

Pay Transparency

Current Trends & Best Practices for Compliance

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Pay transparency laws are increasing in prevalence around the country. These laws are intended to promote fairness and reduce pay disparities based on gender, race, and other factors. Currently, nine states and localities have implemented pay transparency laws, including Oregon's neighbors to the north and south: Washington and California. Although Oregon does not have its own pay transparency law as of the drafting of this article, Oregon employers with operations, employees, or jobs advertised (think remote positions) in any of the states with pay transparency laws, should be aware of their requirements.

Washington

Effective January 1, 2023, Washington State's Equal Pay and Opportunities Act (EPOA) requires employers with 15 or more employees to proactively disclose in job postings:

- The wage scale or salary range for the job; and
- A general description of all of the benefits and other compensation to be offered to the hired applicant.

Importantly, the employee threshold includes employees who do not have a physical presence in Washington, so long as the employer has one or more Washington-based employees. Further, the EPOA's definition of "job posting" is broad and includes "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, and includes any postings done electronically, or with a printed hard copy, that includes qualifications for desired applicants."

The Washington State Department of Labor and Industries (L&I) recently issued guidance on the EPOA's pay transparency requirements, which clarified that all employers, including private, public, unionized, and non-unionized employers, doing business in Washington State are required to comply with the EPOA. Conversely, L&I's guidance explains that employers are not required to disclose wage and salary information for jobs that are to be performed entirely outside of Washington, even if the job posting reaches applicants who could fill the position as a Washington-based employee.

Aggrieved employees may file a complaint with L&I or file a lawsuit if they believe a violation of the EPOA has occurred. Available remedies may include actual damages, double statutory damages (or \$5,000, whichever is greater), interest of one percent per month, and payment of attorneys' fees and costs. L&I may also assess civil penalties ranging from \$500 for a first violation to \$1,000 or ten percent of damages for a repeat violation.

California

California's expanded pay transparency law also became effective on January



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1, 2023, which requires California employers with 15 or more employees to:

- Disclose the pay scale that the employer reasonably expects to pay for the job in any job posting, including those advertised by third parties.
- Disclose, upon request by an employee, the pay scale of an employee's current position. (Note, this requirement applies to employers of any size).
- Retain employment records, including job titles and wage history, for each employee throughout their employment and for at least three years after termination.

The employee threshold is met when an employer reaches 15 employees at any point in a given pay period, and at least one employee is located in California. All employees are included in the employee count for purposes of California's pay equity law, including employees based out-of-state. The California Labor Commissioner issued guidance explaining that a job's pay scale must be included in the job posting if the position *could* be filled by a California resident.

The consequences for failing to comply with California's pay transparency law may be substantial. For example, if an employer fails to comply with the records retention requirement, a rebuttable presumption is created in favor of the employee bringing a pay transparency claim. Additionally, complaints filed with the California Department of Industrial Relations (CDIR) may result in civil penalties ranging from \$100 to \$10,000 per violation.

Other States & Localities

Seven other states have implemented pay transparency laws: Colorado, Maryland, New Jersey, New York, New York City, Nevada, and Rhode Island.

While pay transparency laws vary by state or city, many mirror California's requirement that a wage range must be included in a job posting for any position that could be filled by an individual in the respective state or city.

Compliance

Employers with operations or employees in multiple states, and employers that advertise jobs that could be filled by individuals in other states, should prepare sound compliance strategies to ensure they are complying with respective pay transparency laws. Specifically, employers should consider taking the following steps:

- Review compensation structures for each position, ensuring that they all have wage scales or salary ranges clearly listed;

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- When including a pay range in a job posting, use a low and high number on each end of the scale that encompasses the full pay range (for example “\$60,000 to \$80,000” instead of “\$60,000 and up”);
- Document and retain records of all compensation-related decisions;
- Retain employment records that include job titles and wage history for all employees for at least three years after termination;

- Conduct an internal pay equity analysis to evaluate current wage rates and identify areas for improvement;
- Stay current on changing state guidelines; and
- Reach out to trusted legal counsel for guidance and advice.

Alysha Phelps is an attorney at Barran Liebman LLP, where she focuses her practice on litigation strategy and compliance advice for employers in Oregon and Washington, including pay transparency. For questions, contact her at 503-276-2183 or aphelps@barran.com. Becky Zuschlag is a law clerk and future associate at Barran Liebman LLP, where she supports the firm’s employment, labor relations, and benefits practices.

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