

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

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LEGAL AND LEGISLATIVE UPDATE

by

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N.H. Legislature Adopts Pay Equity Bill

“But wait, there’s still more.” New law prohibits disciplining employees for discussing wages and benefits

While a Paycheck Fairness Act has been pending before Congress for a few years, with little hope of passage in the near future, the New Hampshire Legislature took a bold step forward early this summer and passed its own version. The New Hampshire Pay Equity Act repeals and replaces the New Hampshire Equal Pay Act (RSA 275:37), which was originally adopted in 1947 and was last updated in 2001. The New Hampshire Pay Equity Act strengthens equal pay protections for women in the workplace. It also goes further and prohibits employers from disciplining employees for disclosing wage and benefit information or complaining about those terms of employment. This bill received final approval from the New Hampshire Legislature on May 14, 2014. Following the legislature’s vote, Governor Hassan signed the bill into law. It will take effect January 1, 2015.

Pay Equality

Under the Act, an employer may not discriminate between employees or applicants on the basis of sex by paying employees of one sex at a rate less than the rate paid to employees of

the other sex for equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions. There are several exceptions to this law and they include payment made pursuant to:

- A seniority system;
- A merit of performance-based system;
- A system which measures earnings by quantity or quality of production;
- Expertise;
- Shift differentials; or
- A demonstrable factor other than sex, such as education, training, or experience.

Also, an employer who is paying wages in violation of these terms cannot reduce the wage rate of any other employee in order to comply with these provisions.

Non-retaliation Provision

The Act changes current Equal Pay law in several ways. The current law prohibits discrimination in the payment of wages based on gender. The new law expands those protections with the exceptions noted above. The new law also specifically prevents employers from retaliating against an employee who files a complaint about pay discrimination. This anti-retaliation provision applies even if the complaint only results in an informal investigation by the employer and does not rise to the level of a formal legal complaint.

The anti-retaliation provision also prohibits an employer from discriminating or retaliating against an employee who participates in an investigation or more formal proceeding by testifying, assisting or otherwise participating in the matter of investigation.

Pay Disclosure Issues

The new law also prohibits employers from requiring employees to sign a contract or waiver that would prohibit the employees from disclosing their own pay information, and the employer cannot terminate, discipline or otherwise discriminate against employees for disclosing their own compensation or benefits information.

Finally, the Act imposes additional reporting requirements on employers and requires posting of a notice to employees informing them of the new pay equity law.

Notably, the new law specifically exempts disclosures by human resource professionals and other employees whose essential job functions include regular access to other employees' compensation information. Those employees may still be prohibited by their employers from sharing other employees' confidential pay and benefit information.

A Review of Handbook and Other Policies Recommended

Even before this new law becomes effective, New Hampshire employers should begin reviewing their policies and employee handbooks now to ensure compliance with these new pay equity laws, including amending or excising any policy provision that squarely prohibits discussions among employees about their remuneration.

Confidentiality and nondisclosure agreements should also be reviewed to ensure that compensation and benefits information is not considered “confidential” information of the employer, which the employee may be prohibited from disclosing. These provisions in confidentiality agreements may not appear to be directly related to pay equity, but the definition of “confidential” employer information may be broad enough to encompass the employee’s own pay and benefits amounts, which the employer can no longer prevent the employee from disclosing.

Managers Need to Respond Properly

Managers, supervisors and HR employees should be trained to learn how to respond to a complaint or inquiry from an employee regarding pay discrepancies, keeping in mind that the employee may not explicitly claim that he or she has been the victim of discrimination. Employers should be careful to avoid taking actions that may be viewed as retaliation against employees who inquire or complain about pay discrepancies based on gender, or who participate in investigations or formal proceedings.

Conclusion

This new law is just one of a few new laws, regulations and rulings (including recent rulings from the National Labor Relations Board and guidance from the U.S. Department of Labor and the U.S. Equal Opportunity Commission) that prohibit or frown upon employer policies or practices that stifle discussions about wages, benefits or working conditions. Yes, this is not your grandparents’ workplace. Stay tuned!

Attorney Jim Reidy is a partner at Sheehan Phinney Bass + Green. His practice is in the area of labor and employment law where he exclusively represents management.

Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.