

# Navigating Emerging Liability Risks

## Episode 2

### Compliance to claims: The impact of pay transparency laws

Organizations today are navigating a rapidly changing risk landscape that poses various challenges for senior leaders and executives. Emerging technologies, regulatory shifts, and evolving trends are introducing new risks and intensifying existing ones, necessitating proactive governance and risk management strategies. Through this podcast series, we examine directors and officers (D&O) liability, employment practices/wage and hour liability, fiduciary liability, and kidnap, ransom, and extortion risks that organizations might expect to face.

#### Deepak Adappa:

Welcome to the “Navigating Emerging Liability Risks with Marsh FINPRO” podcast miniseries. I’m your host, Deepak Adappa, Marsh’s US FINPRO Advisory Leader.

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To do so, I’m joined by four of Marsh FINPRO’s liability practice leaders: Ruth Kochenderfer, D&O Product Leader, La’Vonda McLean, Employment Practices Liability/Wage & Hour Product Leader, Kate Maybee,

the Fiduciary Liability Product Leader, and Alyssa Wade, Kidnap, Ransom & Extortion Product Leader. They and their guests are eager to share their insights with you.

So without further ado, I’m pleased to introduce you to your host for this episode, La’Vonda McLean.

#### La’Vonda McLean:

I would like to welcome you to the Marsh Emerging Risks FINPRO podcast. I’m your host, La’Vonda McLean, and I am the employment practices and wage/hour product leader.

In today’s episode, we are discussing a topic that’s becoming increasingly crucial for employers: pay transparency laws. So stick with us as we discuss the evolving landscape of pay transparency.

Today I am joined by two guests, Rachel Freedman, Vice President, Head of EPL Claims for Sompco, and Joseph Kelly, also known as “Joe,” is the national practice leader for Sompco’s Fidelity Employment and Fiduciary Liability products. They both have a lot of expertise and experience when it comes to the legal landscape and claims activity around paid transparency laws. Welcome!

#### Joe Kelly:

Welcome, thank you. Appreciate it, La’Vonda.

#### La’Vonda McLean:

Great. Thank you. So let’s begin by understanding what pay transparency is and why it’s gaining momentum.

So just kind of level setting, pay transparency laws are regulations that require employers to disclose information about employee compensation, which can include salary, wages and benefits. The primary objectives of these laws is to promote fairness and equity and to encourage informed negotiations. Is there anything else around pay transparency laws and why it’s gaining momentum?

#### Joe Kelly:

Yeah I I think - thank you again, but I think you know the intent behind these laws is is really good, because I

think if you look back over the years, you know, discussion about pay in the workplace was muted, and I remember, you know, I hate to say this, but back in the day, it was almost if you discussed pay with other employees, it was almost like a fireable offense...a fireable action. And so that...and I think those were actually the first pay transparency laws that allowed employees to openly talk about compensation. And I think that's that's been a generational shift too that we've seen with newer employees coming into the workforce, they're more open about compensation. And I think that objective is good because if you're aware of what the pay should be then you're much more likely to enter that job at the right pay schedule, regardless of your background.

So that could be anyone. If you're coming from, you know, an area that hasn't had the same opportunities as others. And therefore people in those areas were paid less, and then you come to an area where the pay is higher, you may not know to ask for a higher level of compensation, and so you start out this next opportunity at lower level than others and that just cascades up the line.

I think you know with anything. I think it's more transparency and understanding what's going on is important, and then, you know, there's the context of people for acquiring new jobs but also transferring within or getting promotion opportunities. Again, you need to know you know what those opportunities are based on the pay level, and you don't want to get promoted, and if you come in with lower pay, it's just gonna continue that cycle because maybe, oh, you get a 10% increase. Well, it shouldn't be a 10% increase - you should be in this new salary band that's actually much larger than 10%.

So to kind of break the cycle of of pay inequity, you know, I think these laws are effective in in doing that.

### **La'Vonda McLean:**

Those are all great points, Joe. Thank you for pointing that out around pay transparency and making sure that employees just have, and applicants, have more information. But of course, like most things in the workplace, there are legal implications, and that's where today's topic really hits home.

Pay transparency isn't just a buzzword. The regulatory landscape is shifting rapidly, where several states are

implementing their own laws, which is creating a compliance headache for companies. So what are some of the requirements of these laws? What are the legal risks businesses face when implementing paid transparency policies?

### **Rachel Freedman:**

Sure, I can address some of that. You know, the laws definitely vary by state and even some municipalities. I think there are 14 different laws on the books now. And some of them vary in some of the requirements can be quite specific. For instance, Washington and some other states require a wage scale. So, the ad can't just read "up to \$30.00 an hour," - it has to actually have a high and low of what the pay will be up to a certain amount or, you know, \$40,000 and up is not going to pass muster on a lot of these laws.

Also, a lot of them require you to publish not only the pay, but all the benefits, and we even saw one case where they didn't publish the employee discount as one of the benefits and that is a violation of the statute as well. So it has to be all benefits, including time off, health benefits, 401K potential, things like that. So it's really a overall compensation package.

### **La'Vonda McLean:**

That's a lot of information. Go ahead, Joe.

