



New Regulations on Discussion of Wages Between Employees

The New York State Department of Labor (“Labor Department”) recently adopted new regulations governing the discussion of wages between employees. The regulations were published in the New York Register on February 1, 2017 and became effective immediately.

Summary of the Law

The Labor Department expanded New York Labor Law Section 194 on pay equality to provide that employers cannot prohibit employees from inquiring about, discussing, or disclosing their own wages or the wages of a co-worker. However, as the regulations state, “an employer may, in a written policy provided to an employee either electronically, through publicly available posting, or by paper copy, place reasonable limitations on the time, place and manner that an employee may inquire about, discuss, or disclose wages.”

Furthermore, an employer may limit an employee from discussing wage information if that employee has access to wage information as part of his or her essential job function (e.g. Human Resources staff). This is an example of a “reasonable limitation” imposed by employers. The regulations also prohibit employees from discussing the wages of other employees, unless given permission. “Permission shall mean an express, advance, authorization given voluntarily by the employee, and permission may be withdrawn by an employee at any time.” As such, permission may be given verbally, so a written authorization is not required.

The adoption of these regulations represents a national trend to enhance pay transparency and pay inquiries, as well as to eliminate the wage gap between men and women. New York’s broad legislation aims to facilitate open discussion of wages as a way of combating unfair wage disparities. Under New York’s Equal Pay Act, which amended Section 194, employers can be liable for up to one-hundred percent of the total amount of wages found to be due, and up to three-hundred percent of the total amount of wages found to be due for a “willful violation” of Section 194. However, it is unclear whether a monetary penalty per se would be levied against an employer for simply having an overly broad policy prohibiting the discussion of wages.

Suggestions for Employers to Ensure Compliance

New York employers should ensure compliance with both federal and state law, which are consistent with one another. Similar to New York’s Equal Pay Act, Section 8 of the National Labor Relations Act also prohibits employers from interfering with protected activities, such as discussing wages. When adopting a policy regarding discussion of wages, New York employers are advised to draft the policy in writing and circulate the policy electronically, through postings, or by paper. Most importantly, employers should be proactive in assuring there are no unfair wage disparities. Any wage disparities and rationales for such wage disparities should be carefully calculated and well-documented. Employers are obligated to maintain employment and payroll records under New York Labor Law Section 195, which states that employers must “establish, maintain and preserve for not less than six years contemporaneous, true and accurate payroll records.” Should a dispute with an employee – who now has a private right of action under Section 194 – arise, such information will be vital to any defense.

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If you have any questions about employment policies, please contact [Jason Hsi](mailto:jhsi@garfunkelwild.com) at 516.393.2298 or jhsi@garfunkelwild.com.