

NEW YORK PROPOSES PAY TRANSPARENCY REGULATIONS: 10 TAKEAWAYS FOR EMPLOYERS

Insights
Sep 14, 2023

With only a few days left before New York's pay transparency law takes effect, the state labor department issued proposed rules aiming to clarify employers' wage disclosure obligations. Though the regulations are not yet final, you should welcome this initial guidance in advance of the implementation date and consider commenting on the proposed regulations by the November 12 deadline. While the proposed rules do not address all questions, they do provide key guidance for employers. What are the top 10 things you need to know about the proposed rules and their impact on your hiring process?

1. The Statute Applies to Private Employers with Four or More Employees

Starting September 17, New York's [pay transparency law](#) will require employers to disclose the compensation or range of compensation in any internal or external job advertisement or promotion or transfer opportunity. In addition to salary disclosure, you will also need to disclose the job description for the position, if one exists.

The statutory language indicates that the law applies to any employer with four or more employees, except temporary help firms, and the proposed regulations clarify that the statute is not applicable to governmental agencies.

The regulations also explain the exemption for temporary help firms. For example, the wage disclosure requirements are not applicable to temporary help firms when hiring employees to support another organization's workforce, as

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such placements are already subject to a wage disclosure requirement. However, temporary help firms must comply with the new law when advertising an internal position to perform work for the temporary help firm's operations.

2. Jobs Physically Performed in New York or that Report to a New York Worksite are Covered by the Statute, But Infrequent Physical Presence is Insufficient

The wage disclosure law applies to advertisements for jobs that:

- will be physically performed in New York; or
- will be physically performed outside of New York but will report to a supervisor, office, or other worksite in New York.

The proposed regulations state that incidental or infrequent presence in the state of New York for work-related purposes – such as for occasional meetings or conferences, or mere communication with employees based in New York – is insufficient to require compliance with the statute.

3. Employers Could Be on the Hook for Third-Party Postings

Employers are required to include the salary range in a job advertisement – regardless of the medium used to posted – when the advertisement is aimed at a pool of potential applicants, (which means more than one prospective applicant). Accordingly, advertisements may include:

- newspaper ads;
- printed flyers;
- social media posts;
- e-mails sent to a pool of applicants; or
- any advertisement posted through any other medium.

The proposed regulations state that advertisements are covered regardless of whether they are posted by the employer directly or through a third-party, such as a recruiter or a job listing website. The onus is on the employer to ensure such third parties include the required salary range. However, employers are not deemed

responsible for advertisements that are “scraped” or automatically aggregated electronically and posted by a third party without the employer’s knowledge or consent.

4. No Requirement to Advertise

Nothing in the wage disclosure statute requires employers to advertise for vacant positions or to use any specific medium for posting advertisements. Employers are permitted to hire, promote, or transfer employees without posting an advertisement.

5. Job Descriptions May Be Required

As previously noted, employers are not only required to include the salary range but also the job description for the position, if a job description exists. Although the proposed regulations do not go so far as to *require* employers to maintain job descriptions, they state “limited circumstance” where employers don’t have to create them. For example, in an advertisement for a dishwasher, the name of the position may clearly convey the full extent of the duties without additional detail. The proposed regulations certainly suggest that job descriptions are expected to exist when the job title does not clearly convey the duties of the role.

6. Compensation Generally Must Be Listed As a Range That Reflects Base Pay

The statute requires employers to disclose the compensation or range of compensation for a job opportunity. “Range of compensation” is defined to mean the minimum and maximum annual salary or hourly range of compensation for the position, which the employer in good faith believes to be accurate at the time of the job posting. The range of compensation cannot be open ended. For example, it’s not enough to say “\$20 per hour and up” or “maximum salary of \$50,000 per year.” Moreover, the job advisement must include a range, unless there is no flexibility in the rate being offered, then the fixed wage or salary may be simply stated as “\$20 per hour” or “\$50,000 per year,” for example.

The proposed regulations make clear that other forms of compensation or benefits offered in connection with the opportunity, such as health insurance benefits, paid time off, employer-sponsored retirement plans, overtime pay, commissions, tips, bonuses, or stock options do not need to

be disclosed, though employers are not prohibited from providing additional relevant compensation or benefit information. Employers cannot, however, conflate these other forms of compensation when providing the base pay as required by statute. For example, an employer hiring for a tipped position could state that the base rate of pay is \$18 to \$20 an hour, and further indicate (though not required to do so) that the position also gets tips or that it is estimated the employee will earn an additional \$10 per hour in tips. However, the employer cannot advertise the salary range as \$28 to \$30 an hour that includes the expected tips of \$10 per hour in the range.

7. Compensation Information May Be Separately Provided

Under the proposed regulations, if the range of compensation information is so extensive that it will not fit in the space allotted for the job advertisement, the employer may provide such information in a separate attachment or addendum, so long as it is available free of charge and easily accessible to prospective applicants. Additionally, the main body of the advertisement should clearly and conspicuously state where the range of compensation information is available. Presumably, a clearly disclosed website link would meet this requirement.

8. Geographic and Seniority Based Differentials Must Be Disclosed

The salary range provided in the advertisement must be for a single opportunity at a single geographic location or region. If the advertisement is meant to cover multiple geographic locations or levels of seniority, then multiple ranges of compensation for each opportunity must be provided. For example, if a store with multiple locations through New York State posts a job listing for store clerks available at any of their locations, the job listing will need to provide the ranges of compensation for each opportunity at each store.

9. The Good Faith Range is Not Binding

When providing the salary range in a job advertisement, you must disclose the wage range you believe in good faith to be accurate at the time of the job posting and are willing to pay to the successful applicant. When setting the good faith range, employers will generally consider factors such as the job market, current employee compensation levels, hiring

budget, and experience and education levels acceptable for the position.

The proposed regulations make clear that an employer is not precluded from adjusting the range of compensation during the hiring process. For example, you may need to increase your hiring budget to attract qualified candidates or make a higher offer than expected to an exceptional candidate.

10. But Employers Clearly Lacking Good Faith May Find Themselves in Hot Water

You should note that, under the proposed regulations, an employer's actions would lack good faith if the disclosed range does not reflect or misrepresents what the employer is willing to pay to the successful applicants. Lack of good faith may also be evident if the range of compensation is so broad – without explanation – that it effectively prevents the applicant from understanding the legitimate range of compensation the employer is willing to pay.

Conclusion

Pay transparency continues to be the hottest trend in pay equity legislation, and we expect many states and cities to consider pay transparency laws in 2023 and beyond. You can review pay equity initiatives by checking out the [FP Pay Equity Map](#).

We will monitor developments related to the New York State pay transparency law, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have questions about pay transparency laws or your related policies, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in [our New York City office](#).

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