



Achieve Pay Equity Act: Are Employers Ready to Defend Their Pay Practices?

Publication

3.01.17

Pay equity issues are hot these days, in the boardroom and in the courtroom. Ask any employment lawyer and they will probably tell you that equal pay is likely to be one of the hottest topics in 2017 and beyond. This is doubly so for New York employers, due in no small part to the state's Achieve Pay Equity Act (APEA).

The law, which went into effect about one year ago in early 2016, greatly expands employee pay equity protection for employees in New York well beyond the federal Equal Pay Act (EPA). Recent high-profile cases filed in New York federal court, coupled with the treble damages available under the New York APEA, suggest that pay equity litigation will increase in the coming years. Now is the time for New York employers to take action to protect themselves before the likely onslaught of litigation under the state's pay equity statute.

Achieve Pay Equity Act

Prior to last January, New York's pay equity law mimicked the federal EPA. In fact, the two laws still provide for the nearly identical prohibition on unequal pay for work requiring "equal skill, effort, and responsibility, and which is performed under similar working conditions." As the U.S. Court of Appeals for the 2nd Circuit recently reiterated, in order to set forth a prima facie case under the EPA, a plaintiff must demonstrate that:

- (1) the employer pays different wages to employees of the opposite sex;
- (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and
- (3) the jobs are performed under similar working conditions.

See *Chiaromonte v. The Animal Medical Center*, 2017 WL 390894, at *1 (2d Cir. Jan. 26, 2017) (citations omitted). Ultimately, the critical question under the EPA "is the equal work inquiry, which requires evidence that the jobs compared are substantially equal." *Id.* (quotations omitted). To make this determination, the court must compare "actual job content; broad generalizations drawn from job titles, classifications, or divisions, and conclusory assertions of sex discrimination, cannot suffice." *Id.* (citations omitted). Although there haven't been any notable court cases interpreting the APEA to date, the nearly identical language in the two laws prohibiting equal work for unequal pay

suggests the requirements for a plaintiff to set forth a prima facie case under New York law will continue to track federal law.

However, New York's APEA contains a number of significant provisions that make the New York law much more employee-friendly. First, under the APEA, employers can only set forth an affirmative defense justifying a pay differential if they can prove the differential was based on a *bona fide* factor other than sex (such as education, training, or experience), whereas the federal EPA merely requires a showing of *any other* factor other than sex to justify the difference (in addition to both laws allowing a seniority, merit, or quantitative system to justify the pay differences).

Moreover, under New York law, this *bona fide* factor cannot be based upon or derived from a sex-based differential in compensation, and must be job-related with respect to the position in question and consistent with business necessity. The employer bears the burden of proof on this affirmative defense under both federal and state law; however, that burden is far greater under the APEA.

Next, New York's APEA allows an employee to overcome an employer's affirmative defense of a bona fide factor by showing that (1) the employer's practice causes a disparate impact on the basis of sex; (2) that alternative practices exist that would serve the same business purpose and not cause a disparate impact; and (3) the employer has refused to adopt the alternative practice. The federal EPA does not provide for such rebuttal evidence.

This unique requirement could have significant practical implications for employers defending pay equity lawsuits under the APEA, as plaintiffs' attorneys are likely to seek discovery on employers' business practices and the factors that led to the pay decisions at issue, greatly increasing the scope of discovery and cost of litigation. Employers are well-advised to be mindful of this provision when they develop and document their compensation determinations.

Third, New York's APEA increases the pool of male comparators to which plaintiffs can point to demonstrate a disparity in pay. Under both the EPA and APEA, the relevant comparators must work in the same "establishment." However, New York's APEA expands the definition of "establishment" to include all locations in a "geographical region," no larger than a county.

Moreover, New York's APEA, like recent legislation in many states throughout the country, makes it unlawful for employers to prohibit employees from discussing their wages or the wages of other employees, and institutes anti-retaliation protection for employees who do so. In other words, not only does the New York legislation broaden the scope of the equal pay act beyond its federal counterpart, but it also empowers female employees to openly discuss pay equity issues without fear of retaliation.

