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[Podcast]: The New York City Pay Transparency Law

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In this episode of The Proskauer Brief, partner Evandro Gigante and associate Laura Fant discuss a recent New York City law requiring employers to state salary ranges in job postings. Effective May 15, 2022, as an amendment to the New York City Human Rights law, it shall now be an unlawful discriminatory practice for an employer or their agent to advertise a job including promotions or transfer opportunities without stating the minimum and maximum salary for the position in the job advertisement. Employers should tune in to see what they will really need to consider when implementing this law.

Evandro Gigante: Hello and welcome to The Proskauer Brief: Hot Topics on Labor and Employment Law. I'm Evandro Gigante, partner at Proskauer and with me today is associate Laura Fant. Today we're going to discuss a recent New York City law requiring employers to state salary ranges in the job postings. Laura, can you give our listeners an overview of the new law?

Laura Fant: Absolutely. So effective May 15, 2022, as an amendment to the New York City Human Rights law, it shall now be an unlawful discriminatory practice for an employer or their agent to advertise a job including, and this is key, promotions or transfer opportunities without stating the minimum and maximum salary for the position in the job advertisement. That's a pretty broad statement, right? So I think there's a few things to drill down on there with regard to what employers will really need to consider when implementing this law.

Evandro Gigante: What are some of those things Laura that employers should be thinking about as they plan to prepare for its implementation?

Laura Fant: There’s a few questions when we’re looking at just the statutory language, which is really all we have at this point. We are still waiting for the New York City Commission on Human Rights, which is the agency that will be tasked with enforcing this law. We’re still waiting to see to what extent they’re going to be issuing some regulations and additional guidance. We do expect to see some from them in advance of the law but at the moment there are some open questions. For example, what about job postings that were made prior to the May 15th effective date. To what extent will those be covered by the law? How will the law apply to remote jobs? Which may or may not be performed within the boundaries of New York City depending on where an ultimately successful job applicant is located. Then looking more specifically at the statutory language that we have. How, for example, will salary be defined? You know the statute says that you have to post the minimum and maximum salary for the position. Will salary just encompass the base wages or perhaps maybe additionally non-discretionary bonuses? Or will the city take the position that it includes broader range of compensation options, discretionary bonuses, incentive compensation, etc. That remains to be seen.

Also the law states that when stating the minimum and maximum salary for a position, the range must extend from the lowest to the highest salary that the employer in good faith believes at the time of the posting it would pay for the job. So an open question as well is how will that good faith standard be defined? What will the city be looking for in determining whether an employer was acting in good faith in sharing the information that they share in the job posting.

Evandro Gigante: In terms of other considerations, Laura. It's good to consider things such as what it means to have an advertisement for a position as opposed to perhaps an individual outreach to an employee about a promotion or transfer opportunity. And so I would certainly think that employers should be on the lookout for guidance from the city commission about what it means to advertise a position. Likewise in other city guidance, I think it's fair to say that the city has taken the position that it would date what the actual penalties would be for violation of the law. For example, things such as the laws that prohibit employers from considering criminal background history until having issued an initial offer of employment is an area where the city has attached some penalties for violations depending on the size of the employer and the number of violations. So I think it's also fair to say that employers should be on the lookout for some guidance from the city ideally touching on what the penalties might be for violations of this law. Whether those penalties could be issued on the per posting basis or applicant basis or some other basis.

Laura Fant: Those are both great points. To your first point about what it means to advertise a position, I think that's going to be a particularly key question when it comes to promotional and transfer opportunities, which again are covered under this law. Because there could be different scenarios, right? Some internal promotional opportunities may be advertised to a group or others may be targeted to a specific employee or set of employees without being posted in the broader sense. So it's a question of where the boundaries of what a job posting will be defined as particularly I think in that context.

Evandro Gigante: Totally agree. And I guess another question is whether there are other states around the country that have similar laws to the Pay Transparency Law that's coming into effect in New York?

Laura Fant: There are. So this isn't a new development, per say. It's a fairly recent development. But I will say that New York City's law is taking a broader approach than we're seeing in some other jurisdictions, but not all. So for example, one that got a lot of press recently is Colorado's law, which took effect on January 1, 2021. Which also requires a disclosure of compensation in job postings. The guidance and the law expressly state that what needs to be included in a job posting in Colorado is not only hourly or salary compensation but also a general description of bonuses, commissions, other compensation as well as benefits. So Colorado's taking a very broad approach there. Other states that have similarly passed laws of this type include Nevada, which requires employers provide applicants who have completed an interview for a position with salary information upon request. Connecticut similarly requires employers to provide this information upon request by an applicant or before or at the time that the employer makes an offer of compensation. So those states taking a slightly different approach. Then you have states such as California and Maryland, which require this information to be provided only upon request by an applicant. So these laws are out there but each one takes a slightly different approach. So for employers who operate across jurisdictions, it's important for them to really take a look at what the laws are in each jurisdiction and ensure that any postings that might fall under the coverage of those laws adhere to the specifics of those requirements.

Evandro Gigante: I agree. So there clearly is a lot for employers to be on the lookout for in regards to New York and ensuring compliance with other states. But with that, I want to thank you for joining us today on The Proskauer Brief. Stay tuned for more insights on the latest hot topics in labor and employment law and be sure to follow us on Apple Podcasts, Google Podcasts and Spotify.

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