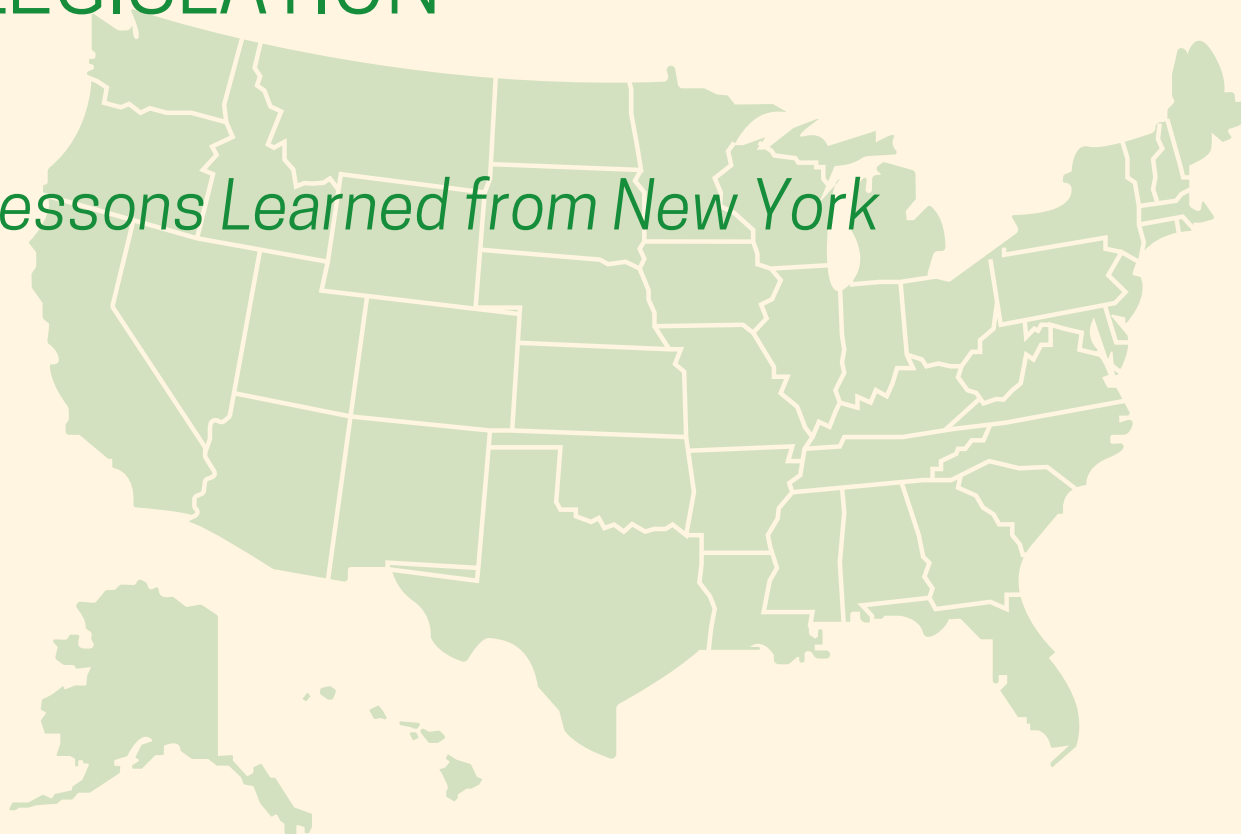


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TRANSPARENCY PAYS

GUIDANCE ON ENACTING PAY TRANSPARENCY LEGISLATION

Lessons Learned from New York



LEGALMOMENTUM®

The Women's Legal Defense and Education Fund™

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INTRODUCTION

In a market that has long devalued work carried out by women and people of color, employers continue to utilize hiring and salary-setting practices that entrench discriminatory decision-making. Among these practices, pay secrecy is particularly pernicious as it fosters pay inequity. Shrouding pay conceals problematic pay disparities and perpetuates reliance on bias in salary setting, while shielding employers from accountability and disincentivizing implementation of more equitable pay schemes.

