

JacksonLewis

# NEW YORK STATE PAY TRANSPARENCY

NYBA HR Roundtable

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**Ana C. Shields**

Ana.Shields@jacksonlewis.com

**Heather L. Veneroni**

Heather.Veneroni@jacksonlewis.com

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# Agenda

- Pay Transparency Laws and Policy Motivations
- NYS Pay Transparency Law
- NYC Pay Transparency Law
- Areas of Concern and Preparing for Strategic Compliance

# Pay Transparency Laws and Policy Motivations

# Pay Transparency Laws - Generally



- Require employers to be more transparent with salary ranges and benefits
- Depending on the jurisdiction, these laws require employers to:
  - Provide applicants the salary range for a posted position at a specified point during the hiring process
  - Provide employees salary range upon request, when changing jobs, or upon hire
  - Include salary range in job postings
  - Include job description in job postings

# Goals

- Pay equity (particularly reducing the gender and racial wage gaps)
- Protect against employment discrimination
- Provide workers with information to gauge their value and whether they are paid fairly
- Increase trust in the workplace
- Strive to facilitate an employer's ability to attract and retain talent

# Combatting Discrimination

- The availability of pay data allows the EEOC to review and reference quantitative evidence when identifying and analyzing systemic discrimination and pay gaps.
- With data points to reference, the EEOC is not only able to evaluate trends within a company, but also trends within the entire industry.

# Success Story - Verve

- In 2018, Verve, a U.K.-based tech firm allowed all their employees to access the pay of peers, supervisors, and even the CEO.
- This complete transparency was successful because Verve used objective measures of job scope and market value of the position to determine pay which allowed rational explanations for pay discrepancies.
- Results?
  - No turnover
  - Greater diversity in the workforce

Source: Kim Elsesser, *Pay Transparency Is The Solution To The Pay Gap: Here's One Company's Success Story*, FORBES (Sept. 5, 2018), <https://www.forbes.com/sites/kimelsesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/?sh=38e113425010>.



# Short-Term Benefits for Employees due to Pay Transparency



- Improved trust
- Sense of fairness
- Increased job satisfaction
- Improved performance

**But does pay transparency actually hurt employees and employers in the long run?**

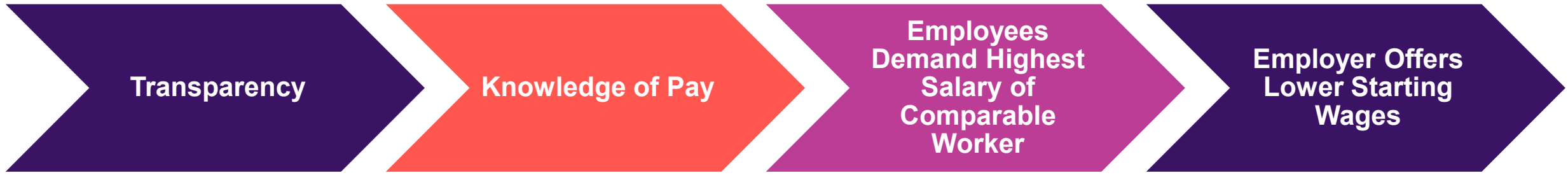
# The Unintended Consequences of Pay Transparency

- Pay compression
  - Often, employers are “forced” to pay closer to the high end of a salary range
- The demand and supply effects of pay transparency
  - Employees with outside options will demand higher wages, those with fewer options will demand lower wages
- Increased employee turnover
- Idiosyncratic deals (“i-deals”)
  - Employees are being treated differently due to individualized deals

