

**SEPTEMBER 7, 2022**

For more information,
contact:

Anne Dana
+1 212 790 5364
adana@kslaw.com

Jalise Burt
+1 212 556 2168
jburt@kslaw.com

Anne Harris
+1 312 706 3670
anne.harris@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-
4003
Tel: +1 212 556 2100

Recent Proliferation of Pay Disclosure Laws in the United States Presents Opportunities and New Considerations for Employers

Series 3, 10 in 10: Issue 5

Within the past five years, a growing number of states and localities have enacted pay disclosure laws requiring employers to disclose pay rates or salary ranges during the hiring process.

To date, California, Colorado, Connecticut, Maryland, Nevada, Rhode Island¹ and Washington have enacted some form of pay disclosure requirements. In addition, some cities are imposing pay disclosure requirements, including New York City and Cincinnati and Toledo, Ohio. More states and cities are expected to pass similar laws in the near future. Currently, for example, the legislature in Massachusetts is considering a bill requiring pay disclosure, and New York and California's legislatures have passed pay disclosure bills, that at the time of publication, are both awaiting the governor's signature.

This article examines the trends emerging from these laws and proposed bills to help employers understand their obligations, better predict where the legislation is headed, and addresses these laws' roles in the larger environmental, social and corporate governance ("ESG") context.

VARIATIONS IN RECENTLY ENACTED PAY DISCLOSURE LEGISLATION

While all pay disclosure laws require some form of pay disclosure, there are five key areas in which these types of laws vary: (1) timing of the disclosure, (2) covered compensation, (3) promotions and transfers, (4) covered situations based on job location and (5) enforcement.



(1) Timing of Disclosure

Pay disclosure laws differ on when disclosure is required. A number of the laws require pay disclosure upon the applicant and/or employee's request during the job application and/or interview process. For instance, California's current law requires the employer to provide the pay scale for a position upon an applicant's request *after the applicant has completed an initial interview*.² In certain jurisdictions, however, the employer is only required to provide the pay scale upon request *after the conditional offer of employment*. Whereas other jurisdictions, such as Colorado and New York City go further, requiring disclosure as early as in the job posting and/or advertisement or Nevada, which requires disclosure automatically after an initial interview even if the applicant has not requested it.

(2) Types of Compensation That Must Be Disclosed

The laws also vary with respect to the types of compensation that must be disclosed. Although all of the jurisdictions that currently have a form of a pay disclosure law require employers to provide a scale or range of base wages or salary, some states require disclosure of broader categories of compensation. For example, Connecticut's law interprets compensation or wages to include commission and bonuses.³ Maryland's code defines wage to include board and lodging among other categories.⁴ Colorado requires employers to provide "a general description of all of the benefits and other compensation to be offered to the hired applicant,"⁵ which includes health care benefits, retirement benefits, any benefits for paid days off, and any other benefits that must be reported for federal tax purposes.⁶

(3) Promotions and Transfers

Many jurisdictions include requirements for employers to disclose wage and salary ranges for *internal* opportunities for promotions and transfers. Some states also impose additional requirements with respect to the manner and timing of publishing opportunities for promotion to current employees. In Colorado, for example, employers must "make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision."⁷

(4) Job Location

With the increasing numbers of remote job opportunities, employers should be mindful of pay disclosure laws that may still govern despite the job posting not being tied to a specific location. For example, Colorado's pay disclosure requirements apply to remote jobs that could be performed anywhere, as long as the job could be performed in Colorado.⁸ New York City requires pay disclosure for jobs that "can or will be performed, in whole or part, in New York City."⁹ Similarly, Connecticut employers must comply with pay disclosure requirements even if the employee is applying for a remote position and is outside the state.¹⁰

(5) Enforcement & Penalties

While some laws enable state and local agencies to impose penalties on employers who fail to comply with applicable pay disclosure requirements, several jurisdictions have created a private right of action for violations of pay disclosure laws."¹¹

EMERGING TRENDS SUGGEST WHERE THIS LEGISLATION IS HEADED

As the pay transparency trend accelerates, jurisdictions are moving away from reactive obligations to provide pay information only upon request by an applicant or employee, and instead are moving towards laws that require proactive wage range disclosure along with more onerous disclosure requirements. A prime example is the recent legislation in New York State, which is waiting for the governor's signature or veto.¹² If enacted, the law would require employers to include a salary range in every advertisement for a job, promotion or transfer opportunity that "can or will be performed,



at least in part, in the state of New York.” In addition to the mandatory salary disclosure, the New York State bill also requires employers to provide the job description, if one exists, in the advertisement.

