

## 4 Questions As NYC's Pay Transparency Law Kicks In

By **Vin Gurrieri**

*Law360 (November 7, 2022, 6:03 PM EST)* -- New York City recently joined the ranks of jurisdictions that require employers to disclose a pay range in job advertisements, adding to an assortment of state and local pay transparency laws that are creating compliance and recruiting challenges for large employers.

The Big Apple's pay transparency statute, which is an amendment to the NYC Human Rights Law, was passed by city lawmakers in December 2021. That version of the law was **later diluted** and delayed, as lawmakers pushed its original mid-May effective date to Nov. 1.

The law mandates that businesses with at least four employees, one of whom works within New York City, include ranges for salaries in job advertisements.

Even though the law has been in effect for only a few days and employers have had plenty of time to prepare, attorneys say many of the compliance questions they've had in the run-up to the law's implementation remain. Moreover, the growing pay transparency movement is creating a patchwork of laws that makes national recruiting more complicated, attorneys say.



New York City's pay transparency statute, which requires certain businesses to include salary ranges in job advertisements, went into effect on Nov. 1. (Jenn Moreno/VIEWpress via Getty Images)

"Salary transparency is the latest tool in an attempt to ensure equal pay, but New York City and the handful of other states that have passed laws are taking different approaches that could limit how effective it ultimately is," said Peter Glennon of The Glennon Law Firm PC, a Rochester, New York-based attorney who represents both plaintiffs and defendants.

Here are four questions facing businesses as more pay transparency laws come online.

### **How Will Salary Ranges Be Defined?**

The growing trend toward job ad pay transparency legislation started in Colorado, which was the first state to require that employers publicize compensation ranges and offer a general description of benefit information in job postings. The law passed in New York City joins similar legislative proposals that have been, or are close to being, enacted in California, Washington and New York State.

In New York City's version, employers must state the minimum and maximum salary that they "in good faith believe" the advertised job will pay at the time the ad is posted, not including benefits or other compensation like commissions or tips, according to guidance the city issued earlier this year.

For employers, one immediate compliance issue is figuring out exactly how to set the annual salary or hourly wage range while still adhering to the law's "good faith" requirement, according to Alexandra Garrison Barnett, a partner at Alston & Bird LLP.

"Employers are wondering how to define the salary range, the applicable salary range for various positions, and whether it needs to be tethered to amounts they previously paid or currently pay employees in the position," Barnett said. "Or if, for example, the outer limits of the range can exceed what they pay or have paid to provide flexibility if a really outstanding candidate comes along."

In scenarios when an exceptional job applicant blows an employer away but makes a salary demand that exceeds the posted job range, Barnett said employers are still unsure about the extent to which they can veer from the salary they posted.

While that may be a specific hypothetical, Barnett said it remains to be seen whether job applicants will view posted salary ranges as rigid or as a starting point for negotiations.

"There [are] open questions about what are the implications for making an exception [to pay] someone an amount that is outside of the posted range, and how such a decision would be defended by an employer if they do that," Barnett said.

### **Will Current Employees Use Posted Ranges to Seek Higher Pay?**

On top of applicants being able to see salary ranges for positions under the city's new law, current employees whose jobs are similar to the ones a company advertises will glean insight into how their pay compares, Barnett said.

If there is a wide enough gulf, it could give current workers an impetus to seek raises, an eventuality that employers should keep in mind when setting salary ranges for prospective employees.

"Armed with that pay range information, those current employees might feel emboldened and equipped to ask for a raise," Barnett said. "So employers need to be cognizant of the potential for that to occur when they're setting the pay ranges and be prepared to respond to those inquiries from current employees if someone asks why they aren't earning amounts at the top of the range or if an employee requests a raise based on the pay scale information that's disclosed in postings."

Barnett also noted that it may be easy for employers to overlook the detail of whether posted salary ranges generally track with current salaries.

It is important for employers "to make sure that there is alignment between what employees are currently making and the range that the employer is advertising to prospective employees," she said.

### **How Will NYC's Law Intersect with Remote Work?**

One lasting effect of the COVID-19 pandemic is that many employers, especially those with national

footprints, converted large swaths of their workforce into remote employees.

The NYC Commission on Human Rights has clarified in guidance that the new pay transparency requirements will apply to any written ad for a new job as well as promotion or transfer opportunities that would be performed at least partially in New York City, including those that will be performed remotely from someone's home.

Ads include those posted internally on a company's bulletin boards, in print or on the internet, and the transparency requirements also apply to jobs seeking part-time workers, independent contractors, interns, or anyone else covered by the NYCHRL, according to the city's guidance.

Michael Schulman, a partner at Morrison Foerster LLP, said employers "have been contending with the need to comply with and the impact of the new law" since it was initially passed, and that one question they have been struggling to answer is which job postings must comply with the new requirements," particularly given the reality of telework.

"The law applies to advertisements for positions that would be performed in New York City," Schulman said. "However, determining whether a position will be performed in New York City is particularly complicated given the recent proliferation of remote work and the tight labor market. Many employers are willing to fill a particular position with talent and don't feel strongly about the location of the candidates."

Some employers, he said, may try to "avoid questions about whether they need to comply with the salary transparency law" altogether by "clarifying that certain advertised positions will not be performed within New York City."

Other companies, Schulman said, may eschew job postings or advertisements altogether as part of their recruitment efforts and instead lean on recruiters or internal talent departments to target candidates.

"Efforts to avoid the requirements of the law might be thwarted as additional jurisdictions pass similar requirements," Schulman said.

Glennon similarly noted that it'll become harder for some companies, particularly larger employers and those that advertise jobs online, where people from any place in the U.S. can see them and apply, to create carveouts for jurisdictions with transparency requirements as more pay transparency laws take effect.

He noted that in the immediate aftermath of Colorado's law, employers advertising remote positions were doing so with disclaimers excluding applicants from Colorado.

"What we see happening are the employers ... they have to now start modifying their process," Glennon said. "What we'll see is larger employers will start complying with the most restrictive wage transparency law, if they're pushing things out on the internet, because we know that the internet is going to be accessible from anywhere."

### **How Will Posted Salary Information Be Used?**

Although New York City's law initially included a broad right for workers and job applicants to sue for violations and seek damages, Glennon noted that it was dramatically scaled back before

implementation.

Under the law's final iteration, only a current employee — not prospective employees — can bring a suit alleging that a company didn't post salary ranges in job ads.

"Originally, it [had a] broad basis for private right of action, not only for current employees but for prospective employees," Glennon said. "But then everybody started to realize that there are a lot of challenges [in] being able to determine if an individual has proper standing, so they tightened that up."

While that modification may lower the volume of potential lawsuits and leave enforcement responsibilities largely on city regulators, advocacy organizations may still be able to pressure companies outside the courtroom if they don't live up to the promises they set in job ads.

"What we might see is some more public advocacy, not as much litigation, but public advocacy coming out of it," Glennon said. "And I imagine somebody will probably start trying to track or do a study to compare those broad [salary] ranges to the actual salaries provided when somebody is hired."

"Again, that will be challenging, because we're talking about the private sector," he added. "But I think what we'll see is, before any individual litigation, we'll see more interest groups."

--Editing by Haylee Pearl.