



Morgan Lewis

# **PAY TRANSPARENCY: LATEST DEVELOPMENTS AND LEGAL CONSIDERATIONS FOR EMPLOYERS**

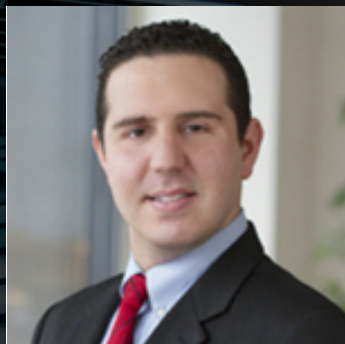
Brian Berry, Daniel Kadish, and Claire Lesikar

November 2, 2022

# Presenters



**Brian Berry**



**Daniel Kadish**



**Claire Lesikar**

**Morgan Lewis**

# Equal Pay Laws

Morgan Lewis

# Elements of an Equal Pay Claim

Under the federal Equal Pay Act (EPA), to establish a prima facie case of equal pay discrimination a plaintiff must show:

1. The employer pays different wages to employees of a different sex at the same establishment; and
2. The employees perform substantially equal work requiring substantially equal skill, effort, and responsibility
3. Under similar working conditions.

Most state equal pay laws generally follow this same framework, but recently states have been changing their laws to make it easier for a plaintiff to satisfy his or her prima facie case.

# Defenses to Federal Equal Pay Claims

Under the federal EPA, an employer may *avoid* liability by proving that the wage disparity is justified by (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.

- In *Rizo v. Yovino*, the Ninth Circuit held that the affirmative defense of “any other factor other than sex” does not include an applicant’s prior salary because an individual’s salary history does not represent a legitimate measure of experience, ability, or performance, and allowing employers to rely on prior pay as an affirmative defense would “perpetuate the very discrimination the EPA aims to eliminate.”

# Defenses to State Equal Pay Claims

Most state equal pay laws follow the EPA's affirmative defenses.

- Some states give examples of potentially legitimate factors other than sex, such as:
  - CA: “bona fide factor[s] other than sex, such as education, training, or experience.”
  - NY: Training, education, and experience are examples of legitimate bona fide factors.
  - WA: Bona fide factors include (i) education, training, or experience; (ii) a seniority system; (iii) a merit system; (iv) quantity or quality of production; or (v) a bona fide regional difference in compensation levels.

# Salary History Bans

Morgan Lewis

# What is a Salary History Ban?

- Also known as “prior pay” laws
- Multiple states and local jurisdictions have laws prohibiting employers from asking about or relying on an applicant’s salary history “as a factor” in determining:
  - *Whether* to offer employment; and/or
  - *What* salary to offer an applicant



# What Constitutes “Salary History”

- Each state may define “salary history” slightly differently but generally it includes all compensation and benefits.
- In New York, however, employers *may* expressly inquire into whether an employee has deferred compensation or unvested equity that he or she may be leaving on the table.
  - Note: Other states, including California, have no such carve-out for deferred compensation.

# California's Prior Pay Law

In California, no employer may:

- Ask an applicant for his or her salary history information, directly or indirectly, either orally or in writing; or
- Rely on an applicant's salary history information "as a factor" in determining:
  - *Whether* to offer employment; or
  - *What* salary to offer an applicant
- Employers also cannot have a staffing or recruiting agency ask applicants about salary history information on their behalf
- "Salary history information" includes all forms of remuneration, including commissions
  - Recruiters/those conducting interviews should reframe commission questions to questions about objective measures of productivity (e.g., gross amount of past sales)
  - Includes deferred compensation and equity (unlike New York)

# Exceptions to California's Prior Pay Law

- Employers may review and consider salary history information that is publicly available pursuant to law
- An applicant may “voluntarily *and without prompting*” disclose his or her salary history to a potential employer
  - In that situation, you may consider and rely on that salary history to set the applicant's salary
  - If this occurs, document the fact that it was the applicant who brought up his or her salary history, including the question that prompted the disclosure
- California's salary history ban does not apply to existing employees
  - An existing employee's salary may still be used to set future compensation and benefits

# Job Posting Pay Disclosures

Morgan Lewis

# Colorado: First State to Require Compensation in Every Job Posting

In 2021, Colorado enacted a law that requires employers to include in all job postings for positions located in Colorado (or that can be performed virtually from Colorado) the compensation and general benefits for the position.

Employers must include the hourly rate or salary compensation (or a range thereof) the employer is offering for the position. This compensation range may extend from the lowest to the highest pay that the employer, in good faith, believes it may pay for the particular job.

Additionally, employers in Colorado must:

- Make accessible to all Colorado employees postings for all company jobs, regardless of whether the employee is qualified for the position or the position can be performed in Colorado; and
- Make accessible to all Colorado employees postings for all company promotion opportunities, regardless of whether the employee is qualified for the promotion or the position can be performed in Colorado.