State legislative efforts to advance pay transparency are helping to dismantle these practices, empowering workers with critical information to better advocate for themselves while mandating employers to improve their pay practices. These efforts include legislation to require employers to disclose pay ranges during hiring; to report pay data by gender, race, and ethnicity; and to protect workers' rights to share pay information.

Working in collaboration with core partners as part of PowHer New York's Equal Pay Campaign, Legal Momentum helped enact groundbreaking pay transparency laws in New York City and New York State that require employers to disclose pay ranges in any advertisement for a job, promotion, or transfer opportunity.[1] These laws, along with similar laws in Colorado, California, Washington and other states and localities, are contributing to a significant shift towards pay disclosure and can serve as a model for similar legislation nationwide.[2]

Building upon lessons learned in New York, including a review of compliance thus far and ongoing advocacy to strengthen existing legislation, this Guidance is intended to serve as a resource for state and federal policymakers and advocates working on legislation to mandate disclosure of pay ranges during the hiring process. To that end, the Guidance highlights the need for these laws, best practices for enacting legislation, and key considerations and components, to support the enactment of meaningful and effective pay transparency protections.

WHY PAY DISCLOSURE IS ESSENTIAL TO CLOSING THE GENDER AND RACIAL PAY GAPS

Under our longstanding system of pay secrecy, workers typically apply for, interview for, and negotiate salaries without knowing the available pay range for a position; and employees typically work without knowing what their colleagues earn.

In this context, women have historically been paid significantly less than male coworkers, based on discriminatory biases, for doing the same or substantially similar work or have been subject to occupational segregation, where they are pushed into lower paying roles often designated as “women’s work.”

Pay secrecy especially disadvantages women and people of color, who, because they have historically earned less due to discriminatory practices, have less leverage and are thus in a weaker position to negotiate higher salaries without information about compensation rates.

Based on the assignment of unpaid caregiving responsibilities to women, employers are known to offer women lower salaries based on discriminatory stereotypes that mark women as unreliable and less competent.[3] Conversely, employers are known to reward male candidates, who are less likely to take on these responsibilities, with higher salaries based on views of men as dependable breadwinners.[4] Employers also undervalue the work of people of color, and especially of women of color, who have long been overrepresented in the lowest-paid occupations in the American economy. [5]

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In a system in which prior salary dictates future salary, this dynamic feeds an ongoing cycle in which women's salaries are artificially depressed, based on systemic inequities and biased notions about what an "exceptional" employee looks like.[6]

As a result of these discriminatory notions, women and people of color are offered less and make less, and typically carry those depressed salaries throughout their lives, often passing them on to future generations.

For too long, pay secrecy has contributed to a protracted pay gap, denying workers critical information needed to identify pay disparities and advocate for equitable and fair pay while allowing employers to make discretionary, candidate-specific decisions about pay that incorporate conscious and unconscious biases about women and people of color. Requiring employers to disclose pay upfront in job postings will make meaningful strides towards reducing inequity, combating discrimination, and improving employer pay practices.

CORE BENEFITS

Requiring employers to disclose pay in job postings helps reduce inequity, combat discrimination, and improve employer pay practices.

01

Increasing Employer Objectivity & Reducing Bias in Salary Setting

Mandating disclosure of pay ranges in job posting encourages employers to price the job and not the person when setting a pay range. Employers must contemplate a range before meeting candidates based on objective factors—such as qualifications, experience level, competencies, job expectations, budget, and the existing payscale for the position.[7] Because pay rates are visible, employers have an incentive to develop more fair and equitable compensation schemes based on these factors instead of making ad hoc decisions that center around subjective candidate-specific assessments, which are known to incorporate implicit gender and racial biases.[8]

02

Increasing Worker Leverage & Mobility

Women and people of color enter salary negotiations with less leverage because their salaries have historically been artificially depressed due to intersecting forms of discrimination. Providing legitimate pay ranges in job postings helps level the playing field, giving all workers, including those with the least amount of leverage, the same basic information about the value employers assign to particular jobs and what an employer plans to pay for that position based on a number of variables. Candidates can now use the pay range to ask important questions and to negotiate based on their skills and experience rather than their prior salary.

