

California Provides Some (But Not Much) Guidance on New Pay Scale Disclosure Requirement: 6 Key Takeaways for Employers

Fisher Phillips Insights

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California officials recently updated their Equal Pay Act FAQs to answer a handful of questions about the state's new pay transparency requirement for job postings — which goes into effect on January 1. But California employers who were expecting their stockings to be filled with clarifications and insightful guidance from the state may instead be left feeling like they received a lump of coal. While the California Division of Labor Standards Enforcement's (DLSE's) December 27 update provides some needed clarification regarding SB 1162, it leaves many questions unanswered and falls short of the more detailed and comprehensive guidance issued by states like Washington and Colorado regarding their own job posting requirements. Here are the six key takeaways for employers as you prepare to comply with California's new law.

1. How to Determine Employee Headcount and Coverage

SB 1162 requires employers with “15 or more employees” to include the pay scale for a position in any job posting. The updated FAQs clarify (as had been expected) that the DLSE interprets this to apply to employers that have 15 or more employees nationwide, with at least one employee located in California.

But how do you determine whether someone is an employee? And how do you measure the threshold if you have a fluctuating workforce? For questions like these, the FAQs direct employers to prior guidance on minimum wage and supplemental paid sick leave. Additionally, the DLSE noted that the new law's requirements will be interpreted consistently with those prior interpretations for counting employees.

2. Remote Work from California is Covered

According to the updated FAQs, the DLSE interprets SB 1162 to mean that the pay scale must be included in the job posting “if the position may ever be filled in California either in-person or remotely.” Therefore, if you are a covered employer, you may want to comply with the job posting requirements if the job is either physically located *in* California or could be performed remotely *from* California.

3. You Can Post a Set Rate if You Don't Have a Range

Many employers have questioned how to comply with SB 1162 if they do not have an hourly or salary range for a position, but rather one set hourly or salary rate of pay. The updated FAQs clarify that an employer that intends to pay a set hourly amount or a set piece rate amount (and not a pay range) may just provide that set amount in the job posting.

4. Only Base Pay Must Be Posted

The updated FAQs clarify that an employer is only required to provide the salary or hourly range, but not necessarily any compensation or tangible benefits in addition to the salary or hourly wage (such as bonuses, tips, or other benefits). The DLSE notes that employers may include this information voluntarily to make recruitment efforts more competitive and reminds employers that other forms of compensation may be relevant and considered for equal pay purposes.

5. Merely Linking to a Pay Scale Will Not Suffice

The updated FAQs specify that employers *cannot* merely link to the pay scale in an electronic posting or include a QR code in a paper posting that will take an applicant to the pay scale information. Instead, the DLSE states that the pay scale shall be included within the posting itself.

6. This is the Land of Confusion When it Comes to Commissions

The guidance on how to handle commissions is unclear and leaves a lot to be desired. For example, in FAQ 33, the DLSE states, “If the position’s hourly or salary wage is based on a piece rate or commission, then the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting.”

This language is a little unclear, as commissions are more often paid as “additional compensation” on top of hourly wages or salary rather than forming the “basis” for the hourly or salary wage. Based on the prior FAQ related to base pay (discussed above), it would seem that “additional compensation” can be — but is not required to be — included in the job posting. But this FAQ and the reference to hourly or salary wages that are “based on a piece rate or commission” is unclear.

For this reason, employers should consult with counsel to navigate how to address commissions when attempting to comply with job posting requirements.

Is Further Clarification Coming?

The updated FAQs are a little thin and do not answer all questions employers have about the new job posting requirement. In some cases, they even raise more questions than answers. The DLSE could potentially update or issue additional FAQs in the coming days or weeks, but there is no set timetable or guarantee that they will do so.

Therefore, employers should continue to work closely with counsel on complying with SB 1162’s requirements.