



## New York State Moves One Step Closer to New Pay Equity Laws

Insights

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On the heels of Governor Andrew Cuomo's call for New York to take additional steps to close the gender wage gap, the New York State Assembly passed a suite of pay equity legislation that would impact both private and public employers if successfully enacted.

New York's existing Achieve Pay Equity Act ("APEA") already aims to combat gender-based pay differentials. The New York State Fair Pay Act, one of the bills passed by the Assembly, extends equal pay legislation beyond gender, and would make it an unlawful discriminatory practice to pay "wages to employees at a rate less than the rate paid to employees of the opposite sex or of a different race or national origin for work in equivalent jobs." Additionally, employers could not pay wages to employees "in a job dominated by employees of a particular sex, race or national origin at a rate less than the rate at which such employer pays to employees in another job that is dominated by employees of the opposite sex or of a different race or national origin, for work on equivalent jobs."

Similar to the APEA, employers would be able to set forth an affirmative defense justifying the pay differential by showing that the differential was based on a *bona fide* seniority or merit system, a *bona fide* system that measures earnings by quantity or quality of production, or a *bona fide* system based on geographic differentials. Additionally, employers could justify the pay differential if based on a *bona fide* factor other than sex, race or national origin, such as education, training or experience. However, this factor cannot be based upon or derived from a sex, race or national origin differential in compensation, and must be job-related with respect to the position in question and consistent with business necessity. However, the employee could overcome this affirmative defense by showing (1) the employer's practice causes a disparate impact on the basis of sex, race or national origin; (2) an alternative practice exists that would serve the same business purpose without causing a pay differential; and (3) the employer has refused to adopt the alternative practice.

Notably, under the new Fair Pay Act, employers would be prohibited from reducing the wages of any employee in order to reach compliance with the law. Thus, if an employer's pay practices need to be adjusted to comply with the law, the employer would need to increase the wages of the lower paid employee rather than decrease the wages of the higher paid employee.

The Assembly also passed a bill prohibiting employers from inquiring about the salary history of job candidates or relying on salary history in determining the wages to offer a prospective employee. Though certain jurisdictions in New York (namely, New York City, Albany and Westchester) have

already implemented salary history bans, this bill would implement a statewide prohibition. If ultimately enacted, job candidates would be permitted to voluntarily disclose their wage or salary history. However, an employer could confirm a candidate's salary history only if, at the time a job offer is made, the applicant responds to the offer by providing prior wage information to support a higher wage than that offered by the employer. If a statewide salary history ban is successfully implemented, employers would still need to comply with any more restrictive local laws regarding salary history inquiries, unless repealed after passage of a statewide ban.

The legislative package passed by the Assembly also includes three measures aimed at closing the wage gap for public employees. If ultimately signed into law, the legislation would establish a statewide policy to ensure equal pay for equal work for state employees and would give public employees a private right of action to sue for violations of the law. Finally, the Civil Service Commission would be directed to study and publish a report evaluating wage disparities among public employees based on sex, race or national origin.

The package of bills passed by the Assembly now faces the Senate's approval before being presented to the Governor. Given the strong support on both sides of the aisle for additional measures to close the wage gap, as well as the Governor's indicated backing, it is likely that stronger pay equity laws will ultimately be signed into law in New York. Employers in New York should stay tuned as these measures work their way through the state legislative process.

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