STATE OF NEW YORK

4240

2017-2018 Regular Sessions

IN ASSEMBLY

February 1, 2017

Introduced by M. of A. NOLAN, CAHILL, COLTON, COOK, DICKENS, GALEF, GLICK, GOTTFRIED, JAFFEE, JEAN-PIERRE, JENNE, LIFTON, MOSLEY, ROZIC, SEAWRIGHT, TITUS -- Multi-Sponsored by -- M. of A. ENGLEBRIGHT, HYNDMAN, SIMON -- read once and referred to the Committee on Labor

AN ACT to amend the labor law and the executive law, in relation to prohibiting employers from seeking salary history from prospective employees; to amend the labor law in relation to prohibiting employer compensation discrimination based on sex, race, or national origin; and to amend the civil service law, in relation to implementing a state policy of a fair, non-biased compensation structure

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 194 of the labor law, as added by chapter 548 of the laws of 1966, subdivision 1 as amended and subdivisions 2, 3 and 4 as added by chapter 362 of the laws of 2015, is amended to read as follows:

§ 194. Differential in rate of pay because of sex**, race, or national origin** prohibited. 1. No employee shall be paid a wage at a rate less than the rate at which an employee of [~~the opposite~~] **a different** sex**, race, or national origin**, in the same establishment is paid for equal **or substantially similar** work on a job the performance of which requires equal **or substantially similar** 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. a bona fide factor other than sex**, race or national origin**, such as education, training, or experience. Such factor: (i) shall not be based upon or derived from a [~~sex-based~~] **sex, race, or national origin based**

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

LBD07473-02-7

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, **race, or national origin** (B) that an alternative employment practice exists that would serve the same business purpose and not 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[~~,~~]**: (a)** 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**; and**

(b) job description alone shall not determine work that is the same or substantially similar.

4. (a) **(i)** No employer shall prohibit an employee from inquiring about, discussing, or disclosing the wages of such employee or another employee.

(ii) No employer shall require, as a condition of employment, that an employee refrain from inquiring about, discussing, or disclosing information about the employee's own wages, or about any other employee's wages.

(iii) Nothing in this subdivision shall obligate an employer to disclose an employee's wages to another employee or a third party.

(b) No employer shall seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or to require that a prospective employee's prior wage or salary history meet certain criteria; provided, however, that: (i) if a prospective employee has voluntarily disclosed such information, a prospective employer may confirm prior wages or permit a prospective employee to confirm prior wages or salary; and (ii) a prospective employer may seek or confirm a prospective employee's wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee.

[~~**(b)**~~] **(c)** An employer may, in a written policy provided to all employees, establish reasonable workplace and workday limitations on the time, place and manner for inquires 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)**~~] **(d)** 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)~~] **(e)** 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)~~] **(f) No employer shall discharge or in any other manner retaliate against an employee because the employee: (i) opposed any act or practice made unlawful by this section; (ii) made or indicated an intent to make a complaint or has otherwise caused to be instituted any proceeding under this section; (iii) testified or is about to testify, assist or participate in any manner in an investigation or proceeding under this section; or (iv) disclosed the employee's wages or has inquired about or discussed the wages of any other employee.**

(g) 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.

§ 2. Section 197 of the labor law, as amended by chapter 564 of the laws of 2010, is amended to read as follows:

§ 197. Civil penalty. **1.** Any employer who fails to pay the wages of his employees or shall differentiate in rate of pay because of sex, **race, or national origin** as provided in this article, shall forfeit to the people of the state the sum of five hundred dollars for each such failure, to be recovered by the commissioner in any legal action necessary, including administrative action or a civil action.

2. Any agreement between the employer and any employee to work for less than the wage to which the employee is entitled under this article shall not be a defense to an action. An employee's previous wage or salary history shall also not be a defense to an action.

§ 3. Section 198-a of the labor law is amended by adding a new subdivision 4 to read as follows:

4. Any agreement between the employer and any employee to work for less than the wage to which the employee is entitled under this article shall not be a defense to an action. An employee's previous wage or salary history shall also not be a defense to an action.

