WASHINGTON STATE ISSUES NEW GUIDANCE ON PAY TRANSPARENCY REQUIREMENTS FOR JOB POSTINGS

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As we previously reported, states and cities across the United States have enacted or expanded pay equity laws that mandate compensation transparency in job advertisements. For example, the amended Washington Equal Pay and Opportunities Act (EPOA) that became effective 1 January 2023 includes new requirements for listing compensation and benefit information in job postings.

In response to questions employers have raised while attempting to comply with the new EPOA requirements, the Washington State Department of Labor and Industries recently issued Administrative Policy ES.E.1 (DLI Guidance) to provide information for employers on how to comply with the pay transparency requirements. Below is an overview of existing EPOA requirements and the new DLI Guidance, as well as recommended best practices.

REQUIREMENTS UNDER THE EPOA

The EPOA requires:

Equal Pay

Employers must provide equal compensation to "similarly employed" employees, except for some specific reasons unrelated to gender. Pay may vary based on business-related factors, including education, training, experience, seniority, merit, systems that measure performance based on production quality or quantity, bona fide regional differences in compensation, or differences in minimum wage.

Equal Career Advancements

Employers must not limit or deprive employees of career advancement opportunities on the basis of gender.

Open Wage Discussions

Employers must not prohibit employees from inquiring about, disclosing, comparing, or otherwise discussing their own wages or the wages of other employees. The definition of wages is broad and includes pay and benefits. Employers also must not require employees to sign agreements that prevent employees from discussing their wages.

Protection From Discrimination and Retaliation

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Employers must not take any adverse action against employees for exercising any EPOA-granted rights, including discussing wages, filing a complaint, or refusing to sign a document preventing disclosure of wages.

Wage and Salary History Protections for Applicants

Employers must not seek the wage or salary history of applicants or require that applicants' prior pay history meet certain criteria (such as requiring a minimum previous salary to be considered for a new position). Note that employers can confirm any wage or salary history the applicant voluntarily discloses or after making an employment offer with compensation.

Wage and Salary Disclosures for Applicants

Before amendment, the EPOA required covered employers with 15 or more employees to disclose the minimum wage or salary for a position only upon an applicant's request once an employer extended a conditional offer of employment. Effective 1 January 2023, the new pay transparency requirements described below replaced this prior obligation.

Wage and Salary Disclosures for Promotions and Internal Transfers

The EPOA requires covered employers with 15 or more employees to disclose, upon request, the wage and salary ranges for a position when an employer offers an employee an internal transfer or promotion. The amendments to the EPOA did not change this requirement, which remains in effect.

NEW PAY TRANSPARENCY REQUIREMENTS FOR COVERED EMPLOYERS

Covered employers in Washington are now required to include a wage or 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.”

The DLI Guidance explains that the new pay transparency requirements apply to all employers (1) “with 15 or more employees,” (2) that “engage in any business, industry, profession, or activity in Washington,” and (3) with job postings “that recruit Washington-based employees.” This includes employers without a physical presence in Washington if they have *one or more* Washington-based employees or if they engage in business in Washington or recruit for jobs that could be filled by a Washington-based employee, including remote jobs.

Even if the EPOA covers an employer, the new requirements do not apply to:

- Job postings for positions that must be performed entirely outside of Washington, even if the posting will be distributed to applicants in Washington (*e.g.*, a secretarial position that must be performed entirely at an office in another state); and
- Job postings that are printed, not electronic, and distributed only outside of Washington.

These exceptions will be narrowly construed.

Note that the DLI Guidance expressly states that employers cannot avoid the Washington disclosure requirements by stating in a posting that job applications from Washington-based applicants will not be accepted or considered.

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JOB POSTING DEFINED

The new EPOA requirements only apply to a job "posting," which means any solicitation that is (1) intended to recruit applicants for a *specific available position* and (2) *includes qualifications for desired applicants*. If either requirement is missing, it is not a posting subject to the disclosure requirements. For example, the following would not be covered job postings because they do not satisfy one of the criteria: "Help Wanted: Apply Inside" or "Help Wanted - Server. Offering minimum wage plus tips." Note that postings are not limited to direct recruitment by the employer but also include indirect recruitment through a third party (such as postings on Indeed or through a college recruiting office). Postings can be through any medium, including electronic or hard-copy postings.

WAGE AND COMPENSATION INFORMATION

Under the new EPOA requirements, covered employers must provide a wage scale or salary range in job postings. The DLI Guidance explains that this means the "most reasonable and generally expected range of compensation for the job," extending from the lowest to highest pay for the position. The scale or range posted must be the one in effect at the time of publication, and the posted scale or range must be updated if it subsequently changes. A wage scale must have clear upper and lower limits and may not be open-ended at either the top or bottom (such as "$80,000/per year and above," or "up to $30/hour"). If there is a starting range or range for a probationary period, both the starting range and general range must be included in the posting. If the posting could be filled by varying titles or levels depending on the chosen applicant's experience, the entire scale by level should be published (*e.g.*, "Analyst 1--$25-$30 per hour, Analyst 2--$60,000-$70,000 per year, Analyst 3--$80,000-$110,000 per year"). Beyond these basic types of pay, the DLI Guidance provides some detail on specific pay types.

