

Podcast

Live from CCC2023 Ep. 2: Pay, Privacy, Unions—and the Rise in Employee Activism

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Details

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Welcome and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis' Corporate Counsel Conference, CCC2023, at the Waldorf Astoria Monarch Beach resort in Orange County, California. What follows are high level conversations on conference programs and why they were important topics to present now.

Jackson Lewis P.C. · Live from CCC2023 Ep. 2: Pay, Privacy, Unions—and the Rise in Employee Activism



Transcript

Alitia Faccone:

Welcome and thank you for joining us for this special edition of 'We Get Work' Live from Jackson Lewis's Corporate Counsel Conference CCC 2023 at the Waldorf Astoria, Monarch Beach Resort in Orange County, California. What follows are high level conversations on conference programs and why they were important to present now. In this episode, Jackson Lewis Lawyers Joy Chin, Chris Patrick, and Stephanie Satterfield discuss The Proliferation of Pay Equity and Transparency Laws: The Promise and Power of Meeting Federal and State Mandates They are joined by special guest panelist, Erin Ickes, senior Counsel of TeleTracking. The episode also includes JL Lawyers, Jason Gavejian and Damon Silver, discussing The Growing Privacy Mandate: What's in Store for CCPA-Covered Employers. As well as Gina Roccanova and Dan Schudroff talking about The Rise in Employee Activism: What a Revitalized Labor Movement Means for Union and Non-Union Workplaces. All of these three topics continue to become a focal point for employees creating increasing challenges for employers.

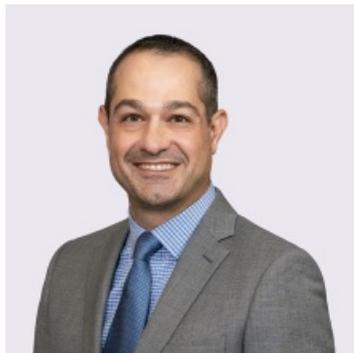
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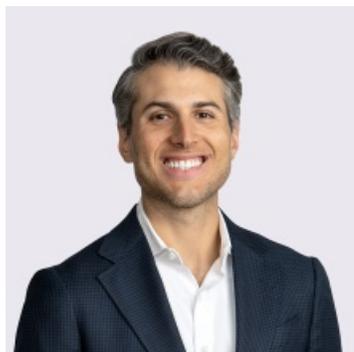


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Good afternoon and thank you for joining us for Jackson Lewis' 'We get work' podcast live from CCC 2023 this afternoon. I'm here with Joy Chin, Stephanie Satterfield and Chris Patrick from Jackson Lewis and Erin Ickes of TeleTracking, our special guest. Thank you all for joining us this afternoon. So I just want to start by asking you a little bit about yourself, where you're from, a little bit about your practice. Joy.

Joy Chin:

Thanks, Alitia. I am in the Long Island office of Jackson Lewis. I am co-lead of the firm's pay equity resource group and our affirmative action OFCCP and Contract Compliance Practice Group. So I help our government contractor clients navigate the EEO and affirmative action laws, right that apply to federal contractors as well as all of our clients on navigating the latest and greatest equal pay laws.

Alitia Faccone:

Stephanie,

Stephanie Satterfield:

Great, thank you, Alitia. I'm Stephanie Satterfield and I sit in the Greenville, South Carolina office and I'm a co-leader of the firm's litigation practice group along with Stephanie Adler-Paindiris. And I devote a significant percentage of my practice to defending pay discrimination claims and advising on how to avoid pay discrimination claims when internal complaints are made.

Alitia Faccone:

Chris,

Chris Patrick:

Thanks, Alitia. I'm Chris Patrick. I sit in the Denver office of Jackson Lewis. My practice involves affirmative action planning, OFCCP, defense, government contractor compliance and pay equity and transparency issues.

Alitia Faccone:

And Erin, welcome.

Erin Ickes:

Thanks for having me. I'm Erin Ickes and I'm based in Pittsburgh. My title is Senior Counsel, and as with most legal departments in a small company, I handle a little bit of everything. I do compliance, privacy, commercial issues, IP, and also employment work.

