

Live from Workplace Horizons 2024 — Episode 1: What Employers Need to Know About Keeping Their Workplace Safe, Drug-Free and Productive

By Emily S. Borna, Matthew F. Nieman, Ian B. Bogaty,

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Meet the Authors



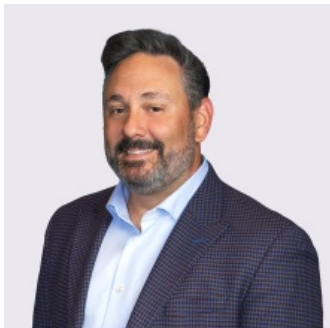
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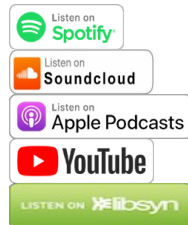
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Details

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Welcome and thank you for joining us for this special edition of We get work™, live from Jackson Lewis' Workplace Horizons 2024 from the Lotte New York Palace in New York City and the Wynn in Las Vegas. What follows are high level conversations on conference programs and why they were important topics to present now.

Jackson Lewis P.C. · Live from Workplace Horizons - Episode 1: What Employers Need to Know About Keeping Your Workplace Safe, Drug-Free, and Productive



Transcript

Welcome and thank you for joining us for this special edition of We get work™, live from Jackson Lewis' 2024 Workplace Horizons Conference. What follows are high-level conversations, providing information on conference programs and in light of the current legal, regulatory and cultural landscape, why they were important topics to present now.

In this episode, we explore what employers need to know about employee safety and relevant regulations, keeping your workplace drug free, and a specific discussion on how these issues and others affect the manufacturing industry. Emily Borna in the Atlanta office of Jackson Lewis and special guests Ellen Weitz of Siemens Energy and Chris Correnti of AGC America share insights from their manufacturing industry roundtable. Ian Bogaty, Courtney Malveaux and Melanie Paul discuss OSHA's expansive enforcement efforts for 2024. And Matt Nieman talks about the current state of marijuana and testing in the workplace.

Today we're talking to Emily Borna, a principal in our Atlanta office of Jackson Lewis. We have special guests, Ellen Weitz of Siemens Energy and Chris Correnti with AGC America. I'd like to thank all of you for joining us today. And I'm first going to ask you to just introduce yourself and tell us a little bit about what you do. Certainly. Thank you, Alitia. We're delighted to be here.

This is Emily Borna. I am in my 29th year at Jackson Lewis. I do employment discrimination litigation, a lot of advice and counsel with an emphasis on disability leave health management, corporate governance, internal investigations, workplace training. And I enjoy working with clients like Ellen and Chris who are in the manufacturing industry. And that's the subject of our roundtable today. Great. Ellen?

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Hi, yeah, I'm Ellen Weitz and I am head labor and employment counsel for Siemens Energy Inc. I handle the U.S. We are an international company. We do business in 90 countries around the world, but I have the U.S. We are an energy technology company. We develop, we produce, we sell and install wind turbines, gas turbines, steam turbines, all throughout the energy business. And I handle both the traditional and the employment. Both of those topics in the manufacturing energy come up quite a bit. And Chris.

Hi, Chris Correnti. I'm general counsel for AGC America. AGC has six different manufacturing businesses in North America, including automotive glass fabrication, chemicals, a couple of electronics related businesses. We have life science biologics business, and we have some small architectural related operations. I have been with AGC now 30 years, so I've seen a lot of changes and we'll talk about some of those today, but delighted to be here. Fantastic.

So Emily, you mentioned that you all participated today in the manufacturing roundtable. Can you provide our listeners with a brief summary of what was covered during your presentation and why it was important to discuss those issues at Workplace Horizons?

Absolutely. We had a lively discussion. There were over...I'd say almost two dozen of us, and it was a bit of a misnomer, it was a rectangle, not a round table, but we were able to all share a little bit about what keeps us up at night from a workplace law standpoint in the various manufacturing industries that were represented. And it was everything from energy and automotive and chemical to food and beverage. We had a really wide range of industries represented.

