

Memorandum in Support

SECTION ON WOMEN IN LAW

Women #4

June 17, 2019

S. 1454

By: Senator Sanders
Senate Committee: Labor
Effective Date: 120th day after it shall have
become a law

AN ACT to amend the labor law, in relation to enacting the “New York State Fair Pay Act”.

LAW AND SECTIONS REFERRED TO: New article 21 of the labor law.

The Women in Law Section (WILS) supports the passage of S.1454 (Sanders), which enacts the “New York State Fair Pay Act” (the Act), because it provides employees with broader and more comprehensive protection against discriminatory wage practices based not only on sex, but also on race and/or national origin.

Background

Despite federal¹ and state² laws aimed at pay equity, pay differences on the basis of sex, race and national origin exist. Although gaps in pay generally have narrowed, in part due to continued legislative efforts as well as changing attitudes, a gender pay gap persists, especially for women as compared to non-Hispanic white men, the largest workforce demographic group.³ Other factors that may influence pay equity include age, education level, disability, sexual orientation and identity, and immigration status. Some researchers and economists have theorized that the persistence of the gender pay gap has been caused by factors other than discrimination: for example, differences in the types of fields toward which women tend to gravitate (e.g., social work versus aerospace engineering); differences in women’s willingness or ability to spend longer hours at the office; women’s tendency to spend child-bearing years out of work or in jobs with more flexible hours; and differences in women’s approach to salary negotiations.⁴ Yet, notwithstanding choices that some women may make or barriers they may face, few dispute that discriminatory bias contributes in part to pay inequity.

¹ See 1963 Equal Pay Act, Title VII of the 1964 Civil Rights Act as amended by the Lily Ledbetter Fair Pay Act (Pub.L. 111-2, S.181).

² See N.Y. Labor Law §194, as amended by the Achieve Pay Equity Law (S.1/A.6075).

³ Anna Brown & Eileen Patten, *The narrowing, but persistent, gender gap in pay*, PEW RESEARCH CENTER (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/>.

Analysis

The current pay equity law in New York, Labor Law §194, amended in 2015, makes it unlawful for an employer to pay an employee less than it pays an employee of the opposite sex for equal work. The Act seeks to replace §194 with a broader and more comprehensive law that aims to eliminate discriminatory wage practices based on sex, race and/or national origin; narrows the availability of some defenses for disparate pay; adds language directing the New York Department of Labor to promulgate regulations specifying how job categories can be compared; and adds a prohibition against retaliation. While not perfect, the Act makes significant strides toward correcting historic wage inequity.

The Act's primary purpose is to target wage differentials that exist for certain classes of workers who have been historically paid less than non-Hispanic white males. For women, such wage differentials can have a rippling negative effect. Studies have shown that women's earnings are increasingly important to the economic stability of families as many are family breadwinners. Persistent earnings inequality for working women translates into lower pay, less family income, and more children and families living in poverty.⁵

Not surprisingly, adding discrimination on the basis of race and national origin magnifies the negative effect. According to a recent study from the National Women's Law Center, African American women working full time, year-round, typically make only 61 cents for every dollar paid to their white, non-Hispanic male counterparts. For Latina women, this figure is only 53 cents; for Native Hawaiian and Pacific Islander women, it is 62 cents; for Native women, it is 58 cents; and for Asian women, it is 85 cents.⁶ By addressing race and national origin discrimination alongside sex discrimination, the Act seeks to attack the broader range of discriminatory behavior that leads to wage inequality. Additionally, the Act adds the right of employees to compare wages across job categories, where one job category may be dominated by employees of one sex, race or national origin, and another job category within the same employer's workforce is dominated by employees of a different sex, race or national origin, a problem known as occupational stereotyping.⁷

⁴ Glenn Kessler, *Here are the facts behind that '79 cent' pay gap factoid*, THE WASHINGTON POST (Apr. 14, 2016), available at https://www.washingtonpost.com/news/fact-checker/wp/2016/04/14/here-are-the-facts-behind-that-79-cent-pay-gap-factoid/?utm_term=.6b5dee20a532.

