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You Can't Be Serious! Pay Transparency, Pay Equity, and Fee Restrictions

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Evolution of Pay Equity Laws

- Equal Pay Act (1963)
 - Requires men and women to receive equal pay for substantially equal work
 - State laws provided greater protections and expanded to more protected classes
- National Labor Relations Act
 - Employees have the right to discuss wages and share wage information



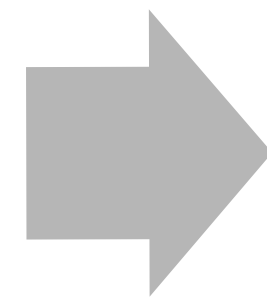
Evolution of Pay Equity Laws

- Salary history bans (starting in 2016)
 - Prohibit employees from inquiring about applicants' past salary or using that information in setting compensation or making employment decisions
- Pay transparency laws
 - Require employers to provide salary information on job postings or other reporting mechanism
- Pay data reporting
 - Requires employers to provide pay and demographic data to enforcement agencies

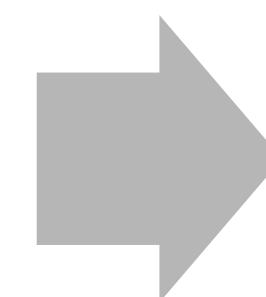


Pay Transparency as a Continuum

**Job Posting
Requirements**



**Pay Data
Reporting**



**Fee Caps/Limits
on Conversion
Fees**



Goal of Pay Disclosure Laws

- Provide consistent information for candidates and employees to evaluate or negotiate higher pay
- Eliminate discrimination
- Achieve pay equity
- Another (intended/unintended) goal for staffing firms: showing your clients the difference between your fees and what workers are paid

Current Laws and Legislation

| Job Posting | Upon Request | With Conditional Offer | Other |
|---------------------------|------------------------------------|-------------------------------|--------------------------------|
| Colorado | California (after first interview) | Connecticut | Nevada (after first interview) |
| Jersey City, NJ (4/13/22) | Maryland | Cincinnati, OH (upon request) | |
| Ithaca, NY (9/1/22) | Connecticut | Toledo, OH (upon request) | |
| New York City (11/1/22) | Rhode Island (1/1/23) | | |
| Westchester, NY (11/6/22) | | | |
| Washington (1/1/23) | | | |
| California (1/1/23) | | | |
| NYS (9/23) | | | |

Additional laws in Illinois; Rhode Island; Albany, NY. Plus, new laws are proposed in Alaska, Massachusetts, Michigan, South Carolina, Vermont, etc.



California

Current employees

- All employers—upon request, employers must provide pay scale for the position

Job postings

- 15+ employees—employers must include the pay scale for the position posted
- Employers that engage a third party to announce, post, publish, or otherwise make known a job posting shall provide the pay scale to the third party and include the pay scale in a job posting



California, cont'd

Applicants

- Maintains the requirement for employers of **any size** to provide the pay scale for a position to an applicant upon reasonable request
- “Pay scale” means the salary or hourly range that the employer **reasonably expects to pay** for the position; only base pay must be posted
- Remote work from CA is covered



California, cont'd

Record-keeping

- Maintain job title and wage rate history for each employee during employment + three years
- Rebuttable presumption in favor of employee if you fail to keep records

Penalties

- \$100-\$10,000 per violation
- PAGA?
- No penalties for first violation if employer demonstrates that job postings have been updated to comply with the law



California—Labor Contractor Reporting

- If an employer hires 100 or more employees through “labor contractors,” the employer must file a separate pay data report covering those employees
- A “labor contractor” is someone that supplies a client employer with workers to perform labor within the client employer’s usual course of business



California—Labor Contractor Reporting

- California Civil Rights Department (through FAQs) has taken a very broad interpretation of “labor contractor”
- A “labor contractor” is an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business
- A client employer’s “usual course of business” means the regular and customary work of the client employer. “Regular and customary work” means work that is performed on a regular or routine basis that is either part of the client employer’s customary business or necessary for its preservation or maintenance. “Regular and customary work” does not include isolated or one-time tasks.
- Example: Janitorial staff performing nightly cleaning and general maintenance of a client employer’s premises would be performing work within the employer’s usual course of business because the work is performed on a regular basis and is necessary for the maintenance of the client employer’s customary business.



