HELP WANTED: WHAT EMPLOYERS NEED TO KNOW ABOUT PAY TRANSPARENCY REQUIREMENTS IN JOB POSTINGS

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Pay equity has been a hot topic in employment law in recent years. Now, laws requiring disclosure of pay scales are viewed as the next step towards achieving equal pay for equal work across genders, races, and nationalities. In fact, *Inc.* magazine named 2022 the "Year of Pay Transparency,"[1] and *LinkedIn News* listed pay transparency as one of the "[i]deas that will change the world in 2022."[2] In the last few years, many states and localities have enacted pay equity legislation focused on mandating compensation transparency in job advertisements. California recently joined other jurisdictions in this effort with Governor Gavin Newsom signing Senate Bill 1162 on 27 September 2022. The law, which goes into effect on 1 January 2023, requires employers with 15 or more employees to include a pay scale in job postings and for employers with more than 100 employees to submit an annual report of pay information to the California Civil Rights Department. Similarly, on 1 November 2022, employers in New York City (with at least four employees) must include a good faith salary range for every job, promotion, or transfer opportunity advertised. These are just a few of the growing number of state and local laws implementing pay transparency requirements for job applicants, as well as in some jurisdictions for current employees.

Many employers—including those that operate in regulated locations, employ remote workforces, or recruit nationally—have questions about what the new laws will require, how to comply with them, and to whom the laws apply. This is understandable considering many of the laws apply even if an employer does not have a physical location in the jurisdiction, such as New York City, where coverage exists if a worker *could* perform the job in the regulated location, or Colorado, where employers with at least one employee residing in the state must comply.

Below is an overview of the jurisdictions that have implemented wage transparency laws and a summary of the requirements of each jurisdiction. It should be noted that many of these laws, as well as those in other jurisdictions, also include document retention obligations, pay equity reporting, and requirements related to compensating employees equitably irrespective of a protected class, such as gender. The below information covers the portions of the laws specifically related to disclosing compensation information in job postings.

SUMMARY OF ENACTED LAWS

California:

Employers in California already were required to provide applicants for a position the pay scale for the job upon a "reasonable" request. Following passage of an expansive pay transparency bill that amended Labor Code Section

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432.3, effective 1 January 2023, covered employers (those with 15 or more employees) must include a pay scale in any advertised job postings, including positions posted by third parties. “Pay scale” is defined as the “salary or hourly wage range that the employer reasonably expects to pay for the position.”[3] Although the definition of pay scale does not explicitly include bonuses, commissions, and other benefits, other state laws do require inclusion of such information, and employers should keep an eye out for additional guidance from the Department of Labor Standards as the effective date approaches. All employers must now also provide this information to current employees upon request.[4]

The amendments to the Labor Code also impose document retention obligations, including maintaining a record of each employee's job title and wage history for three years after the employment relationship terminates. The law can be enforced through a private right of action, and offending employers may be subject to civil penalties, including the possibility of penalties up to US$10,000 per violation. Employers may take advantage of a cure provision, and avoid an initial penalty, if they revise the offending job posting to include the relevant pay scale.

Unlike some of the other laws that state, sometimes explicitly, that the law applies to remote roles (for example, Colorado and New York City), the California law does not specifically address whether the law covers remote job postings as well.

Colorado:

Effective 1 January 2021, Colorado's Equal Pay for Equal Work Act (EPEWA), C.R.S. § 8-5-1-1 *et seq.,* requires covered employers (those with at least one employee in Colorado) to list the rate of compensation (or a range thereof) in job postings to all prospective applicants and notify current employees of promotional opportunities. Covered employers must also provide a general description in the advertisement of any bonuses, commissions, or other compensation the prospective applicant would be eligible to receive if hired.

Colorado's law initially prompted some employers, who did not have any employees located in the state, to exclude remote employees based in Colorado from applying for advertised positions. However, the Colorado Department of Labor quickly issued a stern notice[2] directed to those employers. The notice reminded employers that the EPEWA provisions apply to all remote job openings as long as the hiring employer has at least one worker in Colorado.