You know, we gave this a lot of thought ahead of time and we had identified issues around staffing and redundancy, you know, coming off of the pandemic. What most manufacturers have to grapple with at this point and, you know, foreign talent and harnessing, you know, the right talent and skills to make things work when there's been supply chain shortages and, you know, a lack of the skilled workforce needed to keep operations going. We also covered cyberattacks. This is the second year in a row that the manufacturing industry has been the biggest target of cyberattacks, ransomware, as the advent of artificial intelligence just grows, particularly in this industry.

So Chris, given everything that Emily just said that you all talked about during your round table or your rectangular table, what do you think are some of the issues that resonated with your participants the most?

I think we had really several different issues that we really honed in on during the discussion, although we covered a wide range of topics. So I think one important one is contingent staffing or the use of temporary workers. And it seems like there's a lot of concerns amongst many of the attendees about what legal risks do we have? How are we going to deal with those risks? How can we help our management understand what those risks are and the costs and how can we better plan for our businesses to react to that in the future? Because finding people is very difficult in this market today. I think that was a uniform comment from all the attendees. We are all having trouble finding good qualified or high skilled employees. So businesses have to resort to temporary staffing in many cases to help fill some of those gaps. So it's an important legal risk. Another key area that we did talk about was cybersecurity was an important topic. In fact, the company I work with, unfortunately went through a cyber breach in December. So it's a very, very critical topic. And I think everyone is very concerned about whether they're prepared and what they needed to do in order to try to help their businesses understand what some of those risks are and maybe some things they weren't thinking about.

Another key topic was how are we all going to continue to stay up to date with new

developments in the multiple jurisdictions that I think most of the attendees have plants or employees working in, not only just in the United States, but across multiple countries. So many of the attendees were working for businesses that had operations in Europe or South America or in other parts of the world. And we are all worry a lot about what we're not knowing is coming or maybe what's been passed and did we find out soon enough? Fortunately, Emily told us Jackson Lewis has an excellent tool called CheckIt that they are keeping track of that themselves as a firm. And it's certainly something that can help businesses out.

We do have a tool called CheckIt. So we're glad that Emily mentioned that. Yeah. So again, Ellen, Chris described an awful lot of things that everybody talked about. But for our listeners, what would you say are some of the key takeaways that people should know about the issues manufacturers are facing in the United States and beyond?

Yeah, no, it's a great question. And I want to add before I even answer it just from our roundtable, but all the breakout sessions have actually been addressing so many of the issues that came up at the table, the cyber issue, the remote and the contingency workers and all the things that we were talking about at the table. So I think several of the key takeaways, I'm going to start with one of the things that Chris raised, which is we, as the internal council or the HR people, the lead HR people, we need to keep up with the changes that are going on day to day. And by the way, it's every day, every day there's a new state law, there's a new federal law or it's just guidance. It's, you know, the National Labor Relations Board puts out a guidance memo and it changed 60 years' worth of precedent. So the, one of the biggest takeaways, I think for everybody at all of these sessions is we have to know what's going on out there and we have to be keeping up and it changes so much more now than it ever did. I mean, in one of the groups, he said, look, if we drafted a separation agreement for you five years ago, it's too old. It's stale it you really have to keep up.

The other thing I think we've learned from this meeting is that we have to be able to keep our pulse on what is going on in our own businesses. So much happens that nobody tells us about until after the fact. And so for me, one of the takeaways is how do we make sure that we are staying in touch, you know, how do we make our managers tell us beforehand, come to us, make sure that we are going out there and making them want to come talk to us because so many of the issues that we get other than the cyberattack, which I don't know, you know, is tough is after the fact or, you know, other things.

And I think you talked about it with the cyber. It's important to have like emergency response teams in place so that you can actually do, you can have meetings to prepare you for some things that might occur, so that you actually already have a plan in action. And I think, you know, companies have not really been in a position to do this because it's one of the things we talked about in our meeting is that we're all so lean because that's the way manufacturing has been told to be for so long. But being this lean with all the changes going on, the supply chain issues we've had, you can't get all this stuff done. So we're really having to look at how we set up the whole workforce.