# Pay Compression

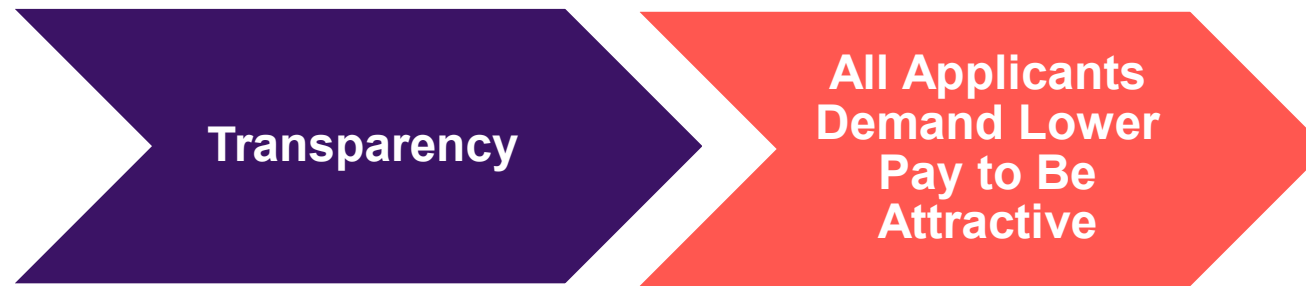
- Pay compression occurs when there is minimal difference in pay between tenured employees and new hires, or managers and their direct reports, despite differences in their respective knowledge, skills, experience or abilities.
- Examples
  - In 2010, California made city managers' pay transparent. In 2012, among top managers, such disclosure led to an approximately 7% decrease in average compensation and a 75% increase in their quit rate, related to managers in cities that had already disclosed salaries.
  - A study using compensation data of approximately 100,000 U.S. academics from 1997 to 2017 showed that pay transparency led to academics being paid more similarly to their peers.
  - Researchers for the Harvard Business Review also found that supervisors, in companies with pay transparency, tend to address employee complaints and salary adjustment requests by reducing differences in compensation (e.g., performance-based incentives) within the same job level, which results in pay compression.
- Source: Leon Lam, et al., Research: The Unintended Consequences of Pay Transparency, Harvard Business Review (Aug. 12, 2022), <https://hbr.org/2022/08/research-the-unintended-consequences-of-pay-transparency>.

# The Demand Effect Of Pay Transparency



- **Transparent Market** → Employers set a maximum starting wage that workers will either accept or reject
- **Secret Market** → Employers are willing to pay any amount that is asked for, as long as it is below the value of labor

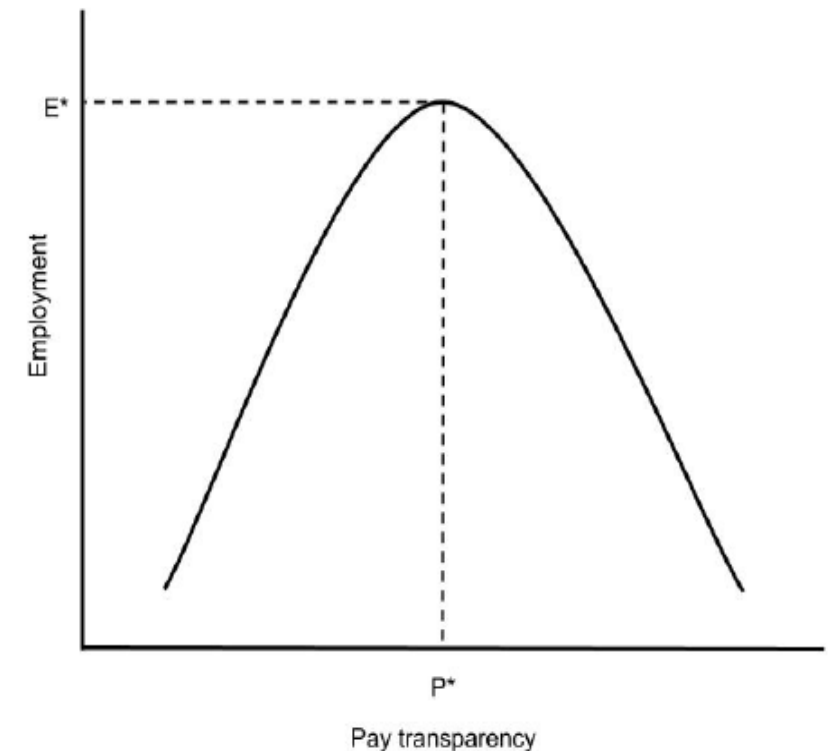
# The Supply Effect Of Pay Transparency



- **Transparent Market** → Those with few outside job opportunities lower their demand more significantly than those with many outside opportunities to appear more attractive, creating a wage gap in the short run.
- **Secret Market** → Applicants demand higher wages than in a transparent market, driving up the average starting rate.