CORE BENEFITS

03

Disrupting Occupational Segregation

Women and people of color have historically been segregated into low-wage, undervalued jobs and paid significantly less. While addressing occupational segregation requires broad efforts to increase wages in these industries, workers have an important role to play. Secrecy around pay has made it impossible for the most marginalized workers to have a sense of what different industries pay, preventing workers from identifying better-paying industries and better paying employers. Pay transparency laws requiring disclosure of pay ranges help women and people of color understand the value that employers assign to different jobs, empowering them to make better more informed decisions about what jobs, employers, and industries to pursue.[9]

04

Safeguarding Low-Wage Workers

Employers in lower-wage, minimum wage, piece rate, and tipped wage industries often target and recruit vulnerable workers, taking advantage of their economic insecurity and/or immigration status. Many of these employers violate or try to skirt labor protections, offering below the minimum wage, failing to pay overtime, and engaging in a range of other wage theft practices.[10] The absence of transparency encourages informality that fuels exploitation. Pay transparency laws that require all employers to disclose wages in job advertisements or upon request, including help wanted signs, make it harder for employers to set exploitative wages behind closed doors. They also help workers identify employers paying above minimum wage. Pay transparency laws play an important function for lower-wage workers and should be sure to include them as beneficiaries.

CORE BENEFITS

05

Advancing Employer Interests & Creating Better Workplaces

Salary transparency is good for employers. Disclosing salary eliminates inefficient hiring practices, helping to bring in candidates who are best suited and committed to carrying out the job advertised within the pay range contemplated and allowing candidates to apply only for those jobs that meet their salary requirements. Salary is one of the most important factors for candidates, and disclosing it also gives employers a competitive advantage by making employers more attractive to workers.[11] By eliminating unfair schemes that breed resentment and result in higher turnover, disclosure allows employers to attract a better qualified applicant pool, and increase trust, job satisfaction, employee engagement, worker productivity, retention, and profitability.[12] Businesses, big and small, across the United States are seeing these benefits and moving towards a practice of disclosing compensation ranges in job advertisements.

06

Doing What Works

Research conducted in jurisdictions that have enacted pay transparency provisions and among employers who have adopted transparent pay practices shows that pay transparency laws do in fact help reduce the gender pay gap.[13]

ESSENTIAL COMPONENTS OF EFFECTIVE PAY TRANSPARENCY LEGISLATION

Based on Legal Momentum’s advocacy to enact pay disclosure legislation and analysis of gaps in existing protections, we have identified key components that should be included in laws aiming to help achieve the goals outlined above to advance gender and racial pay equity; increase fair pay; and to uplift the most vulnerable workers, including women, people of color, and low-wage workers.

PROACTIVE PUBLIC DISCLOSURE

Legislation that only mandates disclosure upon request or at certain stages in the application process is less effective in tackling pay inequity. This approach fails to address or alleviate vulnerabilities for workers facing the greatest barriers, namely women, people of color, and lower-wage workers. Workers with less power and leverage are less likely to request pay information for fear that it will result in retaliation and disadvantage them in the hiring process. Mandating public disclosure in job advertisements helps alleviate some of these vulnerabilities and drives equity more broadly and consistently.

Pay transparency legislation should therefore require that employers make proactive disclosure upfront in all advertisements for new jobs, promotions, and transfer opportunities shared both externally and internally. To prevent employers from circumventing disclosure requirements, legislation should also require employers to disclose pay ranges upon request in scenarios where employers do not post a job advertisement.

DISCLOSURE OF A LEGITIMATE PAY RANGE

Pay transparency laws in New York City and New York State require disclosure of a “good faith” range, an ambiguous term that fails to provide sufficient parameters on the type of range required. Based on Legal Momentum’s tracking, we have seen some employers use this vague standard as a loophole to post overly broad ranges in which the top salary exceeds the bottom salary by anywhere from 40–70 percent.^[14] These ranges obscure or conceal the true range and undermine pay transparency. These ranges also encourage employers to perpetuate discriminatory practices of offering significantly higher salaries to certain candidates based on prior salary, a practice which is also prohibited under many state laws.^[15]

To address these concerns, legislation should require employers to post “the minimum and maximum pay range that the employer actually believes it will pay for a particular job based on factors such as relevant qualifications, the budgeted amount available for the position, applicable pay scale or compensation model relied upon by the employer, the actual range of compensation for those currently holding the position or equivalent positions, or other operational considerations.”

