

Navigating New Pay Transparency Policies:

A Look Across the US

March 28, 2024

Today's Webinar Host:

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- Subject matter expertise
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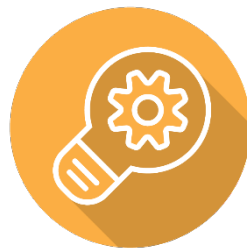
Navigator Independent Contractor

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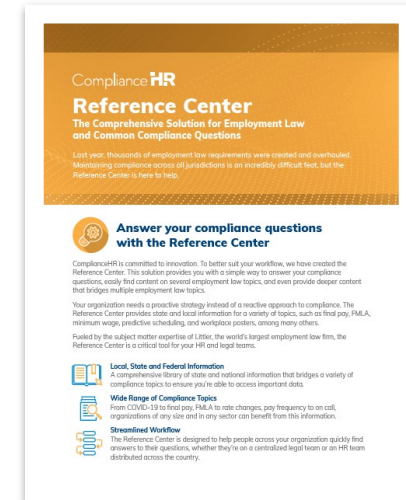
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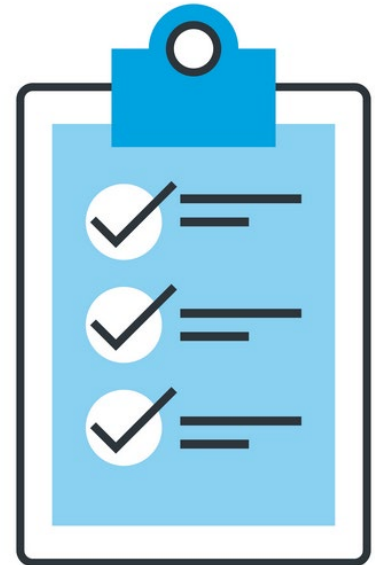
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Introduction

- Starting with Colorado in 2021, multiple states now require employers to disclose salary ranges in pay scales
- The justification is the idea that disclosing a range will help decrease the gender pay gap
- But the patchwork of state and local laws contain differing requirements and nuances that can trip up employers
- We will outline the requirements in each state and tackle real-world hypotheticals

