

# As 2020 Winds Down, Keep Your Guard Up!

By Felice B. Ekelman & Stephanie J. Peet

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## Meet the Authors



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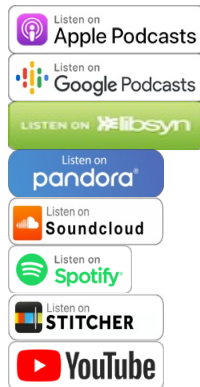
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## Details

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The business world is looking to breathe a collective sigh of relief about getting to the end of 2020. But employers have to stay focused—year-end parties, performance evaluations, compensation and bonus structures all look different this year. Organizations need to anticipate challenges in order to minimize risk, all while keeping their employees engaged and motivated.

Jackson Lewis P.C. · As 2020 Winds Down, Keep Your Guard Up!



## Takeaways

The business world is looking to breathe a collective sigh of relief about getting to the end of 2020. But employers have to stay focused—year-end parties, performance evaluations, compensation and bonus structures all look different this year. Organizations need to anticipate challenges in order to minimize risk, all while keeping their employees engaged and motivated.

### What Employers Need to Know:

- Although we transitioned to a virtual workplace in 2020, policies and protocols from the recent past governing how we work are still in place. Employers should make implementation and communication of those policies a top priority as the year winds down.
  - Holiday parties held in an online format may be perceived as more casual. Remind employees of the company's policies addressing:
    - Dress code;
    - Harassment and discrimination; and
    - Drug and alcohol use.
  - Performance evaluations bring issues that should be considered in light of the changes in the workplace in 2020.
    - Evaluations can be subjective.
    - The last few months of the year tend to be top of mind.

- Jobs and their descriptions may have changed due to a new virtual reality.

Consider soliciting self-feedback and self-evaluations as a solution to the above.

- Look at employment agreements to determine contractual obligations around incentive or bonus pay to avoid the legal ramifications of breach of contract allegations and/or misaligned employee expectations. Also, evaluate whether past practices could have created a legally binding obligation.
  - Is there a force majeure provision in current agreements allowing you to avoid contractual compliance due to an impossibility or business circumstances that arises such as a pandemic?
  - If not, consider including them in employment agreements, leases and any others to mitigate risk.
- Beware misclassification issues arising from changing job descriptions.
- Review employee handbooks in light of changes to laws and regulations around confidentiality and the use of company property, technology and hardware as well as PTO policies.
- Consider formalizing ad hoc policies that worked for your organization undertaken in response to the pandemic.

## Transcript

Alitia ([00:06](#)):

Welcome to Jackson Lewis' podcast We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted?

The business world is looking to breathe a collective sigh of relief about getting to the end of 2020, but employers have to stay focused. Year-end parties, performance evaluations, compensation and bonus structures all look different this year. Organizations need to anticipate challenges in order to minimize risk, all while keeping their employees engaged and motivated.

This episode of We get work™ discusses how familiar office norms are taking place in unfamiliar ways as we wind the year down and explore how to ensure a smooth end to 2020.

Our hosts today are Felice Ekelman and Stephanie Peet, who are back for part two of their series. Part one, The Virtual Workplace, Keeping it Clean Literally and Figuratively, focused on harassment in the virtual workplace. Felice and Stephanie, the question on everyone's mind today is what new or additional human resource challenges should I anticipate between now and the end of the year, and how will my business be impacted.

Felice Ekelman ([01:45](#)):

Stephanie, it's great to be back.

Stephanie Peet ([01:47](#)):

Hi, Felice. Good to be back too.

Felice Ekelman ([01:50](#)):

I thought that we would use the next 20 minutes or so to talk about year-end events that employers typically face and how they may be changed now that so many employers have moved to a remote workplace. Now that we're finally seeing the end of 2020, there's a lot for employers to do. The first thing perhaps is to deal with a holiday party. What do you think?

Stephanie Peet ([02:21](#)):

Absolutely. I think some companies are not going to do a holiday party this year, but I think the more popular route is doing these virtual holiday parties. And kind of like what we talked about in our last podcast, which is a lot of companies are breathing a sigh of relief, thinking that the holiday party is going to be a lot easier this year in terms of those dreaded harassment claims, my suggestion would be don't breathe too hard because those harassment claims still exist.

We're going to find that people are going to be logging into whatever video conferencing platform that they're going to be doing. More likely than not, it's going to involve some sort of alcohol. And more likely than not, there's going to be a fairly casual vibe and feeling to that event, which is fine. But at the end of the day, what employees need to remember is that you still need to comply with the company's policies. You still need to comply with the company's dress code policy. You still need to comply with the company's harassment and discrimination policies. And you might also, and this is not going to be very well-received, but might want to look at the drug and alcohol policies that the company has before you go ahead and log on to that virtual holiday party.

