

Podcast

Transparency and Reporting California Style: A Closer Look at Senate Bill 1162

By Christopher T. Patrick &

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California is pushing the pay envelope to enhance transparency and pay equity for employees in the state. Effective January 1, 2023, Senate Bill 1162 requires California companies with 15 or more employees to include the pay scale for the position in every job posting, and to report additional information on their employees' pay and diversity to the California Civil Rights Division.

Jackson Lewis P.C. · Transparency and Reporting California Style: A Closer Look at Senate Bill 1162



Transcript

Alitia Faccone:

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind: "How will my business be impacted?" California is pushing the pay envelope to enhance transparency and pay equity for employees in the state. Effective January 1st 2023, Senate Bill 1162 requires California companies with 15 or more employees to include the pay scale for the position in every job posting and to report additional information on their employees' pay and diversity to the California Civil Rights Division. On this episode of We get work™, we discuss the evolution of pay reporting and transparency over the past year and how, not surprisingly, California's approach looks a bit different than other states.

Our hosts today are Chris Patrick, principal in the Denver office of Jackson Lewis, and Jacklin Rad of counsel in the Los Angeles office, and both members

of the firm's pay equity group. Chris develops actionable strategies under privilege that identify and eliminate unseen barriers to equal employment opportunities in personnel practices, often informed by trends and employee data. Jacklin is a former senior deputy labor commissioner for California's Department of Labor Standards Enforcement office where her duties included statewide supervision of pay equity investigations and enforcement. She now helps clients navigate the intricacies of workplace law issues, which are quite nuanced in California, including preventative advice and counseling. Chris and Jacklin, the questions on everyone's mind today are what are the new California pay transparency and reporting obligations and how do those impact my business.

Jacklin Rad:

Before we get into the nitty-gritty of the new law and what all of the employer's obligations are under this new law, it's a good idea to go through the history of the California Equal Pay Act, what it means for employers. Then we'll discuss how this new legislation has changed that and if it's changed that. The Equal Pay Act has been around in California for decades. It's not something new. Essentially, it prohibits employers from paying employees of a different sex, race or ethnicity a different pay rate for performing substantially similar work.

This law has gone through a number of amendments. It's been strengthened by the state so that the state is casting a wider net to be able to protect as many people as possible under the Equal Pay Act. Some of the changes were, as I mentioned, to include race and ethnicity along with sex, to include public sector workers. Around that same time, starting in 2015 when the state began strengthening the Equal Pay Act, they also created a lot of pay transparency legislation. We saw that come in between 2015 and 2018 where the legislature passed laws to prohibit employers from retaliating against employees for discussing their wages. There were also requirements to provide applicants the pay scale for a position upon reasonable request. That brings us to the newest legislation, SB 1162, that was signed several weeks ago. Chris, I'll pass it to you to discuss that.

Chris Patrick:

Thanks, Jacklin. Yeah. I think of this really as enhanced transparency from where we were in California. It does two things. One, it has more transparency for applicants. We'll talk about it a little bit later, but it requires pay disclosures in job postings. But two, it lets the state into your house in ways that they weren't in before. It's not entirely true that the pay data reporting was really new two years ago in California for employees, covers things like employees in California or remote employees who report to California, but this new SB 1162 enhanced that it. It ratcheted up what the disclosure was to the state.

For employees, employers have to report on the pay data by race and gender for their employees. It's really largely unchanged. The obligation before was by race and ethnicity and gender and pay band and EEO-1 category, the... California calls it job classification, but at the federal level it's an EEO-1 category to count the number of people who were there, so how many Hispanic women who were

professionals earning between X and Y dollars in the prior year. That obligation is unchanged in this new law but we have an increased obligation, a new obligation, to report the average and median wage of each of those categories as well. Now it would be the number of Hispanic female professionals in my example but also what the average and median wage for those groups would be. We still don't have a lot of guidance here but that's sort of the logical read of what the law says and where we were. Jacklin, do you see any of that differently?

Jacklin Rad:

I don't. I think it's interesting to consider why the state has included these additional requirements for the mean reporting. When they put out their statistical data for the state at the end of the year, it would be interesting to see how that impacts pay disparity in the state among all of the different categories and whether it's going to be impactful.