⁵ *The Gender Wage Gap by Occupation 2016; and by Race and Ethnicity*. WASHINGTON, DC: INSTITUTE FOR WOMEN'S POLICY RESEARCH, <https://iwpr.org/publications/gender-wage-gap-occupation-2016-race-ethnicity/>. See also Erin Coghlan & Sara Hinkley, *State Policy Strategies for Narrowing the Gender Wage Gap* (Apr. 10, 2018), <http://irle.berkeley.edu/state-policy-strategies-for-narrowing-the-gender-wage-gap/#note7>.

⁶ Some subgroups of Asian women suffer from larger pay gaps than the group as a whole. See *The Wage Gap: The Who, How, Why, and What To Do*, NATIONAL WOMEN'S LAW CENTER (October 2018), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>. See also Deborah J. Vagins, *The Simple Truth about the Gender Pay Gap*, AMER. ASSOC. UNIV. WOMEN, available at <https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/>.

⁷ In its Definitions, the Legislature advises that equivalent jobs must be measured "by utilizing job comparison methodologies that do not ignore or undervalue the worth of jobs where women or minorities are disproportionately represented." S1454, §752(D). See, e.g., Pay Equity and Workplace Opportunity: A

The Act also expands on §194 with a detailed section on definitions, including a definition of “equivalent jobs” that is coextensive with federal labor law standards, and by tightening the defenses available to employers charged with pay discrimination. Although it allows employers to apply different pay scales based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a system that recognizes geographic variables, the Act narrows the applicability of such exceptions by requiring the systems to be “bona fide.”⁸

The Act adds a regulatory burden to the state’s Labor Department. In addition to being charged with primary enforcement responsibilities to receive, investigate and attempt to resolve violation complaints, §753 of the Act directs the Labor Department to promulgate regulations to determine whether a job is dominated by women or minorities and a methodology to determine equivalent skill, effort, responsibility and working conditions.⁹ These regulations to determine job equivalency will greatly impact the ultimate scope of the Act.

Lastly, Labor Law §198(3) provides a six-year statute of limitations for all labor claims under Article 6, running six years from the discriminatory event, whether the employee or the Labor Department institutes an enforcement action.¹⁰ Because the Act does not provide a separate statute of limitations for claims arising under the Fair Pay Act, §198(3), it likely will need to be amended to apply to claims under the new Article 21.¹¹

While we strongly support passage of the Act, there are a couple of areas we suggest could be improved. First, it does not extend protections to wage discrimination based on immigration status, age, disability or sexual orientation or any other characteristic subject to discriminatory practices.¹² We encourage the Legislature to continue to expand the

Simple Matter of Fairness, American Assoc. Univ. Women, (Oct. 2012) (citing women’s clustering in “pink-collar” jobs that are low-skilled and low-paying as a major factor in continuing pay inequity).

⁸ Generally, a “bona fide system” is one that was not put in place as a way to discriminate. The Act also retains from §194 that bona fide exceptions do not apply when the employee demonstrates that an employer used a particular employment practice that caused a disparate impact on the basis of sex, race or national origin, and that an alternative employment practice existed that would not produce a disparate impact, but the employer “refused” to adopt such alternative practice. See also Jordan Pace & Bryan Goodman, *Equal Pay: Pay Equally Now, or Pay Much More Later*, NEW YORK LAW JOURNAL (Oct. 22, 2018), available at <https://www.law.com/newyorklawjournal/2018/10/22/equal-pay-pay-equally-now-or-pay-much-more-later/> (“Notably absent from the required proof is any element of intentionality, willfulness [or] malice.”)

⁹ See AAUW Policy Guide to Equal Pay in the States, AMER. ASSOC. UNIV. WOMEN, <https://www.aauw.org/resource/state-equal-pay-laws/>; see also United States Department of Labor, *Pay Transparency and Equal Pay Protections*, https://www.dol.gov/wb/equalpay/equalpay_txt.htm. Other states empower their labor departments to administer and enforce state labor laws. See, e.g., §1197.5 of the CA Labor Code available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB358, and Illinois Equal Pay Act of 2003, <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2501&ChapterID=68>.

