

A photograph of an office environment. In the foreground, a green mesh office chair with black armrests and a chrome base is visible. Behind it is a light-colored wooden desk and a matching wooden cabinet with drawers. The scene is brightly lit, suggesting an indoor office setting.

# New York DOL Adopts Regulations Governing Employment Policies that Limit Employee Discussion of Wages

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# **New York DOL Adopts Regulations Governing Employment Policies that Limit Employee Discussion of Wages**

*By George Patterson 2-16-17*

The New York State Department of Labor has adopted regulations clarifying employers' rights and obligations when implementing policies that limit the discussion of wages in the workplace. Under New York Labor Law section 194(4), an employer may not prohibit employees from discussing wages, but may establish "reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages." The DOL's new regulations provide guidance on the permissible scope of policies that limit wage discussions as well as the notice employers must provide to employees about such policies.

The regulations require employers that place reasonable limitations on the time, place and manner of wage discussions to issue written policies "either electronically, through publicly available posting, or by paper copy." In addition, the limitations "must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant interest, and leave open ample alternative channels for the communication of information." The DOL has also published a separate fact sheet stating that "[s]uch restrictions may not specifically reference the inquiry, discussion, and disclosure of wages." Accordingly, employers must narrowly tailor their policies and may simply choose to state generally that employees are not permitted to engage in communications that are not directly related to the

performance of their jobs during certain designated work periods, which should not be overly restrictive.

Importantly, employers may prohibit employees from discussing or disclosing information about their coworkers' wages without prior verbal or written permission and may also limit disclosures from employees whose essential job functions provide them with access to information about the wages of others. Further, employers must be able to demonstrate that their employees received the policy limiting wage discussions in writing if they wish to take advantage of the affirmative defense for violations of section 194(4) set forth in the statute and must maintain written records of the policy for six years.

Finally, the regulations state that the DOL will revise the Notice of Rates of Pay form required under the Wage Theft Prevention Action Act to include a statement about employees' rights to discuss wages. We will keep our eye out on that development so you aren't providing old forms to your employees after the new ones come out.

### **Takeaways**

Many employers currently rely on handbooks and other policies to inform employees in accordance with NLRB rules that they are free to discuss wages and terms and conditions of employment in the workplace as long as the discussions do not interfere with job performance and productivity. However, in many cases these policies may not be sufficient to satisfy the requirements under the new regulations. Moreover, although the NLRA, which is intended to protect concerted activity, does not generally apply to managerial employees, section 194(4) is focused on promoting pay transparency

to narrow the wage gap between men and women and consequently applies to all employees.

New York companies that utilize a variety of compensation structures with diverse bonus and incentive pay components often prohibit mid- and senior-level white collar workers from disclosing the details of their compensation to avoid creating tension among employees who are compensated differently. However, broad rules banning all discussions of these terms are no longer advisable. Employers should be mindful of confidentiality policies in their offer letters and employment agreements and should instruct managers that employees are free to discuss every aspect of their compensation.

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