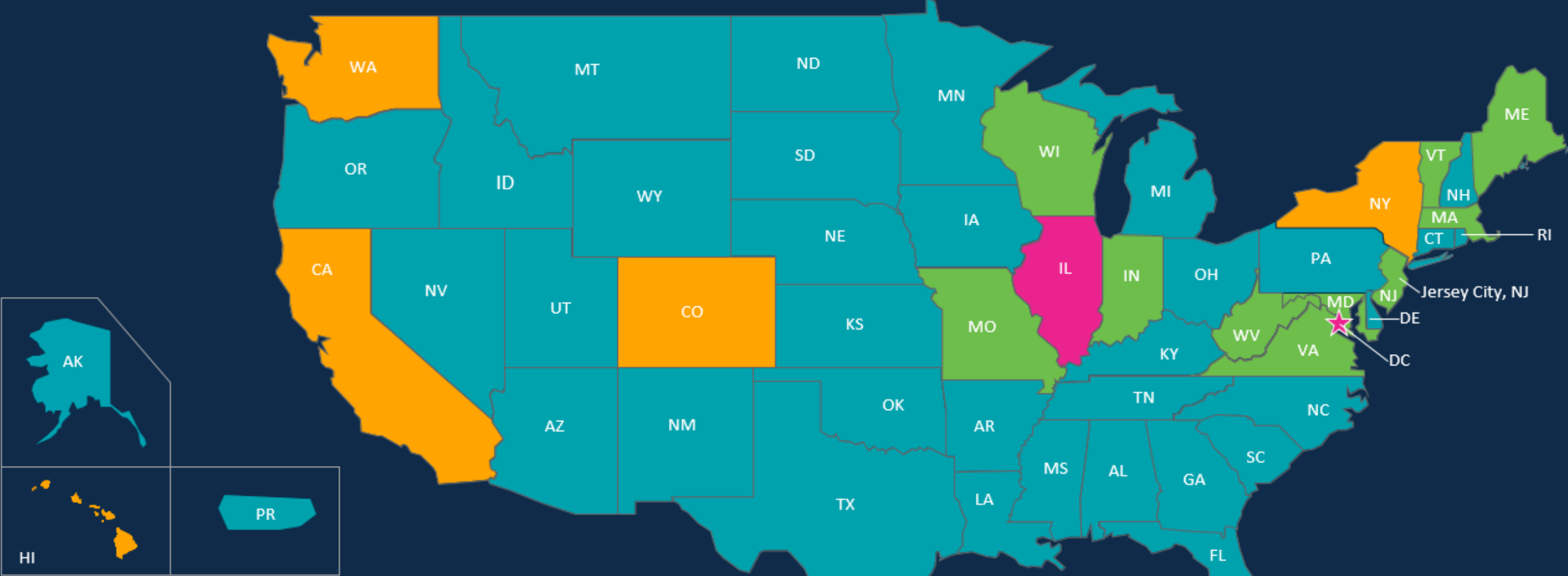


Trends

- Aon's October 2022 Pay Disclosure Pulse Survey
 - 44% of companies plan to disclose pay ranges only when required
 - 31% of companies plan to disclose salaries nationwide regardless of laws
- August 2023 Indeed article claims pay transparency now in a majority of U.S. job postings
- Trends in passed legislation
 - Trend toward requiring disclosure in postings, as opposed to during hiring process
 - Trend toward covering remote jobs in posting requirement
 - No other states have adopted Colorado's promotional notice requirement
- Trends in proposed legislation
 - States with existing pay transparency laws passing amendments (CO, NY)
 - More laws passed each year, with HI taking effect in 2024, D.C. to come later this year, and IL in 2025



Pay Scale Requirements in Job Postings



- States with pay scale requirements in job postings
- States with pay scale requirements in job postings enacted but not in effect
- States with pay scale legislation pending

Wage Transparency Takes Several Forms

- Pay Scale Disclosures
 - Outright
 - Upon Request
 - After Interviews
- Pay data and demographic reporting
- Salary Inquiry Bans:
 - States and Localities differ



States with Salary Ban Inquiry

Alabama

California

Colorado

Connecticut

Delaware

Hawaii

Illinois

Maine

Maryland

Massachusetts

Nevada

New Jersey

New York

Oregon

Puerto Rico

Rhode Island

Vermont

Washington

Washington D.C.

Cities/Counties with Salary Inquiry Bans

Toledo/Cincinnati/Columbus, OH

Westchester/Suffolk/NYC/Albany, NY

Kansas City, MO

Philadelphia, PA

State of the States

An Overview

Colorado Equal Pay for Equal Work Act



Overview

- Applies to all employers with at least one employee working from Colorado
- First state to require compensation ranges in job postings
 - Now in year four
- Only jurisdiction to require application deadlines in postings, notifying incumbents of “promotional opportunities,” and post-selection notice



Colorado: Compensation/Benefits Disclosure Requirements

Jobs that either are to be performed in Colorado, **or that can be performed remotely from anywhere**, must include in the posting:

- The compensation range for the position and descriptions of incentive compensation and benefits
- Compensation range means a “reasonable estimate” of what the employer in “good faith” believes it might pay for the position
 - Benefits descriptions can be short:
 - “Medical, dental, and vision insurance”
 - 401(k) matching, etc.
 - Other forms of compensation
 - “Eligible for annual performance bonus”
 - “+ commissions”



Colorado: Application Deadline

- Jobs that either are to be performed in Colorado, or that can be performed remotely from anywhere, must include in the posting:
 - The employer's good faith belief as to the application deadline
 - Deadline can be extended
 - Unclear if deadline can be shortened
 - "Evergreen" postings may say the company is accepting applications on an ongoing basis



Colorado: Promotional Opportunities Disclosure Requirements

- Employers must give their current CO employees notice of all “job opportunities” throughout the entire company
 - “Job opportunity” defined as “a current or anticipated vacancy for which the employer is considering a candidate or candidates or interviewing a candidate or candidates or that the employer externally posts”
 - For all geographic locations and positions, even if ineligible, if could be a promotion for any CO employee in terms of compensation, benefits, status, duties, or access to advancement
 - Must include compensation/benefits disclosure if the internal opening is in CO or is remote and could be in CO
 - Must include how employees may apply
 - Must make reasonable efforts to tell all employees about opening at the same time, before making a promotion or hiring decision, and with enough time for employees to “reasonably access” the notice

