

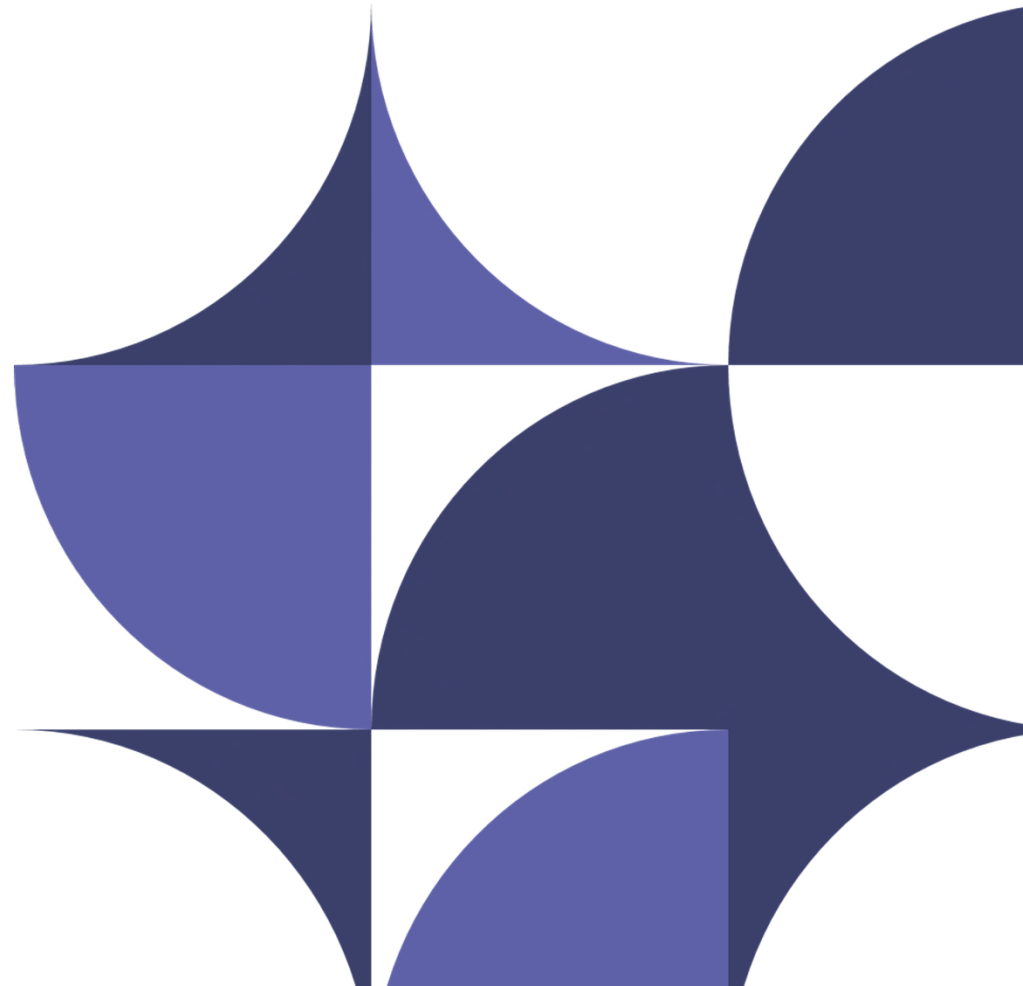


HR Forum: Wage Range Disclosure Laws and NLRA/NLRB Updates

September 29, 2022

Seyfarth Shaw LLP

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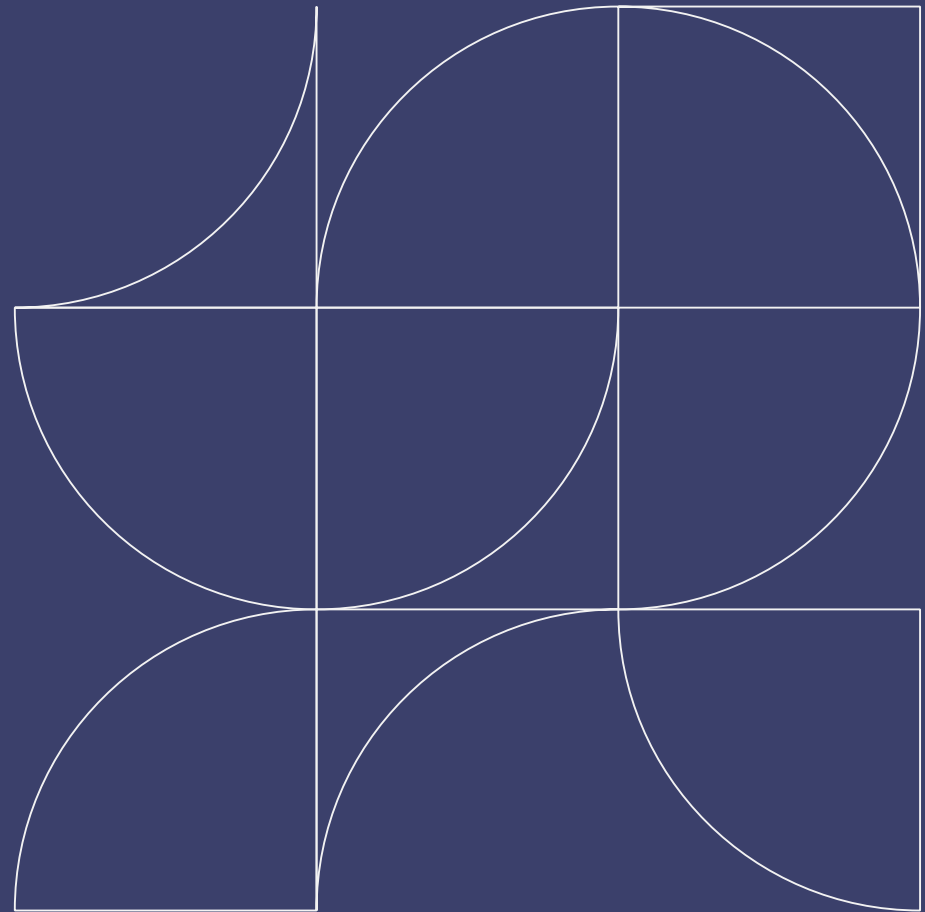
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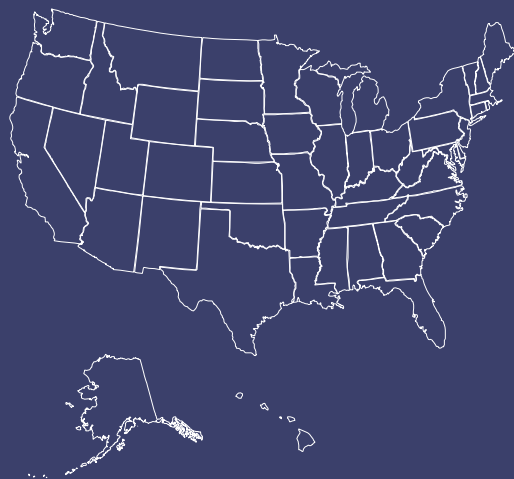
Agenda

- 01** Wage Range Disclosure Laws
- 02** NLRA/NLRB Updates

Wage Range Disclosure Laws



Nationwide Trend



Wage Range Disclosure Laws

- States and localities have adopted laws that require providing applicants and/or employees the pay scale (or other compensation/benefits) for a role upon reasonable request, at some point in time during the application process (e.g., prior to or at the time of an offer of compensation, or upon completion of an interview) or during the employment relationship, or on job postings.
- Impacted Jurisdictions
 - California (amendment eff. 1/1/23)
 - Colorado (far-reaching implications)
 - Connecticut
 - Maryland
 - Nevada
 - New Jersey (Jersey City)
 - New York (New York State (pending Governor action); Ithaca (eff. 9/1/22); NYC (eff. 11/1/22); Westchester County (eff. 11/6/22))
 - Ohio (Toledo and Cincinnati)
 - Rhode Island (eff. 1/1/23)
 - Washington State (amendment eff. 1/1/23)

Details on U.S. Pay Scale Disclosure Laws: Upon Request (Applicant and/or Employee)

	Timing	What Must be Provided
California* (until 1/1/23)	Upon reasonable request, made after an applicant has completed an initial interview with the employer.	"Pay scale," which means a salary or hourly wage range.
Maryland	Upon request.	Wage range (undefined).
Ohio (Cincinnati & Toledo)	Upon reasonable request, after a conditional offer of employment.	Pay scale (undefined).
Washington State** (until 1/1/23)	<p><u>Applicants:</u> Upon request after initial offer.</p> <p><u>Employees:</u> Upon request after offer of internal transfer to a new position or promotion.</p>	<p><u>Applicants:</u> Minimum wage or salary for the position for which the applicant is applying.</p> <p><u>Employees:</u> Wage scale or salary range for employee's new position.</p> <p>If no wage scale or salary range exists, provide the minimum wage or salary expectation set prior to posting the position, making a position transfer or making a promotion.</p>

* CA has amended its law. As of 1/1/23, CA employers must include pay scale information in job postings and disclose pay scale to employees upon request.

** WA has amended its law. As of 1/1/23, WA employers must include wage scale or salary range and benefits/other compensation information in job postings.

