

Evolving Wage Transparency Laws

ARE RESHAPING EMPLOYMENT LIABILITY RISK

RT ProExec



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EVOLVING WAGE TRANSPARENCY LAWS ARE RESHAPING EMPLOYMENT LIABILITY RISK



Wage transparency has become one of the fastest-evolving areas of employment law, creating uncertainty for employers, insurers and brokers alike. The legal and insurance landscape continues to shift, and many employers are finding that employment practices liability insurance (EPLI) coverage for these claims can vary.

As litigation increases, underwriters are paying closer attention to wage transparency practices, insurers are clarifying policy language, and ambiguity remains over how these claims are covered. Employers and their brokers may wish to understand both the compliance obligations and what they mean for coverage.

THE RAPID EXPANSION OF WAGE TRANSPARENCY LAWS

In recent years, states have passed numerous new wage transparency laws. Although the exact requirements vary from state to state, the basic idea is that employers need to post wage or salary information to combat wage discrimination and promote pay equity.

According to HR Morning, pay transparency rules are on the books in California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, Vermont and Washington. Some cities have also adopted pay transparency requirements, including New York City.

Washington is emerging as a key testing ground for litigation trends, enforcement strategies and EPLI coverage disputes. RCW 49.58.110 requires employers with at least 15 employees to disclose the salary in each job posting. If the job pays a fixed wage, the posting must state it. Otherwise, the employer must provide a wage scale or salary range. The job posting must also include a general description of all other benefits and compensation associated with the job.

The Washington law applies to all job postings that are intended to recruit job applicants for a specific available position and that include qualifications, regardless of whether they appear online or in print. Employers are responsible for job postings on third-party platforms, but they are not responsible for postings that are digitally replicated and published without their consent.

The penalties for noncompliance can be significant. Employers can face citations of up to $5,000 per violation. Since multiple violations can occur at once, the costs can stack up quickly.

NEW WAGE TRANSPARENCY REQUIREMENTS BEYOND JOB POSTINGS

While many wage transparency regulations focus on job ads, some states have also passed rules that require disclosure to current employees under certain circumstances. For example:

- In California, Senate Bill 1162 requires employers to disclose pay scales to current employees upon request.
- In addition to pay transparency requirements for both internal and public job ads, Colorado's Equal Pay for Equal Work Act requires employers to disclose job opportunities to all employees and then disclose who was selected to fill the position.
- In Maine, a new law requires employers to disclose the pay range of a position to current employees on request. Employers must also maintain records of each position that an employee holds, including the pay history, for three years after termination.

However, pay transparency is not a two-way street. While employers are increasingly required to provide transparent wage information, they may not be allowed to ask employees about salary history. Colorado, for example, has prohibited employers from asking about an applicant's pay history or using pay history to determine pay.

DOES EPLI COVER WAGE TRANSPARENCY CLAIMS?

When new risks emerge, coverage questions often follow.

Wage transparency violations can trigger fines and penalties as well as civil lawsuits, often brought as class actions. EPLI policies typically exclude regulatory fines. Policies also typically exclude wage-and-hour claims, although some provide this coverage with a wage-and-hour endorsement and separate sublimit. Without a wage-and-hour endorsement, a lawsuit over a wage-related allegation, such as failure to pay overtime or provide required breaks, may not be covered.

EVOLVING WAGE TRANSPARENCY LAWS ARE RESHAPING EMPLOYMENT LIABILITY RISK

The question now is whether this wage-and-hour exclusion applies to the new crop of wage transparency lawsuits. So far, there is no clear answer.

Historically, many policies have been silent on wage transparency claims. According to an article by attorney Charles K. Davis, published in BarNews, some insurers have argued that coverage is not available. These insurers typically posit that the law in question (often Washington's RCW 49.58.110) is a wage-and-hour law, and as such, lawsuits stemming from this law are excluded. Insurers have also argued that the claim does not involve discrimination, harassment or inappropriate conduct, and the remedy is a penalty, which is not covered.

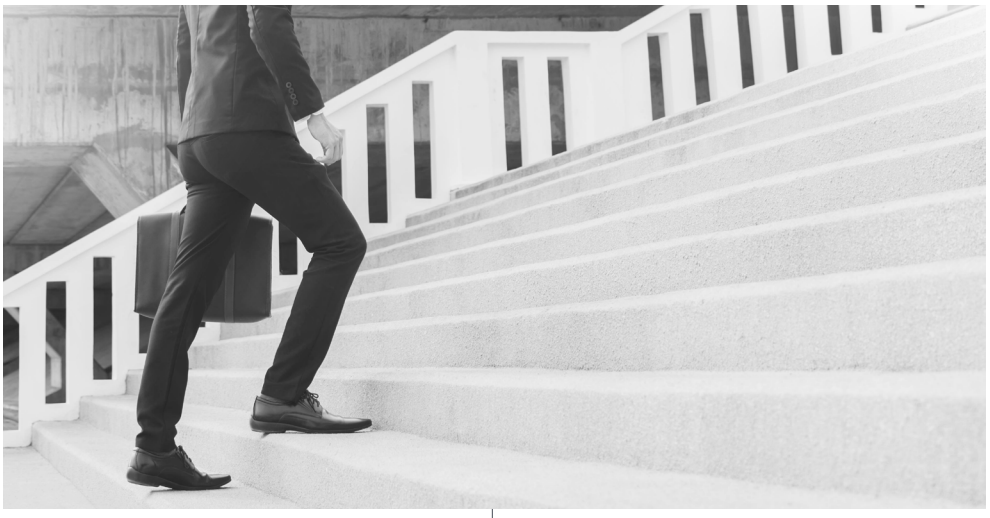
However, not everyone accepts these arguments. Davis points out that although RCW 49.58.110 mentions wages, it is not a traditional wage-and-hour law establishing minimum standards for wages and conditions. Furthermore, wage-and-hour exclusions exist to prevent employers from offloading labor costs to insurers, and that is not an issue with pay transparency claims.