Colorado: Promotional Opportunities Disclosure Requirements

- Exceptions – these are not “job opportunities”:
 - **Career Development:** “A change to an employee’s terms of compensation, benefits, fulltime or part-time status, duties, or access to further advancement in order to update the employee’s job title or compensate the employee to reflect work performed or contributions already made by the employee”
 - **Career Progression:** “A regular or automatic movement from one position to another based on time in a specific role or other objective metrics.”
 - **Acting, Interim, or Temporary(“AINT”):** No posting required to fill an immediate position on an AINT basis for up to nine months

Colorado: Changes in 2024, Exemptions

- Career development
 - Fully exempt from posting requirements
- Career progression
 - Exempt from posting requirements but carry their own requirements:
 - An employer shall disclose and make available to all eligible employees the requirements for career progression, in addition to each position's terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement
 - Eligible employees are those in the position that, when the requirements in the notice are satisfied, would move from their position to the other position listed in the notice as a "career progression"

Colorado: Changes in 2024

- Enacted amendments say employers with no physical location and fewer than 15 employees in Colorado only have to notify their Colorado employees of remote job opportunities, not those physically located outside Colorado
 - Sunsets July 1, 2029



Colorado: Changes in 2024, Notifications

- Geographic Scope
 - Pre-selection notices (i.e., promotion posting requirements) and post-selection notices (i.e., new duty to notify of hires/promotions) both apply only to Colorado employees
 - This means only Colorado employees need to receive the notices!
 - However, you will need provide required notices to Colorado employees even if the job opportunity (for pre-selection notices), or new hire/promotion recipient (for post-selection notices), is outside of Colorado
 - Triggering event is whether a Colorado employee is eligible to receive the notice, not whether the event itself occurred in Colorado

Washington Equal Pay and Opportunity Act



Overview

- Took effect January 1, 2023
- Employers of 15 or more employees, with at least one employee physically working in Washington
- Job postings must include:
 - Wage scale or salary range
 - General description of benefits and other compensation
- To count as a “job posting,” must include
 - qualifications such as specific knowledge, skills, or abilities; &
 - specific position



Washington State Pay Transparency

- Wage scale or salary range
 - Should extend from lowest to highest pay established by employer prior to publishing job posting
 - If not pre-existing, should be created prior to posting
 - Should be updated if the range changes



Washington State Pay Transparency

- “Other compensation”
 - If position has base pay, this can be a general statement:
“commission eligible,” “bonus eligible”
 - For positions paid 100% on commission, employer must state
“rate or range” offered
 - Example from policy guidance: 5-8% of net sale price per unit
 - For more complex plans, agency says it “might” be compliant to
provide the range of compensation to be paid in the form of
commissions
 - Positions paid on piece-rate must state agreed-upon piece rate
 - Example from policy guidance: \$0.55-\$0.75 per pound of
strawberries picked



Washington State Pay Transparency

- “General description of benefits”
 - 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 vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits
 - Type of insurance (medical, vision, dental, life, disability)
 - Type of retirement options (401k, employer-funded, deferred compensation, other defined benefit or defined contribution)
 - Number of PTO/vacation days or hours offered
 - Number of paid holidays
 - Amount of paid sick if more than law requires
- General description must be in posting itself but more detailed information may be linked