Alitia Faccone:

Thank you all. The title of your presentation today was 'The Proliferation of Pay Equity and Transparency Laws, the Promise and Power of Meeting Federal and State Mandates'. And that's a lot in that title and I'm sure a lot in

your presentation. Can you provide our listeners with a brief summary of what was covered in your program and why it was important to present this topic at CCC 2023?

Joy Chin:

Sure. So our panel talked about the growing trend in pay transparency laws, which is actual pay disclosure, which is the mandatory inclusion of pay ranges in job postings or having to file annually wages and hours worked data for an entire workforce. And these laws are cropping up all across the country in different states and cities and even counties have their own versions of these laws and they're all new, right? This is something that employers have never had to deal with and this magnitude, and because these laws are so new, there's little state guidance and no case law yet. So it's making it a tricky area to navigate and we tried to talk about how to implement and comply with these laws in a practical way.

Alitia Faccone:

So what were some of the issues that you think resonated with our attendees during your presentation? What did they really want to know about this topic?

Erin Ickes:

Well, I think that this is something that if you're not already dealing with it, you're going to have to deal with it in the future. And so everyone that we've talked to is really concerned about how to deal with the conflicting requirements and the rapid changes like Joy mentioned, especially with remote workforces, this is becoming increasingly complicated. So we're all truly learning as we go on this and asking each other the same questions.

Alitia Faccone:

Were there other concerns that were addressed or questions that were raised during your presentation?

Stephanie Satterfield:

The concerns that are pressing on the business community in addition to how to comply as Erin noted with these fragmented state laws is how are these disclosures and these reporting obligations going to be used in litigation? And what we already know is that these pay ranges and pay data reports are going to be used in litigation by employees who are claiming that they are either paid below the ranges that are being reported or paid on the lower end of the ranges being recorded. In addition to that, we're seeing a lot of challenges in terms of being able to defend the pay decisions within broad ranges that are being reported.

We also are seeing some steering and glass ceiling issues in litigation around women and minorities being grouped in lower level roles that pay less as a group compared to perhaps men who are paid at higher end of the ranges. In addition, there are some states like Illinois that require certifications in the

form of affidavits as it relates to the pay reporting, and that certainly will be used against employers who are certifying or providing affidavits with respect to pay ranges in defending any pay claim.

Chris Patrick:

I might add on top of that, maybe it's a combination of Erin's response and Stephanie's response, is that it's really the how to? So we have all of these laws that say we have to do certain things in certain circumstances in certain states for certain roles, but if I'm a national employer, how do I get from here to there? And is there a national approach? Do we have to have state approaches? How does remote work factor in to where these jobs are and what laws apply to them? Can we use national ranges for pay disclosures? Do we have to use local ranges for pay disclosures? And I think that sort of implementation, technical blocking and tackling has been a big focus over the past six months and past two days.

Stephanie Satterfield:

Chris, I think that's a great point and I'll just add on to that. I think the sheer fact of more pay reporting leads to more transparency about pay, which results in more pay discrimination litigation.

Chris Patrick:

Yeah, it's a great point. I tell clients all the time, you have two kinds of employees, employees who are talking about pay and employees who will be talking about pay. So it's really important to get comfortable with those discussions.

Joy Chin:

And it's not even just the current workforce that is a litigation risk, right? Once you start publishing pay, you have former employees that may no longer be with the organization but are coming back and saying, Hey, I didn't get paid within those ranges. So what about me?

Alitia Faccone:

What do you believe to be the key takeaways that employers should keep in mind when addressing these issues in their organizations?

