



News & Trending

PUBLICATIONS & ALERTS

“SHOW ME THE MONEY!” - JOB POSTINGS AND THE RECRUITING PROCESS: REQUIRED DISCLOSURES AND PROHIBITED INQUIRIES

Alert | 04.11.2023

By Tommy Postek and Kimberly Korando

New Pay Transparency Laws Pose New Requirements for Job Postings, Recruiting and Workplace Disclosure and Reporting: Part 2 of 4

Before Dolly can channel her inner Bachman Turner Overdrive and take care of business at her "9 to 5," she must first go through what we now call the "talent acquisition" process. In this second Alert, we discuss pay transparency laws governing a key part of that process – job postings and recruiting processes.

Pay transparency laws regulating job posting and recruiting range from prohibiting inquiring about the candidate's past pay, to requiring pay disclosures on the job posting, to requiring the job postings to be provided to current employees. The wide span of differing laws among jurisdictions is challenging for employers with multi-state operations or employees working remotely from jurisdictions other than those in which the employer has operations. These laws tend to apply not just to jobs located in the jurisdiction, but to any job that simply **can** be performed in the jurisdiction which would include any job that **could** be performed remotely. Here is some key information to keep in mind as you go about your talent acquisition process.

Prohibiting Inquiries About Candidate's Past Pay

A growing trend among states is to prohibit employers from asking about a candidate's past pay history, taking adverse action if they decline to provide past pay history or making pay determinations based on the pay they received in prior jobs. Some of the states enacting these laws include Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington.

These laws are intended to prevent perpetuating pay inequality that has disparately impacted certain groups. By having the position rather than the individual's past pay dictate the compensation to be paid, the law operates to avoid continuing effects of possible past discrimination.

Requiring Disclosure of Position Pay

Some states and localities have enacted laws mandating that employers disclose position pay rates on the job posting. Others require the information be provided upon request. Some go further and also require specific bonus information, title and other position specific information to be disclosed. California, Colorado, Connecticut, Maryland, Nevada, New York, Rhode Island and Washington are among the jurisdictions enacting such law.

Among the requirements:

- **Colorado** requires job postings for positions that could be performed in Colorado to list salary ranges and a general description of bonus, commission and other forms of compensation and benefits including paid time off, and requires postings/written notice (along with title, pay, benefits and how to apply) to current Colorado employees of positions that could be performed in Colorado that could be a promotional opportunity.

All employers with at least one employee residing in Colorado are covered.

- **California** requires that all employers, upon request by applicants, provide them with the salary or hourly wage range that the employer reasonably expects to pay for the position to which they are applying. Similarly, all employers, upon request by current employees, must provide the salary or hourly wage range for their position.

Additionally, employers with 15 or more employees, at least one of which works in California, must include in job postings the salary or hourly wage range for the position.^[1]

- **New York City** (along with other localities in NY and NJ) requires job postings to include hourly or salary ranges.

The New York City law applies to employers with four or more workers (or one or more domestic workers), at least one of whom works in New York City, and all employment agencies regardless of size. The employers subject to the other NY and NJ local laws are listed in the footnotes.^[2]

- **New York State** law, in effect on September 17, 2023, will require job postings to include pay ranges and will apply to jobs performed in New York and those performed outside New York State but report "to a supervisor, office, or other work site in New York."

The New York State law applies to employers with four or more employees or persons or entities acting as an employment agent or recruiter or otherwise connecting applicants with employers. Temporary help firms, as defined under state law, are excluded.

- **Washington** requires job postings to include not only pay ranges but also information about compensation in addition to the base pay (such as commissions and bonuses) and information about benefits.

The Washington law applies to employers with 15 or more employees, at least one of which must be a Washington-based employee.

- **Rhode Island** does not require information in job postings, but requires pay ranges to be provided at the time of hire, when an employee moves to a new position or at any time an applicant and employee requests the information.

The Rhode Island law applies to employers with at least one employee within the state.

- **Connecticut** requires pay range disclosures upon the applicant's request or at the time the job offer is made, whichever comes first. Pay range disclosures also must be made to employees upon their request.

Connecticut law applies to all employers within the state with at least one employee, even if the employees are located outside the state.

- **Maryland** requires pay range disclosures upon the applicant's request.

The Maryland law applies to all employers and employment agencies.

- **Nevada** requires pay range disclosures at the time the applicant completes an interview.

The Nevada law applies to all employers and employment agencies.

