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New York State Department of Labor Issues Proposed Regulations on Salary Transparency Law

Law and the Workplace on **September 26, 2023**

On September 13, 2023, the New York State Department of Labor published proposed regulations on the state's salary transparency statute that took effect on September 17, 2023.

As we previously reported, the statute applies to covered employers who post a job, promotion, or transfer opportunity that can or will be performed, at least in part, in the state of New York or for an opportunity outside New York that reports to a supervisor, office, or worksite in New York. Covered employers are required to include the compensation range and job description (if one exists) in job advertisements for covered roles.

Below are some key takeaways from the proposed regulations. Public comment on the proposed regulations will be received until November 12, 2023.

Wage Range Disclosure

The statute provides that the disclosed compensation rage must include the "minimum and maximum annual salary or hourly range of compensation . . . that the employer in good faith believes to be accurate at the time of posting." The proposed regulations clarify that wage ranges cannot be open ended (*e.g.*, $20/hour and up), but if the company has no flexibility on the compensation for a position, the fixed rate can be stated (*e.g.*, $50,000 per year).

Further, the proposed regulations define "good faith" as "the range of compensation the employer legitimately believes they are willing to pay the successful applicant or employee at the time they post the advertisement." As such, they clarify that employers are "not precluded from adjusting the range of compensation after collecting additional information through the hiring process."

The proposed regulations include examples of employer behavior that would or would not constitute "good faith." Examples of "good faith" include: (1) an employer that determines it needs to readjust the salary range for a position to attract qualified candidates and reposts the position with the updated salary range accordingly; (2) an employer that receives an application for a candidate who exceeds the expected qualifications for a role and therefore offers the candidate a rate of compensation above what was listed on the job advertisement; and (3) an employer that institutes a company-wide raise in pay between the time the job was posted and the time an offer was made.

The examples where employers actions may lack "good faith" include: (1) where the range posted "does not reflect, or misrepresents the rate the employer is willing to pay the successful applicant because the rate is deliberately lower or higher"; and (2) where "the range of compensation is so broad, without further information explaining the reason for the breadth, that it has the effect of preventing the potential or prospective applicant from understanding the legitimate compensation the employer is willing to pay."

Finally, the proposed regulations provide that the definition of compensation does not include non-salary components of compensation, such as overtime pay, tips, or commissions, or benefits such as health insurance, paid time off, or employer contributions towards retirement or savings plans,. This is a departure from similar statutes in other jurisdictions (such as Colorado, Washington, and Illinois), which require employers to include certain information about employee benefits.

Job Descriptions

While the statute requires that job advertisements include a job description if one exists, the proposed regulations note that "[a] job description may not exist in the limited circumstance where the name of the position or title clearly conveys the full extent of the duties required of the position without additional detail." For example, "an employer posting an advertisement for a dishwasher who will be solely washing dishes may not have a more detailed job description available."

Job Opportunities Outside New York

The proposed regulations echo that the statute applies to remote work opportunities if an individual reports to a supervisor, office, or other work-site in the state of New York. However, they further provide that "[i]ncidental or infrequent instances of being physically present in the state of New York for work-related purposes, such as for an occasional meeting or conference or mere communication with employees based in the state of New York, shall not alone be deemed physically performing an opportunity 'in part' in the state of New York."

Third-Party Job Advertisements.

The proposed regulations provide that job advertisements are covered under the statute regardless of whether they are posted by the employer or through a third-party and that the employer is responsible for all advertisements "that they have consented to post." However, employers are not responsible for job advertisements that were "scraped" or "automatically aggregated electronically and posted by a third-party without their knowledge or consent."

Job Advertisements Not Required

The proposed regulations make clear that the statute does not require employers to create job advertisements for all positions nor does it prohibit them from "hiring, promoting, or transferring employees without posting an advertisement."

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