

Live from Workplace Horizons 2024 — Episode 5: What Employers Need to Know About AI, ESG and M&A in the Workplace

By Scott P. Jang, Eric J. Felsberg, Monica H. Khetarpal, Laura A. Mitchell, Richard F. Vitarelli & Daniel J. Doron

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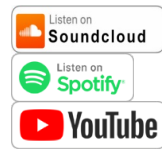


Details

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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 2024 - Episode 5: What Employers Need to Know About AI, ESG, and M&A in the Workplace



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 AI, ESG and M&A in the workplace. Eric Felsberg and Scott Jang bring you up to date on AI in your workplace. Monica Khetarpal and Laura Mitchell survey the evolution of ESG, navigating the tide of change. And Dan Doron and Rick Vitarelli highlight issues for employers related to M&A integration and restructuring.

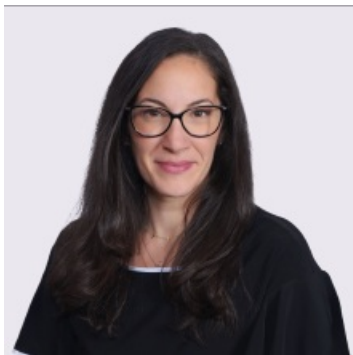
This afternoon, I have the pleasure of speaking with Scott Jang and Eric Felsberg, principals in the San Francisco and Long Island offices of Jackson Lewis. Scott and Eric, can you please introduce yourselves and tell us a little bit about your practice at Jackson Lewis?

Thanks Alitia. Scott Jang here from the San Francisco office. My practice area really focuses on complex litigation, whether it's wage and hour class actions or systemic discrimination charges with the EEOC. I also do a fair amount of advice and counsel work, especially in the arbitration space that has been a very active area in my practice as the US Supreme Court and the California Supreme Court have had some pretty pivotal cases in that area.

Eric?

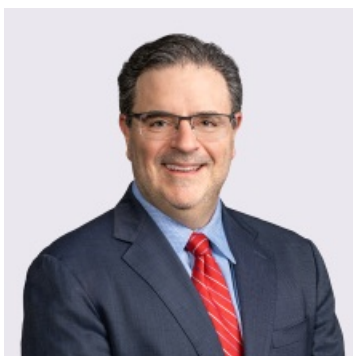
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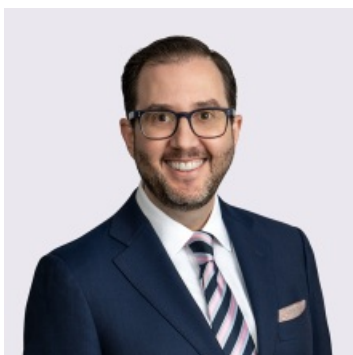
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Yeah, thanks Alitia. This is Eric Felsberg. I'm a principal in the Long Island office. Yeah, I focus my practice on providing advice and counsel on all things having to do with use of artificial intelligence in the workplace. I also assist employers doing business with the federal government on all the regulatory obligations that they are subject to.

Not surprisingly, the title of your presentation today was AI in the Workplace. Can you provide our listeners with a brief summary of what you discussed and why it was important to discuss this topic in 2024?

Yeah, well, I'll start with the second question first. I think to discuss AI in the workplace is particularly timely and important because I think we're seeing an exponential growth in the use of AI in the workplace. And employers, I think, are navigating their way to learn what this technology is capable of and also some of the regulatory obligations that they'll have. So in our presentation, Scott and I gave an overview of how AI is used in the workplace, how different employers are leveraging it to make streamlined processes in terms of managing the workplace.

We spent a significant amount of time talking about the pros and cons, some of the areas of potential liability they have to concern themselves with, and then spent a significant amount of time talking about the increasing regulatory landscape that is rapidly developing even as we sit here, as it pertains to the use of AI.

Given the breadth of those issues and the number of topics you just mentioned, what really resonated with our attendees at the conference? What was most important for them to find out from you both this afternoon?