Details on U.S. Pay Scale Disclosure Laws: Affirmative Disclosure Requirements

	Timing	What Must be Provided
Connecticut	<p><u>Applicants:</u> Upon earliest of (1) applicant's request; or (2) prior to or at the time of an offer of compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) change in employee's position; or (3) employee's first request.</p>	<p>Wage range, which means the range of wages the employer anticipates relying on when setting wages for a position and may include reference to: (1) any applicable pay scale; (2) previously determined range of wages for the position; (3) actual range of wages for those employees currently holding comparable positions; or (4) the employer's budgeted amount for the position.</p>
Nevada	<p><u>Applicants:</u> Upon completion of an interview for a position.</p> <p><u>Employees:</u> For promotion or transfer to a new position if the employee has (1) applied for the promotion or transfer; (2) completed an interview for the promotion or transfer or been offered the promotion or transfer; <u>and</u> (3) requested the wage or salary range or rate for the promotion or transfer.</p>	<p>Wage or salary range or rate.</p>
Rhode Island	<p><u>Applicants:</u> Upon request. Employer <i>should</i> provide the wage range prior to discussing compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) when employee moves into a new position; or (3) employee's request.</p>	<p>Wage range, which means:</p> <p><u>Applicants:</u> The wage range the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.</p> <p><u>Employees:</u> May include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable.</p>

Details on U.S. Pay Scale Disclosure Laws:

On Job Posting

	Timing	What Must be Provided
California <i>(eff. 1/1/23)</i>	On job posting and upon applicant and/or employee's request.	<p>"Pay scale," which means the salary or hourly wage range that the employer reasonably expects to pay for the position.</p> <p><u>Record Retention Requirement:</u> Must maintain records of a job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment in order for the Labor Commissioner to determine if there is still a pattern of wage discrepancy. These records shall be open to inspection by the Labor Commissioner.</p>
Colorado	<p>On job posting.</p> <p>Notice of a promotional opportunity must be made to all employees for whom it may be a promotion, on the same calendar day; and sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply. There is an exception where an employer continuously -- at least once per month -- either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (e.g., a certification or number of service hours): Such an employer may provide a single notice of such promotional opportunities, rather than a notice for each individual promotion.</p>	<p><u>Compensation Information Posting Requirement:</u> For roles that will be CO based, and for remote roles that could be performed in CO, employers must include: (1) the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position; (2) a general description of any bonuses, commissions, or other forms of compensation that are being offered for the job; and (3) a general description of all employment benefits the employer is offering for the position.</p> <p><u>Promotional Opportunity Notice Requirement:</u> Employers must post or otherwise notify CO employees of all job vacancies whether such vacancies exist in CO or elsewhere, and whether or not any CO employee is qualified for the job. The notice must be in writing and can be made by any method(s) reaching all employees. The definition of promotion is broad, applies to any opportunity that could be a promotion for any employee within the organization (including potentially world-wide roles), and includes in-line, career progression promotions. There are some exceptions to this requirement for confidential searches, certain automatic promotions, and temporary, acting, or interim roles.</p> <p><u>Record Retention Requirement:</u> Employers must keep records of job descriptions and wage rate history for each employee for the duration of the employment plus two years after the end of employment.</p>

Details on U.S. Pay Scale Disclosure Laws: On Job Posting (Continued)

	Timing	What Must be Provided
New Jersey (Jersey City)	On a posting or advertisement that provides notice of employment opportunities, transfers, or promotions.	Minimum and maximum annual salary or hourly wage. In stating the minimum and maximum annual salary or hourly wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.
New York State (pending Gov. action)	In an advertisement for a job, promotion, or transfer opportunity that can or will be performed, at least in part, in the state of New York.	<p>Must disclose: (1) the compensation or a range of compensation for such job, promotion, or transfer opportunity; and (2) the job description for such job, promotion, or transfer opportunity, if such description exists. For jobs, promotions, or transfer opportunities paid solely on commission, must disclose in writing in a general statement that compensation shall be based on commission.</p> <p><u>Recordkeeping Requirement</u>: Must keep and maintain necessary records to comply with the requirements of this section including, but not limited to, the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist.</p>

Details on U.S. Pay Scale Disclosure Laws: On Job Posting (Continued)

	Timing	What Must be Provided
New York (Ithaca, NYC, Westchester County)	On advertisement for a job, promotion or transfer opportunity.	Minimum and maximum salary or hourly wage. In stating the minimum and maximum salary/wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.***
Washington State <i>(eff. 1/1/23)</i>	In each posting for each job opening. <u>Employees:</u> Upon request after offer of internal transfer to a new position or promotion.	<u>In Posting:</u> Wage scale or salary range, and a general description of all of the benefits and other compensation to be offered to the hired applicant. <u>Employees:</u> Wage scale or salary range for the employee's new position.