California’s pending update to its current pay disclosure laws would require greater pay scale transparency. If signed into law by the governor, an employer with 15 or more employees would have to include the pay scale for a position in any job posting.¹³ Employers would also be required to provide a current employee, upon request, the pay scale for the position in which the employee is currently employed. The bill further mandates that employers maintain records of a job title and wage rate history for each employee for the period of employment and an additional three years after the end of employment.

Changes in proposed legislation and amendments to existing laws have highlighted this shift. For example, Massachusetts’ proposed legislation has undergone significant modifications since it was first introduced. Earlier versions of the Massachusetts bill required disclosure of the pay scale only upon “reasonable request” by an applicant or employee.¹⁴ However, the most recent version of the proposed bill requires employers to provide the pay scale for a particular employment position “upon advertising or posting the position.”¹⁵ Other states, like Washington, have successfully amended their pay disclosure laws to require employers to proactively disclose pay information.¹⁶

PAY DISCLOSURE LAWS AS AN OPPORTUNITY AND MEANS OF PROMOTING ESG

With most of the pay disclosure laws discussed above having gone into effect within the past three years, the momentum of implementation of pay disclosure requirements at the state and local level has been swift and reflects a larger societal effort to address pay equity concerns. Employers can seize on these trends by voluntarily undergoing internal pay equity audits and adopting pay transparency for employees through various means, such as disclosing salary bands. A comprehensive strategy also allows multinational companies to consider international recommendations and standards. Whether or not they choose to address pay equity issues proactively, companies should carefully monitor for updates at the state and local level in this rapidly developing area.

Separate from government efforts, increased focus on ESG has led third-party certifications regarding diversity, equity and inclusion in the workplace to consider pay equity in their ratings. While legal requirements with respect to pay equity are still developing at the state and local level, companies aiming to be at the forefront of addressing diversity, equity and inclusion issues are presented with an opportunity to go above and beyond what the law requires, particularly in jurisdictions that have yet to adopt pay disclosure requirements.

King & Spalding’s Global Human Capital and Compliance team is available to assist employers in addressing this complicated and evolving area of law.



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¹ Rhode Island's law is set to go into effect January 1, 2023. 2021 R.I. Pub. Laws, ch. 168, §§ 3,4 (eff. Jan. 1, 2023)

² Cal. Labor Code § 432.3(c)

³ *Questions and Answers Regarding Public Act 21-30*, Conn. Dep't of Lab. (2021), <https://www.ctdol.state.ct.us/wgwkstnd/QandArePA21-30.pdf>

⁴ MD Code, Lab. and Emp., § 3-301(d)

⁵ C.R.S.A. § 8-5-201(2)

⁶ 7 CCR 1103-13:4

⁷ C.R.S.A. § 8-5-201(1)

⁸ Scott Moss, *Statement of Basis, Purpose, Specific Statutory Authority, and Findings, Equal Pay Transparency ("EPT") Rules 7 CCR 1103-13 (2021)*, as adopted on November 10, 2020, Colorado Dep't of Lab. and Emp 5 (2020),

https://cdle.colorado.gov/sites/cdle/files/Equal%20Pay%20Transparency%20%28Nov%202020%2C%20ADOPTED%29%20Statement%20of%20Basis%20and%20Purpose_0.pdf

⁹ *Salary Transparency in Job Advertisements*, NYC Commission on Human Rights 1 (2022)

¹⁰ *Questions and Answers Regarding Public Act 21-30*, Conn. Dep't of Lab. (2021), <https://www.ctdol.state.ct.us/wgwkstnd/QandArePA21-30.pdf>

¹¹ N.Y., Code, § 8-107(32)(c) (**Eff. Nov. 1, 2022**); R.I. Gen. Laws 1956, § 28-6-20(b) (**Eff. Jan. 1, 2023**)

¹² Senate Bill S9427A

¹³ SB 1162

¹⁴ See Bill S. 1208

¹⁵ Bill S2721

¹⁶ SB 5761