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Looking Ahead to 2023: Pay Transparency Developments

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As we previously reported, as of November 1, 2022, New York City's salary transparency law requires covered employers who advertise or post a job, promotion, or transfer opportunity for a role that can or will be performed, at least in part, in NYC to disclose in such advertisement of posting the minimum and maximum annual salary or hourly wage that the employer in good faith believes it would pay for the position.

As we look ahead to 2023, similar statutes will take effect in California, Washington, and Rhode Island. Here are some highlights about pay transparency legislation that will take effect on January 1, 2023:

California:

In California, § 432.3 of the Labor Code, as amended requires employers with 15 or more employees to "include the pay scale for a position in any job posting." The law does not define a "job posting," but clarifies that it includes posts by third-parties engaged by an employer to advertise a role. Additionally, all employers must provide the pay scale for a position to an applicant "upon reasonable request," or to an employee "for the position in which the employee is currently employed." Penalties for failing to disclose pay scales are up to $10,000 per violation.

Furthermore, as we previously reported, the California legislation requires that employers provide certain employee pay data to the California Civil Rights Department. Employers with 15 or more employees must report median and mean hourly wages by each combination of race, ethnicity and sex within a given job category. The first reports, which shall be based on 2022 data, are due on May 10, 2023. Penalties for failure to comply with reporting requirements are up to $200 per employee.

Washington:

Washington's Equal Pay and Opportunities Act, R.C.W. § 49.58.110, as amended requires employers with 15 or more employees to "disclose in each posting for each job opening the wage scale or salary range." Notably, the Washington legislation also requires employers to provide a "general description of all the benefits and other compensation to be offered to the hired applicant." The State has released an administrative policy indicating that this description should include, but is not limited to "health care benefits, retirement benefits, any benefits permitting days off (including more generous paid sick leave accruals, parental leave, and paid time off or vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits."

A "posting" under the Washington law is defined as "any solicitation intended to recruit job applicants for a specific available position, including recruitment done directly by an employer or indirectly through a third party." The law expressly clarifies that the definition applies to "any postings done electronically, or with a printed hard copy, that includes qualifications for desired applicants."

Rhode Island:

Rhode Island's Pay Equity Act, R.I. Gen. Laws ch. 28-6, was amended to impose new pay transparency requirements. Unlike the California and Washington laws, the Rhode Island law does not expressly require employers to post anticipated salary ranges in postings. Instead, it provides that, upon request, employers must "provide . . . an applicant for employment the wage range for the positon for which the applicant is applying." Employers "should" disclose the range "prior to discussing compensation" for the position with the applicant.

However, even if not requested, employers "shall provide an employee the wage range for the employee's position both at time of hire and when the employee moves into a new position." Further, employers must provide a wage range for an employee's current position at their request at any time "during the course of employment." "Wage range" is defined as the "lower and upper bounds that an employer is willing to pay an applicant for employment or does pay an employee."

In addition to these laws taking effect soon, proposed pay transparency legislation is currently pending in New York State, Massachusetts, and South Carolina.

In light of the current and developing legislation concerning pay transparency, employers should be proactive in ensuring their job postings are in compliance with all such laws that may apply to such postings. To that end, employers should take note of how these laws define their scope of coverage when determining whether a given posting must include the salary, which is particularly important (and could be complicated) in cases where the position may be performed remotely.

Employers should also remember that pay transparency legislation exists at the local level as well. In addition to New York City, legislatures in Westchester County, NY, Ithaca, NY, and Jersey City, NJ – among other localities – have enacted local salary transparency ordinances.

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