Podcast

2023 Mid-Year Report: Pay Transparency

By K. Joy Chin & Christopher T. Patrick

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Transcript

Alitia Faccone:

No matter the month or year, employers can count on one thing: changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Joy Chin:

Hi, this is Joy Chin. I'm co-leader of the Pay Equity Resource Group, and I'm here today with my colleague Chris Patrick, who's also in the Pay Equity Resource Group, one of my members of my brain trust and a very good friend of mine. Chris?

Chris Patrick:

Wonderful. Thanks, Joy. I'm Chris Patrick, I'm a principal with Jackson Lewis. I practice a firm of action, pay equity, and diversity-related employment law issues and have been doing a lot of advising on the topic we're here to talk about today, which is pay transparency and the midyear update for 2023.

Joy Chin:

Great to be here with you, Chris. So at the beginning of this year, in the year ahead report, we predicted that we'd see more the same this year when it came to pay transparency. Back then, at least three states had pay transparency laws that went into effect on January 1 of this year, California, Rhode Island, Washington, that required employers to include salary ranges in their job postings. And since then, other jurisdictions, Albany County, New York, Hawaii, and others have passed their own salary posting requirements, and similar laws are pending in so many other states and localities. Now, seven months into the year, Chris, what are the most pressing issues and how will those issues related to pay equity and pay transparency continue to change?

Chris Patrick:

Great question, Joy. Pay transparency issues have been really moving quickly. The introduction for the discussion today really was focusing on the new laws as of January 1, but there have been laws on pay transparency for years and years before that as well. So what we're really seeing this year from a more of the same is, isn't that more and more and more of the same? We've seen new laws, as you mentioned, in New York. We've seen them in Hawaii, we've seen them in others. Colorado was one of the more aggressive laws before 2023, and it has a new amendment this year. Illinois is still pending for a possible pay equity law this cycle.

We've seen that these aren't just laws in states on the coast. We've seen a South Dakota pending bill this year, a Kentucky pending bill this year, Missouri, and others. So we're seeing really these laws roll out with a ton of speed and a ton of variation in geography. We practice a lot in this space. We try to keep our finger on the pulse, but it seems that every week I'm learning of a bill that I've missed that has been pending in some state house somewhere. The first hallmark I'd give on what we're seeing this year and what we're seeing in terms of the updates for 2023 is really just speed. The avalanche is coming and it's not stopping.

The second hallmark that I'd give here would be complexity because we are not seeing the same disclosure requirements in every state. Now, most of them are fairly straightforward and they tend to require pay disclosures of base pay ranges in job postings, but that's not what all of them require. Colorado and Washington, not this year but are still active, and some of the pending laws have touched on some additional disclosures beyond base pay. Some reach disclosure of other types of pay. Some reach disclosures of benefits, either more granular disclosures, more specific disclosures, or more general disclosures of benefits. So it's been really, I'll say challenging. We'll circle back to this in our discussion in a moment, but it's been really challenging to have that one-size-fits-all, just sort of set it and forget it in terms of how to comply with all of these new laws that we're seeing, some of which are just bills and are likely to not pass this year. But I think that it does speak to the temperature and the direction of the discourse that we're seeing in these laws in just about every state around the country.

Joy Chin:

Right. Yeah. So let's talk about that for a second. Colorado clearly out California and they took the gold in the pay equity Olympics, because it became the first state to enact a law that required employers to post compensation information in job postings. And as you mentioned, Colorado has since amended its law at least once or twice, a couple of times, right? In New York state, whose law isn't even in effect yet, it doesn't go into effect until September, they've already amended the law back in March. So it sounds like we are seeing more and more of the same, but each of these laws are having different nuances and that they're kind of evolving over time. So what new questions do you see arising for employers?

Chris Patrick:

What a great question. That New York law, especially with the speed of the amendment, I think really echoes the speed comment I had earlier, but it does something new. Most of these laws apply to jobs that are in specific states. Then there's that fun caveat in a post-COVID world about, what about remote jobs? And sort of the standard there has been it applies to remote jobs too. But this New York law is creating another wrinkle in complexity. The amendment, it says that it applies to jobs in New York that will physically be performed in New York, including a job that will physically be performed outside of New York, but reports to a supervisor or office or work site in New York. And they're not the only ones. The Connecticut pending bill seems to have a similar reach.

