

Addressing and Avoiding Pay Inequity

By Stacey A. Bastone & Felice B. Ekelman

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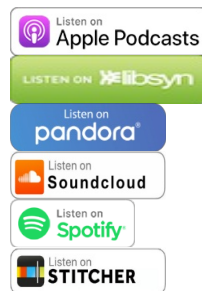
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Details

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How critical is pay equity to a company's human capital? As the labor market continues to change at a rapid pace, employers need to manage the disruptive factors which have an impact on employee compensation and their ability to attract and retain a diverse workforce.

Jackson Lewis P.C. · Addressing and Avoiding Pay Inequity



Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? As lawyers rebuild their workplaces following the disruptions of 2020, identifying and addressing inequities in the workforce comes into sharp focus. Facing heightened challenges to retain and attract diverse talent in what has been dubbed the great resignation, hiring, promotion, leave and accommodation practices also face increased scrutiny as potential areas for inequities. On this episode of We Get Work, we explore what practices can trigger pay inequities and how to develop proactive solutions to address and avoid continued pay gaps.

Our hosts today are Felice Ekelman and Stacey Bastone, principals in the New York City and Long Island offices of Jackson Lewis respectively. The breadth of Felice's litigation practice includes everything from defending wage and hour class actions to handling individual plaintiff claims. Stacey counsels clients on pay equity issues including preparing proactive pay equity analyses, and working with clients on their diversity analytics and affirmative action planning efforts. Both Felice and

Stacey are passionate about the importance and intersection of employer retention and pay equity and helping employers build a stable and productive workforce. Felice and Stacey, the question on everyone's mind today is how critical is pay equity to a company's human capital and how does that impact my business?

Felice Ekelman ([02:05](#)):

Pay equity is critical to a company's human capital and can have a very significant impact on an organization, that's why we're speaking about this today. Why is pay equity so critical at this moment? While we're in the midst of a volatile labor market, employers are facing disruptive forces, which impact on employee compensation and retention and have served to make pay equity a very hot topic. What are the disruptive forces? For sure, the great resignation is one disruption. Scores of employees left the workforce in the last 18 months, and this trend does not seem to be abating. Another disruptive force is the return to work wandering. Employers are still grappling with questions associated with return to work. There's no doubt that we will see a long lasting increase in the number of employees working remotely often in states where employers have no brick and mortar operations.

Another disruption to the labor market is the impact the pandemic had on women in the workplace. It is well-documented that a substantial number of women have left the workplace. And as we speak today, that phenomenon has not yet reversed. What does this have to do with pay equity, our topic of conversation today? Stacey and I think a lot. We've been following the pronouncements of some corporate leaders as they publicly state they will adopt compensation programs that will differentiate between workers who are in office and workers who are deemed remote workers, meaning that remote workers will be paid less for the same work that another employee performs in an office. Other corporate leaders are opting to base compensation on geographic location, regardless of whether the employee is remote or reporting to an office.

Today, we're going to focus on two pay equity issues. First, how do the disruptions I've just discussed and identified impact on compensation decisions? Are there risks to making compensation decisions based on location or remote status? Second, Stacey and I will explore why a pay equity and audit may be an appropriate course of action even in the absence of a formal complaint about pay. Stacey, I think we should start our conversation by reviewing some of the basics. Are there legal guardrails that employers should be focusing on and assessing whether to revise their compensation schemes and undertake a pay equity review?

Stacey Bastone ([04:44](#)):

Felice, you raised some really important questions. First, generally speaking, there are federal and state pay equity laws that typically provide for differentiations in pay based on a geographic differential. Meaning, if a business location is in a state or a city with a high cost of living, pay will be higher as compared to a location with a lower cost of living. However, it's not as straightforward when it's not a business location that we're talking about here. We're talking about people working from home, so no longer tied to an actual business location and this fundamental change in where people work and how employees address it raises a lot of issues. I think it's

important to take a step back to understand the legal framework.

The first major federal equal pay law in the books is the Equal Pay Act, which most of us are familiar with. It was enacted in 1963, so it's not a new law and it prohibits discrimination in pay based on gender. There's no mention of race, ethnicity, or other protected characteristics. The Equal Pay Act established the principle of equal pay for equal work. That's what most people think of when they think about equal pay. And it allows employers to differentiate pay based on several factors. One of which allows employers to implement wage differentials based on any factor other than sex. Whether this defense actually allows employers to consider any other factor while implementing wage differentials, well, that's been one of the most hotly contested issues. And we'll talk about it a little bit later today.

