From the HR Hotline

2023 Q2

Presented by **The Timberland Group**

Zywave's HR consultants continue to provide expertise and serve as a valuable resource for navigating the pressing challenges facing employers today. The HR Hotline fields dozens of questions each day from employers seeking answers to their HR questions.

In recent months, employers have been requesting clarification or seeking guidance on complying with pay transparency requirements, including California's new pay transparency law; understanding eligibility requirements for remote workers under the Family and Medical Leave Act (FMLA); navigating the Fair Labor Standards Act's (FLSA) white collar exemptions; and addressing workplace concerns surrounding ChatGPT and other artificial intelligence (AI) tools. While questions surrounding these topics can vary based on locality, employer and individual circumstances, federal agencies offer guidance that can aid employers in addressing day-to-day challenges in the workplace.

This article explores some questions and answers to common HR situations.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

What Should Employers Know About Pay Transparency?

Pay transparency is the practice of openly sharing pay-related information with current and potential employees. This information generally includes "pay scales," which refer to the salary or hourly wage ranges that employers reasonably expect to pay for specific positions. The goal of pay transparency is to help ensure fairness and equity in the workplace by providing employees and applicants with a better understanding of how they're compensated compared to other positions and individuals. Employees value pay transparency because it can help them to avoid applying for jobs they wouldn't accept due to low pay, negotiate for better salaries and build trust with their employers.

It's becoming clear that pay transparency is not a passing trend. In 2021, Colorado was the first jurisdiction to enact such laws. Since then, more states and localities have enacted their own legislation. By the start of 2023, one-fifth of all U.S. workers were covered under pay transparency laws.

Pay transparency laws vary depending on the jurisdiction. Here are examples of how these laws differ between states and localities:

- In **California**, covered employers must provide pay scale information (e.g., pay scales and hourly or salary compensation details) in any job posting.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

- In **Colorado**, covered employers must provide pay range information in any job listing that could be performed within the state.
- In **Connecticut**, covered employers must disclose wage ranges to current employees and applicants upon receipt of an applicant's request or the communication of a job offer — whichever comes first.
- In **Maryland**, covered employers must disclose pay ranges upon an applicant's request.
- In **Nevada**, covered employers must provide wage and salary information to applicants who have completed an interview.
- In **Jersey City, New Jersey**, covered employers using any print or digital media that circulates within the city to provide notice of employment opportunities must disclose a minimum and maximum salarly (or hourly wage), including benefits.
- In **New York City, Ithaca** and **Westchester County, New York**, covered employers must provide the minimum and maximum annual salary (or hourly wage) for all job postings, promotions and transfer opportunities.
- In **Cincinnati** and **Toledo, Ohio**, covered employers must provide pay scale information to an applicant who has received a conditional offer of employment upon the applicant's request.
- In **Rhode Island**, covered employers must provide pay range information upon an applicant's request and prior to discussing compensation. This can occur at the time of hire or when an employee moves into a new position. Covered employers must also disclose wage ranges to employees upon request.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

- In **Washington**, covered employers must disclose minimum wage and salary information upon an applicant's request if an offer of employment has been made.

In addition to requiring employers to provide pay range information, some jurisdictions, such as Colorado and Washington, require employers to disclose benefits information. As a growing number of states and localities have embraced pay transparency, more will likely do so over the next few years.

Pay transparency laws present distinct compliance challenges for employers. Those who fail to comply with these laws can incur costly penalties ranging from $300 to $250,000, depending on the jurisdiction. Employer compliance difficulties are often greater for organizations that recruit and hire employees across state lines. This has been further complicated by the widespread acceptance of remote work. After all, hiring remote workers can trigger legal obligations and create potential risks even in states where employers do not have a physical presence. For example, an employer advertising a remote work position that can be performed in any state may need to ensure the job posting complies with all applicable pay transparency laws throughout the country, including salary range or benefits information. It's unlikely that employers can avoid their pay transparency obligations by stating that residents of specific states are not eligible to apply, as states such as Colorado do not permit this.