Finally, one of the major catalysts for the expected future uptick in pay equity litigation in New York is that the APEA greatly increases potential recovery for plaintiffs. Whereas the EPA (and New York law prior to last January) allows for only liquidated damages equal to the differential in wages, New York's APEA now allows for up to 300 percent liquidated damages. By way of example, a pay

TITLE VII now allows for up to 300 percent liquidated damages. By way of example, a pay disparity of only \$5,000 per year could now yield damages of \$20,000 per year plus attorney fees and costs.

Anatomy of a Claim

The landscape of pay equity litigation in New York has significantly changed with the passage of the APEA. Procedurally, the options to litigants seeking to vindicate their rights under the APEA are very broad: claims can proceed as an opt-out class action (as opposed to an opt-in collective action under the EPA), a six-year statute of limitations applies (as opposed to three years under the EPA), and claims are subject to the increased (300 percent) liquidated damages. Thus, the APEA has significant procedural, as well as substantive, advantages over its federal counterpart, and can be a powerful tool for litigants pursuing gender discrimination claims.

Going forward, pay equity litigation likely will include hybrid claims under both the federal EPA and New York APEA. Similar to the significant wage and hour class and collective action litigation under the Fair Labor Standards Act (FLSA) and state law, plaintiffs' lawyers can be expected to take advantage of the collective action notice mechanism under the federal EPA—which provides for notice to employees who are "similarly situated"—while at the same time pursuing state law claims as a class action.

The ability to proceed by both a collective and class action is the proverbial "one-two punch," allowing plaintiffs to proceed with claims under both federal and state law. This anticipated trend is borne out by recent filings in the Southern and Eastern Districts of New York, where plaintiffs have brought their APEA claims both individually and as a class action, in addition to federal EPA claims as a collective action. See, e.g., *Grant v. The New York Times Company*, 16-cv-03175 (S.D.N.Y.); *Chodkowski v. County of Nassau*, 16-cv-05770 (E.D.N.Y.)

Moreover, the APEA provides enhanced remedies for discrimination claims filed under Title VII and the New York state and city human rights laws. In two recently filed cases, the plaintiffs brought their APEA claims individually as part of their larger discrimination and retaliation claims. See *Messina v. Bank of America*, 16-cv-03653 (S.D.N.Y.) and *Nayak v. Jefferies Group*, 16-cv-06528 (S.D.N.Y.).

The plaintiffs' inclusion of APEA claims alters their otherwise run-of-the-mill discrimination case. Because the APEA expands the statute of limitations to six years, the employers are subject to a greatly expanded relevant period for discovery. In addition, in both cases, the plaintiffs alleged that decisions about bonuses and salary were made discriminatorily. By including APEA claims, the plaintiffs could potentially recover—in addition to back wages and any punitive and compensatory damages—300 percent liquidated damages for these alleged acts of discrimination, greatly increasing the employers' potential exposure.

Looking Forward

As 2017 continues, New York employers are likely to see an increase in both class action APEA claims and single-plaintiff APEA claims added to otherwise traditional gender discrimination

claims and single plaintiff A/E/A claims added to otherwise traditional gender discrimination lawsuits. When all of the changes of New York's Achieve Pay Equity Law are accounted for, it would not be surprising to see pay equity litigation in New York dramatically increase in 2017. While employers will certainly not welcome that development, an increase in filed cases and decisions will have the side benefit of providing more clarity regarding the differences between New York and federal pay equity law.

In the meantime, though, New York employers must take proactive steps to best protect themselves from potential liability. For example, employers should now examine their pay practices with an eye toward how female employees are paid compared to male employees across all locations within a county. Employers could also have to examine the decision-making behind certain pay practices that potentially cause a disparate impact on employee pay because of sex to make sure that no other pay practice was considered but ultimately rejected.

Furthermore, employers should examine their handbooks and policies to ensure that they do not violate any of the APEA's anti-confidentiality and anti-retaliation provisions. Finally, employers must understand that APEA litigation comes with increased headaches and costs—both in increased potential liability, but also in more advantageous procedural options for plaintiffs and a potential increased scope of discovery.

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