

Management Alert



Significant Changes to New York Laws On Pay Equity, Transgender Protection, and Wage Payments

By Maria Papasevastos

New York Governor Andrew Cuomo and the State Department of Labor (“DOL”) have taken several steps in recent weeks that will significantly affect employers throughout the State. These changes concern the rights of women in the workplace; protecting transgender individuals from discrimination in employment; allowing employers to continue to make certain authorized deductions from employees’ wages; an increase in the minimum wage for tipped workers in the hospitality industry and employees in the fast food industry; and the payment of wages by payroll debit cards and direct deposit.

A summary of these revisions (and proposed revisions) is below.

Women’s Equality

Cuomo signed into law five new statutory provisions affecting women’s rights in the workplace, all of which will become effective on January 19, 2016:

1. **“Fair Pay” Protections:** New York will join California in enacting laws that will make it far easier for plaintiffs to pursue gender-based pay equity claims in the New Year (see our prior alert on the New York Legislature’s approval of this bill [here](#) and our alert on the California Fair Pay Act [here](#)). New York Labor Law § 194 — the State’s counterpart to the federal Equal Pay Act — currently prohibits discrimination in pay based on sex, but like the federal Equal Pay Act, its reach is limited. While the New York law will not be quite as far reaching as the one recently enacted in California, it will mean meaningful changes for employers with New York-based employees:

- Employees can be compared even if they do not work at the same establishment so long as they work in the same “geographic region,” no larger than the same county. While the New York law is less expansive than the California law, which permits comparison of employees sitting hundreds of miles away, this is still a significant extension of the existing federal and state law and will impact employers with multiple work sites within the same county.
- The new law adds to the existing law requiring that employers justify pay differentials and limits the factors that employers can use, mirroring the expansive California Fair Pay Act. The New York law puts the burden on employers to affirmatively demonstrate that any pay differences are based on one or more of a limited number of factors. The permitted reasons for differences in pay are:

- o A seniority system;
- o A merit system;
- o A system that measures earnings by quantity or quality of production; or
- o A bona fide factor other than sex such as education, training, or experience.

This bona fide factor exception will replace the “any other factor other than sex” language in the current law, and will apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a “business necessity” (*i.e.*, the factor relied upon effectively fulfills the business purpose it is supposed to serve). But this defense will not apply if there is an employment practice that causes a disparate impact, or if the employer refuses to adopt a neutral alternative practice that would serve the same business need.

- Employers may not prohibit employees from inquiring about, discussing, or disclosing wage information.
- Finally, liquidated damages for willful violations of § 194 will be increased to 300% of wages due.

2. **Expanded Definition of “Employer” in Sexual Harassment Cases:** The New York State Human Rights Law (“NYSHRL”) currently excludes employers with fewer than four employees from the definition of “employer.” The new law will expand this definition, *in sexual harassment cases only*, to all employers within New York regardless of size.

3. **Plaintiffs May Recover Attorneys’ Fees in Sex Discrimination Cases:** Under the current law, plaintiffs cannot recover attorneys’ fees at trial in employment discrimination cases. This bill will amend the NYSHRL to allow successful plaintiffs to recover fees in employment or credit discrimination cases where the discrimination is based on sex.

4. **Familial Status Discrimination:** This bill amends the NYSHRL to prohibit discrimination in employment based on familial status.

5. **Accommodations for Pregnancy-Related Conditions:** This bill amends the NYSHRL to clarify that employers must provide reasonable accommodations to employees with pregnancy-related medical conditions, unless doing so would create an undue hardship. Under the new law, pregnancy-related conditions are to be treated as temporary disabilities. Also, the employee must cooperate in providing medical or other information necessary to verify the existence of the pregnancy-related condition or necessary to consider the accommodation. Employers must keep such medical information confidential.

Regulations Protecting Transgender Individuals

The Governor has directed the New York State Division of Human Rights to issue proposed regulations to prohibit discrimination and harassment in employment based on gender identity, the status of being transgender, and gender dysphoria. Under the proposals, the term “sex,” as used in the NYSHRL, will include gender identity and the status of being transgender, and the term “disability” will include gender dysphoria.

The proposed regulations are subject to a 45-day comment period before taking effect. (The proposed regulations are available [here](#).)