So I'll ask this to Chris and Ellen. What is the one thought, idea, suggestion out of all of the conversation that was had with a lot of really great information, what are you going to take back? What are you going to implement at Siemens or try to implement at AGC America?

Well, all right, I'll go first and it would be at Siemens Energy, because I'll let him worry about AGC. How's that? For me, it's about going back and I think doing a better partnership with HR and making sure that we are keeping up with the daily changes and that they are making sure that they're communicating that with the operations people and that we're becoming more partnership. And I think that, you know, a lot of businesses, I

don't want to say we're siloed, but we get so busy in doing what we have to do on a daily basis. So my feeling is one-on-ones with my HR partners, more meetings to talk about what changes have come down the pike and what do we want to do to be able to be prepared for that. Thank you. Chris?

Thanks. So, I'm going to break the rules and say there's two things that I'm going to take back. So one is the need for more audits. So one of the things that companies don't like to do, they don't like to pay for audits to check their compliance in multiple different areas. We usually do it when we have a problem. I think one of the things that, you know, I will have to do better. And I think the attendees need to do really make their management understand is we had to be more proactive.

There are too many risks now. There are too many changes. We can't keep up with it. Our HR teams can't keep up with it. So we really need to be more proactive and be more, take a more rational approach to let's check to see how good we really are. We found it with the cyber breach and our HIPAA policies. There are some questions about how updated should they have been, for example, or doing gap assessments. So I think that's certainly one thing that I will take back, have a serious discussion with all of the businesses about. I think the other thing that is very, very important is how to get the business leaders to understand the scope of the risks today. Because again, they're not keeping track of all of these changes. They're relying on us to do that. But we never seem to have time to really sit down enough with them to say, OK, here's the top six things you need to worry about and let's talk about how we can help you deal with those. So that's certainly something we've been trying to do that more, but it's still something that I know we have to do more. And I would expect most of the folks who attended would agree.

Thank you both for sharing that. Emily, back to you. Since we were all together at our conference last year, what do you think has been the most significant development affecting employers in the manufacturing industry?

I would say staffing. It's a stark contrast with some other industries in the post pandemic era, you know, manufacturing in particular had to implement furloughs and reductions and layoffs. And, you know, now getting people back in place, going from the just in time, lean manufacturing philosophy to, you know, having the talent we need and retaining that talent, you know, and if it's not available, particularly for a lot of manufacturers who may have operations in more rural areas, how are you going to harness those skills? And when you do, how are you going to retain that talent? I think that's a big focus in the manufacturing industry in particular, staffing and then, you know, artificial intelligence, how that works in cybersecurity. Certainly there's more than one. I love what Chris said. I mean, you know, what we can do to help.

It's about communication. It's about education. It's preventive strategies as opposed to just reactive, you know, plans. And we really love to partner and team with our clients on this. It's a luxury. Sometimes you don't feel you have time for, but it pays off in huge benefits to put that emphasis on the front end to avoid some of the litigation and the exposures that can come. You know, another topic we talked about at our discussion today, and I can't tell you how many clients commiserated that they're going through or are in the midst of or suffering the fallout from collective actions, particularly on wage hour issues, whether it's rounding or state laws in California that are so difficult to comply with.

Giving some thought on the front end, what can be done to try to head some of that off is really valuable, sort of address this question a little bit, but I'm going to ask it in case there's additional information you'd like to share. How is Jackson Lewis providing assistance to lawyers like Ellen and Chris on some of these issues?