Chris Patrick:

Yeah. They've released a report... I wish I had it at my fingertips. I don't. But they've released a report from the prior reporting year's information that have been submitted to the state that show I think largely what you might anticipate national or state trends to be. They largely mirror some of the national pay gap headlines that we hear in April, May, June most years. I have not yet seen it be used for enforcement but it is more general information that the state has at its fingertips. It has more disclosure for the public not of your company or of any individual company, but general trends in the state with the ability to pivot it out or report it by industry, for example. Jacklin, have you seen any enforcement on the old requirements so far?

Jacklin Rad:

Very little. The only enforcement we've seen is the California Civil Rights Department sending out notices that certain employers have not filed their report and that they will be required to file their report but no penalties, anything of that nature. What we do expect, though, is at some point the expectation is that the state is going to use these individual employer reports to enforce the Equal Pay Act. The expectation is at some point the state is going to look through and start investigating whether at a certain company there are employees of different sex, different race or ethnicity performing substantially similar work where there's a pay gap, a pay disparity that may not be able to be justified.

Chris Patrick:

Yeah. I suppose that raises two questions in my mind. One, there was chatter when the first law came out about two years ago that the state would be using this information in the construct of a complaint investigation. I don't know that they were planning to freewheel in it on their own to look for problems but to use it as part of a larger investigation, a larger temperature check, if you will, to understand if when a complaint comes in the data supports that there might be a there there. The second I think is more interesting in a pay equity space, and

that's that the 10 job categories or EEO-1 categories are very broad. Professionals are not all performing substantially similar work. Even service workers or laborers may not be performing substantially similar work so it's a blunt tool that provides more of a lens than we had before we the state, we the public had before. But I think that there's still quite a bit of lift necessary to take this data into comparisons of employees performing substantially similar work.

Jacklin, you mentioned that there were no penalties for the law or that we've seen for the lack of a pay data report so far. Is that consistent with this new law that's come out or has that changed?

Jacklin Rad:

Oh, that's changed and that's one of the significant changes to this legislation, is that if the Civil Rights Department does not receive a required report from an employer not only can they seek an order requiring compliance, requiring the pay data report compliance, but there's also a civil penalty that shouldn't exceed \$100 per employee per violation. It can move up to... Not to exceed \$200. That can add up, especially when these employers that are required to file the report have to have at least 100 employees.

Chris Patrick:

Jacklin, any idea if that means per employee in California or per employee in the US or per employee anywhere on the planet?

Jacklin Rad:

Chris, that's an excellent question. We're waiting for additional guidance. We don't know. Hopefully the state agencies enforcing these laws will publish guidance. We're expecting it around the beginning of the year. It may come a little bit later. The Civil Rights Department has a great track record of publishing detailed guidance with very helpful examples and our assumption is that they're working on providing the same.

Chris Patrick:

Yeah, I'd guess that as well. Just foreshadowing what we might be talking about in a few moments, this is an area where this SB 1162 was... I don't want to say it was passed quickly, but it moved relatively quickly through the state this last session. Ended up pausing after it passed both chambers in the state, was ultimately signed in the closing days of September, which is the deadline, and as of today, as we're recording this in October, we don't have any subregulatory guidance. We have the language in the text of the statute itself to the extent some of these items touch on other state's laws or ring in what other state requirements are. We may be able to read tea leaves, but it's really that enhanced or that new state guidance that would help us understand what the state thinks this law will mean. I also have early 2022 earmarked as the likely guidance states on that.

Jacklin Rad:

That's right. It's important to wait for that guidance, right, Chris? Because sometimes as experienced as we are in this space, and I've served also on the enforcement side, there are times when I'm just gobsmacked by the guidance that California releases and their definitions of certain things and so it is important to wait for the agency to release that guidance.

Chris Patrick:

This might be actually a great transition to another area where we're getting a lot of questions, but the right answer might be wait for the guidance. Doesn't mean don't prepare, but don't be surprised if the guidance comes out differently. The new pay data reporting obligation applies to employees as it has for the last two years but has this additional disclosure obligation for the median and average pay within each box in the table. But it also now applies to what the state calls employees hired through labor contractors. Jacklin, do you have any idea what that really means?