# Equilibrium of the Demand and Supply Effects

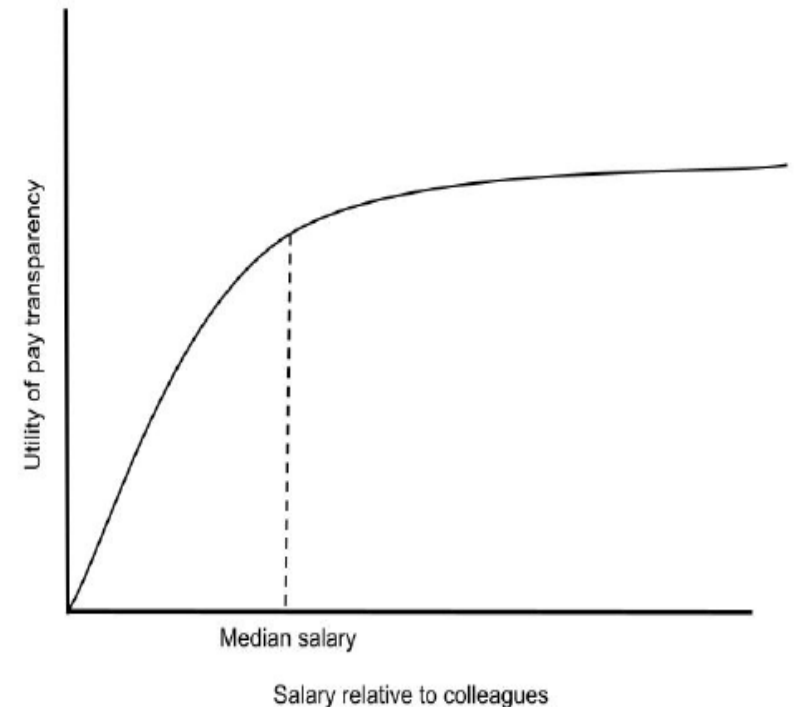
- One study shows that there is an optimal level of transparency (intermediate transparency) that counteracts the demand and supply effects of pay transparency.
- Full secrecy or full transparency minimizes employment, and increasing transparency past the optimal point decreases an individual's bargaining power and transfers it to the company.



Source: BER Staff, *Pay Transparency*, BERKELEY ECONOMIC REVIEW (Nov. 21, 2022), <https://econreview.berkeley.edu/pay-transparency/#:~:text=Pay%20transparency%2C%20which%20refers%20to,attention%20amongst%20organizations%20and%20scholars.>

# Increased Employee Turnover

- Pay transparency can also lead to increased employee turnover by cultivating a negative culture of competition and comparison among employees.
- Many employees will be dissatisfied to learn they make less than the median salary, despite feeling that they provide great value to the company.
- Transparency has a negative impact on those earning below the median salary, and little to no impact on those earning above.



Source: BER Staff, *Pay Transparency*, BERKELEY ECONOMIC REVIEW (Nov. 21, 2022), <https://econreview.berkeley.edu/pay-transparency/#:~:text=Pay%20transparency%2C%20which%20refers%20to,attention%20amongst%20organizations%20and%20scholars.>

# Idiosyncratic Deals (“i-deals”)

- Employees may respond to transparency-induced pay compression by negotiating “i-deals”
- “I-deals” are personalized and unique deals that are negotiated one-on-one with a supervisor and serve as a feasible way to redress perceived inequities (due to pay compression) through non-monetary means.
  - Example: Employees negotiate “less-visible renumeration” (e.g., perks in the workplace) to combat their difficulty in receiving a pay increase.
- Supervisors are also more likely to grant employees’ requests in order to maximize team performance and reduce the risk of turnover due to pay dissatisfaction.



# Pay Transparency Laws Across the Nation

- Fourteen jurisdictions (states and localities) have passed pay transparency laws and three others (Massachusetts, Montana and West Virginia) have proposed bills:
  - New York (effective September 17, 2023)
  - New York City
  - California
  - Cincinnati, OH
  - Colorado
  - Connecticut
  - Ithaca, NY
  - Jersey City, NJ
  - Maryland
  - Nevada
  - Rhode Island
  - Toledo, Ohio
  - Washington
  - Westchester County, NY

# Pay Transparency Laws Across the Nation

- California

- Applies to employers with 15 or more employees with at least one employee in California
- Employers must list a salary range on advertisements for job that will or may be filled in California (even remote positions). Current employees may request a salary range.

