

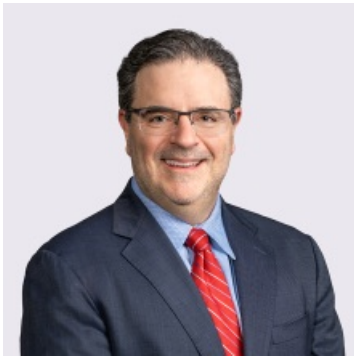
Podcast

Live from CCC2023 Ep. 6: Top Employment Law Topics for 2023 – a Quick Survey (Part I)

By Richard F. Vitarelli, Joshua M. Henderson, Patricia Anderson Pryor &

May 2, 2023

Meet the Authors



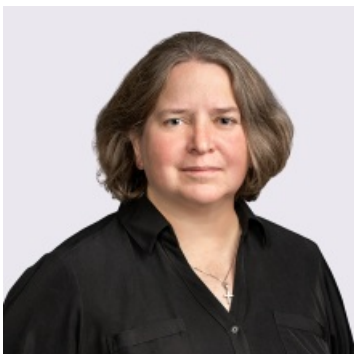
Richard F. Vitarelli

Principal
860-331-1553
Richard.Vitarelli@jacksonlewis.com



Joshua M. Henderson

Principal
Joshua.Henderson@jacksonlewis.com



Patricia Anderson Pryor

Office Managing Principal
513-322-5035

Details

May 2, 2023

Welcome and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis' Corporate Counsel Conference, CCC2023, at the Waldorf Astoria Monarch Beach resort in Orange County, California. What follows are high level conversations on conference programs and why they were important topics to present now.

Jackson Lewis P.C. · Live from CCC2023 Ep. 6: Top Employment Law Topics for 2023 – a Quick Survey (Part I)



Transcript

Alitia Faccione:

Welcome, and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis's Corporate Council Conference, CCC 2023 at the Waldorf Astoria Monarch Beach Resort in Orange County, California. What follows are high-level conversations on conference programs and why they were important topics to present now. In this episode, we cover topics in a time honored CCC tradition, the speed round as Jackson Lewis Lawyers present key issues and takeaways to best prepare employers for what is happening now and coming soon. Rick Vitarelli talks us through M&A Transactions, The Top Five Laborer, Employment, Benefits, and Immigration Issues. Josh Henderson and Sean Paisan, bring everyone up to speed on OSHA with the 2023 regulatory update. And Patty Pryor portends the future of religious accommodations in Is there a change on the horizon?

Good afternoon, and thank you for joining us for Jackson Lewis's We Get Work Podcast live from CCC 2023. I'm here with Rick Vitarelli. Good afternoon, Rick. Can you tell us a little bit about yourself, where you're from, and about your practice at Jackson Lewis?

Rick Vitarelli:

Well, I was born and raised in Connecticut. Lived here my entire life with the exception of seven years where I lived in Boston. I've been practicing law since 1994, so it's 28 years as of today. I am resident in the Hartford Connecticut office, but I am co-leader of two national practices, the labor relations practice, and the transactional services practices of the firm. So, I take on those administrative roles in addition to a pretty heavy caseload.

Alitia Faccone:

So, the title of your presentation today was M&A Transactions, The Top Five Labor, Employment, Benefits, and Immigrations Issue. Can you provide our listeners with a brief summary of what was covered in your presentation and why, Rick, you think it was important to present this topic at CCC today?

Rick Vitarelli:

Well, it was important I think first of all, and some of the feedback I've received so far from the topic is that not many people knew that Jackson Lewis had mergers and acquisitions or transactional services practice. So, that was I think something of news for some of the people in the audience. What I covered in the presentation today was five key issues that come up in diligence, transactions that relate to the subject matter areas that our firm practices in. So, I addressed five categories, because I couldn't stick with individual items, but I five categories of issues that come up in transactions. So, I started off with employment issues that come up in transactions. So, these are things like overt threatened litigation risk, whether they're in suit or whether it's demand letter, and then latent risks that we can take a look at based upon our expertise in particular industries or with particular types of issues that can arise for clients like payroll issues, overtime issues, those kinds of things, other compliance issues.