# Colorado: Penalties for Violations

- Fines of between \$500 and \$10,000 per violation.
- Failure to include compensation and benefit information in a job posting will be considered just one violation per job, regardless of the actual number of postings listing the job.
- In addition to fines, back pay, liquidated damages, or other legal and equitable relief may be awarded for a successful claim of wage discrimination.

# New York City to Require Compensation in Job Postings

- Employers must include minimum and maximum potential salaries in all job advertisements and postings for New York City positions effective 11/1/2022.
- Unlawful to advertise a job, promotion, or transfer opportunity without stating the minimum and maximum salaries for the position in the advertisement.
- Employer must make a “good faith” determination at the time of the job posting of the lowest and highest salary it would pay for that position.
- NYCCHR Guidance:
  - “An ‘advertisement’ is a written description of an available job, promotion, or transfer opportunity that is publicized to a pool of potential applicants.”

# New York City Salary Posting Guidance

- Employers are not required to post non-base wage forms of compensation.
  - Bonuses, commissions, incentive compensation plans, benefits, etc.
- NYCCHR has issued guidance, including contradictory statements:
  - “Any advertisement for a job, promotion, or transfer opportunity that would be performed in New York City is covered by the new law.”
  - “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.”



# New York City Penalties

- Possible civil penalties of up to \$250,000 per violation.
  - Maximum available penalty under the New York City Human Rights Law.
- Current employees can bring a private cause of action seeking damages and attorneys' fees.
  - Prospective candidates have no private cause of action

# New York City Guidance

- New webpage, posted 10/31.
  - <https://www1.nyc.gov/site/cchr/media/pay-transparency.page>.
- “Any advertisement for a job, promotion, or transfer opportunity that ***would be performed in New York City*** is covered by the new law.”
- Links to prior NYCCHR guidance from May 2022



Effective November 1, 2022, the NYC Human Rights Law requires employers to include a good faith pay range in all job advertisements. NYC's Salary Transparency Law is another step towards pay equity for all New Yorkers, and is the latest addition to a **suite of protections** against discrimination for New Yorkers seeking employment.

# California to Require Pay Scales in Job Postings

- Effective January 1, 2023, employers with 15 or more employees must include the pay scale for a position in any job posting that they post directly or through a third party.
- “Pay scale” means the salary or hourly wage range that the employer reasonably expects to pay for the position.

# California Penalties

- The Labor Commissioner may order the employer to pay a civil penalty of \$100 to \$10,000 per violation. No penalty applies on the first violation of the law provided that the employer demonstrates that it has updated its job postings to include a pay scale as required.
- Individuals may file civil actions for injunctive relief and “other relief the court deems appropriate.”

# Washington to Require Pay Scales in Job Postings

- Effective January 1, 2023, employers with 15 or more employees must disclose in each job posting the salary range and a general description of all of the benefits and other compensation (discretionary and non-discretionary) to be offered to the hired applicant.

# Washington Penalties

- Penalties include civil penalties from \$500 to \$1,000 per violation.
- Individuals can bring a private cause of action seeking damages (awarded in the minimum amount of \$5,000) and attorneys' fees.

# Pay Disclosure to Applicants and Employees

Morgan Lewis

# Additional Pay Disclosure Obligations (Apart from Job Postings): West Coast

California: Applicants may reasonably request the pay scale for the position they are applying for and employees may request the pay scale for their current position.

Nevada: Employers must provide applicants with the salary range for the position for which the applicant applied, but only after the applicant's initial interview. Employers also must provide that information to an employee who has applied for a promotion or transfer to a new position, but only upon request and only after the employee has either (i) completed an interview for the promotion or transfer or (ii) been offered the promotion or transfer.



# Additional Pay Disclosure Obligations (Apart from Job Postings): West Coast

Washington: Employers must provide the salary range to an employee who is offered an internal transfer to a new position or promotion upon request.

# Additional Pay Disclosure Obligations (Apart from Job Postings): East Coast

Connecticut: Employers must provide the wage range to applicants no later than at the time the offer of employment is made or earlier upon request. Employers also must provide employees with salary ranges at the time of any change in the employee's position.

Maryland: Applicants may request the wage range for the position for which the applicant has applied.

Rhode Island: Effective January 1, 2023, employers must provide applicants with the wage range for the position before discussing compensation with the applicant. Employers must also provide the wage range to employees upon hire, at the time of any change in the employee's position, and upon request.

# Next Steps

Morgan Lewis

# How to Prepare for Pay Transparency Requirements

- Conduct a pay equity audit to determine if there are wage gaps between employees based on sex, race, ethnicity, or other protected characteristics.
- Consider standardizing pay scales and determining a process to set and adjust these scales.
- Review and confirm which hiring channels are being used and which third parties are advertising on employer's behalf.
- Prepare template language to include in job postings.