To avoid these issues, some employers restrict remote work entirely or require candidates to be located in states or localities that do not have pay transparency laws. Some employers provide broad wage information, such as minimum and maximum salaries for open positions, or adjust their compensation structures to

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

include variable compensation elements, such as equity grants and discretionary bonuses. Additionally, organizations may include qualifying language in their postings that clarifies that the salary for a specific position varies depending on a candidate's experience and geographic location.

These examples of pay transparency laws are only a broad overview. Employers impacted by such laws should review all applicable legislation and stay apprised of any changes. Due to the complexities of pay transparency laws, employers are encouraged to seek legal counsel to discuss any specific issues or concerns.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

What Are the Pay Transparency Requirements for Employers in California?

As of Jan. 1, 2023, California's new pay transparency law requiring pay scales in job openings went into effect. Specifically, Senate Bill 1162 includes the following requirements:

- All employers are to provide the pay scale of an employee's position to the employee upon the employee's request and of a position being applied for by an applicant, upon the applicant's request.
- Employers with 15 or more employees are to include the pay scale for each position in any job posting for the position.

As previously mentioned, a pay scale refers to the salary or hourly wage range that an employer reasonably expects to pay for a position. If an employer intends to pay a set hourly amount or piece rate amount rather than a pay range, the employer may provide that information. If a position's hourly or salary wage is based on a commission, then the commission range the employer reasonably expects to pay for the position must be provided. Any compensation or tangible benefits, such as bonuses or tips, provided in addition to a salary or hourly wage do not have to — but may — be included.

To determine whether an employer has 15 or more employees and, therefore, must include pay scales in job postings, employers should follow these principles outlined in the California Labor

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

Commission's guidance:

- An employer must make a reasonable and good faith determination of their workforce size, recognizing that when there is an ambiguity, courts generally look for a reasonable interpretation that is most favorable to workers.
- Any individual performing any kind of compensable work for an employer who is not a bona fide independent contractor is considered and counted as an employee. This includes salaried executives, part-time workers, minors and new hires.

At least one of the employees must be currently located in California.

If an employer with 15 or more employees engages a third party to announce, post, publish or otherwise make a job posting known, they must provide the pay scale to the third party and the third party must include it within the job posting. This means that the pay scale must be included within the job posting for any position that may ever be filled in California, either in person or remotely. Finally, employers may not link to the salary range in an electronic posting or include a QR code in a paper posting that will take an applicant to the salary information. The pay scale must be included within the actual posting.

Recordkeeping and Reporting Requirements

Under the California Equal Pay Law, employers are required to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment for all employees for a **minimum of three years.** State law also requires certain California employers to file annual workforce pay data reports with the

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

state's Department of Fair Employment and Housing (DFEH). This requirement applies to employers who have 100 or more employees and are required to file the federal Employer Information Report (EEO-1). While the initial deadline for the state-mandated reports was March 31, Senate Bill 1162 changed this as of Jan. 1, 2023, so that the reports are now due on the **second Wednesday of May** every year.

Penalties for Reporting Failures

The DFEH may compel employers to file their annual workforce pay data reports to the state. The DFEH or a court may also impose penalties of up to $200 per employee on employers who violate the law. However, employers, or their agents, who willfully violate the California Equal Pay Law may be charged with a misdemeanor, punishable by a fine of up to **$10,000, imprisonment for up to six months or both.**

For more information, employers can review California Labor Commissions' Equal Pay Act website.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

What Are FMLA Eligibility Requirements for Remote Employees?

The U.S. Department of Labor (DOL) recently published a Field Assistance Bulletin (FAB) that includes guidance on how to apply eligibility rules under the FMLA when employees telework or work away from an employer's facility. FABs provide guidance to the DOL's Wage and Hour Division (WHD) field staff.

The FMLA requires covered employers to provide eligible employees with up to 12 weeks of unpaid, job-protected leave for specific reasons related to the health and well-being of themselves and their families. Generally, employers are covered if they have at least 50 employees.

