

Will Pay Transparency Laws Level the Playing Field?

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Background

According to the federal government, “[a]lthough the gender pay gap has narrowed since the signing of the Equal Pay Act of 1963, women earned 82 cents for every dollar a man earns, according to 2020 data from the Bureau of Labor Statistics.”¹ As a result, women would have had to work an extra 42 days to earn what men did in 2020.² And according to the Department of Labor, “[m]any women of color were paid even less. For example, Black women were paid 64%, and Hispanic women (of any race) were paid 57% of what white non-Hispanic men were paid.”³

To level the playing field, state and local governments are turning to pay transparency laws to try to reduce and ultimately eliminate the gender pay gap.

Moreover, some observers posit that there is a cultural shift underway towards an expectation of greater transparency in pay. As reported by *USA Today*, “a survey of 1,000 full-time U.S. employees by analytics firm Visier found that 79% prefer pay transparency. Nearly as many – 68% – said they would switch jobs to join firms with greater pay transparency even if the compensation is the same.”⁴ The same article in *USA Today* reported that “pay transparency leads to increased happiness, engagement, and loyalty at work, according to a recent survey from job portal Indeed which now prominently features salary ranges when employers provide them.”

And while the Equal Pay Act has been law since before many present-day workers were born, and gender-based pay discrimination is banned by Title VII and many state laws, the problem of unequal pay, which disadvantages women and people of color, appears to be an entrenched one.

Several jurisdictions have passed broad-ranging pay equity and pay transparency laws in a new bid to reduce or eliminate this pay gap. These laws are aimed at imposing greater consequences on employers who discriminate based on gender, race, or ethnicity in pay and, in a more groundbreaking fashion, seek to force employers to disclose wages to current employees, job applicants, and – in some cases – the public at large.

New York State

New York City passed a pay transparency law that went into effect on November 1, 2022. That law requires employers in the city to post minimum and maximum salary information for positions, except for jobs that cannot or will not be performed in New York City. The new law requires employers with four or more employees (including independent contractors) to state “the minimum and maximum salary” in each “advertisement” for a “job, promotion, or transfer opportunity” as long as one of the employees works in New York City. Employers must state the minimum and maximum salary that they, in good faith, believe at the time of the posting they are willing to pay for the advertised job, promotion, or transfer opportunity. The salary must be a range and cannot be open-ended.

Early reports about employer compliance with the New York City law indicate efforts to skirt the law may be underway. *Fortune Magazine* reported, “Employers are testing the limits...by posting pay bands that, in some cases, span more than \$100,000, according to a *Bloomberg News* analysis of over 400 open roles.”⁵

Other localities followed New York City's lead. **Westchester County, New York**,⁶ and **Ithaca, New York**, both enacted local laws requiring employers with four or more employees to comply with pay transparency requirements.

Then, on December 21, 2022, **New York State** enacted a statewide pay transparency law,



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becoming one of the latest states to jump into pay transparency legislation. When signing the legislation, Governor Kathleen Hochul stated, "[t]his historic measure will usher in a new era of fairness and transparency for New York's workforce and will be a critical tool in our efforts to end pervasive pay gaps for women and people of color." The law, which goes into effect on September 17, 2023, requires employers with four or more employees to post compensation ranges for any job positions, promotions, or transfer opportunities.⁷ Range of compensation is defined by the law as "the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity."⁸ We expect that additional regulations will be issued soon.

Colorado

Elsewhere, **Colorado** is at the forefront of legislation to improve pay equity and force pay transparency. The Rocky Mountain State's groundbreaking *Equal Pay for Equal Work (EPEW) Act*, which has been in effect for two years, adds more (potentially redundant) prohibitions on gender-based pay differences. The EPEW Act also bans the use of salary history to set initial pay for new hires, bans salary history inquiries by employers seeking to hire, and aims to force employers to disclose pay in job postings and notify all current employees simultaneously of promotional opportunities, including the pay associated with each opportunity. Another controversial provision of the Colorado law is its application to remote jobs posted by covered employers, which the state defines as anyone with a single employee in Colorado.