# How to Prepare for Pay Transparency Requirements

- Train recruiters, HR professionals, hiring managers, and interviewers on how to respond to pay scale inquiries, when and how to provide pay scale information, prohibited salary history inquiries, and how to respond when a candidate voluntarily discloses salary information.
- Consider how you will respond to a potential uptick in pay raise requests and employee dissatisfaction with their pay.

# FAQs

Morgan Lewis

# FAQs

- Do the job posting requirements apply to remote positions that an employee in NYC, California, Washington, or Colorado could potentially apply to?
- Do the employee thresholds apply to employees just in that state or anywhere?
- Can employees ask about the pay range for other job positions?
- Do these laws apply to promotional opportunities?
- Can employers prohibit employees from discussing their wages? What about the wages of other people?
- Can employers ask applicants about their salary history to determine what their salary expectations are?
- Does the salary range that an employer posts need to reflect the full scale of current employees in the position?

# FAQs

- What do we do when we want to post a job opening that could be filled by multiple levels (e.g., Engineer I, II, or III)?
- Do previously published job postings need to be updated once these laws become effective?
- Are there penalties if an employer later offers someone a salary outside the posted range?
- Does the posted salary information need to include incentive compensation, bonuses, or commissions?
- Are recruiter job advertisements covered? Phone calls?
- Do these laws apply to independent contractor positions?
- Are companies required to advertise for new jobs publicly?

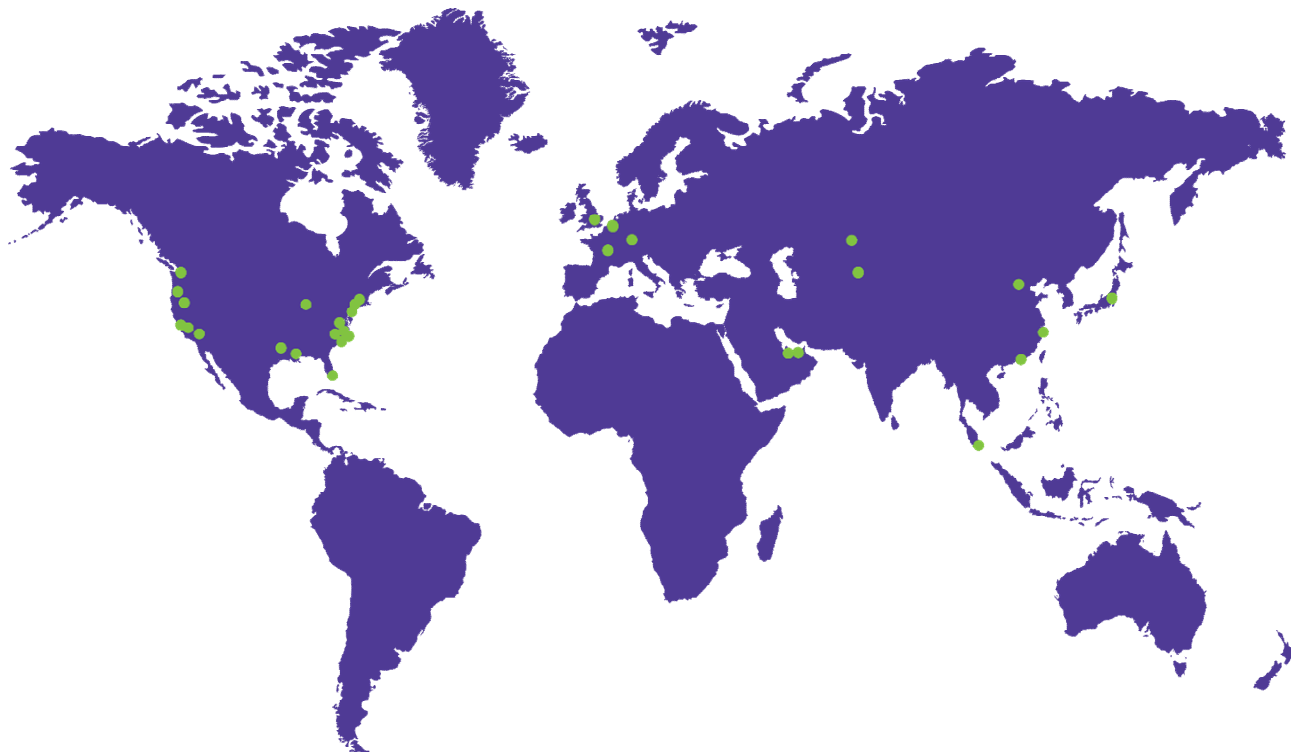


## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
Los Angeles  
Miami  
New York  
Nur-Sultan  
Orange County  
Paris  
Philadelphia  
Pittsburgh  
Princeton  
San Francisco  
Seattle  
Shanghai\*  
Silicon Valley  
Singapore\*  
Tokyo  
Washington, DC  
Wilmington



# Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

# THANK YOU

© 2022 Morgan, Lewis & Bockius LLP  
© 2022 Morgan Lewis Stamford LLC  
© 2022 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.