Next in 1964, the Title VII of the Civil Rights Act was enacted, which further prohibited discrimination in pay and expanded this protection to include race and other protected characteristics as well. For our federal contractor listeners out there, you probably know that pay equity has been a major area of focus of the office of federal contract compliance programs or the OFCCP.

Going back for several years now, there's been momentum in this space, really starting under the Obama administration. What many contractors don't realize is that when you're audited by the OFCCP, you actually have to turn over detailed compensation data to the agency and they employ statisticians and analysts to investigate and analyze your data. This trend has continued under the Trump administration and under the current Biden administration. And not surprisingly, the current administration has been incredibly aggressive in this space.

Layered on top of all of that, but the biggest impact in recent years in the fair pay law space has come from the states. In the absence of federal legislation, which the federal government has tried to pass, but has failed, the states have really been taking up the mantle and they've been enacting their own laws to fill in some of the gaps left by the EPA.

Felice Ekelman ([07:39](#)):

Stacey, what is the focus of these state laws? What are the states trying to accomplish?

Stacey Bastone ([07:46](#)):

There's a few general themes amongst these state laws. First, there are a number of states that have enacted legislation that expands the list of protected characteristics covered. We know that the EPA only covered gender. Many states cover, or most of the new states, I should say, cover race and ethnicity. And some have even gone farther than that. For instance, Colorado's law prohibits pay discrimination based on sex in combination with another protected characteristic. And this is exploring an intersectionality component of pay. Employers need to be mindful that pay disparity based on characteristics other than gender may be protected under these state laws.

Felice Ekelman ([08:29](#)):

The Colorado law, which is an interesting one is quite broad. And one of the things that the Colorado law does that I have not seen in any other state or local legislation is that the law requires when employers post a job opening that the posting include the salary range. And so, what happens in Colorado is even if you have only one employee in Colorado, this new law requires that all job postings nationwide, because that one employee in Colorado might just want to apply, indicate salary range.

And so, this is a significant broadening of a pay equity regulation. In fact, employers who are aware of it often choose not to allow any of their employees who are working remotely to work in Colorado because of this law. And so, we may be seeing laws like this, which enhance transparency, as you just mentioned, Stacey.

I understand that another way in which state laws are broadening the scope of their coverage has to do with the term equal pay. Stacey, what is the focus of these more recently enacted state laws? What are the states trying to accomplish here?

Stacey Bastone ([09:59](#)):

Sure. There's a number of common themes among the states. First, several states have enacted legislation and really, most of the states that have enacted fair pay laws, they expand the list of the protected characteristics that are covered by the law. The EPA only covers differences in pay based on gender, but most of these new laws cover race, ethnicity, other protected characteristics, such as age or religion and Colorado's law in particular goes even further to prohibit pay discrimination based on sex in combination with another protected status, exploring intersectionality component of pay. Employers need to be mindful that paid disparities based on characteristics other than gender may be protected.

Another common theme is expanding the meaning of equal. The EPA really established the principle of equal pay for equal work, which is generally interpreted to mean that employees in the same job title should be earning the same amount. In assessing equity under this standard of review, it's much more narrow because we generally are looking at people in the same job, but other state laws such as the Massachusetts Equal Pay Act and Oregon's Equal Pay Act, they go further because the standard there is comparable.

Felice Ekelman ([11:18](#)):

The standard of equal pay for comparable work is much broader than the standard of equal pay for equal work because one position may be deemed comparable to many other positions. If comparable positions is the standard that employers have to now consider, that could be unpredictable because an employer might not know which positions are going to be deemed comparable to one another until there is litigation or some kind of other regulatory challenge.

Stacey Bastone ([11:55](#)):

That's exactly right. And because these laws are so new, that guidance hasn't been established yet. That unpredictability is very real for employers trying to get ahead and analyze their pay.

Sticking with the state laws, another trend that we're seeing in state legislation is a tightening of the legal defenses that employers can rely on to explain differences in pay. Using the Massachusetts Equal Pay Act as an example, the factors employers can defend differences on are specifically spelled out in the statute. This is also true of the Colorado Equal Pay Act that we talked about a bit.

There's no catch-all like there is in the EPA that says any factor other than sex is a permissible defense, and this makes it much more difficult to defend pay decisions. This is a major shift in how employers will have to defend their paid pay decisions. I can think of countless reasons that have nothing to do with gender or race that may explain differences in pay, but nevertheless would not be defensible under these laws because they don't fit into one of the factors specifically identified in the statute. For instance, the influence of the market, negotiations, even redlining, meaning when somebody's demoted, but keeps their prior salary, those types of explanations, while are explanations, are not necessarily defenses.