Jacklin Rad:

I wish I did, Chris. I really... It would make all of our lives much easier. I don't think that the legislators intended for it to be as confusing as it is. I think they probably have a really good idea of what they meant, and maybe because we're attorneys we're reading a lot into each word, but when we talk about regulatory guidance and the text of statutes it's really important to know exactly what each word means when employers are trying to be compliant. Each word is significant. I don't know what that phrase is pointing to. As you said, we'll have to wait for them to publish examples and guidance. The assumption is, from reading through some of the legislative history, is that contracting and contractors are on the rise and often those contractors are working side by side with employees and they're providing the same services as directly hired employees but in some cases, the contractors are paid less. The assumption is that this second pay data report that deals with employees hired through a labor contractor is trying to shine a light on that, on whether those individuals working side by side with direct hire employees are earning less or not.

Chris Patrick:

Yeah. That's my read too. I've gotten questions about this where they say that the statute says that the report should include employees hired through labor contractors and then the statute defines employees to mean only people on your payroll that you withhold taxes for. Those aren't your contractors, your staffing agency sort of supplied labor, if you will. But I think that it's wise for employers while we wait to see exactly what the guidance from the state will be... I think it's wise for them to assume that that's what this covers Rather than trying to find the loophole that is a technical verbiage argument that says, "No, no, no, employees have to be on your payroll and those folks aren't." It feels like a very high stakes game to me when we couple that with the 100 employee potential civil penalty, and we don't know if that is California or national or international headcount. We're going to know more before the report is due so I think that the right path here is to be comfortable with a little bit of uncertainty, plan for the worst and be pleasantly surprised if we land somewhere closer, so not quite in

the worst. Jacklin, do you see that as a... Do you see a different recommended approach as for folks to deal with this today?

Jacklin Rad:

Chris, you're right on. I think that is a sound approach, that employers should be prepared to file two separate pay data reports, one for their direct hire employees and then a second one for their labor contractor staffing agency workers. Some companies go to vendors for labor. They don't call them staffing agencies, they call them vendors. Those relationships should be explored as well. I think to be prepared is very sound advice. Be prepared to submit a pay data report for all of those additional workers, not just direct hire employees.

Chris Patrick:

I might add don't let that keep you up at night. There's still a lot of runway between now and when these reports are due. The law does include a requirement that the labor contractor, whether it's a staffing company or a vendor or something else, must provide the necessary pay data to the employer to submit this report. This is going to be an area with a lot of fluidity. There's going to be a lot of focus in early 2023 as this guidance comes out where those vendors or staffing companies are trying to figure out what they need to do to comply with this law too. While there's a lot of uncertainty now, I'm hopeful that it will become more certain. I don't mean that employers will like it any more but that it will become more certain as 2022 winds down and 2023 begins to ramp up.

Jacklin Rad:

Yeah, I agree with that. Chris, do you foresee that in the next several years pay data reporting and pay transparency will become so pervasive that it will be normalized? Do you foresee that?

Chris Patrick:

I think there is little doubt that pay transparency will be normalized. I think if we all gather again in five years, the exception will be the states that don't require or the employers that don't disclose pay related information upfront and more readily with their applicants and employees. Pay data reporting I'm on the fence about, in part because it's a crude approximation for what employees actually earn and who's similar to whom and who are the right comparators to understand what's happening under the hood within an organization's pay system. The history, as I see it, of the California Pay Data Report really started with the federal level, the federal EEO-1 report that had a pay data report that was a lot like what California has currently.

The federal government dialed it back then wouldn't share the reports with California and California said, "Well, then I'll have my own report." So it was, in my opinion, a bit of a knee-jerk response to being denied the information from the federal government, but that doesn't mean that the data that is included is particularly useful or informative. I think if it is that the federal government may roll out a similar report again and other states may not follow. If it's not, I

don't know how many other states will choose to continue to engage on a pay data report that isn't useful. I defer to folks far more analytical, far more academic than I in understanding that, but from a practicality standpoint I think pay transparency is likely here to stay. Pay data reporting I'm not sure one way or the other currently. That's a lot on pay data reporting. The law is not all that complicated. It's a little new, it's a little unsure. We're waiting on that guidance but it doesn't seem hard.

Jacklin Rad:

Mm-hmm.

Chris Patrick:

How about the pay transparency law, Jacklin? Can you tell us a little about that? Does that seem hard?

Jacklin Rad:

Chris, I'm glad you asked. That doesn't seem hard at all. SB 1162 in addition to the pay data reporting includes pay transparency regulations in that both private and public employers have to follow wage disclosure requirements in their job postings. That means when a job is posted and potentially a California employee would be applying for that job, then the posting has to include the pay scale that the company reasonably expects to pay for that position. We don't really know what an acceptable pay scale would be. As we mentioned before, there are some question marks when it comes to this law. How wide can the pay scale be? Should the pay scale include the things like benefits, bonuses? We don't know yet. But Chris, do you think that's going to be difficult for most companies to follow?

