



Morgan Lewis

PAY TRANSPARENCY AND IMMIGRATION: RECENT DEVELOPMENTS AND THE IMPACT ON MULTINATIONAL EMPLOYERS

Claire M. Lesikar, Toni Moran, Eleanor Pelta, Eric S. Bord
February 1, 2023

Presenters



Claire M. Lesikar



Toni Moran



Eleanor Pelta



Eric S. Bord

Morgan Lewis

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) that 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 that it may pay for the particular job.

Colorado: First State to Require Compensation in Every Job Posting

- 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 ranging 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.
- New York City Commission on Human Rights (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 attorney's fees.
 - Prospective candidates have no private cause of action.

New York City Guidance

- New webpage, posted 10/31/22.
 - <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.

New York State to Require Compensation in Job Advertisements

- Effective September 17, 2023, New York State will require compensation ranges in all advertisements for new jobs, promotions, and transfer opportunities.
- Applies to employers in New York with four or more employees.
- Applies to all postings for positions that can be performed, at least in part, in New York.

New York State to Require Compensation in Job Advertisements

- Compensation range is defined as “the minimum and maximum annual salary or hourly range of compensation for the ... opportunity that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity.”
 - Jobs that are paid solely on commission must include a general statement that the position is in fact commission-based.
- If a job description exists for the position, it must be included in the posting.

New York State Penalties

- Civil penalties not to exceed \$1,000 for the first violation, \$2,000 for the second violation, and \$3,000 for the third and subsequent violations.

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 Guidance

- The job posting requirement applies to any job posting that could ever be filled in California, either in person or remotely.
- The pay scale need not to include bonuses, tips, or other benefits. Any compensation or tangible benefits provided in addition to a salary or hourly wage are not required to be posted.
- If the position's hourly or salary wage is based on a piece rate or commission, then the piece rate or commission range that the employer reasonably expects to pay for the position must be included in the job posting.
- Employers cannot link to the salary range. It must be included within the posting.

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 to be offered to the hired applicant;
 - a general description of all of the benefits to be offered to the hired applicant; and
 - A general description of other compensation (discretionary and nondiscretionary) to be offered to the hired applicant.

Washington Guidance

- Employers are covered by the job posting requirement if they (1) have 15 or more employees worldwide and (2) engage in any business, industry, profession, or activity in Washington.
- This law only applies to postings that include qualifications for the specific position.
- A posting for a remote role must comply with Washington law if the position could be performed by a Washington-based employee.
- Employers cannot avoid coverage by excluding Washington applicants—e.g., “Washington applicants need not apply.”

Washington Guidance

- If an employer intends to provide lower pay for a probationary period or other initial timeframe, the job posting must list both the starting pay range/rate and the entire scale or range.
- If an employer has a job opening that could be filled with various job titles, depending on experience, the employer must list all potential wage scales or salary ranges.
- If the job is compensated by commission or piece rate, the job posting should include the commission/piece rate or rate range (percentage or otherwise) that would be offered to the hired applicant.

Washington Guidance

- All covered job postings must include a general description of all benefits offered for the specific available position, which includes, but is not limited to, healthcare benefits, retirement benefits, any benefits permitting paid days off (including more generous paid sick leave accruals, parental leave, and paid time off (PTO) or vacation benefits), and any other benefits that must be reported for federal tax purposes, such as fringe benefits.
 - If an employer offers PTO, vacation, paid holidays, or more generous paid sick leave, the job posting must include the specific number of days or hours the hired applicant would expect to receive.

Washington Guidance

- All covered job postings must include a general description of all other compensation to be offered to the hired applicant in addition to their salary range or wage scale. “Other compensation” includes, but is not limited to, bonuses, commissions, profit-sharing, or stock options.

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 attorney's fees.

Immigration-Related Implications of Pay Disclosure Laws for Employers

Morgan Lewis

Permanent Labor Certification Process (PERM)

- Immigration and Nationality Act (INA) Section 212(a)5(A) states that a foreign national coming to the United States to perform skilled or unskilled labor is inadmissible unless the Secretary of Labor has certified that there are not sufficient workers who are able, willing, qualified, and available to perform such labor and the employment of the foreign national will not negatively affect the wages and working conditions of US workers similarly employed.
- The “PERM” program, managed by the Department of Labor (DOL) through a set of detailed regulations found at 20 CFR Section 656, is based upon this provision in the immigration laws.

