New York State Labor Law Amendments Affecting Proof in Pay Discrimination Cases and Employer Policies Concerning Wage Disclosure

Amendments Alter Burden of Proof in Gender-Based Pay Cases and Bar Employer Prohibitions of Employee Wage Discussions

SUMMARY
The New York State Labor Law, in Section 194, prohibits differential pay on the basis of sex. Effective January 19, 2016, new amendments have added specific elements to the burden of proof in claims under Section 194, requiring employers with pay differentials to demonstrate a “bona fide” basis for a differential, “such as education, training, or experience,” which must be job-related and consistent with business necessity. The amendments allow employees to challenge the employer’s basis for a pay differential by showing that the employer’s practice has a disparate impact on the basis of sex and that an alternative practice would serve the same business purpose and not create a pay differential. In addition, the amendments forbid employers from prohibiting an employee from “inquiring about, discussing, or disclosing the wages of such employee or another employee.” An employer may, however, in a written policy provided to all employees, establish reasonable limitations on employees’ communications concerning their wages, including prohibiting an employee from discussing a co-worker’s wages without prior permission. Finally, the amendments increase the liquidated damages available to successful plaintiffs from 100% to 300% of the amount of wages found to be due for a willful violation of the law.
BACKGROUND

Bill No. 6075, effective January 16, 2016, amends Sections 194 and 198 of the Labor Law. According to the New York State Senate’s Memorandum in Support, the legislation was intended to respond to concerns that “women in New York earn 84 percent of what men earn” and that “policies adopted by employers that discourage or prohibit employees from sharing information about their earnings can contribute to unjust wage disparities going undetected.” With this law, New York joins other states, including California, in strengthening their equal pay laws over and above the requirements of the federal Equal Pay Act.

AMENDMENTS TO LABOR LAW SECTIONS 194 AND 198

“Bona Fide Basis” for Pay Differential and Disparate Impact Claim

Prior to these amendments, the New York State Labor Law allowed four exemptions to its general prohibition on differential pay because of sex; differential pay was permissible on the basis of: (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) “any other factor other than sex.” The amendments change the final exemption, which now requires “a bona fide factor other than sex, such as education, training, or experience.” Additionally, the amendments require that the “bona fide factor” be job-related with respect to the position in question and consistent with business necessity. Moreover, even if an employer meets this standard, it can be held liable if the employee demonstrates that the employer “uses a particular employment practice that causes a disparate impact on the basis of sex,” “that an alternative employment practice exists that would serve the same business purpose and not produce” a pay differential, and “that the employer has refused to adopt” the alternative practice.

The legislature thus incorporated into the Labor Law the burden-shifting framework that applies in disparate impact cases under Title VII of the Civil Rights Act and related Supreme Court case law. For example, the law’s definition of “business necessity”—“a factor that bears a manifest relationship to the employment in question”—was taken from the Supreme Court’s decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The amendments also provide that employees will be deemed to work at the “same establishment” for purposes of assessing pay differentials if “the employees work for the same employer at workplaces located in the same geographical region,” provided it is no larger than a county.

Pay Transparency Requirement

The amendments add a new subdivision to Section 194 providing that “no employer shall prohibit an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.” An employer may, however, “in a written policy provided to all employees, establish
reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages.” In particular, the law provides that the written policy may prohibit employees from discussing or disclosing other employees’ wages without those employees’ prior permission. An employee’s failure to adhere to a reasonable written policy is an affirmative defense available to the employer in the event the employee brings claims on the basis of an adverse employment action resulting from communication about wages.

The prohibition on employee discussion of wages does not apply “to instances in which an employee who has access to the wage information of other employees as a part of such employee’s essential job functions discloses the wages of such other employees to individuals” who would not otherwise have access to that wage information. Thus, employers may prohibit, for instance, employees in Human Resources or employees in management roles from discussing wage information with colleagues. However, those employees’ disclosure of wage information would be permissible “in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under [Section 194], including an investigation conducted by the employer.”

**Increased Liquidated Damages**

The law also amends Labor Law Section 198, which provides a private right of action for violations of Section 194. For wage claims brought under Section 194, the amendments increase the liquidated damages available to plaintiffs with successful claims for willful violations of the law from one hundred percent of the total amount of wages found to be due to three hundred percent.

**FORTHCOMING STANDARDS AND REGULATIONS**

The amendments instruct the Commissioner of Labor to issue standards concerning the written policies employers may introduce to establish “reasonable workplace and workday limitations” on employee discussion of wages. The Department of Labor and the New York State Division of Human Rights are also directed to make training available to assist employers in developing workplace policies and procedures to address discrimination and harassment in the workplace.

**IMPLICATIONS**

The law’s prohibitions apply to employees and to wage compensation.

The National Labor Relations Board has long taken the position that employers may not forbid employees covered by the National Labor Relations Act from discussing their compensation. The new law appears to nullify any distinction New York employers may have once drawn between supervisory personnel – who are not eligible to join a union – and ordinary employees with respect to prohibitions on discussing wages. In New York, it is no longer permissible for employers to forbid supervisory personnel from discussing wage information, provided that they are employees. The law does not appear to apply,
however, to bona fide partners, who are not employees. Nor does the law appear to apply to income that does not constitute wages. Thus, hedge funds, private equity funds and other similar entities that pay portions of profits or gains as carried interest or through a K-1 may be able to restrict discussion of those income items.

Although the law expressly prohibits an employer from implementing a policy forbidding current employees from discussing or disclosing their own wages, it is unclear whether it would affect the ability of employers to enter into agreements with departing employees to keep confidential the separation arrangements. There are reasonable arguments that such arrangements are outside the scope of the law.

The significance of the law’s alterations to pay differential standards is unclear.

Whether the law’s elaborations on the pay differential provisions will result in substantive changes in the standards of proof in wage differential cases or are cosmetic will remain to be seen as courts handle cases brought under the law. To a great extent, the additions in the law replicate Title VII standards and thus may not result in changes in employer liability.

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