

5872

2013-2014 Regular Sessions

I N S E N A T E

June 18, 2013

Introduced by Sens. SAVINO, LITTLE, BALL, GOLDEN, ROBACH, HANNON -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the labor law, in relation to the prohibition of differential pay because of sex

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivision 1 of section 194 of the labor law, as added by
2 chapter 548 of the laws of 1966, is amended and three new subdivisions
3 2, 3 and 4 are added to read as follows:
4 1. No employee shall be paid a wage at a rate less than the rate at
5 which an employee of the opposite sex in the same establishment is paid
6 for equal work on a job the performance of which requires equal skill,
7 effort and responsibility, and which is performed under similar working
8 conditions, except where payment is made pursuant to a differential
9 based on:
10 a. a seniority system;
11 b. a merit system;
12 c. a system which measures earnings by quantity or quality of
13 production; or
14 d. [any other factor other than sex] A BONA FIDE FACTOR OTHER THAN
15 SEX, SUCH AS EDUCATION, TRAINING, OR EXPERIENCE. SUCH FACTOR: (I) SHALL
16 NOT BE BASED UPON OR DERIVED FROM A SEX-BASED DIFFERENTIAL IN COMPEN-
17 SATION AND (II) SHALL BE JOB-RELATED WITH RESPECT TO THE POSITION IN
18 QUESTION AND SHALL BE CONSISTENT WITH BUSINESS NECESSITY. SUCH EXCEPTION
19 UNDER THIS PARAGRAPH SHALL NOT APPLY WHEN THE EMPLOYEE DEMONSTRATES (A)
20 THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A
21 DISPARATE IMPACT ON THE BASIS OF SEX, (B) THAT AN ALTERNATIVE EMPLOYMENT
22 PRACTICE EXISTS THAT WOULD SERVE THE SAME BUSINESS PURPOSE AND NOT
23 PRODUCE SUCH DIFFERENTIAL, AND (C) THAT THE EMPLOYER HAS REFUSED TO
24 ADOPT SUCH ALTERNATIVE PRACTICE.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 2. FOR THE PURPOSE OF SUBDIVISION ONE OF THIS SECTION, "BUSINESS
2 NECESSITY" SHALL BE DEFINED AS A FACTOR THAT BEARS A MANIFEST RELATION-
3 SHIP TO THE EMPLOYMENT IN QUESTION.

4 3. FOR THE PURPOSES OF SUBDIVISION ONE OF THIS SECTION, EMPLOYEES
5 SHALL BE DEEMED TO WORK IN THE SAME ESTABLISHMENT IF THE EMPLOYEES WORK
6 FOR THE SAME EMPLOYER AT WORKPLACES LOCATED IN THE SAME GEOGRAPHICAL
7 REGION, NO LARGER THAN A COUNTY, TAKING INTO ACCOUNT POPULATION DISTRIB-
8 UTION, ECONOMIC ACTIVITY, AND/OR THE PRESENCE OF MUNICIPALITIES.

9 4. (A) NO EMPLOYER SHALL PROHIBIT AN EMPLOYEE FROM INQUIRING ABOUT,
10 DISCUSSING, OR DISCLOSING THE WAGES OF SUCH EMPLOYEE OR ANOTHER EMPLOY-
11 EE.

12 (B) AN EMPLOYER MAY, IN A WRITTEN POLICY PROVIDED TO ALL EMPLOYEES,
13 ESTABLISH REASONABLE WORKPLACE AND WORKDAY LIMITATIONS ON THE TIME,
14 PLACE AND MANNER FOR INQUIRES ABOUT, DISCUSSION OF, OR THE DISCLOSURE OF
15 WAGES. SUCH LIMITATIONS SHALL BE CONSISTENT WITH STANDARDS PROMULGATED
16 BY THE COMMISSIONER AND SHALL BE CONSISTENT WITH ALL OTHER STATE AND
17 FEDERAL LAWS. SUCH LIMITATIONS MAY INCLUDE PROHIBITING AN EMPLOYEE FROM
18 DISCUSSING OR DISCLOSING THE WAGES OF ANOTHER EMPLOYEE WITHOUT SUCH
19 EMPLOYEE'S PRIOR PERMISSION.

20 (C) NOTHING IN THIS SUBDIVISION SHALL REQUIRE AN EMPLOYEE TO DISCLOSE
21 HIS OR HER WAGES. THE FAILURE OF AN EMPLOYEE TO ADHERE TO SUCH REASON-
22 ABLE LIMITATIONS IN SUCH WRITTEN POLICY SHALL BE AN AFFIRMATIVE DEFENSE
23 TO ANY CLAIMS MADE AGAINST AN EMPLOYER UNDER THIS SUBDIVISION, PROVIDED
24 THAT ANY ADVERSE EMPLOYMENT ACTION TAKEN BY THE EMPLOYER WAS FOR FAILURE
25 TO ADHERE TO SUCH REASONABLE LIMITATIONS AND NOT FOR MERE INQUIRY,
26 DISCUSSION OR DISCLOSURE OF WAGES IN ACCORDANCE WITH SUCH REASONABLE
27 LIMITATIONS IN SUCH WRITTEN POLICY.