HB2349 Would Amend Washington's Law

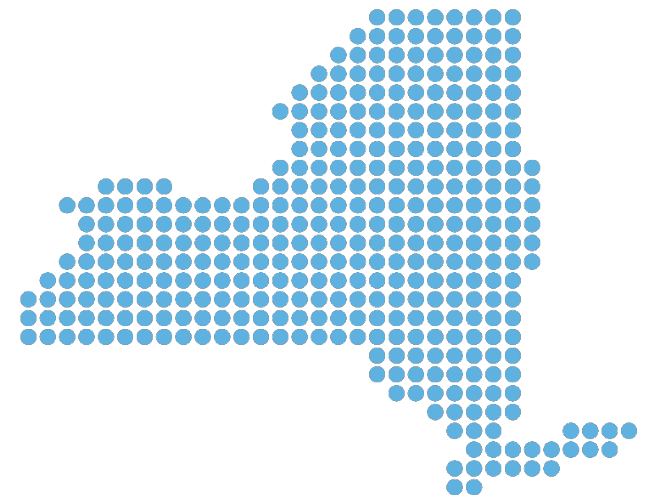
- Would amend the current law, which currently allows for a private cause of action and for class actions, to provide employers with a notice and right to cure period.
- Either the Department of Labor and Industry or job applicant would be required to provide written notice to an employer that a posting was noncompliant with the law before any action could be taken.
- The employer would then have ten business days of the written notice to correct the posting to avoid any and all penalties and damages.
- An applicant is someone who submits a bona fide application for employment for a position listed by an employer.

New York State Pay Transparency Act



New York State Pay Transparency Act – Summary

- Took effect September 17, 2023
- The law requires employers to post salary ranges in job advertisements for positions that will be performed, in whole or in part, in New York, and for positions reporting to a New York-based supervisor
- The commissioner may sue employers for violations of this statute and seek remedies at law and in equity as may be appropriate



New York State Pay Transparency Act

- Any remote or telecommuting opportunities that will report to a supervisor, office or worksite in the state of New York are covered by this law, regardless of whether the employee will be working from home outside New York State
 - Occasional work-related appearances, such as conferences or meetings, would not be enough for the job to be considered “performed in New York State”
- Opportunities are covered whether posted by the employer directly or on the employer’s behalf by a third party such as through a job-listing website
 - Employers are not responsible for any postings that are re-posted or “scraped” by a third-party website without their consent
- All postings for a job, promotion or transfer opportunity must contain a job description when available except in the limited circumstance where the title conveys the job duties

New York State Pay Transparency Act – Pay Range

- A pay range cannot be open-ended. For example, “\$20+ an hour” is not allowed
- If compensation for an opportunity is completely commission based, employers must state that clearly when advertising the opportunity
- A good faith pay range is one that an employer legitimately believes they are willing to pay at the time of the advertisement’s posting, based on the job market, current employee pay levels, hiring budget and the experience/education levels employers are willing to accept from the candidate



New York State Pay Transparency Act – Pay Range (cont'd)



- Employers may post a new advertisement with a new range of pay if they find they need to increase their hiring budget to attract qualified candidates
- For a pay range with “significant breadth,” an employer must provide further information explaining why the range is so broad
- Additional compensation, such as tips, should not be included in base wages

New York State Pay Transparency Act – Multiple and Remote Locations

- Postings that include multiple possible locations or multiple opportunities at different levels of seniority must include a separate pay range for each location or opportunity
 - If there are different ranges for different locations within the state of New York, this would require posting separate ranges for each under the proposed regulations, rather than one range from the minimum of the lowest-paying range to the maximum of the highest-paying range
 - Where company leadership and offices are all located outside of New York, a posting for a remote position would not need to include a pay range even if it could be performed in New York
 - However, if direct supervisors are located outside of the State but the position is hybrid (for example, two days in office, three remote) such that the incumbent required to regularly report to an office in the State, that job posting would need to include a pay range

New York City Pay Transparency Act – Summary

- Effective November 1, 2022 – Not preempted by state law
- The act covers ads publicized to applicants, regardless of the format. Employment agencies are covered, but not temporary help firm that assign their own employees to perform temporary work at other organizations
- Covers advertisements for jobs that can or will be performed, in whole or in part, in New York City
- The advertisement must include a good faith salary range or ranges of possible hourly rates, but not incentive comp, bonuses, or benefits



Penalties For Non-Compliance With New York City's Pay Transparency Act

- Upon receipt of a complaint from the New York City Commission on Human Rights, employers will have 30 days to cure any violation of law. Employers will then be required to submit proof that the violation has been cured, either electronically or in person. If the Commission accepts the proof of cure, the proof “shall be deemed an admission of liability for all purposes” and will be fined \$0 for the first violation
- The law does not specify fines for subsequent violations; however, the Commission will likely rely on their authority to promulgate fines up to \$250,000
- No private right of action for applicants, only employees

