

NYC Salary Range Rules Take Shape Amid Recent Crackdown

By Anne Cullen

Law360 (February 16, 2024, 6:48 PM EST) -- Among the series of complaints New York City fired off in the past six months accusing companies of flouting its salary transparency law are three cases that experts said shine a much-needed light on what the city's civil rights enforcement arm considers a reasonable wage range for a job ad.

The New York City Commission on Human Rights leveled 32 complaints between October and December claiming businesses contravened its nearly 1½-year-old salary disclosure mandate requiring good faith pay ranges in all job advertisements.

Under the law, which went into effect November 2022, employers must include a salary band in any posting for a job, promotion, or transfer opportunity that would be based in the city.

Companies caught up in the city's recent crackdown include big names like Tesla and News Corp., career sites including Indeed and CareerBuilder, and law firms Clausen Miller PC and Morgan & Morgan.

The bulk of the cases claim companies didn't post any salaries at all — a clear violation of the law — however, there are three companies that the city accused of posting overly-broad wage ranges.

Experts said the city's rules governing what is considered a reasonable salary spectrum are hazy, but these new filings sharpen the picture.

"There's not a lot of clarity in the law, exactly what they're looking for," said Morrison Foerster LLP employment partner Andrew R. Turnbull. "This does give more direction in terms of what this agency views is not good faith."

Broad Ranges Under Fire

News Corp. is one of the three companies accused of posting unreasonable salary estimates, with the mass media and publishing giant landing in hot water for listing salaries ranging from \$50,000 to \$180,000 for an Albany bureau chief and \$40,000 to \$160,000 for a video journalist.

An hourly range of \$18 to \$48 for a vehicle operator was included in the complaint against Tesla, as well as an annual salary estimate of \$72,000 to \$210,000 for a construction project manager.

New York City went after staffing firm JK Partners Inc. for its suggested salary windows of \$150,000 to

\$225,000 for jobs including Java risk developer, data engineer and business analyst.

All three cases remain open. News Corp. declined to comment, while Tesla and JK Partners did not respond to requests for comment.

Worker-side advocates said they were encouraged by New York City's work in this arena, as they said some companies have been publishing massive wage ranges that undermine the intent of salary disclosure efforts.

"That has been a major issue," said Melinda Koster, a New York-based partner at Sanford Heisler Sharp LLP who co-leads the firm's discrimination and harassment group. "When employers post a huge range with a delta of \$100,000 or more, that has the potential to obscure the pay transparency and essentially nullify the very purpose of this kind of pay transparency law."

However, Christine Hendrickson, a former Seyfarth Shaw LLP partner who is vice president of strategic initiatives at equity-focused technology provider Syndio, told Law360 these complaints raised her eyebrows, as she said New York City enforcers appear to be taking a stricter position than some businesses may have expected.

"It wasn't a surprise to us at all that we're seeing more enforcement. That was something we expected," Hendrickson said. "We had also expected that employers that are not posting ranges would be primary targets for those enforcement actions, and that's exactly what we saw."

"The part that was perhaps surprising, was the narrowness of which they were deeming ranges to not be in good faith," she said.

She said it's common to evaluate salary ranges in terms of percentages. This means the delta between \$50,000 and \$180,000 for the News Corp. position, for example, is over 110%, and the gaps in JK Partners' postings equate to a 40% difference.

That smaller delta is not rare, Hendrickson said. "For many employers, that will come as a surprise, because it's not uncommon to have a range of 40%," she said.

As a result, she said that companies covered by the New York City law might need to take a fresh look at their job ads, as postings they imagined were compliant may not be in light of this new information.

"There's been this big open question of what is a reasonable range," she said. "And this provides an indication for New York City that ranges as wide as 120% are likely going to catch their eyes, but ranges as narrow as 40% may also catch their eyes."

She also said that New York City's position might be echoed by other jurisdictions with salary range requirements, a list that includes Colorado, New York, Washington, California, Hawaii and the District of Columbia.

"Where we have direction, often there is a ripple effect," Hendrickson said. "So what happens in New York often has ripple effects in other jurisdictions that have that have similar laws."

However, Turnbull, of Morrison Foerster, said businesses may not need to enact wholesale change, as he said they just need to be able to back up their posted range.

If you have an employee within that specific job field making roughly the same as the bottom estimate, and another who is paid an amount nearer to the top of the spectrum, that's good evidence to use, he said.

"We've been telling a lot of companies, you have to tether it to something internally, that, if you get an investigator who comes in and says we think this wasn't reported in good faith, you can show," he said.

Grace Period Almost Up

New York City has now filed 43 pay transparency complaints, including its latest batch. While experts said it's too early to tell how effective the wave of pay transparency laws and the following enforcement action has been in terms of getting employers to shape up, they said they're optimistic based on what they've seen thus far.

Seher Khawaja, a senior attorney for economic empowerment at advocacy group Legal Momentum, said the organization has been "delightfully surprised" at how swiftly many businesses are adjusting to the new landscape.

"I really do think that a lot of employers are increasingly getting on board with pay transparency, both voluntarily and both in terms of complying with existing laws," Khawaja said. "A lot of employers are getting the message that this is the path forward."

Several companies that wound up in New York City's crosshairs told Law360 the cases against them were resolved relatively quickly and painlessly.

Morgan & Morgan told Law360 that the case kicked off in October has been dismissed. Indeed, which was hit with a complaint in November, said the enforcer dropped its case in February, following Indeed's communication about its policy requiring companies posting job ads to include wage details, or to certify that the city law does not apply to the post.

And a case opened in December against architecture firm Interior Architects wrapped up quickly, too, according to the company. The firm said upon notification of the complaint, it "immediately" resolved the commission's concerns "amicably," updated all of its New York City job postings with salary details, and did not face a fine.

Just over half of the salary disclosure complaints New York City has lodged since October are already closed, according to its site.

New York City's law has a grace period built in, as the statute states that no civil penalties will be imposed if a first-time complaint recipient fixes the problem within a month. None of the public complaints seek a monetary penalty, and a New York City spokesperson confirmed no companies have been penalized yet.

Experts said the city appears to be giving companies plenty of time to get up to speed.

"These recent enforcement actions suggest that the commission itself might be extending a grace period in connection with remedies that it is imposing," said Sanford Heisler's Koster.

However, attorneys warned that companies shouldn't get complacent, as the law allows for fines of up to \$250,000 per violation.

"It's very early, so it's certainly possible that the commission will seek a wider range of penalties that are available under that law," Koster said.

Turnbull, of Morrison Foerster, said New York City's enforcement activities "show the risk in this space."

"If companies don't comply, there is a fairly big hammer for the commission on human rights, they can assess civil penalties up to \$250,000, which is pretty hefty," he said. "And they have fairly big discretion on how to assess penalties, so it's certainly something that companies will have to think about when they're doing this."

"We're probably only going to see more and more, whether it's regulatory enforcement or private litigation here," Turnbull said.

--Additional reporting by Daniela Porat, Amanda Ottaway and Vin Gurrieri. Editing by Amy Rowe.

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