Chris Patrick:

Jacklin, I had this question from a client today, this exact question. My answer there is my answer here: technically no. Technically it's pretty straightforward. There will be some interpretation that we still need from the state about what's appropriate to include in the range, but culture-wise, sort of getting the gears moving so that we can do the relatively straightforward disclosure, I think that can be complicated because this is the kind of information that employers have kept close to the vest since they began employing employees hundreds of years ago. It's a competitive advantage. Employers have often seen the salary expense as, well, a cost. If you can get your supplies for lower cost, that's a good business decision to make.

These laws... California's not the first here, but these laws really shift the policy balance. It's the state's determination that an employer's interest in confidentiality and perhaps the trade secret of their comp structure relative to competitors is less important than ensuring that employees or applicants are paid fairly. In the grand scheme of pay equity laws, it's a very market based solution to something that has historically been entirely enforcement based, right? "I will sue because I am unfairly paid." That requires significant resource draw. It requires the administrative agency to stick their nose in many, many,

many employers' compensation practices in order to root out potential discrimination. This disclosure flips that upside down. It empowers all applicants and all employees with the power to more specifically, more effectively ensure fair pay across workforces. That is hard for many employers to really grapple with and sort of understand. At least that's how I see it.

Jacklin Rad:

Yeah. Yeah, I agree with that. As a woman and a woman of color myself, I can appreciate how difficult it was before this legislation was passed to walk into a job interview or to apply for a position without knowing what the potential pay scale even is. It's very difficult to negotiate in that type of setting because the applicant simply doesn't know what the possibilities are. The applicant wouldn't know what their coworker performing the same type of work is going to be making. This hopefully will help to level that playing field. Also, I hope that employers can find something positive in these pay transparency regulations. I hope they can see that it will make their company potentially more competitive, it will draw better candidates. But the question remains, how wide should the pay scale be? How... What's acceptable? Because as you know, Chris, if the pay scale is too wide, it may defeat the goal, right? It won't create transparency at all.

Chris Patrick:

Yeah. Here's another area where we should flag and come back when we get more guidance, but that's not useful today. How do we start thinking about what this requirement is? Well, let's start with the requirement. For employers with 15 or more employees, you must include the pay scale for a position in any job posting. The law then defines the term pay scale to mean the salary or hourly wage range that the employer reasonably expects to pay for the position. That sounds like Colorado's requirement. Colorado, my words, not the states, if you have a job that pays between 80,000 and \$100,000 but you know bring everybody in between 80 and 90, you may disclose 80 to 90,000, what you reasonably anticipate that you're going to offer the successful candidate.

New York City also has a law on this that goes live November 1. The guidance from New York City is that employers must state the minimum and maximum salary they in good faith believe at the time of posting they're willing to pay for the advertised job. Again, that's a good faith belief of what you're willing to pay. Sounds like Colorado, sounds like California. I think that there's a reasonable read here, without knowing more, that you may not have to disclose the full range for the job, just what you anticipate bringing somebody in at. Now, does that include benefits? I don't know. Let's see what the state says. It does not in Colorado, but Colorado has a separate disclosure obligation for certain benefits and other types of pay.

I don't know what all goes in, but I also know that it's not that clean because Washington's current guidance... Washington also has a similar pay transparency law. Its draft guidance says if an employer intends to implement a starting range or a starting rate for an initial timeframe and the starting range... Or that the starting range or rate may be listed on the posting but the entire

scale or range must also be listed on the posting. This becomes this patchwork that is almost clear as mud. What's a national employer to do when California maybe says only the more narrow range of what you anticipate bringing in, perhaps based on budget, or Colorado would allow your good faith belief of what you're going to offer the successful candidate? New York City may similarly, but Washington requires the full range. How does one comply with all of this? Do you have any initial thoughts on that, Jacklin?