Exceptions to the salary posting requirements include:

1. Confidentiality on account of a desire to replace an existing employee;
2. Automatic promotion of an employee after a trial period of up to one year; and
3. Temporary/acting/interim position for up to six months (noting that if the position becomes permanent it must be posted).

The law can be enforced with fines between US$500 and US$10,000 per violation.

Connecticut:

Effective 1 October 2021, Connecticut's “An Act Concerning the Disclosure of Salary Range for a Vacant Position,” requires covered employers (those with at least one employee in Connecticut) to disclose the “wage range” for a vacant position to current employees and applicants upon the earlier of: (i) the applicant's request, or (ii) the communication of an offer of employment.[6] “Wage range” means the range of wages an employer

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anticipates relying on when setting wages for a position. To determine the wage range for a particular position, the employer may reference any applicable pay scale, previously determined range of wages for the position, actual range of wages for employees who currently hold comparable positions, or the budgeted amount for the position.

Subsequent guidance[7] from the Connecticut Department of Labor confirmed, "Yes, the Act applies to employers within the state using the services of one or more employees for pay even if such employees are located outside the physical confines of the state."

Maryland:

Effective 1 October 2020, the Equal Pay for Equal Work Law,[8] as amended, requires covered employers (any employer engaged in business in the state of Maryland) to provide a wage range to all applicants who request such disclosure. The law specifies that employers are prohibited from refusing to interview, hire, or employ an applicant because the applicant requested the wage range associated with the desired position. Maryland also prohibits an employer from requesting past salary information from an applicant. However, an employer may, after making an offer of employment that includes compensation, rely on the wage history that an applicant voluntarily provided to support a higher wage than offered.

While a private cause of action does not exist, an applicant may file a complaint with the Maryland Department of Labor's Commissioner of the Division of Labor and Industry (the Commissioner). Civil penalties range between US$300 and US$600 per violation. However, the law specifies that upon finding a violation, the Commissioner shall either "(i) issue an order compelling compliance[,] or (ii) in the Commissioner's discretion, for a first violation, issue a letter to the employer compelling compliance."[9]

New York:

On 21 December 2022, Governor Kathy Hochul signed NY Senate Bill S9427A. Effective 17 September 2023, covered employers in New York State will be obligated to disclose job compensation ranges in position postings. A covered employer is an entity with four or more employees and employment agencies (excluding temporary staffing agencies). The NY law will require covered employers to include in an advertisement for any job, promotion or transfer the minimum and maximum annual salary or hourly range of compensation that the employer in good faith believes to be accurate at the time of the posting. Importantly, the NY law also requires the employer to post the position's job description, if one exists. However, the law does not require the employer to disclose any further information such as employee benefits, equity or bonuses. Although the law does not include a private right of action, aggrieved individuals may file a complaint with the NY State Commissioner of Labor, and failure to comply with the law can result in civil penalties of up to $3,000.

Nevada:

As of 1 October 2021, Nevada mandates that covered employers (any private or public employer in Nevada) must disclose a wage or salary range to applicants after an initial interview and to current employees that apply for a promotion/transfer, complete an interview for a promotion/transfer, have been offered a promotion/transfer, or request the information to consider a promotion/transfer.[10]

Fines extend up to US$5,000 for each violation and payment of the Nevada Labor Commissioner's fees and costs to investigate and prosecute a claim.[11]

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Rhode Island:

Effective 1 January 2023, the Rhode Island Equal Pay Law has been amended to require employers (those with one or more employee in the state) to provide job applicants a wage range upon the applicant's request.[12] Even when the applicant does not make a request, an employer should provide the wage range for the position "prior to discussing compensation."[13] The wage range is defined as the range the employer anticipates paying for the position, including budgeted amounts. For current employees, the wage range can include applicable pay scales and what other employees in that same position have been paid previously. Finally, if a current employee requests the wage range for their position at any time during their employment, the employer must provide them such information.

The law provides a private cause of action. In addition, enforcement of the law can include fines starting at US$1,000 per violation (first offense) to US$5,000 (two violations in a seven-year period).

Washington State:

As of 28 July 2019, covered employers (those with 15 or more employees) in Washington must disclose the minimum wage or salary for a position upon an applicant's request once a conditional offer of employment is made. The employer must also disclose wage or salary ranges upon the request of an employee offered an internal transfer to a new position or a promotion.

