

November 12, 2015

MEMORANDUM

To: Cabinet
College Presidents

From: Frederick P. Schaffer *FS*
General Counsel & Senior Vice Chancellor for Legal Affairs

Re: Recently Passed Women's Rights Legislation

At the end of October, the Governor signed several bills relating to women's rights in different areas, including employment discrimination, domestic violence, and human trafficking. Please find below a brief summary of four of the bills that were passed that are germane to our work here at CUNY.

1. Strengthening the New York State Equal Pay Law

New York State's equal pay law, Labor Law Section 194, provides that no employee may be paid less than an employee of the opposite sex who is doing the same job in the same establishment, except where the differential is based on a seniority system, a merit system, or a system which measures earnings by quantity or quality of production. Previously, a differential could also be based on "any other factor other than sex," but this has been repealed by Chapter 362 of the Laws of 2015. The new law replaces this language by requiring any other differential to be based on "a bona fide factor other than sex, such as education, training, or experience." Such a bona fide factor may not be based upon or derived from a sex-based differential in compensation, and must be job-related and consistent with business necessity. Employees will be deemed to work in the same "establishment" if they work for the same employer in the same geographical region, which may be no larger than a county.

This exception for a bona fide factor will not apply if an employee demonstrates “(A) that an employer uses a particular employment practice that causes a disparate impact on the basis of sex, (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.”

The new law also seeks to end workplace secrecy regarding wages by making it illegal for employers to prohibit employees from inquiring about, discussing, or disclosing their wages or the wages of another employee. Employers may circulate a written policy to all employees establishing reasonable limitations on the time, place, and manner for inquiries about and discussion of wages. An employer may also prohibit an employee from discussing or disclosing the wages of another employee without that employee’s prior permission. An employer can use as a reasonable defense in an action an employee’s failure to abide by these time, place and manner limitations, where an adverse employment action was taken for failure to adhere to the limitations and not for mere inquiry, discussion or disclosure of wages done within the limitations. This does not apply to employees with access to wage information who disclose those wages to others, unless it is in response to a complaint or charge or in further of an investigation, proceeding, hearing, or action under the Labor Law.

The law also increases the amount of liquidated damages available from 100% to 300% of the total amount of wages due for a willful violation of the equal pay law.

2. Prohibition Against Sexual Harassment Extended to All NYS Employers

The Executive Law was amended by Chapter 363 of the Laws of 2015 to expand the definition of “employer” in the case of actions for sexual harassment to all employers within the State. Previously, employers with fewer than four employees were not included.

3. Employment Discrimination on the Basis of “Familial Status” Prohibited

The Executive Law was also amended by Chapter 365 of the Laws of 2015 to provide that it shall be an unlawful discriminatory practice for an employer to refuse to hire or discharge from employment, or discriminate against the individual in compensation or in terms, conditions, or privileges of employment based on the employee’s “familial status,” such as being a parent. Discrimination based on familial status was already prohibited in the areas of housing and credit. This extension is meant to protect people in the workplace from being negatively affected by stereotypes of parents or guardians of young children that prevent them from being hired or

promoted.

4. Reasonable Accommodations Required for Pregnancy-Related Conditions

The Executive Law was further amended by Chapter 369 of the Laws of 2015 to provide that reasonable accommodation must be provided to employees and prospective employees with “a pregnancy-related condition” as well as to employees with a disability. A pregnancy-related condition is defined as “a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.” In the employment context, the term is limited to “conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.” Pregnancy-related conditions are to be treated as temporary disabilities.

The law requires employees to cooperate “in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation.” Such information must be kept confidential.

This law is similar to the 2014 NYC Pregnant Workers Fairness Act, which amended the City Human Rights Law and already required CUNY to provide reasonable accommodations to women who are pregnant and women who suffer medical conditions related to pregnancy and childbirth. Such accommodations may include bathroom breaks, leave for a period of disability after childbirth, breaks to facilitate increased water intake, periodic rest for employees who stand, and assistance with manual labor – unless the provision of these accommodations would cause undue hardship or the employee could not do the job even with reasonable accommodation. Employers are required to provide new and existing employees with notice of this law, or to post such notice.

cc: Legal Affairs Designees
Labor Designees
Human Resources Directors

