



New Women's Equality Act Legislation Raises Bar for New York Firms

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New York Equal Pay Act

The new law amends the New York Equal Pay Act, making it more difficult for firms to defend such claims. Previously, firms could prevail in such actions by showing that a pay disparity between a man and a woman resulted from “any other factor than sex.” The new law tightens this standard, requiring a firm to offer proof of a “bona fide factor” other than sex which is both “job-related” and “consistent with business necessity.” The statute specifically mentions “education, training, [and] experience” as bona fide factors that may warrant different rates of pay in certain circumstances. The new standard thus makes it more difficult for firms to defend pay disparities, including those based on subjective factors. Other common industry practices, such as setting wages based on an incoming employee’s compensation at his or her previous firm, also may become more risky under the new standard.

Further, even when a firm can demonstrate bona fide reasons for a particular wage differential, a plaintiff can overcome such a showing by demonstrating that (a) the firm uses a particular employment practice that caused a disparate impact based on sex, (b) an alternative employment practice would serve the same business purpose without such an impact, and (c) the firm has refused to adopt this alternative practice.

Not only does the new law increase firms’ risk of exposure, it also raises the stakes. In addition to recovering the amount of any disparity in pay, the law provides aggrieved plaintiffs with the opportunity to collect liquidated damages of up to 300 percent of unpaid wages for willful violations, as well as the potential to recover their attorneys’ fees in bringing such action.

Further, the new law restricts a firm's ability to maintain secrecy over employee compensation information, preventing firms from "prohibit[ing] an employee from inquiring about, discussing or disclosing" employee wages (though firms can place reasonable limitations on the time and location of such discussions).

Discrimination Based on Familial Status

The new law amends the New York State Human Rights Law to prohibit discrimination on the basis of familial status, in addition to the current prohibition against discrimination on the basis of marital status. The law restricts firms from inquiring into or considering parental status when making employment decisions, such as those relating to hiring, firing, compensation, promotions and/or raises.

Pregnancy Discrimination

The amended law requires firms to provide "reasonable accommodations" for employees with pregnancy-related conditions, including miscarriage, abortion, childbirth and subsequent recovery. Reasonable accommodations are likely to include bathroom breaks, water breaks, time off for doctors' appointments and leaves of absence during periods of disability. Firms can require employees to provide medical information verifying the existence of the pregnancy-related condition and the need for the accommodation. As is the case under existing law governing employees with disabilities, firms are not required to grant requests for accommodations that impose an "undue hardship."

Attorneys' Fees For Sex Discrimination Claims

The law amends the New York State Human Rights Law to permit the recovery of reasonable attorneys' fees for plaintiffs who succeed in proving sex-discrimination. The primary impact of this change will be felt by small New York employers outside of New York City, as federal law (covering employers with fifteen (15) or more employees) and New York City law (covering employers with four (4) or more employees) already permit this remedy. Notably, however, the recent amendments also permit a successful defendant to recover attorneys' fees where the defendant can show that the plaintiff's claims were frivolous in nature.¹

What You Should Do:

Firms with operations in New York should expect an uptick in litigation under the new Women's Equality laws. Claims under the New York Equal Pay Act are bound to increase in light of the higher bar to defending such claims and the new provision permitting liquidated

damages of up to 300% for willful violations. Claims alleging discrimination based on familial status, and an increase in claims alleging pregnancy discrimination, also can be anticipated.

Firms should use the period from now until January 19, 2016 (when the new laws become effective) to assess their existing pay practices and pay structure and their human resources policies and protocols. At many firms, compensation decisions for 2015 and/or 2016 will be determined over the next several months, making it an opportune time to address any pay disparities that may exist. Firms should involve their counsel in these reviews, and take all appropriate steps to shroud their reviews in the attorney-client privilege.

Firms also should take fresh looks at their employment templates and policies, and their contracts with employees, to ensure compliance with the new laws, including the above-noted proscriptions on employee confidentiality policies with respect to wage-related information.

We are available to assist firms as they consider and confront these emerging issues.

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¹ The new law also allows employees to file sexual harassment complaints against employers of any size. Previously, employees could pursue such claims only against entities with four (4) or more employees.

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