



Governor Cuomo signs bills into law banning wage history inquiries and expanding pay disparity protections for New York employees

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On the heels of the World Cup victory of the U.S. Women's Soccer Team last week, New York Governor Andrew Cuomo signed two bills into law with the stated goal of advancing his 2019 Women's Justice Agenda. Under the first, New York employers will soon be prohibited from asking job applicants and current employees about their wage histories. The other expands the existing prohibition against paying employees of opposite sexes differently based on the same work to include employees with any protected classification status. The amended pay disparity law not only prohibits disparate pay based on "equal work," but will also prohibit disparate pay based on "substantially similar work." Governor Cuomo signed these bills at the ticker-tape parade celebrating the World Champion U.S. Women's Soccer Team.

Statewide salary history ban

Keeping in line with the recent trend among cities and counties within New York State, on June 20, 2019, the New York State Legislature passed a bill that will prohibit New York employers of all sizes from inquiring about current or prospective employees' wage or salary histories. Now signed into law, these restrictions will become effective on January 6, 2020.

These changes to the New York Labor Law ("NYLL") will prohibit employers from the following types of wage-related inquiries and conduct:

- relying on an applicant's wage history in determining whether to make an offer of employment or in determining the applicant's pay;
- seeking, requesting or requiring (orally or in writing) an applicant or a current employee's wage history as a condition to be interviewed, considered for an employment offer or employment or promotion;
- seeking, requesting or requiring (orally or in writing) an applicant or a current employee's wage history from certain third parties, including a current or former employer, a current or former employee or an agent of the individual's current or former employer;

- refusing to interview, hire, promote or employ an applicant or employee due to the individual's wage history, the individual's failure to provide the employer with his or her wage history or because the individual filed a complaint with the New York State Department of Labor about a violation of this law; and
- retaliating against an applicant or employee due to the individual's wage history, the individual's failure to provide the employer with his or her wage history or because the individual filed a complaint with the New York State Department of Labor about a violation of this law.

The new law, however, allows applicants and current employees to disclose and verify their wage histories, so long as such disclosure is voluntary and without prompting. In this regard, if an employer conveys an offer of employment or offer of promotion with compensation and the applicant or employee responds to the offer by providing prior wage information to support a higher pay than initially offered by the employer, the law expressly permits the employer to confirm an applicant's or employee's salary history.

Employers throughout New York State should review and, if necessary, update their pre-employment and evaluation practices, procedures and forms to comply with the requirements of this new legislation. Employers should ensure that they do not engage in discussions regarding compensation history during the hiring or promotion process, including by asking for such information on an application form, during an in-person interview or during the evaluation or promotion process. In addition, employers should review their reference checking procedures and forms to ensure that they are not requesting an applicant's wage history as part of the onboarding process.

Unlawful pay rate disparities

The New York State Legislature recently passed another bill that prohibits payment of different wages for substantially similar work based upon employees' protected class status. As a result of Governor Cuomo's signature last week, this new law will become effective on October 8, 2019.

This legislation amends the NYLL, which currently addresses unlawful disparate pay, but only on the basis of employees' sex. The expanded protection now extends to all employees who have protected class status. The NYLL defines "protected class" to include age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status and employees protected from discrimination under the New York State Human Rights Law.

The legislation also expands the scope of the protection of the pay disparity law. Existing law prohibits employers from disparately paying employees of the opposite sex for "equal work." The amended law prohibits disparate pay based on "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

This legislative amendment will not, however, affect the permissible reasons an employer may use to compensate employees at different pay rates for substantially similar work so long as the difference is based on: (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production or (iv) a bona fide factor other than protected class status.

In the months preceding the effective date of this law, employers should consult with counsel in order to review and, if necessary, update their compensation practices and procedures to ensure compliance with this law.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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