PROGRAM BILL #26

GOVERNOR'S PROGRAM BILLS

2013

MEMORANDUM

AN ACT to amend the labor law, in relation to the prohibition of differential pay because of sex;

AN ACT to amend the executive law, in relation to unlawful discriminatory practices;

AN ACT to amend the executive law, in relation to the provision of attorney's fees in cases of housing, employment or credit discrimination; to amend the executive law, in relation to the awarding of reasonable attorney's fees;

AN ACT to amend the executive law in relation to the unlawful discriminatory practice because of familial status;

AN ACT to amend the real property law and the real property action and proceedings law, in relation to prohibiting discrimination in housing based upon domestic violence status and establishing a task force to study the impact of source of income on access to housing;

AN ACT to amend the domestic relations law, the family court act and the criminal procedure law, in relation to the scope of orders of protection and temporary orders of protection;

AN ACT to amend the family court act and judiciary law, in relation to establishing a pilot program for the filing of petitions for temporary orders of protection by electronic means and for issuance of such orders ex parte by audio-visual means; and to amend the executive law, in relation to review and reports by the chief administrator of the courts;

AN ACT to amend the penal law, the criminal procedure law, the social services law, the civil practice law and rules, the mental hygiene law, the correction law, the vehicle and traffic law, the public health law, the real property actions and proceedings law, and the real property law, in relation to enacting the "trafficking victims protection and justice act"; to amend the penal law, in relation to prostitution in a school zone; to amend chapter 74 of the laws of 2007 amending the penal law, the criminal

procedure law, the correction law, the social services law, and the executive law relating to human trafficking, in relation to extending the interagency task force on human trafficking for four years; and to amend the executive law, in relation to human trafficking awareness;

AN ACT to amend the executive law, in relation to reasonable accommodation; and

AN ACT to amend the public health law, in relation to access to reproductive services

Purpose:

This bill would enact the New York Women's Agenda, which would break down barriers that perpetuate discrimination and inequality based on gender. New York State has a proud history and tradition of leading the nation in progressive ideals and reforms. This is especially so with respect to women's rights. In 1848, the women's suffrage movement was born at the first Women's Rights Convention in Seneca Falls, New York. From that moment in time and continuing through today, the state has been the home of female leaders and visionaries, from Elizabeth Cady Stanton who initiated the first organized women's rights and women's suffrage movements, to Audre Lorde, a leading African-American poet and essayist who gave voice to women's issues, and Gloria Steinem, the journalist, author and activist. These New Yorkers have served as role models for not only their generation but for every generation to come.

Over the years, New York has fallen behind in its role as a progressive leader on women's rights. Today, statistics clearly show that women in New York State are not treated equally to men. Study after study shows gender inequality in our communities where women are paid less than men for the same work, women face discrimination in the workplace based on familial status and pregnancy, and women face discrimination in housing because of their domestic violence victim status.

The New York Women's Agenda will break down barriers that perpetuate discrimination and inequality based on gender. New York has served as a model for equality and fairness on several issues including women's rights. The New York Women's Agenda will return the State to its rightful place as a leader on women's equality.

Summary of Bills:

1) Pay Equity

This bill would amend Labor L. § 194, which prohibits a differential in rate of pay because of sex, to replace the current "any other factor other than sex" exception with an exception that requires that the differential in rate of pay be based on a bona fide factor other

than sex such as education, training or experience. Such a factor could not be based on a sex-based differential, and must be job-related and consistent with business necessity. This standard would mirror the current defense afforded to employers in disparate impact cases under Title VII of the Civil Rights Act. The exception would not apply if the employee demonstrated that an employer uses a particular employment practice that causes a disparate impact on the basis of sex and that there was an alternative employment practice that would accomplish the same business purpose and the employer has refused to adopt such a practice. "Business necessity" would be defined as a factor that bears a manifest relationship to the employment in question, the definition enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and subsequent cases. Additionally, § 194 would be amended to clarify that a differential in pay may not exist even if the two employees whose rate of pay is being compared work in different physical locations, provided that those locations were in the same geographic region. Section 194 would also be amended to forbid employers from prohibiting employees from sharing wage information. This protection helps guarantee the individual state right of equal pay, without interfering with current federal provisions regarding collective protected activity aimed at "mutual aid and protection".

