

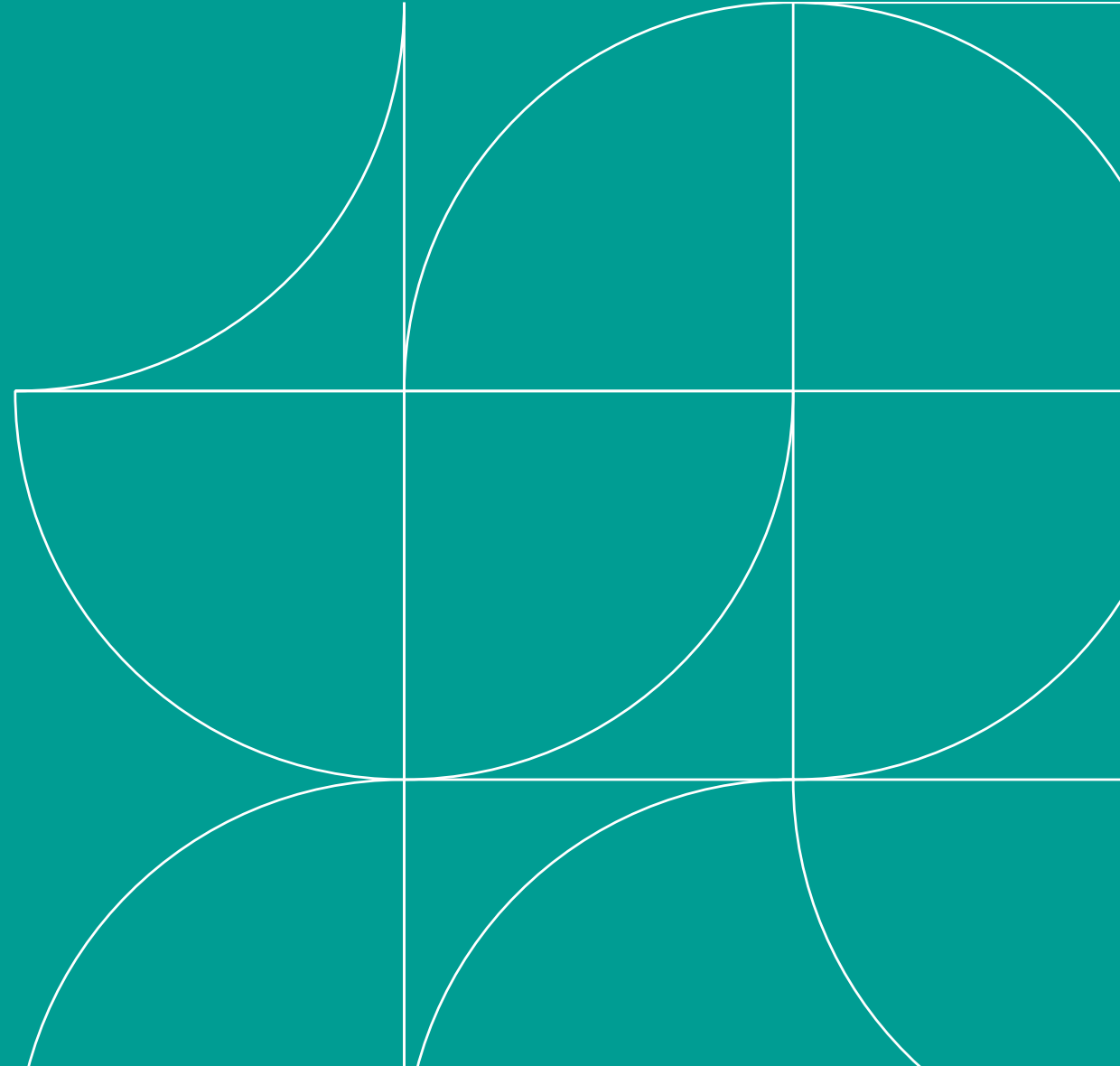


Pay Transparency in 2023

December 13, 2022

Seyfarth Shaw LLP

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Agenda

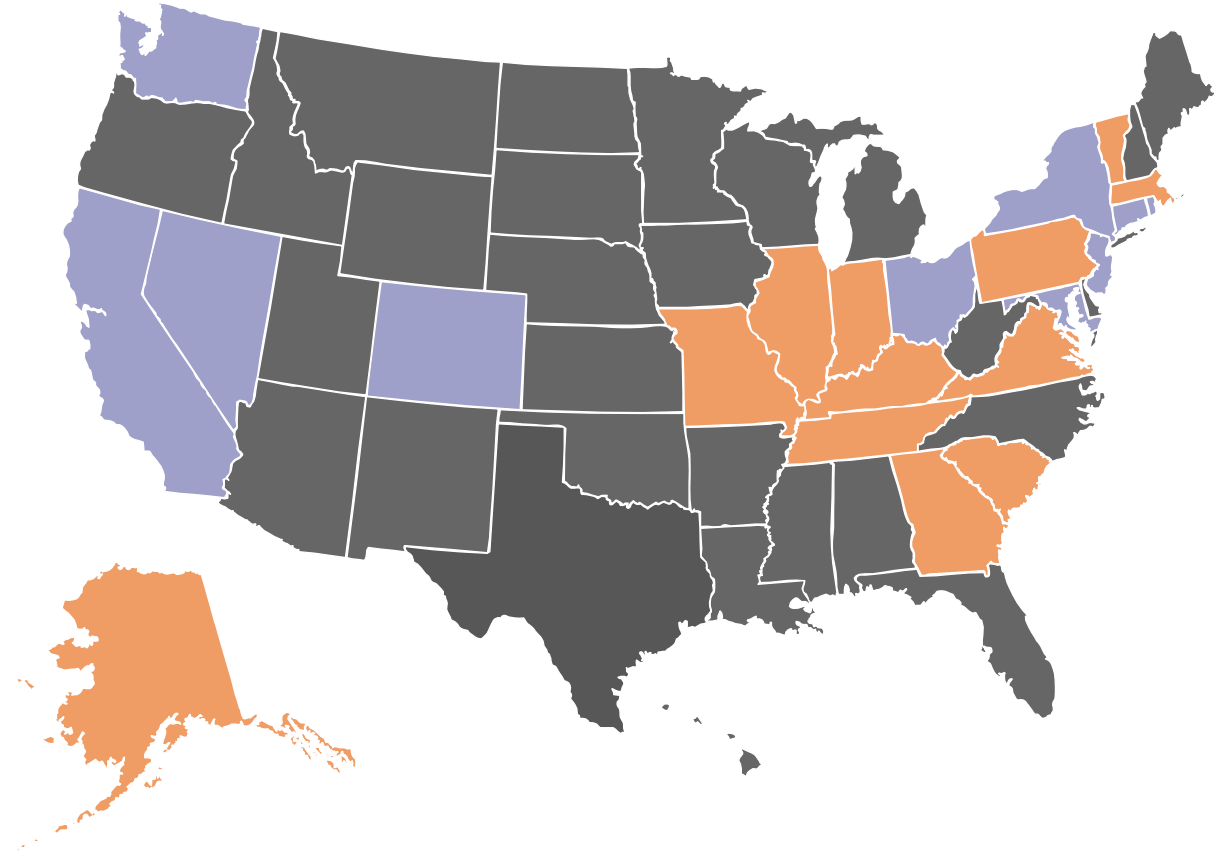
- 01** Pay Transparency: The Big Picture
- 02** Wage Range Disclosure: Top 6 Questions
- 03** Wage Range Disclosure Best Practices
- 04** Rapid Fire Questions
- 05** 2023 Pay Data Reporting Requirements

The Trend Towards Pay Transparency Continues

Jurisdictions That Recently Introduced Pay Transparency Bills:

- Alaska
- D.C.
- Georgia
- Chicago
- Indiana
- Kentucky
- Massachusetts
- Missouri
- New Jersey