Yeah, so I think most of the attendees kind of understood how AI is being used in the workplace. I think a lot of them had some thoughts about how they could use it and perhaps maybe they are using it. But I would say what resonated the most is, you know, kind of steering clear some of those areas of potential liability. So things like disparate treatment, disparate impact, the regulatory landscape. And there was also a lot of interest in kind of the recommendation that Scott and I made that, you know, employers really should, if they don't already have a policy in place that governs the use of AI by their employees.

Scott, since we were together at our conference last year, what do you believe to be the most significant development affecting employers in this space?

Well, I'm not sure if it's a development per se. I think when it comes to AI, what has transpired in the brief time of one year has just been the kind of ethos and focus on AI. Before speaking earlier today, I was in my room preparing and I was watching the Golf Channel and every single sequence of commercials had at least one AI program or commercial. And it just really resonated me because it really does illustrate how AI is now everywhere, in every aspect of our lives, even outside of the employment context. So I think that this sudden shift to the collective consciousness of focusing on AI has been the difference. And what that means for clients is that one, there's an expectation that there's a use of AI in the workplace and using these tools that are now potentially at people's hands in order to make the workplace more efficient, more productive.

And when it comes to our clients, it also means it's an expectation that employment council knows what the regulatory landscape and what are the limitations are. And so I think that that shift in terms of we really need to pay attention to this. This is at the forefront of everyone's mind. That has been the big difference between 2023 and 2024. OK, so this one's important.

How can we help employers? What are some key takeaways that you shared this afternoon? And what can we tell our listening audience here at We get work™?

Yeah, I mean, just to kind of buttress what Scott was saying, I mean, it's an incredibly exciting time to be around AI because it's one of these things that is so new, it is rapidly developing. And I think there's this tendency for employers to kind of want to get involved. A lot of times they're not quite sure why or if they should be involved, but it just seems like something they should be doing. And that potentially, while exciting, potentially could be dangerous. And so, you know, a few of the takeaways we provided to the audience is they have to monitor the developing technology. This technology is developing so quickly that it is difficult at times to keep up and really try to understand what the capability of these different technologies are.

The second thing is they just have to have a policy. If you're starting to kind of step into the AI space, one of the things you want to avoid is just a free for all, where everyone could just use whatever tool that they wish to use. And there are concerns there. For example, employees may not know that they should not be putting confidential information into an AI tool, or a recruiting team may not fully understand that by using AI that potentially could have disparate impact issues associated with it. So it's really important to have a policy and associated with that policy having a kind of a gatekeeper or maybe even a committee that acts as a gatekeeper to monitor how it's being used.

And then last but not least, as quickly as the technology is developing, these different regulations are developing and no one regulation is the same. It would be much easier if we had one uniform regulation for everyone. But we don't. So, you know, each of these, of course we have some federal guidance, but each different state, municipality, and, you know, these different governments and jurisdictions, they come out with their own version of what they think the regulation should be. And that makes it incredibly, incredibly challenging for employers because you have to manage not only the technology, their employees, but this patchwork of regulatory requirements. And so that to me is, you know, kind of what employers need to be thinking about in the current environment.

Scott, with the rapidly developing technology and the proliferation of regulations, how is Jackson Lewis helping employers with these issues and their organizations?

I think starting out with the obvious is, you know, a new developing area in the law. We're the eyes and ears in terms of how regulations are being proposed and implemented, not just federally, but also throughout the different states and local municipalities. This is an area that has been active both in the federal and the lower level. So just in terms of keeping up with what is going on in this space in terms of regulations, I think our attorneys are at the forefront of that and are going to be releasing webinars and articles on this. I think almost weekly basis

coming out in 2024. Also, not to plug Eric's team, but we do have an AI team that is dedicated to making sure that our firm is at the forefront in terms of developing policies for AI, as well as other things that are critical with respect to AI, including data verification, disparate impact analysis. Those are areas in which I know his team is really focused on and I think will become increasingly important as employers and our clients increasingly rely on AI in their workspace.

