

NYC Pay Transparency Law May Fail To Close Wage Gap

By **Peter Glennon** (June 27, 2022)

Pay transparency is a hot topic. From Colorado to New York City, lawmakers looking for ways to reduce the wage gap among women and minorities are proposing new rules to make salary information public.

This is a worthy goal, as women make 83 cents for every dollar men make, and Black men make 87 cents for every dollar a white man makes. The numbers are even worse for women of color.[1]

It's not just a matter of which jobs people have either. The wage gap is persistently found in all professions, from fast food workers to doctors.[2]



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But it remains to be seen if pay transparency laws will be the solution that will help close the wage gap.

The idea is simple: If workers knew how much their counterparts were making, those being paid unfairly would be able to negotiate for higher pay more effectively — or seek different employment — while workplaces with dramatically unfair pay differences would find it harder to recruit until they addressed the problem.

But the first question faced by supporters of these proposals is how to structure them, especially since most people prefer keeping their finances private and may be uncomfortable with their exact salary being publicized.

The solution that lawmakers have hit on for now is to target help wanted ads and other job postings. If workers know how much their employers are willing to pay for a position similar to theirs, and potential applicants know what the pay range is, then in theory female and minority workers would have more of an advantage in negotiations. For now, it is just a theory.

As we've seen with proposals in Colorado and New York City, there are a few hiccups.

Colorado's statewide version of wage transparency went into effect on Jan. 1, 2021.[3] Among other things, it requires employers to include compensation in job postings and notify employees of promotional opportunities.

As in New York City, it was intended to help close the wage gap among women, but the realities of the statutory language's impact on businesses were apparently not considered enough, because numerous companies sought to avoid the penalties of the law by excluding Colorado residents from remote job opportunities.

Companies including Johnson & Johnson, Twitter Inc., Nike Inc. and Abercrombie & Fitch Co. decided to expressly exclude Colorado residents.[4] There is even a website, www.coloradoexcluded.com, that states that 211 companies have opted out of hiring Coloradans, or at least requiring that they move out of Colorado for the job.

Reportedly, this is not because the companies are necessarily opposed to advertising possible compensation ranges, but because their hiring processes were not considered in the statutory language. While the Colorado government sought to assure companies that

they misunderstood the law's text, it is apparently contemplating modifications to the law to address business concerns.

That is a very similar situation with the New York City law, which was delayed from a May to November effective date.

Even the current law in New York City lacks any real teeth if the goal is to close the wage gap. Businesses do not have to hire somebody within the advertised pay range; rather, it only requires businesses to publish a compensation range that the business "in good faith believes at the time of the posting it would pay."^[5]

In job markets like we have today, it would not be surprising for a company to advertise a broad, good faith salary range to have flexibility because it may have to hire a person with midlevel experience instead of a person with the desired senior-level experience. This is highly likely for small and microbusinesses.

Another challenge in implementing these laws is that while civil service salaries are public and based on position and tenure, private business is profit driven, which at times results in wages being based on an employee's value rather than based on tenure or the position itself.

The focus on hiring has also led to a lot of concern over how these regulations could hurt businesses in a tight labor market with rising wages like the one we have now. Current employees may see that a position with a competitor business pays greater than they receive today due to the so-called loyalty discount, which makes some longtime employees' wages less than the current market.

This is not the first attempt at solving the wage gap problem. Other tools already exist, including throughout New York state.

In New York, there are already a number of laws on the books that attempt to address the wage gap and related discrimination against women, minorities and other groups, as well as a law that allows workers to discuss their own salaries with each other — not to mention the federal Equal Pay Act and state equal pay laws.

The purpose of equal pay laws is to ensure that one person is not paid less than another person due to a protected category.

The National Labor Relations Board also has a rule that employers cannot discipline an employee for discussing wages.

One may question whether these current laws failed to address the issue. It is challenging to determine whether you are paid less for an unlawful reason. But someone else may question whether job applicants and employees are well aware of these laws.

