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Employers preparing for equal pay law

New statute adds civil penalties

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Many companies are reviewing their employee pay policies in anticipation of New York state's new equal pay law scheduled to take effect Oct. 8.

"From my experience, there are very few employers who intentionally discriminate in their pay practices," said Benjamin E. Mudrick, a partner at Harter Secrest & Emery LLP.

"Employers want to treat their employees fairly, and they try to do so. The issue with this law is, even if you have good intentions, you can still suffer consequences if your results end up being discriminatory," Mudrick said.

The new law has two parts. The first part, which takes effect Oct. 8, prohibits employers from paying workers differently based on protected characteristics.

This change is actually an amendment to an existing law that prohibits pay disparity based on sex. The new law expands that to include every protected characteristic.

In advance of the new law, employers should not only review the way they set pay rates, but they should also evaluate whether those practices are unintentionally resulting in some sort of improper practice, he said.

The second part of the new law, which takes effect on Jan. 6, bans employers from asking potential employees about their salary history.

Mudrick said many of his employer clients

now ask prospective employees about past salary.

"The new law prohibiting the ability to ask about somebody's pay history has raised a lot of questions about how to implement that and how to set wage rates and starting salaries when you don't have that information," he said.

After a job offer is made, an employee can voluntarily provide past salary as part of a negotiation for a starting salary.

"But the employer should never be the one to ask about it and should never imply that they want that information from an individual," Mudrick said.

Federal laws and the state Human Rights Act already made it illegal to pay individuals differently based on their race, religion, sex or other protected characteristic.

The new law adds that to the state Labor Law and provides an avenue for aggrieved employees to recover attorneys' fees as part of their claims. Additionally, the new law includes civil penalties of \$500 for each violation.

"When you add up the attorneys' fees and the damages, the liability can add up very quickly," Mudrick said.

Currently, under state law, employers cannot pay employees differently within a specific job title. But the new law now says that you cannot pay employees differently if they perform substantially similar work, Mudrick said.

That change means that employers need to analyze their pay practices across job titles where the employees are doing similar work.

"In the past, you would look at two mechanics to see if they were paid the same, but now you can actually look at mechanics and parts men and other people who, even

though they have a different job, work in somewhat similar situations," Mudrick said.

That aspect of the new law could make things more difficult for employers, because it's unclear how government officials and courts may choose to compare workers.

Although the law prohibits disparity in pay for people doing the same job, there can be variations based on factors such as seniority, merit and productivity. But for any distinctions, employers must have a clear business justification.

"To the extent you are taking things into account to create differences in pay ... you need to have written plans and documents to be able to prove why you've made those decisions and why there's a legitimate business reason to do those," Mudrick said.

"Now is a time when employers should do some sort of analysis to determine if there is a differentiation in how they're paying people, and even if they haven't done it intentionally, whether it resulted in some sort of disparity between men and women or people of different races," Mudrick said.

But, because that analysis will likely be under scrutiny if a pay disparity claim winds up in court, the analysis should involve an attorney, which would bring the review under the protection of client-attorney privilege.

"That does not offer complete protection, because the underlying pay data and the demographic information about your employees is not privileged in any way, so that information is still going to be available," Mudrick said.

But any analysis conducted by an attorney will be protected by client-attorney privilege, Mudrick said.

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