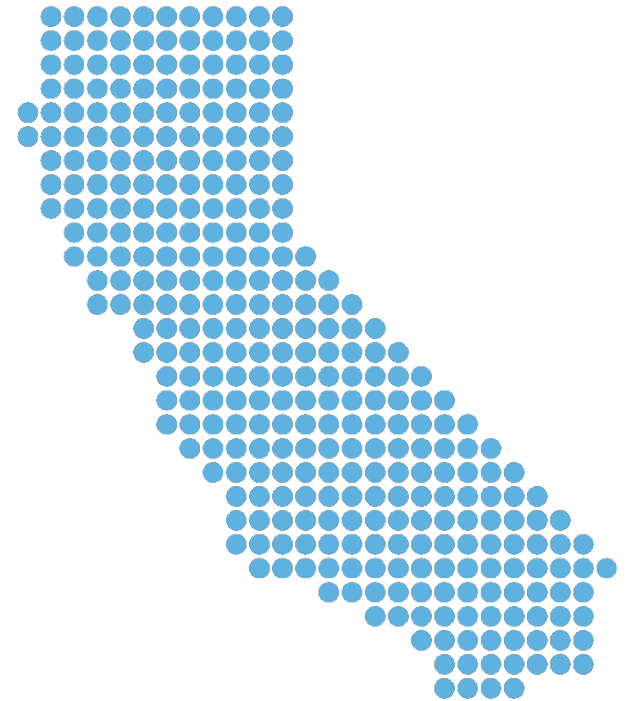


California Pay Transparency Law



California Pay Transparency: Overview

- Pay **Scale in job** postings
- Pay Scale to employees



“Pay Scale” Defined

- “The salary or hourly wage range that the employer reasonably expects to pay for the position”
- “Reasonably expects” vs. minimum/maximum
- What are you actually prepared to pay?
- Salary Only: No bonus, benefits, PTO, 401k, etc.



Employers With 15 or More Employees

- The statute does not specify how to count the employees for purposes of coverage, but the Labor Commissioner has issued guidance
- Labor Commissioner interprets the 15-employee threshold to apply when:
 - An employer reaches 15 employees at any point in a pay period, and
 - At least one employee is currently located in California



“Pay Scale” Must Be Disclosed in Any Job Opening



- Job opening is not defined
- “Help Wanted?”
- A social media post that reads “manufacturing jobs available, apply now online”
- Compare with Washington and Colorado, where a job posting is covered if it includes qualifications or references a specific position for a desired applicant

“Pay Scale” Must Be Disclosed to All Job Seekers

- Prior rule: only if candidate had completed an initial interview
- Now any **job seeker** is entitled to pay info upon request

An applicant is defined as someone who is:

- Seeking employment with the employer
- Not currently employed with that employer in any capacity or position

Existing Employees Entitled to Pay Scale

- Employers must provide current employees the pay scale for their current position
- Comparing pay scale leads to questions about pay differences
- Document your reasons for pay differences
- No retaliation for comparing notes
- \$100-\$10,000 Penalty



Hawaii Pay Transparency Act



Hawaii

- Took effect on January 1, 2024
- Requires all job listings to disclose an hourly rate or salary range reasonably reflecting the actual expected compensation
- Excluded from these requirements are internal transfers or promotions, public employees, and employers with fewer than 50 employees companywide



Illinois Pay Transparency Act



Illinois

- Takes effect on **January 1, 2025**
- Will require employers with 15 or more employees to include a pay scale and benefits in job postings for jobs which either are to be physically performed in Illinois or if the job would report to a supervisor, office, or other work site in Illinois
- For positions that are not posted, applicants may obtain the pay scale and benefits for the position upon request and prior to any discussion of compensation or offer
- The bill provides for a 14-day cure period after receiving notice of a violation without penalty, and then a penalty of up to \$500 for the first violation; and a second cure period of 7 days for a second offense, and then a penalty of up to \$2,500 for the second violation. The third violation has no cure period and carries a penalty of up to \$10,000.