So in terms of what is a challenge for employers, what is arising here, the first would be what jobs have to comply. And I think it's far from clear. What is reporting to a work site in Connecticut, what does that mean? We don't yet have guidance beyond the text of the laws themselves. And I think that there will be a challenge here, just pure blocking and tackling for employers to decide which jobs fall into this new expanded role. If you have a job in Omaha, Nebraska but their supervisor is in Albany, New York, now that Nebraska job all of a sudden has some pay transparency requirements under this New York amendment. So I think that there's going to be a lot of administrative work to get our houses in order, in order to make sure that we know what jobs are supposed to include transparency.

I think the other area here is what is a national employer to do with a patchwork of state laws in different cost of labor markets. Many employers have a geographic differential or something similar, geographic tier, that they apply to different parts of the country, and it has always been a challenge for employers to both be transparent and tailor their disclosures to the legal requirements of the various state laws. The example that I've been using, I work with numbers but I'm not that kind of numbers guy, I use examples that revolve around a hundred thousand dollars. So if the national midpoint for a job is a hundred thousand dollars, and in New York or San Francisco, it might earn up to 120, and in Kansas City, Missouri, it might earn 80, $20,000 above or $20,000 below that national midpoint, what's a New York employer supposed to disclose? If you ask an employer, the job can earn between 80 and 120, but if you ask New York regulators, you're not paying 80 for that job in Manhattan, for example.

So it becomes a little complicated. It becomes a little unclear to ensure that we are giving the disclosures that regulators want us to disclose. And that's not just theoretical. In the past month, I've dealt with complaint here in Colorado, an investigation here in Denver, where an employer posted a Colorado range for a job in Denver, and the range was the rate that they anticipated paying for the job in Colorado. But Denver's minimum wage required payment above the low end of what their disclosure for Colorado would permit. So from the employer side, they gave the Colorado range, and they're not going to pay less than a minimum wage. That would be illegal. They would just tweak the range to comply with local laws. But the State of Colorado was very laser focused on whether or not the employer really intended in good faith to pay the low end of the range that was disclosed for a job in Denver when that low end of the range would be lower than Denver's minimum wage.

I don't mean to be complicated. It is complicated. And I think that that is just one example of how employers are going to have to shuffle and adjust, because what's easy for them might be in the spirit of transparency but it may not be consistent with how local laws, regulators, and in some instances, plaintiff's counsel will seek to enforce the letter of the required disclosure. So I think that that level of where is the job, what are the local requirements, and what are the ranges that we anticipate actually paying for those roles is almost going to overwhelm job postings with the amount and detail of disclosures that may ultimately be necessary as we get more and more laws with similar but different pay transparency requirements.

Joy Chin:

No, I appreciate you trying to uncomplicate this complicated set of roles we've been given to play with. But I just want to go back to something that you said. We're not only now just seeing some enforcement out of Colorado, but there are still in many other jurisdictions, there's little or no published guidance. Right? So what can employers do right now? What are their immediate compliance issues?

Chris Patrick:

So right now, employers should be focusing on knowing where their employees are. For employers who continue to be site-based, this is an easier proposition than for employers that have embraced a fully remote employment model. And it's not just because employers should know where their workers are for team building, for time zones' inefficiencies, but because that's going to dictate in many instances what laws apply. And if we don't have that baseline, we're going to have a really hard time being compliant with these laws on a go-forward basis.

The second thing employers should be doing today is evaluating their national recruiting to comply with and harmonize local compensation philosophies. If they have them, some employers are abandoning a geographic tier compensation model. Some employers think it's necessary to the profitability and to ensure that they're paying appropriately for labor based on where those employees work.

And then third, employers should anticipate unanticipated issues with enforcement. Joy, you could not be more correct that there is very little guidance about what these laws mean besides the text itself of each of these laws, but they will be enforced on a micro-targeted basis. California will care about California law and California disclosures. Colorado will care about Colorado law and Colorado disclosures and so on. So we should be thinking a little less about what is the easiest way to arguably comply. You may certainly do that, but do it with eyes wide open that these laws will likely be enforced on a state-by-state, law-by-law, disclosure-by-disclosure basis.

Joy Chin:

Chris, so many different laws, so many different jurisdictions, so many employers with a lot on their plate and very limited resources. I've had some discussions with some clients who aren't based or haven't yet been recruiting in jurisdictions that have these salary posting requirements, but they've elected to go ahead and include salary ranges on all job postings regardless, just so they can stay ahead of the curve. Is that what we should be expecting to do? Are there broader baseline issues? And is there a blue sky approach that we can take?