§ 4. Section 115 of the civil service law, as added by chapter 790 of the laws of 1958, is amended to read as follows:

§ 115. Policy of the state. **1.** In order to attract unusual merit and ability to the service of the state of New York **and all its political subdivisions**, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government, it is hereby declared to be the policy of the state [~~to provide equal pay for equal work,~~] and **all its political subdivisions thereof, consistent with the federal Equal Pay Act of 1963 (29 U.S.C. § 206), the federal Civil Rights Act (42 U.S.C. § 2000e-2), article fifteen of the executive law, and section forty-c of the civil rights law, to ensure a fair, non-biased compensation structure for all employees in which sex, race, or national origin is not considered either directly or indirectly in determining the proper compensation for a title or in determining the pay for any individual or group of employees, and to provide** regular increases in pay in proper proportion to increase of ability, increase of output and increase of quality of work demonstrated in service.

2. It shall be an unlawful discriminatory practice, except as provided in subdivision five of this section, for any public employer in this state to discriminate against an individual in any way based on an individual's sex, race or national origin in the payment of compensation nor shall they compensate any person in its employ at a rate less than the rates paid to its employees of a different sex, race or national origin for work on a job, the performance of which requires equal or substantially similar skill, effort and responsibility performed under similar working conditions. For the purposes of this subdivision, job description alone shall not determine work that is the same or substantially similar.

3. For the purpose of this section, the term "compensation" shall include but not be limited to: all earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is paid on an annual salary, hourly, biweekly or per diem basis; reimbursement for expenses; health, welfare and retirement benefits; and vacation pay, sick pay, separation or holiday pay, or any other form of remuneration.

4. (a) Where an employee believes he or she is being discriminated against in terms of compensation in violation of this section, such employee may bring an action in any court of competent jurisdiction to recover the equitable and monetary relief described in paragraph (b) of this subdivision.

(b) (1) In any action in which a court or jury finds that an employer has engaged in acts in violation of this section, the court or jury shall award to any affected employee or employees monetary relief, including back pay in an amount equal to the difference between the employee's actual earnings and what the employee would have earned but for the employer's unlawful practices, including an appropriate increase in retirement benefits, and an additional amount in compensatory and punitive damages, as appropriate.

(2) In any action in which a court or jury finds that an employer has engaged in acts in violation of this section, the court shall enjoin the employer from continuing to discriminate against affected employees and shall direct the employer to comply with the provisions of this article; and may order the employer to take such additional affirmative steps as are necessary to ensure an end to unlawful discrimination, including reinstatement to the same or a comparable position for employees in the unclassified service or employees classified as management/confidential or labor; reinstatement with back pay; or reclassification of affected workers.

(3) In any action in which an affected employee or employees prevail in their claims against employers, the court may, in addition to any judgement awarded to the plaintiffs, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the employer.

(c) An action to recover the damages or equitable relief prescribed in paragraph (b) of this subdivision may be maintained against any employer in any court of competent jurisdiction by any one or more employees or their representative for or on behalf of:

(1) the employees; or

(2) the employees and other employees similarly situated.

5. (a) It shall not be a violation of this section for an employer to pay different compensation to employees, where such payments are made pursuant to:

(1) a bona fide seniority or merit system;

(2) a bona fide system that measures earnings by quantity or quality of production;

(3) a bona fide system based on geographic differentials; or

(4) any other bona fide factor other than sex, race or national origin, such as education, training, or experience. Such factor: (A) shall not be based upon or derived from a sex, race, or national origin based differential in compensation; and (B) 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 (i) that an employer uses a particular employment practice that causes a disparate impact on the basis of sex, race, or national origin, (ii) that an alternative employment practice exists that would serve the same purpose and not produce such differential, and (iii) that the employer has refused to adopt such alternative practice.

(b) For the purpose of paragraph (a) of this subdivision, "business necessity" shall be defined as a factor that bears a manifest relationship to the employment in question.

(c) Nothing set forth in this section shall be construed to impede, infringe or diminish the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining relationship.

6. Any agreement between the employer and any employee to work for less than the wage to which the employee is entitled under this section shall not be a defense to an action. An employee's previous wage or salary history shall also not be a defense to an action.

§ 5. Section 296 of the executive law is amended by adding a new subdivision 19-a to read as follows:

19-a. It shall be an unlawful discriminatory practice of an employer, labor organization, employment agency or licensing agency, or its employees, agents, or members to seek a salary history from a prospective employee for an interview or as a condition for employment.

§ 6. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date.