An employee is deemed eligible for FMLA benefits if they meet these requirements:

- They have worked for their employer for at least 12 months.
- They have worked 1,250 hours during the 12 months preceding the leave.
- They work at a location where their employer has at least 50 employees within 75 miles.

In FAB No. 2023-1, issued Feb. 9, 2023, the WHD notes that employees who telework are eligible for FMLA leave on the same basis as any other employees; however, for FMLA eligibility

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

purposes, a teleworking employee's personal residence is not considered a "worksite." The FAB states that when an employee works from home or otherwise teleworks, **their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made.** Thus, if at least 50 employees are employed within 75 miles of an employer's worksite, the employee meets that FMLA eligibility requirement.

In addition, according to the FAB, the count of employees within 75 miles of a worksite includes all employees whose worksite is within that area, **including employees who telework and report to or receive assignments from that worksite.** The FAB also states that, with respect to the FMLA's hours-worked requirement, all hours worked are counted when an employee teleworks from home consistently or in combination with working at another or various worksites.

For more information, employers can review the DOL's resource: [The Employer's Guide to The Family and Medical Leave Act.]()

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

What Should Employers Know About the FLSA's White Collar Exemptions?

Under the FLSA, covered employers must pay employees at least the federal minimum wage for all hours worked and overtime pay — at a rate of 1.5 times their regular pay rate — for all hours worked over 40 in a workweek. However, the FLSA provides several exemptions from minimum wage and overtime pay requirements. The most common are "white collar" exemptions. These exemptions mainly apply to executive, administrative and professional employees (EAPs), but they also include outside sales personnel and certain computer and highly compensated employees (HCEs).

To qualify for a white collar exemption, an employee must satisfy the following tests:

- **Salary basis test —** This test ensures the employee is paid a predetermined and fixed salary that is not subject to reduction due to variations in the quality or quantity of work.
- **Salary level test —** This test confirms that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is $684 per week ($35,568 per year) for EAPs and $107,432 per year for HCEs. The current salary threshold took effect on Jan. 1, 2020.
- **Duties test —** This test requires that the employee's job duties conform to EAP duties. To satisfy the duties test, an employee's actual work responsibilities must match the description the FLSA assigns to the exemption.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

Employers should be aware that in the DOL's spring regulatory agenda, the agency shared that it intends to issue a proposed overtime rule in May 2023. According to the regulatory agenda, this proposed rule is expected to address how to implement the exemption for EAPs from the FLSA's minimum wage and overtime requirements. The agency originally planned to publish the proposed rule in April 2022, but then delayed it until October 2022. While the proposed rule is now set to be published in May, there could be further delays based on the DOL's previous postponements.

Employers should start to consider the new overtime rule if they haven't already, as it could significantly affect organizations' operational and compliance costs and increase their litigation risks. Therefore, it's critical that employers understand the new rule and its potential impacts on their businesses. Employers can start preparing despite the chance of further delays; the rule change would alter existing laws and significantly impact organizations and employees.

For more information on the FLSA, employers can review additional resources on the WHD's website.

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

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AI tools have made their way into many workplaces across the country and are rapidly changing how organizations operate and make decisions. The accessibility and capabilities of AI tools such as ChatGPT allow employers to experiment with and assess how their organizations can benefit from incorporating this technology into their day-to-day operations. Despite the potential benefits, ChatGPT and other AI tools have considerable limitations that employers must consider before adopting them. For example, AI technology can create the impression that it can do more or is more reliable than it is. However, AI's knowledge is limited since it's based only on the information used to train it. Therefore, the information AI tools provide users may be low quality or outdated, or it may contain errors. As a result, employers cannot be certain that the information this technology provides or what it produces is accurate. In some cases, AI-generated errors can be costly, subjecting organizations to government audits, fines and penalties. Employers would be wise to review and verify the content produced by AI tools before using it.

