

Locke Lord QuickStudy: Now What? Tips for Avoiding Liability ?Under NYC, CA and Other ?Pay Transparency Laws ?

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If your company operates on a national basis or if you are seeking any remote workers in the U.S., you are probably wondering, how can we possibly comply with the New York City pay transparency law and the hodgepodge of similar laws that require minimum and maximum salary ranges of job postings and advertisements? Or if you are a CFO of the company, you may be asking, how do we avoid liability for violating one of these laws? Short answer to both questions: It's not straightforward. We will try to help you below in determining what you should and should not do under the New York City pay transparency law^[1] as well as similar laws covering states such as California,^[2] Colorado,^[3] and Washington State.^[4]

After the first week that the New York City law has been in effect, an analysis by Bloomberg News of over 400 salary ranges posted by large employers operating nationwide show minimum salaries for some positions are less than half the maximum salaries for many positions, while other companies have posted minimum salaries at 60-80% of the maximum.^[5]

Pay transparency laws are generally intended to address gender and other forms of bias in the pay received by women and minorities.

There are currently pay transparency or disclosure laws in over 20 states and local jurisdictions, with varying requirements. While the four jurisdictions noted above have laws that address the content of job postings, many others do not regulate the content of ads and job postings. Some require that companies simply provide salary or hourly pay ranges for open positions to those candidates who ask for such information. Other laws (related to pay transparency but with a slightly different focus) prohibit companies from asking applicants about their current salary or pay rate. Those laws limited to disclosure "on request" or barring "inquiry" about salary history are far easier to comply with than laws that seek to regulate internal and external job postings and advertisements.

The questions created by some of these laws are now coming to light. For example, the original New York City law was amended before it even became effective to clarify the type of job-related information required in advertisements and postings as well as which businesses and positions the law governs. Those amendments have given employers greater clarity about the New York City law, but they also highlight open issues under pay transparency laws from other states and municipalities.

The original New York City law expressly stated that it was limited to disclosure of the minimum and maximum “salary” for a position; the amendment clarified the law to require disclosure of the minimum and maximum “*annual salary or hourly wage*” of the job opening being posted.^[6] Neither the original nor the amended law, however, expressly cover commissioned employees (other than any base salary or draw they may receive) or those paid on a piece rate basis. And the law does not cover bonuses, commissions, tips, stock options, or benefits, as do some state laws such as Colorado and Washington.

Another amendment was an express statement that the law does not apply to “Positions that cannot or will not be performed, at least in part, in the city of New York.”^[7] Thus, the law does not appear to regulate a job posting by a nationwide employer with offices in New York City where the job in question is to be performed wholly outside of New York City. But what about a job that can be performed remotely by New York City residents as well as those residing outside the City? And what about jobs where the worker must attend a one-day orientation session or quarterly or annual in-person meeting in New York City? The answer to these and other questions about the jurisdictional reach of other pay transparency laws, including the California law, are also unclear.^[8]

Addressing a concern that the New York City law would prompt class actions by any *applicant* for a position, the amendment expressly states that the only persons who may bring an action for a violation of the law are *current employees* who sue “their current employer for an alleged violation of this [law] in relation to an advertisement by their employer for a job, promotion or transfer opportunity with such employer.” An applicant can, however, under the New York City law, file a complaint with the New York City Commission. This litigation carve-out for applicants, however, is not a feature of the California or Washington State pay transparency laws; applicants presumably can bring lawsuits under those laws.^[9]

Penalties can be assessed by the New York City Commission of up to \$125,000 for a violation of the law.^[10] Penalties are not likely to be so hefty, and the law expressly states there is no fine for a first offense if it has been cured within 30 days of the service of a complaint noting the 30-day cure period. Nonetheless, willful repeat violations can result in a fine of up to \$250,000, so compliance is essential. Colorado permits the filing of complaints with the applicable state agency,^[11] with fines ranging from \$500 to \$10,000.^[12] In California, fines for violations of the pay transparency law can be issued by the Labor Commissioner from \$100 to \$10,000 per violation, but no penalty shall be assessed for a first offense that is cured.^[13] In Washington, statutory damages of \$5,000 may be awarded by that state’s administrative agency along with a civil penalty of up to \$500 for a first offense and \$1,000 for repeat violations.

Although the situation of each employer may warrant differing approaches, here are some steps that a nationwide employer should consider if some or all of its job postings may fall under one of the state or local pay transparency laws:

- The New York City law provides that the disclosure requirement requires disclosure of the minimum and maximum annual salary or hourly wage rate that the employer “in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.”^[14] Therefore, we suggest employers who may have job postings subject to a pay transparency law document their good faith belief of the salary or hourly wage range in an email or other electronic record to a designated individual or email address that preserves such emails.^[15] If an employer has obtained any competitive compensation or other reports upon which the salary range is based, those should be preserved as well. When minimum and maximum salaries differ greatly, such as some of the disparities reported in the Bloomberg News report mentioned above, the need for documentation, including a more detailed statement of the factors used in determining the salary ranges, is

even more compelling.

