

TO: Vermont Senate Committee on Economic Development, Housing, & General Affairs
FROM: Cary Brown, Executive Director of the Vermont Commission on Women

RE: H704, an act relating to disclosure of compensation in job advertisements
April 16, 2024

Several questions were raised during the committee discussion of H704 on Friday, April 12, 2024. This letter attempts to address those questions, and additional information can be found in the [VCW testimony on H704 in the House Committee on General and Housing of March 13, 2024](#).

Issues identified in the Senate committee on Economic Development, Housing, & General Affairs included:

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The issues are addressed below.

1. Enforcement of the proposed law

This law would be included in Title 21, Chapter 5, Subchapter 006 of the Vermont Statutes Annotated, “Fair Employment Practices.” Enforcement is covered under [21 V.S.A. § 495b](#):

(a)(1) The Attorney General or a State’s Attorney may enforce the provisions of this subchapter by restraining prohibited acts, seeking civil penalties, obtaining assurances of discontinuance, and conducting civil investigations in accordance with the procedures established in 9 V.S.A. §§ 2458-2461 as though an unlawful employment practice were an unfair act in commerce. Any employer, employment agency, or labor organization complained against shall have the same rights and remedies as specified therein. The Superior Courts are authorized to impose the same civil penalties and investigation costs and to order other relief to the State of Vermont or an aggrieved employee for violations of this subchapter as they are authorized to impose or order under the provisions of 9 V.S.A. §§ 2458 and 2461 in an unfair act in commerce. In addition, the Superior Courts may order restitution of wages or other benefits on behalf of an employee and may order reinstatement and other appropriate relief on behalf of an employee.

(2) Any charge or formal complaint filed by the Attorney General or a State’s Attorney against a person for unlawful discrimination or sexual harassment in violation of the provisions of this chapter shall include a statement setting forth the prohibition against retaliation pursuant to subdivision 495(a)(8) of this title.

(b) Any person aggrieved by a violation of the provisions of this subchapter may bring an action in Superior Court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney’s fees, and other appropriate relief.

(c) Any employer who violates the provisions of subdivision 495(a)(7) of this title shall be liable to any affected employee in the amount of the underpaid wages and an equal amount as liquidated damages, in addition to any other remedies available under this section. (Added 1963, No. 196, § 3; amended 1975, No. 198 (Adj. Sess.), § 2; 1981, No. 65, § 2; 1999, No. 19, § 5; 2001, No. 81 (Adj. Sess.), § 2, eff. April 25, 2002; 2015, No. 97 (Adj. Sess.), § 55; 2017, No. 183 (Adj. Sess.), § 2.)

2. Evidence that the proposed law would help with pay disparity

The gender wage gap is a complex issue with multiple factors causing it, and as such it needs to be addressed from multiple angles, including government, education, and the private sector all working together. The legislature gets credit for a strong equal pay law that has been even further strengthened this legislative session; allowing employees to discuss their pay so that it’s easier to see pay disparities; prohibitions against requiring salary history from job applicants; and good protections against sexual harassment. Education and advocacy organizations get credit for supporting initiatives such as the LEEP Toolkit, a free pay equity tool for employers; the Equal Pay Compact, a pledge to take action to reduce pay inequity; and programs such as Vermont Works for Women’s Gender Equity Advancement Roundtable, where employers learn about supporting women in the workplace.

One of the factors in causing pay inequity is how people are compensated. There is rarely outright, intentional discrimination at play when people are paid differently, but bias does have an impact.¹

¹For instance, there is a motherhood penalty observed in hiring, pay, and promotion:

- Women with children were 6 times less likely than women without children to be recommended for hire
- Mothers were recommended a starting salary that was 7.9% lower than the salary offered to non-mothers

This bill would address at least two significant factors impacting wage differences – inequity in the negotiation process and lack of transparency in compensation.

