

New York State Passes Five New Laws to Effectuate Gender Equality in the Workplace

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The New York State Legislature recently passed [several pieces of legislation](#), all of which are intended to curtail gender-related employment discrimination. Among other things, this legislation strengthens existing laws, creates new causes of action, and provides for the award of attorneys' fees. All of this legislation, collectively referred to as the Women's Equality Agenda ("WEA"), was signed into law by Governor Andrew Cuomo on October 21, 2015.

Further, in his continued push on gender-related issues, at the Empire State Pride Agenda's dinner on October 22, 2015, Governor Cuomo announced [proposed regulations](#) that would ban private and public employment discrimination against transgender individuals.¹ This proposal is subject to a 45-day notice and comment period before it can be fully implemented.

Below is a summary of the amendments that make up the WEA, which will become effective on January 19, 2016.

1) Fair Pay Law Amendments (NY Bill A6075)

As we have [discussed previously](#) with respect to the California Fair Pay Act, New York has now joined the national trend of states that are bolstering their fair pay laws, so that such laws are even more robust than their federal counterpart, the Equal Pay Act of 1963. Bill A6075 modifies the following sections of the New York State Labor Law regarding equal pay:

First, the Fair Pay Law Amendments amend Labor Law Section 194's equal pay provisions from the original standard, which permitted pay differentials based on "any

¹ In New York City, the City Human Rights Law already protects employees from discrimination on the basis of "gender identity."

factor other than sex” to a “bona fide factor other than sex” standard, which may include education, training, or experience. The Fair Pay Law Amendments make clear, however, that such a factor must:

- not be based upon or derived from a sex-based differential in compensation,
- be job-related with respect to the position in question, and
- be consistent with business necessity.

An employee may still proceed with a claim under Section 194.1 if the employee demonstrates that, despite the factor meeting these three elements:

- the employer’s particular employment practice causes a disparate impact on the basis of sex,
- an alternative employment practice exists that would serve the same business purpose and not produce such pay differential, and
- the employer has refused to adopt such alternative practice.

Second, the Fair Pay Law Amendments amend the definition of the term “same establishment” in New York State’s Labor Law Section 194.1 to include more than one workplace located in the same geographical region. So, under the New York Equal Pay Act, employers must now ensure that no employee is paid a lower wage than the wage paid to an employee of the opposite sex in the same establishment for equal work on a job that requires equal skill, effort, and responsibility, and which is performed under similar working conditions (except under certain limited circumstances). This expanded definition, however, limits a “geographical region” to no larger than a county.

Third, the Fair Pay Law Amendments add a pay transparency provision, prohibiting employers from taking adverse action against an employee who inquires about, discusses, or discloses his or her wages or the wages of another employee. Employers may, however, establish a written policy that sets forth “reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages.” There are also limitations to this pay transparency scheme, including that employees may not discuss or disclose the wages of another employee without that employee’s consent, and that employees who have access to wage information of other employees as a part of their essential job functions (i.e., HR staff) may not share such wage information with others who do not otherwise have access to such information, except when certain circumstances are present (e.g., an investigation or government inquiry). Employers should be mindful of the National Labor Relations Board’s position regarding prohibiting covered employees from discussing wages when considering whether to create such a policy and, if so, how to craft it.

Finally, the Fair Pay Law Amendments increase the amount of liquidated damages under Section 194 from 100 percent to up to 300 percent of the total damages when a willful violation is found.

2) Sexual Harassment Protections (NY Bill A5360)

This bill amends the New York State Human Rights Law (“NYSHRL”), which generally applies only to businesses with four or more employees, so that the sexual harassment protections under the NYSHRL apply to all New York employers, regardless of the number of employees. The Sponsor’s Memo to this bill indicated that the bill will affect the more than 60 percent of New York employers that employ fewer than four employees.

3) Recovery of Attorneys’ Fees (NY Bill A7189)

This bill amends New York Executive Law Section 297(10) to permit plaintiffs and defendants to recover attorneys’ fees in connection with claims of employment or credit discrimination on the basis of sex. The NYSHRL previously granted reasonable attorneys’ fees only in the context of housing discrimination claims. This bill does not provide attorneys’ fees for other types of employment discrimination under the NYSHRL.

4) Discrimination Based on Familial Status (NY Bill A7317)

This bill amends the NYSHRL, which bans employment discrimination on the basis of many protected categories, so that it now includes “familial status” as a protected classification. Familial status was already a protected category under the NYSHRL, but only with respect to housing discrimination.

The term “familial status” means:

- (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or
- (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:
 - (1) a parent or another person having legal custody of such individual or individuals, or
 - (2) the designee of such parent.

The Sponsor’s Memo to this bill indicates that the legislation was intended to protect women with children because that group is “less likely to be recommended for hire and promoted, and, in most cases, are offered less in salary than similarly situated men.”

The bill will likely provide greater protections outside its intended group, because it also covers men and other individuals who are gaining custody of a child.

5) Reasonable Accommodations for Pregnancy (NY Bill A4272)

This bill amends the NYSHRL to require employers to provide reasonable accommodations for employees with a pregnancy-related condition, which is defined as “a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” The bill requires an employee to “cooperate” in providing medical or other information that is necessary to verify the existence of a “disability or pregnancy-related condition,” meaning that employees must engage in the interactive process with the employer attempting to provide a reasonable accommodation.

The Sponsor’s Memo for the bill provides a list of potential reasonable accommodations, including “a stool to sit on, extra restroom breaks, transfer away from hazardous duties, a temporary reprieve from heavy lifting, or a reasonable time for child-birth recovery.” The new legislation itself, however, does not specifically reference these proposed accommodations. Employers in [New York City](#) will already be familiar with pregnancy accommodation requirements, since the City enacted a reasonable accommodation law for pregnant individuals (whether or not the individual suffers from a “pregnancy-related condition”) on January 30, 2014.

What New York Employers Should Do Now

In anticipation of this quintet of legislation becoming effective this coming January, New York employers should do the following:

- With the assistance of counsel, consider conducting a review of job titles and compensation methodology to ensure compliance with Section 194.1’s amended fair pay provisions.
- If you are a small employer (i.e., you have fewer than four employees), review your policies and ensure that you maintain a robust policy prohibiting sexual harassment and providing an internal complaint procedure.
- Train hiring and other managers to be sensitive to issues regarding familial status, in all phases of the employment relationship, from interview to termination.
- Train supervisors and human resources professionals to engage in an interactive process with pregnant individuals seeking workplace accommodations.

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