- Colorado

- On job advertisements for jobs that may or will be filled in Colorado (even remote positions), employers must list (1) a salary range, and (2) all benefits.
- Employers must also internally promote promotional opportunities to current employees on the same day and sufficiently in advance of promotion decisions.
- Violations? → 3 employers fined (one for \$34,500); 129 compliance assist letters for remote jobs; 122 opportunity to cure letters to cure any violation type

# Pay Transparency Laws Across the Nation

- Connecticut
  - Applies to employers with at least one employee in Connecticut
  - Employers must share the salary range if an applicant asks for it, or when the employer extends an offer, whichever occurs first.
  - Employers must provide the employee with the salary range when they are hired, if they change to a new position, or if the employee requests it.
- Jersey City, NJ
  - Applies to employers with 5 or more workers and principal place of business in Jersey City.
  - Employers must list the salary range and description of benefits on all ads for any job, transfer or promotion opportunity.

# Pay Transparency Laws Already in New York

- Ithaca, NY
  - Applies to employers with 4 or more employees in Ithaca.
  - Employers must list the salary range and description of benefits on all advertisements for any job, transfer or promotion opportunity.
- Westchester County, NY
  - Applies to any employer posting for a job that can or will be performed in Westchester County.
  - Employers must list the minimum and maximum salary range on all job ads for roles that can or will be filled in Westchester County (even remote positions)
- New York City

# Existing New York and Federal Laws Related to Pay Transparency

- Under New York law, an employer cannot:
  - Prohibit employees from asking another employee about their pay, discussing their pay with another employee, or disclosing their pay to another employee. However, an employer may create reasonable limitations on when, where, and how those discussions take place.
  - Require employees to discuss or disclose their pay.
  - Ask employees or applicants, or their current or former employers, to provide pay history as a condition to being interviewed, offered, or promoted for a job.
- Under the National Labor Relations Act, employees have the right to communicate (or not communicate) with other employees at their workplace about their wages, or other terms and conditions of employment. This is referred to as an employee's right to engage in "protected concerted activity."
- Under both state and federal law, it is unlawful for an employer to retaliate against an employee for exercising their right to discuss or refrain from discussing their pay.

# New York City Pay Transparency Law

# NYC Pay Transparency Law

- Effective November 1, 2022, employers advertising jobs in New York City must include a good faith salary range for every job, promotion, and transfer opportunity advertised. The law requires employers to:
  - Include a good-faith compensation range in all advertisements for new jobs, promotions, and transfer opportunities for all positions that can or will be performed, at least in part, in New York City (even remote positions)
- To whom does the law apply?
  - All employers with four or more employees, or one or more domestic workers, except temporary help firms. As long as one of the employees works in New York City, the workplace is covered.
  - \*\*Employers who do not advertise jobs, but instead fill positions through a non-competitive process or succession planning are not subject to the law.

# What is an “Advertisement”?



- An “advertisement” is a written description, in any medium, of an available job, promotion, or transfer opportunity that is publicized to potential applicants.
- Examples:
  - Internal bulletin boards
  - Internet advertisements
  - Printed flyers
  - Newspaper advertisements



# Compensation Range

- “In stating the minimum and maximum annual salary or hourly wage for a position, the range may extend from the lowest to the highest annual salary or hourly wage the employer in good faith believes at the time of posting it would pay for the advertised job, promotion, or transfer opportunity.”
- The range cannot be open ended. However, if the employer has no flexibility in the salary the minimum and maximum may be identical.

# What is “Salary”?

- “Salary” includes the base annual or hourly wage or rate of pay, regardless of the frequency of payment.
- “Salary” does not include:
  - Health, life, or other employer-provided insurance
  - Paid or unpaid time off work, such as paid sick or vacation days, leaves of absence, or sabbaticals
  - The availability of or contributions towards retirement or savings funds, such as 401(k) plans or employer-funded pension plans
  - Severance pay
  - Overtime pay
  - Other forms of compensation, such as commissions, tips, bonuses, stock, or the value of employer-provided meals or lodging
- Employers may include information about the frequency of pay, benefits, and other forms of compensation.

