Podcast

2022: The Year Ahead for Employers - Industry Forecast

By Eric J. Felsberg, Maurice G. Jenkins, Stephanie E. Satterfield & Sarah R. Skubas

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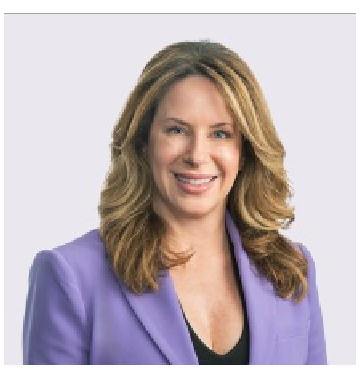

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Details

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As we enter the third year of the pandemic, change continues to be the one constant for employers. This episode in *The Year Ahead* series features a Q&A discussion with co-leaders of Jackson Lewis' Healthcare, Manufacturing, Retail and Technology industry groups who will share insights on how industries are addressing the challenges seen in 2021 and offering best practices to stay compliant and mitigate risk in 2022.

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Takeaways

The evolving nature of COVID-19 introduced obstacles to return-to-office plans. New virus variants brought vaccine, testing and mask mandates to the forefront, along with trickle-down impacts like labor shortages and an increase in accommodation requests. George Floyd's death ignited a global response that further fueled the momentum of social forces and moved legislatures and organizations to respond. California led the charge in requiring diverse representation on boards of directors. In the financial industry, we also saw the Nasdaq and other institutions require women and minorities to be included on boards. Add to that a new administration and executive agency leadership with distinctly different policy agendas than their predecessors, and we find ourselves facing an incredibly challenging year in 2022.

New Ways to Work

COVID-19 has forced businesses to find new ways to work. In both the healthcare and manufacturing spaces, labor shortages and emerging technologies are having a direct impact on how employees perform their jobs and deliver products and services.

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Employee Engagement

Union activity and organizing are on the rise as social forces coincide with increased remote work options stemming from the pandemic and a supportive legislative and regulatory environment. Employers should seek feedback from employees to identify and address areas of concern early to mitigate future issues.

Addressing Labor Shortages

Employers across all industries struggling with a shortage of skilled laborers are increasingly relying on immigration, turning to third parties and looking to internal resources to train current employees for new roles to fill gaps.

Transcript

Alitia (00:08):

Each year, Jackson Lewis publishes *The Year Ahead for Employers*, a forecasting resource to support organizations as they navigate the legislation, regulation and litigation trends impacting their business. In 2022, we provide the insights and analysis of our attorneys on labor and employment law in the field in a variety of digital imprint formats, including this four part podcast series.

As we enter the third year of the pandemic, change continues to be the one constant for employers. Return to office plans have been disrupted by COVID-19 variants and labor shortages. Coalitions of social forces have amplified calls for equal rights and changes in how we work. And policy shifts ushered in by the Biden administration and influential regulatory agencies converged, creating yet another challenging year ahead for employers. This episode of *The Year Ahead* series features a Q&A discussion with co-leaders of Jackson Lewis' healthcare, manufacturing, retail and technology industry groups, who will share insights on how industries are addressing the challenges seen in 2021 and offering best practices to stay compliant and mitigate risk in 2022.

Our moderator is Stephanie Lewis and she is joined by Eric Felsberg, Maurice Jenkins, Michael Mortensen, and Sarah Skubas. Stephanie is a principal in the Greenville office, a member of the firm's Board of Directors, as well as co-leader of the litigation practice group and the pay equity resource group. She advises businesses on practices and policies to foster employee engagement and avoid litigation and represents them when litigation is unavoidable.

Eric is a principal in our Long Island office, the co-leader of the technology industry group and the national director of the firm's data analytics group. He leads a team of multidisciplinary lawyers, statisticians, data scientists and analysts with decades of experience managing the interplay of data analytics and the law. Maurice is a principal in the Detroit office and co-leader of the manufacturing industry group. He advises and represents employers with respect to strategic labor relations matters, collective bargaining, and NLRB litigation. Mike is a principal in the Dallas office and co-leader of the retail industry group. His practice focuses on traditional labor relations, workplace law and preventative advice and counseling. Sarah is a principal in the Hartford office and co-leader of the firm's healthcare industry group. Her practice is focused on employment litigation, preventative counseling and labor relations. Stephanie, Sarah, Mike, Maurice, and Eric, welcome, and thank you for joining us today on *The Year Ahead* series.