And then we talked about other legal requirements that could be triggered by a transaction like more requirements and so forth. We talked about how we try to quantify risk in transactions like first of all identify risk, then quantify the value in dollars or in impact to operations, and then come up with solutions and that we can help our clients feel comfortable with in proceeding forward with a transaction, understanding what their business needs are going to be post transaction.

Then I went into some discussion about employee benefit risks. We talked about the need to vet a seller's benefit plans to ensure that they're compliant with law and qualified. Talked about how there are options for a buyer in terms of structuring a transaction to either set up their own plans, replicate plans, have seller plans transferred depending upon what the results are of diligence. We talked a little bit about that. We also addressed issues involving immigration, vetting the I-9 Compliance, looking at the timing of visa transfers for non-immigrant workers that are working under visa programs and how that can impact a transaction, its timing. And then we got into some substantive labor issues and multi-employer pension benefit issues, which are related to sort of

union operations, and covered those issues with the attendees.

Alitia Faccone:

So, you covered a lot in your presentation. What are some of the issues that you think really resonated with our attendees and what did they really want to know?

Rick Vitarelli:

Some of the feedback so far has been focused on really trying to understand how we quantify risk for things like the union organizing risk or the impact of a seller structure if we end up in a stock transaction and take on their business, how we can assess the impact of flaws in the employer structure. Clients were surprised at how we can calculate risk for such things as potential class action litigation liability for a seller. And so, I explained to them that we follow a protocol that's very similar to what we do in cases where we have to go to a mediation on a contested case where someone's made an allegation that an employer is non-compliant and how we come up with the numbers using statisticians that we have to help us provide our legal advice to clients on that risk factor, including the likely dollar value of that risk or at least variations of dollar value based upon worst case or best case scenarios. So, that was something I think that was enlightening.

Alitia Faccone:

What do you believe to be the key takeaways that employers should keep in mind?

Rick Vitarelli:

The key takeaways for employers in dealing with these issues today really stemmed from the need on these transactions and these opportunities for companies, especially to acquire businesses, to really understand how to practically understand the risks that are present in any kind of a deal, a potential deal, understand how to quantify it as a high, medium or low risk depending upon the client's tolerance and what they consider to be material. And then third, how do understanding that risk come up with practical solutions to proceed with the transaction? We see a lot of transactions now where there's multiple bidders looking to buy a particular entity. It seems like investors and strategic companies are looking to pick up companies that are in brick-and-mortar or even old-line industries, infrastructure industries, construction, utilities. It's sort of like new energy areas, tech companies. It's really important that as you go through this diligence process that you align yourself with practical legal counsel that can help you make these decisions and come up with workarounds so that you can make the most appealing pitch to a potential target.

Alitia Faccone:

And so, Rick, why is it important to hire a labor and employment firm when an organization is facing this type of transaction, and how is Jackson Lewis providing assistance to clients in this area?

Rick Vitarelli:

Well, if you're going to assess labor and employment law risk in a transaction where a labor employment risk factor is material and a gating issue as to whether or not the transaction's going to go forward, you need to get someone who understands those risks and can understand them to a point where they can be identified, quantified, and addressed in a practical manner. So, just like you'd go to a doctor who is a cancer specialist, you had cancer, you'd go to somebody who understands those types of issues, that come up in a transaction because you'd have someone who has a well-rounded understanding of the law, but also the practical application. In the case of things like union relations or labor agreements, you want to have somebody who understands how to administer a labor agreement, understands the unions involved in the personalities, and how labor-management relations operate. So, they can give you an assessment of really what it means in practice or practically for your organization at the time of the transaction going forward.

We have noticed that as the markets change in terms of legal markets, a lot of the larger firms that had dedicated labor and employment practices, like firms that I came from where I was one of a few labor attorneys or labor and employment attorneys that would work on M&A deals, they just don't have the bench necessarily to be able to address these types of issues in a practical sense based upon the need for experience or local experience or deep experience with one of the substantive areas in where we practice. So, they just don't have the bench strength and in some cases, they don't have some of substantive areas that come from focusing on particular disciplines within labor and employment law, union relations, multi-employer benefits are both places regular benefits, defined benefit plans, understanding those, understanding health and welfare plans and what compliance issues can be present in those.