Jacklin Rad:

Yeah. That's problematic, and especially problematic for companies that are employing remote workers across the country. Because you have one job posting that can be fulfilled in any state because it's remote. Now all of a sudden, several states have slightly different job posting pay scale requirements so is the solution to have one job posting and then several different pay scales that comply with each jurisdiction? I mean, I don't know how that's going to work, but it sounds like... Based on what you're telling us, Chris, it sounds like that may be a workable solution because it's difficult for employers to know exactly what the pay scale is going to be. Sometimes those are negotiated. Sometimes out of need, necessity an employer will hire a worker at a higher rate. You know, it happens.

Chris Patrick:

For sure. For sure. It happens regularly. Some of these laws contemplate... Colorado, for example, contemplates that you may hire outside of the posted range. Now, if you hire too frequently outside of the posted range we should have a conversation about if that's a good faith range that you're posting, but that's a different question. Jacklin, you make a really good point here referring to remote roles and national job postings because not every state... We don't know what California will interpret the requirement to include pay transparency or the wage range in the postings, but other states, other laws, seem to require... Colorado definitely requires that a remote role that could be filled in Colorado because it's a remote role that we must include the pay disclosures there. New York City's guidance seems to be similar. Washington's guidance seems to be similar. I'd be a little surprised if California was more narrow than what seems to be the emerging trend on what roles are covered but stranger things have happened. This is a, "Pay attention in early 2023 and reevaluate." But we should currently anticipate that remote roles would likely be covered, at least that's how I see this. That's my advice here. Is yours different, Jacklin?

Jacklin Rad:

Oh, mine is exactly the same. I don't see California state agencies or the California Labor Commissioner giving up her jurisdiction where she may have jurisdiction so I fully agree with you, Chris.

Chris Patrick:

Jacklin, that's a lot. None of it is too complicated except for that squishiness of what we don't know, but as we sit here today trying to plan for these laws going

active or this law going active in January... Pay disclosures are required beginning in January, the pay data report won't be due until May. What should employers do now? How can they prepare?

Jacklin Rad:

The takeaway for employers... Employers that have 100 or more employees should file a pay data report for their direct hired employees. That's been the law. That's nothing new. We've had that for a couple of years, but now in addition to that employers should prepare to file a similar pay data report for their contractors/vendors/other workers that work side by side with their direct hire employees. On the pay transparency side, employers with 15 or more employees should be prepared starting January 1st to post pay scales in their job postings for any position where it's remotely possible that a California employee would apply and fill that position.

Chris Patrick:

Let me... You've mentioned two things that as we're in closing makes me think we haven't discussed and we probably should. One, you've mentioned the in remote that they could be hired in California. Take it from me, I sit in Colorado. There was a big to-do when employers started saying, "Colorado residents will not be hired for these jobs or Colorado excluded from this job posting." Not surprisingly, Colorado didn't take nicely to that position that employers had even though it may technically be correct in the rules. They issued guidance that said all remote roles are covered, so I agree that the right way to look at this is a remote job that could be filled in California.

But I think if we're spending our energy trying to thread the needle of what's the difference between a remote job that could be filled in California and what's a remote job that couldn't just be filled in California, that we may spend a lot of time with not very good results when we start seeing how the state is enforcing that. The second item that I heard in your wrap-up for employers is a really good point too, and it's the pay transparency in job... Or in job postings is only for employers with 15 or more employees. But employers with fewer than 15 are not off the hook entirely. There are pay transparency requirements for them too. Specifically, if an employer or an employee asks for their pay scale, employers of all numbers and sizes have to disclose that. The fact that we're small doesn't mean we don't have to have pay scales. We probably should put those in place and that we still have to respond to an employee who asks for one.

We also as an employer with fewer than 15 have the obligation as it exists today. If somebody has applied for a job and they have made it to an interview, if they ask for the pay scale for the role we still have to provide it. This is not a, "The secret to not being transparent is to be a small employer." It's the secret to not having to put the pay scale in your job posting is to be a small employer. All employers will have pay transparency obligations here. Jacklin, I totally endorse and cosign all of the advice that you have just given to employers out there. I'd also add on because of this additional detail that small employers need to have pay scales too so if you're not there, start thinking about what you are reasonably likely or willing to pay for roles because you'll need them in order to

comply when an employee or applicant asks.

Jacklin Rad:

Thanks, everyone, for joining us in this conversation about SB 1162, pay data reporting and pay transparency. If you have any questions about what we've discussed or specific questions about how to comply with the law or how to prepare pay scales, please give us a call.

Chris Patrick:

Thanks so much, Jacklin. It's been a pleasure chatting about this today.

Alitia Faccone:

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