Stephanie Lewis (03:05):

Hello, and thank you for joining the industry forecast segment *2022: The Year Ahead for Employers*. I'm Stephanie Lewis. I'm the managing principal of the Greenville, South Carolina office. And I will be moderating a panel discussion of our industry thought leaders discussing the legislation, litigation and trends impacting the healthcare, manufacturing, retail and technology industries.

It is no surprise to any of you that 2021 brought a tremendous amount of change and compliance challenges in the workplace. The evolving nature of the COVID-19 virus introduced new obstacles to your plans to return to the office. The Delta and Omicron variants have brought vaccine, testing and mask mandates to the forefront, along with trickle down impacts like additional reasonable accommodation requests and labor shortages.

George Floyd's murder ignited a global response, further fueling the momentum of social forces, moving legislatures and organizations to respond in both word and concrete action. California, of course, led the charge requiring diverse representation on boards of directors, and in the financial industry, we saw the NASDAQ and other institutions require women and minorities be included on boards as well. Add to that a new administration, an executive agency leadership with distinctly different policy agendas than the prior administration, and we find ourselves facing an incredibly challenging time in 2022.

So let's get started with our conversation. Maurice, what do you believe the single greatest impact was that COVID-19 had and continues to have on the manufacturing industry?

Maurice Jenkins (05:00):

Well, first of all, thank you for that question, Stephanie. I'm Maurice Jenkins. I'm a partner in the Detroit office of Jackson Lewis and co-chair of the firm's manufacturing industry group. That question, Stephanie boils down to COVID-19, what it really did is force manufacturers to find new ways to get the work done through the shortages in manpower, that forced as manufacturers and other industry leaders have to do, forced them to look for new ways to manufacture their products, deliver their services associated with those products, and close that much valuable gap or disruption in the supply chain, which was also caused by the COVID-19 pandemic.

The dislocation of labor, these new technologies that we see evolving in the manufacturing industry among our clients and other companies make it clear that there'll be an urgent need going forward. And that impact will be felt with respect to the skills gap. Those skills that will be needed in that new industry

4.0 environment that manufacturers are going to, where digital technologies, artificial intelligence and those kinds of things will directly impact how employees perform their jobs, where and what they actually do.

Stephanie Lewis (06:36):

Maurice, that's such an important point. What types of incentives or arrangements do you see employers in the manufacturing industry offer to address the labor shortages and the challenges that they face as a result of COVID-19?

Maurice Jenkins (06:53):

Well, in the short run, what we're seeing is a heavy reliance on immigration with respect to obtaining those skills that are necessary to operate in a digital environment where again, manufacturing is headed. So at the same time, last November, President Biden signed into law a $1.2 trillion infrastructure bill that included as part of that incentive or focus, if you will, enhancing the skills and reliability of the supply chain. And so again, these are two factors that will continue to require employers to look at their talent and what their talent is capable of doing, because that flexibility in the way products are produced is going to only be strengthened.

Stephanie Lewis (07:50):

Maurice, in light of the labor shortages, do you see most manufacturing clients implementing vaccine mandates at this point?

Maurice Jenkins (07:59):

Well, many have, but much like the CDC provides and most state legislatures that have addressed it or not banned it, if you will. Manufacturers are taking a reasonable approach. Those manufacturers who are union represented, they've already had those discussions and the unions have been fully supportive of vaccinations, but not mandatory without those exceptions recognized by law, whether it's religious belief or some other underlying medical condition. And what we'll see is that that kind of scrutiny only tightens the workforce testing because as we see with Omicron, the infections have not gone away. Those impacts that we saw in 2021 will continue into 2022 and really put a strain on employers' ability to a match their workforce with employees ability to match their workforce with the needs of the business.

Stephanie Lewis (09:06):

Really valuable insight Maurice, thank you so much. Sarah, no industry has faced a greater impact from COVID-19 than the healthcare industry. When we think about the evolution of COVID-19 over the past two years, what should employers in the healthcare industry be preparing for and how?

