Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 110:
Being Transparent: Seeing Through Pay Transparency Risks and Coverage

By Jeremy M. King and Sandra Halbing

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Jeremy King: Welcome back to *Don't Take No for an Answer*. I'm Jeremy King, a partner in Lowenstein Sandler's Insurance Recovery Group. And I'm pleased to be joined today by my colleague Sandy Halbing. Today we're talking about how a patchwork of employer transparency statutes are reshaping the employment risk landscape. Lawsuits are being filed, and this means insurance and insurance disputes are not far behind. So Sandy, why don't you tell us, what are employer transparency statutes?

Sandra Halbing: Thanks for having me, Jeremy. These are statutes that require employers to disclose pay ranges and benefits in job postings, share promotion and advancement information, and explain how algorithms and AI are used in their employment decisions. These laws often apply to both external and internal employment or promotion opportunities.

Jeremy King: That's a pretty big change in the world of employment law. How many states have passed these statutes?

Sandra Halbing: As of now, at least 17 states. This includes New York, New Jersey, Connecticut, California, Washington, D.C., Massachusetts, and Illinois, to name a few of the big ones. They've all enacted these pay transparency laws.

Jeremy King: Wow. Those are certainly some states that have a substantial employer footprint. Where these laws are in place, what's happening that a lawyer needs to be aware of?

Sandra Halbing: Well, employers that fail to comply with these laws are getting hit with private lawsuits, agency enforcement, and fees. More concerning, private plaintiffs are often bringing these actions on a class or collective basis, which drives up the potential liability for employers. These defense and settlement costs can be

significant. The statutes often provide for actual damages, liquidated damages, and attorney's fees.

Jeremy King: Well, what are the stakes for the employers then in these disputes if they're facing those kinds of damages?

Sandra Halbing: Sure. So, as that might suggest, there's a risk of substantial damage and legal fees. Employers are hit with agency investigations and administrative costs. And often these class and collective suits are likely to seek statutory damages that can be assessed on a per-violation or per-individual basis, plaintiffs might seek attorney's fees awards, and there may be injunctions that compel employers to make swift changes to their postings, processes and systems. And of course, there's always the possibility for public and employee relations fallout, especially around pay equity issues. This can really lead to high costs of discovery, audits, and remediation, even if an employer ultimately prevails.

Jeremy King: So, it sounds like you're telling me the stakes are pretty high. I mean, these lawsuits and these proceedings, they clearly can be a significant risk to employers. And what type of employers do you think are facing this risk and need to be worried about this the most?

Sandra Halbing: In short, everyone. Employers of any size with any type of workforce, whether that's on-site, hybrid, remote, especially multi-jurisdictional employers that are posting nationally or hiring remotely will need to be cognizant because the laws are different across the country. And employers that are using recruiters, staffing vendors, ATS systems, and any sort of AI or analytics in their hiring or promotion really need to be thinking about this.

Jeremy King: Well, I'm really glad that we're talking about it. These new rules and regulatory requirements, they seem to raise substantial concerns for many employers. It's painting a grim picture here. I hope you have some good news for us considering what you're describing.

Sandra Halbing: Thankfully I do, and this is an insurance podcast so the good news is that with the right insurance strategy and policy language, much of this risk can be managed through insurance coverage that the employers have already paid for.

Jeremy King: Now that is the kind of news we like here on *Don't Take No for an Answer*. That's very good news for policyholders. I can see why insurers would be concerned about these statutes, it seems like there might be significant claims on the horizon under these policies. What kind of policies should we be looking at here to cover losses related to these kinds of statutes?

Sandra Halbing: So, the number one option is basic coverage under employment practices liability insurance policies. These policies typically provide protection against multiple employment-related torts. And this coverage often includes discrimination in the workplace. The purpose of these state transparency statutes is to address discriminatory practices in hiring, promotion, and retention. In addition, many of

these EPL policies also cover claims of discrimination from third parties and job applicants, which is precisely the type of claims that are implicated by these laws.

