

PROPOSED REGULATORY TEXT

For additional information, see the September 13, 2023 issue
of the New York State Register at <https://dos.ny.gov/state-register>

Parts 192 and 194 of Subchapter F of Chapter II of Title 12 of the New York Code, Rules, and Regulations (“NYCRR”) are moved to Subchapter G of Chapter II of Title 12 of the NYCRR.

Subchapter G of Chapter II of Title 12 of the NYCRR is renamed Payment of Wages.

A new Subpart 194-2 is added to Subchapter G of Chapter II of Title 12 of the NYCRR as follows:

Subpart 194-2 – Pay Transparency in Advertisements for Jobs, Promotions, or Transfer Opportunities.

Section 194-2.1 – Applicability.

- (a) All terms used in this Subpart correspond to the definitions set forth in section 194-b of the New York State Labor Law (“the Act”).
- (b) This Subpart is not applicable to governmental agencies.
- (c) This Subpart is applicable to all advertisements for jobs, promotions, or transfer opportunities (“opportunity” or “opportunities”) that will physically be performed, at least in part, in the state of New York, including an opportunity that will physically be performed outside of the state of New York but reports to a supervisor, office, or other

work site in the state of New York. Opportunities that are physically performed outside of the state of New York include, but are not limited to, opportunities where a prospective applicant may be working remotely, telecommuting, or working from “home.”

(d) Incidental or infrequent instances of being physically present in the state of New York for work-related purposes, such as for an occasional meeting or conference, or mere communication with employees based in the state of New York, shall not alone be deemed physically performing an opportunity “in part” in the state of New York.

(e) The Act is not applicable to temporary help firms as defined by subdivision five of section 916 of the New York State Labor Law regarding employees that temporary help firms hire in order to perform work or services for other organizations, to support or supplement such other organization’s workforce, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects. For such employees, temporary help firms must still abide by applicable department guidelines for Notice and Acknowledgement of Wage Rates. The Act is applicable to temporary help firms for opportunities to work for the temporary help firm itself. For example, a temporary help firm must comply with the Act when advertising an opportunity for an administrative assistant position to perform work or services for the firm itself and not for other organizations.

Section 194-2.2 – Advertisements.

(a) Advertisements are covered by the Act regardless of the medium in which they are posted. Advertisements may include, but are not limited to, a newspaper advertisement, a printed flyer that is either distributed or displayed, a social media post, an e-mail sent to a pool of applicants, an e-communication sent using an electronic mailing list, or an advertisement posted through any other medium. For the purposes of this section, a “pool of applicants” means more than one potential or prospective applicant.

(b) Advertisements are covered by the Act regardless of whether they are posted by the employer directly or through a third-party, such as a recruiter or a job listing website. Employers are responsible for complying with the Act and this section for all advertisements that they have consented to post, regardless of whether they use a third-party recruitment tool such as a recruiter, a website, a paper or electronic mailing list, or a physical or electronic job board, to post the advertisements.

(c) Employers shall not be deemed responsible for advertisements that are “scraped,” or automatically aggregated electronically and posted by a third-party without their knowledge or consent. This provision does not preclude a third-party from being deemed an “employer” pursuant to the Act or this section.

(d) The Act does not prohibit employers from hiring, promoting, or transferring employees without posting an advertisement nor does it require employers to create an advertisement to hire, promote, or transfer employees. The Act does not require employers to use any specific medium for posting advertisements.

(e) Advertisements must contain a job description for the opportunity if a job description exists. A job description may not exist in the limited circumstance where the name of the position or title clearly conveys the full extent of the duties required of the position without additional detail. For example, an employer posting an advertisement for a dishwasher who will be solely washing dishes may not have a more detailed job description available; however, an employer advertising for such a position may still choose to provide a job description in the advertisement.

Section 194-2.3 – Range of Compensation Requirements.

(a) Advertisements must contain the range of compensation for an opportunity. The “range of compensation” solely means the base rate of pay, regardless of the frequency of payment; for example, an annual salary, an hourly wage, or a piece rate. Such range must be for a single opportunity and a single geographic location or region. If an advertisement for an opportunity is intended to cover multiple geographic locations or intended to include multiple levels of seniority or supervisory authority, then multiple ranges of compensation for each individual opportunity must be provided.