Sarah R. Skubas (09:26):

Hi, Stephanie, great to be here with everyone. I'm Sarah Skubas, I'm a principal in the Hartford office and I'm a co-chair of the firm's healthcare industry group. And you nailed it on the head, Stephanie, right? There has not been any other industry that's had a more challenging two years driven by the pandemic. And as Maurice indicated, there are a host of issues that we anticipate those in the healthcare industry need to be prepared to continue to address as we head into 2022. I could probably talk for 30 minutes on all those issues, but if I had to identify a few other than obviously, the impacts of the current COVID-19 surge, like Maurice addressed, there's a real staffing crisis in healthcare driven by a couple of unique factors specific to the industry. Certainly vaccination mandates, burnout, escalated retirement of direct care providers, a lack of pipelines for those new providers.

And so I think employers in the healthcare industry really need to evaluate the specific circumstances driving those staffing shortages to view the use of travelers, locum tenants, and other temporary employees to help manage that issue specific to the industry. I think there's going to be again, similar to Maurice, but with the healthcare lens, another issue they're going to really have to look at is expansion beyond what's been traditionally an in-person sort of brick and mortar patient care experience. And as a result, a really evolving workforce. So healthcare employers are going to have to continue to evaluate their ability to provide care through telehealth, other online tools. I think there's going to be a real focus on additional investments and training of employees to facilitate this growth area. Along those lines, I think healthcare employers in 2022 are going to continue to take a look at their remote workforce outside of their traditional employee footprint, right?

It's a newer model for the industry that hasn't really traditionally employed a remote workforce, really focusing on individual employment at a local level. There's obviously a host of employment taxation and other implications if choosing to employ a workforce outside of the states in which a healthcare employer traditionally operates in. And I think we're going to really see a lot of expansion in that area to address all these issues. 2021, huge for mergers and acquisitions in healthcare and I don't see that stopping anytime soon. So there's going to be a host of issues, especially in employment and labor issues and liabilities that come as a result and that was really driven by the pandemic, right? They need to be competitive in the market in expanding their footprint as a key component of that.

And then finally, if I had to say again, I could probably go on forever, but if I had to identify one of those final issues that I think healthcare employers are going to really be faced within 2022, which is certainly a direct result of the demands of the pandemic is increased union activity, both in terms of our existing unionized workforces, where we're going to see it increased demand for more unionized employees asking for more, a lot has been driven by the pandemic and then certainly increased organizing efforts. And we've already seen it a lot in the nursing field in particular. So it's going to be a really, a lot of challenges coming our way in 2022 for healthcare employers, but a lot of opportunities as well I think.

So, Mike, I know one of the areas you specialize in is union avoidance, and maybe you can give us some insight based on Sarah's point about more union activity coming out of the pandemic and the healthcare industry and about what's driving that.

Michael T. Mortensen (13:09):

Thanks, Stephanie. Yes, I'm Mike Mortensen. I'm the co-chair of the retail industry practice group and I'm based out of our Dallas office. And there are quite a few drives, obviously, with the onset of COVID-19, safety issues were at the forefront. From the retail perspective, one new aspect was employment practices for retailers because they were frontline workers who became front-page news and the public really got some support behind it. And there were frequent conversations, a lot of publicity about employment practices taking care of employees because it impacted everyone. And so in addition to those concerns, unions had exploited the opportunity by increasing efforts to organize lobbying and being very vocal in the media about advocating for workers' rights and a lot of employees were engaging in what's called protected concerted activity, even in the non-union environment where employers have difficulty sometimes recognizing what exactly protected concerted activity is and how do you appropriately address it.

Stephanie Lewis (14:31):

So we saw a lot of walkouts over things like requiring the workforce that we do have to work extra hours or certainly vaccine mandates. Is that what you were seeing too, Mike?