Yeah, well, you know, we have refined our practice to focus in on on areas where we do have a lot of conversant feedback and expertise, whether it's manufacturing, or some of our other industries, construction, healthcare, the value of sitting around the table with other people in these industries and hearing some of the same thoughts and brainstorming about ways to address them is incredibly valuable. And so we have a blog, for example, for the manufacturing industry that comes out on a regular cadence about the latest developments. And we have conferences like this where we can exchange and share. You know, Chris, your check is in the mail because audits are one of the best preventive strategies, you know, and tools that we can do to help our clients stay compliant. And with new tools we're developing, like the CheckIt resource, which is available to clients for an annualized subscription, you know, they get the benefit of the work that we are doing in our 60 plus offices on an ongoing basis to stay abreast of the latest developments and new legislation from jurisdiction to jurisdiction, because it's a full-time job just to keep up with that moving target. We can be a resource to help you ensure compliance, you know, as you have a revolving door of people and you're trying to be responsive to emergencies that are knocking on the door. Emily, Ellen and Chris, thank you so much for joining us behind the podcast mic today, and we hope you enjoy the rest of the conference.

Thank you. This afternoon, we're talking to Matt Nieman, principal in the DC region office and a member of the firm's drug testing and substance abuse practice group. Good afternoon, Matt. Can you tell us about you and your practice at Jackson Lewis? Absolutely. I'm glad you had me. Unbelievable. I'm approaching 18 years here at Jackson Lewis. Congratulations. Guess all that time as a drug prosecutor has paid off, they could talk about drugs for a living. Not surprisingly, the title of your presentation today was Marijuana and Testing. Can you provide our listeners with a brief summary of what you covered in your presentation and more specifically, why it was important to present this topic at Workplace Horizons?

Absolutely. We talked about marijuana, cannabis as it is accounted for in many a law, and that it's everywhere now and the basics as to what testing is and isn't.

Most importantly is having employers understand if they're still using drug policies from 20 years ago, do they have any currency with what's going on now? Ask them to be intentional and give me a little information to figure out how that would work. What do you think some of the issues were that resonated with our attendees during your presentation? What's important for them to know? Quite a few people came up to me afterward and noted that their policies maybe had a little dust on them and realizing that they were going to be doing some things just because instead of that they've given it some actual thought and hadn't even given any consideration to what a drug test really was and maybe need to change how their managers were being trained.

Were there other concerns that were addressed or questions that were raised that impact this particular topic that you talked about today? I think the biggest thing is the mechanics of what drug testing really is and understanding that when you're testing for cannabis, it's not like testing for alcohol.

You don't know if somebody is high, whether they pass or fail a drug test. And I think talking with the audience and having them understand that a drug justice says drugs were ingested at some point and whether that was five minutes ago or five days ago is not something you get out of that test.

So given all of the issues that were raised during your presentation, what do you believe to be the key takeaways employers should keep in mind when addressing these issues in their own organizations? At a bottom line, they should always be intentional. If something just is,

it doesn't mean it should continue to be. And as every state passes their own version of requirements and, hey, off-duty marijuana use is now legally protected versus another place says, no, no, never, you got to make sure that your organization is doing what it means to do. And if it's not, make it so. Look at those laws, decide if a one size fits all policy is what I have. Is that really what you need? And is it even compliant? Being intentional is the key.

Thank you. What do you think has been the most significant development or maybe the most couple of significant developments affecting employers in this space since last year? Easy. The number of legislatures who have decided that the science exists that doesn't exist. California says, go ahead, use all the tests you can, the tests for the actual drugs and not the metabolites that are left over. Only problem there is those tests don't really exist, especially in a way to help somebody anywhere other than exactly around LA. So with employers being asked to make an impossible choice of trusting science that doesn't exist, they have to look for other options on how to do things, which may even mean going back to the way we did it in the mid-eighties before drug testing. Substance abuse isn't just drug testing. And if folks can remember that, since they weren't working at that time, it's the best way to go forward.

All right. So it's a perfect segue into my next question. How else is Jackson Lewis providing assistance to organizations on these issues? Well, in addition to being a phone or email or zoom call away, we also have the drug and alcohol testing law advisor blog that can be logged onto as well. Legislators are coming up with new laws all the time, trying to recreationally legalize marijuana in lots and lots of places. So checking there regularly to make sure that you've got the updates for where your operations are is absolutely critical. Matt, thank you so much for joining us this afternoon, for speaking at the conference today, and enjoy the rest of the conference. My pleasure. Go, JL.

