Tuesday, March 15, 2016

In deference to Bob Dylan, while you may not need a weatherman to know which way the wind blows, employers quite often rely on employment lawyers to help them recognize an approaching legal storm and how best to prepare for it. Today, this weatherman is forecasting a coming pay equity storm. To best prepare, below are four changes to New York’s Equal Pay Act, along with four tips for employers who seek shelter from the storm through good compliance practices.

Over the years, a chronic wage gap between male and female workers has been the subject of countless workplace studies. And while laws designed to address the disparity – like the federal Equal Pay Act – have been passed, women continue to lag men in wages, according to many reports. In recent months, however, legislative and other developments portend change, and for those in New York State, that change is already here. Following California, which enacted statutory amendments to strengthen its equal pay act, New York State amended its own pay equity law. That amendment, which went into effect late January 2016, made several key changes to the existing law that should prompt employers to re-examine their pay practices and
Four Important Changes To New York’s Equal Pay Act

Like the federal Equal Pay Act, New York’s pay equity law has required employers to pay equally men and women in the “same establishment” for “equal work” (i.e., work requiring “equal skill, effort and responsibility”) that is “performed under similar working conditions.” Against this requirement, an employer may defend any wage disparity if based on any factor other than sex.

Four noteworthy changes are found in New York’s amended law.

1. **Giving definition to “same establishment.”** Under the amended law, employees may be deemed to work in the “same establishment” if they work in the “the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities.” Consequently, in any equal pay case, wage comparisons may be made beyond a single work site.

2. **Refining the “factor other than sex” defense.** Under the amended law, employers still have an “other than sex” defense, but based on the revised language, the standard seems more stringent and bit more slippery. The employer must show that the wage disparity is based on “a bona fide factor other than sex, such as education, training or experience” and that the bona fide factor does not stem from a sex-based differential in compensation, relates to the job, and is consistent with business necessity. In any case, this defense will be disallowed if the employee can show that (a) the employer’s business practice has a disparate impact based on sex, (b) an alternative practice exists that would serve the same business purpose but not create the disparity, and (c) the employer refused the alternative practice.

3. **Barring employer restraints on wage talk.** The amended law bars employers from prohibiting employees from talking or inquiring about their own or another employee’s wages except in very limited situations. As we have addressed here previously, certain workers already have such protections, specifically, those employed by federal contractors or covered by Section 7 of the National Labor Relations Act. The amended New York law extends to all employees of private employers in New York, and while it permits employers to establish reasonable time, place, and manner restrictions on such wage discussions or inquiries, covered employees may well now have a cause of action against employers who put up (or continue to enforce) such restraints unreasonably.
4. **Tripling of liquidated damages.** Employers that willfully violate the amended law may be liable for liquidated damages equaling 300% of the total amount of the wages due to the victim of a discriminatory pay practice. With respect to violations of other New York wage laws, liquidated damages remains 100% of the total amount wages due or unpaid.

**Four Practical Steps For Employers**

With these changes, employers are advised to be proactive on several fronts.

1. **Review and revise practices/policies.** Employers might begin by checking their policies and practices against the amended law. After all the prompts from the NLRB and OFCCP, here is one more opportunity for employers to remove from their employment and confidentiality agreements those traditional provisions that bar employees from sharing or discussing compensation information. Also, with the tripling of liquidated damages, employers may want to adopt or amend arbitration agreements that will cover equal pay claims, as well as include class action waivers.

2. **Train supervisors and HR.** Supervisors and HR personnel must be trained on any new practices and policies. These key personnel must understand the new rules (or better yet, not enforce old rules) relating to workplace wage discussions and compensation determinations.

3. **Make a written record.** Facing a heightened burden to defend compensation decisions or disparities, employers should be doing the evidentiary legwork that can help them identify the business rationale and legitimate reasons for any compensation decision or disparity.

4. **Conduct an audit.** There is no better way of assessing an employer’s risk than determining, via a comprehensive audit, whether and to what extent its pay practices are out of compliance.

It is not difficult to see how these changes to New York’s pay equity law will make it easier for women to establish – and more difficult for employers to defend – discriminatory pay practices. And with states like California and New York leading the way, changes in other states are surely on the way as Congressional action to update the federal Equal Pay Act continues to stall. Beyond gender, and as minorities continue to move up in corporate hierarchies, pay equity disputes are likely to become more prevalent under Title VII of the Civil Rights Act. Indeed, the pay equity storm clouds are no longer on the horizon, they have arrived, and it is time for employers to batten down the compliance hatches.

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