Michael T. Mortensen (14:42):

Yes. We were seeing it quite a bit. And a lot of it comes to do with brand recognition. When you speak about retailers, everyone knows have their favorite retailers and they're in there all of the time, so they really identify with it and that gets a lot of attention. And what you saw over the last two years were a number of petitions circulating throughout the internet being publicized on media, websites, and papers, and organized walkouts for big-name employers. And I'm sure we can think of several of those and because of the publicity, it sort of compounded with the onset of the George Floyd protests, COVID, everything that was going on, there was an increase in social awareness among the public at large and that is really what drove quite a bit of this.

Stephanie Lewis (15:37):

Well, your mention of George Floyd takes us to the social awareness movement that we've all faced in the last year as well. So, Eric, I wanted to hear from you and the technology industry, of course, there have been employees and stakeholders demanding specific commitments and dictating how organizations should be run. What are the pressing areas or questions that employers in the technology industry need to address to foster an inclusive environment? And also what preventative steps should they be taking to address the calls for meaningful social change?

Eric J. Felsberg (16:18):

Yeah, thanks very much, Stephanie and I'm happy to address that question. My name is Eric Felsberg. I'm a principal in the New York Metro region of Jackson Lewis and as Stephanie alluded to, I am the co- leader of the technology industry group. Look, the technology industry has long been the focus of social awareness and diversity-related initiatives well before some of the events we have seen unfold over the last several months and a couple of years. And oftentimes the social awareness and diversity-related initiatives will result as you mentioned in commitments being made by organizations in the establishment of diversity-related policies and procedures. However, although, well-intentioned, a lot of times these initiatives have not produced the change in the timeframe desired and we've seen this a lot in the technology space.

Look, technology plays a huge role in our everyday lives and when you couple that with the current environment, it's really brought the issue of diversity inclusion, especially in the tech industry, under a bright spotlight. There's an increased demand, as you mentioned for transparency and measurable change and we've seen some results from this, right? We've seen an increase in the dialogue between employers and employees. We've seen a lot of increased visibility, oftentimes in response to demands, even from external pressures around the demographic composition of various tiers within an organization and what we have seen on our end is an increased desire for quantitative and is an increased desire for quantitative analyses of workforce data and trends. And so for the tech industry employer, when you're trying to foster an inclusive environment, you want to consider a number of items. First is, and perhaps most important, you want to kind of identify those reason and interests that have prevented change in the past. As I mentioned, we've seen a lot of commitments in the past. And again, with the best of intentions, a lot of times those commitments aren't met. So you want to be able to identify, employers do, identify those reasons why change hasn't happened in the past and the question of quantitative analyses, right? Undertaking quantitative analyses, not only to identify issues in the workplace, but to set reasonable thresholds. I have fueled a number of calls as I'm sure probably some of you have around just kind of pulling a threshold or something that sounds favorable, that we can kind of put out there. And then we'll worry about how we're going to kind of hit that later or meet that commitment.

You really want to try to quantify that issue as much as you possibly can using data and using some benchmarking information. And then perhaps if not the most important, certainly close to the top is to seek feedback from your employees, right? And the pandemic has really made this more difficult. Because you have a number of employees, especially in the tech space, a lot of employees working remotely. And this has had a very significant impact and on employer employee engagement. So employers have really had to be creative with respect to fostering diversity and inclusion when you're managing a workplace that is largely remote. So the use of things like employee engagement surveys and climate assessments can really prove helpful in this space. But look, regardless of the efforts undertaken, employers have to set realistic timetables and objectives. They should avoid trying to get too far out beyond their skis and really try to set something that's realistic and meaningful.

And as they're doing this, seek objective advice and counsel from their advisor.

Stephanie Lewis (20:34):

Those are great practical pieces of advice, Eric, for dealing with these calls to action and for companies who want to respond with policies that create meaningful change. Maurice, I'm curious, in the manufacturing industry, we've seen a lot of large employers really look to be leaders in this space. Is there anything that you would say is a particular good example of one of our manufacturing leaders action in response to calls for social change or a particular watch out?

