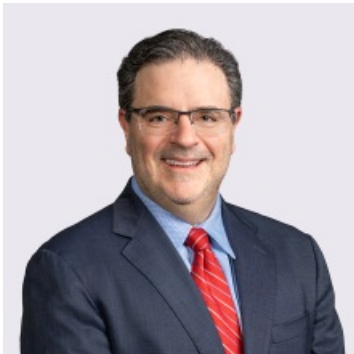


# Corporate Transactions and Workplace Law: An Indispensable Alliance

By Richard F. Vitarelli & Stephanie O. Zorn

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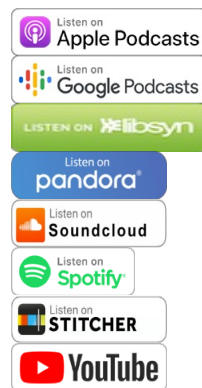
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When it comes to consolidations and restructurings, in-house counsel and the corporate law firms that support them have competing priorities to further a company's business objectives and mitigate legal risk. Labor and employment considerations are equally critical to a successful transaction.

Jackson Lewis P.C. · Corporate Transactions and Workplace Law: An Indispensable Alliance



## Takeaways

### Corporate Transactions and Workplace Law: An Indispensable Alliance

When it comes to acquisitions, restructurings or the sale of a business, in-house counsel and the corporate law firms that support them -- many of whom no longer have their own labor and employment departments or who want deeper labor and employment expertise to support a deal -- seek to further a company's business objectives and mitigate legal risk. Labor, employment, employee benefits, workplace safety and immigration considerations are critical to a successful transaction.

### What Employers Need to Know:

- There is a high volume of M&A activity as the world emerges from COVID-19, with substantial private and public sector investment.
- Heavy infrastructure businesses like construction, materials, utilities, energy and new energy industries are experiencing significant activity.
- Technology, manufacturing, hospitality and healthcare are also active industries.
- Acquisitions are a means of expanding in many industries in light of a tight labor market and the lack of available skilled workers.
- Many investors are pursuing the same targets creating competition in the

marketplace.

- Labor issues in transactions require careful analysis, understanding and planning during the due diligence process, particularly:
  - Acquirers looking to compete in union and nonunion sectors;
  - Complex labor relations profiles of seller and/or buyer (*i.e.*, multiple collective bargaining agreements, overlapping operations, hybrid union and non-union operations pre- and post-integration);
  - Evaluation of wages and benefit obligations, provisions impacting non-union operations, future operations, commonly owned businesses, successors, transferees or assignees; and
  - Multi-employer pension plan liabilities of the seller and controlled group companies.

Employment and employee benefits issues include:

- Employment agreements, executive compensation arrangements and restrictive covenant agreements;
- Fair Labor Standards Act/state and local laws governing minimum wages, overtime, exemptions from overtime, meal/rest periods and similar rules. ;
- Prevailing wage, Service Contract Act (or similar laws) providing special wage, benefits and recordkeeping obligations for certain types of work performed for governmental entities;
- Independent contractor classifications, any joint-employer risks;
- Pending and potential claims and litigation;
- Form I-9s and immigration law compliance;
- OSHA and workplace safety documentation and compliance;
- Employee handbooks and policies;
- Employee benefit plan compliance and go-forward strategy, including vendor agreements; and
- WARN obligations.

Consider utilizing a data analytics team to quantify noncompliant practices and identify potential liabilities, address as appropriate as part of the deal.

Effective deal-related documents that address applicable labor/employment/employee benefits issues, articulate and quantify risks, and facilitate communications between the parties and other stakeholders are important to advance and close transactions. These include, by way of example, due diligence memoranda, purchase agreements, common interest agreements, nonreliance letters, employee matters agreements and transitional services agreements.

Plan for and execute pre- and post-closing business integrations, including negotiation of new labor agreements, employee benefit plan terminations/spin-offs, new restrictive covenant and employment agreements and employee onboarding.

- Be prepared to work collaboratively with multiple stakeholders in an acquisition or sale, communicate clearly and share information.