Jeremy King: Well, nothing is ever that straightforward. So, what kind of issues might arise in these kinds of insurance cases? What are the key statutory and policy term differences that really drive liability, and frankly, insurability here?

Sandra Halbing: So, there's a few things to look at here. First, who's protected under the policy? Is the policy protecting employees only, or does it extend to applicants, interns, contractors? In addition, what triggers a violation of the pay transparency statute itself? Is it missing pay range in postings, is it the timing of disclosures, record-keeping, AI notices? Depending on what the trigger is for the statute, that could have implications for whether or not the claim is one that's related to discrimination and, therefore, covered under the EPL policy. Similarly, it will really matter what the remedies are. Are we looking at damages, penalties, fee shifting, injunctive relief? Some policies address liquidated damages, either expressly including them within loss or expressly excluding them. We'll also need to look at the intent standard: was this strict liability, negligence, or a willful violation standard? And then of course, where are the nexus for the claims, where the worker's sitting, where was the posting accessible, or where is the employer based? All of these factors will really drive liability and of course insurability.

Jeremy King: That's quite a lot of issues that they have coming up in front of the court. And I mean, I guess you could say the future is now, right? We don't have to wait for this, there's already been some action on this. My understanding is last month in the state of Washington, a policy holder filed the action Feast Foods LLC v. Houston Casualty Company. What do we know about this case, Sandy?

Sandra Halbing: So, you're right. In Feast Foods, a group of job applicants filed a putative class action against Feast Food under Washington's Pay Transparency Act. The class claims that the company's job postings lacked the required salary ranges and benefits information. Feast Foods went to its EPL insurer, and that insurer denied coverage, which triggered a dispute over whether the pay transparency claims fit within the EPL's definition of wrongful acts or loss. The underlying class in Feast Foods was each plaintiff with seeking $5,000 in statutory damages on a per-applicant basis. And they do not need to prove actual harm to recover. So, there's a lot at stake here.

Jeremy King: Yeah, those damages can add up really, really quite quickly. And in that case, in Feast Foods, the insurers took an aggressive tactic that we're actually seeing more and more. They moved for judgment on the pleadings right out of the gate, didn't they?

Sandra Halbing: They did, yes.

Jeremy King: Do you know what they were arguing? Can you describe it to us?

Sandra Halbing: So, Houston Casualty, the insurer there, is arguing that the omission of salary ranges is not discrimination within the policy terms, nor does it fit within the definition of an employment practices wrongful act in the policy. And in addition, they are arguing that statutory damages are excluded from the definition of loss because they're not compensatory damages. In response, Feast Food countered, of course, against the insurer and argued that instead, applicants are treated as employees under the policy's definitions and that wage-disclosure duties stemmed from the Equal Pay Act's anti-discrimination purpose. They argue that the pay transparency law establishes that an omission of this information is discrimination and, therefore, would fall under the policy. And on the loss, Feast Food pushes back by arguing that statutory damages have a compensatory purpose, as some courts have acknowledged, and therefore they do constitute a covered loss.

Jeremy King: My understanding is part of the purpose of those statutory damages is precisely because of the difficulty of proving actual damages, and they are intended to compensate folks for the time that they spent applying for those jobs that don't have the proper transparency postings. Are there any other issues you think employers should be aware of that we haven't touched on yet that relate to these actions?

Sandra Halbing: I think we've covered most of it. One other thing I might mention is that sometimes there are wage-an-hour exclusions or sublimits, which may be invoked if some of these claims touch on pay practices. So that's something else to consider. Is there anything else you can think of that I might've missed, Jeremy?

