

EMPLOYMENT LAW UPDATE
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New York's new pay equity legislation expands New York State's wage parity statute to include employees of all protected categories

Effective October 8, 2019, New York's equal pay law expanded beyond protection for women to encompass all protected classes under the New York State Human Rights Law, including age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status.

Prior to this, New York Labor Law § 194 stated that, “no employee shall be paid a wage at a rate less than the rate at which the 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” [emphasis added]. The new standard replaces that with “**substantially similar work**, when viewed as a composite of skill, effort, and responsibility,” lowering the employee's burden of establishing pay discrimination and making it easier for employees to assert claims. Instead of finding an “equal” comparator (always highly litigious and contentious), an employee is now able to compare themselves to employees who share “substantially similar work” and job responsibilities. While this change is monumental, it does not affect an employer’s affirmative defenses that justify pay differentials through seniority systems, merit systems, a system that measures earnings by quantity or quality of production, education, training, or experience.

As the law expands to protect employees in more classes, traditional issues facing equal pay cases may finally be brought to light, such as access to information. An employee would still have to establish her own comparator, but the information to do so is frequently not readily available. An employee would need that information in order to discover the comparator sharing this substantially similar work. For instance, if a woman sees the salary and benefits information of a man currently in a totally different role than her, she may remember that she came into the job at the same time as the man, was interviewed by the same person, and spent the same two years under the same boss. Then perhaps on the woman’s maternity leave, that man was promoted and now has higher pay and can no longer be considered “substantially similar” to her. She may not remember at the time of her lawsuit filing that this man is actually a fair comparator, but a chart including his name, salary and benefits could jog her memory. Young & Ma LLP partner Tiffany Ma discusses this on WNYC on October 7, 2019:

<http://www.youngandma.com/equal-pay>

Employers can no longer base compensation packages simply on “job titles.” They need to look across all their employees and equally compensate those who share substantially similar responsibilities and assignments. It would be prudent for employers to conduct a pay analysis across all employees to make sure they comply with this law, as willful violations of New York's equal pay law under N.Y. Labor Law § 194 can result in liquidated damages of 300% of the pay differential going back six years. Employers should be mindful that N.Y. Labor Law § 194

claims are typically brought with other discrimination claims (e.g., gender) that allow plaintiffs to seek emotional distress damages, which can also be very sizable.

Employees, on the other hand, can feel more empowered to pursue claims that focus on pay discrimination. Although finding a viable comparator may be difficult, it is not impossible, as the discovery process can reveal a comparator of ***substantially similar work and job responsibilities***. The law now protects a much broader category of employees, and employees are encouraged to assess with counsel whether the state equal pay law is applicable anytime she or he feels significantly underpaid when compared to colleagues doing similar work. As always, it is important that employees maintain good records of their own employment and salary history.

At Young & Ma LLP, we tailor and create unique business and legal strategies to obtain our clients' objectives and goals. To request a private consultation or to discuss further with the authors, please email tma@youngandma.com or call 212-971-9773.