



Stop the Presses!

Making Sure Your Job Postings Are Updated To Comply With Washington's New Pay Transparency Requirements

Effective January 1, 2023, employers with 15 or more employees must include in each job posting: (1) the wage scale or salary range for the job; and (2) a general description of all the benefits and other compensation to be offered to the person hired. RCW 49.58.110.

The Washington Department of Labor & Industries recently issued an administrative policy (the "L&I Policy") that is intended to provide guidance on complying with the new posting requirements. Review the policy here: <https://www.lni.wa.gov/workers-rights/docs/ese1.pdf>. There are some gray areas, however, so employers will need to monitor how the Department enforces the new law once the requirements take effect.

Below are key FAQs regarding the posting requirements.

Frequently Asked Questions

To meet the employee coverage threshold, does an employer need to have 15 employees within the State of Washington?

No. An employer will be subject to the new pay transparency requirements if it has 15 employees total and one or more of the employees is based in Washington.

What is a "job posting"? Does the law apply to hires that are made through existing relationships or referrals?

A "posting" is defined to include any solicitation intended to recruit job applicants for a specific available position with stated qualifications for desired applicants, whether done by the employer or through a third party. Postings include both printed and electronic solicitations.

Based on this definition, the new law should not apply to new hires that result from an existing relationship or referral. For example, if an employer is not looking to fill a position but is introduced to a strategic candidate, and discussions with that candidate lead to an offer of employment, the law should not apply because there was no "posting" soliciting applicants.

The L&I Policy provides various examples of what does and does not constitute a job posting subject to the new pay disclosure requirements. Per the policy, a sign, reader

board, or online post with the following statements would not be considered a job posting because they fail to include qualifications and/or reference a specific position for a desired applicant:

- “Help Wanted. Part-time Dishwasher. Experience Needed.”
- “Hiring Now-All Jobs. Food Handler’s permit required”
- “Manufacturing jobs available, apply now online. Weekend shifts required.”
- “Help wanted-Server. Offering minimum wage plus tips.”

In contrast, the following statements on a sign, reader board, or online post would be considered a job posting because they do include qualifications and/or reference a specific position for a desired applicant in L&I’s view:

- “Help Wanted- Server. Food Handler’s Certification Needed. Offering: \$24.00- \$26.00 per hour, medical benefits, 70 vacation hours per year, and \$500 sign-on bonus.”
- “Seeking applicants for a Billing Specialist position. Must have 2 years of medical bill processing experience. \$30.00- \$40.00 per hour, medical, vision, and dental benefits, 401k retirement plan, and stock options available. More information can be found via hyperlink here.”
- “We are looking for a qualified applicant who has experience with use of spreadsheets and database software for a Data Analyst role. Salary range is \$60,000 - \$80,000 per year. Medical, vision, dental benefits, tuition reimbursements, and stock options available for the hired applicant. More information can be found via hyperlink here.”

How does the law apply to internal transfers or promotions?

The statute provides that where an employee is offered a transfer to a new position or a promotion, the employer must provide the wage scale or salary range for the new position, if requested by the employee. Thus, even if there is no external “posting,” the compensation range for a position offered to an internal candidate must be disclosed upon request.

How specific does the employer need to be regarding the “wage scale or salary range”? Can an employer comply by specifying a very expansive range? What about using “up to \$X” (no bottom range) or “\$X+” (no maximum) to maintain flexibility?

According to the L&I Policy, a posting must provide the employer’s “most reasonable and genuinely expected range of compensation for the job.” Extremely broad ranges will likely be closely scrutinized, and may run afoul of the law if they do not provide meaningful information to applicants about the pay for the posted position. The L&I Policy indicates that postings should not use open-ended phrases, such as “\$60,000 per year and up” or “up to \$29.00/hour,” as these phrases fail to indicate the bottom and/or top of the range.

Where a particular posting could encompass a range of experience levels, an employer may want to specify a very broad pay range, which would allow an offer to depend on the candidate's experience. It is not clear how L&I will evaluate such a posting. The L&I Policy suggests that an employer could approach this situation by specifying a starting range, as well as a total range for the position. Per the example provided, an employer could indicate that the salary range for a position is \$60,000 - \$70,000 per year, but that new hires generally start between \$60,000 - \$65,000 per year.