*** This terminology varies slightly in each of the laws.

New York City Salary Range Disclosure Law

Overview of NYC Obligations

- Unlawful discriminatory practice for an employer or employment agency to advertise a job posting, promotion, or transfer opportunity without including the minimum and maximum salary for such position in the advertisement
- Applies to employers with 4 or more employees
- Does **not** apply to job advertisements for temporary employment at a “temporary help firm”

Amendment to NYC Law (Int. 0134-2022)

Recent Amendment

- Pushed the law's effective date to Nov. 1, 2022
- Clarified that the law does not apply to “[p]ositions that cannot or will not be performed, at least in part, in the city of New York”
- Clarified that the law applies to employees who are paid hourly as well as on a salary basis
- Limited the availability of a private right of action to employees bringing claims against their current employers (*i.e.*, not applicants)
- Specified that civil penalties will be \$0 for a first violation, if the employer proves that the violation has been cured within 30 days

New York City Commission on Human Rights Fact Sheet

Key Takeaways

- Employee threshold is 4 (including owners), so long as at least one employee works in NYC
- Law does not apply to temporary help firms, but employers that work with temporary help firms must disclose salary range in their postings
- “Advertisement” is a written description of an available job, promotion, or transfer that is publicized to applicants, ***regardless of format***
- No requirement to create advertisements to hire, but if an employer chooses to advertise, the advertisement must disclose the salary range
- “Salary range” means the ***lowest and highest*** salary the employer, in good faith, believes it would pay to the successful applicant ***at the time of the posting***

New York City Commission on Human Rights Fact Sheet

Key Takeaways

- Covers postings for **any remote** work that **could** be performed in NYC – expansive reach
 - “Covered employers should follow the new law when advertising for positions that can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from the employee’s home.”
- “Good faith” means the salary range the employer honestly believes at the time of the posting that they are willing to pay the successful applicant

New York City Commission on Human Rights Fact Sheet

Key Takeaways

- The salary range cannot be open ended
 - ***Not*** “\$15 per hour and up” or “max \$50,000 per year”
 - If no flexibility in salary, minimum and maximum salary may be identical (e.g., “\$20 per hour”)
- Only need to disclose the base salary or wage rate
 - “Salary” or “wage rate” does not include benefits, paid or unpaid time off work, contributions to 401K, overtime, bonuses, stock, or the value of employer-provided meals or lodging
 - Employer could opt to disclose more information in the advertisement

New York City Salary Range Disclosure Law

Potential Exposure and Penalties

- Violation will be treated similar to a discrimination claim under the NYCHRL
- Private right of action limited to employees bringing claims against their current employers (*i.e.*, not applicants)
 - Employees may sue for back pay, front pay, compensatory damages, punitive damages, and injunctive relief
- Applicants or current employees can file a complaint with the NYCCHR
 - Commission can impose a civil penalty of not more than \$125,000 or not more than \$250,000 for a willful violation
 - But civil penalties \$0 for a first violation, if employer proves that the violation has been cured within 30 days
 - NYCCHR can order changes to certain job advertisement policies and practices

Ithaca and Westchester County

Overview of Obligations

- Mostly track NYC law on general requirements
 - Minimum and maximum salary in posting for a job, promotion, or transfer opportunity
 - “Good faith” requirement for range
 - Temporary help firms excluded
- Ithaca Differences
 - Does not apply to an employer “that employs fewer than four employees whose standard work locations are in the city”
 - Does not include the provisions added in the NYC law’s amendment (e.g., 30-day cure opportunity)
 - Effective September 1, 2022

Ithaca and Westchester County

Overview of Obligations

– Westchester Differences

- Includes provisions from an earlier iteration of the NYC Amendment
 - Excludes “Help Wanted” sign or similar communication
 - Includes “any employer who posts for positions that are required to be performed, in whole or in part, in Westchester County, whether from an office, in the field, or remotely.”
- Will become null and void on the day that Statewide legislation goes into effect
- Effective November 6, 2022

