Trends in 2023: Broad-Reaching Pay Transparency Requirements May Affect Out-of-State Employers

As 2023 starts, employers are watching the development and growth of pay transparency laws designed to promote pay equity. Multiple states and municipalities have enacted laws providing for measures such as wage disclosures; bans on salary history inquiries; protections allowing employees to discuss wages; record keeping requirements; and/or annual wage reports to the state. These laws reflect an increasing trend toward wage transparency throughout the country. A notable new development is the emergence of law requiring wage range disclosures in job postings and certain other employment situations. These requirements generally apply even if a covered employer has few employees – or in some cases, only one employee — working in the state or municipality enacting the law. As of the date of publication, these states and municipalities include, but are not limited to, California, Colorado, New York State, New York City, Jersey City, NJ and Washington State. These laws may have wide-reaching effects on employers based outside of those locations.

Key Pay Transparency Laws for Multistate Employers

Below is a general summary, as of the date of this article, of certain state and municipal laws requiring wage range disclosures in job postings, all of which are likely to affect multistate employers:

California

On December 28, 2022, the California Labor Commissioner's Office updated its Frequently Asked Questions with respect to amendments to the California Labor Code taking effect January 1, 2023. These changes, as described in Senate Bill 1162 amended the California Labor Code, include greater pay transparency requirements for employers such as wage disclosures in job postings and additional annual wage reporting requirements. These changes affect employers with even one employee in California as follows:

Wage Disclosures and Record Keeping

Employers with 15 or more employees (including at least one employee in California) must:

- Include a pay scale (as defined under the law) in all job postings, including third party postings, if the position may be filled by an employee in California, either in-person or remotely. Pay scale does not include bonuses, commissions, tips, or other benefits. However, if the position's hourly or salary wage is based on a piece rate or commission, the piece rate or commission range the employer reasonably expects to pay for the position must be disclosed.
- Upon request, provide current employees with the pay scale for the position that employee holds.
- Maintain records of each employee's job title and wage history for the employee's entire period of employment and three years thereafter.

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Employers will have an opportunity to cure first violations of the wage disclosure requirements. Thereafter, DLSE may award civil penalties of $100 to $10,000 *per violation.* Additionally, courts may order substantial penalties against businesses that fail to comply with reporting requirements.

Reporting Requirements

Employers with 100 or more employees (including at least one employee in California) will also be required to make annual pay data reports to the California Civil Rights Department (CRD). Each report must include specific detailed wage information in accordance with the law, including but not limited to a breakdown of employees by race, ethnicity, and sex, whose annual earnings fall within certain pay bands.

Colorado

Since January 1, 2021, Part 2 of Colorado's Equal Pay for Equal Work Act (C.R.S. § 8-5-101 *et seq.*), which requires salary range disclosure for job postings and related recordkeeping requirements, has covered all employers with at least one employee located in Colorado. The Colorado Division of Labor Standards and Statistics (the "Division") has issued Guidance for employers, clarifying that:

- Employers must disclose the hourly or salary compensation, or a range of compensation in all job postings, including opportunities for promotion. The range may not be open-ended, and must be specific to the job advertised. Job postings must also include a general description of all benefits and other compensation.
- The law applies to all job postings, including remote positions, unless the job will be performed entirely outside of Colorado. When advertising remote positions, a statement that the employer will not accept Colorado applicants does not create an exemption from the law.
- With limited exception, employers must make reasonable efforts to announce opportunities for promotion to all current employees on the same calendar day, prior to making a hiring decision.
- Covered employers must maintain certain records for all Colorado employees for the duration of employment and two years thereafter.
- The Division may require an employer bring job postings into compliance and may issue fines of $500 to $10,000.

New York

On December 21, 2022, New York State Governor Kathy Hochul signed legislation S.9427-A/A.10477 into law, which goes into effect on September 17, 2023. The law defines employers as any entity with at least four employees; however, the law does not indicate how many of those employees must be New York based. The legislature has charged the New York State Department of Labor with issuing rules and regulation on the law, which will ideally provide clarification on this and other issues before the law takes effect. Based on the plain language of the statute:

- Covered employers must disclose the compensation, or a range of compensation (as defined under the law), in any job posting where the position can or will be performed "at least in part" in the state of New York. This includes job postings for promotions and transfer opportunities.

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The statute does not clarify what it means to perform a position "at least in part" in New York. However, based on the interpretation of similar laws, it is reasonable to assume this refers to remote or hybrid positions. Job postings must also include the job description, if a description exists.

