

New York State's Amended Pay Transparency Law

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by Krista Bolles

Pay transparency laws are on the rise across the country. New York is currently one of four states and a growing number of municipalities to enact laws requiring employers to disclose salary and wage ranges in job advertisements. California, Colorado and Washington also require salary and wage range disclosures in job advertisements. Other states, including Connecticut, Maryland, Rhode Island and Nevada, require employers to disclose salary and wage ranges to candidates at some point during the hiring process or upon request, although they stop short of mandating such disclosures in job advertisements. More states and municipalities are likely to follow as similar pay transparency bills make their way through various state and local legislatures.

New York's Pay Transparency Law, New York Labor Law § 194-b (the "Law"), takes effect on September 17, 2023. It was enacted in December 2022, and subsequently amended in March 2023. The amendments altered and clarified the Law in significant ways, including with respect to its extraterritorial reach and former recordkeeping requirements. Employers with operations in New York, as well as employers outside of New York with remote or hybrid workforces, will soon need to determine whether, and to what extent, they are covered by the Law, and begin taking steps to comply with it. Fortunately, many employers who are currently subject to similar pay transparency laws in other states and municipalities, including New York City, will have a head start.

Who is covered by the Law?

The Law provides for broad coverage. In the age of remote and hybrid work, the Law's reach will undoubtedly extend beyond New York's state lines. The Law applies to employers with four or more employees who advertise for jobs that will be (i) physically performed, at least in part, in New York; or (ii) physically performed outside of New York if the position reports to a supervisor, office or other worksite in New York. Employers will therefore need to assess reporting structures, employee residences and work travel requirements in order to determine whether the Law will apply to their job advertisements—particularly those for remote and hybrid positions.

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What constitutes a covered job “advertisement”?

The Law applies to external advertisements for jobs as well as advertisements for internal promotion and transfer opportunities. When the Law was amended earlier this year, the legislature clarified its scope by defining the term “advertise.” The Law broadly defines “advertise” to mean: “to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity.” This definition appears to encompass both formal job postings as well as informal written descriptions of employment opportunities that are made available or distributed to potential applicants. However, purely oral communications concerning jobs and internal opportunities are not covered.

What does the Law require?

The Law requires employers to disclose in covered job advertisements the minimum and maximum annual salary or hourly wage they in good faith believe is accurate for a position at the time of posting, and a job description if one exists. Notably, the Law does not require disclosure of non-salary or non-wage compensation such as overtime, incentive compensation or benefits. If a position is compensated solely based on commissions, employers must include a statement to that effect in the job advertisement. In a positive turn of events for employers, the recent amendment removed the recordkeeping requirements that were contained in the original version of the Law.

Further clarification on the Law is expected prior to its effective date. The Law directs the New York Department of Labor to promulgate rules and regulations to effectuate the Law. The New York Department of Labor should issue regulations, and likely guidance on the Law as well, as we get closer to the September 17, 2023 effective date.

What are the consequences for non-compliance?

The Law does not provide for a private right of action. Instead, a person claiming to be aggrieved by a violation of the Law may file a complaint with the New York Department of Labor for an investigation and determination of an appropriate remedy, if any. The Law provides that an employer who fails to comply with the Law “shall” be subject to a civil penalty of up to \$1,000 for a first violation, \$2,000 for a second violation and \$3,000 for a third and subsequent violations. The assessment of civil penalties is therefore mandatory in the case of noncompliance.

What do employers need to do?

As September approaches, employers in New York and employers outside of New York that offer hybrid and remote positions should evaluate whether, and to what extent, their job advertisements will be covered by New York’s amended pay transparency law, and begin preparing salary and wage ranges to include in covered job advertisements. It is also a good time for employers to consider whether their job advertisements may be subject to similar pay transparency laws in other states, including California, Colorado

and Washington.