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State Pay Transparency Laws: What's Required Now and What's Next?

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As the summer winds down, multistate employers must remain apprised of an ever-increasing number of obligations in the area of pay transparency. Below, we highlight recent developments to existing pay transparency laws, summarize new pay transparency laws enacted over the summer and offer compliance tips for multistate employers grappling with this growing nationwide trend.

New York

Starting in the Empire State, New York employers are reminded that the state's pay transparency law (signed into law in December 2022) goes into effect on **September 17, 2023.** The law, which was amended earlier this year, largely tracks the requirements of New York City's law, which became effective on November 1, 2022.

The state law covers employers with at least four employees and requires employers to disclose the compensation or range of compensation in any job posting, promotion or transfer opportunity, as well as the job description for the position, if one exists. The job description requirement is a major distinction from New York City's law, which has no such requirement. Penalties include a fine of up to $1,000 for a first violation, $2,000 for a second violation and $3,000 for a third or subsequent violation.

In a recent amendment, the state clarified that the scope of covered job postings includes jobs that "will physically be performed, at least in part, in the state of New York, including a job, promotion, or transfer opportunity that will physically be performed outside of New York but reports to a supervisor, office, or other site in New York." The amendment substantially extends the scope of the law. In fact, even **nonremote** jobs, such as jobs based in other offices of the employer, will be covered if they report into a New York location. In addition, through a new, expansive definition of the term "advertise," the amendment also clarified that the law applies to both internal and external job postings. For positions with solely commission-based compensation, the amendment also clarified that a compensation range is not required; rather, employers should include a "general statement that compensation shall be based on commission."

Finally, the amendment also removed the record-keeping requirements under the law, which previously constituted another major departure from New York City's law. Although employers no longer need to maintain records of compensation and job descriptions in accordance with the state's pay transparency law, employers must still comply with record-keeping obligations under the New York State Labor Law.

Hawaii

Meanwhile, in the Aloha State, **effective January 1, 2024,** Hawaii's new pay transparency law (signed in July 2023) will require employers with 50 or more employees to include the hourly pay rate or salary range in job listings. The rates or range must "reasonably reflect[] the actual expected compensation" for the position. Notably, the law does not require disclosure of other benefits, like bonuses or stock options, as some other pay transparency laws do. Further, the law does not apply to internal transfers or promotions. These exclusions, along with the 50-employee headcount threshold, make Hawaii's pay transparency requirements less onerous than other states' laws. Open questions remain, however, including whether the 50-employee requirement includes all employees or only those employed in Hawaii. The law also materially expands equal pay protections, prohibiting employers from discriminating against employees based on any protected category – not just sex – by paying them differently for "substantially similar work."

Illinois

As we previously reported, the Prairie State recently enacted its own pay transparency law in August 2023, requiring pay and benefits disclosure **beginning on January 1, 2025.** Read more about the law in this August 28 client alert.

Colorado

As we previously reported in this November 2020 client alert, the Centennial State's pay transparency law – the Equal Pay for Equal Work Act – went into effect in 2021 and requires employers to disclose pay ranges and other forms of compensation and employment benefits in job postings, as well as certain promotion information.

In June 2023, Gov. Jared Polis signed an amendment to the law, which takes effect **on January 1, 2024.** The amendment clarified the law's application to employers with only remote employees in the state and redefined job opportunities subject to the notice requirements, while also enacting additional requirements for job notices. We outline these updates below.

Job opportunity notices

The amended Equal Pay for Equal Work Act makes three significant changes to job opportunity notices employers must provide to their Colorado employees.

First, career progression or career development promotions are no longer considered "job opportunities" subject to the internal notice requirements of the law. The amendment defines "career development" as "a change to an employee's terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee's job title or compensate the employee to reflect work performed or contributions already made by the employee." The amendment defines "career progression" as "regular or automatic movement from one position to another based on time in a specific role or other objective metrics."

Second, the amended law now provides that if an employer is physically located outside of Colorado and has fewer than 15 employees in the state working remotely, then through July 1, 2029, the employer need only provide notice of remote job opportunities to its employees in Colorado. The Colorado Department of Labor and Employment (CDLE) has since clarified in an Interpretive Notice & Formal Opinion that this means that small, out-of-state employers no longer need to disclose in-person (nonremote) job opportunities to its Colorado employees, although external postings for those jobs must still disclose pay.

Third, the notice of job opportunity must now include an additional component – the date the application window is anticipated to close.

Post-selection notice regarding selected candidate

Employers now also must comply with an additional notice requirement after selecting a candidate to fill a job opportunity. Specifically, within 30 days after a candidate is selected to fill a job opportunity and begins working in the position, employers will need to make "reasonable efforts" to announce, post or otherwise make known to the employees with whom the selected candidate is intended to regularly work, the following information:

- The name of the candidate.
- The selected candidate's former job title, if selected while already employed by the employer.
- The selected candidate's new job title.
- Information on how employees may demonstrate interest in similar job opportunities in the future – including identifying individuals or departments to whom an employee can express interest in similar job opportunities.

The amendment clarifies that the requirement should not be applied in a manner that violates a candidate's privacy rights under applicable law or in a manner that would place a candidate's safety or health at risk. However, the amendment does not further define what constitutes "reasonable efforts" under the law or how to determine whom a selected candidate will "regularly work" with.

New requirements for positions with career progression

Although employers will no longer need to provide employees with notice of career progression promotions, under the amendment, employers must now disclose and make available to all eligible employees the requirements for career progression (under the new definition referenced above), in addition to each position's terms of compensation, benefits, full-time or part-time status, duties and access to further advancement. The law

does not define who would be considered an “eligible employee.”

Enhancement of the CDLE’s investigatory powers

Lastly, the amendment now requires the CDLE to create and administer a process to accept and mediate complaints, investigate complaints, order compliance and relief, and provide legal resources regarding violations of the wage discrimination provisions of the law. In addition, the amendment expanded the maximum period for which aggrieved employees will be able to recover back pay – from three to six years – for violations of the law. We expect to see more guidance from the CDLE on these processes in the near future, in addition to further guidance on the pay transparency amendment.

Considerations for employers

For multistate employers, complying with this patchwork of pay transparency laws is increasingly challenging. According to the National Women’s Law Center, nearly 44.8 million people – or 26.6% of the labor force – is now covered by various state pay transparency laws. Employers with multistate operations may wish to consider adopting a uniform nationwide policy addressing salary ranges, including policies addressing promotion and transfer opportunities, as the number of states enacting pay transparency laws will undoubtedly increase. Employers may wish to consider, for example, adopting a national policy that complies with the most stringent pay transparency requirements of the states in which it operates or has employees, in order to reduce the administrative burden of tracking and complying with several different laws in multiple jurisdictions.

Employers also should pay special attention to where employees are located, particularly remote and hybrid employees, and their reporting structures. For example, the Illinois and New York laws include positions that may be performed out of state or from other employer locations, if they report into the state. Determining an accurate reporting structure is essential to complying with these requirements. In addition, employers should train appropriate staff and hiring managers to ensure compliance with any recordkeeping obligations, reporting requirements, employee pay inquiry responses and related data security matters. If not already done, employers also may wish to conduct a pay equity audit in conjunction with legal counsel to take advantage of legal safe harbors afforded to employers who run such audits. Legal counsel can assist with making applicable adjustments and communicating those adjustments to employees and external stakeholders.

If you have questions about pay transparency laws or are interested in conducting a privileged pay equity audit, please contact the Cooley employment team.

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