Chris Patrick:

I'll be unhelpful and then helpful. Unfortunately, we may be entering an era in which there isn't a good blue sky, one-size-fits-all approach to these evolving laws. And even if there were today, that doesn't mean that there will be tomorrow. We're just seeing too many and two different laws roll out state by state. But on the helpful side, I agree, Joy, I'm seeing a lot of employers working toward a... I don't know if it's the lowest common denominator or the highest common denominator in terms of the disclosures that they're putting out there, but if employers are in single states or limited geographies, this is easier. If employers are a national, multistate, multijurisdiction in terms of pay equity, pay transparency requirements, it becomes a little more complicated. But I think there's a choice.

I think employers can either increase administrative spend, increase HR headcount, increase risk of one-offs getting the required disclosures wrong, and do a patchwork state by state approach. That's not wrong if employers choose to follow that path. Or, I think we need to start considering rolling it out everywhere regardless of where the job is. Because if the New York standard becomes the new standard, that a job in a pay transparency jurisdiction, including a job expressly not in a pay transparency jurisdiction that reports to a supervisor in a pay transparency jurisdiction, if that's the new normal, then just about all jobs everywhere for national employers risks requiring a pay transparency salary range, at least in the job postings, everywhere. So administratively, I think that's the choice. Do we do one? Do we do the other? Both of them increase administrative burden.

Substantively, I think the blue sky approach is to know what you pay for and ensure you're in fact doing that consistently. That's less about pay transparency, and that's more about pay equity and fairness. It builds trust with employees. It gets you ahead of potential liability and litigation, and it helps you ensure that you are paying for the things that you want to pay for, not just good negotiators, market changes over time, and other things that are a little harder or can be a little harder to defend depending on the circumstances. So that's my advice to employers there. Blue sky would be, understand the administrative aspects and which path do you want to take and make sure that you are in fact paying for the things that you want to pay for, because that makes pay transparency so much easier and reduces friction both with talent coming in the door as well as employees who are currently working for you.

Joy Chin:

All right. So Chris, for my last question, I'm going to ask you to settle into your Monday morning quarterback armchair because we now have the benefit of at least seven months of hindsight. How have expectations surrounding pay equity, pay transparency advanced since the start of the year? What are employers talking about today?

Chris Patrick:

Well, employers should be talking about informally that legislative cycles are largely ending for 2023. That means that for the most part, we have or know about the laws that are likely coming down the pipe this year, and so we can really start to plan. But these laws do have momentum, both in speed and unpredictability of the requirements, so we really have to stay nimble. Anything that we're planning to roll out now, we should be prepared to revisit as more laws come down and come out that have similar or maybe slightly different requirements.

Employers are talking about their focus on ensuring fair pay and avoiding substantive risks that pay transparency can bring. If you're disclosing a pay range and your current employees are paid below that range, we will have a problem. We will have a lot of explaining to do, and we could catch litigation. So ensure that we're paying fairly and for the things that we want to pay for. Employers are considering pay transparency through the eyes of state agencies, and they're really struggling with, and maybe struggling is the wrong word, grappling with how to balance that administrative burden that may not have been budgeted for in our 2023 budgets and how to roll it out with the patchwork evolving landscape that we may not have been anticipating in Q4 of 2022.

Finally, employers are evaluating whether to implement pay transparency practices beyond just the states that require it. We mentioned it earlier, but we may be beyond the days where jobs in certain states have disclosures and jobs in other states do not. But don't get me wrong. I'm not saying every employer has to be there. I'm saying employers that have sufficient geographic differential might capitalize on efficiencies in the process and reduce litigation and pay equity risk if they look more broadly and skate to where the puck is going to be as opposed to try to engineer for where the laws are now.

I suppose the last thing I'll mention on that is, employers are talking about employees and applicants who are requiring increased pay transparency whether or not the laws are there yet, particularly younger workers who value alignment with sustainability and social responsibility of the organizations that they work for. Those employers with a younger workforce are often thinking in terms of how can we provide the transparency that will attract the talent that will align with the values that we want to espouse as an organization, and what policies and procedures do we need to implement today in order to be there in 2023 and beyond.

Joy Chin:

Chris, thank you so much for your insight. I always enjoy our discussions about pay equity. This pay equity landscape, it's been a bit of a rollercoaster ride, so I think we all need to stay nimble and roll with the twists and turns. I'm sure that you and I will continue to have a lot to talk about as pay equity landscape continues to evolve. So, thank you.

Chris Patrick:

I couldn't agree more, Joy, I look forward to our discussions. Thanks so much for today.

Alitia Faccone:

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