Maurice Jenkins (21:09):

Well, there are a number of companies that have demonstrated and have historically been able to, as my daughter would say, show receipts when they're challenged with respect to their commitment to diversity and inclusion and equity as the George Floyd events of last year unfolded. The concept of equity began to bubble up and going to Eric's comments, that use of data is twofold. Because as manufacturers are seeking to have more well established numbers and data that would show commitment in the DEI space, whether it's through their supply chain or within their own C-suite or organizational structures, you still have numbers at stake and performance management, even hiring decisions are being driven more and more by artificial intelligence and data that from the standpoint of manufacturers, that's going to continue as they seek to upskill their workforce to implement those training programs. And yes, a number of, shall I say, manufacturers with foresight that aren't waiting for disruption in their supply chain have implemented strategies to ensure that the skills of their workforce are there at the same time, balanced against their commitments in the DEI space.

But there is still going to be challenges and pressures for employers in the manufacturing space to try to manage performance using data and using technologies like body sensors. We hear about certain large global companies that use AI to determine whether individuals are really at work and working at a particular pace. And so, these kind of technologies are crucial in the manufacturing space to close the supply chain gaps and deal with fluctuations of manpower, but they also channel employers from a fair employment practices standpoint to ensure that their policies and the way they select and who they select for discipline or advancement is consistent with that balanced non-discriminatory approach, data and anecdotally.

Stephanie Lewis (23:40):

Great, great, very helpful. So I want to turn now to legislative activity, Mike, there were several pieces of federal legislation with significant impacts on employers introduced in 2021 and they're making their way through Congress. And there's also, as we know, sweeping regulatory changes at the NLRB and the EEOC, not to mention OSHA spurred on by the change in administration. Where do you see the opportunities and potential liabilities in the retail industry?

Michael T. Mortensen (24:14):

Well, it's important to understand what's pending out there with respect to some of these changes, and it's not unusual with respect to the National Labor Relations Board for there to be a change every time there's a change in administration. Well, prior to his inauguration, President Biden pledged to be one of the most labor friendly, pro labor presidents in history. And so far, he appears to be making good on his word. And shortly after taking office, he fired the Trump appointed general counsel who is responsible for setting the prosecutorial agenda for what cases will be presented for the board. So in addition to the pending legislation, which I'll address, he created a White House task force that was specifically commissioned with the goal of increasing union membership across the United States and engaging in public outreach to both union and non-union workforces.

And the most notable of the pending legislation is the PRO Act, or the Protecting the Right to Organize Act. And it was passed in the House and it is pending in the Senate. And it includes sweeping changes to strengthening unions and making it easier to organize imposing increased penalties for unfair labor practices. And it even includes a provision in there that would allow individual employees to file civil claims for unfair labor practices and impose personal liability on officers and directors. Now these actions are dependent on public interest and there has been an increased public interest in unions, but fortunately, and this is not for certain, but we don't anticipate the PRO Act will be passed by the Senate unless there's a change to the filibuster rules, but the impact of the PRO Act can be accomplished through different means.

So for example, the Build Back Better Act, which is a reconciliation bill, and you wouldn't expect a lot of changes to substantive statutes like the National Labor Relations Act, but it does in fact include some labor relations issues. Meaning, there would be imposed, and this is still in the bill that came out of the health, education, labor, and pensions committee within the Senate to add severe penalties, fines to employers for violations, including not to exceed $50,000.00 for violations, including not to exceed $50,000 for each violation, or if it's a discharge or results in serious economic harm, that could be doubled to $100,000 and also include personal liability for officers and directors. And so that's a back door to enacting some of the proactive provisions that may not be done, but there's a question as to whether or not that's appropriate for A reconciliation bill, which is much easier to pass at 51%. If that fails, if both fail, the National Labor Relations Board has indicated a proactive approach. And when I say the Board, I'm referring to the Board's General Counsel, Jennifer Abruzzo, who is a former General Counsel for the CWA and very, very aggressive with a pro-labor agenda, and has announced multiple initiatives that would impact not only retail, but all employers as a whole.

And it includes things like overturning past precedent regarding making it easier to organize the workforce, scrutinizing handbook policies, as we've seen in the past, expanding the definition and protection of protected concerted activities, especially in a non-union location, which is for a lot of retailers outside of the grocery industry, in the store fronts, that could be a significant issue. I'm sure many employers are receiving letters or petitions from groups of employees complaining about working conditions and management sometimes have difficulty recognizing what's considered protected concerted activity. And even if an employee were to engage in unprofessional or inappropriate behavior, they could still have the protection of the Act and an employer could unknowingly violate the Act.