Research shows that when job applicants are clearly informed about the context for negotiations, including the types of compensation, benefits, or conditions that are negotiable, or the typical pay for the position, **gender differences in negotiation outcomes lessen**, and suggests that initiatives which improve transparency are likely to help equalize opportunities at the bargaining table:

- Andreas Leibbrandt and John A. List, “Do Women Avoid Salary Negotiations? Evidence From A Large-Scale Natural Field Experiment,” National Bureau of Economic Research, November 2012, <https://www.nber.org/papers/w18511>
- Maria Recalde and Lise Vesterlund, “Gender Differences in Negotiation and Policy for Improvement,” National Bureau of Economic Research, December 2020, <https://www.nber.org/papers/w28183>
- Hannah Riley Bowles et al., “When Gender Matters in Organizational Negotiations,” 2022, [When Gender Matters in Organizational Negotiations | Annual Reviews](#)
- J Jennifer E. Dannals et al., “The Dynamics of Gender and Alternatives in Negotiation,” American Psychological Association, 2021, <https://psycnet.apa.org/record/2021-03654-001>
- Erin Coghlan and Sara Hinkley, “State Policy Strategies for Narrowing the Gender Wage Gap,” Institute for Research on Labor and Employment, Apr. 2018, <https://irle.berkeley.edu/publications/irle-policy-brief/state-policy-strategies-for-narrowing-the-gender-wage-gap>

When applicants negotiate without having accurate salary information, they are more likely to use their own past salary history as a reference point, commonly asking for 10% - 20% more than they last earned – but for women and people of color, this increase is often not enough to bring them to par with their white, non-Hispanic counterparts, and instead **this practice can end up perpetuating existing pay disparities**:

- Kim Elssesser, “Women of Color Set Lower Salary Requirements Than White Men, According to Job Search Site,” Fe. 2023, Forbes, <https://www.forbes.com/sites/kimelssesser/2023/02/06/women-of-color-set-lower-salary-requirements-than-white-men-according-to-job-search-site/?sh=3231d869454d>
- “Revealed: Gender and Race Pay Gaps are Widening at an Alarming Rate,” Feb. 2023, Otta, <https://employers.otta.com/blog/gender-race-salary-gaps>

Research done after states have enacted policies banning employers from relying on a job applicant’s salary history to set pay has pointed to **increased wages for women and a reduction in gender pay gaps**:

- Sourav Sinha, “Salary History Ban: Gender Pay Gap and Spillover Effects,” 2019, <https://doi.org/10.2139/ssrn.3458194>
- James E. Bessen et al., “Perpetuating Inequality: What Salary History Bans Reveal About Wages,” June 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729

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- Non-mothers were 8.2 times more likely to be recommended for a promotion than mothers
Source: Correll, Shelly, Stephen Benard, and In Paik. “Getting a Job: Is there a Motherhood Penalty?” American Journal of Sociology (112(5):1297-1339 (2007)

Colorado enacted a law in 2019 requiring pay range transparency in job postings, and **salaries overall increased by about 3.6%**:

- David Arnold, et al., “The Impact of Pay Transparency in Job Postings on the Labor Market,” Aug. 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186234

3. Clarity about the kinds of information required in different kinds of job postings

The [bill](#) requires any advertisement of a Vermont job opening to include:

- the compensation or range of compensation, and
- a job description, if one exists.

The bill defines “advertisement” as written notice, in any format, of a specific job opening. It does not include verbal announcements (such as radio or television).

It also does not include general announcements that notify people that employment opportunities may exist, but that don’t identify any specific job openings.

The New York Department of Labor offers the following guidance about posting under their pay transparency law:²

Q: I am posting a job opportunity on social media. There is a character limit, but our information regarding range of pay is extensive. What can I do?

A: When there is extensive range of pay information that will not fit in an allotted advertisement space, an employer is allowed to provide the range of compensation information in a separate location, as long as the information is still available free of charge and easily accessible. If there is limited space in a single social media post, creating a thread of posts or providing a website link that connects to a full job posting with the complete range of pay information would be permitted.

H704 does not include any such explanation of how to handle postings on social media with a character limit, but it is reasonable to assume that the Vermont Department of Labor will be able to come up with guidance for similar situations.

4. The question of why not require compensation information to be disclosed “upon request”

Requiring applicants to request compensation information maintains the burden of transparency on the employees, whereas the proposed law would shift that burden to employers. States are recognizing that without this shift, the law is not as effective in meeting its objectives.