Labor Law Amendments on Permissible Wage Deductions Extended

In 2012, Labor Law § 193 was amended to expand the instances where employers could make deductions from employee wages with the employee’s consent. The expanded grounds for permitted deductions included deductions for gym membership dues, discounted parking or mass transit passes, cafeteria and vending machine purchases at an employer’s place of business, tuition fees for pre-school through post-secondary school, and daycare, before-school and after-school care expenses, among other deduction categories. Of particular interest to many employers were new provisions allowing wage

deductions for recovery of overpayments of wages and repayment of advances.

Under the 2012 enactment, these changes were set to expire and be deemed repealed three years after their effective date — meaning they would have expired on November 6, 2015. Before that deadline, Governor Cuomo signed into law a bill that extends the expiration date for an additional three years, through November 2018.

Raising the Minimum Wage and Reducing the “Tip Credit” in the Hospitality Industry

On October 7, 2015, the DOL published [proposed regulations](#) that, as of December 31, 2015, would raise the minimum wage for “service employees” and “food service workers” to \$7.50 per hour (from \$5.65 and \$5.00 per hour, respectively), and reduce the maximum available “tip credit” to \$1.50 per hour (from \$3.35 and \$4.00, respectively). With respect to service employees working in resort hotels, the proposed regulations would similarly raise the minimum wage to \$7.50 per hour (from \$4.90 per hour), and reduce the maximum available “tip credit” to \$1.50 per hour (from \$4.10 per hour), but further state that the tips received must “equal or exceed at least \$5.05 per hour.” The proposed regulations are subject to a 45-day public comment period.

Minimum Wage for Fast Food Employees

The DOL issued [proposed regulations](#) on October 21, 2015 to raise the minimum wage for “fast food employees” working at a “fast food establishment” to \$15.00 per hour by December 31, 2018 in New York City and by July 1, 2021 in the rest of New York State. The regulations implement the proposal made by the Fast Food Wage Board last July, which was adopted in full by the acting Commissioner of Labor. The increase would be phased-in according to a schedule set forth in the proposed regulations, with the first increase of \$10.50 per hour in New York City and \$9.75 per hour outside of New York City to be effective on December 31, 2015. The proposed regulations are subject to a 45-day public comment period.

Payment of Wages By Payroll Debit Cards and Direct Deposit

The DOL issued [proposed revised regulations](#) on October 28, 2015 governing permissible methods of wage payment, including payment by payroll debit cards and direct deposit. The revisions respond to comments the DOL received after publishing its proposed regulations in May. The proposed revised regulations are subject to another 30-day public comment period. The regulations will go into effect six months after adoption of the final rule.

For employers that pay wages by payroll debit card or direct deposit, the proposed revised regulations would require that they provide employees a written notice that includes:

1. a plain language description of all of the employee’s options for receiving wages;
2. a statement that the employer may not require the employee to accept wages by payroll debit card or by direct deposit;
3. a statement that the employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full; and
4. a list of locations where employees can access and withdraw wages at no charge within reasonable proximity to their place of residence or place of work.

The regulations would further require that employers obtain employees’ informed written consent without intimidation, coercion, or fear of adverse action for refusal to accept payment of wages by direct deposit or payroll debit card, and employers may not make payment of wages by direct deposit or payroll debit card a condition of hire or of continued employment.

Under the proposed regulations, employers must provide written notice and written consent in English and the employee's primary language when a template notice and consent in such language is available from the Commissioner of Labor. Employers may provide written notice and obtain employees' written consent electronically, so long as the employee can view and print both the notice and consent at work, without cost, and the employer notifies the employee through the electronic process of his or her right to print these materials.

In addition, for payment by direct deposit, the proposed regulations would require the employer to keep a copy of the employee's consent during the period of the employee's employment and for six years following the last payment of wages by direct deposit. The employer must also give the employee a copy of his or her written consent.

For payment by payroll debit card, the proposed regulations impose several additional requirements on employers before they are able to utilize this method of payment. Beyond the consent and notice requirements, employers must wait seven business days after an employee gives consent before paying that employee's wages by payroll debit card, and must ensure that the employee is provided access to one or more ATMs located within a reasonable travel distance to the employee's work location or home, as well as a method to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without the employee incurring a fee. Also, if an employee is covered by a valid collective bargaining agreement that expressly provides the method(s) by which wages may be paid to employees, the employer must obtain the union's approval before paying covered employees by payroll debit card.

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