### **Joe Kelly:**

No, I was just gonna say like, when you start seeing that case that like Rachel referenced where, you know, they don't list the 10% discount or whatever the the benefit is, that's where you see like the unintended consequences of how some of these laws are written, how they can be twisted and really manipulated by the plaintiff's firm to bring actions that there's no real economic loss there, you know. nobody's... nobody's necessarily being hurt in those types of situations and and I think that's where, you know, you get into these situations where the intent of the law is really good, everybody's on board with more pay transparency, but how that's manipulated to turn into... to legal challenges where, you know, this is... this is nothing nefarious by the employer to, like, exclude these pieces of information. You know, the law firms, the plaintiff's firms, they're just finding these loopholes.

### La’Vonda McLean:

Right. The unintended consequences that we always have to deal with within our product lines. So Rachel, you mentioned the state of Washington, so that is definitely a prime example of the legal risks that exist. Employers face some real risk if they don't comply with the pay transparency requirements in the state of Washington. We are seeing a surge of lawsuits in the state of Washington related to pay transparency. So what is happening in the state of Washington, as it pertains to this litigation?

### Rachel Freedman:

Yes, so what Washington State did uniquely is they provided a private cause of action where individuals can actually file a lawsuit and collect statutory damages as well as attorney's fees for violations of the statute. And as a result, which we see with many similar type laws, plaintiff's firms – there's a few of them that we've become familiar with – almost make it into a cottage industry where they just find applicants to troll and find potential violations and file suit. And I just read the other day that I think there's about 250 lawsuits now filed in the state of Washington for pay transparency.

And what has happened is they find these plaintiffs, as I said, to apply to these jobs. I think there's also, I also read that there were seven plaintiffs that have filed 10 or more of these suits. So it's really now become more about plaintiff's attorney's fees unfortunately and one firm in particular that's really filed just a slew of these lawsuits.

### Joe Kelly:

Yeah, they've really tapped into something here - kind of hit the jackpot because you know they can produce, you know, estimates of what potential applicants were and it's very hard to verify this information and... and you know they can say, is it realistic that, you know, an 18-year-old who's never gone to college applies for a job as a doctor? Is that an applicant? I mean, but they can make the case the way the law is written that that is considered an applicant, so you can see how this could potentially multiply with that \$5000 per applicant into some pretty serious potential damages for the employers in this state and I just... I think there is some backlash out there amongst employers in the state of Washington with regards to this law.

### La’Vonda McLean:

Yeah, absolutely. Employers beware. So do you see any relief in sight for the state of Washington? Where do we go from here?

### Rachel Freedman:

So as Joe just touched upon, there is a case pending right now at the Washington Supreme Court about whether an applicant needs to be a bona fide applicant, whether they needed to really intend to apply and get that job versus more of just a serial filer trolling the internet for these potential violations. So that's a question for the Supreme Court, which would make a huge difference. Right now we just had oral arguments last month. Unfortunately, the early word is that it seemed like some of the justices were favoring not adding that requirement into the statute, because it's not technically in there, but again, that's just reading the tea leaves. So everybody's waiting with bated breath on the decision.

### La’Vonda McLean:

Yes, pins and needles. Hoping that we get some relief for employers.

### Joe Kelly:

Yeah, I mean there is, there is a potential legislative remedy as well to provide more clarity around the law. There's there's a there's a bill that's been written - I don't think it's hit the the floor yet of the Washington state representatives, but there is a bill that's been, you know, obviously heavily lobbied by the Washington state, like Business Bureau and the business is there, because this is, this is a major problem and there needs to be some sort of solution and some people, yes, they if they would have applied for a job, if they would have known the salary was taxed and they legitimately wanted that job and they didn't apply because they didn't know what it was. Yes, is that something, but you got to take the teeth out of this so that the plaintiffs can't round up 10,000 people who, you know, may or may not have actually applied or had any intent to get this job.

### La’Vonda McLean:

Absolutely. Well, it seems like maybe there's some hope inside from a legislative perspective. Some court actions but TBD on on both of those. So given these challenges, what can employers do to mitigate risk and

navigate this complex landscape? I mean, should companies be trying to comply with every single law or is there more strategic approach that you recommend?

### Joe Kelly:

Yeah. I mean obviously you need to monitor these different state laws pretty closely. I think there's two areas that you know the industry could really improve on, and I guess when I say industry, employers or human resources departments working job posting sites to make sure that they're also alerting them that, "hey, there's this law change that has happened, you need to include these items in your job post" because the way the law is written is that, you know, you are still liable for that as an employer. And so I think that needs to be done and needs to be better coordinated there... but what I always say because we see this a lot... California is very progressive with their employment legislation. Do... like look at what California is doing and then create policies and procedures that would be compliant in California and I guarantee you're probably going to be compliant in 50 other states and the same thing with apply true with with this pay transparency in Washington state. If you're compliant there, then you're gonna be ready for whatever state comes out with the the next level of legislation regarding pay transference.

### La'Vonda McLean:

Those are great points, Joe. Thanks for that. So let's talk about the insurance implications of these claims under employment practices insurance policy, as I'm sure everyone wants to understand it and hear about. So give us your thoughts there.