## Transcript

Alitia (00:06):

Welcome to Jackson Lewis's 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 in its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? When it comes to consolidations and restructurings, in-house counsel and the corporate law firms that support them have a wide range of responsibilities and competing priorities to further a company's business objectives and mitigate legal risk. Labor and employment considerations are equally critical to a successful transaction.

On this episode of We get work™, we discuss the intricacies of employment law and the relevance of labor, employment, employee benefits and immigration issues that often arise during a corporate transaction. Our hosts today are Stephanie Zorn and Rick Vitarelli, principals in the St. Louis and Hartford offices of Jackson Lewis respectively, and co-leaders of the transactional services team. Stephanie assists clients with employee benefits and employment matters implicated in mergers and acquisitions with a special focus on clients in the private equity, technology, consumer goods, manufacturing and healthcare sectors.

Rick, also the co-leader of our National Labor Relations Practice group, has over two decades of experience as a labor law strategist, including representing employers in collective bargaining, union organizing and multi-employer benefit matters, including in the context of mergers and acquisitions, corporate restructuring and contract administration. Stephanie and Rick, the question on everyone's mind today is, what do employers need to know about employment issues that arise in corporate transactions to ensure material risks and requirements are appropriately addressed in every transaction? And if not, how will that impact my business?

Rick Vitarelli ([02:23](#)):

Hello everyone. I'm Rick Vitarelli. I'm the co-leader with Stephanie Zorn of the firm's transactional services group. I'm also chair of the firm's 160th attorney National Labor Law Practice and have been actively involved in our multi-employer benefits practice. For most of my 27 year career, I've worked in full service firms, joining Jackson Lewis in 2015. I have a background in restructuring and working with distrust entities. Stephanie and I started working on M&A projects together at Jackson Lewis in 2019 and the work has grown exponentially every year since then. Our transactional group represents primarily but not exclusively buyer side clients. Most of these deals are large and they seem to get larger each year. In some cases, we help clients prepare to sell and reorganize businesses to be sold. We also perform diligence reviews of labor, employment, employee benefits, workplace safety and immigration aspects of deals. And our work has been busy, particularly as we approach the end of 2021.

Stephanie Zorn ([03:17](#)):

Thanks Rick. Hi, I'm Stephanie Zorn. In addition to co-leading the transactional services group, I'm a member of the firm's employee benefits practice group. For the past 20+ years, I've exclusively represented management in employee benefits and

employment matters both in house with a Fortune 500 global consumer goods company and in private practice. Rick and I both had backgrounds in M&A work, so it was really terrific when we had the opportunity to start doing more of that type of work here at Jackson Lewis.

As Rick said, it really started in 2019 when we had the opportunity to work on a \$1.3 billion asset acquisition. Since then, the demand for the firm to do this type of work has grown exponentially year over year. In addition to the due diligence review that Rick mentioned, our deal work also includes preparation of the transaction related documents that are needed such as the due diligence memorandum, the purchase agreement and disclosure schedules, any common interest agreements that might be needed for the transaction, and non-reliance letters. We also interface with any co investors and rep and warranty insurers who might be involved in the deal. Rick, what are some of the labor issues you see on deal work?

Rick Vitarelli ([04:36](#)):

Well, Stephanie, we see acquirers today looking to compete in the non-union and union sectors at the same time. Heavy infrastructure businesses like construction, materials, utilities, energy, and new energy industries, are very, very hot right now. We're also seeing activity in manufacturing, hospitality, and healthcare. Some of this activity has been spurred on by the COVID-19 pandemic. Many targets have legacy labor issues and complex contractual profiles and multi-employer pension liabilities, the latter of which can get into the tens or hundreds of millions of dollars in some of these transactions.

We look at all of these as well as the structure of the companies that we're looking to buy and of the companies that are going to be receiving assets. We also look at related companies as part of these transactions. Our role has been really to look at how these labor obligations, the benefits obligations, and other employment obligations impact the deal risk for our clients. We also look at how these commitments and contractual obligations drive the purchaser's post acquisition integration plans.

We see a lot of activity these days in other industries as well, some of which have labor aspects and elements. These deals are looking to capitalize and continue to track and follow the movement of traditional industries in the gig economy and looking to implement new technologies to help old line businesses meet the needs of today's consumer. So as much as labor is sort of an older practice area going back to the 1930s, we see that a lot of labor issues impact these deals. We're seeing a big influx of capital and activity in light of the infrastructure bills that are being considered by Congress today. And Stephanie, your role on these deals has been to focus on the employment employee benefits work. What kind of employment employee benefits work do you see these days on deals?

