an employer may pay male and female employees different amounts for comparable work only if the employer can prove that the pay differential is based on either a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any factor other than sex. Once in effect, the amendment changes the "any other factor other than sex" requirement to the stricter requirement that the pay differential be based on "a bona fide factor other than sex, such as education, training and experience."

The amendment also requires that the bona fide factor-other-than-sex be "consistent with business necessity." Therefore, the factor-other-than-sex will have to be not only related to the employee's job duties, but also necessary for the position. Even if an employer can meet this burden, an employee will be able to claim a violation if the employee can show that the employer's factor-other-than-sex has a disparate impact based on sex and that the employer refused to adopt an alternative practice that would not produce such a disparate impact. The result is that it will be much harder for employers to justify pay disparities between comparable male and female employees.

The second amendment to NYLL § 194 expands the number of employees that can be used as comparators to establish an equal pay violation by allowing employees to compare themselves to employees working not just at their workplace, but also to those working at other “workplaces located in the same geographical region, no larger than a county.” This change allows employees to claim gender-based pay disparity based on compensation paid to employees working at different locations within the same region. This will require employers to be more vigilant in ensuring equal pay not just in the same facility, but also across facilities.

The third amendment provides that no employer may prohibit “an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.” However, the amendment also allows employers to have a written policy that establishes reasonable “limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages” consistent with standards to be issued by the Commissioner of Labor and state and federal law. Employers should review their handbook and policy manuals to ensure they are compliant.

The last amendment to NYLL § 194 increases the amount of liquidated damages a plaintiff may recover if an employer is found to have willfully violated the law, from 100 percent to 300 percent of the unpaid wages owed to the employee.

Reaching all employers

For years, the HRL has only applied to employers with four or more employees, thus exempting many small employers. However, the new Protect Victims of Sexual Harassment bill amends the HRL by removing the four-employee threshold for sexual harassment claims, and provides that sexual harassment claims can now be brought against “all employers within the state” regardless of size. As a result, many small employers that previously were not subject to sexual harassment claims will now need to adopt anti-harassment policies and train employees accordingly.

Accommodations for pregnancy

The Governor signed the Protect Women from Pregnancy Discrimination bill amending the HRL to require covered employers (those with four or more employees) to provide pregnant employees with reasonable accommodations due to a “pregnancy-related condition,” which includes any “medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” Under the new law, pregnancy-related medical conditions are treated as temporary disabilities, and employers must provide reasonable accommodations, unless doing so would create an undue hardship. As with other accommodation requests, employers can require that the employee provide medical or other information that verifies the existence of the condition or information that is necessary for consideration of the accommodation, and the employee must cooperate in providing the requested information.

‘Familial status’ discrimination ban

The End Family Status Discrimination bill bans “familial status” discrimination in the workplace, adding it as a protected characteristic along with, among others, race, age, religion and sex. This amendment means that employers may not discriminate against applicants and employees who are pregnant, in the process of securing legal custody of a child under 18, or who are parents or legal custodians of, or live with, a child under 18.

Attorneys’ fees for prevailing parties

The Remove Barriers to Remediating Discrimination bill allows, but does not require, the Division and state courts to award attorneys’ fees to a prevailing party in a discrimination claim based on sex. However, the bill permits an award of attorneys’ fees to an employer only if it can show that the applicant’s or employee’s claim is frivolous and even then such awards will be rare.

Expanded protections

In addition to the Women's Equality Act, Governor Cuomo directed the Division to issue the first-ever statewide regulations banning harassment and discrimination on the basis of gender identity, transgender status or gender dysphoria. Specifically, the proposed regulations prohibit discrimination and harassment on the basis of gender identity and the status of being transgender. Further, the regulations establish gender dysphoria as a protected disability under the HRL, requiring employers to provide reasonable accommodations to employees with gender dysphoria. The proposed regulations were published on Nov. 4 and were subject to a 45-day comment period. The regulations will not take effect until final regulations are issued at a date to be determined.

What should employers do?

Employers should review their policies and procedures as soon as possible to ensure they are in compliance and make changes where necessary. Employers should also train managers, supervisors and human resources employees about the effects of the new laws and employees' and employers' obligations under them.

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