- New York State
- Pennsylvania
- South Carolina
- Tennessee
- Vermont
- Virginia

- Wage range disclosure requirements in 14 jurisdictions
 - Pending legislation in ~16 jurisdictions
- California and Illinois have adopted pay reporting requirements

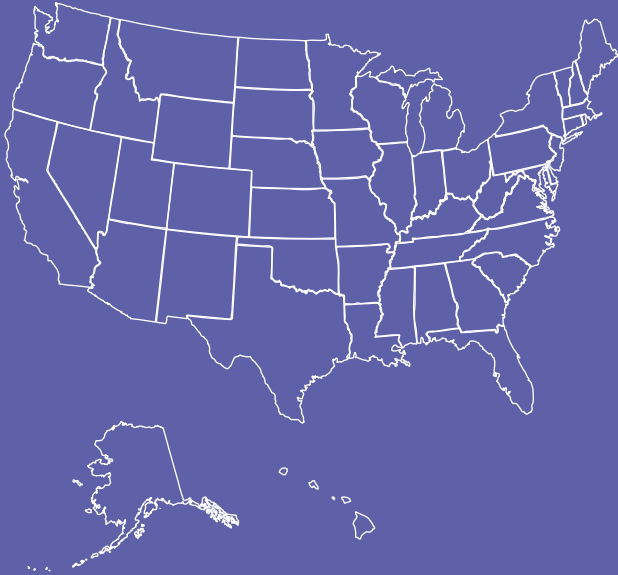


Wage Range Disclosure Requirements

- States and localities have adopted laws that require providing applicants and/or employees the salary/wage range (or other compensation/benefits) for a role: 1) on job postings; 2) at some point in time during the application/employment relationship; or 3) upon reasonable request