Effective 1 January 2023, under the Washington Equal Pay and Opportunities Act, as amended, covered employers in Washington also are required to disclose a salary range in job postings as well as a general description of the benefits and other compensation to be offered. This includes all "discretionary and nondiscretionary wages and benefits provided by an employer to an employee as a result of the employment relationship."[14] Additionally, the Washington Department of Labor and Industry notes on its website that its Employment Standards Program anticipates developing an administrative policy to help employers better understand the requirements of this legislation.

The law provides that the penalty for a first violation may not exceed US$500. For a repeat violation, the penalty may not exceed US$1,000 or 10% of the damages, whichever is greater.[15]

OVERVIEW OF SELECT ENACTED LOCAL LAWS

Cincinnati, Ohio:

Effective 13 March 2020, under the City of Cincinnati Ordinance No. 83 (the Ordinance), covered employers (those with 15 or more employees within the city) are required to provide the pay scale to an applicant for a position after a conditional offer has been made and if a reasonable request is made by the applicant.[16] The Ordinance does not define the terms "reasonable request" or "pay scale."

The Ordinance creates a private cause of action and provides for compensatory damages, reasonable attorney's fees, the costs of the action, and legal and equitable relief with a two-year statute of limitations on such damages and relief. In a unique turn, the Ordinance also provides a safe harbor for employers who, within the previous three years, and before a lawsuit is filed against the employer, have received an external certification, which is then made publicly available, that their practices do not include salary history in the hiring process. Pursuant to the Ordinance, the city established the Salary History Implementation Working Group. It is expected that this

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group will provide further guidance on all aspects of the Ordinance, including the parameters of the safe harbor provision.

Westchester County, New York:

Effective 6 November 2022, Westchester County Local Law No. 119—amending the local human rights law (Section 700.03(a)(9))—prohibits covered employers (those with at least four employees) from advertising a position without including the minimum and maximum salaries for the job advertised.

The Westchester County law applies to positions that are required to be performed in whole or in part in Westchester County, whether in a physical office or remotely. While no private cause of action exists, violations of this law are subject to any of the appropriate penalties within Section 700.11(h) of the local human rights law, which include compensatory and punitive damages, as well as civil penalties up to US$250,000.

Ithaca, New York:

Effective 1 September 2022, Ithaca City Code § 215-3(F) (amended 4 May 2022 by Ord. No. 2022-03), requires employers that employ four or more employees within the City of Ithaca to include in job advertisements the minimum and maximum hourly or salary compensation for the position advertised, including postings for promotions or transfers.

Ithaca's law is silent as to its application to workers located outside of Ithaca, such as a remote employee. In other words, the law is silent on whether employers must comply with the salary disclosure requirements if an employee would not be physically working from Ithaca.

Employers who violate Section 215-3(F) may be liable for “money damages and any other remedy available at law,” as set forth in Section 215-9.5. In addition, a private cause of action exists.

Jersey City, New Jersey:

Originally effective 13 April 2022 and subsequently amended 15 June 2022, Ordinance No. 22-045 (the Ordinance) requires covered employers, employment agencies, and agents of covered employers (those with five or more employees within Jersey City) to include a minimum and maximum salary range and benefits in every job posting or advertisement. The Ordinance specifies that any independent contractors engaged by the employer on the date the job advertisement is posted will count towards the five-employee threshold.[17]

Violations of the Ordinance can be reported to the Office of Code Compliance, or to the Women's Advisory Board for referral to the Office of Code Compliance, and will be subject to the penalties set forth in Section 1-25 of the Municipal Code, including fines of up to US$2,000.

New York City:

Effective 1 November 2022, a covered employer (those with four or more employees) must disclose a good faith salary range for every job, promotion, and transfer opportunity that is advertised. The disclosure must contain the “minimum and maximum annual salary or hourly wage.”[18] All prospective applicants, including internal applicants, are entitled to receive the disclosure when the job is posted.

The law applies to any position that *could* be filled by a candidate who resides in New York City. Further, the law also explicitly provides that it applies to any position that may be performed, *at least in part*, in New York City, which could even encompass an employee who is required to report to a New York City office for work on a

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sporadic or infrequent basis. Salary transparency protections will be enforced by the New York City's Commission on Human Rights. After the first violation, employers that violate the law may face civil penalties up to US$250,000.

