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州の給与透明化法ーPERMの求人活動を実施する前に 雇用主が確認すべき5つの問題

Heather L Frayre *著*

何が起こっているか?

ここ数年、求職者の賃金の透明化を図るため、複数の州におい て、給与透明化法が制定されています。この法律の目的は、求職 者が給与に関する一般的な考えを持った上で賃金交渉に臨むこと で、最終的に給与の平等性を実現することにあります。給与透明 化法では、求人広告に給与・賃金の範囲を記載することが義務付 けられているため、求職者がその職種に関する給与を合理的に予 測することができるようになっています。コロラド州の給与透明 化法が2021年1月1日に施行されて以降、多くの州または一部の自 治体がそれに追随しています。

同様の法律を検討する州が増えるにつれ、給与透明化法を制定す る州の数も増えています。Center for American Progressが 提供する以下の図表では、現在制定されている様々な法律の詳細 に関する説明がなされています。

State	Effective date	Covers employers	What information are employers required to share?	When and where must the salary range be shared?
Maryland	October 1, 2020	Engaged in business in the state.	"The wage range for the position for which the applicant applied."	Upon request.
Colorado	January 1, 2021	With at least one employee in the state.	"Hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all the benefits and other compensation to be offered."	In job postings.
Connecticut	October 1, 2021	With at least one employee in the state.	The wage range for the applicant or employee's position.	For applicants, the earliest of the applicant's request, or before or at the time an offer of compensation is made. For employees, when the employee in ired, changes positions, or first requests a wage range.
Nevada	October 1, 2021	In the state, including employment agencies.	The wage or salary range or rate for a position, promotion, or transfer.	For applicants, after the inferview. For employees, when the employee has applied for a promotion or transfer, been interviewed or been offered a promotion or transfer, and requested the wage or salary range or rate.
Rhode Island	January 1, 2023	With at least one employee in the state.	"The wage range for the position for which the applicant is applying"	For applicants, upon request and prior to discussing compensation. For employees, 'both at the time of hire and when the employee moves into a new position'; during employment, wage range information must be provided anytime an employe requests it.
Washington	January 1, 2023	With 15 or more employees.	"The wage scale or salary range, and a general description of all the benefits and other compensation to be offered."	In a job posting. For an internal transfer or promotion, upon request.
California	January 1, 2023	With 15 or more employees.	"The salary or hourly wage range that the employer reasonably expects to pay for the position."	In a job posting. For employees who seek to know the salary range of their current position, upon request.
New York	September 17, 2023	With four or more employees, including employment agencies.	Compensation or range of compensation.	in a job posting or advertisement.

これらの法律は似ているように見えますが、対象となる雇用主 の規模等、法の適用範囲に影響を与える規則が異なる場合があ ります。特に、給与透明化法の中には、州内に雇用主や従業員 がいない場合でも、遠隔地の従業員が対象となると解釈される ものもあります。

PERMに関する規制

PERMは厳格に規制されたプロセスで、雇用の意思の有無、雇用の 資格の有無、該当するポジションに就くアメリカ人労働者の有無 を判断するための雇用市場テストの実施が求められます。雇用主 は、労働市場テストの一環として、労働省(DOL)から実勢賃金決 定書(PWD)を取得する他、様々な広告や掲示が求められます。シ

DOLの規制では、求人広告に賃金が記載される場合、DOLが決定し た実勢賃金及び外国人従業員に提示される賃金より低い金額を記 載してはならないとされています。DOL規則は、影響を受ける労働 者に提供される通知 (Notice of Filing。広告ではない) にのみ 賃金を記載することを要求しています。また、他の形態のPERMの 求人においては、賃金の記載は必要ありません。

給与の透明性に関する法律とPERMの整合性

コロラド州は、PERMの一環として求人広告を掲載する雇用主に対 しては、給与透明化法を適用しないことを表明しています。しか し、他の州は同様の表明はなされていません。したがって、雇用 主がPERMで求められる求人活動を行う際には、州法または自治法 の規制に反しないよう、慎重に行う必要があります。例えば、雇 用主は、リモートワークの傾向や、リモートワーカーへの広告の 可能性を考慮した上で、PERMの全ての求人広告に賃金レンジを記 載するかを検討すべきです。なお、雇用主がケースバイケースで 賃金や賃金レンジの記載を検討する場合には、労働担当弁護士と 相談し、以下の5つの項目を確認する必要があります:

- 1. 雇用主の規模、本社所在地、特定の地域に所在するオフィス 等の要因から、州または自治体の賃金法賃金規制に拘束され るか?
- 2. 職務が遂行される場所、リモート勤務の可否、その職務に関 連する出張の必要性などから、当該職務が州または自治体の 賃金法・賃金規制の対象となるか?
- 3. 広告に掲載される賃金レンジは、PERM規制の要件(下限は実 勢賃金と同等またはそれ以上でなければならず、また、外国 人労働者にオファーされる賃金を下回ってはならない)を満 たしているか?

