

Employee Benefit ■ Plan Review

New York Lawmakers Expand Pay Equity Law and Ban Salary History Inquiries

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On the heels of passing sweeping changes to New York’s harassment and discrimination laws, the state legislature has approved major changes to New York’s pay equity statute. This two-pronged expansion of the equal pay law includes (i) A 8093-A / S 5428-B¹ (“Pay Equity Bill”), which will enable many more employees to more easily prove compensation discrimination, and (ii) A 5308-B² / S 6549³ (“Salary History Bill”), which provides a ban on salary history inquiries. Governor Andrew Cuomo, who has been a strong advocate of the measures, signed both bills into law.

EXPANSION OF PAY EQUITY LAW

Consistent with the federal Equal Pay Act, New York law, with some exceptions, currently requires that men and women receive equal pay for equal work. The Pay Equity Bill dramatically expands the law to protect an employee, job applicant, or intern based on *any protected class* recognized under the New York State Human Rights Law (“HRL”). The more than one dozen categories protected under the HRL currently include age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status.⁴ Thus, whereas the law previously allowed an equal pay claim based only on sex, the Pay Equity Bill will permit an individual to assert a claim of unequal pay based on, for example, race, sexual orientation, or familial status.

As importantly, the Pay Equity Bill also significantly lowers the burden of proof for establishing an equal pay claim. Currently, state equal pay law requires equal pay for equal work on a job, the performance of which “requires equal skill, effort and responsibility, and which is performed under similar working conditions” in the “same establishment” as the complainant’s comparator. Curiously, the Pay Equity Bill does not eliminate the “equal pay” standard; rather, it adds an alternative and less stringent standard, which mandates equal pay for “substantially similar work” when the jobs being compared are “viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” Accordingly, to prevail on an equal pay claim, a member of any protected class will only need to demonstrate that his or her job is substantially similar to the comparator’s job, rather than equal to such position.

The Pay Equity Bill does not alter the existing exceptions to the equal pay mandate, other than to prohibit a wage disparity based on any protected status (rather than just on sex). Hence, a pay differential may be lawful if it is (i) job-related and consistent with business necessity, and (ii) based on a nondiscriminatory factor, such as a seniority or merit system or the quantity or quality of work, or another *bona fide* factor other than status within a protected class (such as education, training, or experience). An employee retains the ability to overcome the employer’s justification for the wage differential by demonstrating that the employer’s policy or practice has a disparate impact on

the basis of status within a protected class, and that an alternative, non-discriminatory practice that would meet the employer's business needs exists, but the employer has refused to adopt it.

The Pay Equity Bill takes effect 90 days after enactment.

SALARY HISTORY INQUIRY BAN

The Salary History Bill prohibits every employer from:

- Relying on a job applicant's wage or salary history in determining whether to offer employment to that individual or in deciding the salary to offer;
- Requesting or requiring, either orally or in writing, an applicant's or current employee's salary history as a condition to being interviewed or considered for an offer of employment, or as a condition of employment or promotion;
- Seeking an applicant's or employee's wage history from a current or former employer, except as discussed below; and
- Refusing to interview, hire, or promote, or otherwise retaliating against, an applicant or current employee: (i) based upon his or her salary history, (ii) because the applicant or employee refused to provide his or her salary history, or (iii) because such individual filed a complaint with the Department of Labor alleging a violation of this law.

The Salary History Bill contains an exception for circumstances in which an applicant or current employee voluntarily, and without prompting by the employer, discloses his or her wage history for such purposes as negotiating salary. In addition, an employer is permitted to verify salary history if, following a job offer with compensation, the employee provides his or her salary history to support a higher wage than that being offered. Finally, an employer may inquire

into or verify salary history pursuant to any federal or state law that "requires the disclosure or verification of salary history information to determine an employee's compensation." It should be noted, however, that certain exceptions recognized under New York City's salary history inquiry ban, such as asking about cancelled deferred compensation, are not included in the Salary History Bill.⁵

An applicant or employee aggrieved by a violation of the salary history inquiry ban may bring a lawsuit for damages. A court also may award injunctive relief, as well as reasonable attorneys' fees, to a plaintiff who prevails on his or her claim.

It should be noted that the clause prohibiting an employer from "refus[ing] to interview, hire, promote, otherwise employ, or otherwise retaliat[ing] against an applicant or current employee based upon prior wage or salary history" is unclear and potentially problematic. For example, assuming an applicant voluntarily discloses his or her current salary and it is significantly higher than the amount the employer can pay for that position, would the employer's decision not to hire the applicant because it cannot meet or exceed the applicant's current salary constitute a violation of the provision's ban on "refus[ing] to ... hire ... based on prior wage or salary history"? Hopefully, the state will provide guidance as to the intent of this provision.

The Salary History Bill becomes effective 180 days after enactment.

WHAT NEW YORK EMPLOYERS SHOULD DO NOW

New York employers should take the following measures.

With respect to the Pay Equity Bill, employers should do the following:

- Review pay practices and make any necessary changes to ensure that any wage differentials

among substantially similar jobs are based on objective, nondiscriminatory factors, such as those discussed herein.

- Until the courts have had an opportunity to weigh in on the new standard, take a conservative approach to determining those jobs that are "substantially similar."

With regard to the Salary History Bill, employers should do the following:

- Review and, if necessary, revise current hiring and promotion practices and forms to ensure that neither job applications nor interviewers seek salary history information.
- Await any further guidance that may (or may not) be forthcoming from the state.
- If the services of an employment agency are engaged, make sure the agency complies with the new prohibition on salary inquiries.
- Train human resources staff and hiring managers on the ban and any new policies implemented to ensure compliance with it. 🌟

NOTES

1. [https://assembly.state.ny.us/leg/?default_fld=&n=S05248&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y#jump_to_Text](https://assembly.state.ny.us/leg/?default_fld=&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y#jump_to_Text).
2. <https://legislation.nysenate.gov/pdf/bills/2019/A5308B>.
3. <https://www.nysenate.gov/legislation/bills/2019/s6549>.
4. The New York Legislature just approved an expansion of the prohibition on race discrimination. If signed into law by the governor, A 7797 / S 6209 will add to the definition of "race" "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles," such as "braids, locks and twists." See, <https://www.nysenate.gov/legislation/bills/2019/a7797>.
5. It is likely that, once effective, the Salary History Bill will supersede Westchester County's salary history inquiry ban, since the county ordinance (<https://www.esrcheck.com/file/Westchester-County-Documents-4054.pdf>) includes a specific provision to this effect. It is unclear, however, what impact, if any, the Salary History Bill will have on the bans enacted by Albany County, New York City,

and Suffolk County, as the applicable laws of those jurisdictions do not address this preemption question. The Salary History Bill, itself, merely states that “[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any applicant or current or former employee under any other law or regulation”

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