Permanent Labor Certification Process (PERM)

- A PERM labor certification application, made on ETA Form 9089, is the first of three steps required in order for an employer to sponsor most foreign nationals for lawful permanent residence. The form documents the steps the employer took to test the job market and the qualifications of the foreign national for the employer's job opportunity.
- When a PERM is certified, the DOL is attesting that an employer has adequately tested the US labor market through good faith recruitment, and that there were no US workers "able, willing, qualified, and available" to perform the job in the geographic area of intended employment.
- More than 120,000 PERM applications are filed by US employers with the DOL each year.

PERM Requirement – Prevailing Wage

- The PERM regulations require an employer to request from the DOL a determination of the prevailing wage for the specific occupation in the geographic area of intended employment.
- The employer must also undertake various types of recruitment, including the following:
 - Print advertisements – typically two Sunday ads in the newspaper of widest circulation in the area of intended employment, or print ads in professional journals;
 - Three other types of recruitment chosen from a regulatory menu of 10 options, including job search websites, local or ethnic newspapers, and radio or television ads.

PERM Advertisements Requirements

- 20 CFR Section 656.17(f) provides that an advertisement for a PERM labor certification must name the employer, instruct applicants to report to or send resumes to the employer, provide “a description of the vacancy specific enough to apprise the US workers of the job opportunity for which certification is sought,” and indicate the geographic area of intended employment.
- Per DOL guidance, employers are not required to enumerate every job duty, requirement, or condition in an advertisement so long as the employer can demonstrate a “logical nexus” between the advertisement and the position described at length on the employer’s ETA 9089 form.

PERM Advertisements: Wage and Benefits Offered

- Under the DOL rules, an employer may not offer wages or working conditions to US workers that are less favorable than those offered to the foreign national worker.
- Significantly, under the DOL rules neither the wage nor the benefits offered are required to be disclosed in PERM advertisements.
- Because a PERM application relates to a future position that a foreign national will assume upon being granted lawful permanent residence (a green card) the wage offered in a PERM application need not necessarily be paid to the foreign national beneficiary until that foreign national is granted the green card.

PERM Requirements When Wages Are Stated in Advertisements

- Under PERM rules, when a wage is disclosed or stated in an advertisement, that wage must be at or above prevailing and must not be lower than the wage offered to the foreign national.
- A wage range may be used, but the lower end of the wage range must be at or above prevailing, the wage range must include the wage offered to the foreign national, and the same wage range must be used in all advertising and on the employer's ETA 9089 form.

PERM Requirements When Wages Are Stated in Advertisements

- If these rules are not observed, the DOL will deny (refuse to certify) the employer's PERM application.
- As PERMs now take many months to prepare and file, and the DOL is taking eight to nine months to certify a PERM, a denial could be fatal to the employer's efforts to sponsor a foreign national employee before that employee's temporary visa status expires.

Considerations and Strategies for Employers Filing PERM Applications

Morgan Lewis

Impact on PERM Labor Certification Practice

- In states or localities in which there are pay transparency rules in effect, where an employer is placing a PERM advertisement, a wage must now be disclosed.
 - Will impact all types of print advertisements;
 - May impact advertisements in other media, depending on the provisions of the law in that jurisdiction;
 - While pay transparency rules may allow for a general or inexact wage range, PERM rules will require a wage range that conforms with PERM rules, i.e., where the bottom of the range is at or above prevailing;
 - Depending on the jurisdiction, a statement regarding benefits must be included.

Impact on PERM Labor Certification Practice

- Critically, compliance with state and local wage transparency rules, and a desire to avoid labor certification denial, may require certain employers to wait for a prevailing wage determination from DOL before placing any ad that now requires a wage range.
- This is a troubling result in light of DOL's extremely lengthy processing times for prevailing wages (8-9 months.)
- This will lengthen an already inordinately long labor certification process.
- DOL is currently under fire for a number of prevailing wage requests that have been pending since January 2022.

Impact on PERM Labor Certification Practice

- Compliance will be especially challenging where an employer wishes to advertise a position for PERM purposes that allows for remote work or work from home.
 - Remote work or WFH is considered a benefit that, if provided to the foreign national employee, must be explicitly advertised to US workers.
 - In certain jurisdictions, under pay transparency rules, if the position may be performed from that state or locality, compliance with the pay transparency rules of that state or locality is required.
 - Thus, if an employer's PERM job opportunity is located in a state in which there are no pay transparency rules, but can be done remotely from anywhere in the US, the likelihood is that the employer may have to ensure that the advertisements for that job opportunity are compliant with not one but numerous pay transparency rules.