# What is a “Good Faith” Range?

Compensation Range Examples	
\$15 per hour and up	X
Maximum of \$50,000 per year	X
\$17/hour - \$20/hour	✓
\$65,000 - \$75,000	✓
\$20 per hour	✓

# How has the NYC Law Fared?

- Employers have tested the “good faith” range with broad and large ranges
  - \$50,000 to \$145,000 for a reporter
  - \$125,800 to \$211,300 for a senior technical writer
  - \$0 to \$2,000,000 for several jobs at one company
- Employers have found loopholes and avoid job advertisements altogether
  - Applicants are directed to submit their resume to a general address;
  - Employers use recruiting firms to attract talent; or
  - Employer states the job cannot be performed in NYC
- What may be coming down the pike?
  - Lower employee morale due to knowledge of value to the company
  - Discrimination suits

# Even the Government Tested the “Good Faith” Range



## General Counsel

New York City Office of Technology  
& Innovation

Brooklyn, NY (On-site)

\$106.7K/yr - \$241.1K/yr

# Current Postings in NYC

## Marketing Manager

Brooklyn, NY 11224 • Hybrid remote  
\$90,000 - \$120,000 a year - Full-time

Apply now



### 5. BENEFITS & COMPENSATION:

- Salary: Please provide salary requirements
- Benefits: Health, Dental and Vision insurance, Life insurance Plan
- Paid Time Off: Holidays, vacation, personal, comp days and

Job Type: Full-time

Pay: \$90,000.00 - \$120,000.00 per year

## Manager Social Media

Long Island City, NY 11101  
\$81,000 - \$136,200 a year  
You must create an Indeed account before continuing to the company website to apply

Apply on company site



- procedures and risk controls
- Uphold JetBlue's safety performance metric goals and understand how they relate to their duties and responsibilities

### Equipment:

- Office equipment

### Work Environment:

- Normal Office Environment

### Physical Effort:

- Moderate physical effort required by handling objects up to 40 pounds occasionally and/or up to 10 pounds frequently. (Light)

### Compensation:

- The base pay range for this position is between \$81,000.00 and \$136,200.00 per year. Base pay is only a component of JetBlue's total compensation package, which may also include performance bonuses, stock units, as well as access to healthcare benefits, a 401(k) plan and company match, crew membership plan, short-term and long-term disability coverage, basic life insurance, free space available at JetBlue, and more.

## B2B Creative Strategy Manager

New York, NY 10007  
\$114,000 - \$212,000 a year - Full-time  
You must create an Indeed account before continuing to the company website to apply

Apply on company site



### Compensation

Our benefits are designed to help you move forward in your career, and in areas of your life outside of Verizon. From health and wellness benefits, short term incentives, 401 (k) Savings Plan, stock incentive programs, paid time off, parental leave, adoption assistance and tuition assistance, plus other incentives, we've got you covered with our award-winning total rewards package. For part-timers, your coverage will vary as you may be eligible for some of these benefits depending on your individual circumstances.

If you are hired into a New York work location, the compensation range for this position is between \$114,000 and \$212,000 based on a full-time schedule. The salary will vary depending on your location and confirmed job-related skills and experience. This is an **incentive** based position with the potential to earn more. For part-time roles, your compensation will be adjusted to reflect your hours.

# **New York State Pay Transparency Law**

# NYS Pay Transparency Law

- On December 22, 2022, Governor Hochul signed the NYS Pay Transparency Law, and the law goes into effect on September 17, 2023.
- Effective March 2023, the law requires employers to:
  - Include a good-faith compensation range in all advertisements for new jobs, promotions, and transfer opportunities that “will physically be performed, at least in part” in New York, as well as jobs “that will physically be performed outside of New York but report[] to a supervisor, office, or other work site in New York.”
  - Include a job description on such advertisements, if such a description exists.
    - The law does not define “job description” and does not appear to require an employer to create such a description prior to advertising.



# What is an “Advertisement”?



- The December 2022 version of the law did not define job “advertisement.”
- However, effective March 2023, “advertise” is defined as “to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity.”
- The law will apply to both internal and external job opportunities.

# To Whom Does It Apply?

- All employers with four or more employees, except temporary help firms.
- \*\*Employers who do not advertise jobs, but instead fill positions through a non-competitive process or succession planning are not subject to the law.