This afternoon we're talking to Melanie Paul, Ian Bogaty, and Courtney Malveaux, principals in our Atlanta, Long Island, and Richmond offices of Jackson Lewis. I'd like to start by asking you a little bit about yourselves and your practice. Melanie.

Yes, I'm a principal in Atlanta and co-head of our workplace safety and health practice group. I've been with Jackson Lewis for five years. And prior to that, I was with the Department of Labor Office of the Solicitor in Region 4 in the Southeast for 10 and a half years. And now I'm helping clients on this side navigate sticky OSHA issues, inspections, and defending them in litigation where necessary.

Ian. Hi, Ian Bogaty, principal in the Long Island office. I am a member of the labor practice group, as well as the workplace safety practice group. I've been with the firm for 20 years, been doing OSHA work and workplace safety for that entire period of time. I've not been with the government side as these two folks but doing the best that we can to represent our clients and all these issues that we're going to talk about today.

Thank you. Courtney. Thanks, Alitia. Yes, Courtney Malveaux. And so I'm also co-leader of the workplace safety and health practice group. And so before defending companies that receive citations, don't hate me, I used to sign them. So I was a labor commissioner for my home state. And so among other things, led our OSHA program for that state. And so learn how the process is done soup to nuts from the enforcement side and now bringing that to employers.

Great. Thank you. Melanie, the title of your presentation at the conference is OSHA's expansive enforcement efforts for 2024. Can you provide our listeners with a brief summary of what you covered in your presentation and why it was important to present this year.

Yes, absolutely. So as we all know and have felt, this administration has been very

aggressive in enforcement as well as rulemaking. And from OSHA, what we have seen are some new rules that are really impacting employers' work sites. Two of those, which dropped this year or became effective this year, are OSHA's electronic recordkeeping rule and the new third-party walk-around rule which will allow the agency to identify or to allow third parties to potentially represent employees in an inspection at an employer's work site. So there's a lot of issues that come along with that, but very important topics. And I was inspired by being in Vegas and so came up with the concept to do a game show to make it really fun and lively and engaging for the audience because I recognize that OSHA issues are not always the most interesting for people, and people are not as excited to talk about it like I am. So I really wanted to do something to really engage our audience and really help them understand why these issues are important. Thank you. Ian, what are some of the issues that really resonated with our attendees during your presentation? What is it that they really needed and wanted to know?

Yeah, it's a great question. The nice part of my practice being that I do some labor stuff as well as workplace safety is that the walk around rule that Melanie spoke about is one of the most front facing rules that I've seen come about where you almost have interagency involvement. So this walk around rule that Melanie mentioned is going to allow potentially union organizers to come into facilities during ocean inspections and represent the employees. That's not something that's ever existed before. And so, when the attendees hear that their potentially non-union operations are subject to not only ocean inspections, which can be pressing, difficult, strenuous, stressful for them. Now they have to worry about potentially a union organizer being the representative of those employees in a non-union workforce. That's something that's shocking for them, right? We've never seen that. And so where does that come from? Is it inter-agency involvement? Don't know. The administration has made it very clear that we're pro-union, we want more unionization in the country, and that's something that this rule will absolutely yield if it goes into effect at the end of May when it's scheduled to. So we'll see if there are some challenges to it and whether it will go into effect or not, but something that employers are very concerned with right now. Courtney, what are some of the other challenges you talked about?

So the first time we presented, and I expect we will again very soon, get questions about how to handle when the inspector shows up at your work site, what do you do? And you can't just freeze in the headlights, you do have to act with intent. And so having kind of a plan, having a point person and asking the right questions up front questions like, okay, if there's a third party person there, what are their credentials and ask the compliance officer. So this person here, how is this person helping with your investigation here and what value that and what are the credentials and also what's their background. So as Ian pointed out, if this person's from a union and this is a non-unionized work site, well, it's your business to know who's coming onto your site. You may have trade secrets to protect that they are on your property. And so this is very much in your business. And so. That was part of the discussion last time was, okay, asking the questions and knowing who this person is. And if necessary, look, we usually let people come into our work sites without requiring OSHA to get a warrant. But you know, if this rule goes through, and if this kind of privilege is abused for ways that were never intended under the OSH Act, then maybe it would make sense then to start looking at legal process like requiring them to get a warrant and defining what it is they're looking for and really getting kind of a handle as to what this inspection is supposed to be really about.