Another suggested approach is to establish position levels tied to experience/qualifications, and provide a salary range for each level. For example, if a particular job opening could be filled with varying experience levels, the employer could identify the job titles encompassed by the posting, with salary ranges for each, such as:

- Accounting Analyst 1 - \$27.00 - \$29.00 per hour
- Accounting Analyst 2 - \$65,000 - \$80,000 per year
- Accounting Analyst 3 - \$80,000 - \$110,000 per year

In this situation, the employer would presumably have criteria regarding experience and/or other qualifications that would determine where a candidate would be slotted, allowing candidates to determine more precisely the salary range applicable to them.

The permissible scope of a pay range is one of the unknowns under this new law, and until we begin seeing enforcement activity it is difficult to know how aggressive the Department will be in challenging expansive ranges. Establishing a very large range and simply stating that actual pay will depend on experience may be deemed too vague and noncompliant. If a posting could truly encompass a wide range of experience levels, warranting a large pay range, the employer can try to minimize risk by specifying sub-ranges tied to qualifications.

If a position is compensated in part by commission rates, how detailed must the posting be?

Per L&I, for positions paid in whole or part on commissions, an employer should specify the rate or rate range for commissions. For example, the Department indicated that a posting could state that the position will earn commissions of 5-8% of net sale price per unit. It would not be sufficient to simply indicate that an employee will earn commissions without any further detail.

Can employer negotiate a salary that is outside of the posted pay range?

The L&I Policy contemplates that a pay range may change after the posting has been published. If this occurs, the Department recommends that the employer update the posting to reflect the updated pay range. Thus, if a particular candidate negotiates a salary that is above the posted range, the employer can legally agree to hire the candidate at that higher salary. If possible, the employer should quickly update its job

posting to adjust the high end of the range. This may seem silly if the employer has effectively already hired the candidate and is no longer seeking applicants, but it would achieve technical compliance. That said, even in the absence of reposting, it seems unlikely that L&I would discover a hire that fell outside a posted salary range; the candidate who successfully negotiates salary above the posted range has little incentive to report this. However, it is possible that the Department could begin conducting audits or could receive a whistleblower-type complaint from someone who learns that a new hire is being paid outside the posted range. Reposting therefore minimizes risk.

Additionally, the Department guidance indicates that an employer may offer a different position than what the applicant applied for. In that case, the L&I Policy provides that an employer may offer the applicant the pay range specific to the position offered, rather than the position posted.

How much detail must be included in a posting regarding the benefits and other compensation that would be offered to the hired applicant?

The statute requires only a “general description” of all benefits and other compensation for which a position is eligible. The L&I Policy provides the following additional guidance as to various benefit categories:

- **Insurance**: The posting should list the kinds of insurance offered, such as medical, vision, dental, life, and/or disability insurance. A statement that “Employees (and their families) are covered by medical, dental, vision, and basic life insurance” would be sufficient. Based on the sample language provided by L&I, it is not necessary to provide plan details, co-pay information, or other detailed information.
- **Retirement Plans**: The posting should list any available retirement options, such as 401k, employer-funded retirement plans, or other deferred compensation or defined benefit plans. Plan details are not required.
- **Paid Time Off/Vacation/Sick Leave**: The posting should list the number of days or hours of paid leave the hired applicant would receive (e.g., 8 hours of vacation and 8 hours of paid sick leave per month).
- **Paid Holidays**: The posting should list the number of paid holidays the hired applicant would get, but need not specify the holidays.
- **Other Compensation**: The posting should list other forms of compensation that would be available to the hired applicant, such as bonuses, profit-sharing, stock options, or the like. Per the example offered by L&I (“Hired applicant will be able to purchase company stock, receive annual bonuses, and can participate in profit-sharing”), details are not required.

The L&I policy provides that an employer with electronic job postings may elect to use a link or hyperlink that leads an applicant to more detailed descriptions of any benefit or compensation information. The Policy further provides that if the information is covered in such a link, it need not also be included in the primary posting. However, if the

employer uses a link/hyperlink to satisfy its disclosure obligations, it must ensure the functionality of the link(s) regardless of any use of third-party administrators.

What are the penalties for violating the pay transparency requirements?

If an employer fails to comply with the requirements, an applicant or employee may file a complaint with L&I, which may investigate and order the employer to pay the complainant actual damages, as well as double damages or \$5,000 (whichever is greater). The Department can also order the employer to pay the Department's costs of investigation and enforcement. Civil penalties of up to \$1,000 per violation or 10 percent of the damages (whichever is greater) can also be imposed. Alternatively, a complainant can initiate a lawsuit against the employer for actual and double damages, plus attorneys' fees and costs.

If you have specific questions about the new pay transparency requirements, please feel free to reach out to one of the attorneys in Summit Law Group's Labor & Employment group.

Important Notification

This summary is intended to provide an overview of recent legal developments. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.