Stephanie Zorn ([06:11](#)):

Well, before I address that, Rick, let me ask you a question. Do you see a lot of double breasting issues arise in your deal work?

Rick Vitarelli ([06:20](#)):

Absolutely. I think we have seen over the past few years no fewer than seven of those deals come in for in the transaction space as well as clients coming to us to talk about how they should align their corporate structures in light of having commonly owned businesses that operate in union and non-union sectors. It seems to be very commonplace these days.

Stephanie Zorn ([06:39](#)):

Okay, awesome. I had never heard of double breasting before I started working with you, so that's something I've learned about labor law in doing this work. Turning to employment and employee benefits, I work with a top team from across the firm, primarily partner level attorneys with specialized subject matter expertise. Our due diligence consists of a thorough compliance review of the target's employment agreements, executive compensation arrangements, and Fair Labor Standards Act exemption classifications for purposes of minimum wage and overtime entitlement. We tend to see overuse of exemption classification switch can lead to a lot of potential exposure. We also look at independent contractor classifications, any joint employer risks. We review the wage and hour practices of the target. We look at pending and threat and litigation.

We also review the Form I-9s to make sure those are compliant and identify any issues so we can advise the buyer whether new I-9 should be executed or existing ones merely adopted with the deal. We review immigration law compliance. That's particularly important in industries like tech industries that tend to have a lot of foreign nationals working here in the US. We review the OSHA documentation, the target maintains, and assess whether they're experiencing an excessive number of incidents relative to their size and their peer companies. We look at the employee handbooks and policies, make sure those are all up to date, contain the appropriate policies and have appropriate state agenda for any special state policies or rules that apply.

And we review the employee benefit plans and employee benefit plan compliance. As part of that, we review the vendor agreements that the target has with third party employee benefit plan providers. We review those for several reasons, but one of the largest ones is to ensure that the appropriate HIPAA or other privacy required provisions are contained in those agreements. That's very important. We also review whether the target has any government contracts, and that can be important for a number of reasons, including whether prevailing wage rules apply to the work that the target's performing. Rick, I think you've seen a couple of prevailing wage issues come up in deals that we've worked on. Can you give us an overview of what those look like?

Rick Vitarelli ([09:12](#)):

Yes. And this happens when targets are performing work that is for government entities and subject to either state prevailing wage laws or service contract laws that require that the target follow certain wage and benefit guidelines for work that are performed on the contract. What we see is that these rules come from the federal government under the Davis Bacon Act and the service contract act, but many, many states, including California, have state prevailing and service contract to act laws that also apply to work performed for those governmental entities. That seems

to be a place, because of the nature of the work that we're doing, whether it's in a construction or a service industry, that we need to be mindful of during these transactions.

We've seen a number of cases recently, a number of matters where we've had to really drill down on prevailing wage compliance as it also impacts FLSA compliance and overtime roles. So these can be things that are material and deals, and because of the nature of the deals that are occurring, heavy infrastructure type deals and service entities that are looking to purchase or device businesses, this is something that we just continue to see.

Stephanie Zorn ([10:18](#)):

Right. Another area where we review for targets with, international operations. We have a team of international firms that we partner with and these international partner teams perform the due diligence for non-US jurisdictions and work very well with us. Our work also includes, beyond the due diligence review, pre and post closing business integration. And this includes things like employee benefit plan terminations or benefit plan spinoffs. It includes new employment agreements for executives with compliant restrictive covenant agreements, employee onboarding, which includes things like new offer letters and new I-9s, and finally either before or after an acquisition reductions in force might be necessary for the targets workforce. So those are all aspects of the things we do on these deals. Rick, who are the firm's clients for our transactional services work?