### Rachel Freedman:

Sure. So you know as we see it, this is part of the Washington Equal Pay Act. The act was created to address gender and racial pay inequality and so we view this as a pay equity claim like any other pay equity claim, and so that's a wrongful employment practice under our EPL policy and we see this as something triggering EPL...as any other pay equity claim would.

### La'Vonda McLean:

Great. As a broker, I like that. I can assure you my clients do too.

### Joe Kelly:

Yeah, I'm curious what you're hearing out there in the marketplace.

### La'Vonda McLean:

Thank you for that question, Joe.

On my end, it's been a mixed bag where we've had some that have taken the position that you just articulated, Rachel. And then we have others that have taken a different position. But as you know it always depends on how the claim comes in and everything is a fact specific kind of analysis. So it depends, but it has been a mixed bag.

So from an underwriting perspective, how are you even underwriting to this risk? What questions should clients be prepared to answer?

### Joe Kelly:

Yeah. So it's, you know, I feel on its face, this should be something we can... we can underwrite to because...in fact, we've trained our underwriters on this. Seeing this issue emerging, we've provided a lot of training on this so that that underwriter gets a submission in now, and there is believed to be Washington...Washington based employment exposure, and that's a whole separate...what is Washington based employment... that's a whole separate definition. You can read the statute on what that means, but we'll just say if there's an inference of that we're asking our employees, our underwriters, to go out and look at the job postings for that company.

And what we're looking for is, is there a reasonable range because that's the way that the wording is – it's got to be reasonable, so it can't be, this pays \$10 to \$20,000 per hour... that wouldn't probably pass the reasonableness test. But is there a reasonable range? And then is there a description of benefits? And then we also like to see that there's some sort of link to a page that lists out even greater detail and benefits because that was that was kind of a scary realization, that claim that Rachel was referencing where, you know, the employer had a pay range, they had listed out the... a general description of the benefits, which is also how it reads, but the case was brought on a very specific benefit item, and so having that link to a real thorough description of all the benefits that are with this company is really important.

You know, if we can't determine what Washington-based employment is, we encourage them to look at how they're doing job postings and other jurisdictions, or if we know they have Washington exposure but just no jobs posted there, do the same thing. How are they doing this in other areas? If they got the pay range and they have the description of benefits, then we feel pretty good about it.

Now, in certain circumstances where there's a lot of that exposure to Washington State, we do have a questionnaire. And I know our brokers love questionnaires and probably the insurance even more, but, you know, we are trying to dig in deeper to really underwrite to this exposure and we ask for things like, "Have you used outside counsel to access assess your exposure?" We try to dig in a little bit deeper and really quantify the number of applicants and employees in Washington state.

### La'Vonda McLean:

Yeah, well, as you know, sometimes we're not a fan of questionnaires, but I think in this instance it's a good way, at least for clients, to sort of, kind of, stay on top of this risk and understand what it is that they should be looking out for.

So, that's a lot. I mean, where do we go from here? I think, you know looking ahead, the trend toward pay transparency is likely to continue. It's not going away. There are several other states that are enacting similar laws. I think public sentiment supports these measures. Employers should anticipate further legislative developments. Anything else on where do we go from here?

### Rachel Freedman:

Well, I think one of the things insureds should watch out for too is, as Joe mentioned, the third party sites. I think a lot of companies think, "Well, I didn't do the ad, we can track this out." But unfortunately, they can still be liable. So I think they need to see what their contractors are doing because it could still impose liability.

### Joe Kelly:

Yeah, I just have two thoughts. You know, one, whether your EPL insurance is with Sompco or with someone else, insurance carriers have a lot of great resources to help them with risk management, and we've actually highlighted pay transparency in our risk

management tool as an area of focus. So I think these services are underutilized by our insureds, so we encourage them to really dive into issues like this because it can help keep you current, give you checklist on how to get compliant, stuff like that.

Additionally, I think we all need to be mindful of state employment laws with a private right of action, because this could pop up...may not be paid transparency, but we saw it with BIPA in Illinois, kind of the same issue with the private right of action, we're seeing it now with Washington pay transparency, so...whenever you are alerted of a law that has that provision in it, then you need to be really, really highly attuned to it. That's more of a general, outside of pay transparency cautionary tale.

### La'Vonda McLean:

Right. I think that's a great point, especially around the risk management services and loss prevention services that our carrier partners offer under these EPO products, which is one of the benefits and one of the things that clients are paying for when they purchase this product. So great point.

So thank you for joining us on this deep dive into pay transparency laws and their implications. Stay informed and stay compliant.

I would like to thank my guests from Sompco for joining me today. Thank you.

### Joe Kelly:

Hey, thanks for having us.

### Deepak Adappa:

That's all for this episode of the "Navigating Emerging Liability Risks" with Marsh FINPRO podcast miniseries. We hope you enjoyed our discussion and thank you for listening.

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Until next time, thanks again for listening. I'm your host,  
Deepak Adappa, Marsh's US FINPRO Advisory Leader,  
signing off.

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