- Employers must maintain any records that are necessary to comply with the law. Records include, but are not limited to, the history of compensation ranges for each job and job descriptions (if any exist) for each job, promotion, or transfer opportunity.
- Covered employers that fail to comply may be subject to civil penalties in accordance with N.Y. Lab. Law § 218.

Employers with New York based employees may already be subject to similar wage disclosure requirements under local laws in New York City, Ithaca, and Westchester County – all of which are already in effect. Albany County has also enacted a similar wage disclosure law that goes into effect on February 12, 2023.

New Jersey

New Jersey has not yet enacted a statewide law requiring wage disclosures in job postings; however, Jersey City, NJ has had a wage transparency law in effect since April 13, 2022. Initially, the law only applied to employers with a "principal place of business" in Jersey City, but on June 15, 2022, the city revised the law by adopting Ordinance 22-045. As amended, the law now applies to all employers and employment agencies, as well as the agents of those employers, if the employer has five or more employees working within Jersey City (for purposes of this law, "employees" includes independent contractors). Covered employers that advertise employment opportunities "by any means" must disclose a minimum and maximum annual salary or hourly wage in any such postings or advertisements. The law applies regardless of whether the advertised position is permanent or temporary, and includes any postings or advertisements the employer may create for promotion or transfer, if applicable.

Washington

Washington has amended its Equal Pay Act, effective January 1, 2023. According to State guidance, under the law, "employers" include all those that are engaged in any business, industry, profession, or activity in the state with at least one employee based in Washington. The guidance clearly specifies that the employer need not have a physical office location within the state to be covered.

- Employers with 15 or more employees (and at least one based in Washington) must include a wage scale or salary range, as defined under the law, in all job postings for positions a Washington-based employee could perform. Postings must also offer a general description of all benefits and other forms of compensation. Employers cannot avoid wage disclosure requirements by indicating that the employer will not accept Washington applicants. This requirement also applies to job postings by third parties.
- No wage disclosure is required if the advertised job is tied to a physical worksite located outside of Washington and the job will be performed entirely outside of Washington. Printed hard copy

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job postings made and distributed entirely outside of Washington are also exempt from the wage disclosure requirements.
- Upon request, employers must provide current employees the wage scale or salary range of the new position for an internal transfer or promotion.
- In addition to potential court remedies, the Washington Department of Labor & Industries may order employers to pay civil penalties of $500 for a first violation, with greater penalties for subsequent violations.

Increased Employer Coverage – New Laws on the Horizon

Employers throughout the country should be on alert for additional pay transparency laws; states such as Massachusetts and Kentucky have already considered pay transparency laws in previous legislative sessions, and are likely to see similar bills proposed in the upcoming legislative session.

Notably, the push for pay transparency is not exclusive to state and local governments. The Salary Transparency Act, proposed in Congress last year, would require employers to disclose a wage or wage range in job postings for all internal and external employment opportunities. Although Congress did not take any action on the matter last year, it would be no surprise to see similar legislation under consideration in 2023.

Best Practices

Employers should contact legal counsel to resolve any questions about coverage and compliance under state and municipal laws. Employers should review their current pay practices for potential discrepancies, and prepare for a possible increase in equal pay claims as pay transparency and equity issues gain greater visibility to employees. Recommended best practices for employers include, but are not limited to, the following:

- Determine what, if any, current state or local pay transparency laws the business must comply with as soon as possible and stay alert for new laws in all jurisdictions where employees work.
- If covered by any current laws:
    - analyze employee wage data and identify the current salary range for existing positions.
    - review current job advertisements to identify postings that are subject to wage disclosures (including advertisements for remote work) and ensure those postings include applicable salary and benefit information for all necessary jurisdictions.
    - if using templates for future job advertisements, add a placeholder for salary range where it may be required and, if necessary, benefits information.
    - update data collection and record retention practices to include wage information as required by state or local laws.
    - establish a policy allowing covered applicants and current employees to request salary range information, a procedure for responding to those requests, and an anti-retaliation policy as required by state or local laws.
- Consider being proactive by conducting a pay equity audit to identify areas of wage inequity, if any exist. Employers should consult with counsel to evaluate risks, benefits, and possible

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application of privilege before undertaking a self-assessment of wages.

As pay transparency laws and the guidance surrounding them continue to evolve, employers are encouraged to consult with their MBJ attorney to ensure they are up-to-date and in compliance with requirements.

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