Washington D.C. Pay Transparency Act



Washington, D.C.

- Covers all employers with at least one employee in the District of Columbia
- Requires an employer to disclose the minimum and maximum projected salary or hourly pay in all job listings and position descriptions
- Requires disclosing to applicants the existence of healthcare benefits that employees may receive before the first interview
- No private right of action. Enforced by AG. Mayor may also assess fines \$1,000-\$20,000.
- Signed by Mayor Jan. 12, 2024; effective June 30, 2024

Pending Legislation in the States



Indiana: HB 1046 Pending

- Require employers to disclose the wage or wage range and a general description of benefits in job postings and upon hiring.
- Warning first, then Fines \$100-\$500 depending on number of violations.



Maryland: HB 649 Pending

- Would require employers to disclose (internal and external postings) wage range and a general description of benefits and any other compensation offered.
- The bill includes “board, lodging, or other advantage provided to an employee for the convenience of the employer” in its definition of wages.
- Penalties would range from a warning letter for a first offense to a \$600 fine for a third and subsequent offense.

Massachusetts (H.4109 Pending)

- Version of the bill passed both houses of the legislature in 2023, but not yet enacted
- Would require employers with 25 or more full-time workers in Massachusetts to disclose pay ranges in job postings
 - “Pay range” means the annual salary range or hourly wage range that the employer reasonably and in good faith expects to pay for such position at that time
 - “Posting” means any advertisement or job posting intended to recruit job applicants for a particular and specific employment position, including recruitment done directly by an employer or indirectly through a third party
 - Penalties include: warning for the first offense, not more than \$500 for the second offense, and not more than \$1,000 for a third offense. Subsequent violations carry significantly higher penalties up to \$25,000 per each offense.
- Adds **Pay Data Reporting** Similar to CA and EEO-1.

Minnesota: HF3587 Pending

- Would require employers with 30 or more employees to disclose salary ranges and a description of all benefits and other compensation to be offered in their job postings.
- Salary range means the *minimum and maximum* annual salary or hourly range of compensation for a job opportunity of the employer at the time of the posting of an advertisement for such opportunity.
- However, statute says employer must post a “starting salary range.”



Missouri: SB 1193 Pending

- Bill introduced would require employers to provide wage ranges in response to inquiries by employees and prospective employees.
- Requires forms of compensation to be disclosed, including piece rate and commissions.
- May ask an applicant for their “salary expectations.”
- Fines would range from a minimum of \$1,000.00 up to \$5,000.00.

New Jersey: Competing Bills Introduced

- SB2310 would require employers with ten or more employees to disclose the compensation and benefits for a job position in each job posting; requires employers to announce known promotion opportunities to employees.
 - Applies to external and internal positions as well as promotions other than a promotion for a current employee that is awarded on the basis of years of experience or performance (“in line promotions”).
 - Benefits and compensation for which an employee would be eligible in their first 12 months of employment must also be listed.
 - Violations \$1,000 to \$10,000
- SB1107 would require employers with ten or more employees to include certain salary, compensation, and benefit information in all job postings.
 - This bill carries similar requirements and the same fines as its counterpart but limits geographic scope to positions whose physical locations are in whole, or substantial part, in the State of New Jersey.

Vermont: H.704 Pending

- Would require employers to disclose compensation or range of compensation in job openings.
- Would require the job description to be posted, if one exists.
- Potential applicants include both current employees and the general public.
- The geographic scope is limited to jobs in Vermont or jobs that report to a supervisor, office, or worksite in Vermont.
- This law would take effect July 1, 2024, if enacted.

West Virginia: HB 4272 Pending

- Would require employers to provide the range of wages, benefits, and other compensation to applicants [upon request](#).
- The bill allows employers to rely on or confirm a wage history provided by an applicant after an initial offer of compensation.
- In the event of a violation, the bill would allow for a private right of action.

Wisconsin: AB 905 Pending

- Would require employers to include the range of hourly wages or salary, and any other benefits or compensation in job listings.
- Employers would also be required to retain records of job listings for two years after each position is filled or no longer published.
- Penalties would range from \$500 to \$10,000.00.