There's a number of other provisions in there just knowing that this is all going to increase union activity, potential protected concerted activity with heightened penalties. And so to prepare, what employers should really do is, one, educate themselves on what protected concerted activity is, conduct vulnerability assessments to determine, okay, well, what are the issues in our workforce? What do we need to address? How can we improve our employee relations within our organization? And a lot of that may have to do with a wage and benefit analysis, just given the current economic climate, the staffing shortage, and the Great Resignation, educating and training those managers on how to respond to complaints from employees or union demands for recognition, including reviewing handbook policies that are lawful under current Board law, but may be overturned.

And it's simple things such as confidentiality policies, civility and respect in the workplace policies, things that you wouldn't ordinarily recognize as a potential violation, but could result in a notice posting that must be read and distributed to all of your employees depending on what the Board would require. With retail specifically, and for the last two years, it's hard to say this is something preparing for the future because it's been ongoing for the last two years, but preparing for increased attention, whether it's through demonstrations, nationally publicized petitions, as you've seen with a lot of other actions that have been taken primarily in the retail industry because of the brand recognition and the interaction with the public. And so there are a number of things, and this should be very high on the agenda because it is often overlooked in non-union environments and this is something, given the focus and outreach that the National Labor Relations Board and the White House Task Force is taking, could be more and more common. And so that's a really important issue to keep on the radar.

Stephanie Lewis (31:26):

Mike, that makes really good sense. Employers really need to understand the guardrails around what is protected activity, even outside of their unionized workforces, because there's so much more protected activity going on. And that includes protests and it includes Facebook and it includes social media and it includes these walkout threats. So really need to understand the guardrails of what you can and can't do and how to recognize protected activity. And it's just no question that all of the agencies are more aggressive in terms of policing employee rights. I mean, I know Eric can attest to that with OFCCP and we all have seen that with the EEOC as well. And, of course, Sarah, I am interested in how the healthcare industry is planning for additional compliance with labor shortages with the various agencies creating compliance concerns in the healthcare industry around COVID-19.

Sarah R. Skubas (32:21):

Yeah, it's a really hard time and we're stuck right in the middle of it. Vaccine mandates have dominated the healthcare industry since around the summer, whether it be through a rash of voluntary mandates that a lot of large healthcare hospital organizations undertook to smaller practices or now being forced to comply with what I call a hard mandate. No test out option, whether it be through state or local rules, and now the pending CMS for certain CMS covered providers and suppliers. And that, while certainly it directly implicates the healthcare industry, it indirectly implicates so many other industries. I can't tell you how many clients I've spoken to who have questioned to say, "I'm not covered by CMS, but I provide laundry services," or, "I do valet services at a covered provider and they're within the scope."

And I think that's going to have a real big impact on shortages and staffing, not just for healthcare, but all those other industries that support and work for our healthcare clients. And healthcare, and all industries, are getting really creative, but there are regulatory impacts. Not everybody can go in and provide care to an employee, and so really looking at internal resources to help train up existing employees, again, looking to third party to fill the gap. We've seen an increase in utilizing third parties to come in and run ERs and other departments within a hospital organization. So healthcare employers need to get creative just like others in the industry to fill the gap driven by a lot of the pandemic, and specifically vaccine, I would say, we'll continue to see that trend.

Stephanie Lewis (34:05):

That's a great place to end this conversation. We've heard some themes among the industries around labor shortages, employee relations concerns, the rise of labor activity, and the practical advice on how to implement a compliant DEI program. It's really great to hear from this esteemed panel of industry group leaders discussing what to expect in 2022 in the healthcare manufacturing, retail, and technology industries. This is a part of a broader series of videos and podcasts and webinars and interactive resources to create a more dynamic and engaging experience for our clients. So we really hope you enjoyed this conversation and learned from it. And we thank you all.

Alitia (34:55):

Thank you for joining us. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. For more information on today's topic, our presenters, and other Jackson Lewis resources, visit jacksonlewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client/lawyer relationship between Jackson Lewis and any recipient.