There may not just be enough bench strength knowledge base know-how, familiarity with the regulators, local nuanced issues, and understanding the personalities involved if there are things like labor where there needs to be a relationship with the labor unit. So, we offer our clients a platform where we can draw from our collective experience, which we increasingly because of our practice group model centralize so that we make it accessible to the lawyers in the field so that our transactional team can draw from the collective expertise from our lawyers in the substantive areas where those are gating issues in a transaction.

Alitia Faccone:

Thank you very much, Rick for joining us here today live from CCC. We look forward to talking to you soon. Thank you.

Rick Vitarelli:

Thank you, Alitia.

Alitia Faccone:

I'm here with Sean Paisan and Josh Henderson. Good morning gentlemen. Can

you tell us a little bit about yourself, where you're from and your practice at Jackson Lewis?

Josh Henderson:

Good morning, Alitia. I'm Josh Henderson. I am a new principal in the San Francisco office of Jackson Lewis. I'm really happy to have joined the firm just two months ago. My practice consists of a broad range of labor and employment issues, but my focus is primarily on OSHA matters, workplace safety in OSHA, and traditional labor.

Alitia Faccone:

Welcome, Josh. Sean?

Sean Paisan:

Good morning. My name is Sean Paisan. I am with the Irvine office of Jackson Lewis, and my practice primarily focuses on Cal/OSHA and the Western state plan states as well. So, Washington, Oregon, Nevada, Arizona, and Hawaii, if I'm lucky.

Alitia Faccone:

You both covered the 2023 OSHA regulatory update at CCC this year. Can you provide our listeners with a brief summary of what you covered in your presentation and why you thought it was important to present those issues at CCC?

Sean Paisan:

Sure. So, we covered some new developments in OSHA law, and we focused on three things really. First was the National Emphasis Program on heat. That is OSHA's directive to really focus on heat illness in making employers aware that they are going to be out conducting inspections on heat issues and really getting employers to understand that heat is a recognized hazard that they need to plan and prepare for both indoor and outdoor. We also covered Cal/OSHA's new non-emergency regulation regarding COVID-19 or the NER as I called it. And then finally we talked about OSHA's directive to... For lack of a better term issue, more citations, and they're going to do that by ungrouping violations and issue a citation for each violation. And they're also going to be doing a instance-by-instance citation where each instance would be a different citation.

Alitia Faccone:

Josh, given all those issues being raised by OSHA, what were some of the concerns that resonated with our attendees during your presentation?

Josh Henderson:

I think the primary concern was the last point that Sean made about the instance-by-instance citation enforcement policy. We expect to see a greater number of citations issued based on each instance of a violation and more

citations means more penalties and greater amount of penalties, which could very well lead to more litigation and more appeals. And so, the feedback that we got and the concerns that we received after our panel was really focused on that area and how much more companies may be embroiled in litigation with OSHA going forward.

Alitia Faccone:

Sean, what do you believe to be the key takeaways that employers should keep in mind when addressing these issues in their organizations?

Sean Paisan:

The key takeaways are really being prepared, being proactive, and having a plan. Because all of these items mean that OSHA is going to be conducting more inspections. More inspections means OSHA is going to be on your property and you need to have a plan in place before OSHA even gets there. You don't want to be scrambling when OSHA's at your receptionist demanding to be let in or at your front desk demanding to see the property. You want to know what you're going to do ahead of time, and that means getting together, talking to your attorneys, and figuring out a good plan of action well before OSHA shows up at your door. So, knowing that they are going to be coming, conducting more inspections, having a plan in place, you also want to have your policies in place to address the specific issues that were raised during the presentation.

And the issues here really concern having a good heat program protecting your employees from heat hazards, and that's not just to prevent an OSHA citation, but also to take care of your employees. Another key takeaway is on the directive to issue more citations for lack of a better term, to ungroup violations, and issue instance-by-instance citations. Really, you just want to make sure that your programs are up-to-date and you're doing everything as well as you can because when they do come and inspect, they are going to be using this new directive to try to issue as many citations as possible.

Alitia Faccone:

Thank you, Sean. Josh, how else are you and Sean and your new Jackson Lewis colleagues providing assistance to organizations on these issues?