New York State *(pending Governor action)*

Overview of Obligations

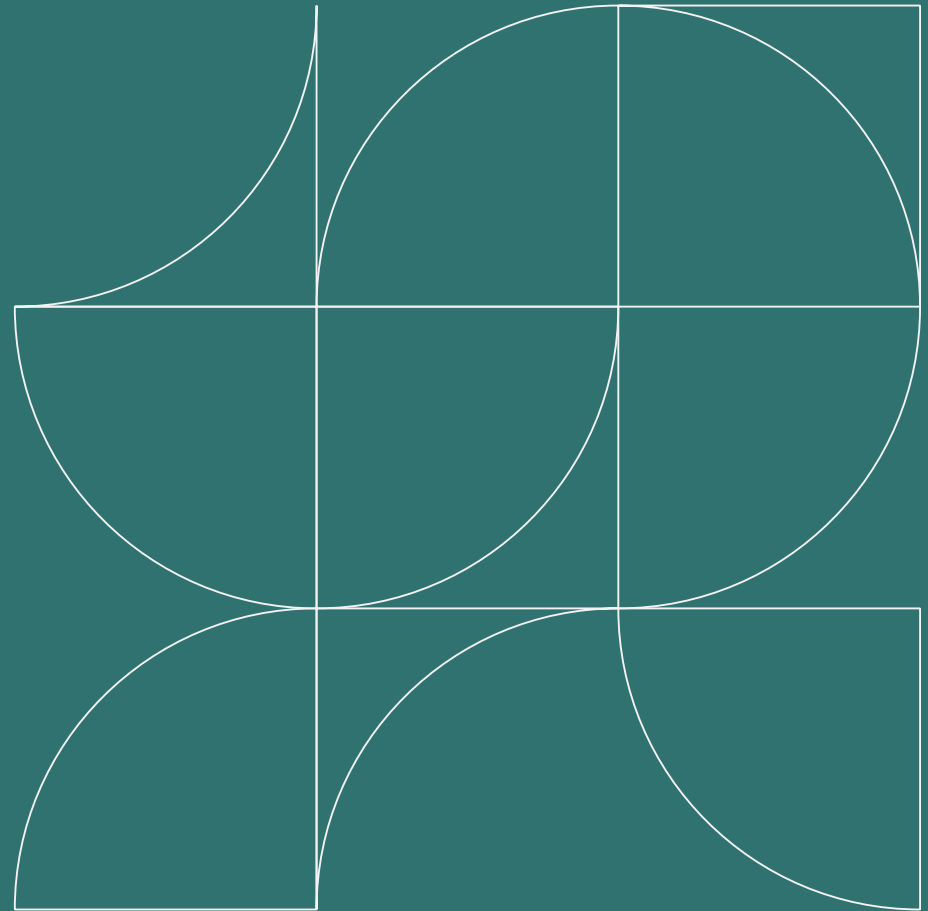
- Will require employers to disclose in a job posting:
 - Compensation or a range of compensation for such job, promotion, or transfer opportunity
 - Job description for such job, promotion, or transfer opportunity, if such description exists
- Specifies that advertisements for jobs, promotions, or transfer opportunities paid solely on commission will be compliant with the compensation disclosure requirements “by disclosing in writing in a general statement that compensation shall be based on commission”
- Applies to job postings that “can or will be performed, at least in part, in the state of New York”
- No private right of action
 - A person may file complaint with the Commissioner

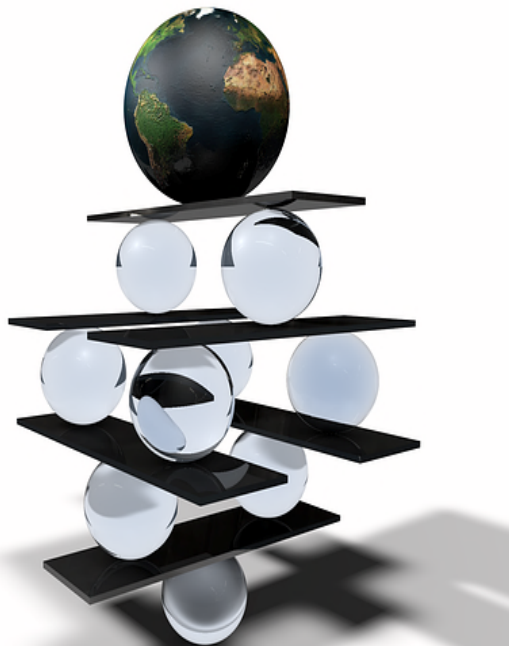
New York State *(pending Governor action)*

Overview of Obligations

- Includes an explicit no retaliation provision
- Recordkeeping Requirement: Must keep and maintain necessary records to comply, including:
 - History of compensation ranges
 - Job descriptions, if such descriptions exist
- Penalties: May be subject to an order directing compliance and civil penalties up to \$1,000 for a first violation, \$2,000 for a second violation or \$3,000 for a third or subsequent violation
- Rules and regulations; public outreach campaign
- Effective 270 days after enactment
- Will not supersede or preempt any local law, rules or regulations
 - Except Westchester County