These EPEW Act requirements aim to equip job applicants and employees alike with information that will help them advance their careers on a level playing field. The Colorado EPEW has been criticized by a number of employers, mainly on the basis that forced disclosure of formerly confidential salaries will unfairly advantage competitors and that the requirement to announce promotional opportunities is vague, ill-defined, and not well-designed for the real world, where "inline" advancement often occurs without there ever being an open position. Some employers, recoiling from the EPEW Act's more novel requirements, have gone as far as instituting a recruiting rule saying "no Coloradans need apply" in a bid to avoid the EPEW Act.

Other States

Rhode Island's new pay transparency law (effective January 1, 2023) bans consideration of salary history in setting initial pay and requires disclosure of "wage ranges" to applicants and employees upon request.

Nevada requires employers to provide the wage or salary range or rate to applicants who interview for the position, or in certain situations, during a promotion or transfer.

Maryland requires employers to provide wage ranges to job applicants upon request.

Washington's law (effective January 1, 2023) requires employers with at least 15 employees to provide a wage scale in job postings and a description of benefits and other compensation.

Several local governments have gotten into the act, too, with municipal pay transparency laws enacted in **Cincinnati** and **Toledo, Ohio**, and **Jersey City, New Jersey**.

California

Traditionally a bellwether for progressive employment legislation, California passed SB 1162 on September 27, 2022. The law added requirements to California's existing "salary history ban" that prohibits employers from seeking or using an applicant's salary history in deciding whether to offer a job to the applicant or in determining what salary to offer an applicant. The law also requires California employers to provide pay scale information to job applicants upon reasonable request.

SB 1162 now extends the pay transparency obligations of California employers to current employees as well, obligating all California employers to provide pay scale information for an employee's current position upon request and also requiring California employers with 15 or more employees to publish the pay scale for a position in any job posting. If the employer engages a third party to post or publish its job postings, the employer must provide pay scale information to

the third party, who must include the information in the job posting. “Pay scale” is defined as the “salary or hourly wage range that the employer reasonably expects to pay for the position.” Although the law is silent as to whether this includes other information such as bonuses, commissions, options, or benefits associated with the position, recent guidance from California’s Department of Industrial Relations clarifies that other compensation or tangible benefits are not required to be included, but if the position’s hourly or salary wage is based on a piece rate or commission, the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting as well.

SB 1162 also modifies the existing requirement applicable to private employers in California with 100+ employees to submit an annual pay data report to the state. In addition to the pay, hours worked, and demographic information already required, the report must now include the median and mean hourly rate “for each combination of race, ethnicity, and sex within each job category.” Pursuant to SB 1162, reports will be due annually on the second Wednesday of May each year, beginning on May 10, 2023.

California’s new law, unlike Colorado’s, does not impose a maze of new regulations surrounding promotions and is more limited in scope. The Department of Industrial Relations guidance clarifies that the pay scale must be included within the job posting by California employers only if the position may ever be filled in California, either in person or remotely. On the other hand, Colorado does not require employers to submit annual pay data reports to the state, which California requires. Also, penalties for violations can be severe in California; the new law allows courts to impose civil penalties of \$100 per employee for not filing the pay data report.

The consequences, both intended and unintended, of these new pay transparency laws remain to be seen. And while there is room for disagreement over whether new pay transparency laws will be a net positive for workers and employers, one thing is clear: legally-mandated pay transparency is a trend to which employers must be attuned.

For questions about pay equity laws, please contact Elena Hillman in California, Jake Rubinstein in Colorado, or Janice Agresti in New York.

¹ <https://www.census.gov/library/stories/2022/01/gender-pay-gap-widens-as-women-age.html#:~:text=Although%20the%20gender%20pay%20gap,the%20Bureau%20of%20Labor%20Statistics,> accessed October 3, 2022.

² <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/#:~:text=In%202020%2C%20women%20earned%2084,what%20men%20did%20in%202020,> accessed January 11, 2022.

³ <https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap>

⁴ <https://www.usatoday.com/story/money/2022/10/03/public-salary-jobs-pay-gap-california/8162530001/>, accessed October 4, 2022.

⁵ <https://fortune.com/2022/11/04/new-york-city-pay-transparency-law-salary-range/>, accessed November 7, 2022

⁶ Note that when statewide legislation goes into effect, Westchester County’s local law will become null and void.

⁷ N.Y. Lab. Law § 194-b, effective September 17, 2023

⁸ *Id.*