

# CLIENT ALERT

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## New York City Pay Transparency Law to Take Effect November 1, 2022 New York State May Be Right Behind

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On January 15, 2022, New York City enacted legislation requiring all covered employers advertising jobs in (or that *could* be performed in, even remotely) New York City to include a “good faith” salary range for every job, promotion and transfer opportunity advertised, internally or externally. When first passed, the new law attracted considerable attention and was set to go into effect in short order on May 15, 2022. However, the City Council recently and significantly amended the law, which was signed by Mayor Eric Adams on May 12, 2022. Most notably, the amendment pushes back the effective date of the new law several months to **November 1, 2022**, providing employers some additional breathing room.

In sum, the pay transparency law makes it an “unlawful discriminatory practice” under the New York City Human Rights Law for an employer to advertise a job, promotion, or transfer opportunity without stating the position’s minimum and maximum salary.

The recent amendments to the law were passed in response to concerns that it was unclear, too burdensome, and that the initial effective date of May 15, 2022 did not leave employers adequate time to prepare. Employers should take note of this recent amendment, as additional extensions to the law’s effective date are unlikely.

A detailed summary of key points from this new legislation are below.

### Who is a “Covered Employer”?

The new pay transparency law applies to most New York City Employers. All employers that have four or more employees (including owners and individual independent contractors) in *or* outside New York City (so long as at least one is in New York City) or that have one or more domestic workers are covered by the pay transparency law. Employment agencies are also covered by the new law, regardless of their size.

There is a limited exemption for job advertisements for “temporary employment at temporary help firms.” Temporary help firms are defined as businesses that recruit and hire their own employees and assign those employees to perform work at or perform services for other organizations or businesses.

### Requirements for Covered Advertisements

As discussed above, any advertisement for a job, promotion, or transfer opportunity that would or *could* be performed in New York City must comply. An “advertisement” is defined broadly, and includes a written (including online or electronic) description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants, regardless of the medium used (. For example, covered listings include bulletin board postings, internet advertisements, printed flyers

distributed at job fairs, and newspaper advertisements.

For covered job advertisements, Employers must provide the minimum and maximum salary they *in good faith* believe at the time of the posting they are willing to pay for the advertised job, promotion, or transfer opportunity. The use of the term “good faith” was particularly criticized for its ambiguity, and need for further clarification. The amendments to the law provide some clarity, namely that both a “minimum and maximum base annual salary or hourly wage” must be provided, and certain open-ended phrases such as “\$15 per hour and up” or “maximum \$50,000 per year” are not consistent with the law’s requirements. The amendment also makes clear that alternative forms of compensation and fringe benefits are excluded and need not be disclosed in job advertisements, such as group employee benefits (e.g., health insurance), overtime pay, tips, commissions, bonuses, or equity or other incentive grants.

Interestingly, the law does not force employers to advertise available jobs. In other words, a document listing maximum and minimum salary ranges need not be created if no advertisement is used for a particular job search.

### **Enforcement and Penalties**

Like other provisions of the NYCHRL, the Pay Transparency Law carries stiff potential penalties and is subject to investigation by the Commission on Human Rights, and/or The Law Enforcement Bureau. Testing, tips from the public, and other sources of information can be utilized by these agencies. Finally, although individuals continue to have a private right of action against employers for violations of the pay transparency law, the law’s recent amendment clarifies that *only current employees* (and *not* applicants who are never ultimately hired) may pursue a private right of action against their employers. This helps alleviate the risk of applicants (whether real or feigned) from trolling the text of job advertisements to pursue private claims against prospective employers.

Employers found to violate the pay transparency law may be required to pay monetary damages to

affected employees, amend advertisements and postings, create or update policies, conduct training, provide notices of rights to employees or applicants, and engage in other forms of affirmative relief.

In an important departure from the original law, the amendment provided a new “first strike” opportunity to cure. In sum, the Commission will not assess a civil penalty against an employer for a first complaint alleging a violation of the salary transparency provision, provided that the employer shows proof that they have cured the violation within 30 days of receiving the Commission’s notice of the violation. Otherwise, covered employers may be assessed civil penalties of up to \$250,000 for an uncured first violation of the new law, as well as for any subsequent violations.

### **New York State Pay Transparency Law**

In addition to the New York City law, on June 3, 2022, the New York State Legislature passed Senate Bill 9427A, which if enacted would require employers statewide to also include a salary range *and* position description in each job advertisement. The statewide bill is similar in many respects to the New York City Pay Transparency Law, although there are some differences.

Like the New York City law, the state bill provides that employers with four or more employees must disclose the (i) actual salary, (ii) minimum and maximum starting salary, or (iii) hourly wage that the employer “believes in good faith to be accurate at the time of posting” for any advertised “job, promotion, or transfer opportunity that can or will be performed, at least in part, within the State of New York.” The New York State bill goes further and also specifies that an employer must include a general statement if commission compensation will be provided instead of a fixed salary amount or a range, as well as a job description for the position, to the extent one exists.

Violations of the state law are subject to investigation and prosecution by the New York State Department of Labor. Moreover, any “aggrieved” person (including applicants) can file a complaint that an employer violated the law. Employers found to be in violation of the law may

be assessed civil penalties not to exceed \$1,000 for the first violation, \$2,000 for the second violation, and \$3,000 for the third and subsequent violations. At this time, there appears to be no “first strike” cure period in the proposed law, unlike its New York City equivalent.

If signed, the new statewide law would take effect 270 days after Governor Kathy Hochul signs the bill. We expect that if signed, the New York State Department of Labor will issue additional enforcement guidance. We will continue to monitor any other developments as well.

### **Recommended Actions for Employers**

Employers should prepare to bring their job advertisements into compliance in advance of the November 1, 2022 effective date. Employers should first take steps to ensure job positions and titles used in the workforce are accurate and consistent. Employers should also document and determine good faith salary ranges for each position (using existing and former employee compensation levels as a guide). Employers should also use this time to review and update their policies regarding the publication of job postings, including internal promotion and transfer opportunities, and ensure centralized control of recruiting (either through human resources or specific trained managers). Finally, other wage and hour compliance “red flags” are potentially required to be disclosed within job advertisements under the new laws, and should be reviewed and adjusted accordingly. For example, jobs that pay below the statutory hourly minimum wage or federal and state salary thresholds, as well as positions that are vulnerable to overtime exemption misclassification lawsuits, should be reviewed in depth.

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