Scott, Eric, thank you so much for coming by and talking about your topic with us today. I can't wait until 2025 to see where this topic takes us and what you both have to say next year. Eric and I will be cloned out by then. Exactly. Thank you. Thank you very much. Thank you.

Today, we're talking to Monica Khetarpal and Laura Mitchell, principals in the Chicago and Denver offices of Jackson Lewis. Monica and Laura, can we start by having you introduce yourselves and tell our audience a little bit about your practice?

Sure. I'm Monica. I'm from the Windy City. And I've been with Jackson Lewis for probably 15 or so years now. My practice focuses on diversity and inclusion within ESG. I co-lead our ESG practice group with my friend and colleague, Laura, and also our higher education practice group. But the other half of my practice is litigation. You'll never take the litigator out of me. I can't stop.

Hi, I'm Laura Mitchell. I'm a principal in our Denver office, and I am actually no longer a litigator. You can definitely take the litigator out of me. But I do practice in our affirmative action OFCCP defense practice group, as well as our pay equity group and co-lead ESG with my friend Monica. And I'm happy to be here today.

The title of your presentation was The Evolution of ESG, Navigating the Tide of Change. Monica, can you provide our listeners with a little bit about what your presentation was about and why it was important to present this topic at Workplace Horizons?

Sure. So there's nothing actually new about ESG. In fact, ESG existed before it was called ESG. We used to call it corporate responsibility or just doing the right thing, right? And so things have changed, though. We're seeing some regulation with respect to ESG, not a lot. We are seeing the sort of social and political zeitgeist change. And there's a push and pull. And so what we talked about today was sort of where our clients are at with respect to their ESG programs. We found that some are still trying to formulate their program, put it together, and envision what they want it to be. And some have built out ESG programs, which they are, as they should be, constantly evaluating to make sure that they are fitting the company's needs.

Laura, what are some of the issues that resonated with our attendees during your presentation?

Yeah, so I think during the conversation, really understanding, that having a unifying set of values and principle and identity as an organization really should be the first step in developing your ESG program. And I think that really resonated with those that are still working to build their program or evaluating it.

And also, we had a great discussion about kind of thinking outside the box in ways to show value to your employees in becoming an employer of choice, that it doesn't have to be just about your traditional we're going to be transparent about our demographic information or we're going to do these things that everybody else is doing, but really thinking outside the box as a differentiator in the market.

Monica, were there other concerns that were addressed or raised about this topic? What did our attendees really want to know?

Yeah, a lot of them were, you know, grappling with this push and pull concept. So again, there is not a lot of legislation that's governing exactly what ESG is, right? There are some that talk about disclosures and whatnot, but it's not very specific. But then what we have on the state level is sort of conflicting legislation about when and where and how ESG can be used in evaluating investment opportunities and whatnot. There are states that prohibit evaluation of ESG factors or investment in companies that engage in certain ESG initiatives. And then there are states who are requiring it.

Similarly, within corporations and other entities, there are people who are very comfortable with pushing ESG initiatives and feel that it's the right thing to do. And there are others who feel that sometimes there's too much risk involved. And so it was really that push and pull that they were trying to decide how to navigate. Laura?

I think that another concern that we addressed was really this notion of things are different, they seem different, we're talking about them in different terms, but they really are the concepts that we are all very familiar with. Non-discrimination, not creating a hostile work environment, good governance, hygiene as an organization, so that you can feel comfortable and that we can talk to leadership and stakeholders about ESG in terms that they're comfortable with so that we can get buy-in and actually make progress and start to deal with this push and this pull in the way that we know how to do because we've been doing it for years.

So Laura, given all of these issues, what were some of the key takeaways that you both shared with our audience members here at the conference and for our listeners who might be tuning in after the conference?

I think one of the really big ones is things feel different, but they are the same. Like we just talked about that. Even the term ESG itself is changing. Folks are pulling away from using it and going back to corporate responsibility, values-based governance, but it's still about these tenants that we know as employers and as organizations. It's about developing our brand, our value, who we are. And so that thinking about things in those terms is a way to feel comfortable in this kind of tide of change.