Chris Patrick:

I'm interested in what others have to say on this too, but my answer in a word is prepare. This is about understanding what jobs you have and what they do. It's about understanding their skills, qualifications, credentials, experiences of the employees who are in them. It's about understanding what is your pay philosophy or pay structure. Are you paying to market? Are you paying on the bottom end of market or you want high-end caliber employees and therefore you are looking for high-end caliber compensation? There's not one answer to it. It's about understanding where you are and what you are looking for in your talent pools. Once you know your ranges, what are we paying for within those

ranges? I have a slide in a presentation I roll out pretty regularly that has about 30 dots on a pay range, and you hit a button and half of them turn to identify they're female and half of them turn to identify that they're male.

And because I've made the presentation for this purpose, the women are all clustered at the bottom, right? Why is it justifiable with the things that are important for your compensation system? Or is it something that has just happened in the practices that have existed in our workforce and in our systems? So once we know what jobs we have, how we want to pay and what we want to pay for preparation, I think includes a pay analysis. Are we paying the way that we think that we should?

It can be done statistically, it can be done anecdotally. It should always be done with legal because you never know what you're going to find when you start looking. And we want to make sure that if we identify something that we don't love that we can correct and we can protect that information. And I think finally, it's prepare with understanding how we're going to have these conversations. We've had tough conversations with employees for years about why they earn what they earn or why their performance is, what their performance is. And this proliferation of pay transparency is really going to put a lot of sunlight on pay, individuals pay, job pay ranges, and we're going to have to get really comfortable really fast explaining why somebody earns what they earn in a range.

Joy Chin:

I just think that's absolutely right. If you're going to invite people in. Right and throw up in the shades, you need to get your house in order before you do that.

Erin Ickes:

And to build off of what Chris said, I think some people think about it as just about the job posting and what they have to put in the job posting, but there's a ripple effect, and as Joy had mentioned about former employees, and it's about your current employees, they are looking at these postings and they are going to be evaluating how they measure up against it. And so if you're prepared and you know where those questions are going to be coming from, those conversations are much less painful. Speaking from experience.

Stephanie Satterfield:

Erin, didn't you have an example of someone who reapplied for her position when she saw the pay range?

Erin Ickes:

That wasn't within my organization, but that has been something that's been making news that it was someone who was making, I think, what about 30,000 less than the range that was posted for the exact job she was performing. So she applied for her own job. I'd be interested to see how that shakes out, especially because I believe she was not only female but a minority.

Stephanie Satterfield:

But I think that's another great example for what I say is my key takeaway is everything in your reporting can and will be used against you in a court of law. So you have someone who's an employee who sees a pay range posted and she's paid \$30,000 less, that will become evidence in her pay discrimination complaint.

Erin Ickes:

Absolutely.

Alitia Faccone:

How else is Jackson Lewis providing assistance to clients on these issues?

Joy Chin:

Well, we are helping our clients with proactive pay equity analyses and helping them to understand and get a handle on their pay structures. But also we have a blog on which we post regularly the latest updates on these laws as they evolve and as they are being enacted in these different jurisdictions.

Chris Patrick:

And there's not a one size fits all approach here. So different employers will choose different layers or levels of transparency that comes with different levels of burden. It comes with different levels of staffing, it comes with different timelines. And of course, if your footprint implicates California, you comply with California. If your footprint implicates Colorado, you comply with Colorado. And so we have a team of lawyers who are counseling on these issues regularly to help employers not only be compliant, but be compliant in a way that accomplishes their strategic objectives as well, because there are some decisions that have to be made as far as how we want to check all these boxes while maintaining our culture and being the employers that we want to be in this space.

Alitia Faccone:

Well, thank you all very much for joining us this afternoon, and thank you for being here live at CCC 2023. I'm here with Damon Silver and Jason Gavejian. Good afternoon, gentlemen. Can you tell us a little bit about yourself, where you're from and your practice at Jackson Lewis?

Jason Gavejian:

Sure. So this is Jason. I'm currently the office manager for the Berkeley Heights office, and I'm also the co-leader of the firm's privacy data and cybersecurity group on a nationwide basis. Born and raised in New Jersey, but happy to be here in California for CCC.

Alitia Faccone:

Thank you, Damon.