Legislation should further specify that “the breadth of the wage range provided is one factor relevant to the analysis of whether the wage range has been set in good faith” and that the range is for a single opportunity. Advertisements seeking to cover multiple levels, bands, and geographic locations should do so by including multiple ranges.

Laws in New York City and New York State only require that the range be in good faith “at the time of posting.” While this language is meant to give employers leeway to revise the range based on changed circumstances, it also creates a dangerous loophole for employers to pay outside the range without transparency and to revert to discriminatory decision-making.

Employers should be discouraged from paying outside the range and encouraged to consider the full range of qualifications when establishing a range so as to limit adjustments. If adjustments are necessary and the employer seeks to offer outside the range, employers should be required to reissue the posting with the revised pay range to ensure ongoing transparency.

DISCLOSURE OF BASE PAY, OTHER FORMS OF COMPENSATION & BENEFITS

In many industries, base wage or salary does not capture the full spectrum of compensation. Employers regularly offer a variety of compensation packages, including bonuses and stock options, and these packages vary by worker even in cases where workers share the same job title and responsibilities. As a result, these additional forms of compensation can serve as key drivers of inequity. Access to critical benefits also advances gender equity. Because women are disproportionately tasked with caregiving and bear the cost of pregnancy, access to benefits like sick time, paid family leave, and healthcare is often essential when considering a job opportunity, yet women often refrain from inquiring about these benefits upfront due to fear of retaliation.

Pay transparency legislation is therefore more effective in addressing gender and racial pay discrimination *when it mandates disclosure of base pay, regardless of the frequency of payment; all known forms of compensation; and a general description of core benefits such as healthcare, paid time off, and paid family leave. Legislation should require disclosure of applicable ranges for any known yet discretionary forms of compensation, like bonuses.*

DISCLOSURE TO EXISTING EMPLOYEES

To effectively tackle gender and racial pay discrimination, employers need to address inequities in their existing compensation schemes. One way to force employers to begin this process is by requiring them to engage in broad internal pay transparency. This means that *employers should be required to disclose the current compensation range to existing employees for their current title. One way employers can easily do this to ease burden is to maintain a deidentified list of all existing employees that includes job title, rate of pay, gender, race, and ethnicity that is updated annually and internally available to all employees. Employers should also be required to publicly disclose deidentified pay data by gender, race, and ethnicity, and should be tracking and maintaining this data internally.*

This type of pay transparency helps us get to the heart of pay discrimination, by allowing workers to assess whether they are paid fairly and to encourage employers to maintain thoughtful, equitable, and fair compensation schemes that withstand public scrutiny. *In addition to mandating disclosure of compensation ranges in job postings, legislation should therefore mandate disclosure of current compensation ranges (including base pay plus other forms of compensation) to employees annually and upon request, with safeguards against retaliation.*

DISCLOSURE OF JOB DESCRIPTIONS

Women, particularly women in lower-wage work, regularly accept positions at a particular wage only to see their job responsibilities expand while their wages remain stagnant. The absence of written job descriptions encourages informality, which often results in wage theft, with employers expanding job responsibilities without negotiation and without pay increases. The absence of a clear job description also creates ambiguity that can make it difficult for women to establish pay inequities in cases where they know they are being paid less to do the same job as their male counterparts. Job descriptions—which list duties and expectations—provide some basis for distinguishing the low and high ends of the pay range and are thus critical towards assessing whether a salary range is overbroad or legitimate. *Legislation should mandate that advertisements include job descriptions alongside pay ranges, to give context to the pay range and to serve as a check on exploitative labor practices.*

