

CLIENT ALERT

California Joins National Trend in Enacting Pay Transparency Laws

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Beginning January 1, 2023, California employers will be required to affirmatively disclose pay scales for positions published in job postings. This new mandate comes from the state's enhanced pay transparency legislation which California Governor Gavin Newsom signed into law on September 27, 2022.

On the other side of the country, New York employers also will soon be required to disclose a good-faith salary range in their advertisements for any jobs, promotions, or transfer opportunities, if Governor Kathy Hochul signs state-wide legislation awaiting her signature. With New York City's new pay transparency legislation set to take effect on November 1, 2022, New York and California represent the newest jurisdictions set to join a growing number of states and local municipalities that have enacted similar laws aimed at increasing pay transparency.

What is Pay Transparency?

Pay transparency laws generally require employers to disclose wage information to job applicants. These laws differ based on when information must be disclosed and whether it is owed to a candidate affirmatively or only upon request. Some laws require wage information to be contained in public job postings, while others require wage information to be provided later in the hiring process to those candidates still in contention for a job. Still other laws obligate employers only to provide wage information to candidates who specifically request such data. Overall, there are at least fourteen jurisdictions, including California and New York City, with a pay transparency law in effect or set to become effective in the next year. Other notable jurisdictions, including New York State, are on the verge of joining the trend.

California's Pay Transparency Law... Enhanced

Until recently, California required employers to provide external applicants with a pay scale if applicants requested the information. That changed when Gov. Newsom signed SB 1162 into law. SB 1162 will require nearly 200,000 California employers with 15 or more employees to affirmatively disclose pay ranges.

What does the law require? Employers must disclose "the pay scale for a position in any job posting," and if the employer engages a third party to publish a job posting, employers must provide the pay scale to the third party.

To whom does the law apply? California employers with 15 or more employees, whether the employer publishes its own job posting or engages a third party to announce, post, publish, or otherwise make known a job posting. In the latter case, the employer must provide the pay scale to the third party, which also will be required to include the pay scale in the job posting.

How will the law be enforced? A person who claims to be aggrieved by a violation of the pay transparency requirements may file a written complaint with the Labor Commissioner within one year after the date the person learned of the violation. The law also creates a private right of action, specifically permitting individuals to bring “a civil action for injunctive relief and any other relief that the court deems appropriate.” Upon finding that an employer has violated the law’s disclosure requirements, the Labor Commissioner may order the employer to pay a civil penalty of no less than one hundred dollars (\$100) and no more than ten thousand dollars (\$10,000) per violation. The amount of the penalty is based on the totality of the circumstances, including, but not limited to, whether the employer previously violated the requirement. Notably, however, no penalty will be assessed for first-time violations upon a showing by the employer that all job postings for open positions have been updated to include the required pay scales.

New York City’s Law: The Basics

Initially enacted in January 2022, the New York City salary disclosure law, referred to as 2022 Local Law 32, was set to go into effect on May 15, 2022. However, on April 28, 2022, the New York City Council approved an amendment to the law to provide additional clarity and time for employers to comply. The law, as amended, will be effective on November 1, 2022.

What does the law require? Employers advertising a job, promotion, or transfer opportunity that can or will be performed, at least in part, in the City of New York must state the minimum and maximum annual salary or hourly wage that they, in good faith at the time of the posting, are willing to pay for the advertised position. An “advertisement” is defined as a written description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants, including postings on internal bulletin boards, internet advertisements, printed flyers distributed at job fairs, and newspaper advertisements. Guidance from the New York City Commission on Human Rights (“NYCCHR”) confirms that the law covers both in-person jobs and those to be performed virtually in New York City, including remote jobs that could conceivably be performed in New York City.

To whom does the law apply? All employers with four or more employees will be required to comply with New York City’s pay transparency law. Owners and individual employers count towards the four employees. The four employees do not need to work in the same location, and they do not all need to work in New York City for the law to apply. As long as one of the employees works in New York City, the employer is covered. The law also applies to employment agencies.

How will the law be enforced? NYCCHR will accept and investigate complaints filed by the public. The law also creates a limited private right of action for *employees* to sue their current employers, but does not create a similar private right of action for applicants. NYCCHR guidance states that employers who are found to have violated the law are liable for monetary damages, to be paid to affected employees, and civil penalties of up to \$250,000. Notably, the law as amended forgives a first violation if cured within 30 days of service of a complaint, meaning employers will not be required to pay a penalty for first offenses. Employers found in violation of the law may also be required to amend advertisements and postings, create or update policies, conduct training, provide notices of rights to employees or applicants, and engage in other forms of affirmative relief.