You know, I think that there's really no no-risk situation, and that's a big takeaway. That either you're going to, you know, if you do a lot of ESG, you have a risk of being challenged. If you don't do enough ESG, you're not going to be an employer of choice. You're not going to be a product of choice to the people who are your consumers. So it's an imperative that you do something. So what do you do about that? Our recommendation is really listen. Listen to all of the

stakeholders, not just your employees, not just your C-suite. Listen to your shareholders. Listen to your customers. Listen to your middle management. And take that information after you do these listening tours and decide from there what is your brand, what are your corporate values, where do you want to go, and what is your risk profile. And from there, let those values guide your ESG practices and use that as an anchor.

Right, it's about where do you want to spend your energy and it should be where it matters most. Yes. And you don't know that unless you're listening. Exactly.

Laura, one more question. How is Jackson Lewis providing assistance to employers and their organizations on these topics?

Well, as this landscape changes and we ride these waves of change, we continue to monitor all of the developments in these different spaces. What makes the ESG practice as amazing as it is, is that we're cross-practice oriented. So we have subject matter experts from across the firm that are part of our core team. So we're monitoring developments in data analytics, in health care, in benefits, in DE&I, and reporting on those through podcasts and other types of materials.

Monica, Laura, thank you so much for stopping by the We get work™ podcast mic this afternoon. And please enjoy the rest of the conference. Thank you. Thank you.

This afternoon, we have the pleasure of talking to Rick Vitarelli and Dan Doron, principals in the Hartford and New York City offices of Jackson Lewis. Rick, can you please introduce yourself and tell our listening audience a little bit about your practice?

Good afternoon, Alitia. Good afternoon, everyone. I'm Rick Vitarelli. I am a traditional labor lawyer by training and background. I'm also the co-chair of the labor relations practice at the firm, as well as co-chair of the transactional services practice at the firm. My background came largely from working full-service firms where I was on deal teams in both commercial real estate and in M&A work. I would support those teams in labor and employment issues generally with a particular emphasis on labor and multi-employer benefits issues.

Thanks Rick. Dan?

Dan Doron. I'm a principal in our New York City office and I focus my practice on the employment issues that come up in M&A transactions as well as post-closing. And in addition, I counsel employers on the full panoply of employment laws.

Thanks, Dan. Dan, the title of your presentation today was M&A Integration and Restructuring Issues. Can you provide our listeners with a brief summary of what you covered in your presentation and why it was important to present this topic at Workplace Horizons?

Sure. We spoke about key considerations for onboarding employees in connection with asset purchases specifically. And we focus on asset purchases because in stock deals, these issues are more straightforward. In asset purchases, some of the things that employers want to consider are identifying the employees who are coming over, determining where in the organization those employees are going to be

housed, analyzing things like employment agreements for assignability and how you would go about getting an assignment of an employment agreement. We spoke about things like WARN Act considerations in deals, both for buyers and sellers, as well as some immigration concerns and benefits concerns that come up. And we think these issues are worthwhile to discuss with our clients because the earlier they're thinking of these issues, when they're going through a transaction process, the smoother the process will ultimately be. So sensitizing our clients to be thinking about these issues early is very much to their benefit because when the issues are raised later in the process, it just becomes more of a burden to our clients and especially the HR teams at our clients.

Our clients are pretty well-versed in risk identification, in diligence in transactions, as well as mitigation of those risks if they're involved on deal teams. What we really wanted to focus in on would be the integration issues that occur after the deal. So we think it was important for us to kind of focus on that as a part of the presentation, or at least the thrust of it, so that folks understood that the HR folks, especially where labor and employment and benefits issues predominate and really are a gating issue in a deal, they need to be able to clear these. And so if they're going to be involved in deal teams in the diligence phase, they should really be thinking about what you need to do post deal in order to integrate those assets so that you get the benefit out of the acquisition. And in so many deals that we work with, because we are labor and employment lawyers, the issues really involve people and labor and employment issues, prior risk issues, but also going forward, how you take those assets in a business and moving forward and get the full value out of it.