Jeremy King: Yeah, I think your calling out wage-an-hour exclusions is important. Many of these policies carve out claims like this from the wage-an-hour language, and policyholders need to be very careful to make sure that their exclusions are applied narrowly in litigation and not to allow the insurers to give them a broad reading. The best advice I think I can give policyholders going forward is that when you're getting served with a new lawsuit of any kind, it's always an excellent time to trigger a broad review of your policies and look for areas of coverage that might apply. For instance, here, in addition to the employer's practices liability coverage, employers might also want to consider looking at their D&O policies. These policies typically do carry exclusions for employment-related practices, but there are governance issues that are caught up in these pay transparency cases, and there may be a potential for grounds to cover claims based on either misstatements, omissions, that have gone into the policies behind the pay disclosure. It's important to coordinate your tenders across all your claims-made policies and preserve any allocation and other insurance arguments that may arise out of them. That said, whether employment practices policy or D&O policy, when do you think insurers should get involved? What's the best advantage to a policyholder in terms of giving that notice of claim?

Sandra Halbing: Policyholders should not wait for a lawsuit. Many policies treat attorney demand letters and administrative charges as claims. Therefore, employers should tender their claim early to preserve their defense rights, panel options and settlement funding. In addition, they should consider a notice of circumstances if they've identified systemic postings or disclosure errors that could spawn multiple claims.

Jeremy King: Those are terrific points. That's really part of good claims hygiene. In the name of being proactive, policyholders really should consider reviewing their policies carefully at renewal too and implementing an underwriting strategy to protect their coverage. That includes, of course, conducting that pre-renewal coverage audit to go through your claims-made employment practices and D&O policies to make sure that the exclusions and the coverages work well together. And then you've got a good broad definition of claim that's going to include demand letters and administrative investigations, and frankly, also a definition of loss that's going to be comprehensive enough to include the concept of liquidated damages. Here at *Don't Take No for an Answer*, we also always advocate for policyholders going and preserving their rights to select their own counsel during underwriting and ask your insurer to endorse your preferred counsel to their panel in the policy itself so that you never have an issue with who's going to represent you when a claim arises. You really also need to scrutinize endorsements, limits, and sublimits as part of that review, and practice good claims rate hygiene, monitor your prior acts dates, make sure there's a good continuity of coverage and that you don't have any issues with either prior pending litigation exclusions or prior notice of claims and circumstances. What else do you think, Sandy? Is there anything else that employers should be thinking about from a risk management perspective regarding any statutes?

Sandra Halbing: Employers can engage in operational risk reduction that supports insurability. By this, I mean employers can map their footprint, know where employees and applicants sit, and which obligations and statutes they have to abide by. They can standardize postings, making templates for pay ranges and required notices, and perform a centralized review. They can also train human resources, recruiting, hiring managers to focus on applicant disclosures, promotions, and documentation, make sure everyone's caught up to speed on these laws. They can also do a pay range and pay equity tune-up to ensure that posted ranges match the actual compensation practices, and tighten record keeping, retain drafts, ranges, and any evidence of disclosures.

In addition, they can engage in vendor management, and make sure that their recruiters, staffing firms, ATS providers are being held to their standards. In addition, AI is always at play here, and that's going to be increasingly the case. So, employers can assess their disclosure and audit duties and coordinate their legal compliance and IT as it relates to AI. And then finally, of course, looking ahead, employers can create a response playbook so that they're prepared to triage demand letters and notice insurers when and if this situation arises.

Jeremy King: Thank you, Sandy. I can't emphasize that last point enough. The response playbook can be critical for a policyholder to both maximize their coverage and

be prepared when lawsuit comes in. You want to make sure you have a plan in place before that eventuality. So Sandy, I really appreciate your being here with us today. That is all for today's episode. If I had to sum up a key takeaway from our discussion, I think I'd have to say that the most important thing employers and policyholders should remember is that good risk management requires identifying potential exposure, implementing policies and procedures to guard against that exposure, and purchasing an insurance program that applies broadly to give coverage if a loss arises. These pay transparency obligations and lawsuits are here and going to be here, but policyholders can protect themselves by consulting coverage counsel and their broker while implementing good risk management practices. Sandy, really, thank you for being here with me today.

Sandra Halbing: Thanks for having me, Jeremy.

Jeremy King: Until next time, thanks for joining us for another episode of *Don't Take No for an Answer*.

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