- We suggest that employers assume that virtually all remote positions can be filled by someone that resides, or will have to perform some work, in a state covered by one of the state pay transparency laws.
- While employers may be able to comply with pay transparency laws by excluding applicants for remote positions from certain states and cities with such laws, such exclusions are not without risk as these laws might be interpreted by the applicable agencies or courts as forbidding employers to do so absent some compelling business reason. Colorado, for example, issued an Interpretative Notice and Formal Opinion on September 6, 2022 that “A remote job posting, even if it states that the employer will not accept Colorado applicants, remains covered by the Act’s transparency requirements.”
- Job postings of minimum and maximum salary or hourly wage rates are likely to be viewed by existing employees to compare their compensation to that of new hires. Before posting pay ranges for all positions and in considering what ranges to post, employers should consider how the pay ranges match up with the pay rates of current employees and whether the posting will create issues among any of its existing workers.
- Employers may wish to consider modifications to job titles to more closely align with pay differentials to avoid postings with wide pay ranges.
- Where a company pays different amounts for the same position depending on geography or scarcity of incumbents or candidates in some locations, we suggest that the posting note that “salary or hourly rates are dependent on location or other business factors.”
- Likewise, it may also be beneficial for employers to include in a posting a listing of one or more other factors contributing to a range of compensation, such as experience and education.
- While the New York City and California laws only covers salary and hourly rate ranges, the pay transparency laws in Colorado and Washington State require disclosure of benefits and other compensation. Colorado and Washington require a “general description of all of the benefits and other compensation to be offered to the hired applicant.”^[16] This can create the need for a rather lengthy job posting or advertisement. But to ensure compliance, we suggest that nationwide employers seeking remote workers include not only salary or hourly rate ranges but also an abbreviated recitation of all additional forms of compensation and benefits that may be meaningful to an applicant.^[17]
- Employers should consider that some laws cover more than traditional full-time employees. For example, the New York City Commission on Human Rights has taken the position that the City law applies to all persons covered by the New York City Human Rights Law, which covers seasonal and part-time employees, interns, and independent contractors. The inclusion of independent contractors expands the law in a way that may cover certain companies seeking to engage gig workers who may reside in New York City.^[18]
- If the job is being posted or advertised by a staffing company, we suggest that employers insist that the staffing company include the same information that employers are required to include on a job posting. While the New York City law expressly excludes job advertisements for temporary employment at a temporary help firm, this exemption does not apply to employment agencies and other types of staffing companies where the worker is not an employee of the staffing company or where the worker is an independent contractor.^[19]

Those companies that operate only in a single state or city not covered by one of the existing pay transparency laws and do not advertise for remote positions may not need to address the various pay and benefit disclosure issues addressed above. More pay transparency laws will likely be enacted in other states or cities in the coming years, so the above suggestions may be useful to ensure compliance with any new legislation.

[1] N.Y.C. Int. No. 134-A (2022), codified at N.Y.C. Admin. Code Sec. 8-107, subdivision 32.

[2] The California law (SB 1162) is effective Jan. 1, 2023 and will be codified at Cal. Labor Code sec. 432.3(c)(3) and (5).

[3] Colorado Revised Statutes sec. 8-5-201(2).

[4] The Washington State law (SB 5761) is effective Jan. 1, 2023 and will be codified at RCW 49.58.110 (1).

[5] See “NYC Employers Test Pay Law with Ranges Spanning Over \$100,000,” by Jeff Green, Bloomberg Law, Daily Labor Report, November 4, 2022.

[6] Under the law, the New York City Commission on Human Rights views the law as covering postings on internal bulletin boards, which presumably covers electronic bulletin boards.

[7] That final language changed the original proposed language of the amendment that excluded “Positions that are *not required to be performed*, at least in part, in the city of New York.” Int. No. 134 (Mar. 15, 2022)

[8] California Labor Code 432.3(g) states only that it applies to “all employers,” whereas Colorado’s compensation posting requirements provide some clarity: it does not apply to jobs to be “performed entirely outside” Colorado or postings outside of Colorado. 7 CCR 11003-13, Rule 4.3. Would an orientation or quarterly or annual meeting in the state trigger coverage of the job posting aspect of that state’s pay transparency law?

[9] California Labor Code Sec. 432.3(c)(3); Revised Code of Washington Sec. 49.58.110(4) and 49.58.070.

[10] N.Y.C. Admin. Code Sec. 8-126.

[11] Colorado Revised Statutes Sec. 8-5-203(2) regarding violations of Secs. 8-5-201 and 8-5-202.

[12] Colorado Revised Statutes Sec. 8-5-203(4).

[13] California Labor Code Sec. 432.3(d).

[14] N.Y.C. Admin. Code Sec. 8-107 (32)(a). The law governs employers who have four or more workers (or one domestic employee) covers by the New York City Human Rights Law.

[15] An email might say, for example, that the salary range was determined in discussion with the name(s) of the company employee(s) who participated in setting the salary range, and can include a reference to all factors considered, such as market conditions, existing company salary ranges, and/or other factors. Salaried positions should only apply to jobs that are overtime exempt.

[16] See Colorado Revised Statutes sec. 8-5-201(2). The Rules issued by the Colorado Division of Labor Standards states that the law requires a “general description of all employment benefits the employer is offering,” including “health care benefits, retirement benefits, paid days off (including sick leave, parental leave, and paid time off or vacation benefits), and any other benefits that must be reported for federal tax benefits, but not benefits in the form of minor perks.” 7 CCR 1103-13, Sec. 4.1.1(C). For the Washington law, see RCW sec. 49.58.110(1).

[17] For example, an ad may include, in addition to the salary or hourly wage range, a general description of other forms of comp and benefits, such as “bonus, [comm’n,] health, 401k, vac, sick & parental lv [or PTO & parental lv], STD, LTD, life [etc.].”

[18] There are some steps that businesses exclusively using independent contractors can take to minimize the likelihood that the New York pay transparency law applies.

[19] These suggested steps are not legal advice, which can only be provided after consideration of all relevant facts regarding a particular company and any and all applicable pay transparency laws, which are subject to legislative amendment, enforcement guidance, and judicial interpretation.

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