

They Work Hard for Their Money, So You Better Pay Them Right- Governor Cuomo Signs Historic Pay Equity Legislation

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With the crowd's chant of "equal pay" echoing at the Women's World Cup soccer match and again as the champions float down the Canyon of Heroes, the issue of pay equality continues to be in the spotlight, and the New York legislature has jumped onto this moving train.

In addition to passing a [powerhouse bill](#) that strengthens protections for workers who claim workplace harassment, New York recently passed two pay equity bills that expand protections for current employees and job applicants.

Now, more than ever, employers in New York State should pay close attention to this rapidly changing legal landscape.

From "Equal Pay for Equal Work" to "Equal Pay for Substantially Similar Work"

The [first pay equity bill](#) implements a new standard for assessing pay discrimination claims under the New York Labor Law and expands protections to employees of all protected categories, not simply gender. The implications of the new legislation are best understood by comparing it to the existing law.

The Old Laws - Under existing federal ([29 U.S.C. § 206\(d\)](#)) and state law ([New York Labor Law § 194](#)), employers must pay men and women "equal pay for equal work," defined as requiring equal skill, effort and responsibility performed under similar working conditions. This seemingly simple standard was often difficult to define in real life, because, well, it's just never comparing apples to apples. Courts and employers often struggle with these concepts.

The New Law - First, the comparison is no longer just men and women-the law now applies to any employee who falls into any one of the protected categories under the New York State Human Rights Law (NYSHRL), including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status. Thus, this new pay equity legislation reaches far beyond gender equality and creates a new claim for any employee who falls into any of these (many) protected categories.

Second, the new law provides an alternative standard to establish pay discrimination. Before the new law passed, employees had to prove they did not receive equal pay for "equal work." Now however,

employees can succeed on the merits if they do not receive equal pay for “**substantially similar**” work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” The new legislation is significant because it lowers an employee’s burden to establish pay discrimination by allowing employees to compare themselves to employees who share substantially similar, but not “equal,” job responsibilities. In effect, an employee does not need to identify a “comparator” who performs essentially the same work to establish a claim.

While the new law is expansive, it does not amend the affirmative defenses available to employers to justify pay differentials, such as a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex, such as education, training, or experience.

New equal pay law will be effective on October 8, 2019.

Salary History Ban Applies Statewide

Following in the footsteps of local municipalities including New York City, Suffolk County, and Westchester County, the New York State legislature [passed a bill](#) prohibiting employers from inquiring or relying upon the salary history of a job applicant in determining whether to extend a job offer and in setting an applicant’s salary. An employer is also prohibited from retaliating against an applicant who refuses to disclose salary history information.

Unlike New York City’s [salary history ban law](#), which only applies to prospective employees, this new legislation also applies to current employees who are seeking internal transfers or promotions. Upon enactment, employers in New York State are now prohibited from requesting or relying upon a current employee’s salary or salary history in determining whether to interview the current employee for a different position, determining whether to extend a current employee an offer for a different position or promotion, or in setting the current employee’s salary if transferred or promoted.

The new legislation does not prohibit an applicant or current employee from voluntarily, “and without prompting,” disclosing or verifying salary history, including for the purposes of negotiating wages or salary. Further, if an applicant or current employee responds to an offer of employment or promotion by disclosing wage or salary history to negotiate a higher offer, an employer may confirm wage or salary history at such time.

The salary history law becomes effective on January 6, 2020.

Takeaway for Employers

While we fantasize that management and HR employees read this blog for fun, we surmise that our readers are primarily focused on one thing: should you change existing internal policies and practices in light of this new legislation and if so, how? **Our answer is yes**, and we suggest employers consider the following:

- Engage in a privileged pay equity audit and broaden the lens in which employees are typically grouped for comparison. Employers should look beyond job title, and instead focus on grouping employees who perform similar job functions and tasks since minor differences will no longer justify pay differentials.
- On that same vein, when employers group employees for comparison, employers can no longer compare employees only by gender but must assess and compare employees of all protected

characteristics under the NYSHRL. This is not a simple task and we recommend employers engage outside counsel, particularly to keep the audit privileged.

- Although job descriptions are not outcome determinative, job descriptions should be revised to ensure they reflect the actual responsibilities, skills, and effort required of the position to comply with the new legal standard.
- Last, but certainly not least, we recommend that HR and management take a second look at internal hiring and promotion practices due to the new salary history ban legislation. We recommend employers assess internal transfer applications, form interview questions, or anything related to the internal hiring and transfer process. Specifically, employers should take care to ensure that internal applications do not request salary history or wage information and that model interview questions for internal hiring are devoid of any inquiries regarding the same.

Navigating this new legislation is tough-with amorphous standards, employers are often left guessing how new laws will be enforced in the real world. Regulations have not been issued yet, leaving pay equity a hot legal topic. Join Kelley Drye on **September 17, 2019**, as we tackle this rapidly changing landscape in a webinar entitled, *The “Year of the Woman” - Pay Equity and Gender Equality Legislation and Litigation*. This webinar is part of WORKing Lunch, a larger educational series hosted by Kelly Drye’s Labor and Employment group. To view webinar programs and date [click here](#). To register for one or more webinar in this series please email marketing@kelleydrye.com.