Felice Ekelman ([03:35](#)):

I think employers need to think twice about sending alcohol to all their employees. First of all, some employees can't or shouldn't or don't want to drink, but employers who send a full bottle of wine to employees will have to then face up to the fact that there are some employees who are going to drink the entire bottle of wine during the holiday parties. So I think it would be best if employers' cheer basket didn't have any alcohol in it and instead had party favors or food for employees to enjoy during the policy. That would be a good first step.

Stephanie Peet ([04:12](#)):

And a second step is, we're not party planners, so we're not going to get into different suggestions for the parties. But I do suggest that when you are on these parties, try not to have it centered around alcohol. Have some other idea or topic or entertainment at issue so alcohol isn't front and center, and we can hopefully avoid those harassment claims and the dreaded calls to the employment lawyers come the end of December or January. So that would be a good start.

Felice Ekelman ([04:41](#)):

Those are all good tips. So should employers be undertaking evaluations at the year end, Stephanie? Most employers tend to conduct their evaluations at the end of the year, and it's been a disruptive year with folks working both in the office and at home. And I think a lot of employers might consider dispensing with evaluations this year. I don't happen to think that's a good idea, but I'm curious about what you think.

Stephanie Peet ([05:13](#)):

I think giving feedback, honest feedback to the employees is critical. So if we're virtual, if we're in the office, that doesn't matter. I think feedback is critical.

Personally, Felice, I'm not a giant fan of the annual performance evaluation process generally. I think there's a lot of potential issues that we find when we do these evaluations. For example, the ratings tend to be very subjective. If I give someone a meets expectations, I may think that's a good review. Other managers may give a meets expectations and not think that that's a positive, or an employee may decipher that reading in a different way.

So that's one issue, but some of the bigger issues I have with the end of year performance review, it tends to reflect what has happened in October and November and December, but seems to kind of ignore the performance, good or bad, that has happened earlier in the year. And from my perspective and what I've been kind of counseling clients on is let's do more consistent feedbacks. Quarterly tends to work well, so at least four times a year and you can capture about three months at a time. And that way, it lessens the pressure of what that one annual performance review is going to look at, and I think it's a lot easier for both employees and for the managers giving them to tolerate.

So yes, Felice, to your question. I think we should not ignore, we should not put aside the performance review simply because a lot of our employees have been working from home and simply because we've been in a global pandemic. That being said, I think this is a great time to start thinking about is the annual performance evaluation process working for us. And if you're seeing the flaws that I generally see, then maybe this is a good opportunity when you're making other changes to determine whether or not this is a process that could use a little bit of transformation as well.

Felice Ekelman ([07:17](#)):

I'm a fan of formal feedback as long as it's meaningful and as long as the supervisors and managers who are providing the feedback have been trained, and as long as the tool that's being used is meaningful. And to that end, I think that this year's evaluations may be presenting some new issues because performance may be different because the jobs may be different.

I think that more positions than we think have had to evolve or morph when they moved from a workplace to the home and became remote. There are many positions that have had to change because certain tasks can't be performed or certain tasks have become more important than others, and evaluations have to reflect the

change in duties and responsibilities.

So I think employers would be well-served to look at the evaluation tool that they're using before they use it to make sure it still makes sense given the evolution in work that has happened this year.

Stephanie Peet ([08:26](#)):

Felice, I couldn't agree with you more. And I think maybe this year, if companies aren't generally doing this in their process, is maybe soliciting some self feedback and self evaluations from these employees, especially those that have been working from home. It may be a little bit more difficult for supervisors to had a good handle on some of the projects that you've been doing. So it might help them bring light to those projects. But also the struggles that some of these employees have been having may be on the employer. And the self review process might be a good opportunity for the employees to share that and it might give some insight as the overall process and their feedback generally.

Felice Ekelman ([09:05](#)):

And employers might find out that many of their supervisors really have no idea how employees have been performing because they haven't been able to check in in the same way that they typically check in when they're not working remotely. Because so many jobs that lend themselves to remote work are jobs that can't be measured in a quantitative way, and the qualitative analysis is not so easy when you're not in the same place working alongside a subordinate. And so that's going to also create some challenges.

And so this year really, employers should be careful to make sure that whoever's doing evaluations really understands what they should be looking for so that the process is fair and meaningful.

So kind of with that is usually pay issues because, in many workplaces, at the end of the year, employees are thinking about wage increases and/or bonuses. And so if an employer has not yet made a pronouncement to its employees about what if any wage increases and bonuses they should expect, now this is the time, it is already December, this is the time to be making those announcements and making sure that whatever policies you implement are fair, reasonable, and lawful. So what are some of the issues you're seeing with bonuses at the end of the year?

