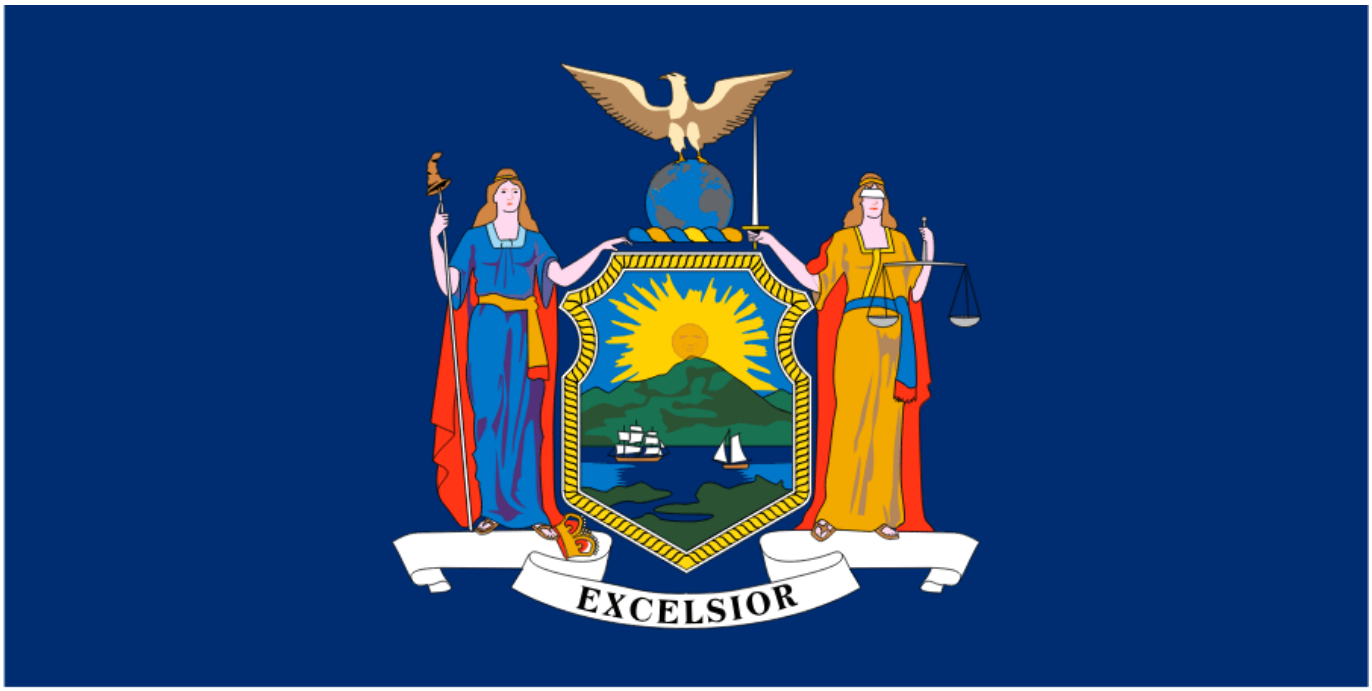
Ogletree Deakins

New Requirements and Looming Deadlines in October 2019: What New York Employers Need to Know

October 2, 2019

By Simone R.D. Francis

As we previously reported this past summer, the New York State Senate and Assembly passed Senate Bill 6549, which amended Section 194 of the New York Labor Law to prohibit wage differentials based on any protected class. As we also reported, the State Senate and Assembly also passed an omnibus bill that overhauled New York's antidiscrimination laws. Governor Andrew Cuomo signed these bills into law on July 10 and August 12, 2019, respectively. As a result, several new laws are slated to take effect in October 2019.



As we previously reported this past summer, the New York State Senate and Assembly passed Senate Bill 6549, which amended Section 194 of the New York Labor Law to prohibit wage differentials based on any protected class. As we also reported, the State Senate and Assembly also passed an omnibus bill that overhauled New York's antidiscrimination laws. Governor Andrew Cuomo signed these bills into law on July 10 and August 12, 2019, respectively. As a result, several new laws are slated to take effect in October 2019.

October 8, 2019: Expanded Pay Equity Requirements Take Effect

Effective October 8, 2019, New York's equal pay law, which currently applies only to sex, also will prohibit any differentials in pay because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, disability, predisposing genetic characteristics, familial status, marital status, and/or domestic violence victim status. In addition to continuing to prohibit differentials among individuals who perform "equal work," the amendment also will prohibit differentials among individuals who perform "substantially similar work."

