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Labor & Employment Alert

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New York State's pay transparency law is now in effect

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Shortly before the law's September 17, 2023, effective date, the New York Department of Labor (DOL) issued proposed regulations and guidance on employer compliance obligations.



What's the impact?

- The law requires employers advertising for jobs in New York State, including certain jobs performed remotely outside the state, to provide a "range of compensation" in "good faith."
- The DOL issued proposed regulations, providing further definitions and examples, and will accept public comments for 60 days.
- The DOL also issued guidance documents, which vary in some respects from the statutory language and the proposed regulations, including on the subject of job descriptions.

The New York State legislature passed the pay transparency bill on June 2, 2022, which Governor Hochul signed into law on December 21, 2022, effective September 17, 2023. In the meantime, Governor Hochul signed amendments to the law on March 3, 2023, as further described below.

Under the law, the New York Commissioner of Labor was directed to promulgate rules and regulations to effectuate the law. Shortly before the law's effective date, the DOL published proposed regulations in the *State Register* on September 13, 2023, for public comment without scheduling a hearing. The DOL also issued guidance documents, largely tracking the proposed regulations but also raising additional questions.

To comply with the law, employers with four or more employees must include the following information in advertisements for any job, promotion, or transfer opportunity for any position "that will be physically performed, at least in part," in New York State:

- / The compensation or a range of compensation for such job, promotion, or transfer opportunity; and
- / The job description for such job, promotion, or transfer opportunity if such description exists.

One of the most significant amendments clarified the law's application to remote workers. Specifically, under the amended law, employers must disclose the compensation or range of compensation for any position physically performed, at least in part, in the State of New York, "including a job, promotion, or transfer opportunity that will physically be performed outside of New York but reports to a supervisor, office, or other work site in New York." This is one of the areas where employers hoped for some clarification in the forthcoming regulations.

The DOL's proposed regulations and guidance on the pay transparency law

The DOL published proposed regulations on September 13, 2023, with a public comment period of 60 days. After that period, the DOL will publish final rules.

Additionally, the DOL issued guidance in the form of a [pay transparency fact sheet](#) and [FAQs](#) on its website for both employers and employees.

POSITIONS REPORTING INTO NEW YORK OR PHYSICALLY WORKING "IN PART" IN NEW YORK

As amended, the law states that job opportunities available outside of New York are covered by the law if that position will report to a supervisor, office, or other work site in New York. The DOL's proposed regulations clarify that this includes any remote or telecommuting opportunities that report to a supervisor or worksite in New York, regardless of where the employee is physically working from. Further, the proposed regulations state that incidental or infrequent work-related visits to New York or mere communication with employees based in New York are not sufficient for the job to be deemed to physically perform work "in part" in New York.

ADVERTISEMENTS DEFINED

The law does not require an employer to advertise or post a job opportunity or use any particular medium, which the proposed regulations confirm. As amended, the law defines advertising to mean “making available to a pool of potential applicants for internal or public viewing.” The proposed regulations elaborate on what it means to advertise a job opportunity, explaining that the law covers advertisements, regardless of medium, through which an employment opportunity is shared with a “pool of potential applicants”—defined as more than one prospective applicant. The proposed regulations give examples of advertisements covered by the law, such as social media posts, an email to a pool of applicants, or any form of communication using an electronic mailing list. The proposed regulations also state that employers are responsible for complying with the law as to all postings they consent to post, whether directly or through a third party, such as a third-party recruiting tool or service. The DOL’s guidance states that employers “are not responsible for any postings that are re-posted or ‘scraped’ by a third-party website without their consent.”

The statute applies to any employer with four or more employees. The proposed regulations also clarify that the law does not apply to governmental agencies.

CONFUSING DOL GUIDANCE ON JOB DESCRIPTIONS

The law states that an employer must include a job description in a covered advertisement “if such description exists.” Despite the clarity of this language, the DOL’s proposed regulations imply that there should be only “limited circumstances” when a job description does not exist.

Going even further, the DOL’s guidance states that “[a]n employer must create a job description except in the limited circumstance where the title conveys the job duties.” The basis for this guidance is not contained in either the law itself or the proposed regulations. As a result, it is expected that the DOL will receive public comments on the proposed regulations on this point, with employers seeking further clarification.

RANGE OF COMPENSATION AND GOOD FAITH REQUIREMENTS

Under the law, an employer advertising for a covered job opportunity must provide, in good faith, the range of compensation it will pay for the position. The proposed regulations provide further definitions and details, including:

- / The “range of compensation” must reflect the minimum and maximum annual salary or hourly range of compensation for the position that the employer, in “good faith,” believes to be accurate at the time of posting the advertisement.
- / “Good faith” means the range of compensation an employer legitimately believes it is willing to pay the successful applicant or employee at the time it posts the advertisement.
- / An employer may adjust the range after collecting additional information through the hiring

process. The proposed regulations also include illustrative examples of both good faith adjustments and lack of good faith.

- / The “range of compensation” solely means the base rate of pay, such as salaried, hourly, or piece rate. Employers may include information about other benefits, but the base rate must be clearly stated.
- / The range must be for a single opportunity in a single geographic region or location; if the advertisement covers multiple positions or locations, then multiple ranges must be included.

The proposed regulations include examples of compensation ranges that would and would not comply with the text of the law. For example, according to the DOL’s proposed rules, a singular fixed rate, such as “\$30 an hour,” may be listed if the employer does not plan to offer a range. However, open-ended pay ranges such as “\$20+ an hour” or “maximum of \$50,000 per year” would not be permitted.

Employer action

Employers now need to comply with this law for all covered advertisements. All employers that advertise for positions based, at least in part, in New York State or that may report to supervisors or offices in New York State should review the proposed regulations and guidance issued by the DOL. Employers may submit comments on the proposed regulations and should continue to monitor developments after the 60-day comment period closes and the DOL issues final regulations.

Lastly, employers with employees or recruiting activities in multiple states and jurisdictions should continue to monitor any future changes in pay transparency laws.

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