Impacted Jurisdictions

- California (eff. 1/1/23)
- Colorado
- Connecticut
- Maryland
- Nevada
- New Jersey (Jersey City)
- New York (Ithaca; NYC; Westchester County; New York State (pending Governor action); Albany County (eff. 90 days after enactment))
- Ohio (Toledo and Cincinnati)
- Rhode Island (eff. 1/1/23)
- Washington State (eff. 1/1/23)



#1: Affirmative Disclosure - On Job Posting

	Timing	What Must be Provided
<p>California (<i>eff. 1/1/23</i>)</p>	<p><u>Job Posting</u>: In each posting for each job opening.</p> <p>Also, for employees upon request but only for current job.</p>	<p>“Pay scale,” which means a salary or hourly wage range that the employer reasonably expects to pay for the position.</p>
<p>Colorado</p>	<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>

#1: Affirmative Disclosure - 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 Governor 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>
New York (Albany County, 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.

#1: Affirmative Disclosure - On Job Posting (Continued)

	Timing	What Must be Provided
Washington State <i>(eff. 1/1/23)</i>	<p>In each posting for each job opening.</p> <p><u>Employees:</u> Upon request after offer of internal transfer to a new position or promotion.</p>	<p><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.</p> <p><u>Employees:</u> Wage scale or salary range for the employee's new position.</p>

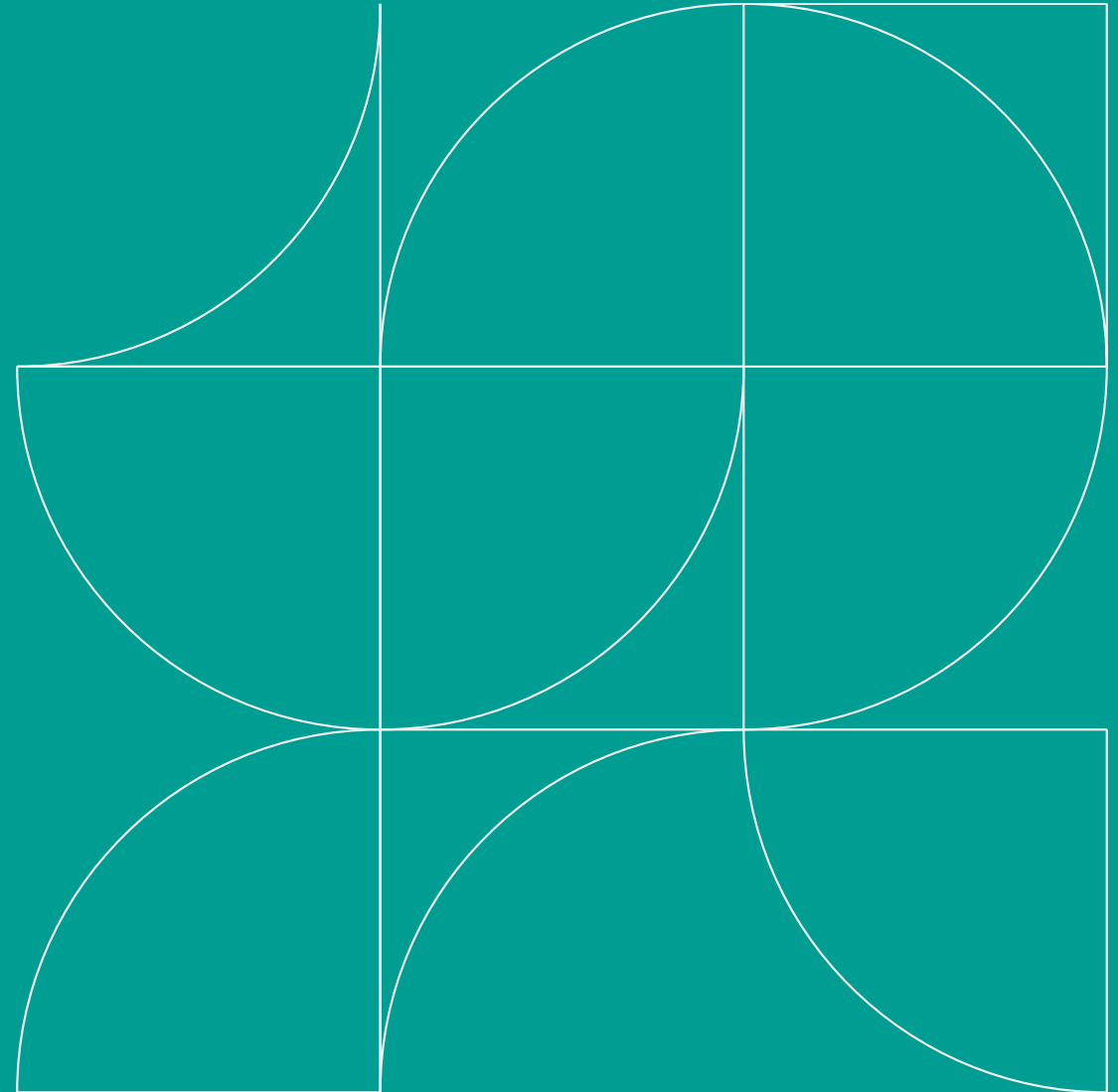
#2: Affirmative Disclosure Requirements - Other