Specifically, New York law will prohibit all employers from paying an employee in one or more protected class or classes at a wage rate that is less than the rate at which an employee without that status is paid for:

- equal work on a job, which requires equal skill, effort, and responsibility, and which is performed under similar working conditions; or
- substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

As with the existing law, a pay differential would be permitted when such differential is based on:

- a seniority or merit system;
- a system measuring earnings by quantity or quality; or
- a bona fide factor other than status within one or more protected class or classes that is job related and consistent with business necessity, such as education, training, or experience.

However, employers cannot use a factor that is based on status within one or more of the protected classes to justify a differential, and any factor that an employer uses to justify a differential must be job related with respect to the position in question and consistent with business necessity. Furthermore, consistent with the existing law, an employee would be able to overcome a stated explanation by demonstrating that:

- an employment practice causes a disparate impact on the basis of status within one or more protected class or classes;
- an alternative practice exists that would serve the same purpose and not produce such differential; and
- the employer refused to adopt the alternative practice.

October 9, 2019: Deadline for Sexual Harassment Prevention Training

Since October 9, 2018, the state of New York has required all employers to (i) establish a sexual harassment prevention policy and (ii) provide all employees with annual sexual harassment prevention training.

The state guidance requires sexual harassment policies to include specific examples of conduct that constitutes unlawful sexual harassment, a written complaint form, and information regarding employees' legal rights and available forums to adjudicate sexual harassment complaints with federal, state, and local agencies.

The deadline for completion of the initial training is October 9, 2019 (i.e., one year after the law's effective date). New York state has published a model anti-harassment policy, model complaint form, and model training program that employers may adopt. Alternatively, employers may adopt policies and training programs that meet or exceed the detailed minimum standards provided by the state.

New York's guidance contains minimum requirements for sexual harassment training, including that the training be "interactive." Notably, New York does not require trainings to be of a specific minimum duration, provided that trainings meet or exceed the state's minimum standards. Additionally, since August 12, 2019, employers have been required to provide employees a notice containing the "employer's sexual harassment prevention policy and the information presented at such employer's

sexual harassment prevention training program" (in English and in the primary language of the employee) upon hire and at every annual sexual harassment prevention training program.

October 11, 2019: Changes to the New York State Human Rights Law Take Effect

On October 11, 2019, several changes to the New York State Human Rights Law (NYSHRL) will take effect.

All private-sector employers will be subject to the antidiscrimination provisions of the NYSHRL, and the prohibition against unlawful discrimination based upon each of the protected categories identified in the NYSHRL will extend to nonemployees.

Additionally, harassment will be considered "an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment" because of his or her protected characteristics. Employers will have a seemingly narrow affirmative defense to liability if "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." "The fact that such individual did not make a complaint about the harassment to [his or her] employer . . . shall not be determinative of whether such employer [is] liable." Claims by domestic workers will be subject to the same standard.

As a result, the NYSHRL will permit the prevailing claimant to recover both attorneys' fees and punitive damages from private employers.

October 11, 2019: New Requirements Regarding Nondisclosure Agreements

Effective October 11, 2019, New York employers will be barred from requiring nondisclosure clauses in any settlement, agreement, or other resolution of any claim where the factual foundation involves discrimination, including, but not limited to, under the NYSHRL, unless the condition of confidentiality is the complainant's or plaintiff's preference. Any nondisclosure term or condition must be provided in writing to all parties in plain English and, if applicable, the primary language of the complainant, after which he or she will have 21 days to consider such term or condition and 7 days to revoke the acceptance after execution of such agreement.

Additionally, effective October 11, 2019, any nondisclosure term or condition will "be void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled."

Key Takeaways

In light of these changes in New York laws, employers may want to carefully review their current practices and consider taking the following steps:

- reviewing all agreements, including, but not limited to, employment, separation, and settlement agreements, to ensure any nondisclosure clauses meet the requirements of the new law;
- ensuring that all employees have received the required sexual harassment prevention training, the required notices regarding the employer's policy, and the information presented in the training program;
- informing and training all employees involved with employee relations about the new requirements; and
- evaluating existing pay practices to ensure compliance with the expanded pay equity requirement.
- Ogletree Deakins will continue to monitor developments with respect to these laws and will post updates on the firm's blog as additional guidance becomes available.

RELATED ARTICLES

November 17, 2022

DOL Sued Over FOIA Request for Contractors' EEO-1 Reports

R.D. Francis
Managing Shareholder, St. Thomas; Shareholder, New York

January 25, 2023

OFCCP's Scheduling List Targets Contractors That Didn't Certify in OFCCP's Contractor Portal

RELATED WEBINAR

February 9, 2023

I-9 Compliance Series: The Basics, Part 1—What Does Good Faith Compliance Mean? Contractors'...

RELATED SEMINAR

Ogletree Deakins

February 16 | Miami, FL

Employment Law Briefing

Browse More Insights

PODCASTS

SEMINARS

WEBINARS

Sign up to receive emails about new developments and upcoming programs.

SIGN UP NOW