Damon Silver:

Yeah, I'm Damon Silver. I'm in the firm's New York City office. Worked long time as a member of the Privacy Data and cybersecurity group. Also excited to be out here in California. We actually have some sun now. It's good times.

Alitia Faccone:

Life is good.

Damon Silver:

Life is good.

Jason Gavejian:

Life is good.

Alitia Faccone:

Damon, the title of your presentation this afternoon was 'The Growing Privacy Mandate: What's in Store for CCPA-Covered Employers'. Can you tell us a little bit about your program today, what you covered and why it was important to present this topic at CCC?

Damon Silver:

Yeah, absolutely. So the CCPA has been around for a couple years, but up until January 1st of this year, there really wasn't a whole lot that employers needed to pay attention to, needed to do with respect to their workforces. Specifically. All they had to do until January 1 was provide a what's called notice at collection, which discloses the categories of personal information that they collect about employees, applicants, and contractors, and the purposes for which they used that information. All of a sudden, in the beginning of this year, the exemption of employment information from all of the other rights and obligation under the CCPA expired. And so now employers are scrambling to ensure that they have detailed privacy policies that cover their workforce, that they are prepared to respond to requests from members of their workforce to access their information, correct their information, delete their information.

Employers need to make sure that they've identified the vendors that process personal information on their behalf and that their contracts with those vendors have appropriate CCPA provisions. They need to start thinking about how long they're keeping information about their employees, which for many companies is something they just haven't really thoughtfully considered before. And they also just need to, broadly speaking, be mindful about what data they're collecting in the first place, what they're doing with it, who they're disclosing it to, because the CCPA has a much more rigid structure around all of those things than most employers are accustomed to.

Alitia Faccone:

Jason, given some of the new challenges that Damon described employers are

facing and organizations are facing, what are some of the issues that resonated with our attendees during your presentation?

Jason Gavejian:

Yeah, so we were lucky. We had a very interactive session, and I think some of the real issues that resonated the most with the audience was, as Damon mentioned, the individual rights request that employees or applicants now have and how an organization can go about actually responding to them. One of the pieces of our presentation was a flow chart talking through that process from receipt of an individual rights request all the way up to the company's response and how they go about doing that. It seemed that the audience was really interested in that. We also discussed the difficulties that they are all having as organizations with the data mapping process and trying to get the different departments or different business units all on board with the initiative. Finally, we discussed some issues about potential risk of enforcement activity and how much of a potential risk that might be for the particular organization.

Alitia Faccone:

Damon, what do you believe are some key takeaways that organizations should keep in mind when they go back to their workplaces and have to address these issues?

Damon Silver:

Yeah, so one key takeaway employers will want to keep in mind is that they really need to, whether it's through data mapping or some other means, get a handle on what data their organization is collecting and generally speaking, what they're doing with that information. Another thing that we emphasize during our program is that the CCPA can seem overwhelming, but there are some relatively low investment high return steps that employers can start taking to get a much better handle on their CCPA risk. So one of the things they can make sure they're doing is that they're providing notices at collection to their employees, applicants and contractors, and they're making sure that they're getting those notices in front of people before they start collecting personal information. Another thing they can do is take a look at their privacy policies, make sure that all the CCPA required contents in there, make sure that they're accurately describing their data practices.

They can do a quick inventory of the vendors that are collecting personal information about their employees, applicants and contractors, and make sure those contracts include the required CCPA content. And then the last thing they can do is start developing internal processes, and maybe those will take the form of workflows or some other type of process to make sure that when they start getting requests from their employees, say to delete or correct their information, they're not handling those haphazardly, they're not handling them inconsistently in a way that would expose them to discrimination or retaliation liability in addition to CCPA, non-compliance liability, having some type of program in place so that the team that is tasked with handling those

requests has a very clear sense of what they need to be doing.

Alitia Faccone:

And Jason, how are you and Damon and your colleagues at Jackson Lewis providing assistance to organizations?