Laws and regulations haven't kept up with employers' incorporation of AI technology in the workplace. While many existing laws address AI-related issues, as a whole, AI is a relatively new legal area. There's currently a variety of federal and state regulations that address aspects of AI's use in the employment context; however, legal issues related to AI in the workplace will likely continue to emerge as this technology

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

develops and become more advanced. Because AI technology in the employment context is largely unregulated, there are many gray areas employers must navigate. Employers can establish governance policies to evaluate and monitor AI tools as well as assess the long-term impacts of these tools. Implementing such policies can help ensure employers consider the legal, business and reputational risks associated with using AI and protect against them. Existing workplace policies may already address some AI-related issues, but employers may need to reevaluate these policies to specifically handle all AI-related concerns. This can help ensure that organizations use AI tools responsibly and integrate this technology to complement human activity in the workplace.

For employers operating in multiple states, AI use can present problems due to the patchwork of federal and state laws regulating this technology. It's possible that using AI tools in the workplace may be illegal in some jurisdictions or subject to different regulations. Therefore, organizations must devise policies to navigate these issues if they have employees working in different states.

Data Privacy and Surveillance

AI technology can collect and analyze data to help increase workforce and organizational productivity. This can help employers transform their approaches based on AI-derived insights or tracking employee performance. However, employers must consider employees' privacy rights when doing this and institute effective policies to outline and protect those rights. Some jurisdictions have imposed consent and notice requirements for using AI tools in the workplace. Currently, New York, Delaware and Connecticut require employers to notify employees of electronic monitoring. Other states have implemented consent and notice requirements for using

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

AI technology as an interview tool. For example, in Maryland, an employer cannot use facial recognition software during interviews unless the interviewee signs a waiver. Establishing policies to address these issues can help ensure that increased monitoring of employees doesn't become intrusive or reveal private information. This can include disclosing how AI technology is utilized with applicants and employees.

Copyright and Intellectual Property Rights

AI-generated content can violate copyright laws or infringe on third-party intellectual property rights. For example, conversations employees have with AI chatbots may be reviewed by AI trainers, inadvertently disclosing sensitive and confidential business information and trade secrets to third parties. This could potentially expose employers to legal risks under privacy laws. Additionally, employers should consider the status of any content generated using AI tools, how it's protected and who holds the right to use that content before using it. Employers can review and update their confidentiality and trade secret policies to ensure they cover third-party AI tools. Organizations can also train employees on potential copyright and intellectual property issues, ensuring inputs used to create AI-generated content do not include data that's protected or confidential. Some employers may decide to restrict access to AI tools to reduce their risks.

Anti-discrimination

Using AI technology can lead to intentional and unintentional discrimination in the workplace, resulting in costly lawsuits or investigations. For example, AI algorithms used to make employment decisions may be based on historical data sets that could be biased or discriminatory—benchmarking resumes or other job requirements based on protected characteristics, such as age,

What Should Employers Know About Pay Transparency?

What Are the Pay Transparency Requirements for Employers in California?

What Are FMLA Eligibility Requirements for Remote Employees?

What Should Employers Know About the FLSA's White Collar Exemptions?

How Can Employers Address Workplace Concerns Related to ChatGPT and Other AI Tools?

race, gender or national origin. Therefore, employers need to be cautious when developing, applying or modifying data to train and operate AI tools to make employment decisions.

The U.S. Equal Employment Opportunity Commission (EEOC) identified AI technology as a priority subject matter in its 2023-2027 Strategic Enforcement Plan, signaling a potential increase in AI-related enforcement actions. The agency recently issued guidance regarding employers' use of algorithms and AI tools when making hiring or other employment decisions, to ensure their decisions don't violate employees' federal civil rights. Additionally, in 2023, the EEOC launched the Artificial Intelligence and Algorithmic Fairness Initiative to help ensure that workplace use of AI tools complies with federal civil rights laws. While many employers likely already have anti-discrimination policies in place, they can consider instituting bias audits to impartially evaluate the disparate impacts of their AI tools on protected classes. They can also review any AI-based compensation management tools to ensure they don't violate pay equity laws.

To learn more, employers can review additional resources on the EEOC's website.

Employers should note that compliance requirements vary by locality, and they should contact local legal counsel for legal advice. We'll continue to keep you apprised of noteworthy updates on these topics. For resources on any of these topics discussed, contact us today.

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