What's an Employer to Do?



Job Postings

- If the candidate provides their current pay, and states a minimum salary they would require to move to your company *based upon their current pay*:
 - YOUR RESPONSE: “Company does not set pay based upon wage history” and steer the dialogue to the candidate’s expectations for what they want to earn at Company”
- You **can** base pay decisions on the applicant’s salary expectations and, also, based on their skills, education, training, experience (or if travel is a regular and necessary part of the work performed)



CAN DISCUSS SALARY EXPECTATIONS



**DON'T DISCUSS WAGE HISTORY
(NOT BASED UPON CURRENT PAY)**

Strategies for Posting Pay Range/Pay Scale

- Post lower range initially to determine what kind of candidate the lower range attracts
- Re-post with a higher pay range if lower range does not attract qualified candidates
- Develop several levels within each position (e.g., HR Generalist I, HR Generalist II, Sr. HR Generalist) with pay ranges for each level
 - Instead of a larger pay range that applies to all roles

Pay Transparency Laws & Virtual Work



Pay transparency laws apply to **the location where the job will be performed**

Example: if you have an applicant for a virtual position in New York, you must comply with New York law



If it's not clear for a virtual position the location from which the person intends to perform the job, include a question **asking where the applicant would intend to work**

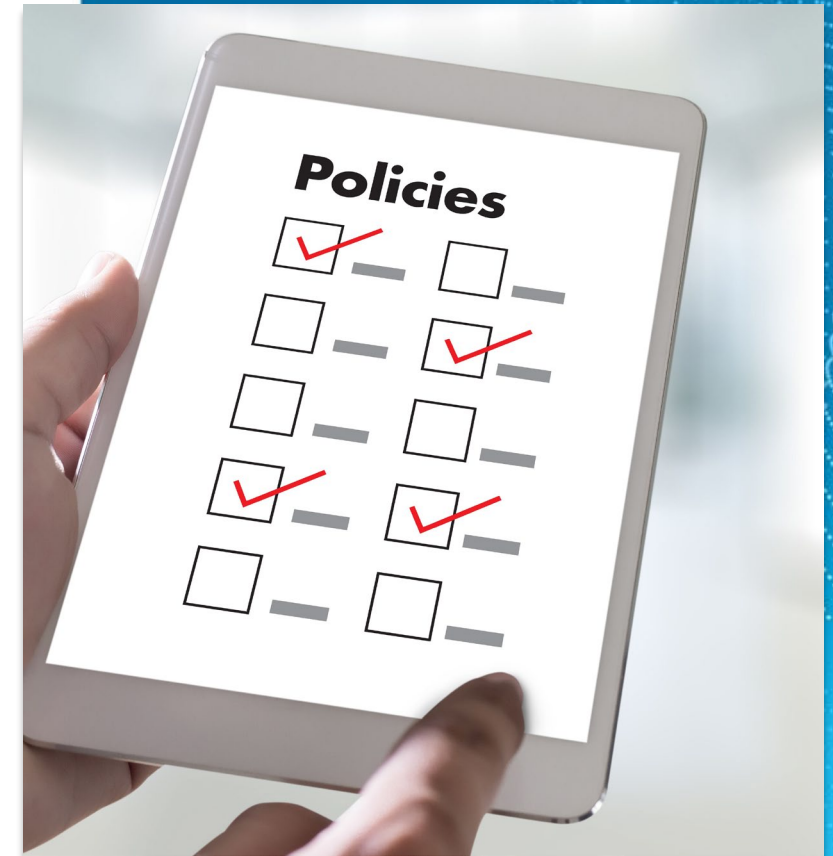
Add this question to all positions where virtual work is possible



Can tell applicants/new hires that they would be approved to work from X location, but would need advance approval to move to another location because Company does not conduct business in all jurisdictions

Practical Considerations for Employers

- Modify policies (disciplinary, compensation, retaliation, EEO, etc.) regarding disclosing and/or requesting salary information.
- Review compensation and compensation-related policies and guidelines for compliance with fair pay requirements.



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Questions?

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Thank you!

