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Washington's New Pay Transparency Law: The Department of Labor and Industries' Administrative Policy Is Here

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Just in time for implementation of the hotly anticipated Washington salary posting requirements, the Washington State Department of Labor and Industries (“L&I”) released its final administrative policy regarding the Washington Equal Pay And Opportunities Act (“the Equal Pay Act”).

This new policy, number ES.E.1 (“the Policy”), answers many outstanding questions employers have had regarding how they should comply with the new wage disclosure requirements beginning on January 1, 2023.

In addition to outlining the rights of employees and prospective employees under the Equal Pay Act, the Policy clarifies which employers must comply with wage disclosures

and what should be included in job postings for applicants and disclosures to existing employees seeking new positions.

Wage Scale Or Salary Range Disclosure Requirements

The Policy clarifies that the Equal Pay Act requires all employers with “15 or more employees, engaging in any business, industry, profession, or activity in Washington” to disclose a wage scale or salary range for any new job posting.

Who Must Comply?

If an employer has at least one Washington-based employee, the “15 or more employee” threshold is met, even if all other employees are not physically located in Washington.

The disclosure requirements also apply to an employer that does not have a physical location in Washington, but engages in business in Washington or recruits for jobs that could be filled by a Washington-based employee.

Thus, if a position could be filled by a remote worker living and working in the state of Washington, the posting for that position must include a wage scale or salary range and a general description of benefits and other compensation. The Policy makes clear that an employer cannot avoid making disclosures by indicating within the posting that the employer will not accept Washington State applicants.

On the other hand, an employer does not need to disclose wage and salary information for jobs to be performed entirely outside Washington, even if the job posting reaches Washington-based applicants. This limited out-of-state exemption must be applied narrowly, on a case-by-case basis and should be tied to a specific worksite located outside of Washington. Additionally, employers do not need to disclose wage and salary

information in printed, hard copy postings made and distributed entirely outside of Washington.

Who Does This Law Protect?

Under the modified Equal Pay Act, all *applicants* who apply to a posting recruiting Washington-based employees, are protected. A person is only considered an “applicant” for the specific posting(s) they applied for, not for every available job at the employer. Applicants are not only prospective employees, but also include existing employees who are applying for a different position with their employer.

What Must Be Disclosed?

Beginning on January 1, 2023, applicable employers must disclose, in each posting for each job, the wage scale or salary range and a general description of all of the benefits and other compensation.

Wage Scale Or Salary Range

The wage scale or salary range should be the employer’s most reasonable and genuinely expected range of compensation for the job. The range should extend from the lowest to the highest pay established by the employer prior to publishing the job posting. If the employer does not already have an existing wage scale or salary range for a position, it must establish one prior to publishing the posting. Notably, the Policy appears to focus on the range established *for the job generally*, rather than the range of compensation that the employer expects to pay *the successful candidate*. Going further, the Policy states that if an employer “intends to implement a ‘starting range’ or ‘starting rate’ for an initial timeframe of employment or probationary period, the starting range or rate may be listed on the posting *but the entire scale or range must also be listed on the*

posting.” (emphasis added). This approach potentially differs from how other state and local agencies have interpreted those jurisdictions’ salary range disclosure laws (e.g., Colorado and New York City).

The Policy also states that a posting’s listed scale or range cannot be left open-ended at either the top (i.e., \$60,000 per year and up) or at the bottom (“up to \$29.00/hour”). In addition, if a job is compensated by commission rates, the employer must include the rate or rate range that will be offered. Similarly, if the job is compensated by piece rate, that piece rate or wage scale should also be listed.

General Description of All Benefits or Other Compensation

In addition to the wage scale or salary range for the position, employers must identify a “general description of all benefits or other compensation.” This includes, but is not limited to, health care benefits, retirement benefits, any benefits permitting paid days off (including more generous sick leave accruals, parental leave, paid time off or vacation), discretionary bonuses, stock options, commissions, or other forms of compensation.

Employers do not have to include the total monetary value of the benefits offered, but may choose to do so.

Can I Negotiate?

What if you wish to offer a salary that is outside of the posted wage scale or salary range? The Policy provides that if the wage scale or salary ranges changes after a posting has been published, the employer should update the posting to reflect the updated wage scale or salary range. Further, it suggests that an employer may offer a different position than what the applicant applied for and if so, should disclose the wage scale or salary range specific to the position offered.

Electronic Postings

If the job posting is electronic, L&I explains that employers may utilize a link or hyperlink to lead the application to a more detailed description. Similarly, if the benefits and other compensation information is available on the original or subsequent web pages, then the information needs to only be listed at least once. But employers remain responsible to assure all links are functioning, even if they are maintained by third-party administrators.

What Should You Do To Prepare?

If you have not yet done so, employers hiring in Washington in 2023 should ensure that all job postings intended to recruit a job applicant contain the required wage scale or salary range plus the general description of all of the benefits and other compensation for the specific position. Remember, penalties for failure to comply with the Equal Pay Act are steep and can range from actual damages or \$5000 (whichever is greater), civil penalties ranging from \$500 to \$1000 per violation, and costs and reasonable attorneys' fees. Seyfarth's Seattle office can assist you with these disclosures and answer any related questions you may have.

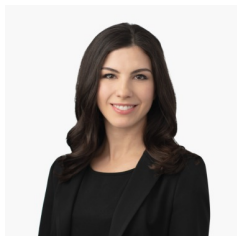
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