Many consider this trend as having started with the enactment of Colorado's equal pay transparency law, which went into effect on January 1, 2021. Colorado's law, while not the first, took the transparency laws other states had enacted and expanded upon them, in what then seemed to be a radical way. Since then, more states, counties and cities have passed their own pay transparency laws which, seemingly inspired by Colorado, are becoming decidedly more expansive. Employer reactions and experience in responding to the Colorado law have provided helpful insight when considering how to, or how not to, deal with these growing legal requirements.

When Colorado's law was passed, some employers decided to avoid hiring employees in Colorado for fear of having to provide them with all postings which would qualify under this law. Others began wording job postings in a way to attempt to exclude Colorado employees from consideration. In response to job postings stating that Colorado applicants need not apply for remote positions, the Colorado Department of Labor and Employment gave notice that employers cannot avoid compliance by stating in job postings that Colorado residents are ineligible. These attempts have gotten less popular as authorities have interpreted the expansive language of the laws to preclude wordsmithing as a way of avoiding disclosure and as employers have found that excluding an entire state's talent pool and market potential was ultimately prohibitive of sound business. As Colorado employers have worked out ways to adapt posting policies and procedures that allow for their employees to enjoy the benefit of internal career advancement while retaining talent, other states are jumping on board with expanding their transparency laws to be more in line with Colorado's.

What should you do?

The growing number of jurisdictions imposing restrictions and requirements on employers presents a number of compliance challenges. Here is a checklist that may be helpful in working through some preliminary issues:

1. Know where your business operations, current employees and potential employees are located. State and local jurisdictions will be important to know.
2. Check the current and upcoming pay transparency laws in each of these jurisdictions. Determine whether the laws contain any coverage thresholds that would exempt your organization.
3. Determine whether your organization will seek to adopt a uniform national approach to job postings and pay disclosures or, alternatively, will tailor practices on a jurisdiction-by-jurisdiction basis.
4. Revisit your internal policies, procedures and training guidelines to make sure that they are compliant with the applicable laws.
5. Some basic practical tips/best practices to consider:

- Remove all inquiries about the candidate's past pay from applications, screening questionnaires and interview guidelines. Consider replacing these with inquiries about the candidate's "salary expectations" for the job to which they are applying.
 - Train your recruiting staff, hiring managers and others in the selection and interviewing process on the applicable requirements and prohibitions.
 - Beware attempting to wordsmith job postings. Pay transparency laws may be drafted to be quite expansive or sufficiently detailed to foil such efforts.
 - For example, wording a salary range as \$75,000/year and up will not comply with laws requiring a range of minimum to maximum. A more appropriate approach may be to list a range with qualifying language explaining that placement in the range will depend on a number of factors, including experience, work location and other relevant considerations.
 - Consider carefully the potential negative consequences of other "creative" solutions, such as listing low salary ranges to lower candidate expectations or listing excessively large ranges that impair the usefulness of the information.
6. Be prepared to answer candidate and current employee requests for position pay range information and requests for their salary to be reviewed and adjusted in light of posted ranges.

Finally, pay transparency is an evolving and growing compliance challenge. It will be essential to stay up to date with compliance guidance issued by the authorities in the jurisdictions applicable to your business as well as keep abreast of new laws enacted in other jurisdictions.

In our next Alert, we will cover Required Disclosures to Employees and Pay Data Reporting. In the meantime, for more information on these topics, please contact Tommy Postek, Kim Korando or the Smith Anderson employment lawyer with whom you regularly work.

[1] For more information, see [California Equal Pay Act](#).

[2] **NJ: Jersey City** – Employers with at least five workers (employees and independent contractors) in Jersey City on the date of the notice or advertisement are covered by the local laws.

NY: Albany County – Temporary help firms advertising for temporary employees are not covered by the local posting laws; **City of Ithaca** – Employers, not including temporary help firms seeking temporary employees, with at least four employees (excluding domestic service and parent, spouse or child relations with the employer) whose standard work location is in the city are covered; **Westchester County** – Employers that post for positions that are required to be performed, in whole or in part, in Westchester County, whether from an office, in the field or remotely, are covered by the local law. Temporary help firms advertising for temporary employees are not covered by the local posting laws.

PROFESSIONALS

[Kimberly J. Korando](#)

[Tommy Postek](#)

PRACTICE AREAS

Employment Litigation

Employment, Labor and Human Resources

