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Kelly Bunting: Welcome to the latest episode of Asked and Answered, GT's Labor and Employment Podcast. Today I am joined by Mikaela Masoudpour, and we're discussing the new Pay Transparency Laws passed in Minnesota and so many [00:00:30] other states. Mikaela, welcome. Please tell us about your work.

Mikaela M.: Thank you so much for having me, Kelly. I'm really excited to be with you today. I've been engaged in specific work around pay transparency since Colorado adopted the first pay disclosure law with job posting requirements back in 2019. Colorado's law was effective in January 1st, 2021. They've already amended it, but I've been doing broader work in the equal pay space [00:01:00] for my entire career.

Kelly Bunting: Well, we'll go into some depth discussing how employers can deal with the consequences of the pay transparency movement. But to start with, can you say more about what you mean by the equal pay space and how pay transparency fits into that?

Mikaela M.: So I'll keep the history lesson short, but back in 1963, President Kennedy signed the Equal Pay Act, so the EPA, it's often referred to, and that statute [00:01:30] generally protects employees from wage discrimination on the basis of sex. So it requires employers to equally pay men and women that perform substantially equal work requiring substantially equal skill, effort and responsibilities under similar working conditions at the same establishment. Many states have a similar statute with their own sort of EPA. Some of them require that [00:02:00] you also are paying similarly based on race or other protected characteristics in addition to sex. A number of states actually have stricter requirements for what factors an employer can point to explain if there actually are pay disparities. So okay, we do have these two people who look similarly situated. There's a difference in compensation. So these requirements generally have existed for many years, but the pay transparency laws that we've really [00:02:30] been seeing this trend for the last five years require employers to include salary ranges or variations of that in their job postings.

Some also require disclosing benefits, other compensation, and there can be a number of different variations on that. And really each jurisdiction has its own quirks. So because we're not seeing these laws at the federal level, it's really important for multi-jurisdictional employers to [00:03:00] understand the nitty-gritty of these laws. Some may cover a position that can be performed remotely in a state, others like Colorado and soon to be Illinois, they have a law that's been passed that will be effective January 1st of 2025, require that an employer post promotions or job opportunities. And then they also have to make disclosures about a selected candidate. So you can see how there's a lot of different pieces that fit into what these laws are.

Kelly Bunting: Really difficult for [00:03:30] multi-state employers, I would imagine. So let's dig into the requirements for one of the most recently passed laws, Minnesota. Can you tell us some of the specifics there?

Mikaela M.: The Minnesota is one of the more straightforward job hosting laws. It was signed by Governor Waltz back on May 17 as part of a larger bill called the Omnibus Bill and Industry Policy Bill, and the requirements of this new law are in addition [00:04:00] to existing pay disclosure protections for employees. So many states, when they're adopting these new requirements, they already have existing equal pay protections that are important to keep in mind, and they may be regulating what you can ask an employee about their prior compensation or having bans on actual current employees discussing their wages with other employees, which is what has existed in Minnesota. So thinking forward to what this new requirement will be, [00:04:30] for every job posting for a job opening, and that's a term used in the statute, a covered employer must disclose the starting salary range, or if there won't be a range, a fixed pay rate.

And along with that, they must include a general description of all benefits and other compensation that will be offered to a selective job applicant. The description of the benefits and the other compensation has to include other fringe benefits such as health benefits, retirement benefits, and [00:05:00] other financial perks associated with the position. So you might be asking yourself, "What is a job posting?" Here for Minnesota, it applies to any solicitation intended to recruit job applicants for a specific available position. It would also apply to recruitment performed by the employer directly or by a third party. So think like a job site like Indeed. And then it would also cover electric or hard copy postings that list [00:05:30] qualifications for applicants. So that could be internally, posted in the window, what have you. Fortunately here, these requirements don't take place until January 1st, 2025, which is really what we're typically seeing for these laws being post and passed now. So employers do have plenty of time to prepare for these Minnesota-specific requirements.