If individuals were more open about discussing their compensation, and the company's human resources department routinely audited compensation levels to identify variances or great differences in positions, then the current laws may theoretically work better at closing the wage gaps, without adding new laws. (Notably, New York state recently strengthened its whistleblower laws, further benefiting employees.)

One realistic challenge for the well-intended pay transparency law is that there must be flexibility for the complex situations many employers face.

For a small business, an employee may be asked to do a lot of tasks requiring different skill sets, and the job — and specific wages — may evolve to fit the person. In a larger business, jobs may be more narrowly defined. A posted salary range on a help wanted ad can't cover those wildly varying situations.

Some — including some supporters of the law — have argued that the New York City law may even hurt efforts to recruit women and minorities, since employers may need compensation flexibility to pay more or less, based on experience, for an applicant for a high-profile job in order to build or maintain diversity, a strategy that would be undercut by pay transparency.

Another solution under discussion in the country is to require pay transparency, but in a less burdensome or public way. In California, widely considered an employee-friendly state, an employee or potential applicant for a job can ask for the salary range, and the business is required to answer.

This requires more work on the part of employees, and it may not have the dramatic effect that lawmakers hope more public requirements on help wanted ads will have on hiring. But it addresses the issue of salary transparency without placing as severe a burden on employers as the New York City salary transparency law would.

The truth is that it's unlikely that any of these proposals on their own will turn out to solve the wage gap, and we won't know for a few years if they help at all.

One problem is that the wage gap is cumulative. Each time that someone is hired for a position, his or her new employer decides on pay that can be influenced by implicit bias or even open prejudice, or indirectly affected by other factors, like where the new hire went to college.

Those differences add up over time, especially in states that don't bar employers from asking an applicant's current salary. Even if pay transparency laws work as intended, it may take multiple job changes before those effects can be seen on a single worker.

It's also possible that employers looking to skirt the new regulations will turn to other forms of compensation, just as they increased benefits to get around government-mandated wage freezes during World War II.

Most government jobs already have pay transparency. There's even a website where you can search how much a specific employee of New York state earns. But those positions are heavily circumscribed, with rules and regulations about what workers do and how they do it, and the work itself rarely changes.

Private sector businesses are a whole different animal. Because they are profit-driven, they are forced to innovate, and few jobs remain the same for long: Workers who once built widgets are soon tasked with overseeing robots that build widgets.

These pay transparency laws may help, or they may turn out to be little more than window dressing, but it's unlikely that they will fix the underlying problem on their own.

One wonders whether a greater impact may be achieved by encouraging employees to exercise their rights to discuss their compensation and avail themselves of protections under equal pay laws.

As discussed above, then at least people would learn more accurate information and be able to assess whether an equal pay violation has occurred. Couple that fact-gathering with internal pay audits, and the gap may close without the need for additional laws.

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[1] According to the U.S. Census Bureau, <https://www.census.gov/library/stories/2022/03/what-is-the-gender-wage-gap-in-your-state.html>. Also see Payscale, <https://www.payscale.com/research-and-insights/racial-wage-gap-for-men/>.

[2] According to the American Association of University Women, <https://www.aauw.org/issues/equity/pay-gap/>.

[3] Equal Pay for Equal Work Act, C.R.S. § 8-5-101 et seq.

[4] <https://www.wsj.com/articles/many-companies-want-remote-workersexcept-from-colorado-11623937649>.

[5] NYC Administrative Code Section 8-107, subsection 32. ("32. Employment; minimum and maximum salary in job listings. a. It shall be an unlawful discriminatory practice for an employment agency, employer, employee or agent thereof to advertise a job, promotion or transfer opportunity without stating the minimum and maximum salary for such position in such advertisement. In stating the minimum and maximum salary for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity."). Also see <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3713951&GUID=E7B03ABA-8F42-4341-A0D2-50E2F95320CD&Options=&Search=>.