

Guidance on Pay Equity for Employers in New York State

Statutory Requirements

Labor Law Section 194 makes it is unlawful for an employer to pay an employee less than an employee of the opposite sex for equal work. Employers are also prohibited from restricting its employees' ability to inquire or discuss wages with their co-workers. This applies to any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service.

This Guidance

This Guidance is intended to fulfill the requirement of the Laws of 2015, chapter 362, directing that the Department of Labor and the Division of Human Rights shall make training available to employers to assist them in developing policies, procedures and their own training to address and eliminate discrimination and harassment in the workplace. The topics to be covered include, but are not limited to, issues relating to pregnancy, familial status, pay equity and sexual harassment, and the training shall take into account the needs of employers of various sizes. While not limited to the same, the department and division are required to make such training available through online means. In developing such training materials, the department and division shall afford the public an opportunity to submit comments on such training.

This Guidance is available on the Department of Labor's website, www.labor.ny.gov, or by calling the Department of Labor at (888) 469-7365, and on the Division of Human Rights' website, www.dhr.ny.gov, or by calling the Division of Human Rights at (888) 392-3644.

What Is Equal Pay?

Section 194 of the Labor Law prohibits employees from being paid less than an employee of the opposite sex for equal work that requires equal skill, effort and responsibility, and is performed under similar working conditions. Differentials in pay may, however, be based on:

- a seniority system;
- a merit system;
- a system which measures earnings by quantity or quality of production; or
- a bona fide factor other than sex, such as education, training, or experience.

What Is a Bona-Fide Factor Other Than Sex?

A bona-fide factor other than sex **is** one that:

- is not based upon or derived from a sex-based differential in compensation; and
- is job-related with respect to the particular position and consistent with business necessity.

A bona-fide factor **is not** one where:

- the employer's actions or practices cause a disparate impact on the basis of sex; and
- the employer has not adopted an existing alternative practice that would serve the same business purpose that would not produce such an impact.

What Is a Business Necessity?

A business necessity is a factor that bears a manifest relationship to the employment in question.

For example, employers that pay employees additional or greater wages due to their status as a 'head of household' may violate Section 194 of the Labor Law as it does not likely have a manifest relationship with the employment in question, and it may have an unlawful disparate impact on women.

Restrictions on the Inquiry, Discussion, and Disclosure of Wages

Section 194 of the Labor Law prohibits employers from restricting employees' ability to inquire about, discuss, or disclose wages with other employees. However, the employer may provide, in a written policy, reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages. Such restrictions may not specifically reference the inquiry, discussion, and disclosure of wages, nor can they be so restrictive as to completely remove employees' ability to engage in such inquiry, discussion, and disclosure. No employee is required to discuss their wages with another employee, and employees who have access to other employees' wage information as a result of their job duties (e.g., Human Resources staff), may be limited in the disclosure of such information by their employer.

Retaliation Is Unlawful

It is unlawful for any employer, or any agent or employee of the employer, to retaliate against an employee who has exercised his or her rights under the Labor Law.

Retaliation consists of an adverse action or actions taken against the employee by the employer because of the fact that the employee exercised his or her rights under the Labor Law. The action need not be job-related or occur in the workplace. Unlawful retaliation can be any action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of harassment or any other practices forbidden by the Law.

Actionable retaliation by an employer can occur after the individual is no longer employed by that employer. This can include giving an unwarranted negative reference for a former employee.

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to make a claim of retaliation, the individual must be able to substantiate the claim that the adverse action was retaliatory.