

U.S. Equal Pay and Pay Transparency Laws Are Getting More Complex

November 28, 2022 – Cross-Border Counselor

by Aaron Goldstein

Several U.S. states have been adopting more complex pay transparency laws and stricter equal pay statutes that prohibit employers from paying two employees differently to perform the same role based on factors such as race or gender. While these two types of laws are different, they go hand in hand since pay transparency laws require employers to disclose the very information that tips off employees (and plaintiffs' attorneys) to the facts necessary to bring equal pay claims. Companies looking to hire in the U.S. must become familiar with these laws or face substantial statutory penalties and civil liability.

Equal Pay Laws

Most U.S. states have some form of equal pay law. Many U.S. states have adopted equal pay laws that go beyond simply outlawing disparate treatment and that require employers to justify pay disparities according to a set (and sometimes quite short) list of allowable "bona fide" factors. In Washington State, for example, pay disparities must be justified by factors such as: differences in education, training or experience; seniority; merit/work performance; quantity or quality of production; regional differences in compensation; local minimum wage; or other factors that are job related and consistent with business need. While this last factor sounds like a helpful catchall that would allow any reasonable factor to apply, until a particular reason is tested in litigation, employers run a significant risk relying upon such untested reasons. In all cases, employers bear the burden of proof to justify why pay disparities exist. California, Colorado, Oregon, and several other states apply a similar list of allowable factors.

In many states, employers are explicitly barred from using an applicant's pay history to justify a pay disparity. The laws in these states recognize that historical discrimination has led to substantial pay gaps based upon sex and race and that allowing employers to use historical pay as a justification essentially enshrines historical discrimination on the bases of sex and race. Many states go a step further and prohibit employers from even asking about pay history at all.

Related People

- Aaron Goldstein

Related Capabilities

- Canada Cross-Border Transactions

Pay Transparency

Several U.S. states have adopted pay transparency laws that require employers to disclose the pay scale for a position for which an employer is advertising to all applicants and current employees. The first of these laws to make big waves was passed in Colorado and made headlines because it requires employers to disclose compensation and benefits information not just for positions open to outside candidates, but for internal promotions as well. As a consequence, an employer with a single employee in Colorado would have to provide pay scale and benefits information to current employees any time even an internal promotion could be filled by a current employee. Many U.S. employers responded to Colorado's law by including a disclaimer in job postings stating that the position is not open to Colorado residents. Other U.S. states passing similar pay transparency laws have responded by including provisions that employers cannot avoid their pay transparency laws with such disclaimers.

California, as it often does, has taken pay transparency to the next level—requiring employers with over 100 employees (including those outside of California) to file an annual report with the California Civil Rights Department that discloses pay information by race, ethnicity, and gender within each of ten job categories, such as sales workers, professionals and executives. For each of the ten categories, covered employers must disclose: the number of employees by race, ethnicity and gender; for each combination of race, ethnicity and gender, the mean and median hourly rate of pay; the number of employees by race, ethnicity and gender whose annual earning fall within each of the pay bands used by the U.S. Bureau of Labor and Statistics; the total number of hours worked by each employee in each pay band; and for covered employers with multiple establishments, there must be a separate report that covers all of the above for each separate establishment.

Conclusion

Employers looking to hire in the U.S. must navigate this new layer of complexity in the form of state pay transparency and equal pay laws. These laws vary significantly from state to state and not all of their requirements are intuitive. Employers face not only fines and suits by enforcement agencies for violating these laws, but private civil litigation as well. What is more, pay transparency requirements make it a lot easier for employees (and plaintiffs' attorneys) to spot illegal pay disparities. Companies looking to hire in the U.S. should be sure to vet their job offers and pay scales with employment counsel to make sure they are compliant.