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States Expand Pay Transparency Requirements, Including for Remote Job Postings

April 18, 2022 – Cross-Border Counselor
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In order to address income disparities and employer discrimination, a growing number of jurisdictions in the U.S. have implemented salary transparency laws that not only require disclosure of certain salary information during the hiring process upon request, but require public disclosure of salary ranges in all posted job advertisements. Canadian companies with U.S. employees should familiarize themselves with such laws and consider implementing a uniform policy for salary transparency as more and more states start requiring affirmative wage disclosures.

Most recently, Washington State amended its Equal Pay and Opportunity Act to require employers to affirmatively disclose in job postings a wage range, plus any other benefits or compensation to be offered, regardless of whether the applicant requests this information. The law applies to all employers that do business in Washington with 15 or more employees. Without the amendment, the law currently requires employers to provide applicants the minimum salary for the position, but only if the applicant requests such information after the job offer has been made. A number of other states, such as California, Connecticut, Nevada, Maryland, and Rhode Island, similarly require disclosure of salary information to job applicants, but Washington takes it a step further by requiring the salary information to be publicly disclosed with any job posting.

Washington's new law takes effect on January 1, 2023, and is similar to laws in Colorado and New York City, which also require affirmative disclosure of wage information as part of the hiring process. For violations of Washington's revised law, an employer may not only be subject to civil penalties imposed by the Department of Labor and Industries, but an employee may bring a claim against the company and recover actual or statutory damages, whichever is greater, plus attorneys' fees and costs.

The Colorado transparency law applies broadly and covers Canadian companies that have at least one employee in Colorado. The Colorado Department of Labor and Employment (CDLE) has clarified that compliance with its transparency rules is required in a job posting as long as the employer has at least one Colorado employee at the time

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of publication, and the job is tied to a location in Colorado or is advertised as being remote. The CDLE has further clarified that employers cannot get around the transparency rules by explicitly excluding from consideration applicants in Colorado. For example, job postings cannot state that that the job can be performed remotely from anywhere other than Colorado. If there is just one person living in Colorado and working for the employer, the salary range must be posted for remote jobs, regardless of the preference an employer might have as to the location of the employee. Accordingly, Canadian companies that have at least one Colorado employee must publish compensation information about positions located in, or positions that could be performed remotely from, Colorado at the time of the job posting.

The New York City pay transparency law, which goes into effect May 15, 2022, similarly requires all New York City employers to state the minimum and maximum salary associated with an advertised job, promotion, or transfer opportunity. The law does not apply to advertisements for positions that are not required to be performed in New York City, so advertisements for remote positions or those for roles in other locations would not need to include salary information.

Nonetheless, Canadian companies posting jobs online that are accessible by Colorado, New York City, or Washington residents may be required to include compensation and benefits information in the posting. For example, even if a position is open to employees from anywhere in the U.S. and can be worked remotely, that position may potentially be filled by someone working in Colorado, so the employer must post the compensation range if it is a covered employer under the Colorado law (i.e., if the employer has at least one employee in Colorado). In other words, nearly all positions that could be filled by an employee working remotely are covered by the Colorado statute, even if there is a low chance that the position would be filled by a Colorado applicant.

Accordingly, Canadian companies that advertise in the U.S. and allow positions to be worked remotely must ensure that they are complying with the applicable state pay transparency laws. Canadian employers should assess which advertised positions would be covered by transparency laws, consider implementing a uniform policy that would comply with the strictest requirements, and make sure they have knowledgeable legal counsel to avoid civil penalties and damages for noncompliance.