Given the complicated nature of these transactions, what were some of the issues that really resonated with our attendees during the presentation? What did they really want to know about these deals?

Well, because the labor and employment issues in deals that we handle are typically gating issues, they're significant. That's why we are called in by full-service firms and also strategic acquirers and private equity firms to help. It's to identify what are really the significant most high priority issues in the deal, to identify what those are. Determine what's material, separate the wheat from the chaff, and to identify possibly how we can influence the structure of the deals so that we put our client in the best position to mitigate the risk and moving forward to be able to take those employees across and leave some of those liabilities behind. We also emphasize the need, and I think what really resonated was the need to plan in advance at the deal stage for what you're gonna do post-deal, because sometimes you have simultaneous sign and close, and sometimes you have a delayed sign and close, but when you start to take over those assets, you are the employer, possibly a successor employer to the previous one, but you need to make sure going forward, you've mitigated those risks and you've put your own stamp in place on the business that you're buying.

So Dan, lots of things to talk and think about. I'm sure you shared that with your attendees today in the presentation. If you had to pick some key takeaways for your attendees here at the conference and also our listening audience, what would you share?

Sure. You know, I think one of the things that the important things is as you're going through the diligence process, you're going to identify a number of issues which are not going to be showstoppers. They're things that are going to be marked in the diligence report as to be addressed post-closing. And that's really low-hanging fruit that employers can do post-closing is go through the diligence report, use it as a starting point for remediating some of those issues, bringing handbooks and policies up to date, up to current best practices and current legal compliance. That's really easy stuff. Some of the stuff our clients are also very interested in is how do you tackle some of the more challenging stuff? How do you deal with it post-closing when you've identified potentially employees who've been misclassified for FLSA purposes or potentially a group of folks who've been misclassified as independent contractors? And what are some strategies you can use to address these things post-closing, but also minimize risk? Another key takeaway, I think, is really, as I mentioned, think about integration early on. The diligence process is not just about identifying the risks. It's also about gathering the information that's going to be necessary or helpful to plan for and optimize the post-closing state.

Rick?

I think the key takeaway from the program is if you're an in-house legal lawyer and you need to be involved in the employment and HR issues that come up in deals, you've got to get involved early on in the process and try to encourage your business clients internally to have you involved in the process early so you can anticipate how the deal is going to impact the labor relations or the employee relations issues post-closing.

As a labor lawyer, I always look at everything from organizing risk and from the satisfaction of employees. Obviously, when you have a deal, you want to keep the employees happy and you want to keep them on your payroll in most cases. So you want to make sure that the deal is done in a way that anticipates that a deal is an upsetting time for people when they don't know what the new owner is going to do with that business. So the more that the legal and HR, especially the employment and labor lawyers and the benefits lawyers can understand what's going to happen with the deal, the more they can mitigate those things that would cause friction and ensure that when folks come over, they don't feel that the deal is a bad deal for them. So that's really, I think, the most important thing.

The other part of it is if you have union and hybrid non-union operations, either before or after the deal, it's really important to have competent labor counsel that understands the issues about contract administration for purposes of collective bargaining, making sure that you're not violating the CBAs, that you're bargaining where there's an obligation to bargain in anticipation of the deal, and that when you're setting up the business, if you're making any changes whatsoever, that you really have an appreciation for management rights in the agreements and what you can do without bargaining, what you can do with bargaining and anticipate the need to build in the union as one of the stakeholders as part of the deal at the appropriate time so that you could have them not be surprised by the deal and push back in a legal sense on anything that you do. So that's really critically important.

It's also important to understand how to administer things like third party benefit fund obligations so that you don't find yourselves in a position where you don't know how to administer those or you're missing payments or you're paying late.

Dan and Rick, a lot to think about. Thank you for joining us behind the podcast mic today and we hope you enjoy the rest of the conference. Thanks for having us. Thanks for having us.

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