"The pay transparency class-action lawsuits do not allege that the employer has done anything that could be interpreted as offloading labor costs to the insurer. So for the purposes of EPLI coverage, RCW 49.58.110 should not be considered a wage and hour law," says Davis. For now, the question remains unsettled.

INSURERS HAVE BEGUN CLARIFYING COVERAGE

Rather than relying on silent policy language, more markets are taking additional steps to underwrite to the exposure and explicitly state their position on wage transparency claims. These changes do not necessarily take the form of broad exclusions. In fact, most carriers appear to be using defense-cost-only sublimits, often tied to wage-and-hour endorsements.

In Washington, for example, some carriers are also adding endorsements that exclude statutory damages under Washington's pay transparency law while still allowing defense costs to apply for discrimination claims involving wage transparency law violations. In some cases, it may be possible to amend or remove these endorsements.



Underwriting has also become more rigorous, with markets asking more detailed questions about an employer's job posting practices and hiring locations before quoting or renewing coverage.

Meanwhile, not every carrier has addressed the issue specifically, which may leave coverage in question and lead to coverage disputes if a claim arises. Because each carrier's approach differs, coverage can vary considerably from one policy to the next.

THE GROWING RISK OF LITIGATION

For employers, inadvertent violations of pay transparency law can be costly. For job applicants, those violations can create an incentive to sue.

Washington's pay transparency lawsuits have triggered what some are calling a "cottage industry," according to The Seattle Times. In two years, around 250 lawsuits were filed. A single law firm is responsible for most of those lawsuits. People can search for noncompliant job postings online and then file lawsuits even if they have no real interest in securing the job being advertised. However, the founding partner of Emery Reddy, the firm behind most of the suits, argues that the lawsuits help improve compliance with the law.

A recent amendment to the law provides Washington employers with a five-day opportunity to correct violations. Although this may help reduce the number of lawsuits, the five-day window is tight, and employers that miss notices may not make the necessary corrections in time, leaving them exposed to litigation. When that happens, they'll likely look to their EPLI policy for support, but they may not find coverage.

While statutory penalties for wage transparency violations may appear relatively modest on a per-violation basis, the total financial exposure can be significant. Those penalties generally fall outside the scope of EPLI coverage. The more substantial exposure typically arises from civil claims, often brought as class actions, where employers face potentially significant defense costs as well as settlements or judgments. As these claims become more common, employers benefit from a clear picture of what their EPLI policy will and won't cover.

HOW BROKERS CAN HELP EMPLOYERS MANAGE WAGE TRANSPARENCY RISKS

While regulations and coverage continue to evolve, pay transparency litigation can create significant financial exposure for employers. Here's how retail brokers can help clients manage their risks:

- **Point out applicable state laws.** Pay transparency requirements vary by state and may apply even when employers are hiring remotely. Brokers can encourage clients to research which jurisdictions may create exposure.
- **Encourage proactive compliance reviews.** Internally reviewing job posting practices, hiring workflows and compensation disclosures can help employers reduce the likelihood of costly litigation. Underwriters may also ask about these practices.
- **Discuss EPLI coverage implications.** Wage transparency claims are creating new coverage questions. Brokers should review policy language carefully for wage-and-hour



exclusions, endorsements and defense-cost limitations. When policies are silent on the matter, coverage disputes may arise.

- **Monitor renewal changes closely.** As carriers respond to rising claims activity, new exclusions or endorsements may appear at renewal. Brokers can help clients understand what is changing in their coverage.
- **Prepare clients for rapid response obligations.** Brokers may want to remind clients to establish internal processes for monitoring notices and responding quickly to alleged violations.
- **Consider positioning EPLI as part of a broader workforce risk strategy.** Wage transparency litigation highlights how quickly employment-related exposures can change. Regular policy reviews and proactive guidance can help employers stay ahead of emerging risks.
- **Emphasize the benefit of working with a retail trading partner who is monitoring the evolving EPLI landscape.** With this much at stake and coverage still in flux, it pays to stay informed.

Need assistance?

RT ProExec can guide you through the changing wage transparency landscape and help you find coverage options for your clients' exposures.

The RT ProExec Advantage

RT ProExec is a leading specialty insurance practice focused exclusively on Executive, Professional and Transactional Liability. We provide cutting-edge product knowledge, innovative placement methodologies, and exceptional service to support retail clients and their insureds.

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RT ProExec delivers market leading scale and depth.

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- Creative problem-solving
- Robust educational resources and services
- Claims advocacy and support

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