Josh Henderson:

Well, I would say that we are thought leaders in this area, and we provide assistance in terms of blog posts, podcasts. I recently did a podcast with Melanie Paul, the OSHA practice group leader at Jackson Lewis. She and I spoke about the grouping policy and the instance-by-instance policy as well as in-person CLE events, which we're happy to do and happy to work with clients to tailor that the CLE to their specific needs and questions.

Alitia Faccone:

Thank you, gentlemen, for joining us this morning and we hope that you enjoy the rest of the conference.

Josh Henderson:

Thank you.

Sean Paisan:

Thank you for having us.

Alitia Faccone:

I'm here with Patty Pryor. Good morning, Patty. Can you tell us a little bit about you, where you're from and your practice at Jackson Lewis? Well,

Patty Pryor:

Sure. I'm Patty Pryor. I'm from the Cincinnati office and I practice all over the place for Jackson Lewis. A lot of things with disability leave an accommodation, and most recently I've had the pleasure of working with the firm throughout all the COVID issues and now religious accommodation that stemmed from that.

Alitia Faccone:

The title of your presentation was Religious Accommodation Change on the Horizon with a question mark. Can you provide our listeners with a brief summary of what was covered in your program and why it was important to present this topic at CCC 2023?

Patty Pryor:

Sure. We have seen just a huge influx of religious accommodation requests at companies and also religious accommodation lawsuits. I told the attendees that in my first 23 years of practice, I'd probably only handled about five religious accommodation cases. In the last year and a half, I've handled over a thousand EOC charges on religious accommodation and close to 50 religious accommodation lawsuits. So, it's just an explosion that we're seeing that employers aren't used to, aren't prepared for.

Alitia Faccone:

What accounts for this explosion?

Patty Pryor:

Well, I blame everything on COVID. First and foremost, it's always about COVID, but it is the... During COVID, there are a lot of companies went through vaccine mandates because of influenced by the government. Those vaccine mandates were highly divisive. They're divisive both politically and also for many individuals, they claimed it was divisive and against their religious beliefs to accept the vaccine. That is what spurred so many of these requests, which is important in terms of there were a lot of requests and accommodation issues coming out of those, but more importantly, what it did was raise the IQ of employees to this idea of religious accommodation where many employees in the past had not really thought about it in the same terms.

Alitia Faccone:

So, what were some of the important issues and concerns that you think resonated with our attendees during your presentation?

Patty Pryor:

I think it's primarily just being aware this isn't necessarily anything new right now. There's a change coming, and I'll talk about that in a minute, but right now, it's the same thing that's been in place for years. Employers are aware of it's just not something they've had to handle as much or as frequent as they might now. So, it's primarily making sure they're training managers, training HR, that they're prepared for the requests that might come in and that their policies are in place, or they at least thought through the process of how they're going to handle.

Alitia Faccone:

So, in addition to training, what do you think are some key takeaways employers should keep in mind when addressing these issues in their organizations?

Patty Pryor:

Well, I think one of the key takeaways is that change is coming, and I mentioned that a minute ago. The change that's coming is we... There is a Supreme Court case currently pending where at least there's speculation that the Supreme Court might change the standard for what's an undue hardship, for years that has been a de minimis standard. Speculation is that that could change by the Supreme Court. So, I think it's for employers, it's paying attention to that being aware of it that's coming, and that might change how things are handled in the future.

Alitia Faccone:

So, Patty, how are you and your colleagues at Jackson Lewis providing assistance to organizations proactively and in real-time on these issues?

Patty Pryor:

So, obviously helping the employers conduct training, helping develop policies, helping develop practices, and really just starting to think through those processes and being a resource. These can sometimes be very complicated questions. Everyone's individual religious belief is not always something an employer's heard of before. So, it's being there to help kind of counsel, and advise through the difficult ones.

Alitia Faccone:

Thank you very much, Patty. I am sure we're going to be hearing more from you on this issue, and we hope you enjoy the remainder of the conference.

Patty Pryor:

Thank you.

Alitia Faccone:

Thank you for joining us on We Get Work. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. We Get Work is available to stream and subscribe on Apple Podcasts, Google Podcasts, Libsyn, Pandora, SoundCloud, Spotify, Stitcher, and YouTube. For more information on CCC or the topics and issues discussed on this podcast, please reach out to your Jackson Lewis attorney, or 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.

©2023 Jackson Lewis P.C. 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. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.