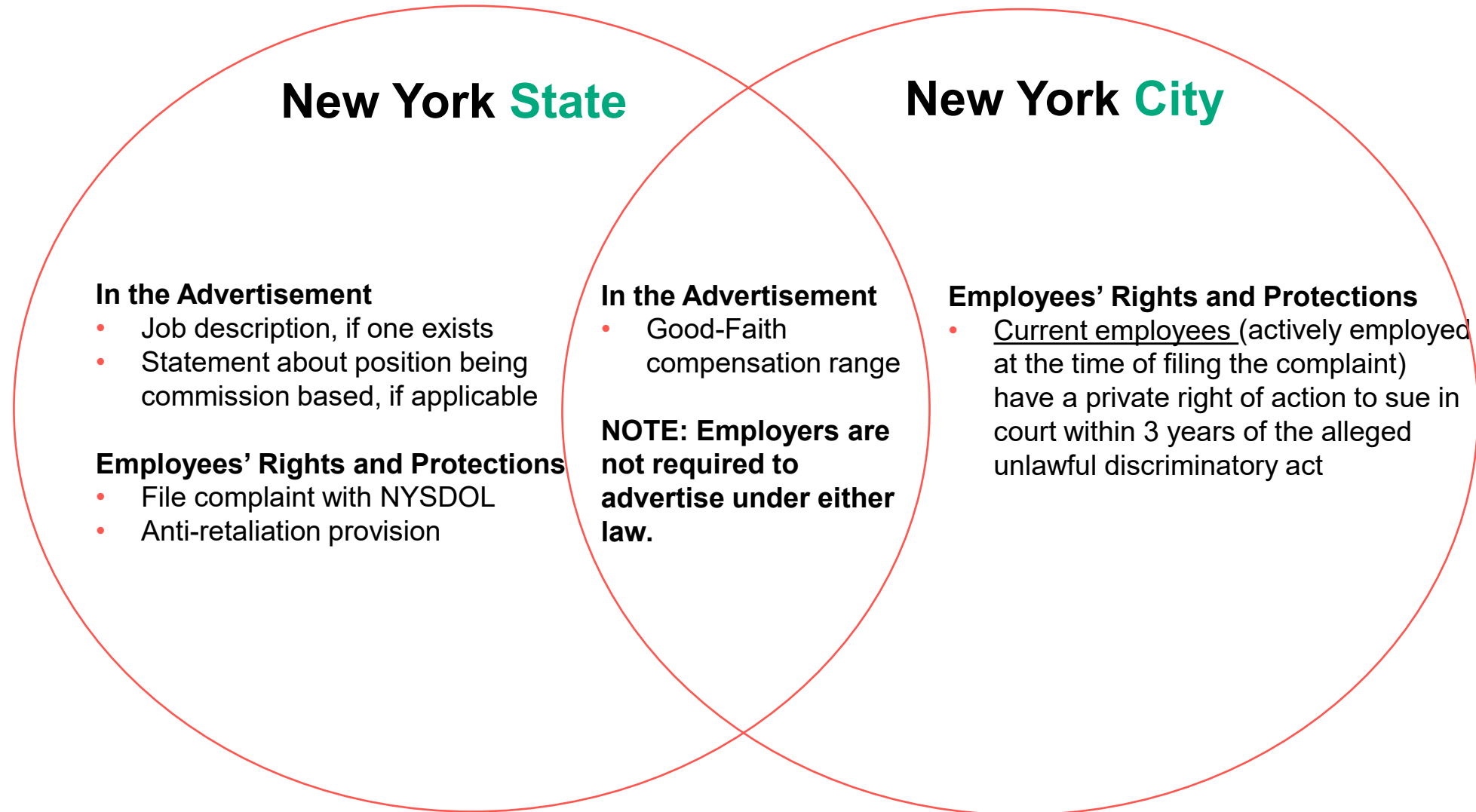
# Compensation Range

- “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.”
- If a position is solely commission-based, the advertisement need not include a range, but must include a statement that the position is in-fact commission based.
- The March 2023 amendment eliminates the requirement to maintain records related to the “history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions.” While no longer required, covered employers may want to consider preserving these records to defend compensation decisions, if needed.

