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CLIENT ALERT

New York State Expands Prohibitions on Wage and Salary History Discrimination

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On July 10, 2019, New York Governor Andrew Cuomo signed into law two amendments to the New York Labor Law that aim to address pay disparities based on sex and other protected classes. The new pay equity amendment, which will become effective on October 8, 2019 and covers all private employers in New York State, expands the prohibition of Section 194 of the New York Labor Law against differential wages by sex to include differentials based on additional protected "classes," including "age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status" and those who engage in protected activities under the New York State Human Rights Law when compared to employees "without status within the same protected class or classes." This legislation now prohibits differential pay for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Employers that violate these mandates face damages not only for the differential but also for liquidated damages of up to 300 percent of the differential. The other amendment signed by Governor Cuomo prohibits employers from inquiring about or relying on an individual's wage or salary history in making employment and pay decisions, with only specified exceptions. This second amendment will become effective on January 6, 2020, will cover all private and public sector employers in the State of New York; it provides a private right of action to sue for damages, injunctive relief, and reasonable attorneys' fees.

Pay Equity Amendment

Section 194 of the New York Labor Law still permits differential pay based on a seniority system, merit system, system which measures earnings by quantity or quality of production, or bona fide factor other than protected class status, such as education, training or experience. Such factors may not be based on protected class status and must be job related to the applicable position and consistent with business necessity. These defenses do not apply where the employee demonstrates that the employer used a particular employment practice that caused a disparate impact on the basis of protected class status, an alternative practice would meet the employer's business needs and not produce such differential, and the employer has refused to adopt it. It has yet to be determined whether such factors must explain the entire disparity in pay.

Salary History Amendment

The salary history amendment makes it unlawful to: (i) rely on the wage or salary history of an applicant in determining whether to offer employment or determine wage or salary; (ii) orally or in writing seek, request, or require the wage or salary history from an applicant or current employee, or (iii) orally or in writing seek, request or require the wage or salary history of an applicant or current employee from a current or former employer. Employers with operations in New York State may not refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee: (i) based upon prior wage or salary history; (ii) because he or she did not provide wage or salary history, or (iii) because he or she filed a complaint with the department alleging a violation of this law.

Notably, the salary history law recognizes three exceptions. First, the amendment does not prevent an applicant or employee from "voluntarily, and without prompting, disclosing or verifying wage or salary history," for example, for purposes of negotiating compensation. Second, it allows an employer to confirm wage or salary history *after an offer of employment* with compensation has been made, but only if the prospective employee responds to the offer by disclosing wage history to negotiate for a higher wage or salary. Lastly, this amendment does not supersede any previously enacted federal, state, or local law that requires the disclosure or verification of salary history to determine an individual's compensation. The new law does not address its application to wage and salary inquires in connection with corporate acquisitions. If the same interpretation applied by the New York City Human Rights Commission is applied, the employees of the target companies will not be considered applicants for this purpose, but the utilization of such data to make wage and salary decisions will depend on the facts and circumstances.

Both laws follow the New York State legislature's recent trend of passing legislation intended to protect employees from discrimination, harassment, and other unfair practices. California, Massachusetts, Maryland, and Colorado, among others, have passed pay equity laws aimed at addressing pay disparities. Salary inquiry ban laws have previously been enacted in other jurisdictions, including Massachusetts, Oregon, and Delaware, as well as New York City, Suffolk, Westchester and Albany counties.

In light of these new statutory requirements, employers with operations in New York State should regularly analyze their compensation (at the direction of counsel, pursuant to the attorney-client privilege) to assess the defensibility of the company's compensation practices and identify potential areas of risk. Employers should also proactively develop a pay equity program that includes memorializing the legitimate factors that impact pay and defining and documenting which positions perform "substantially similar work." While the salary history ban was already a New York City law, employers with operations elsewhere in New York State should examine their hiring practices to ensure compliance. Employers should proactively alert their hiring staff regarding this new legislation, including informing and training any employees involved in recruitment and selection. Third party recruiters and background check providers should be notified that they must not supply such information regarding applicants for employment. Employers should also examine and where necessary modify any application forms or systems that include inquiries that could be perceived to seek, request or require wage or salary history.

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