	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>

#3: Upon Request (Applicant and/or Employee)

	Timing	What Must be Provided
Maryland	Upon request.	Wage range (undefined).
Ohio (Cincinnati & Toledo)	Upon reasonable request, after a conditional offer of employment.	Pay scale (undefined).

Wage Range Disclosure Top 6 Questions



What is considered a “job posting” or “advertisement”?

California

- any job posting (not defined)
- directly or through third parties

Colorado

- written or printed communication (electronic or hard)
- specific job available

New York City

- written description of available job, promotion, transfer
- publicized to a pool of potential applicants
- regardless of the medium in which disseminated

Jersey City

- posting or advertisement by any means
- directly or through third parties

Washington

- solicitation intended to recruit for an available position
- qualifications for a specific position
- directly and through third parties

Do the job posting requirements apply to remote positions?

Yes, if could be performed in jurisdiction

- Colorado
- New York City
- New York State (if enacted)
- Washington

Yes, if required to be performed in jurisdiction

- Westchester County, NY

Most Likely

- California
- Albany County, NY
- Ithaca, NY
- Jersey City, NJ

How do I define the salary range?

Generally:

- Base salary or wage range
- Range cannot be left open-ended
- What you reasonably/in good faith expect to pay for the position

California

- “‘Pay scale’ means the salary or hourly wage range that the employer reasonably expects to pay for the position.”

Colorado

- The “hourly rate or salary compensation (or a range thereof) that the employer is offering for the position”
- “A posted compensation range may extend from the lowest to the highest pay the employer in good faith believes it might pay for the particular job, depending on the circumstances.”

New York City (and other NY)

- The “minimum and maximum annual salary or hourly wage for such position.”
- “[M]ay extend from the lowest to the highest annual salary or hourly wage the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.”

Jersey City

- The “minimum and maximum annual salary or hourly wage to said posting or advertisement.”
- “[M]ay 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

- 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 no existing wage scale or salary range, *should* create prior to posting

Washington Administrative Policy (issued 11/30/2022)

“A wage scale or salary range should provide the applicant with 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, a scale or range should be created prior to publishing the posting. . . .

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. For example, the employer intends to hire an applicant and specifies that new hires generally start between \$60,000 and \$65,000 per year. The employer further specifies that the hired applicant’s placement within the entire range is based on qualifications and professional experience and lists the entire salary range for the position as between \$60,000 and \$70,000 per year. In this case, both the ‘starting range’ and the entire salary range should be disclosed to the applicant.”

Do I need to describe other compensation and benefits?

- Only in CO and WA
- General description of all benefits for the position
 - Health care, retirement benefits, paid days off, and any tax-reportable benefits, but not minor “perks” like use of an on-site gym or employee discounts
 - No open-ended phrases (“etc.” or “and more”)
- WA may require more detail than CO
 - For time off/vacation/holidays, “should list the amount of days or hours the hired applicant would expect to receive.”
 - If the general description of benefits changes after a posting has been published, an employer should update the posting to reflect the updated benefit information.

What If Our Company Doesn't Have Pre-Established Pay Ranges?