Stephanie Peet ([10:41](#)):

So I think a lot of companies are struggling financially, and while they would like to reward their employees, they might just not have the money to do that. The problem with that could be if there is some sort of an agreement or promise that the company made by way of bonus to these employees.

So for example, there could be an employment agreement that says that if the employee rates at a certain level, that they are entitled to a certain bonus or incentive compensation. I encourage the listeners to go back and look at these policies, look at these employment agreements and see what you are contractually bound to do and whether you have any sort of defenses or outs to these contractual

entitlements. Because if you don't and we choose not to pay what we have paid, there could be legal issues that result from that.

That's the biggest issue that I'm seeing. And the question that I'm getting most often about this end of year bonus and incentive compensation issue. What about you?

Felice Ekelman ([11:48](#)):

I think that in addition to the breach of contract issue, there could just be an issue with respect to employee expectations. You know, not every employer that has had financial challenges this year has communicated that to its staff, and employers may have made rosier pronouncements than they should have and they may have raised expectations among employees who are used to a holiday bonus or an end of the year merit increase. And those expectations may not be met this year. And if they're not met, while there may not be a breach of contract claim, there certainly could be a breach of trust in terms of the expectations between employee and employer.

And so this is the time for employers to carefully decide what they're going to talk about in terms of how this year was and what next year might bring. And frankly, it's not so easy to predict. These are kind of unpredictable times. And so employers might be well-served to not making very many predictions.

Now, that's one way to look at it, but on the other hand, there are a lot of employers who are in tough job markets where they have employees in competitive positions and they have to make sure that they don't lose their employees and they have them on hand, feeling positive about the workplace next year. And so employers have to be very careful about how they were these communications going backwards for 2020 and going forward to 2021.

So this is tricky, but you're absolutely right. Employers must look at their individual employment contracts, number one. Make sure that whatever decisions they're about to make don't contravene those contracts. And number two, they have to look at their past practices to evaluate whether or not any of those past practices could have created a legally binding obligation. And if not, whether those past practices could have created an expectation, that's going to result in a human resource issue in terms of employee expectations. So those are the things I think employers need to be looking at right now with respect to bonuses, and hopefully have already done so.

Stephanie Peet ([14:16](#)):

To follow up on that, given you just mentioned this year has been so unpredictable, I think 2021 is going to be similarly unpredictable. I would encourage employers to go ahead and look at your agreements and see if there's a force majeure provision in them as, some sort of provision that allows employers to get out of, or to not have to comply with certain obligations due to an impossibility or business circumstances that arises where it makes the fulfillment of that entitlement almost impossible, such as a pandemic.

I would go and look at those agreements. And to the extent you don't have force majeure agreements or provisions, I would encourage you to strongly consider them. And not only in employment agreements and leases and all of the other agreements that you have, but I think if 2020 has taught us anything, it's you have



to prepare for the unpredictable. And one way to do that is such a provision.

Felice Ekelman ([15:15](#)):

There are a lot of employers who provide bonuses directly related to productivity or sales, and if sales have not been this year what they were in past years, resulting in significant lost income to employees, employers may want to rejigger those compensation schemes. In some jurisdictions, you need to put them in writing. And so if they're going to be changed prospectively, you should put that in writing. I think that's an excellent idea anyway. But I think employers have to be tuned into employees, again, their expectations. And if the bonus schemes are resulting in different compensation, addressing that proactively, as opposed to just letting employees wonder what the employer has in mind.

So I think this year and next year are going to be very important. And there are some employers who might be very honest with employees and defer bonuses this year to pay them next year, or pay them in part this year and next year when cashflow is better. I think there's a lot of creativities that employers can use if they don't have a legally binding contract that limit their ability to do so.

So what about increases in salary and compensation? A lot of the US workforce is expecting increases at the end of the year, and it's been a tough year for a lot of employers. What are you hearing from employers about this?

Stephanie Peet ([16:50](#)):

I mean, it's tough. I think some companies have done well in the pandemic and they want to reward those employees that have worked very hard under very trying circumstances, and then I equally have heard about the companies that are financially struggling, struggling terribly, and while they would love to reward their employees for the hard work that they have done, they simply can't.

And for those employees, I'm telling, or at least suggesting, try and find something to do to acknowledge the good work that goes beyond compensation. So it could be sending them a note, letting them know how much you appreciate them and how their hard work and their good work is recognized by the company and how it has helped the company get through this. And if they stick it out, then they will do well. But some companies just aren't going to be able to reward their employees as they previously did in years past. And again, it's going to hurt employees as far as expectations. My best piece of advice on that is transparency.

I think transparency and being honest and communicating truthfully with your employees under the circumstances is going to go a long way, and acknowledging the hard work that they have done. Even if you can't reward it financially, acknowledgement can go a long way.