Rick Vitarelli ([11:25](#)):

Well, our clients range in size and in industry, but we've seen concentrations of them, as I pointed out earlier, in some of these heavy industrial type settings, but we've also seen real tech companies with no labor overlay whatsoever that have different issues that are really looking at people who are into high tech applications, sort of the new economy. We see our work coming from a number of different sources. We've noticed that because of how the legal industry has evolved, many large firms that perform deal work are no longer staffing internally labor and employment capabilities or even general benefits capabilities. In many cases, these firms are localized in the major metropolitan markets and do not have operations or attorneys throughout the country in different markets where the differences in state and local laws are significant and can be very significant in deals.

So what we've seen is that because our scope is focused in on labor employment benefits and immigration issues and everything within that span, these firms will rely upon us to supplement their deal teams. So oftentimes we're called upon by large international deal firms to assist with the US based acquisitions and acquisitions that have extraterritorial application outside the US. We also see smaller firms, deal firms, general practice firms that will often ask us to get involved on M&A work that might be more on a regional or local basis. And so we've also supported firms like that as we've kind of seen this practice evolve.

And then of course we have clients that we work with that are strategic clients in a particular industry that are in an inquisitive mode looking to roll up other businesses and grow throughout the country. And this seems to be a place where



companies have acknowledged that because of labor shortages in the market, especially of skilled crafts people and in skilled positions of all types, it's easier to acquire a company to grow than it is to hire off the street and staff your workforces through normal means.

A lot of our work has also come from private equity firms that have asked us to become involved in deals, sometimes based upon a particular area within the span of work that we perform, and in other cases to handle the full swath of labor and employment matters as we go through diligence. So it's I think our clients are always the clients that are looking to acquire in the businesses, but the sources of the work and the folks that are asking us to get involved are diverse, including some other law firms.

Stephanie Zorn ([13:52](#)):

Our firm has experienced such a demand for our representation in deal work. What do you think has made us successful?

Rick Vitarelli ([14:03](#)):

Well, I think our firm has grown to 62 offices or 61 offices across the country. We just opened up an office in Riverside, California, so I lose track of the count, but it's a large number of offices throughout the country. I think the fact that we have 50 state capabilities and understand the laws in those states and we can provide local guidance to our clients on what's happening in those markets, including what some of the agency interpretations are that may not be published or well known outside of the normal sort of research volumes that we can access through electronic research. There's a real premium on knowhow on a local level.

We also have aligned ourselves across the country because of our size into what I would call sub-specialties within each discipline where we have practice areas. So we have a privacy group. We have a government contracts group. We have attorneys that focus on prevailing wage. We have national teams that handle Fair Labor Standards Act and analogous state and local laws on wages hours and labor code issues that may arise within a particular state or even a municipality. So it's difficult, I think, for firms that are handling this kind of work to be able to address those types of issues on the local scale as well as on the national scale. And we bring to our teams folks that are very experienced in these areas. A lot of our teams will consist of senior attorneys and partners or very senior associates who have been focused in on substantive disciplines that are relevant to the deal so we can really get an idea of how to appraise and even monetize in some ways the risk.

We have other functions or service areas within the firm that have been very helpful. We have teams of attorneys and non attorneys who can perform statistical analysis and can help crunch numbers on deals to help monetize the liability as the clients and the owners are trying to appreciate how a particular risk might impact a purchase price. So we use these for our FLSA collective actions practice across the firm and to prepare for mediations and trial, but we also use it to support the deal teams, and they've been very, very, very good in helping us and they help us as a seamless part of our team.

As far as our teams are concerned, we've had to draft our attorneys and work with them to understand the real time pressures of a deal. Working with these international firms, we've had to learn and take our already good client service model and adapt it to a seven day a week 24 hour day schedule with extremely acute deadlines that are part and parcel of all these deals. So we look for those substantive specialties, but we also look for lawyers that can collaborate and work together seamlessly as part of teams, make sure that they're talking to one another on a regular basis about things that might carry over to a different work stream. So, we're really happy with the folks that we have here and the ones that have really adapted their practices to be able to deliver tremendous value.

Stephanie Zorn ([17:00](#)):

What do you see in the near term for M&A activity in general?