Another common theme that we're seeing is that many states are enacting pay transparency laws and salary history bans.

Felice Ekelman ([13:27](#)):

By pay transparency, you're talking about the right for employees to share information about their compensation and to discuss compensation with each other, right?

Stacey Bastone ([13:40](#)):

Absolutely.

Felice Ekelman ([13:41](#)):

And so, the National Labor Relations Act, which is a federal law that's been in place since the 1930s, has been deemed to protect employee's right to engage in what's known as protected concerted activity. And that has been held to include the right to talk about pay. And so, the federal law has always permitted employees to talk about pay with one another, but how do these state laws expand this concept of transparency, Stacey?

Stacey Bastone ([14:22](#)):

You're absolutely right. This isn't necessarily new, but there are some expansions based on the state fair pay laws, first, that they include all employees and a lot of them also extend to applicants as well. While the idea of pay parent isn't new, the idea of extending it further is, and it's also putting in the forefront the idea of pay transparency and really letting employees know that it's okay to talk about pay, because the idea is that if employees are engaging in discussions about their pay and taking away the stigma of having these discussions and sharing information more freely, two things will hopefully happen.

First, employees will be armed with more knowledge about how much their colleagues earn and will be better equipped and more confident in raising their own concerns about pay. And second, employers will feel the pressure to be more

transparent about pay. And so, the idea is that the more employees and employers are talking about pay and removing secrecy from the process, the more equitable pay will become.

Felice Ekelman ([15:25](#)):

It is true that for a lot of employees, sharing information about pay has always been something that employees have been reluctant to do. And I think this trend is turning that completely upside down. And that Colorado law that you were just talking about takes the transparency piece to a new level because while a number of states have said that employers cannot ask about prior compensation in interviewing applicants, the Colorado law requires that employers post salary ranges for positions that an employee in Colorado might be able to apply for, which would include remote positions.

For those employers who are remote forward, a new terminology, meaning employers who intend that most employees are going to be working remotely and not assigned to a particular brick and mortar workplace, if positions are remote, then they will have to be compliant with the Colorado law. It's going to be interesting to see how this impacts employers who have Colorado employees. And it's also going to be interesting, I think, to see if other states and municipalities adopt similar standards.

Stacey Bastone ([16:55](#)):

I think that's right. I think that while Colorado right now is certainly of the, if not, the most aggressive of the state laws, I definitely think that we can see other states following suit and as they do so, employers really have to think about how they are setting pay and how they're implementing their policies because being consistent in this space is really key. And that means consistency in assigning jobs to grades or ranges and setting starting salary, and even in terms of awarding increases and awarding other types of pay such as bonus and other variable pay.

Felice Ekelman ([17:33](#)):

These laws all require that employers be increasingly well-disciplined in administering their pay. If there are salary ranges, don't deviate from them except in very extraordinary and well-documented reasons that can be justified under the applicable law. And so, discipline becomes really the key to a well-administered compensation system. And the disparities can arise in all kinds of ways, even innocently and inadvertently.

For example, in many situations, problems arise because of starting salaries. You could have two people receive the same job on the same day, and one does a better job negotiating the starting salary than another. Well, if they happen to be of a different gender and let's just assume for the sake of this conversation, that the male has negotiated a higher salary than the female, over time, if increases are based on percentages, then over time, the disparity between the pay of the male and the female is just going to widen. And that can be the root cause of at least one kind of pay disparity that employers really need to look at more carefully.

Stacey Bastone ([18:59](#)):

Absolutely. And I think that this issue can be further compounded when employers base starting salary, at least in part, on what the employee was previously earning, because that can be perpetuating potential past discrimination and really setting employers up to fail in terms of paying employees equitably. That's why many states have specifically prohibited employers from asking about employee's prior salary during the application process, and instead, they can ask about salary expectations.

It's not a proof solution because it still leaves a lot of guesswork, but it's a start. And as you said, Felice, the more that employers are really maintaining consistency and having discipline in how they're setting those starting salaries and staying within those predetermined ranges, the more success they're going to have over the lifetime of that employee.

Felice Ekelman ([19:49](#)):

I want to mention that another critical moment in addressing compensation is when there are mergers and acquisitions and integrating multiple businesses in one is a challenge and synchronizing pay if the positions in the different companies are the same is really important. And I would say that employers should not wait and do this a year or two after the transaction, but should be more proactive and address it soon after if not at the moment of the transaction, because those kinds of differences are hard to justify.

