

New York State Enacts Stricter Pay Equity Law and Bans Salary History Inquiries

On July 10, 2019, at the ticker tape parade celebrating the US Women's National Team's victory at the World Cup, Governor Cuomo signed two bills into law that require equal pay for equal work regardless of membership in any protected class and prohibit employers from asking prospective employees about their salary history. Employers should be mindful of these changes and re-evaluate their pay policies.

Expanded Pay Equity Law

Prior pay equity laws only prohibited differentials in pay due to an employee's gender. Under the expanded law, employers are prohibited from employee pay differentials based upon employee membership in any class protected under the New York State Human Rights Law ("NYSHRL") including, but not limited to, age, religion, sexual orientation, disability, and marital status where employees perform equal or substantially similar work. However, pay differentials will still be permitted where the differentials are based upon:

- a seniority system;
- a system that measures earnings based upon quantity or quality; or
- a bona fide factor other than membership in a class protected by the NYSHRL such as education, training or experience that is job-related and consistent with business necessity.

While pay differentials are permitted under these circumstances, employees will be able to refute the justification for the pay differential where they establish that the practice has a disparate impact upon a protected class, that there is an alternative practice that would achieve the same purpose without the disparate impact, and that the employer refused to adopt the alternate practice.

This law will go into effect on October 8, 2019.

Salary History Inquiry Ban

Following the enactment of similar laws on the local level in Albany, Suffolk and Westchester Counties and New York City, Governor Cuomo signed into law legislation barring employers from relying upon or inquiring about the salary history of a job applicant or current employee as a factor in deciding whether to hire the applicant, promote the current employee or what salary to offer. Moreover, employers are also prohibited from:

- seeking, requesting, or requiring applicants or current employees to disclose their salary history as a condition of consideration for employment, an offer of employment or an offer of promotion;
- seeking, requesting, or requiring applicants or current employees' current or former employers or agents to disclose their salary history; and
- refusing to interview, hire, promote, otherwise employ or retaliate against an applicant or current employee based upon salary history or their refusal to provide their salary history.

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However, nothing in the law prohibits an applicant or employee from voluntarily, without prompting, disclosing their salary history, including for the purposes of negotiation. Moreover, an employer can confirm salary history after an offer of employment with compensation is made and the applicant or employee proffers their salary history for the purposes of negotiating a higher rate of compensation.

Violation of the ban on salary history inquiries may result in liability for damages, injunctive relive and attorneys' fees.

This law will go into effect on January 6, 2020.

What Employers Should Do

Employers should review their compensation practices to ensure that they do not disadvantage members of a protected class. Moreover, they should review the salaries and wages paid to employees in substantially similar roles to ensure that their pay practices, though neutral, do not disparately impact members of a protected class. Where systems are required, such as a seniority system or one that measures earnings based upon quantity or quality, Employers must establish an actual system that is neutral towards protected classes, administered objectively and can be explained cogently in the event it is challenged.

Finally, Employers should review their hiring and promotional practices to ensure that their applications, interview aids and documents used to aid in the internal promotions process are devoid of any sections where they seek information on applicants' and employees' salary history.

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