前述の通り、PERMの規制上、雇用主は、実勢賃金や外国人労働 者にオファーされる賃金よりも低い賃金(またはそ賃金レン ジ)を記載してはならないことになっています。

4. タイミングへの影響があるか?

PERMの規制上、PWDが発行される前に求人活動を行うことも可能 ですが、その場合には、雇用主がリスクを負う可能性がありま す。例えば、PWDの発行時期を雇用主がコントロールすることは できないため、申請前に求人広告が期限切れになる可能性があ ります。また、求人広告に実勢賃金を上回る賃金・賃金レンジ を記載しなければならない場合においても、雇用主が負うリス クが増えます。毎年7月1日、新たな賃金データを反映させるた め、公示された実勢賃金が調整されますが、職種によっては、

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前年よりも大幅に上昇した実勢賃金が適用されることも珍しく ありません。そのため、雇用主がPERMの一環として求人広告に 賃金・賃金レンジを記載する場合には、PWDが発行されるまでは 求人広告の掲出を待つことを強くお勧めします。

5. 賃金レンジを含めることで、どのような影響があるか?

実勢賃金の要件を満たすため、賃金レンジの下限を、雇用主が通常オファーする賃金よりも高い水準に設定することも多くなっています。そのため、PERM手続の一環として実施される求人活動で提示される賃金に関しては、実際の賃金レンジが反映されていない場合があります。すなわち、PERMの求人活動における求人広告とそれ以外の求人広告との間に矛盾が生じる可能性があります。加えて、PERM規制や州・自治体の規制を遵守しつつも、ビジネス戦略に沿ったPERM採用戦略を立てる上で考慮されるべき雇用主独自のポイントが存在する場合もあります。

PERM手続における求人広告には、全てのポジションに関する要件を具体的に記載する必要はないものの、PERM広告が同等のポジションに関する他の求人広告よりも高い賃金レンジをとなっている理由を求職者に知らせるために、そのような要件を記載することが有益な場合もあり得ます。

結びに変えて

新たな賃金透明化法は、現在の雇用環境への対応といった観点からは時代遅れとなっているPERM規制を遵守する雇用主にとって、難題を提起しています。PERMの要件と賃金透明化法が交錯する本課題については、PERM規制と州や自治体の規制の両方の要件を満たすPERM採用活動を行うためにも、移民法及び労働弁護士とともに最善の戦略を立てる必要があるといえるでしょう。

著者について



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電話番号:915-541-9370

Email: hfrayre@dickinsonwright.com.

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March, 2023

STATE PAY TRANSPARENCY LAWS: 5 QUESTIONS EMPLOYERS MUST ASK BEFORE STARTING A PERM RECRUITMENT CAMPAIGN

By Heather L Frayre

What Happened?

Over the past couple of years, multiple states have enacted pay transparency laws with the goal of increasing wage transparency for job seekers. The objective of these laws is ultimately to achieve pay equality as job seekers approach the bargaining table with a general idea of what to expect in terms of salary. Pay transparency laws require that job advertisements include a salary or wage range that is not open-ended and provides a reasonable, "good faith" expectation of the pay associated with the position. Colorado's pay transparency law took effect on January 1, 2021, and since then a number of states, and even some localities, have followed suit.

The list of pay transparency laws continues to grow as more and more states consider similar legislation. The following chart from the Center for American Progress, available here, provides some details as to the various statutes that are in existence today.

State	Effective date	Covers employers	What information are employers required to share?	When and where must the salary range be shared?
Maryland	October 1, 2020	Engaged in business in the state.	"The wage range for the position for which the applicant applied."	Upon request.
Colorado	January 1, 2021	With at least one employee in the state.	"Hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all the benefits and other compensation to be offered."	In job postings.
Connecticut	October 1, 2021	With at least one employee in the state.	The wage range for the applicant or employee's position.	For applicants, the earliest of the applicant's request, or before or at the time an offer of compensation is made. For employees, when the employee is hired, changes positions, or first requests a wage range.
Nevada	October 1, 2021	In the state, including employment agencies.	The wage or salary range or rate for a position, promotion, or transfer.	For applicants, after the interview. For employees, when the employee has applied for a promotion or transfer, been interviewed or been offered a promotion or transfer, and requested the wage or salary range or rate.
Rhode Island	January 1, 2023	With at least one employee in the state.	"The wage range for the position for which the applicant is applying."	For applicants, upon request and prior to discussing compensation. For employees, "both at the time of hire and when the employee moves into a new position", during employment, wage range information must be provided anytime an employee requests it.
Washington	January 1, 2023	With 15 or more employees.	"The wage scale or salary range, and a general description of all the benefits and other compensation to be offered."	In a job posting. For an internal transfer or promotion, upon request.
California	January 1, 2023	With 15 or more employees.	"The salary or hourly wage range that the employer reasonably expects to pay for the position."	In a job posting. For employees who seek to know the salary range of their current position, upon request.
New York	September 17, 2023	With four or more employees, including employment agencies.	Compensation or range of compensation.	in a job posting or advertisement.