DEFINING “JOB ADVERTISEMENTS” BROADLY

Pay transparency laws should benefit all workers, including workers across all industries and workers in lower-wage industries. *To ensure all workers are effectively covered, the term “advertisement” or “posting” in pay transparency legislation should be defined broadly to include all written and electronic forms of advertisement, including signs displayed in store windows and email communications, even if one-on-one. Laws should apply insofar as the information has been displayed or distributed to one or more potential applicants. When drafting legislation, keep lower-wage workers in mind as intended beneficiaries of these laws and avoid provisions and language that exclude them.*

COVERAGE OF ALL EMPLOYERS

All workers deserve pay transparency. Carving out small businesses from coverage under pay disclosure laws excludes some of most vulnerable workers from protection. In New York City and New York State, attempts to narrow the applicability of the law to only businesses with 15 or 20 employees or more would have excluded a significant number of employers and workers, including women working in restaurants, nail salons, hair salons, retail stores, and daycare centers. This type of exemption simultaneously excludes many small yet high-revenue employers, including boutique law firms and hedge funds. Moreover, transparency laws do not impose onerous requirements on employers, and they are arguably less onerous on small businesses, which have smaller budgets and fewer employees to track, and thus should be able to easily determine and disclose compensation ranges during their hiring process. Excluding small businesses also puts them at a competitive disadvantage in an environment where workers increasingly expect to see a pay range.

Pay transparency legislation should cover all workers and thus all employers. Instead of excluding small businesses from compliance, which inevitably excludes a large number of women workers in lower-wage industries, legislation can build in specific assistance, guidance, and support for small businesses as well as a lower penalty scheme.

EFFECTIVE ENFORCEMENT & RECORDKEEPING

To ensure that employers comply with the law and post legitimate salary ranges, employers must be able to verify that a salary range was posted in good faith. *Employers should therefore be required to maintain records of job postings and salary range determinations to verify that ranges were accurate and in good faith. Legislation should make clear that the burden of demonstrating “good faith” or a “legitimate” pay range rests on the employer.* Because violations impact the public at large, including any member of the public who is looking at and contemplating applying for a particular job posting, legislation should include a broad complaint scheme.

To ensure effective enforcement, legislation should therefore empower any aggrieved individual or organization, not just applicants and employees, to file a complaint with the assigned enforcement agency to report a violation of a pay transparency law. Legislation should include a sliding scale of penalties that have teeth, particularly against large employers that purposefully seek to avoid transparency requirements. While pay transparency laws are meant to function primarily as regulatory requirements, legislation should still contemplate a limited private right of action, particularly for existing employees, to challenge violations of these laws.

EMPLOYMENT AGENCIES & RECRUITERS

Employers continue to try and find ways to use outside entities to avoid pay transparency requirements. To eliminate loopholes, pay transparency legislation should apply to employment agencies, recruiters, and others similar entities. The term “advertisement” should be defined to include the types of recruitment practices used by these entities to ensure that they cannot be used to skirt requirements.

TEMP WORK

Temp agencies are regularly used to employ vulnerable workers at lower wages and over an extended period of time while simultaneously avoiding labor and anti-discrimination laws. *Temp agencies should therefore not be exempt from compliance and, like all employers, should be mandated to disclose the pay range or the rate of pay for a particular position.*

CONCLUSION

We are shamefully overdue in closing the pay gap, particularly for women of color, whose work has long been purposefully undervalued, underpaid, and exploited. While pay inequity is multifaceted, and addressing it requires a range of strategies, we cannot overlook the vital role that pay transparency plays in tackling inequality, discrimination, and exploitative labor practices.

One year into the implementation of New York City's law, we know pay transparency works. Overnight, we witnessed employers change their practices and workers become stronger advocates for themselves, unearthing disparities, demanding fair pay, seeking new employment, and disregarding opportunities that do not list legitimate salary ranges.

We hope legislators across the country will join this necessary movement to advance pay equity through transparency by enacting strong and meaningful legislation at the state and federal levels.

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ENDNOTES

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[2] Colo. Rev. Stat. § 8-5-201; Cal. Lab. Code § 432.3(c); Wash. Rev. Code § 49.58.110.

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