S T A T E O F N E W Y O R K

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2015-2016 Regular Sessions

I N A S S E M B L Y

January 30, 2015

Introduced by M. of A. CERETTO, MALLIOTAKIS, RAIA, STEC, CURRAN, MILLER, DUPREY, LUPINACCI, McKEVITT, MONTESANO, FINCH, McLAUGHLIN, DiPIETRO, KOLB, CORWIN, SALADINO, BORELLI, GIGLIO, PALMESANO, TEDISCO, WALTER, RA, GOODELL, PALUMBO -- Multi-Sponsored by -- M. of A. CROUCH, JOHNS, OAKS -- read once and referred to the Committee on Labor

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:

Section 1. Subdivision 1 of section 194 of the labor law, as added by chapter 548 of the laws of 1966, is amended and three new subdivisions 2, 3 and 4 are added to read as follows:

1. No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, except where payment is made pursuant to a differential based on:

a. a seniority system;

b. a merit system;

c. a system which measures earnings by quantity or quality of production; or

d. [any other factor other than sex] A BONA FIDE FACTOR OTHER THAN SEX, SUCH AS EDUCATION, TRAINING, OR EXPERIENCE. SUCH FACTOR: (I) SHALL NOT BE BASED UPON OR DERIVED FROM A SEX-BASED DIFFERENTIAL IN COMPENSATION AND (II) SHALL BE JOB-RELATED WITH RESPECT TO THE POSITION IN QUESTION AND SHALL BE CONSISTENT WITH BUSINESS NECESSITY. SUCH EXCEPTION UNDER THIS PARAGRAPH SHALL NOT APPLY WHEN THE EMPLOYEE DEMONSTRATES (A) THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT ON THE BASIS OF SEX, (B) THAT AN ALTERNATIVE EMPLOYMENT PRACTICE EXISTS THAT WOULD SERVE THE SAME BUSINESS PURPOSE AND NOT

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

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PRODUCE SUCH DIFFERENTIAL, AND (C) THAT THE EMPLOYER HAS REFUSED TO ADOPT SUCH ALTERNATIVE PRACTICE.

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

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

4. (A) NO EMPLOYER SHALL PROHIBIT AN EMPLOYEE FROM INQUIRING ABOUT, DISCUSSING, OR DISCLOSING THE WAGES OF SUCH EMPLOYEE OR ANOTHER EMPLOYEE.

(B) AN EMPLOYER MAY, 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. SUCH LIMITATIONS SHALL BE CONSISTENT WITH STANDARDS PROMULGATED BY THE COMMISSIONER AND SHALL BE CONSISTENT WITH ALL OTHER STATE AND FEDERAL LAWS. SUCH LIMITATIONS MAY INCLUDE PROHIBITING AN EMPLOYEE FROM DISCUSSING OR DISCLOSING THE WAGES OF ANOTHER EMPLOYEE WITHOUT SUCH EMPLOYEE'S PRIOR PERMISSION.

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

(D) THIS PROHIBITION SHALL 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 DO NOT OTHERWISE HAVE ACCESS TO SUCH INFORMATION, UNLESS SUCH DISCLOSURE IS IN RESPONSE TO A COMPLAINT OR CHARGE, OR IN FURTHERANCE OF AN INVESTIGATION, PROCEEDING, HEARING, OR ACTION UNDER THIS CHAPTER, INCLUDING AN INVESTIGATION CONDUCTED BY THE EMPLOYER.

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

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

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

a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, EXCEPT SUCH LIQUIDATED DAMAGES MAY BE UP TO THREE HUNDRED PERCENT OF THE TOTAL AMOUNT OF THE WAGES FOUND TO BE DUE FOR A WILLFUL VIOLATION OF SECTION ONE HUNDRED NINETY-FOUR OF THIS ARTICLE.

S 3. The department of labor and the division of human rights shall make training available to assist employers in developing training, policies and procedures to address discrimination and harassment in the workplace including, but not limited to issues relating to pregnancy, familial status, pay equity and sexual harassment. Such training shall take into account the needs of employers of various sizes. The department and division shall make such training available through, including but not limited to, online means. In developing such training materials, the department and division shall afford the public an opportunity to submit comments on such training.

S 4. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

S 5. This act shall take effect on the sixtieth day after it shall have become a law; provided, however, that the commissioner of labor shall take actions necessary to provide for the promulgation of standards pursuant to subdivision 4 of section 194 of the labor law, as added by section one of this act, prior to this act taking effect; and provided further, however, that the department of labor and division of human rights shall take actions necessary to establish training pursuant to section three of this act prior to this act taking effect.