CLIENT ALERT: NYC Amends Pay Transparency Law with Implications for Employers Located Outside of the City

On April 28, 2022, the New York City Council (the "Council") voted to amend the City's new pay transparency law (the "Law"), pushing back the effective date from May 15, 2022 to November 1, 2022 and resulting in several substantive changes to the Law.

The Law makes it an unlawful discriminatory practice for covered employers to advertise any job, promotion, or transfer opportunity without including the minimum and maximum potential wage range offered for the position. However, the original Law was largely ambiguous, which prompted many businesses to request further clarification. As a result, the Council voted to amend the Law and delay the effective date, making several revisions to clarify the application, geographic scope and remedies available to employees under the Law.

The Original Law

The Council initially passed the Law on January 15, 2021 and required employers with four or more employees, including independent contractors, to disclose a minimum and maximum salary range in all job postings and hiring advertisements. A fact sheet published by the New York City Commission on Human Rights (the "Commission") clarified that an employer is a qualified employer under the Law if any of its workers work within New York City. In other words, an employer with even one worker within the city is subject to the requirements of the Law.

The fact sheet broadly defines "advertisements" to include any written description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants, regardless of medium. Further, it specifies that a posting must include the base wage or rate of pay, whether it is an annual salary or hourly wage. Employers are required to make a "good faith" effort to determine, at the time of the job posting, what the employer would pay for the advertised job, promotion or job opportunity. However, the Commission clarified that the advertisement does not need to include information relating to benefits, such as employer-provided insurance, paid time off, tips, or commissions. Advertisements for "temporary employment at temporary help firms," such as jobs advertised through placement agencies, are specifically exempt from the Law.

One major concern for employers was a statement in the fact sheet indicating that covered employers must follow the Law when advertising for positions that "can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from the employee's home." Given the increased trend of hiring remote workers for businesses throughout the country, this broad language prompted many employers located outside of the City to demand further clarification on the applicability of the Law for their own hiring procedures.

The Amendment

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Following pushback from employers, the Council voted to amend the Law, giving employers an additional six months to come into compliance, and adding some clarifying language to the Law's scope and enforcement provisions. The four-employee minimum and applicability to employment agencies remain unchanged by the amendment. Further, the amendment did not alter the requirement that employers disclose a "good faith" determination of the salary range for each specific job in a hiring advertisement. However, in accordance with the Commission's fact sheet, the amendment added language to indicate that "salary" information includes either "annual" salary or "hourly wage," as applicable.

Notably, the amendment did not include geographic limitations for the *employer's* location. Rather, the Council amended the Law to exempt "positions that cannot or will not be performed, at least in part, in the city of New York." The result is that nationwide employers hiring for remote positions are likely required to post a salary range in their job advertisements because it is possible to perform the position in New York City.

Further, the amendment specified that only *current* employees have a right to bring a private action against *their* employer for an alleged violation of the Law. Effectively, this means that applicants who are merely perusing job postings or who apply but are unsuccessful in the hiring process will not have a private right of action against non-compliant employers.

Moreover, the amendment clarifies that first time violations of the Law will be subject to a penalty of $0, as long as the employer cures the violation within 30 days of being served with a complaint. Employers will be required to submit proof of the cured violation, and the amendment vaguely notes that such proof, if "accepted by the commission . . . shall be deemed an admission of liability for all purposes," without defining the term "for all purposes." The amendment does not specify what penalties may apply for subsequent violations, but it is likely the Commission will rely on its authority to fine employers up to $250,000 under the New York City Human Rights Law.

Do You Still Have Questions?

The Commission has indicated that it will update its fact sheet to reflect changes to the Law at some point in the future. Morgan Brown and Joy is actively following the trend of salary transparency requirements around the country. If your business hires employees to work in New York City, or plans to advertise remote work positions after November 1, 2022, we recommend that you contact Morgan Brown and Joy to stay up to date on this law and any newly released guidance.

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