Options for Employers

- Large employers who advertise for PERMs in numerous jurisdictions nationwide may want to consider using a range for advertising that begins with the highest prevailing wage of all jurisdictions in which it is advertising, and includes benefits language that is compliant with the laws in jurisdictions that require such language.

Options for Employers – Remote Workers

- Employers advertising for positions based in a certain locality or at the employer's headquarters, but that can be done remotely from anywhere, may wish to state a wage range in their PERM ads in order to be compliant with a number of different pay transparency laws, but the employer should be able to follow the the DOL rule that allows the bottom of the range to be at least the prevailing wage for the position in the geographic area in which the position is based (the Headquarters Rule).

Options for Employers

- Can employers who do not wish to post a salary or salary range for a position based in a jurisdiction that does not have a pay transparency rule limit WFH or remote work for that position, e.g., limiting to residents of that jurisdiction instead of allowing for remote work from anywhere in the United States?
- Advisable to have a business rationale for doing so...

Avoiding Unfair Immigration-Related Employment Discrimination

- Compliance with transparency rules in the context of PERM advertising may expose employers to charges of unfair immigration-related employment practices.
 - For example, disclosing a salary that meets prevailing wage, or a range that begins with prevailing wage, but is the salary that the foreign national will be offered, and not the salary currently paid to workers in that position at the employer.

Questions?

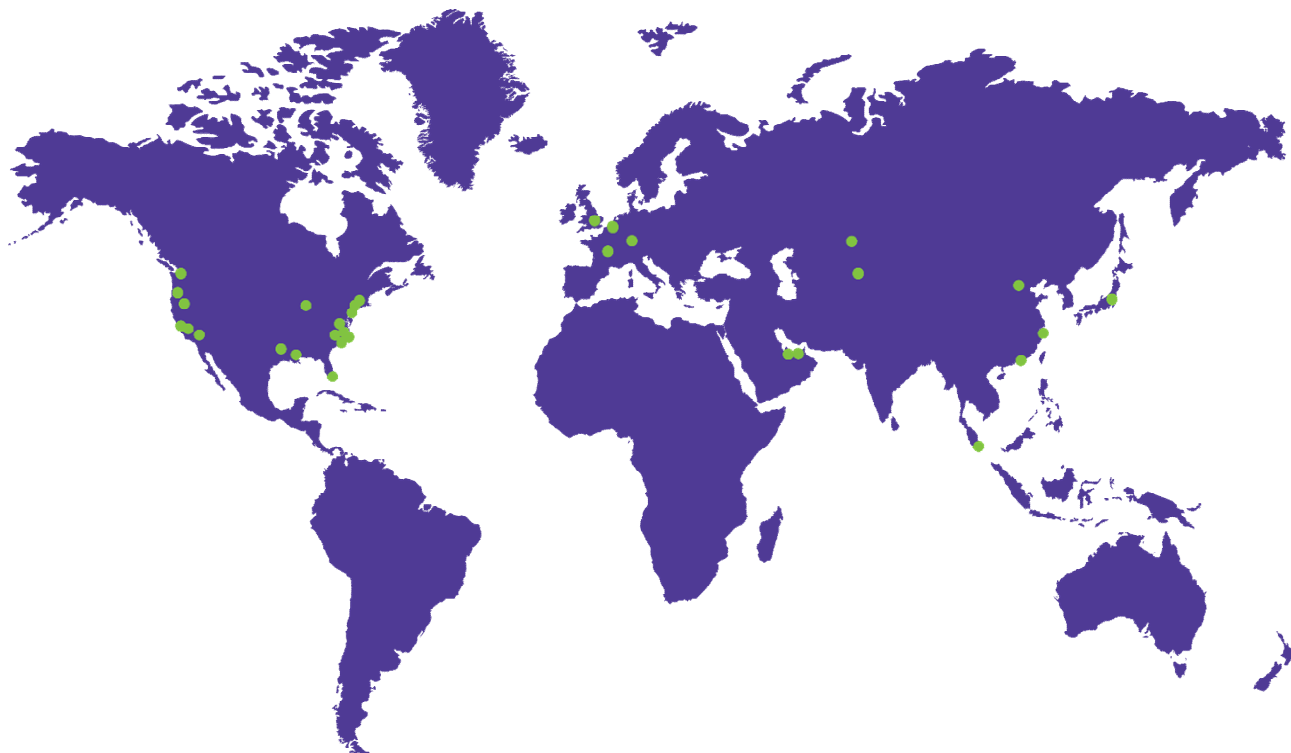
Morgan Lewis

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
Astana
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.

THANK YOU

© 2023 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership

Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius 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.

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.