28 (D) THIS PROHIBITION SHALL NOT APPLY TO INSTANCES IN WHICH AN EMPLOYEE
29 WHO HAS ACCESS TO THE WAGE INFORMATION OF OTHER EMPLOYEES AS A PART OF
30 SUCH EMPLOYEE'S ESSENTIAL JOB FUNCTIONS DISCLOSES THE WAGES OF SUCH
31 OTHER EMPLOYEES TO INDIVIDUALS WHO DO NOT OTHERWISE HAVE ACCESS TO SUCH
32 INFORMATION, UNLESS SUCH DISCLOSURE IS IN RESPONSE TO A COMPLAINT OR
33 CHARGE, OR IN FURTHERANCE OF AN INVESTIGATION, PROCEEDING, HEARING, OR
34 ACTION UNDER THIS CHAPTER, INCLUDING AN INVESTIGATION CONDUCTED BY THE
35 EMPLOYER.

36 (E) NOTHING IN THIS SECTION SHALL BE CONSTRUED TO LIMIT THE RIGHTS OF
37 AN EMPLOYEE PROVIDED UNDER ANY OTHER PROVISION OF LAW OR COLLECTIVE
38 BARGAINING AGREEMENT.

39 S 2. Subdivision 1-a of section 198 of the labor law, as amended by
40 chapter 564 of the laws of 2010, is amended to read as follows:

41 1-a. On behalf of any employee paid less than the wage to which he or
42 she is entitled under the provisions of this article, the commissioner
43 may bring any legal action necessary, including administrative action,
44 to collect such claim and as part of such legal action, in addition to
45 any other remedies and penalties otherwise available under this article,
46 the commissioner shall assess against the employer the full amount of
47 any such underpayment, and an additional amount as liquidated damages,
48 unless the employer proves a good faith basis for believing that its
49 underpayment of wages was in compliance with the law. Liquidated damages
50 shall be calculated by the commissioner as no more than one hundred
51 percent of the total amount of wages found to be due, EXCEPT SUCH LIQUI-
52 DATED DAMAGES MAY BE UP TO THREE HUNDRED PERCENT OF THE TOTAL AMOUNT OF
53 THE WAGES FOUND TO BE DUE FOR A WILLFUL VIOLATION OF SECTION ONE HUNDRED
54 NINETY-FOUR OF THIS ARTICLE. In any action instituted in the courts upon
55 a wage claim by an employee or the commissioner in which the employee
56 prevails, the court shall allow such employee to recover the full amount

1 of any underpayment, all reasonable attorney's fees, prejudgment inter-
2 est as required under the civil practice law and rules, and, unless the
3 employer proves a good faith basis to believe that its underpayment of
4 wages was in compliance with the law, an additional amount as liquidated
5 damages equal to one hundred percent of the total amount of the wages
6 found to be due, EXCEPT SUCH LIQUIDATED DAMAGES MAY BE UP TO THREE
7 HUNDRED PERCENT OF THE TOTAL AMOUNT OF THE WAGES FOUND TO BE DUE FOR A
8 WILLFUL VIOLATION OF SECTION ONE HUNDRED NINETY-FOUR OF THIS ARTICLE.

9 S 3. The department of labor and the division of human rights shall
10 make training available to assist employers in developing training,
11 policies and procedures to address discrimination and harassment in the
12 workplace including, but not limited to issues relating to pregnancy,
13 familial status, pay equity and sexual harassment. Such training shall
14 take into account the needs of employers of various sizes. The depart-
15 ment and division shall make such training available through, including
16 but not limited to, online means. In developing such training materi-
17 als, the department and division shall afford the public an opportunity
18 to submit comments on such training.

19 S 4. Severability clause. If any clause, sentence, paragraph, subdivi-
20 sion, section or part of this act shall be adjudged by a court of compe-
21 tent jurisdiction to be invalid, such judgment shall not affect, impair
22 or invalidate the remainder thereof, but shall be confined in its opera-
23 tion to the clause, sentence, paragraph, subdivision, section or part
24 thereof directly involved in the controversy in which such judgment
25 shall have been rendered. It is hereby declared to be the intent of the
26 legislature that this act would have been enacted even if such invalid
27 provisions had not been included herein.

28 S 5. This act shall take effect on the ninetieth day after it shall
29 have become a law; provided, however, that the commissioner of labor
30 shall take actions necessary to provide for the promulgation of stand-
31 ards pursuant to subdivision 4 of section 194 of the labor law, as added
32 by section one of this act, prior to this act taking effect; and
33 provided further, however, that the department of labor and division of
34 human rights shall take actions necessary to establish training pursuant
35 to section three of this act prior to this act taking effect.