Toledo, Ohio:

Effective 25 June 2020, the City of Toledo's "Pay Equity Act to Prohibit the Inquiry and Use of Salary History in Hiring Practices" mandates that employers must provide applicants the pay scale for the position they are applying for after the employer has made an offer and upon the applicant's reasonable request. The ordinance does not apply to internal transfers or promotions or to applicants who are rehired within five years.

There is a private cause of action for violations of the act and those affected applicants can bring a cause of action within two years from the occurrence of a violation. Those affected could seek "compensatory damages, reasonable attorneys' fees, the costs of the action, and such legal and equitable relief as the court deems just and proper."[19]

SUGGESTED ACTION ITEMS

The differences in scope and applicability aside, all of these laws demonstrate a growing trend of mandated salary disclosures in pursuit of pay equity. Indeed, most if not all of these laws were passed as one of several amendments to the respective jurisdictions' laws centering on pay equity and discriminatory hiring practices—such as bans on inquiries into salary history. Although the equally growing trend toward remote workforces may make implementation of these laws challenging, employers should expect further proliferation of laws of this kind to be the way of the future.

Employers with operations in these jurisdictions and those that may be covered based on the locations of their employees should evaluate the pay ranges for all current positions. As part of this review, employers may want to consider engaging counsel to conduct a pay equity analysis and make any necessary modifications to existing compensation ranges. Finally, employers should ensure that the compensation information to be included in the applicable job postings is accurate and satisfies the various requirements under these new laws.

FOOTNOTES

[1] Anna Meyer, *Why 2022 Is the Year of Pay Transparency*, INC. (Jan. 13, 2022), https://www.inc.com/anna-meyer/pay-transparency-linkedin-big-ideas-2022.html.

[2] LinkedIn News UK, *20 Big Ideas that Will Change Our World in 2022*, LINKEDIN (Dec. 8, 2021), https://www.linkedin.com/pulse/20-big-ideas-change-our-world-2022-linkedin-news-uk.

[3] CAL. LAB. CODE § 432.3(c).

[4] See S.B. 1162, "An Act to Amend Sections 432.3 and 1197.5 of the Labor Code, Relating to Employment," (Cal. 2022).

[5] Colo. Dep't of Lab. & Emp., Div. of Lab. Standards & Stats., Notice Regarding Labor Law Compliance (July 21, 2021), https://cdle.colorado.gov/sites/cdle/files/Compliance%20Assistance%20Letter%20to%20Employers%2C%20Rem

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ote%20Jobs%20Covered%20by%20EPEWA.pdf.

[6] CONN. GEN. STAT. § 31-40z (2019).

[7] Conn. Dep't of Lab., Questions and Answers Regarding Public Act 21-30 (Sept. 28, 2021), https://www.ctdol.state.ct.us/wgwkstnd/QandArePA21-30.pdf.

[8] MD. CODE, LAB. & EMPL., § 3-301, *et seq*.

[9] *Id.* §3-308.

[10] NEV. REV. STAT. § 613.133(2).

[11] *Id.* § 613.133(6).

[12] R.I. Gen. Laws § 28-6-22(c).

[13] *Id.*

[14] WASH. REV. CODE § 49.58.010(1).

[15] *Id.* § 49.58.030(d)(ii).

[16] City of Cincinnati, An Ordinance No. 83 "Prohibited Salary History Inquiry and Use" (March 13, 2019), https://www.cincinnati-oh.gov/cityofcincinnati/equity-in-cincinnati/city-of-cincinnati-s-salary-equity-ordinance.

[17] JERSEY CITY MUN. CODE Ch. 148 (2022).

[18] N.Y.C. Council, A Local Law to Amend the Administrative Code of the City of New York, In Relation to the Employers Required to Post Minimum and Maximum Salary Information (March 24, 2022), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5528005&GUID=4544EE38-4659-44F6-9092-19D965A680AE&Options=ID%7cText%7c&Search.

[19] TOLEDO, OHIO, MUN. Ch. 768.03 (2019).

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