Kelly Bunting: And since you figure most employers have already complied with a lot of the other state's laws, hopefully they've got some mechanism in place that will [00:06:00] help them comply with this one. But to your point, it's very state specific. So there are some things in some of these laws that simply don't exist in other states laws. So going back to Minnesota's law, does it apply to all employers? Is there some sort of limit that employers need to be aware of or something they need to comply with that's specific to Minnesota?

Mikaela M.: Yeah, absolutely. And so here, [00:06:30] if you only have a small number of employees in Minnesota, you might not even be impacted. You only have to comply if you have 30 or more employees in Minnesota, and that could be at one job site or multiple sites across the state. Now of course, if you're a multi-jurisdictional employer, you're in all 50 states and you've already decided to adopt, "I'm going to have these ranges," absolutely, go ahead and keep doing that. But you don't need to make any state specific changes. One thing that's

really important to keep in mind with these laws is [00:07:00] how they apply to remote employees, right? That's a big issue everyone's been dealing with for these last five years.

Here, the Minnesota law doesn't address whether it applies to positions that could be filled by an employee working remotely. So we'll continue to watch to see if there's any guidance that comes out on that point. And they're also not really clear about the penalties for non-compliance. The law does specify that the Minnesota Department of Labor and Industry or the [00:07:30] State Attorney General may enforce violations of the law. That's a helpful point here, and a really big distinguishing factor with some states, there is no private right of action. So there's a bit less risk from individual employees, though of course they may still make reports to the government and it may still be something that gets them looking at other equal protection, EPA protections that do have private rights of action.

Kelly Bunting: It's a huge sigh of relief, I think for most employers to know that, okay, [00:08:00] there's not another law that employees can sue under. But this isn't the only big shift for Minnesota employers lately. Since July 2023, non-compete provisions are no longer enforceable against Minnesota employees or independent contractors in most situations. Doesn't really apply to a non-disclosure agreement or agreement designed to protect trade secrets or confidential information, so they still remain options depending [00:08:30] of course on what the FTC law, what ends up with that. And then there's a couple of new things that just occurred that have to do with the Minnesota non-compete law, right?

Mikaela M.: That's right. Actually effective July 1st, 2024, so just recently, Minnesota further amended its restrictive covenant law so that it voids all non-compete and non-solicitation provisions and contracts between a company and its customers. So a bit different. We're [00:09:00] not just looking at that employee space, but it continues to be a really hot area for the Minnesota legislature and of course broader across the country. We'll be continuing to watch what happens in that space this summer.

Kelly Bunting: So turning back to the Pay Transparency Law, do you have any guidance for employers to consider when they are setting the salary range for specific jobs?

Mikaela M.: This is a really important process, and I'll talk a bit in the Minnesota framework, but this really applies broader when thinking about complying with these statutes. [00:09:30] It's most important that employers set the salary range in good faith. This is language that we see very consistently across different state requirements. So the Minnesota statute defines its salary range as a minimum and maximum annual salary or hourly range of compensation anticipated at the time of posting of an advertisements for such opportunity. So it can't be open-ended unless you decide to go the route of the fixed pay rate, meaning this is an exact salary [00:10:00] or an hourly rate that they intend to pay. You see an employer be more interested in a fixed rate when it's maybe a position that has

an hourly rate for somebody maybe in retail or restaurants where it's a bit more standardized, otherwise that's typically not as attractive of an option.

But when you set the range, it's important for, I think savvy employers really take this as an opportunity to step back and be strategic, and not just think, "Okay, what am I doing just for this [00:10:30] position in isolation?" But thinking about how that role fits into the broader compensation strategy. Particularly if this is an employer or maybe this is the first law that you're having to comply with, you're in Minnesota only, or you aren't in any other states that have had this, you can do a lot now in terms of building out salary structures. Developing more clarity in job architecture, maybe if you don't have a sophisticated organization in that area of your compensation, and that you can define roles for different jobs [00:11:00] at different layers of the organization. And this can be done in conjunction with a privileged internal pay equity audit. And for some of you, you might be nodding your head along going, "Of course, we know all about a pay equity audit."