(b) The range of compensation does not include other forms of compensation or benefits offered in connection with the opportunity, such as:

(1) health, life, or other employer-provided insurance;

(2) paid or unpaid time off, sick days, vacation days, leaves of absence, or sabbaticals;

(3) the availability of, or contributions towards, employer-sponsored retirement or savings plans;

(4) severance pay;

(5) overtime pay; or

(6) other forms of compensation such as commissions, tips, bonuses, stocks, or the value of employer-provided meals or lodging.

(c) Employers are not prohibited from providing additional relevant compensation or benefit information beyond the requirements of the Act and this section. For example, a range of compensation for a tipped job may be stated as “\$18 an hour,” but may also exceed the requirements of the Act and this section by stating “\$18 an hour plus tips,” or “\$18 an hour plus an estimated additional \$10 per hour in tips.” An employer is prohibited from including other forms of compensation such as tips in the range of compensation itself, as it fails to disclose the base rate of pay. For example, where the base rate of pay is \$18 an hour with an estimated additional \$10 per hour in tips, an employer cannot advertise the range of compensation as “\$28 per hour” or “\$28 per hour including expected tips.”

(d) The range of compensation cannot be open ended, for example, by stating “\$20 per hour and up” or “maximum \$50,000 per year.” If an employer has no flexibility in the rate or salary they are offering, the fixed rate or salary may be simply stated, for example, as “\$20 per hour,” or “\$50,000 per year,” provided that offering a fixed rate or salary is still a range of compensation as defined by the Act and this section.

(e) Where the range of compensation information is extensive such that it will not fit in the space allotted for the advertisement, the employer is permitted to provide such information in a separate attachment or addendum, provided that the attachment or

addendum is available free of charge, easily accessible to the prospective applicant, and the main body of the advertisement clearly and conspicuously states where the range of compensation information is available.

(f) The range of compensation must include the minimum and maximum annual salary, or hourly rate, for an opportunity that the employer believes in good faith to be accurate at the time of the posting of an advertisement for such opportunity. “Good faith” means the range of compensation the employer legitimately believes they are willing to pay the successful applicant or employee at the time they post an advertisement. An example of “good faith” is where an employer considers factors such as the job market, current employee compensation levels, hiring budget, and experience and education levels acceptable for the opportunity; determines the legitimate range of compensation that they are willing to pay the successful applicant or employee for the opportunity; and includes this range in the advertisement. “Good faith” is based on the time that the employer posts the advertisement; an employer is not precluded from adjusting the range of compensation after collecting additional information through the hiring process.

(1) Illustrative examples of employers engaging in “good faith” actions:

(i) An employer determines after posting their initial advertisement that they need to increase their hiring budget to attract qualified candidates and posts a new advertisement with a new range of compensation.

(ii) An employer develops a range of compensation for an opportunity based on qualities, such as a specific education or experience level, reflected by current employees or applicants for past opportunities.

However, the employer receives an application that exceeds the expected qualifications for the position. In order to hire such a candidate, the employer offers a rate of compensation above what was initially listed on the advertisement.

(iii) An employer develops a range of compensation for an opportunity and, after posting the position but prior to making an offer, the employer institutes a companywide increase in pay that also causes the posted range of compensation to increase.

(2) Illustrative examples where employers' actions lack "good faith":

(i) The range of compensation does not reflect, or misrepresents, the rate that the employer is willing to pay the successful applicant for the opportunity at the time of posting the advertisement because such rate is deliberately lower or higher.

(ii) The range of compensation is so broad, without further information explaining the reason for the breadth, that it has the effect of preventing the potential or prospective applicant from understanding the legitimate range of compensation that the employer is willing to pay the successful applicant for the opportunity at the time of posting the advertisement.

Section 194-2.4 – Enforcement.

(a) The Act permits "any person claiming to be aggrieved by a violation" of the Act to file a complaint. For the purposes of this section, any such person means a current, prospective, or potential employee or applicant who claims to be aggrieved by a

violation, or an organization acting on such person's behalf, or the recognized and certified collective bargaining agent acting on such person's behalf, as permitted pursuant to section 196-A of the Labor Law. The Commissioner of Labor ("Commissioner") may also initiate their own investigations based on tips and other sources of information, including reports of violations from the public.

(b) Persons seeking to file complaints of violations or reports of violations of the Act, or this section, shall follow procedures set forth for this purpose on the Department of Labor's website.