This bill would also:

- amend Labor L. § 198 to increase the liquidated damages allowed for willful violations of § 194 to up to 300% of the wages found to be due; and
- require the Department of Labor and the Division of Human Rights to make training available to employers to assist them in preventing discrimination and harassment in the workplace.

2) Sexual Harassment

This bill would amend Exec. L. § 292 to apply the existing provisions of the Human Rights Law to employers with fewer than four employees in cases of sexual harassment.

3) Attorney's Fees

This bill would amend Exec. L. § 297 to provide for attorney's fees in employment or credit discrimination cases when sex is a basis of discrimination and retain the existing allowance for attorney's fees in housing and housing related credit cases. It would similarly amend Exec. L. § 296-a to permit the awarding of attorney's fees in credit discrimination cases when sex is a basis of discrimination in matters brought before the Department of Financial Services.

4) Familial Status Discrimination

This bill would amend Exec. L. § 296 law to prohibit discrimination in employment based on familial status.

5) Housing Discrimination

This bill would amend the Real Property Law to add a new Section 227-d, which would prohibit discrimination against domestic violence victim status in housing. A violation of this prohibition would be a misdemeanor. This bill would also allow for a civil action for a violation of the prohibition. It would also add a new Section 744 to the Real Property Actions and Proceedings Law to, in a proceeding to recover possession of a residential unit, provide a defense that such proceeding is unlawfully based on a person's domestic violence victim status. An exemption would exist under both of these sections for a building that is owner occupied with two or fewer units. This bill would also create a task force to study the impact of source of income on access to housing.

6) Strengthening Orders of Protection

This bill would amend the Family Court Act, the Criminal Procedure Law, and the Domestic Relations Law to make clear that a protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate such order and that the protected party cannot be arrested for violating such order.

7) Pilot Program for Remote Petitioning of Temporary Orders of Protection

This bill would amend the Family Court Act and the Judiciary Law to allow for the development and establishment of a pilot program in family courts for the remote petitioning and issuance by audio-visual means of temporary orders of protection. It would also amend the Executive Law to require that the Chief Administrator of the Courts submit regular reports to the Governor and the Legislature on court practices, procedures and services with respect to the adequacy and appropriateness of its services for crime victims.

8) Human Trafficking

This bill would amend the Penal Law and several other provisions of law to address human trafficking. The Penal Law would be amended to:

- conform the ages of victims in certain prostitution offenses under Article 230 to the ages of victims of rape offenses under Article 130;
- raise penalties for sex trafficking and labor trafficking, including making significant violations of both crimes violent felonies, and creating an aggravated labor trafficking crime;
- provide an affirmative defense for defendants being prosecuted under prostitution and loitering statutes that the defendant's participation was the result of being a victim of sex trafficking or compelling prostitution;
- improve the school zone prostitution law by adding as a class E felony the offense of patronizing a person for prostitution in a school zone;
- eliminate the term "prostitute" and replace it with "person for prostitution";

- add three new sections, 230.11, 230.12 and 230.13, to create three new aggravated patronizing offenses where the person patronized is a minor: aggravated patronizing a minor for prostitution in the third degree, a class E felony; aggravated patronizing a minor for prostitution in the second degree, a class D felony; and aggravated patronizing a minor for prostitution in the first degree, a class B felony;
- provide that a person is guilty of promoting prostitution in the second degree if he or she knowingly advances or profits from prostitution of a person less than 18 years old, a class C felony;
- provide that a person is guilty of promoting prostitution in the first degree if he or she knowingly advances or profits from prostitution of a person less than 13 years old, or, being 21 years old or more, knowingly advances or profits from prostitution of a person less than15 years old, a class B felony; and
- make the crime of compelling prostitution a class B felony when a defendant, who is 18 years old or more, knowingly advances prostitution by compelling a person less than 18, by force or intimidation, to engage in prostitution.

In addition, this bill would expand the porthole for the availability of human trafficking victim services by providing that a victim of human trafficking may, in addition to contacting law enforcement, also contact an established provider of social or legal services designated by the Office of Temporary and Disability Assistance (OTDA), the Office for the Prevention of Domestic Violence (OPDV), or the Office of Victim Services (OVS) to become eligible for services. It would also create a civil right of action for victims of trafficking and compelling prostitution crimes to sue their perpetrators and others in civil court for damages; extend the interagency taskforce on human trafficking; and provide for the suspension and revocation of Class E drivers licenses—the license required to drive passengers for hire—for those who are convicted of certain trafficking crimes. Finally, this bill would also require training for law enforcement.