Short Term

- Prioritize jobs that are likely to be posted in the relevant states in Q1-Q2
- Focus on existing data to formulate ranges:
 - Current employee pay for positions
 - Determine starting salaries for hires in recent time period (1-2 years)
 - Identify readily available market data sources

Long Term

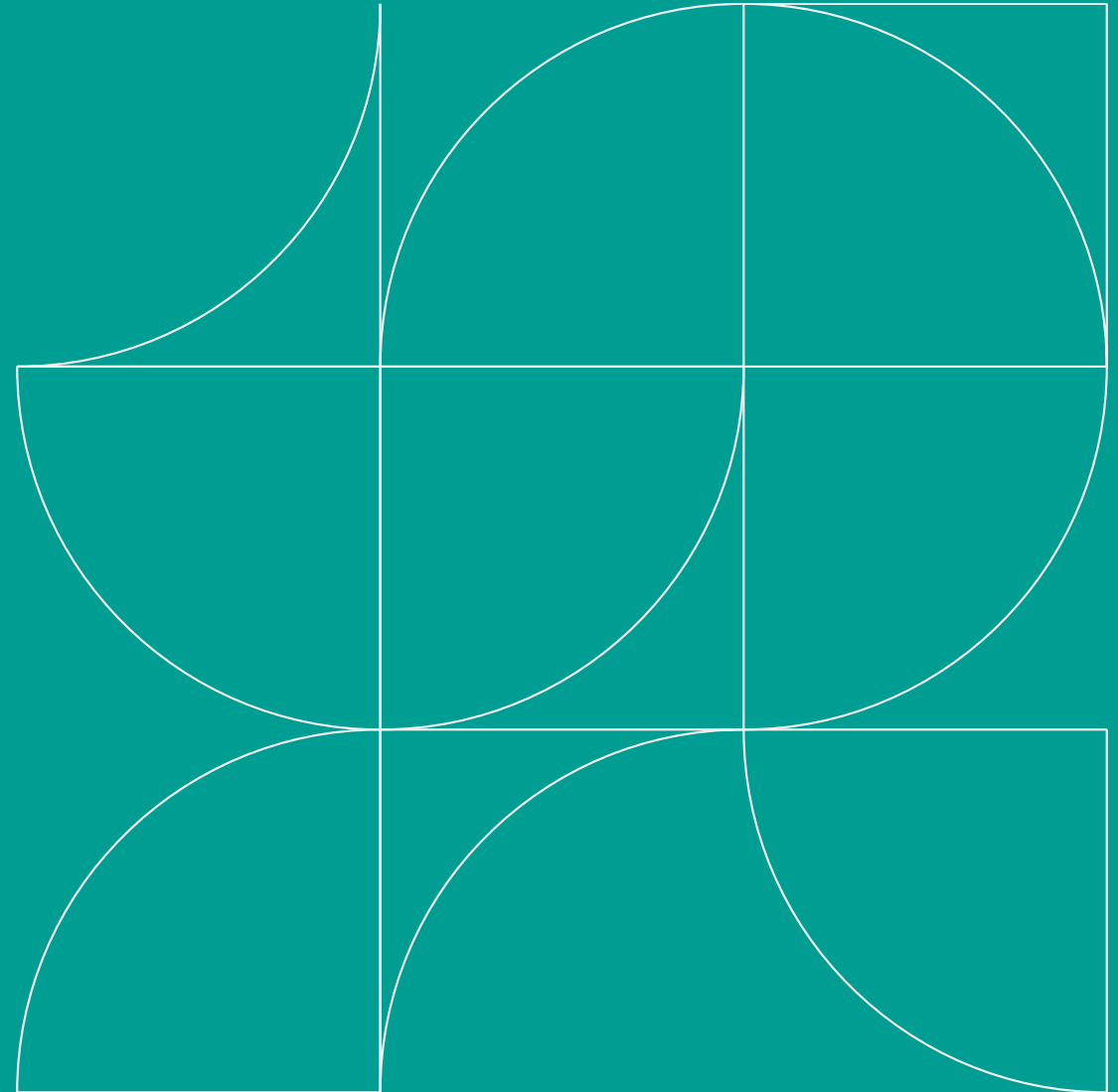
While not required, it would be a best practice to implement Job Ranges/Compensation Structure

- Partner with comp professionals (internal/external)
- Develop or refine job structure (level/function)
- Develop, define, refine experience levels
- Develop, define, refine scope of responsibility
- Evaluate career tracks
- Introduce market data
- Examine geographic pay differentials
- Develop pay ranges
- *KEY: Before finalizing, determine where pay for current workforce sits within the proposed band – conduct equal pay analysis with legal partners*

What are the Enforcement Provisions/Penalties?