While these laws may appear similar, aspects of the rules that impact their reach may differ, such as the size of the employers covered. Notably, some pay transparency laws may also be interpreted to cover remote employees even if the employer has no presence or employees in the state.

PERM Regulations

The vast majority of employers who sponsor employees for permanent residency do so through the <u>PERM</u> labor certification process. PERM is a

highly regulated process that requires a test of the job market to determine whether there are willing, qualified, and available United States (U.S.) workers to fill a particular position. Employers are required to obtain a prevailing wage determination (PWD) from the Department of Labor (DOL) and place various ads and postings as part of the labor market test.

DOL regulations require that if a wage is listed in recruitment, it cannot be lower than the prevailing wage as determined by DOL and cannot be lower than the wage offered to the foreign national employee. DOL regulations only require that the wage be listed on the Notice of Filing, which is a required *notice* (not an advertisement) to be provided to the employer's affected workforce. Other forms of PERM recruitment do not require the listing of a salary.

Reconciling Pay Transparency Laws with PERM

While the state of Colorado has indicated that it will not enforce its pay transparency laws against employers placing ads pursuant to a PERM recruitment campaign, other states have not offered similar assurances. Thus, employers must be cautious when conducting PERM recruitment that they do not violate state or local laws. Employers should consider including wage ranges in all PERM advertising, especially in light of the trend towards remote work and the potential reach of these ads to remote workers. If an employer chooses, however, to consider including a wage or wage range on a case-by-case basis, it should consult with its labor and employment counsel and ask the following 5 questions:

- 1. Is the employer bound by any state or local wage laws, based on factors such as the size of the employer, the location of its headquarters, or its presence in a particular location?
- 2. Is the position affected by any state or local wage laws, based on factors such as the location of the job, whether remote work is permitted, or any travel requirements associated with the position?
- 3. Does the posted wage range satisfy the requirements under the PERM regulations (the low end of any wage range must be equal to or greater than the prevailing wage and the offered wage cannot be lower than the wage offered to the foreign national employee)?

As noted above, PERM regulations forbid an employer from including a wage or wage range that is lower than the prevailing wage or that offered to the foreign worker.

4. Is there any impact on timing?

PERM regulations permit that recruitment be conducted prior to the issuance of a PWD. While the employer undertakes some degree of risk generally in choosing this option (e.g. lack of control over prevailing wage determination timing may result in expired advertising before filing is possible), there is also an increased



risk in conducting recruitment before the issuance of a PWD if the advertisements must include a wage range that must not be lower than the prevailing wage. For example, every year on July 1, posted prevailing wages are adjusted to reflect new wage data. It is not uncommon for some occupations to carry a prevailing wage requirement that has increased significantly from the prior year. Therefore, if an employer includes a wage or wage range in its PERM advertising, it would be highly advisable to wait until after the PWD has been issued to place its advertisements.

5. What is the impact of including a wage range?

Because it may often be necessary to adjust the low end of a wage range to a level that is typically higher than the employer would normally offer due to prevailing wage requirements, the PERM wage range may not be the true range that would be offered for a particular position. This situation may create inconsistencies with other advertisements placed pursuant to traditional, non-PERM advertising. There may also be other considerations unique to the employer that should be considered in developing a PERM recruitment strategy that both complies with PERM and state/local regulations but also aligns with business strategy. Also, while it is not required to specifically list out all of the position's requirements in a PERM advertisement, it may be beneficial to list the requirements in order to notify job seekers of the reason a PERM advertisement may command a higher wage range than an advertisement for a similar position.

Conclusion

New pay transparency legislation poses a challenging issue for employers attempting to navigate compliance with PERM regulations, which are outdated in addressing the current employment environment. This issue of the intersection of PERM requirements and applicable pay transparency laws must be addressed with immigration as well as labor and employment counsel to determine the best strategy for conducting PERM recruitment that satisfies both the PERM regulations as well as state and local rules.

ABOUT THE AUTHORS



Heather Frayre is a Member in Dickinson Wright's El Paso office, where she assists clients in navigating immigration matters tied to the recruitment, hire, transfer, and retention of foreign workers. She counsels corporate and individual clients on a full range of immigration matters,

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