- For jobs compensated by commissions, the employer should include the rate or range of rates (percentage or otherwise) the employer will offer for the position (*e.g.*, "5-8% of net sale price per unit"); and
- For positions compensated on a piece-rate basis, the posting should specify the piece-rate wage or the hourly wage scale plus the piece-rate formula (*e.g.*, "$17 per hour plus $0.25 per pound of strawberries picked, or the greater of $0.75 per pound of strawberries picked or $19 per hour").

Employers must also provide a general description of "other compensation" that will be offered, including, for example, bonuses, profit-sharing, stock options, or other forms of compensation that would be offered to the hired applicant in addition to their salary or wage. The DLI Guidance identifies the following relatively generic description of other compensation as acceptable: "Hired applicant will be able to purchase company stock, receive annual bonuses, and can participate in profit-sharing."

BENEFITS INFORMATION

Under the new EPOA requirements, job postings must include a "general description of all benefits." The DLI Guidance states that this "includes, but is not limited to, health care benefits, retirement benefits, any benefits permitting paid days off (including more generous paid sick leave accruals, parental leave, and paid time off or

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vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits." The DLI Guidance provides additional detail:

Insurance

List all types, not just medical

Retirement

Include not just 401k, but also deferred compensation and other defined benefit and contribution plans

Holidays

List the total number of holidays (not the specific days) provided

Paid Time Off or Vacation

List the number of hours per month or days per year the hired applicant will receive (*e.g.*, "eight hours per month" or "12 days per year")

Paid Sick Leave

List the number of hours per month or days per year if more generous than required by state or local law

The description should include the most reasonable and genuinely expected benefits offered for the specific available position.

Employers must include the benefits description in the posting and cannot simply include a link to a summary page of benefits. A link may be included to provide more detail, but it does not take the place of the required general description. The DLI Guidance noted the following acceptable general description:

> Employees (and their families) are covered by medical, dental, vision, and basic life insurance. Employees are able to enroll in our company's 401k plan, as well as a deferred compensation plan. Employees will also receive eight hours of vacation leave every month and 12 paid holidays throughout the calendar year.

BEST PRACTICES AND ACTION ITEMS

Employers should ensure they are complying with Washington's new EPOA requirements and following best practices. Beyond simply complying with the law as summarized above, consider the following.

Plan Ahead With Wage Scales and Salary Ranges

If your company does not already have one for a position, create a scale or range before publishing the posting. As part of this process, employers may want to consider engaging counsel to conduct a pay equity analysis and make any necessary modifications to existing compensation ranges.

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Ensure All Employees are Paid Within the Identified Salary or Wage Range

If not, assess why (keeping in mind pay equity requirements) and take appropriate action to modify the employee's compensation or the appropriate range. Often, the employee's pay should be increased, but in some situations it may be appropriate to amend the range to be accurate without adjusting employee pay.

Ensure That All Existing Job Postings Include the Required Information, Including Postings Listed by Third-Party Entities at an Employer's Direction

Do Not List an Inaccurate Range

Studies and surveys indicate that some employers are listing a false salary range in external postings for various reasons, including the view that a new hire will not be hired above a certain maximum. If there are multiple ranges, fully disclose them (*e.g.*, "New hires will be paid a starting salary between US$75,000 and US$85,000. Employees in this position who have worked for the company for at least six months will be paid between US$75,000 and US$95,000").

Make Sure That the Benefits Listing is Accurate for the Position Posted

Certain benefits may only be offered to executives or some other category of worker, such as non-exempt employees. Do not list benefits that the employee hired for the posting will not receive.

When Drafting the Benefits Description, Err on the Side of Being Over-Inclusive

The law and DLI Guidance require a list of "all of the benefits" to be offered. Omitting certain benefits required by law (*e.g.*, unemployment, industrial insurance coverage, statutory sick leave, Washington paid family medical leave) seems to be permitted based on the samples listed in the DLI Guidance, but consider adding a catch-all (such as "and all other benefits required by applicable law") at the end of the listing to signal that there are other benefits.

If Your Company Provides Unique Compensation Methods, List Them (at Least Generically) as Part of the "other Compensation" in the Posting.

Monitor and Audit Compliance With the New Requirements

Do not simply implement a system to comply and move on to the next compliance concern. This is a new area for Washington employers and there are bound to be mistakes. Ensure not only that the salary/wage and benefit disclosures are being added to all postings but also that all employees are being paid within the posted ranges and offered the listed benefits.

Keep in Mind Pay Transparency Requirements in Other States and Cities Where You Have Employees

Information regarding these other state and local requirements can be found on the K&L Gates Hub here. Consider aligning practices to provide administrative ease. For example, for an employer covered by the Washington and California pay transparency laws, only Washington requires that job postings disclose all benefits, and only California requires that employers disclose pay ranges to current employees who are not seeking a promotion or transfer. Consider complying with the more generous law in both locations unless your company has in place a clear system to ensure precise compliance with the particular state requirements.

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