Melanie, it sounds like employers have an awful lot of their plate with this potential new rule. What were some of the other concerns that were addressed or raised during the presentation? Well, our clients in the audience really wanted to know about what they can do to prohibit potentially third parties from coming onto their work site. You know, they

might want to cooperate in an OSHA inspection and not make OSHA go get a warrant to conduct an inspection there, but they might want to exclude those third parties. And what is that going to look like? And how are they going to be able to do that? So those were some of the questions that we had from the audience that they were really interested in knowing about. What are a company's legal rights under due process in the US Constitution? Guess what? The Fourth Amendment actually applies to companies. We don't think of search and seizure law as applying to places of business, but it very much does.

And it's going to be important to hold the agency's feet to the fire on that and make sure that they are dotting their I's and crossing their T's and really making sure that they're protecting employers due process rights. And look, the agency doesn't have any obligation to advise companies on what their rights are, which is why it's so important to reach out to outside counsel and people with subject matter expertise like us to be able to advise clients that they do have these rights. And, you know, for us to strike the balance in asserting those rights while also cooperating in an investigation. And it can be a fine balance.

Melanie, thank you so much. And it's really interesting. Most employers wouldn't necessarily think of using the Fourth Amendment in that way. So Courtney, what might be some other key takeaways you want our attendees here today and our listening audience to be able to take from your presentation?

Right. So these new steps OSHA is taking is in the context of what issues already were there. And so when OSHA shows up and we're not only thinking about whether to open the workplace to that compliance officer and to the third party person that might be with them. So it is important to identify, okay, what is the extent of this inspection? Is it targeted? Is it comprehensive?

For certain industries that are under a national emphasis programs that still endure OSHA is taking targeted inspections and opening them to virtually comprehensive ones already. And so that's one of the challenges that's still there. And so that's happened and you have to make these decisions real time to ask these questions and determine whether you're going to require warrants or not. In terms of the compliance officer asking for documents and records, well, again, some might be trade secrets and also they may or may not exceed the scope of the inspection. In addition, there are interviews that the compliance officer is usually asking for after a walk around. And so we, employers have to know, okay, is this someone who's speaking for themselves or might they be a manager who could be viewed as speaking for the company? And so ensuring that employers know their rights as they're dealing with these things, they're really gonna have to know these things on the spot. And that came up in the discussion last time.

Ian, how are Jackson Lewis lawyers like Melanie, Courtney, and yourself providing assistance to employers on not only the issues that are in front of them today, but what might be coming very, very soon? So look, OSHA inspections are challenging. Too many employers, I find, tend to get a citation, maybe it's \$12,000. And their immediate instinct is, I can settle this, right? I can settle this and maybe I spend \$8,000, maybe cheaper than hiring counsel. What they seem to forget is that what OSHA tends to do is re-inspect, right? They're going to come back and they're going to see if you have the same problems. They're going to see if you have the same problems in other locations. So settling that first case, even though it may make financial sense, if in the long term, usually doesn't because that repeat violation that they may get the next time can be a 10 times multiplier. So you went from what could have been a \$12,000 citation to a \$120,000 citation. So Jackson Lewis attorneys are available. We're here 24-seven. When there's an inspection, we can advise behind the scenes, we can advise in person. We've been through inspections, making sure

employers know what their rights are. We've got blogs, we've got articles, right? There are tons of resources at our clients fingertips so that they can put themselves in the best possible position. So when these inspections come along, they're prepared, they've got what they need.

And they're being counseled the right way because more often than not, look, there may be an easy way out, but what does that have effect later on? And that's something that we need to make sure our clients are understanding. And again, we're here for them whenever they need us. Courtney, Ian, Melanie, thank you so much for joining us behind the podcast mic today. And we hope you enjoy the rest of the conference. Thanks. Our pleasure.

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