

HOW TRANSPARENT ARE YOU?



Equal Pay and Pay Transparency Laws are Not Going Away: Are You Compliant?

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Across the country, states are increasingly passing pay transparency and equal pay laws which impact how employers advertise their positions, hire and pay their employees. This article examines the trends, traps and tricks to compliance with pay transparency and equal pay laws.

Currently, 10 states have active pay transparency laws, including California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, New York, Rhode Island and Washington. This is a trend that is only increasing with many other states considering passing similar laws or which already have pending legislation in the works. This trend is not restricted to states and is also increasing on the local level with certain lo-

calities and cities, including Jersey City, New Jersey, Cincinnati, Columbus and Toledo, Ohio, to name a few passing or considering the passage of legislation.

State pay transparency laws vary in their application, with some applying only to employers with 50 or more employees working in state, while others apply to employers with one or more employees working in state, or generally to all employers conducting business in state. For example, Maryland's Equal Pay For Equal Work Act applies to ALL Maryland employers conducting business within the state, whereas Hawaii's SB 1057 applies only to employers with 50 or more employees in Hawaii.

Pay transparency laws also vary in their

requirements, with some requiring employers to disclose wage ranges on all job postings, including for internal promotions or job transfers, while others only require employers to disclose a wage range upon request by an applicant. Several states' laws even prohibit employers from requesting an applicant's wage or salary history.

Employers who operate and have employees working in multiple states must ensure compliance with each states' respective pay transparency laws for the various states in which their employees are based and work. And, if compliance with these laws wasn't challenging enough, pay transparency laws are changing the landscape of employment negotiations with respect to compensation,

benefits and incentive pay structures.

The most glaring problem pay transparency laws create for employers is managing an applicant's expectations once an employee knows the range of compensation available for a given position. Clearly, applicants who know the highest pay rate available for a position will demand or expect it and be upset if they aren't offered or don't receive it. This can sour the employment relationship from the start. Similarly, state laws requiring employers to disclose available benefits and incentive pay also create expectation issues because applicants may expect payment of a bonus if the possibility of one is disclosed in a job posting.

Though, employers can easily take control of employment negotiations and manage an applicant's expectations when required to disclose a position's pay range by taking the following steps.

First, *and most importantly*, carefully draft job advertisements and related communications. Clearly state on all job postings and in all communications regarding an available position or promotional opportunity that any disclosed pay range is based on a consideration of neutral factors and criteria such as required qualifications, experience, education, skill, training, certifications, seniority, etc.

Second, include a disclaimer on all postings and in all related communications informing applicants that the employer reserves the right to offer the selected candidate or applicant an hourly rate or salary at an appropriate level to be set and determined by the employer that is commensurate with the applicant's qualifications, experience, education, skill, training, certifications or seniority.

Employers must also be mindful of any applicable notice requirements. The days of posting a job advertisement on an online job board and waiting for applicants to apply are gone. For example, Illinois' pay transparency law House Bill 3129 (HB 3129) requires employers to notify their current employees of all opportunities for promotion no later than 14 calendar days after the employer makes an external job posting for the promotional opportunity.

Employers also need to consider the type of position they are advertising to ensure compliance with state transparency laws. State transparency laws can apply to all onsite and remote positions, depending on the state. Employers who aren't physically located in a state because they don't have a physical office or facility, but who have employees working remotely in state can still be required to comply with an applicable state transparency law. For example, effective January 1, 2024, employers that are only physically located outside of Colorado and

who have fewer than 15 employees working in Colorado, all of whom work only remotely, are only required to provide notice of remote job opportunities through July 1, 2029. As such, it's important for employers to remember that they may still be required to comply with a state's pay transparency law even if they don't have physical operations within a state or even if they only have employees working remotely in a state.

The key to compliance with pay transparency laws, regardless of what state your business operates in or in which you have employees in, is to ask "who, what, and when."

Who does the applicable state pay transparency law apply to, meaning is your business required to comply with a state's pay transparency law because you have enough employees working within the state (i.e., 50 or more employees), and if so, to whom, as in which employees, or prospective employees, is your business required to disclose information to—current employees, remote employees, applicants?

What information is required to be disclosed, i.e., the exact wage amount or a wage range, benefits and incentive pay information? What type of employment opportunity does the required disclosure apply to, i.e., only job openings or on promotional opportunities as well?

Lastly, **when** is the information required to be disclosed, i.e., at the time the job is posted, during the application process, when requested by an applicant or even after the selected candidate has started in the position like in Colorado? For example, Colorado requires employers to notify their Colorado-based employees of every job and promotional opportunity made available by the employer on the same day they are announced or posted and before a candidate is selected for the position.

As if pay transparency laws are not confusing enough, employers must also be cognizant of equal pay laws. Nearly all U.S. states have passed equal pay laws requiring employers to pay employees performing the same or similar work, the same hourly rate or salary regardless of the employee's sex and gender. While only a handful of states don't have equal pay laws, virtually all U.S. employers are covered by federal law under the federal Equal Pay Act. Equal pay laws prohibit employers from discriminating against employees in their terms, conditions and payment of compensation based on an employee's sex and gender.

Employers can easily comply with equal pay laws and manage employee expectations by using neutral factors and criteria in negotiating and paying compensation, regardless of an employee's sex and gender, by taking the following steps:

First, carefully draft job descriptions so that it clearly identifies the employee's job duties and responsibilities and any required prerequisites for the role, including any applicable qualifications, experience, education, skill, training, certifications or seniority, etc. Again, ensure that you use neutral criteria and language.

Second, apply the same method of communicating with all employees within a position about their pay, including how and when incentives or bonuses are or will be paid. Clearly and consistently articulate how bonuses will be paid or earned, again using neutral factors and criteria for earning bonuses or other types of incentives such as stock options, profit sharing, etc.

The easiest way to avoid multi-state compliance issues with complex and conflicting state equal pay and pay transparency laws is to have a uniform system and process in place for hiring and compensating employees, regardless of the states where your employees are located and work.

With the increasingly complex requirements involved in multijurisdictional compliance, including hyper localized laws, it is difficult to remain abreast of the latest legislation much less the latest trends. However, when examining equal pay and pay transparency legislation it is safe to say that these are two legislative trends that will only continue to increase and impact the way employers do business. Working with counsel to review your practices and knowing where you are advertising, where your employees are working (even remotely) and being consistent in your hiring practices is more crucial now than ever. A review upfront can save you from a multi-state lawsuit later.



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