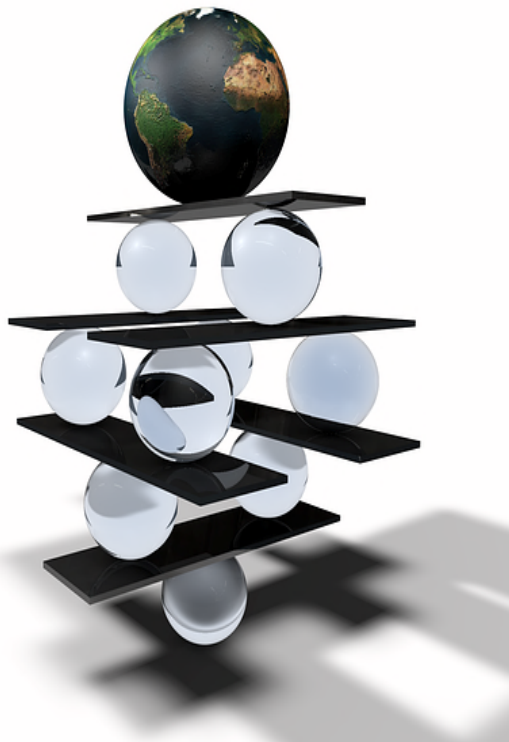
Key Takeaways For Employers





Develop a Compliance Strategy

- Consider the organization's transparency strategy
 - What will it share? When? To Whom?
- Consider impact of certain state laws across the organization
- Consider administrative burden versus organizational culture on transparency
- Do you have pay ranges? If not, do you need them?
- What are the relevant considerations unique to your business?

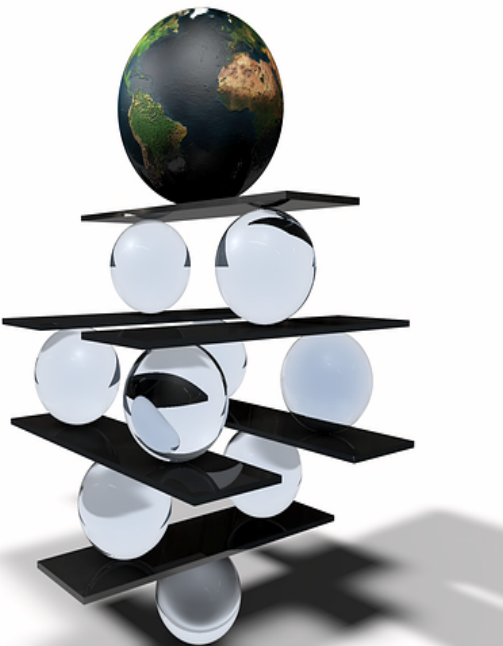


Develop a Compliance Strategy

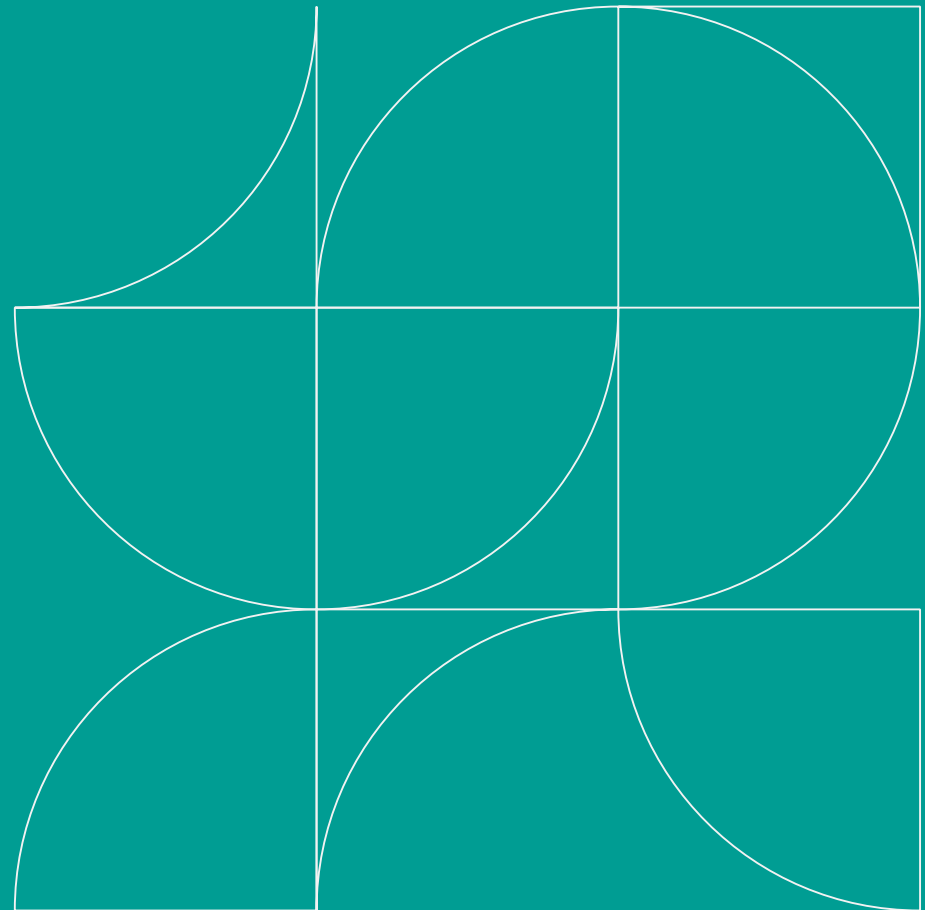
- Are all of your hiring managers, talent acquisition professionals and human resources employees trained on the requirements of the laws?
 - Talking points, FAQs
 - Templates for responding to requests for pay disclosures
 - Templates for proactive disclosures
- Developing job posting language based on your transparency strategy