9) Pregnancy Discrimination

This bill would amend Exec. L. § 296 to clarify that employers must perform a reasonable accommodation analysis for employees with pregnancy-related conditions. A pregnancy-related condition would be defined as a medical condition related to pregnancy or childbirth. A reasonable accommodation would not have to be granted if it imposed an undue hardship on an employer. A pregnancy-related condition would be treated as a temporary disability for the purposes of current Division of Human Rights regulations regarding reasonable accommodations. Additionally, it would codify in law a requirement currently in regulation that an employee must cooperate in providing medical or other information to verify the existence of a disability or pregnancy-related condition.

10) Roe v. Wade

This bill would amend the Public Health Law to protect a woman's right to choose by codifying in state law the federal Supreme Court decision Roe v. Wade, 410 U.S. 113 (1973). This bill would allow a woman to terminate her pregnancy within twenty-four weeks of the commencement of her pregnancy, or when necessary to protect a woman's life or health as determined by a licensed physician. It would further prohibit any prosecution or proceeding under the Penal Law for any action authorized by this section or permitted by the Public Health Law and Education Law. This bill would also repeal Penal L. §§125.05(2), 125.05(3), 125.15(2), 125.20(3), 125.40, 125.45, 125.50, 125.55, and 125.60 to the extent they are inconsistent with this bill. Finally, it would also make clear that nothing in the amendment shall conflict with any applicable state or federal law or regulation permitting a health care provider to refrain from providing abortions due to the provider's religious or moral beliefs, or with the federal partial birth abortion ban codified in 18 U.S.C. § 1531.

Existing Law:

These bills would impact existing protections that are available under the Labor Law and the Executive Law. They would also impact existing provisions of law regarding orders of protection. They would modify existing laws regarding sex and labor trafficking and prostitution offenses, found in the Penal Law, the Social Services Law, and several other provisions of law. They would also amend the Public Health Law.

Statement in Support:

- **Achieving Pay Equity**

Wage disparities have a detrimental effect on society. Individuals are put at an economic disadvantage because of characteristics that bear no relationship to their job performance. Such disparities prevent maximum utilization of labor in the state economy. Additionally, policies adopted by employers that discourage or prohibit employees from sharing information about their earnings can contribute to unjust wage disparities going undetected. Despite existing protections under the law, women in New York earn 84 percent of what men earn and jobs traditionally held by women pay significantly less than jobs predominately employing men. In New York, on average, a woman working full time is paid $42,113 per year, while a man working full time is paid $50,388 per year. This creates a wage gap of $8,275 between full-time working men and women in the state.

This bill would amend existing law to ensure that women receive the wages they were always entitled to, as well as provide for increased liquidated damages. Individuals who were paid unequal wages would be entitled to liquidated damages of up to 300% of the amount of unpaid wages. Existing exemptions in the law would be tightened so that pay differentials are

excused where the employer can show that the differential is truly caused by something other than sex and is related to job performance and consistent with business necessity. Employers would also be prohibited from forbidding employees from sharing wage information that would otherwise deny women workers the ability to discover whether their wages are unequal to their male counterparts.

- **Stopping Sexual Harassment in All Workplaces**

Sexual harassment disproportionately affects women in the workplace. In 2011, women filed 75% of all sexual harassment complaints filed at the New York State Division of Human Rights and 83% of all sexual harassment complaints filed at the Equal Employment Opportunity Commission. However, those persons working for employers with fewer than 4 employees cannot file a complaint with the State, because small employers are currently exempt from the provisions of State law that prohibit harassment—and more than 60% of the state's private employers have fewer than 4 employees. This bill would amend the law to protect workers from sexual harassment regardless of the size of the workplace. Under the amended law, an employee of any business, large or small, may file a complaint for sexual harassment.

- **Allowing for the Recovery of Attorney's Fees in Employment and Credit and Lending Cases**

Under existing law, attorney's fees for employment and credit and lending sex discrimination cases are not available even after the plaintiff proves discrimination at trial. As a result (a) many who are discriminated against but cannot afford to hire an attorney never seek redress; (b) those who hire an attorney on a contingency fee arrangement are not "made whole" for their losses because they must pay for their attorneys out of their recovery; and (c) some who cannot afford to hire an attorney, but who try to do so on a contingency basis, are unsuccessful because the case is either too small or too risky. This bill would allow for reasonable attorney's fees in employment and credit discrimination cases when sex is a basis of discrimination.