# Other Requirements and Provisions

- Rights of Workers
  - Any person claimed to be aggrieved by a violation of the law can file a complaint with the NYSDOL: 1st Violation – up to \$1,000; 2nd Violation – Up to \$2,000; 3rd+ Violation – Up to \$3,000
  - Anti-Retaliation Provision → “No employer shall refuse to interview, hire, promote, employ, or otherwise retaliate against an applicant or current employee for exercising any rights’ pursuant to the law.”

# Similarities and Differences between the State and City Laws



# Best Practices

- We expect the NYSDOL to provide more guidance as the law nears its effective date, but here are some preliminary best practices:
  1. Provide broad salary ranges to avoid pay compression. But remember, the range must be in “good faith”!
  2. Disclaimer Language (e.g., an employee’s salary is based on commensurate experience and other qualifications)
  3. Train your supervisors about addressing complaints by current employees to avoid “i-deals”

# Federal Pay Transparency Bill

# Federal Pay Transparency Bill Introduced:

- Federal pay transparency regulations are currently limited to the Equal Pay Act of 1963 (EPA), which prohibits pay discrimination based on sex.
- While this law provides a baseline level of protection against pay discrimination, it does not give employees the right to know what other employees in their organization make.



# Federal Pay Transparency Bill Introduced:

- On Equal Pay Day (March 14, 2023), Congresswoman Eleanor Holmes Norton introduced three bills, including a national pay transparency bill, to close the pay gap between men and women.
- The Salary Transparency Act (amending the Fair Labor Standards Act) would require all U.S. employers to provide the salary range for jobs in all advertisements.
  - The salary range would need to include wages and other forms of compensation the employer anticipates offering the candidate for the job opportunity.

# Federal Pay Transparency Bill: Civil Penalties

- The act includes civil penalties ranging from \$5,000 for a first violation, increased by an additional \$1,000 for each subsequent violation, not to exceed \$10,000, plus liability to each job applicant for damages and reasonable attorneys' fees.
- The bill also includes a private right of action.

# **Areas of Concern and Strategic Compliance**

# Areas of Concern

- Pay equity and discrimination claims (disparate treatment and impact)
- Lawsuits based, in part, on job descriptions
  - Potential DOL classification audits?
- Union organizing
- DEI / Unconscious bias
- Competition in the marketplace
- Existing transparency laws

**We can help you navigate these issues!**

# Pay Equity and Discrimination Claims

- The main goals of pay transparency is to foster pay equity and reduce the wage gap and combat unlawful discrimination in pay practices.
- When pay data becomes public, employees and applicants will have access to sensitive data that can lead to a pay equity claim or a discrimination claim.
- Disparate Treatment
  - Employees may allege they are receiving a lower salary or hourly wage due to their membership in a protected class.
- Disparate Impact
  - Even if an employer uses objective criteria, an employee may argue that such objective criteria negatively impacts workers of a certain protected class. For example, the objective criteria results in employees of one race being compensated more than those of another race.



## Pay Equity Analysis

- A pay equity analysis is a statistical way of identifying pay gaps within an organization. It does so by cross referencing pay scales against any number of criteria – gender, ethnicity, education, seniority, etc.
- A pay equity analysis will allow you to identify discrepancies that cannot be explained by legitimate, non-discriminatory reasons. It allows you to get out ahead of the “problem” and fix it before it becomes a larger issue.
- How is it conducted?
  - Collect workforce data
  - Compare employees with similar job functions
  - Review and interpret findings
  - Correct wage gaps that are not justified

# Potential Lawsuits Due to Job Descriptions

- The New York State pay transparency law requires employers to post job descriptions, if one exists, on an advertisement.
- A job description may put the company at risk for litigation!
- Disability Discrimination
  - The essential functions of the job (as listed in the job description) may become critical evidence in a failure to accommodate claim.
  - It can also give more “teeth” to a failure to hire claim.
- Wage and Hour
  - Is the employee appropriately classified as “exempt” or “non-exempt?”
  - Will the DOL use that information to affirmatively initiate an audit?
- It is crucial to review job descriptions now!