Some of you might be going, "Wait, what is that?" So that's really an opportunity for employer to take a peek under the hood and then make adjustments if warranted. And this can be really big going back to the idea of the pay transparency laws are not the first thing we're seeing in this space. [00:11:30] And so an audit and looking at how does this one salary fit into the broader pay practices can really help a company avoid equal pay litigation from current and former employees.

These kinds of studies can serve as an affirmative defense in litigation in some states, and they really can give an employer a lot of helpful insights to information and things they may not have known before. And taking a step away from that just to these general salary ranges, showing them publicly [00:12:00] in these job postings can create a lot of new risk for current employees. Or if done well, it can be an avenue to reinforce trust. So first, on the risk front, if an employee is sitting there and they have their job title and they see a range being posted for their same job title or a similar role, and they make a conclusion that they're being underpaid, you could see a lot of things coming out of this.

They may seek employment elsewhere. A disgruntled employee may file [00:12:30] a complaint or pursue equal pay litigation. So for Minnesota, they're not able to bring a claim under this law, but they have other avenues that they could seek relief or they could just go directly to the state. But on the flip side, when you have employers that are really thoughtful and strategic about this and they're thinking about the range they're posting, they're thinking about their current employees, I think this is an opportunity to use it to their advantage. It's one way that a company can forecast its pay culture. Employees can understand why they're earning [00:13:00] specific levels of pay. They can see, "Oh, wow, I am really in line with what other folks, what they're looking to be paid." And that kind of trust can really go a long way to boosting a company's ability to recruit and retain top employees.

Kelly Bunting:

So really, an employer can use these laws to either support the culture or create the culture that they would like to see, or they're not thinking ahead, as you say, if they're not thinking strategically, it [00:13:30] could lead to some bad result. It's best to sit and think about it before you simply come up with some pay range and put it out there, publish it. And you talked a little bit about pay equity audits, which sounds like a good idea on the surface. Tell us a little bit more about pay equity audits.

Mikaela M.:

So big picture, a pay equity audit looks at the pay data of a company and compares similarly situated employees. So that's looking [00:14:00] at things like job title, geography, raid, manager status, things like that, and then doing a sophisticated analysis to identify potential pay discrepancies. A lot of how this manifests depends on the size and type of the organization. Typically, it will involve multiple regression analysis, which if you don't know what that is, that's exactly why I strongly recommend working with legal counsel on this. And they're typically going to partner with an expert [00:14:30] who is an economist who's going to be able to perform these things with your pay data. So that multiple regression analysis looks at things on the backend, though for smaller populations, there's also a process that's a bit more manual called a cohort-based comparison of employees. And we could talk for an entire hour about what goes into a pay equity study, what that all looks like.

In fact, that's a big part of my practice. So I'd be happy to do that with anyone who's listening. But sticking to the big picture, key questions can include, [00:15:00] what are the components of pay? Salary, bonus, equity awards? What needs to be looked at? You really have to be very thoughtful about which employees are considered similarly situated. And then you think about what are legitimate factors that may explain differences in pay at the organization. So that really can be very employer-specific. I already hinted at this, but outside counsel's really important here, or at least legal counsel. No pay equity study should ever be done without [00:15:30] being done at the direction of legal counsel. You really want to make sure you're cloaking the study with the appropriate attorney-client privilege, and that it's being done on a confidential basis. There can be all sorts of risks that you open yourself up to if you have these kinds of studies that are done that could be discoverable in litigation to auditors, things of that nature.

