



## PHILLIPS LYTLE LLP CLIENT ALERT

### LABOR & EMPLOYMENT



DECEMBER 2015

## *New York Expands Workplace Protections Based on Gender*

On October 21, 2015, New York Governor Andrew Cuomo signed five bills ushering in sweeping changes to the state's gender-based workplace protections. The new laws are part of the Women's Equality Act originally introduced in 2013, and are intended to provide women with more protection from discrimination at work. The new laws' protections range from strengthening the requirement that women receive equal pay to subjecting all employers, regardless of size, to the prohibition against sexual harassment, to requiring covered employers to provide reasonable accommodations for pregnant employees. Each of the new laws takes effect on January 19, 2016, and is discussed below.

### **New Equal Pay Protections**

The most expansive bill the Governor signed effects four substantive changes to New York Labor Law (NYLL) § 194 that concern sex-based pay differences.

The first amendment to NYLL § 194 restricts the conditions under which an employer may pay male and female employees performing comparable work by deleting language that permitted such a difference be based merely on "any other factor other than sex" and replacing it with the more restrict requirement that the "other than sex" factor be "a bona fide factor other than sex, such as education, training or experience" that is "job-related." 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 establish 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 recoverable for a violation of the law from 100% to 300% of the unpaid wages owed to the employee.



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### **Sexual Harassment Claims Can Now Be Brought Against All Employers**

The New York Human Rights Law (HRL) has for years applied only to employers with four or more employees, thus exempting many small employers. However, one of the new bills the Governor signed amends the HRL by removing the four-employee threshold 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 did not have to worry about sexual harassment claims will now need to adopt anti-harassment policies and train employees.

### **Accommodations for Pregnant Employees**

The Governor also signed another 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.” As a result, employers will now have to engage in the interactive process when a pregnant employee requests an accommodation. As with other accommodation requests, employers can require that the employee provide medical or other information that verifies the existence of the condition or that it is necessary for consideration of the accommodation.

### **“Familial Status” Discrimination Banned**

A third bill amending the HRL 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 final bill signed by the Governor allows, but does not require, the New York State Division of Human Rights 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.

### **What Should My Company Do?**

Given that these new laws take effect on January 19, 2016, 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.

### **Additional Assistance**

*For more information regarding New York’s expansion of workplace protections based on gender, please contact any of the attorneys on our Labor & Employment Practice Team. ■*



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### LABOR & EMPLOYMENT ATTORNEYS

James D. Donathen (716) 847-5476 [jdonathen@phillipslytle.com](mailto:jdonathen@phillipslytle.com)  
Marc H. Goldberg (518) 472-1224 Ext. 1229 [mgoldberg@phillipslytle.com](mailto:mgoldberg@phillipslytle.com)  
James R. Grasso (716) 847-5422; (212) 508-0475 [jgrasso@phillipslytle.com](mailto:jgrasso@phillipslytle.com)  
Amanda L. Lowe (716) 504-5747 [alowe@phillipslytle.com](mailto:alowe@phillipslytle.com)  
Kevin J. Mulvehill (585) 238-2095 [kmulvehill@phillipslytle.com](mailto:kmulvehill@phillipslytle.com)  
Linda T. Prestegaard (585) 238-2029; (212) 508-0425 [lprestegaard@phillipslytle.com](mailto:lprestegaard@phillipslytle.com)  
Patrick A. Sheldon (716) 504-5753 [psheldon@phillipslytle.com](mailto:psheldon@phillipslytle.com)  
Elizabeth Vanderlinde (212) 508-0464 [evanderlinde@phillipslytle.com](mailto:evanderlinde@phillipslytle.com)



**Albany** Omni Plaza 30 South Pearl Street Albany, NY 12207-3425 (518) 472-1224  
**Buffalo** One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400  
**Chautauqua** 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906  
**Garden City** 1305 Franklin Avenue Suite 200 Garden City, NY 11530-1630 (516) 742-5201  
**New York City** The New York Times Building 620 Eighth Avenue 23rd Floor New York, NY 10018-1405 (212) 759-4888  
**Rochester** 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000  
**Washington, DC** 800 17th Street NW Suite 450 Washington, DC 20006-3962 (202) 617-2700  
**Canada** The Communitech Hub 151 Charles Street West Suite 152 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800

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