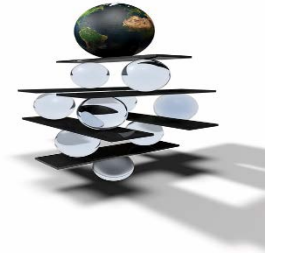
Jurisdiction	Civil Penalty/Fine	Enforcement
California (Pay Scale Disclosure)	At least \$100 but no more than \$10,000, per violation. Possible to avoid fine for first violation by showing updated and compliant job postings.	PAGA possible for failure to disclose pay scale, not pay data reporting or job posting requirements.
Colorado	Fine of between \$500 and \$10,000 for each violation. In practice, the Department has waived fines where employer brings postings into compliance after the first violation.	No private right of action. Employees and applicants can file complaints with Colorado Department of Labor and Employment (enforcement actions possible).
New York City	No penalty for first violation (if cured within 30 days of warning). Civil penalties up to \$250,000 for an uncured first violation and any subsequent violation.	Enforced by NYC Commission on Human Rights. Can cure violation, but proof of cure “shall be deemed an admission of liability.”
	Current employees may sue for back pay, front pay, compensatory damages, punitive damages, and injunctive relief.	Private right of action also available for <i>employees only</i> (not applicants).
Washington	Actual damages or \$5000 (whichever is greater), civil penalties ranging from \$500 to \$1000 per violation, and costs and reasonable attorneys’ fees	Private right of action - civil actions for damages. Penalties imposed by Department of Labor & Industry.