Maryland is currently considering strengthening their law to stop putting the burden of asking on applicants.³ Connecticut’s law currently requires disclosure upon request, and the state is currently considering an update that would require the information to be included in job postings.⁴

² [Pay Transparency Act Frequently Asked Questions | Department of Labor \(ny.gov\)](#)

³ [Quick Facts About State Salary Range Transparency Laws - Center for American Progress](#)

⁴ [Quick Facts About State Salary Range Transparency Laws - Center for American Progress](#)

5. Clarity about the meaning of “good faith” in the bill, and how it would be enforced

A concern emerging in recent years of this law being in effect in some states is that some employers may post overly broad ranges that end up not being helpful. Netflix did this in California, posting a pay range of \$60,000 - \$290,000 for a job in consumer products.⁵ But Colorado amended its law in 2023 to require employers to disclose in good faith the range and benefits, hoping to avoid this problem.

The [Colorado law](#) states:

4.1.2 Pay ranges. A posted compensation range may extend from the lowest to the highest pay the employer in good faith believes it might pay for the particular job, depending on the circumstances. An employer may ultimately pay more or less than the posted range, if the posted range was the employer's good-faith and reasonable estimate of the range of possible compensation at the time of the posting.

[Guidance on the law issued by the Colorado Department of Labor and Employment](#) clarifies:

“Ranges of pay are compliant if they span the lowest to highest the employer actually believes it may offer for the specific job, depending on qualifications, employer finances, or other considerations.

Example 2: An employer can't post the same \$30,000-\$100,000 for janitor and accountant jobs, if it doesn't genuinely anticipate offering accountants the low end, or janitors the high end.

Example 3: An employer can't post a \$70,000-\$100,000 range for a junior accountant job just because it pays senior accountants the high end of the range. It can post \$70,000-\$100,000 for an accountant position if it doesn't limit the post to junior or senior accountants, and genuinely might offer as low as \$70,000 for a junior accountant, or as much as \$100,000 for a senior one.

Ranges can't lack a top or bottom, like “\$30,000 and up” or “up to \$60,000.”

An employer may ultimately pay more or less than a posted range — as long as the range, when posted, was what the employer genuinely believed it would be willing to pay for the job.”

New York's pay transparency law also requires a good faith pay range, and their Department of Labor offers this guidance:⁶

Q: How do I know if I am posting a pay range in good faith? Is there a definition for good faith?

A: A “good faith” pay range should be the range of pay you legitimately believe you are willing to pay at the time of the job opportunity posting. You should consider what is the legitimate range of pay that will be required to attract qualified candidates at the time you are posting the advertisement. Factors to take into account include the job market, current employee compensation levels, hiring budget, and the experience and education levels you are willing to accept for the position.

Q: Can an employer revise a pay range in an advertisement after it is publicly posted, shared and/or distributed?

A: Yes, a good faith range of pay is based on the time the original opportunity is posted. An employer may adjust the range of pay in an advertisement in good faith after collecting additional information during the hiring process.

⁵ [How Pay Transparency Laws Help and Limit Job Seekers - The New York Times \(nytimes.com\)](#)

⁶ [Pay Transparency Act Frequently Asked Questions | Department of Labor \(ny.gov\)](#)

Q: I have interviewed an applicant with a master’s degree and would like to hire them. The pay range I originally offered was based on a candidate having a bachelor’s degree. Am I able to offer a higher salary to match the candidate’s advanced degree?

A: Yes, an employer may develop a good faith pay range based on certain qualities, including a specific education or experience level based on current employees in a similar role. If you receive an application that exceeds those qualifications, it is still in good faith to offer the candidate with higher qualifications a higher salary than the salary posted in the original advertisement.

Q: I developed a good faith pay range for a job posting based on other positions at the same level within my company. Prior to hiring, the company instituted a company-wide pay increase for all employees. Can I offer the new employee a salary above the original pay range posted based on this increase?

A: Yes, you created a good faith range based on similar positions within the company at the time of posting. It is still in good faith to offer a salary outside that original range that keeps with the company-wide pay increase at the time of hiring.

Q: I want to attract candidates with at least five years of experience, but I have been given a minimal hiring budget. Can I post a pay range based on experience to recruit the candidates I want if it is beyond the budget I have?