California—Labor Contractor Reporting

- A labor contractor must supply all necessary pay data to the employer
- Civil penalties for noncompliance—\$100 per employee for the failure to submit pay data reports, \$200 for subsequent violations
- If an employer is noncompliant to due data not provided by a labor contractor, the court may apportion penalties
- Challenges for staffing companies—disclosure of fees (clients and competitors); likely result is rate suppression



New York State (Eff. 9/17/23) and New York City (Eff. 11/1/22)

- Under both laws, employers are covered if they have four or more employees
- Employment agencies, but not temporary help firms, are covered by the statute
- Minimum and maximum annual salary/hourly range must be included in job ads for new hires and internal promotions
- NY State law requires jobs paid solely on commission to state that in the ad
- NY State law requires inclusion of the applicable job description
- NY State law applies to jobs NOT performed in NY State, but which report “to a supervisor, office, or other work site in New York”
- NY State law requires record-keeping (history of wage rates and job descriptions)
- Independent contractors are counted for NYC ordinance but not for NY State law
- Penalties—NYC-Human Rights Law, three year SOL; NY State-\$1,000 -\$3,000 fine



Important Questions

- What does “compensation” mean?
- How do we comply if we hire nationwide, and multiple states have different requirements?
- How do we handle remote employees?
- Can we define the job such that it cannot be performed in [Selected State] or remotely from [Selected State]?



Important Questions, cont'd

- Do the pay transparency laws apply to high-level positions, or just lower ones?
- How much flexibility do we have in determining the “range”?
- Are we “stuck” paying a candidate what we listed in the job posting?
- How do we comply with pay transparency and pay data reporting requirements as a “labor contractor” without disclosing our fees or rates?



Conversion Fees and Rate Caps

- White House, U.S. Federal Trade Commission, and state governments have expressed concerns over price gouging, particularly for health care staffing during Covid-19
- Laws in CT, IL, IA, KY, LA, MA, MN, and OR
- Laws pending in OH and PA
- Generally, these laws apply to health care staffing companies and require
 - 1) Registration with the state
 - 2) Disclosure of data (staffing agreements, pay information, client charges, etc.)
 - 3) Rate caps
 - 4) Noncompete prohibitions
 - 5) Prohibitions on liquidated damages or other compensation if a nurse becomes a permanent employee of your client
 - 6) Cannot recruit potential employees at your client's health care facilities



Trends and Potential Risks From Pay Equity Legislation

- Likely proliferation of these laws to other states/cities
- EEOC may try to implement the Obama EEO-1 Pay Reporting Requirement
- Lawsuits based on technical violations of the applicable statute
- Pay equity and discrimination claims (disparate treatment and impact)
- Lawsuits based, in part, on job descriptions
- Potential U.S. Department of Labor classification audits
- DEI/unconscious bias
- Competition in the marketplace and compression of rates
- Increased turnover/retention issues
- Union organizing



Compliance Action Items

- National or local approach?
- Determine appropriate pay ranges and criteria for same
- Review existing job postings and job descriptions
- Training supervisors, managers, HR, and recruiters
- Assign a team member to monitor the accuracy of postings so they don't become outdated
- Revise staffing services agreements
- Pay equity audits



Pay Equity Audit

Step 1: Gather relevant data

Step 2: Identify comparable jobs

Step 3: Calculate whether members of a protected class are paid equally in comparison to those outside of the protected class

Step 4: Assess whether differences in pay are justified under applicable law

Step 5: Address unjustified pay differentials (pay changes, promotions, criteria for determining wage rates, etc.)



Questions?

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