Wage Range Disclosure Best Practices



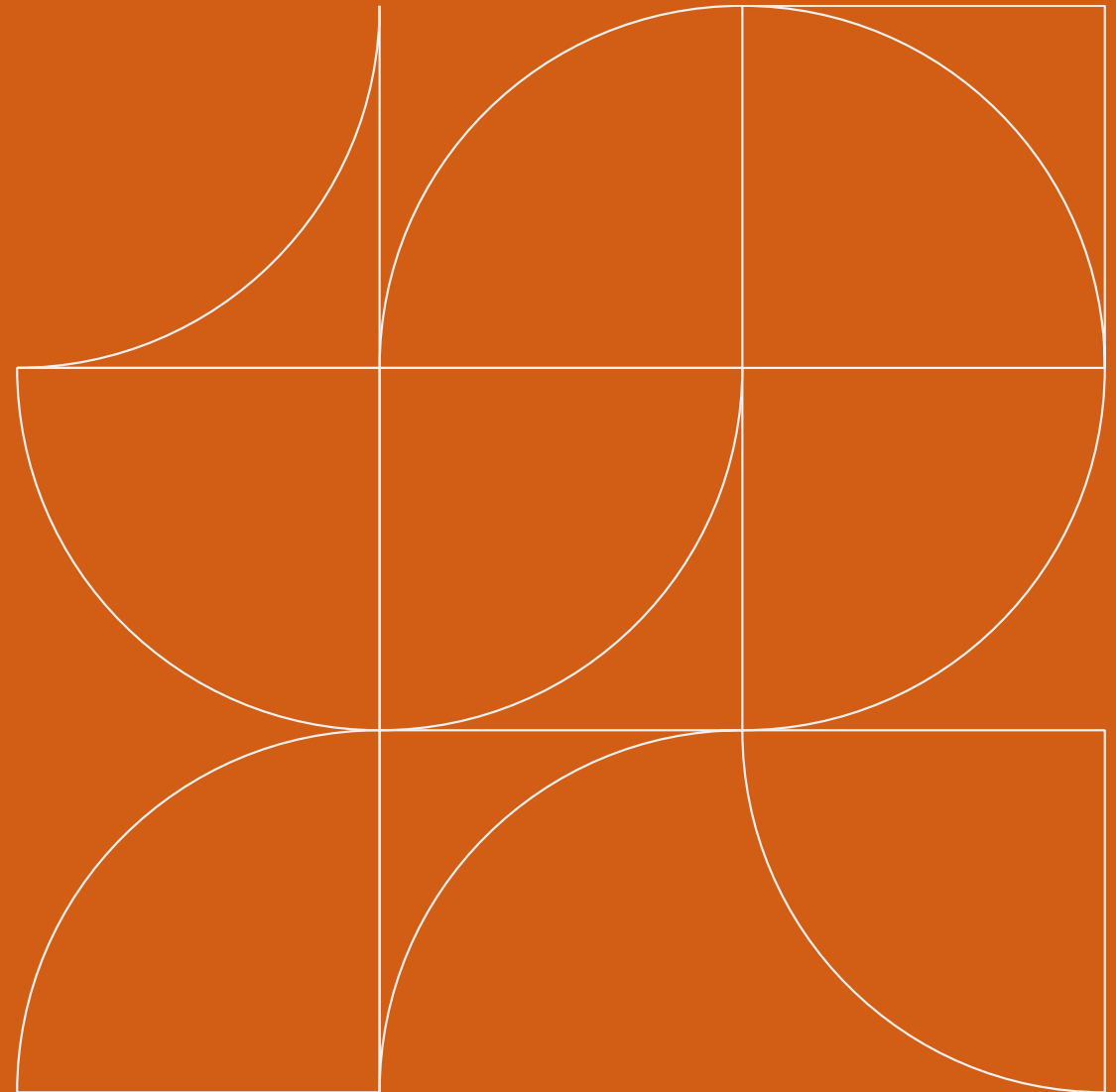


- Partner with key stakeholders to develop a comprehensive strategy
 - National vs state-by-state approach?
 - Guiding principles/governance: who will provide
 - Consider providing greater transparency regarding how comp is set at organization
- Determine ranges for each jurisdiction
 - Employees above/below range?
 - Consider how to post geographic differentials
 - Full range vs. posted range?
 - Balance the legal requirements and the “optics”
- Develop language to be used on postings, offer letters, etc...
 - Consider whether to be more expansive than required based on talent acquisition needs; consider disclaimers (e.g., posted range applies to the current posting)



- Consider how to address questions from employees in jurisdictions that do not have pay transparency requirements
 - Beyond legal: these are practical/business considerations
- Develop strategy responding to questions from current employees about position on range
- Train key personnel and operationalize process
 - Talking or FAQs points for leaders and employees
 - Templates/scripts for responding to applicant/employee requests
- Continue to monitor pay transparency laws and trends nationwide