So working with council really maximizes the confidentiality, which is important within the organization and preserving that privilege. And there are a lot of reasons [00:16:00] beyond just the pay transparency trend that we talked about to consider these studies, but I think they operate really in tandem. We're seeing government agencies like the federal EEOC or the OFCCP that are increasingly investigating pay equity. Some of you might remember the EEOC used to have pay data be submitted for a minute. They keep talking about bringing that back. There are of course states like California and Illinois that do require that, work with a lot of clients on their data submission there. [00:16:30] Submitting that blindly obviously has some risks with it. So doing these kinds of

studies can help you be just more in touch with what it is you're submitting and whether or not you want to be taking any proactive action on your own end.

It can reduce litigation risk, help with employee morale, and it can help align company values, particularly if you're a public employer or you're interested in ESG initiatives, DEI, other things like that. So there's a lot of reasons for that, and there can be a lot of benefits. So we've touched on some of [00:17:00] this already, but in addition, it can help respond to shareholder activism. If you're a really large employer, you may make a decision to make public statements. Even smaller employers that might not have that kind of risk or might not be interested in making those statements, it can be useful in complying with affirmative action obligations. Think an affirmative action plan, an AAP for OFCCP, or just to be able to make appropriate remediation if anything is addressed. And that really [00:17:30] can reduce litigation risk tremendously.

Kelly Bunting: Back to the pay transparency requirements, however, we're looking at the next six to 12 months. What can employers expect?

Mikaela M.: The bottom line is just more requirements, more compliance that you're going to have to deal with. According to a recent SHRM study, 42% of HR professionals said that their organization currently operates in a location that requires pay ranges to be included in job postings. [00:18:00] We're just going to continue to see this increase meaningfully. We have eight states, the District of Columbia, and seven more cities and counties that have active laws. We've really been talking about the state level, but you can't forget the city and county piece as well. So places where you're maybe less likely to see the [inaudible 00:18:18] at the state level, like Ohio, you have Cincinnati and Toledo that have passed laws. They're generally a bit less burdensome than some of the others, but they're there nonetheless and important to be aware of. [00:18:30] So just to tell you maybe some of the most recent changes, DC's law was just effective June 30th, Maryland passed a law effective October 1st of '24.

Kelly Bunting: That's this October.

Mikaela M.: This October. So a couple of months away. If you have questions about that, you can look up the article that GT put out about that. There's also more in January. Of course, we've talked about Minnesota. We have Illinois going to effect in January as well. And actually after Minnesota passed it, Vermont passed a law and they're effective in [00:19:00] July 1st, 2025. They have some really interesting carve-outs in Vermont that I view as a bit more employer-friendly. So it's good to be aware because if there are things that maybe the organization has preferred not to put out there and they want to do a bit less, they may have that option in Vermont. And there are a number of other states that are considering proposed pay transparency legislation, and some of there are places you might not expect to see it. That list includes Alaska, Georgia, Kentucky, Oregon, Pennsylvania, South Dakota. [00:19:30] So what we're really seeing is that these laws aren't limited really to so-called red or blue states.

Kelly Bunting: Well, let's talk about the federal government specifically. There hasn't been a lot of movement in too many things. The federal government certainly does seem to lag behind the states when it comes to some sort of comprehensive legislation, still waiting for some sort of comprehensive paid leave for maternity care, still waiting for data privacy [00:20:00] laws. Anything that is easier for an employer to comply with on a nationwide basis as opposed to complying with all these separate laws from state to state to state like we're seeing here with pay transparency. Is the federal government doing anything on some sort of nationwide pay transparency law?

Mikaela M.: Well, currently, as I said, there is no generally applicable federal law and we are not seeing movement for a federal statute. It's not for lack [00:20:30] of interest from parts of the federal government. Following an executive order signed by President Biden earlier this year, there is a proposed rule that was issued that requires federal contractors to post salary ranges. I mentioned briefly the EEOC had required pay data reporting as part of EEO-1 reporting that I'm sure many of our listeners are familiar with with their companies. There continue to be discussions, but it's very incremental movement. But that isn't to say that the [00:21:00] agencies are not looking at this kind of data. Anytime a government regulator does have access to the company's pay data, there's a risk that they will dig in further and potentially identify pay disparities. And so companies should be prepared for that because even when it's not something that has clear federal regulations, it is on the EEOCs target list when they think about what are they looking at from their strategic plan.

