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NY Equal Pay Act Will Cover All Protected Characteristics

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New York State will vastly expand the scope of its Equal Pay Act to cover all characteristics protected under the New York Human Rights Law, including age, race, creed, national origin, sexual orientation and disability. Previously, the law was limited to sex and prohibited pay differentials only between employees of different sexes. The changes go into effect 180 days after the bill is signed into law, which Gov. Andrew Cuomo is expected to do.

Employers should prepare to audit their payroll, benefits and compensation records to avoid liability and stand ready to justify pay differentials.

Background

Congress passed the Equal Pay Act in 1963, which imposes liability on an employer for paying an employee of one sex less than any opposite-sex employees performing equal work, with limited exceptions. In 1966, New York passed its own version of the Equal Pay Act, which closely followed the federal version and was also limited to pay differentials between employees of different sexes performing equal work. (We have previously written about the [federal and New York Equal Pay Acts](#).) Significantly, neither law requires any evidence of discriminatory intent to impose liability; the fact of the differential is enough. Both laws originally imposed 100 percent liquidated damages on top of compensatory damages, meaning that a successful plaintiff

could recover double the pay differential (unless the employer can establish a good faith belief that its pay practices were lawful). Effective since January 2016, New York amended its Equal Pay Act to increase liquidated damages to 300 percent. This means that successful plaintiff can now recover *quadruple* the pay differential. The 2016 amendment also limited the main defense to an Equal Pay Act claim—that any differential was based on a “factor other than sex”—by tightening the requirements for such a defense to require, among other things, that the factor be job-related and “consistent with business necessity.” The statute of limitations for an Equal Pay Act violation is six years under New York law (while it is three years under federal law).

Expansion to Cover All Protected Characteristics

As part of a flurry of legislation last week, the New York legislature passed a bill that will make the New York Equal Pay Act applicable to every characteristic protected under the Human Rights Law. In other words, employers will become liable for pay differentials between employees of different races, different national origins, different ages, and so on.

The full list of protected characteristics, as of the time of this writing, is as follows:

- age
- color
- creed
- disability
- domestic violence victim status
- familial status
- gender identity or expression
- marital status
- military status
- national origin
- predisposing genetic characteristics
- race
- sex
- sexual orientation

Only those differentials based on a factor other than the protected characteristic will justify a pay differential.

The amendment also loosens the criteria for what will qualify as comparable work under the law, adopting the language of “substantially similar work” in place of “equal work.” The amendment defines “substantially similar work” as work “when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”

This dramatic expansion of the Equal Pay Act follows a related move in New Jersey last year, where a similar law covers all characteristics protected under the [New Jersey Law Against Discrimination](#).

How Employers Should Prepare

Given the significant potential liability, employers should audit their payrolls to see if salaries, hourly rates, benefits, and other forms of compensation are equal among employees performing substantially similar work. Duties, not titles, are key in determining substantially similar work. Employers should consult counsel

before determining that a pay differential is justified by a factor other than the protected characteristic, as courts have closely scrutinized what will and will not pass muster. In addition, employers cannot reduce anyone’s pay to remedy an unjustified pay differential.

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