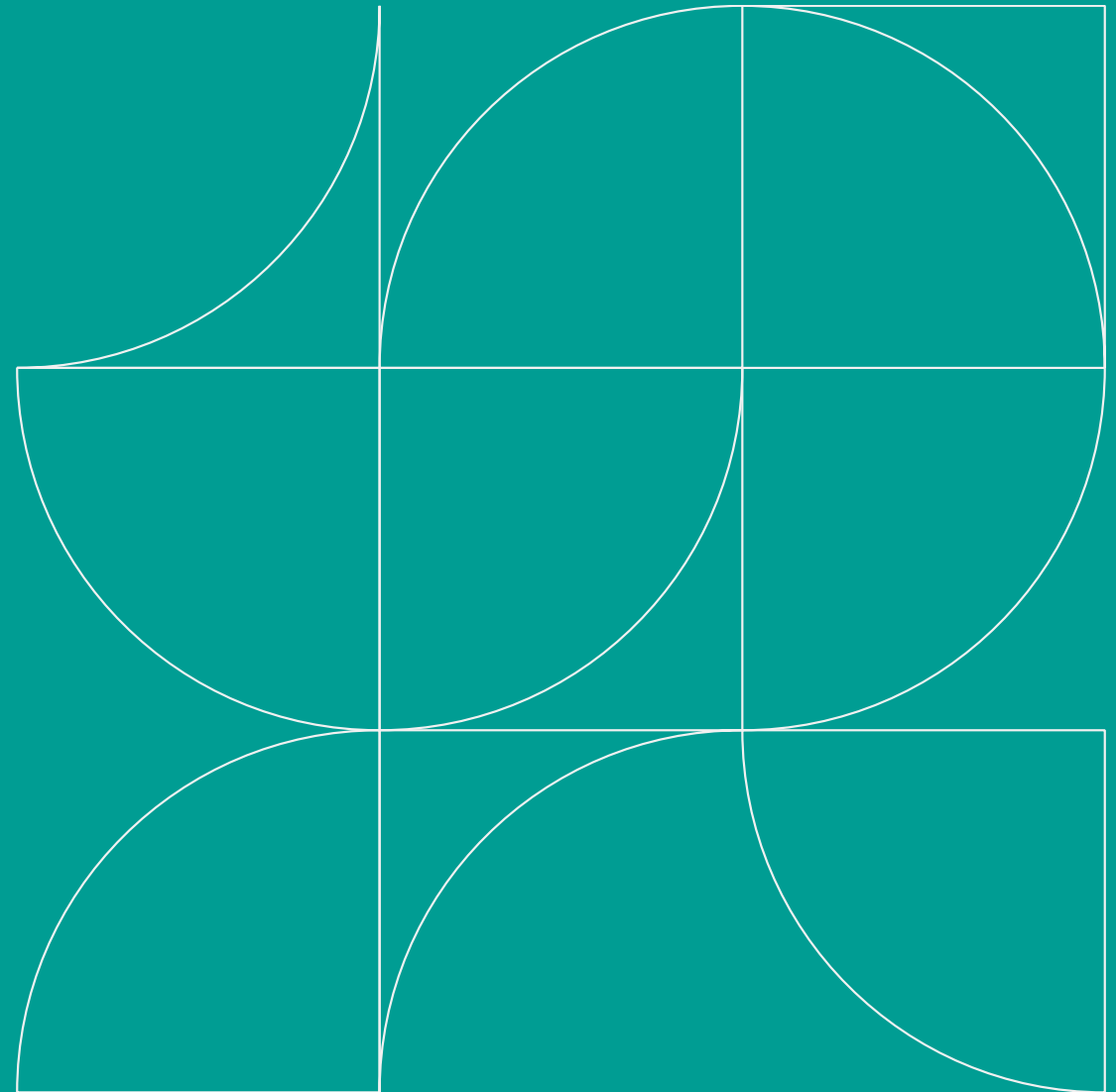
Rapid Fire Questions



Questions from Attendees:

- Can I have a broad national range that encompasses different geo differentials?
- What if the salary range for current employees is different than what I expect to pay the successful candidate (i.e., the hiring range vs entire range for position)?
- How do I define the salary range for employees paid on a full commission basis? What about a base + commission position?
- Can I offer a salary above/below the posted range?
- What if an applicant from a jurisdiction that requires wage range disclosure in job postings applies for a position to be performed outside of that jurisdiction? Do I have to repost the job with the salary range?
- Do I have to change my job postings that are already up on 1/1/23?
- I only have one employee in the jurisdiction, do I have to disclose pay information?
- Can we include an electronic link to compensation and benefits information in our job postings?
- Is the pay range only required on postings? Do we need to post or provide pay scales to all employees?
- Has there been any enforcement thus far? Do we expect a focus on these laws going forward?
- Are there states which may implement pay transparency regulations in 2023 that we should anticipate?

Pay Data Reporting Requirements and FAQs



What are the Changes to Pay Data Reporting Under CA SB 1162?

New Timing

- Second Wednesday in May
- In 2023, the deadline is May 10th

New Scope

- 100+ employees (1 in CA)
- Applies even if employer does not have an EEO-1 filing requirement

New Data

- Median hourly rate
- Mean hourly rate

New Report

- New “labor contractor” data report

What are the contractor pay data reporting requirements?

Gov. Code 12999(a)(2)

- Private employers with 100+ “employees hired through labor contractors” are to submit a separate pay data report (“contractor report”)
- Important Definitions
 - “Employee”: individual on an employer’s payroll, including a part-time individual, **and** for whom employer is required to withhold federal Social Security taxes (Gov. Code 12999(k)(1))
 - “Labor contractor”: individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business. (Gov. Code 12999(k)(2)).
 - Note: While defined in other statutes, “usual course of business” is not defined under SB 1162
- *Definitions do NOT align with legislative intent*

Illinois: Overview of the Law



- Illinois joins California to become only the second state to require the collection and production of workforce pay data from private employers.
- The Illinois law goes even further by requiring that employers **proactively verify compliance** with certain state and federal laws and by collecting **employee-level** pay data.
- Under the law, a covered “business” must:
 - Obtain an equal pay registration certificate (EPRC) from the Illinois Department of Labor
 - Recertify compliance every two years thereafter

1

EEO-1
Report

2

Equal Pay
Compliance
Statement

3

Wage Data

Equal Pay Compliance Statement

- **Statutory Compliance**
 - No non-appealable adverse judgements (anti-discrimination laws).
- **Lack of Wage Disparity**
 - Average compensation for female and minority employees is not below the average compensation of the business' male and non-minority employees in the same EEO-1 report.
- **No Sex-Based Personnel Decisions**
 - Business does not restrict employees of one sex to certain job classifications and makes retention decisions without regard to sex.
- **Wage Disparities Addressed**
- **Frequency of Wage Determinations**
 - How often wages and benefits are evaluated to ensure compliance with laws
- **Analysis of Wage Determinations**
 - Information regarding the approach the business takes to determining appropriate wages for its employees.

******IDOL has developed a template document for use by employers.***

EEO-1 & Wage Data

- **(1) EEO-1 Report**
 - The business' most recently filed EEO-1 Report.
- **(2) Employee Wage Data** A listing providing **employee-level data** for all Illinois-based employees separated by:
 - Name
 - Last 4 of SSN
 - Gender
 - Race and ethnicity
 - Total wages rounded to the nearest \$100 (*Box 5 of W-2)
 - Hire date (training materials refer to job start date);
 - Termination date (training materials refer to job end date)
 - Job Classification (EEO-1 Category)
 - Job Title
 - County where employee works
- Data may be manually added or uploaded using CSV file

* Per training session

thank you

For additional information, please contact any member of Seyfarth's Pay Equity Group or visit:

<https://www.seyfarth.com/services/practices/advisory/employment/pay-equity.html>