Let's skip back, Stacey, to the question we teed up at the beginning of our conversation, which is the question about the current situation where there are a lot of employers moving towards increasingly remote workforces or workforces that work in a hybrid kind of situation. And the question is, should an employer undertake a situation where they pay remote workers differently from those employees who are reporting to a brick and mortar location?

Stacey Bastone ([21:13](#)):

Sure. And I think there's a lot of things that employees have to think about. There's the legal perspective. There's also the employee relations perspective, but whether or not it's defensible to pay remote workers less or to pay remote workers based on where they're living is really going to depend on the jurisdiction. The EPA and many of the state laws will allow employers to defend their compensation decisions based on geography, but that does not necessarily extend to paying remote workers differently just because they're remote.

I mean, it also raises the question of what about that situation where you have remote workers who may live nearby or near an actual business location, but they're remote. They're in the same cost of living. They may be deemed to be right in the same county or city or even a smaller jurisdiction, but what would be the basis there for paying them less? Some of those state laws probably wouldn't allow for differences there. Employers have to be careful about how they're really forming those compensation policies.

Felice Ekelman ([22:16](#)):

And there are going to be situations, and we're seeing them already with our clients where employers are trying to attract staff and a lot of people want to work

remotely. And if employers offer prospective employees or their current workforce the opportunity to work remotely or in a real office location, the question is who is going to volunteer to work remotely? The literature we're reading and I think anecdotally we're finding that women who disproportionately have more responsibilities in the home are more likely to raise their hand and say, I will work remotely, I would be willing to take a pay cut or less money for the benefit of not having to commute and to be home. And employers may have to address that sometime in the future if this creates a disparate impact, for example.

Stacey Bastone ([23:17](#)):

Absolutely. And there may be a legal defense for this under the EPA under this idea of any factor other than sex can be a defense if applied uniformly. Some of the state laws may accept this as well, but we won't know for sure until case law addresses it, but I think it still obviously leaves open the employee relations issues and optics issues that employers are going to have to deal with, and then also employee retention issues. If certain employers are doing this but others have more flexible standards, it's going to be an issue in terms of retention, especially as we're dealing with now, the great resignation that we're seeing.

Felice Ekelman ([23:56](#)):

And I am seeing, and I assume you are too, a significant increase in the number of our clients who are asking about and undertaking pay equity reviews. Let's talk about that for a minute. A pay equity review is a way for an employer to have an examination of their compensation system to see if it would stand in case of a legal challenge or a regulatory challenge, and we're seeing a lot of employers asking about whether and how to undertake a proactive analysis, that could be because of a concern by a board, it could be a concern by leaders or human resource and people, experts, or even legal departments wondering whether with all this talk about equity or whether the workplace can withstand a challenge, and more importantly, whether there are issues that should be uncovered.

Stacey Bastone ([24:58](#)):

Absolutely. I'm seeing incredibly high demand for these proactive pay equity analyses. I work with a lot of clients on these types of analyses and I would say over the last five years and two to three years in particular, the amount of work we're doing in this space has increased dramatically. And really, when thinking about these analyses, you want to think about, well, what are we trying to do here? And in most cases, we're trying to get ahead of potential issues because these analyses are meant to identify systemic issues, meaning are there trends where we're paying particular races or ethnicities more than others, but to undertake these analyses, it shouldn't be taken lightly. You want to make sure first going into the analyses that if you're going to undertake it, you have buy-in from leadership and hopefully, a budget to address any potential concerns.

And then from there, you hopefully... I always recommend doing this under the advising council, so whether that's your internal council or working with your external council, you want to take steps to cloak the process and privilege and then roll up your sleeves and dig in into the process, really understand how it is that

you're paying your employees, what the policies actually say, and compared to what's being done in practice. Work to identify who's comparable or similar to one another. And this is where it really comes into play where you're situated and what those state laws are, whether you have to think about this similarly situated or the comparable standard.

And then from there, you're going to be hopefully working with statisticians who can run sophisticated analyses to identify those trends. And so, a lot of my clients are doing this on a proactive basis because they want to identify those issues and be able to report internally or externally, but there's also state laws in particular, the Massachusetts Equal Pay Act, which provides for safe harbor, meaning that if you engage in these analyses, that's a potential defense and if the analysis was done reasonably, it's a potential defense to the state law claim in the future.

Felice Ekelman (27:07):

I think it's important for employers today to feel confident that their compensation scheme is fair. It will enable them to confidently attract talent and to have confidence that there is no inequality even if inadvertent in the compensation scheme. I think, Stacey, you're right that considering an audit is a really good first step. Thanks for your time. And I look forward to our next conversation.

Alitia (27:42):

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