Jason Gavejian:

Well, as you mentioned, or as we discussed earlier, we realize that a lot of employers, especially those in-house counsel who we work with, are having difficulty in implementing compliance measures for their organization. So we've tried to take some traditional paths with webinars, articles, our blog, the Workplace Privacy Report to provide updated information for them and some information, FAQs, et cetera, related to the statute and the regulations that have been issued. In addition, understanding that much of this comes down to written policies or procedures. We've also developed comprehensive templates, forms and flow charts to assist in their internal compliance measures.

And finally, we've identified a number of vendors who we're working with who can help clients go through the data mapping process, or can also help clients understand what they may be collecting through their website, identifying pixels, cookies, or other tracking technologies to ensure that they're putting themselves in a strong position from a compliance standpoint to address those risks. Overall, we want employers to understand that while we have their back when it comes to employee and employer relations issues under the CCPA, we also can assist from their compliance side for the traditional commercial consumers or patients that they might be dealing with and the information that they may be collecting from them.

Alitia Faccone:

Jason, Damon, thank you for joining us behind the 'We Get Work' podcast mic this afternoon, and enjoy the rest of the conference.

Jason Gavejian:

Thank you.

Damon Silver:

Thank you.

Alitia Faccone:

I'm here with Gina Roccanova and Dan Schudroff. Good afternoon. Can you tell us each a little bit about you, where you're from and your practice at Jackson Lewis?

Gina Roccanova:

Sure. I work in the San Francisco office. My practice focuses on traditional labor law, but I also do employment advice and counseling and some litigation as well, focusing on California law more than anything else.

Alitia Faccone:

Dan,

Daniel Schudroff:

Hi everybody. I'm Dan Schudroff. I'm on the other coast. I'm in the New York City office, and I do primarily traditional labor relations work, as well as like Gina, a little litigation and some advice and counsel as well.

Alitia Faccone:

Thank you. The title of your presentation this afternoon was 'The Rise in Employee Activism, what a Revitalized Labor Movement Means for Union and Non-Union Workplaces'. Dan, can you provide our listeners with a bit of a summary of what you covered in your program today and why it was important to present this topic at CCC?

Daniel Schudroff:

Sure. So we did it in a hypothetical format where we had 10 hypothetical questions based on recent case law issued by the National Labor Relations Board. We used some cameo appearances by some celebrities to kind of introduce those topics, but the hypotheticals were designed to spur discussion amongst the group that was of the audience, and then make it a participatory dialogue between presenters and attendees because there are no real right answers to any of these questions, and we had a really nice discussion with our group this afternoon.

Alitia Faccone:

Thanks, Gina. During that discussion that Dan mentioned, what were some of the issues that resonated with our attendees during your presentation?

Gina Roccanova:

Yeah, so I think one of the recurring themes in the presentation is, it is often difficult for employers to really wrap their heads around how much latitude employees have when they're engaging in protected concerted activity. For example, there is a lot of latitude for them to use potty words and be very rude in the workplace if they are engaging in a topic protected by the law.

Alitia Faccone:

So Dan, what do you believe are some key takeaways that employers should keep in mind when addressing these issues in their organizations?

Daniel Schudroff:

I think it's really important for employers to have open minds when before taking any kind of disciplinary decisions against employees, that the National Labor Relations Act does apply to both unionized and non-unionized employers, so that even if an employer is not unionized, that the National Labor Relations Act may provide protections to employees and that employers

should consider that when there are disciplinary actions that are to be taken.

Alitia Faccone:

Thank you. Gina. How are you and Dan and your colleagues at Jackson Lewis providing assistance to organizations on these issues?

Gina Roccanova:

Yeah, so one of the things we touched on in the presentation was how rapidly board standards are changing, and so we are tracking those very closely. We are publishing blog posts about that when things, major cases come out. And also, we're here for advice, and we would much rather lawyers call us before they take an action than after the ULP has already been filed.

Alitia Faccone:

Gina, Dan, thank you for joining us behind the Week at Work podcast mike this afternoon, and we hope you enjoy the rest of CCC.

Gina Roccanova:

Thank You.

Daniel Schudroff:

Thank you.

Alitia Faccone:

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