A: No. While you made a good faith effort to research the pay range other positions with similar experience are receiving, if the pay range posted is more than what you as an employer are willing to pay, that pay range has not been posted in good faith.

Q: I don’t know what I want to pay a potential employee until I have interviewed them. Can I post a wide range of pay to cover any potential scenario?

A: No. Having a range of pay so broad as to prevent a potential applicant from understanding the legitimate pay range an employer is willing to pay is not in good faith. For a pay range with significant breadth, an employer must provide further information explaining why the range is so broad.

Enforcement under the Vermont proposal would be the same as the enforcement of the overall law.

6. Further information about whether municipalities and the State of Vermont are currently engaging in this practice, and/or are required to

The [State of Vermont](#) currently posts the starting pay for all of its classified positions, but not for its exempt positions. This new law would require a change in practice by the State in its posting of exempt positions.

While the current postings for exempt positions with the State of Vermont indicate “salary commensurate with experience,” in reality every position comes with an expectation of range of compensation. There are clear guidelines established by the Vermont Department of Human Resources as to salary for exempt positions, which are [outlined on their website](#).

One of the items on that website states: “When recruiting [for an exempt position] a working salary range must first be authorized.”⁷

Public sector salaries are a matter of public record, which means that they have a much higher degree of pay transparency than the public sector, and we see a much smaller gender wage gap in these jobs:

- “Release: OPM Releases Proposed Regulations to Prohibit Use of Previous Salary History,” May 2023, Office of Personnel Management, [RELEASE: OPM Finalizes Regulation to Prohibit Use of Non-Federal Salary History](#)

Similarly, jobs in which employees are represented by a union have pay transparency, and a smaller gender wage gap:

- Amanda Fins, et al., “Unions Are Good for Women,” July 2021, National Women’s Law Center, <https://nwlc.org/wp-content/uploads/2021/07/Union-Factsheet-7.27.pdf>

7. Clarity about the meaning and the practicality of reference to positions that are paid “solely on a commission basis”

The question was raised as to how there could be jobs in Vermont that were paid solely on a commission basis. The Vermont Department of Labor could provide more complete information, but an initial investigation suggests that such a compensation structure may be permitted, but only with the assurance that employees make at least the minimum hourly wage for the hours they work. It’s the employer’s responsibility to ensure that this happens.

Source: [A Summary of Vermont Wage and Hour Laws:](#)

“Commissions

When employees are paid by “commission” only, then those “commission” payments are considered “wages” and fall under the same protection from deductions as regular “wages” do. If employees are paid with a combination of “wages” and “commission”, certain deductions are allowed. These deductions can only take an employee to the current minimum wages. Allowable wage deductions are provided for in Vermont’s Minimum Wage Rules.

REMEMBER it is an employer’s responsibility to ensure employees make AT LEAST the current minimum wage for all hours worked, whether payment is made with straight commission or a combination of wages and commission.”

8. Clarity about how jobs that use tipped wages are covered under this proposal

The New York Department of Labor provides the following guidance on how to communicate about jobs where tips are expected:⁸

Q: I am looking to hire servers at my restaurant and tips are an important addition to their hourly wage. Am I able to include this additional compensation information in the job posting?

A: Yes, an employer may include additional benefit or compensation information in a job posting as long as it is clear the additional compensation is not part of the base wage. For example, a pay range for a tipped server could look like “\$18 an hour,” “\$18 an hour plus tips” or “\$18 an hour plus an estimated \$10 per hour in tips.” It is not ok to add the expected tips to the base pay and list the hourly wage as “\$28 an hour.”

⁷ [Exempt Employees | Department of Human Resources \(vermont.gov\)](#)

⁸ [Pay Transparency Act Frequently Asked Questions | Department of Labor \(ny.gov\)](#)

9. Concerns about employers recruiting nationally who may be reluctant to recruit Vermont applicants because they don't want to comply with this law

With the growing number of states that are requiring wage transparency in job postings, 26.6% of workers in the country are already covered by this requirement.⁹ It is already completely impractical for any employer to even attempt to exclude potential employees from any particular state, and will just become increasingly so.

⁹ [Nearly 21 Million Women Benefit from Pay Range Transparency Laws. Another 18.5 Million Could Soon. - National Women's Law Center \(nwlc.org\)](#)