Develop a Strategy for Evaluating Compensation on an Ongoing Basis

- Proactive pay analyses, prepared under privilege
 - Be strategic keeping in mind often applicable laws (e.g., Illinois, by county)
 - What are relevant factors that impact pay
 - Are they available electronically? If not, how do you get there over time?
 - Do you have a compensation structure that allows for appropriate comparison groups?
- Do you have a system for evaluating compensation on a routine basis?
 - Compa-ratio? Internal peer review upon hire? Peer review at promotion?
 - Consider each component of pay and how best to evaluate (e.g., bonus, equity)



Current State of Organizing Activity



Lots of Campaigns & Charges

Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed

Office of Public Affairs

202-273-1991

publicinfo@nlrb.gov

www.nlrb.gov

July 15, 2022

**** The NLRB's July 13th press release used an incorrect date range from which the data was calculated. The increase in union election petitions has been revised from 56% to 58%. The increase in unfair labor practice charges has been revised from 14.5% to 16%. ****

Lots of Campaigns

- Targeted Industries
 - Retail
 - Tech
 - Media
 - Non-Profit Organizations
 - Banking
 - Politics
- Increase in Independent Unions
- International Influence

What Is Driving the Campaigns?

- Younger Workers
 - “Today we explain how college-educated workers are driving a spike in union organizing.”
 - New York Times – July 17, 2022
- Traumatic Events
 - COVID
 - 2020 - Massive Layoffs
 - 2021 – Continuing Restrictions & Resignations
 - 2022 - Inflation
- Activism
 - Social Justice

What Is Driving the Campaigns?

- Workplace Justice
 - Recent successful public campaigns
 - #MeToo
 - Pay Equity
 - Wage disparities to the Mega Wealthy
- Politics
 - Politicians are standing with unions
- Fame
 - Relentless Press Coverage
 - Fame can be monetized

2022 – Walkouts, Strikes and Strike Threats

- Happening in many locations in U.S.
- Happening across Europe – rail, air, baggage handlers, healthcare
- All labor disputes have become fodder for the press

Ask yourself these four questions

#1

Am I showing an interest in the things that mean the most to my people in their personal lives?

#2

Am I checking in, informally, with each of my people every so often?