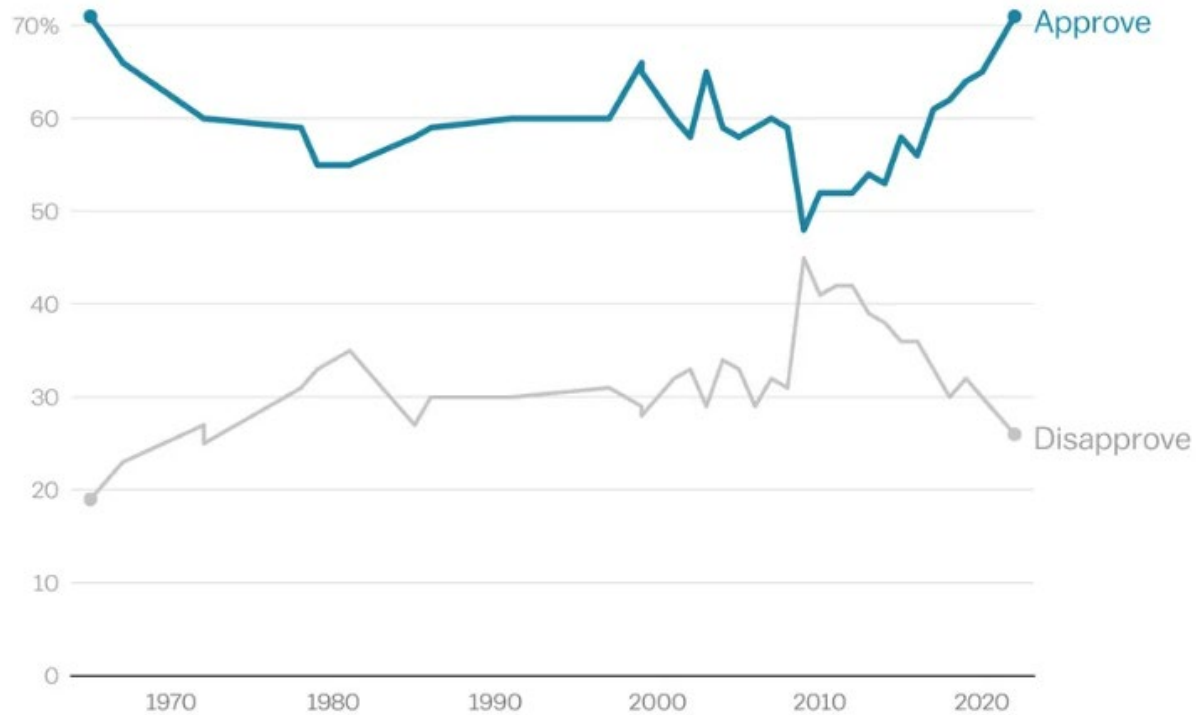
# Union Organizing

- The goal of a union organizer is to persuade your employee that the union will help provide a better job experience than you could provide alone.
- If you were a union organizer, wouldn't you use public salary ranges:
  - Appeal to disgruntled employees
  - Foster a belief of “inequity” in the workplace
  - Attack the company's “transparent nature” and “open-door” policies
- A union organizer will use this information to leverage against your employees and “guarantee” that they can get your employees better wages, benefits, etc.



# Union Organizing

## Approval of Unions Across America



## NLRB Elections – Union Win Rate



# Union Organizing

- You may say that those statistics do not matter because “our company will never be unionized.” However, there has been a major push for unionization, particularly in industries and fields that are not traditionally unionized.
  - Starbucks
  - Amazon
  - Tech Employees
- How can you combat?
  - Union organizing audit now! Don’t wait until it’s too late!

# DEI / Unconscious Bias

- Everything else being equal between a male and female employee, unconscious bias often results in higher pay for the male employee.
- Unconscious bias does not just go away with salary transparency. For example, a man may receive the higher end of the salary range whereas a woman may receive the lower end. The risk of litigation still exists.
- An employer combats unconscious bias by creating objective criteria to determine salaries:
  - Market analysis
  - Geographic location
  - Job requirements and duties
- An employer can also uncover unconscious bias through a pay equity analysis.
- Conducting unconscious bias training now can help to minimize these risks.

# Competition in the Marketplace

- Salary transparency allows competitors to better assess where they fall within the market (assuming each competitor provides a “good-faith” range).
- If another company invariably provides higher salaries, it may hinder your company’s ability to recruit and retain talent.
- To attract and retain talent, focus on:
  - Workplace culture
  - Quality of Life
  - Work-Life Balance
  - Flexible Work Options
  - Other Benefits
- You must compete on differentiators that other companies cannot provide!

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Questions?

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**Thank you.**