New York State Prepares to Follow Suit

New York State lawmakers recently passed pay transparency legislation that mandates employers disclose the range of compensation (i.e., the actual salary, the minimum and maximum annual salary, or the hourly rate that the employer in good faith believes to be accurate) in job postings. Governor Hochul is expected to sign the bill. It will take effect 270 days after she signs.

While the New York State law generally resembles New York City’s law, the statewide legislation will differ by permitting penalties in an amount up to \$1,000 for a first violation, \$2,000 for a second violation, and \$3,000 for a

third or subsequent violation. The law does not explicitly address whether it applies to employers with employees working remotely in New York, what exactly qualifies as a “job posting,” whether overtime, benefits, or other types of compensation must be disclosed, or whether job applicants can bring claims under the law in addition to current employees. These issues may be addressed in future amendments, regulations, or guidelines issued by the New York State Department of Labor.

Pay Transparency Across the Country

There are several approaches to pay transparency. Some state and local governments have passed legislation similar to the laws in California and New York City and awaiting signature in New York State:

- Colorado’s Equal Pay for Equal Work Act requires employers with at least one employee in Colorado to disclose hourly or salary compensation as well as other information about benefits in job postings. It applies to job postings for positions located in Colorado as well as remote positions for Colorado-covered employers to be performed virtually either inside or outside of the state.
- Washington State’s law also requires employers to proactively disclose wage scale or salary range information in job postings, and recent updates to Washington’s law further require a general description of all of the benefits and other compensation associated with the advertised position. The Washington law, as amended, takes effect on January 1, 2023.
- Local ordinances in Jersey City, New Jersey, as well as the City of Ithaca and Westchester County, New York, similarly take an affirmative disclosure approach to pay transparency.

In contrast, other states require employers to disclose salary information later in the application process.

- In Nevada, for example, employers and staffing agencies are required to provide wage rate or salary range information to job applicants following an interview for the position.
- Maryland’s Equal Pay for Equal Work law only requires wage information to be provided upon request.
- Connecticut’s pay transparency law obligates employers to provide job applicants with the wage range for a position on the earlier of the applicant’s request or before/at the time the employer makes an offer.
- Local ordinances in the Ohio cities of Cincinnati and Toledo mandate that employers provide the pay scale for a position when an applicant has made a reasonable request and received a conditional offer of employment.

Other states may be looking to join the trend toward greater pay transparency. Pay transparency bills are pending in the Massachusetts and Pennsylvania legislatures, and South Carolina is also reportedly considering legislation.

What This Means for Employers

California and New York City’s pay transparency laws align with a national trend of requiring greater disclosures by employers of pay-related information in the recruiting and hiring process. To prepare to meet these new requirements, or to ensure that current legal obligations are satisfied, employers should consider taking certain steps, including:

- Review compensation practices to understand pay ranges for positions or groups of positions. This may include a pay equity audit to ensure that compensation for employees, including new hires, is fairly and consistently determined and complies with existing pay equity laws. An audit may also help refine or redefine pay bands. For purposes of compliance with pay transparency laws, a pay equity audit can help verify that an employer understands the pay ranges for company positions so that subsequent disclosures in the recruiting and hiring process are accurate. Importantly, pay equity audits should be conducted under the guidance of counsel to ensure results are protected by attorney-client privilege.
- Review job descriptions for accuracy and to understand what jobs are being performed and where such work is being performed. Importantly, many of the new laws include within their scope jobs that are performed or could be performed remotely.

- Review recruiting and hiring procedures to confirm that pay disclosures are included in job advertisements and other written materials, as required and at appropriate intervals.
- Train personnel involved in recruiting and hiring, including third-party vendors if used, on the content and timing of required disclosures.

Given the differences in pay equity laws among the states and larger cities and the variety of approaches taken by companies in the areas of compensation, recruiting, and hiring, some employers may have additional or alternative steps to take to ensure compliance with these laws. In particular, and as a preliminary step, employers with employees in multiple jurisdictions will need to carefully evaluate which laws may apply to them. Employers should consult with counsel to ensure they remain compliant with the latest pay transparency legislation in all jurisdictions relevant to that employer.

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