- **Ending Familial Status Discrimination**

Women with children are less likely to be recommended for hire and promoted, and, in most cases, are offered less in salary than similarly situated men. This type of discrimination impacts those who are perhaps most in need—70% of children living with single mothers are poor or low income. Currently, State law protects against familial status discrimination in housing, but not employment. This bill would prohibit employers from denying work or promotions to workers simply based on their familial status.

- **Stopping Housing Discrimination for Victims of Domestic Violence**

Discrimination against victims of domestic violence is almost always discrimination against women. Of all victims of domestic violence, 85% are women; an estimated 1.3 million

women are victims of assault by an intimate partner each year, and about 1 in 4 women will experience intimate partner violence in their lifetimes. This bill would amend the Real Property Law to protect victims of domestic violence from discrimination when they attempt to rent or lease housing and provide victims of domestic violence a defense in eviction proceedings.

- **Protecting Victims of Domestic Violence by Strengthening Order of Protection Laws**

Women face too many obstacles in securing protection from their abusers. For example, some victims of domestic violence require immediate temporary orders of protection, but have no means to travel to the appropriate family court. To protect victims of domestic violence, and ensure that they are able to secure much-needed orders of protection, this provision would allow the Office of Court Administration to develop a pilot program to allow victims to petition for temporary orders of protection remotely.

- **Strengthening Human Trafficking Laws**

Human trafficking is a crime that exploits vulnerable individuals. For both sex and labor trafficking, victims are made to act against their will and in many cases, are forced or coerced into committing crimes. For victims of sex trafficking, who are almost always women, the crime is often prostitution.

While New York has one of the most comprehensive anti-human trafficking laws in the country, this bill would strengthen the existing law to: (a) increase penalties for trafficking; (b) expand the scope of certain promoting prostitution crimes and the crime of compelling prostitution; (c) create an affirmative defense in prostitution prosecutions that a defendant's participation was a result of having been a trafficking victim; and (d) make it easier for trafficking victims to receive services. These amendments will deter human trafficking, make prosecution and enforcement more effective, and solidify New York's status as a leader among the states in protecting vulnerable individuals subject to exploitation.

- **Stopping Pregnancy Discrimination Once and For All**

Conditions related to childbirth and pregnancy can result in impairment requiring accommodation. Some pregnant workers require modest adjustments on the job for conditions related to pregnancy and childbirth in order to stay healthy and keep working. Employees may require a stool to sit on, extra restroom breaks, transfer away from hazardous duties, a temporary reprieve from heavy lifting, or a reasonable time for childbirth recovery. In order to adequately protect the rights of pregnant workers, it is necessary to create a specific protection in the Human Rights Law requiring employers to provide a reasonable accommodation for pregnancy-related conditions, unless doing so would create an undue hardship. While the Division of Human Rights has long interpreted the sex and disability protections of the Human Rights Law to encompass pregnancy-related conditions, recent Court decisions have contributed to the already considerable confusion as to the availability and extent of this protection. The purpose of this

bill is to codify the Division's existing interpretation of the law while not depriving women of any of their existing protections under the disability and sex discrimination provisions of the law.

- **Protecting a Woman's Freedom of Choice**

This bill aligns State law with existing federal law. In Roe v. Wade, 410 U.S. 113 (1973), the United States Supreme Court ruled that the United States Constitution protects a woman's right to terminate her pregnancy when necessary to protect the health and life of the woman. New York became one of the first states to provide women the right to choose prior to Roe and therefore did not include elements now protected under federal law. This proposal would not change or alter existing State and federal laws that permit a health care provider or institutions from refraining from providing an abortion for religious or moral beliefs, would not expand the class of individuals who could perform abortions, nor would it alter the current long-standing criminal ban on partial birth abortion. However, it would incorporate the important reproductive rights that women in New York have had since Roe.

Budget Implications:

These bills have no budget implications for the State.

Effective Date:

These bills would take effect 90 days after enactment, except for the pilot program bill, which would take effect on April 1, 2014, and the reproductive choice bill which would take effect 30 days after enactment.