¹⁰ N.Y. Labor Law §198(3).

¹¹ Under federal law, workers have only 180 days from an incident of unequal pay (i.e., a paycheck that is less than a comparable employee’s), to seek redress, which effectively resets the clock each paycheck.

¹² Based on various studies, as to immigrant status, the typical non-naturalized foreign-born woman is paid 80 cents per dollar of what a foreign-born man is paid. Among undocumented Mexican immigrants, the

protection the Act offers to underrepresented groups and to consider how the law in the future may protect against wage discrimination based on other characteristics. Second, although the exceptions for wage differentials are now required to be “bona fide,” New York could improve on the exception further by limiting how employers count family-related leaves against an employee’s seniority.¹³ For example, Massachusetts allows a difference in pay based on a “system that rewards seniority, provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority.”¹⁴ Not counting pregnancy and family-related leaves against employees’ seniority will do much to bring parity to wages, as well as to underscore the value society places on such leaves.

Finally, there are current efforts within the federal government to amend the Paycheck Fairness Act¹⁵ to require the Equal Employment Opportunity Commission to collect compensation data from employers. A more transparent system will reveal pay discrimination and help prospective employees determine an appropriate salary without the fear of underestimating their worth or, conversely, asking for more and then being rejected.¹⁶ We encourage New York lawmakers to consider a similar requirement, especially if the federal amendment falls through.

CWIL and NYSBA Executive Committees Have in the Past Supported Fair Pay and Pay Equity Bills

The Committee on Women in the Law (CWILS), as the Section on Women in Law was formerly organized, and NYSBA’s Executive Committee, have voted in the past to support earlier fair pay/equity bills.¹⁷ In its 2011 statement, the NYSBA, through the CWIL, advised that pay equity advances women’s economic status, thereby buoying the economic security of families throughout New York.¹⁸ The new Act continues to promote

gender wage gap is wider: For every dollar a man is paid, a woman is paid 71 cents. Compared with native-born men, the average foreign-born woman is paid 58.4 cents on the dollar. Gould, E., Schieder, J. & Geier, K. (2016). *What is the gender pay gap and is it real?* WASHINGTON, DC: ECONOMIC POLICY INSTITUTE, <https://www.epi.org/files/pdf/112962.pdf>. As to age, the gap is shown to expand over the course of a woman’s career, affecting her length of employment and retirement prospects. For example, women ages 45 to 64 working full time, year round are typically paid only 76 cents for every dollar their male counterparts are paid; and for women still working at age 65 or older, the figure is 77 cents. As to disability, women with disabilities working full time, year-round are typically paid just 83 cents when compared to their male counterparts with disabilities. Similarly, lesbian women make less than men. *The Wage Gap*, *supra* note 7.

¹³ An Act to Establish Pay Equity, (updating the Massachusetts Equal Pay Act), M.G.L. c. 149, §105A.

¹⁴ Seyfarth’s Pay Equity Group, *The New U.S. Pay Equity Laws: Answering the Biggest Questions*, available at https://www.seyfarth.com/dir_docs/publications/payequitybrochure.pdf

¹⁵ H.R.7. Paycheck Fairness Act available at <https://www.congress.gov/bill/116th-congress/house-bill/7/text>

¹⁶ *Id.* at Sec. 8.

¹⁷ See NYSBA #9, Memo in Support of S.1/A.6075 (Apr. 27, 2015); NYSBA Women #1, Memo in Support of A.8070 (Jun. 16, 2014).

¹⁸ NYSBA Statement before the New York Assembly Standing Committee on Labor et al. Regarding Pay Equity in New York, Hearing #1 (Dec. 12, 2011).

women's wage equality by filling gaps in the existing laws and strengthening employees' avenues of redress.

Conclusion

The NYSBA's Women in Law Section **SUPPORTS** the passage of S.1454 (Sanders), which enacts the "New York State Fair Pay Act" (the Act), because it is an important step toward improving the current state law addressing pay inequity. The Act expands the protections to include race and national origin, provides important measures that strengthen and clarify the current law, and ensures that any system implementing wage differences is bona fide and not pre-textual.