Felice Ekelman ([18:12](#)):

One of the issues that I think it's important for us to talk about, Stephanie, is consistent with what we spoke about earlier about jobs evolving or changing when they transition to the remote workplace. For better or worse, many employers have had to restructure their operations, lay off employees, reorganize their workforce.

And many employees' positions, as we noted earlier, have changed. Employers need to make sure that those employees they've designated as exempt from overtime are still performing duties that warrant that exemption.

So a very simple example, if there was an employee who previously supervised 20, a staff of 20, and as a result of layoffs now only supervises one employee and instead is an individual contributor principally, that employee is no longer exempt as an executive under the federal and most state wage and hour laws. And so that employer really should not be paying that employee on a salary basis and must pay that employee overtime if there's no other basis for an exemption.

I think this is an important issue that employers should be looking at as they see that their workplace has changed and perhaps they've undertaken several reorganizations. So I'm going to be talking to employers about that issue to make sure that they fix any misclassifications and address issues that might've happened this year, as well as next.

Stephanie Peet ([19:56](#)):

Yeah. And Felice, on that note, I think looking at the exempt status is a very wise move, but I also think because these positions have evolved a lot over the past year, let's take a look at those job descriptions and let's see if they are accurately reflecting what that employee does now, not what the employee did in January, 2020, because chances are it's probably not going to be the same, and keep on looking at those job descriptions and modifying them to accurately reflect what it is that that person actually does now. I think that would be a really good practice.

Felice Ekelman ([20:34](#)):

And we've talked a lot with employers this year and in the recent past about pay equity reviews. Is this a year that employers should be looking at the pay equity issue? and by pay equity, I think we mean that there are no distinctions in pay based on a protected class. Obviously an employer can pay an employee with more responsibility or more experience more than another employee in the same title if those are qualifications that get rewarded, but to pay an employee more because of their gender or race or national origin and no other reason, that would of course be unlawful. Do you think employers should be undertaking pay equity reviews at this point?

Stephanie Peet ([21:27](#)):

I never can identify a bad time where an employer can undergo a pay equity analysis. These claims are hot. I don't envision that stopping anytime soon. And I think this is, right now, we're doing a lot of cleansing, right? We're making our list and we're checking it twice. So I think this is a really good time that we should look at how we are paying people and making sure that we're doing so appropriately.

And we have to be careful because especially during this pandemic, we want to make sure that we're not penalizing the caretakers that have been at home supporting and taking care of children and parents. That could have a disparate impact on people. And we do want to really make sure that when we're paying people, we're paying them appropriately, and what time is better than now to



engage in that pay equity audit? So Felice, absolutely. Now is the time.

Felice Ekelman ([22:19](#)):

Yes. And so much has been written and talked about in the last six months about the pandemic and its impact disproportionately on women in the workplace. And so employers certainly need to be cognizant of that.

So I think the final thing employers should do as they wind down the year is think about updating their favorite writing, the employee handbook. Because so much has happened this year, and in many jurisdictions, there are new laws and regulations that should be provided for in the employee handbook. This is a year where a handbook review really is an important task to undertake.

Stephanie Peet ([23:01](#)):

And I think going through this past year has raised a lot of issues for employers about what they want their policies to say and to not say.

So we talked about it on our last podcast, Felice, was all the confidentiality and privacy issues from working from home. Now's a perfect time to go back and look at your policies about confidentiality and about using company property, about the technology, using the company's hardware and those kinds of policies. I also think it's a great time to look at your PTO policies. Depending on state law, how you want employees to use, whether or not you're going to pay if they don't use the policies, if they don't use the PTO, whether or not they're allowed to accrue.

I think what companies thought and wanted to do in 2019 may not be what they now have in mind in 2020 when they saw what transpired this past year.

Felice Ekelman ([23:58](#)):

These would also be good times to formalize some ad hoc policies that many employers have undertaken, safety policies, issues about conduct, both in the workplace, as well as communicating about attendance and scheduling. Things that employers may have started to wing it in the beginning of the pandemic, they have now probably come up with practices that would warrant updated policies.

And so, what we're going to see next year is going to have a lot of challenges as hopefully we all go back to our offices, at least with some degree of frequency. And then we're going to have to undertake issues about telecommuting, next year, and how we handle accommodations for employees who want to work from home when the pandemic ends.

So I think, Stephanie, that you and I are going to have a lot to talk about next year as we start thinking about coming back to the workplace and how we handle what we've learned during this pandemic, and how the change in the workplace during the pandemic is going to have long-term impact on work.

Stephanie Peet ([25:18](#)):

Felice, talking in 2021 means that we made it through 2020, and that is music to my ears. So I want to wish you a very happy holiday, a very happy new year. It has

been a pleasure, and I look forward to doing this again with you in 2021.

Felice Ekelman ([25:36](#)):

Same here.

Stephanie Peet ([25:37](#)):

Take care.

Speaker 1 ([25:40](#)):

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