Kelly Bunting: What has enforcement been like of these laws? [00:21:30] And I want to go back to the private right of action. I mean, do employees have the right to sue under all of these laws? I think you said that varies definitely from state to state.

Mikaela M.: Yeah, I do think this is a bit of a bright spot where some employers can have a little bit of relief. Many of these laws are exclusively enforced by government agencies. The recent amendments in Maryland actually removed an existing private right of action. So that's one reverse trend that was [00:22:00] a little bit surprising to see. However, there are some states like California, Washington, states that probably don't surprise anyone listening, where a private right of action does exist. So job applicants, employees can themselves bring a suit. There's been the highest amount, I would say of enforcement from my perspective, has been in Washington State, surprising given the private right of action. As an example, the year it was effective, there were 31 lawsuits filed by one [00:22:30] plaintiff's firm, and they had big employers were hit by this. And then in the first nine months, Washington's Department of Labor and Industries received 224 complaints.

So we're starting to see those complaints and litigation play out. So back in April, the federal court in the Western District of Washington in Floyd versus Insights Global granted the defendant's motion to dismiss, and the court did hold that plaintiffs didn't have standing to sue based on Washington's pay transparency [00:23:00] law. But the judge granted leave to amend, and

notably, and I think this is really important for employers to keep in mind, that the plaintiffs under the law, under the Washington law, are authorized for job applicants to sue. And so it's not something that's limited only to a current employee.

So that really broadens the scope of potential plaintiffs under the Washington law. Just to pull out another trend moving to the East Coast, New York City and their [00:23:30] Commission on Human Rights investigated, well, is actively investigating complaints. But they had a bit of a focus at the beginning, at least from what we were seeing reported, on job sites like Indeed and ZipRecruiter. And reportedly, the agency was intentionally having a special emphasis on third-party job sites with the thought that it would get the message out broader to employers that it doesn't matter if you're posting this or it's a third party, subject to some defenses, you are still responsible [00:24:00] for making sure the right information is in your job posting.

Kelly Bunting: If an employer wants to be prepared for the pay equity implications of these pay transparency requirements, are there any additional steps that they should be taking now?

Mikaela M.: So I think number one is conducting a proactive pay equity audit. I think that really has the biggest ability to get good bang for your buck and really give you good information about your organization. Number two is [00:24:30] evaluating internal systems, and the processes and those things that may be contributing to pay inequities. But also just what makes up our pay ecosystem. So these are looking at factors like your compensation policies and practices. What is your job architecture and compensation structure? If you don't know how to answer that question, that's where I would start. If you don't have those things doing a useful, and I think informative pay equity audit is very difficult, and I don't recommend that my clients do that.

And the third is really committing [00:25:00] to education and training. This is a big sea change for a lot of employees that work in that space. So you want to be making sure there's guidance around how do you set employee compensation? What are these pay equity laws? And we haven't talked a lot about salary history bans, but that's another piece out there and really what recruiters and interviewers can ask about what an employee has made in prior positions has just a ton of more restrictions than it used to. So you really want to make sure that your folks that work [00:25:30] in this space are very aware.

Kelly Bunting: You touched on so many great points there. I'm just going to add my support to training. I'm a huge believer in training on so many levels, on so many laws, management training in particular, so that your managers don't create liability for the organization. They actually help to prevent liability for the organization. So you've really given us an awful lot to think about, and I want to [00:26:00] thank you for providing such helpful insights. Thank you, Mikaela.

Mikaela M.: Thank you so much for having me. It's been a real treat to speak with you today.

Kelly Bunting:

That's it for today's episode of Asked and Answered, GT's Labor and Employment Podcast. Thank you for joining us.