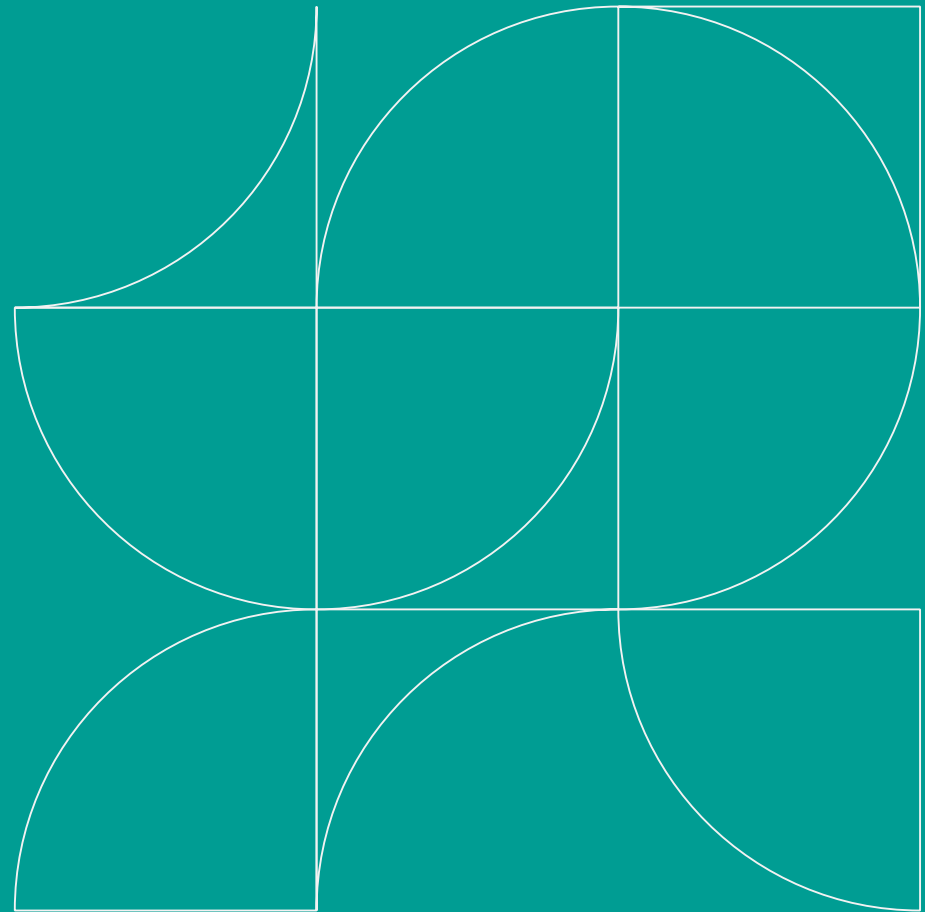
#3

Am I taking the time to listen to the concerns my people are raising and then explaining the reasons for my (or more senior management's) actions?

#4

Am I doing the fundamental blocking and tackling of appreciation (e.g., simply saying “thank you”)?

The NLRB General Counsel's Agenda & What is Changing or Going to Change Under the NLRA



Traditional Labor



General Counsel Jennifer Abruzzo

- Sworn in on July 22, 2021:
 - Formerly the Special Counsel for Strategic Initiatives for Communication Workers of America (CWA)
 - Former Acting GC and Deputy GC at NLRB
 - Four-year term
- Philosophy
 - “I believe that vigorous enforcement of the Act will help level the playing field for workers and their freely chosen representatives, bring much needed equity to the historically underserved members of our communities, engender safe and productive workplaces, which is particularly critical right now as we fight a pandemic, and build a better economy for workers, families, and communities in this country.”

**Be on the
lookout**



GC Memo 21-04

- GC Abruzzo has signaled a desire to change existing laws on:
 - Employee handbooks
 - Protected Concerted Activity
 - Union access
 - Employee status
 - Applicability of Weingarten in non-union settings
 - Laws around intermittent striking and picketing

**Be on the
lookout**



Other Recent GC Memos

- **Mandatory Submissions to Advice:**
 - Cases and subject matter areas where the Trump Board overruled legal precedent.
- **Increased utilization of Section 10(j) Injunction Proceedings**
- **Seeking Full Remedies**
- **Full Remedies in Settlement Agreements**
- **Student-Athletes**
- **Elimination of Captive Audience Meetings**



2022 Noteworthy Rule Making

- Joint Employer Status
- Procedures Governing Blocking Charges, Voluntary Recognition, and Bargaining Relationships In Construction Industry

Traditional Labor



Notable Rulings from the New NLRB

- Not so much yet
- Regions are developing test cases
- Amicus Briefs are being solicited

Traditional Labor



Likely Changes to Come

- Confidentiality in Arbitration Agreements
 - *Dish Network, LLC*, 370 NLRB No. 97 (2021).
- Implementation of Employee Handbooks
 - *Stericycle, Inc.*, 370 NLRB No. 89 (2021)
- Investigative Confidentiality Rules
 - *Alcoa Corp.*, 370 NLRB No. 107 (2021).
- What constitutes Good Faith Bargaining.
 - *District Hospital Partners, L.P. d/b/a The George Washington Univ. Hosp.*, 370 NLRB No. 118 (2021)
- Work rules, handbooks and policies—abandonment of *Boeing*.
 - *AT&T Mobility LLC*, 370 NLRB No. 121 (2021)
- Social Media Postings (also foreshadowing abandonment of *Boeing*)
 - *Medic Ambulance Service, Inc.*, 370 NLRB No. 65 (2021).

Traditional Labor



More Potential Changes - Cases in Which Amicus Briefs Have Been Solicited

- *American Steel Construction* 371 NLRB No. 41 (2021) - Should the Board overrule *PCC Structurals* (appropriateness of bargaining unit), and if so, what standard should be adopted?
- *Atlanta Opera, Inc.* 371 NLRB No. 45 (2021) - Should the Board adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, if not, what standard should replace it?
- *Stericycle, Inc.* 371 NLRB No. 48 (2021) – Should the Board overrule *Boeing Co.* (standard for determining work rule violations)?

Traditional Labor



More Cases Soliciting Amicus Briefs

- *Sunbelt Rentals, Inc.*, 370 NLRB No. 94 - Should the Board overrule *Johnnie's Poultry* (employer investigations), and if so, what standard should be adopted?
- *Int'l Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, 370 NLRB No. 40 (2020) - Does the display of Scabby the Rat and large banners constitute picketing or otherwise coercive non-picketing conduct in violation of Section 8(b)(4)?
- *Ralphs Grocery Company* 371 NLRB No. 50 (2021) – Whether to adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1)?

What Can We Be Doing?

- Stay up to date regarding NLRB developments, rule making, and decisions.
 - Understand the impact on your Company and workforce
 - Revise workplace policies and employee handbooks as required.
 - Engage outside counsel periodically for assistance.



Q&A

thank
you

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