Rick Vitarelli ([17:04](#)):

Well, Stephanie, there's a huge need for M&A support. I think you and I can testify to that if we needed to, but deal volumes are very high right now. I think part of the reason for the deal volume is that investors had been holding money during COVID and had been prepared prior to COVID to invest in businesses that could help them expand their footprint or their capabilities. In some cases, investors are looking to go into brick and mortar and old line businesses where they see that as part of the need to enhance and rehabilitate our national infrastructure are going to be hot industries. New areas of energy, solar, wind power are really demanding that companies are prepared to be able to meet the need for the growth. Once the government funds this Infrastructure Bill, it is going to be a shot in the arm for some of those businesses.

And we see that a lot of companies and investors are clamoring for the same targets. So oftentimes we're involved in bidding situations under very tight time pressures to perform our work and advise clients on how they can best present their bids as they make those decisions as a business. So I think that as we look at things moving forward, this area is hot and it's only going to get hotter. And with the real dearth of skilled trade and labor in many, many industries, including white collar industries, acquisitions are going to be the way that businesses will decide to grow and scale their operations. So there's a lot more to come, but right now we're seeing the beginnings of this activity and everyone in the space seems to be extremely busy.

Stephanie, there's so much that we've seen over the past few years. Are there any other observations that you would have for folks that are looking at the M&A space and considering acquisitions or potentially considering being acquired?

Stephanie Zorn ([18:44](#)):

Yeah. I think if they haven't undergone a thorough compliance review within the past three to five years, that is going to be a really useful exercise to go through the due diligence process. Even if they don't end up consummating the sale, they are going to learn good things about their business and they're going to be able to identify areas where they can further mitigate risk and make changes. So, that is super helpful to clients even if the deal falls through. And I would echo your



comments about our data analytics team. The first time I ever used them on a deal, it was so impactful for the buyer to be able to see the quantified numbers on what the practices, non-compliant practices of the target, what that could end up costing them if they didn't make changes and if those potential liabilities were not addressed in the purchase agreement and in the purchase price. So that's an amazing resource for us to be able to bring to this work.

Rick Vitarelli ([19:49](#)):

Stephanie, if you could comment for a moment too in terms of our approach to working with various stakeholders and constituencies during deals, and oftentimes in these transactions there are other law firms, consultants, and stakeholders that are involved. Can you just comment for us how our firm will approach those constituencies on a deal?

Stephanie Zorn ([20:08](#)):

Yeah, absolutely. We work really, really closely with deal counsel obviously on these deals. They're under amazing pressure and tight deadlines and we're very responsive to that. We understand the pressures that they're working under. So responsiveness is absolutely number one with us and an equal number one is the excellent work that we bring to the table, the excellent substantive work of equal importance. We also interface with any co investors on the deal and any rep and warranty insurers who are involved. So, those are some very important interfaces that occur in addition to interface with the direct client. Can you think of any others that I did not mention? Well, the unions, that could be important, I'll let you speak to that.

Rick Vitarelli ([20:53](#)):

Yeah. I think we work with so many constituencies on deals. On these teams, we'll sometimes have an investor in the background or more than one investor, we'll have the portfolio company or the strategic client itself, and we'll also have consultants that work in the background that will assist with the diligence process and sort of understanding the risk profile of various red flags that we find in these deals. And so our firm works collaboratively and cooperatively with all relevant stakeholders that are aligned with our clients on these deals to make them work. What we've learned over time is how to be communicative, how to understand what we are handling versus what they handle, and how to make sure that we work with these other constituencies to make sure that the client is cared for and has its issues addressed in these transactions, which can be extremely complicated.

Stephanie Zorn ([21:46](#)):

Right. Absolutely. Especially on some of the larger deals, it's common that an accounting and human resources advising firm is involved and our work in theirs can overlap a little bit in some areas. So we're very cognizant of connecting with them, having good open communications and making sure we're coordinating our reviews properly and sharing information. Rick, it was great to talk to you a little bit about our M&A work today.

Rick Vitarelli ([22:17](#)):

Our favorite topic.

Stephanie Zorn ([22:18](#)):

Our favorite topic.

Rick Vitarelli ([22:20](#)):

And as if we don't speak to each other every single day 14 times, but it is an absolute pleasure, Stephanie, as always to talk to you and to speak with you about this topic. It's really an important one for our clients and one that I'm just really glad that we've had an opportunity to work on together over the years.

Alitia ([22:36](#)):

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