

New York State Takes an Ax to the Workplace Glass Ceiling: New Legislation to Advance the Rights of Women and Transgender Individuals in the Workplace

On October 21, Governor Cuomo signed into New York State law five bills aimed at eliminating discrimination against women in the workplace. These laws, which take effect on January 19, 2016, add new protected classifications and remedies for workplace discrimination. Among other things, they strengthen the State's existing pay equality law, require the provision of reasonable accommodations to pregnant employees, and protect workers against discrimination on the basis of family status.

In addition, on October 22 Governor Cuomo introduced new regulations protecting transgender workers. These regulations will go into effect after a 45-day comment period. They will carry the full force of law because the New York State Division of Human Rights has statutory authority to promulgate regulations interpreting the State Human Rights Law. However, it is possible that there will be legal challenges to Governor Cuomo's use of his executive authority instead of the legislative process.

The New Anti-Discrimination Laws

Achieve Pay Equality (S. 1 / A. 6075)

This legislation strengthens the existing New York State law prohibiting employers from paying women less than men for performing the same work. New York employers will no longer be permitted to forbid employees from discussing their salaries with each other (something already barred by Section 7 of the National Labor Relations Act). However, employers are free to implement written policies that establish reasonable time and place limitations for discussions about wages, and employees with access to wage information as part of their job duties may not disclose the wages of other employees. The new legislation also enhances the damages provision of the law. If employees are paid less than the wages to which they are entitled, liquidated damages up to 300% of the total amount of the wages found to be due are available for a willful violation of the law.

Protect Victims of Sexual Harassment (S. 2 / A. 5360)

This amendment to the State Human Rights Law expands the term "employer" to include all employers in New York State for sexual harassment actions. The existing law does not include employers with fewer than four employees.

Remove Barriers to Remediating Discrimination (S. 3 / A.7189)

Under this law, prevailing parties in employment sex discrimination cases can now recover attorneys' fees in cases brought under New York State law. Employees will be awarded fees in only those actions in which the employer was found liable for having committed an unlawful discriminatory practice, and employers will be awarded fees only if the action was frivolous.

End Family Status Discrimination (S. 4 / A. 7317)

This legislation expands the State Human Rights Law to prohibit discriminating against workers based on their familial status. It aims to protect workers from being discriminated against because they have children. The current State

law prohibits discrimination based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status.

Protect Women from Pregnancy Discrimination (S. 8 / A. 4272)

This amendment to the State Human Rights Law requires employers to provide reasonable accommodations for employees with a pregnancy-related condition. This is an expansion of the current law, which requires employers to provide reasonable accommodations for employees with a disability. The current State Human Rights Law was not always interpreted as including pregnancy-related conditions. Under this new law, employees must cooperate in providing medical or other information necessary to verify the existence of a pregnancy-related condition. The requirement to provide pregnant women with reasonable accommodation already exists under the New York City Human Rights Law.

Transgender Status Regulations

Governor Cuomo introduced regulations through the State Human Rights Law that affirm that all transgender individuals are protected under the law. These regulations provide that discrimination on the basis of gender identity and the status of being transgender constitutes sex discrimination under the existing state law and thus is prohibited. The new regulations also deem harassment on the basis of a person's gender identity or status of being transgender to be sexual harassment and thus prohibited under state law. Lastly, they add gender dysphoria to the list of protected disabilities. Gender dysphoria is defined in the regulations as "a recognized medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth."

Recommendations on Best Practices

New York employers should take this opportunity to ensure that they are providing equal pay for equal work and that their policies do not require employees to keep wage information confidential (though the organization itself should still treat this information as confidential). In addition, New York employers should expand their anti-discrimination policies to include familial status and (assuming the regulations go into effect after the comment period) gender identity, gender dysphoria, and transgender status. If they have not already, New York employers should also update their reasonable accommodation policies to include accommodations for pregnancy-related conditions and train those responsible for managing the interactive process in the ways in which pregnancy-related conditions can be accommodated. Finally, assuming the regulations go into effect, New York employers should also consider implementing gender-neutral dress codes and reviewing their short-term disability plans to determine if gender dysphoria is included as a covered condition.

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