

2021: The Year Ahead for Employers

January 2021

Shell shocked by 2020, employers are at a crossroads in 2021. Whether deciding to return to the workplace or remain virtual, a mix of business as usual combined with the realities of COVID-19 will influence practically every decision.

Jackson Lewis P.C. · 2021: The Year Ahead for Employers

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Transcript

Alitia (00:07):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted? Shell shocked by 2020 employers are at a crossroads in 2021, whether deciding to return to the workplace or remain virtual, a mix of business as usual combined with the realities of COVID-19 will influence practically every decision.

This episode of We get work™ introduces our 2021 the year ahead for employers forecast report, and identifies the top issues and trends facing employers in the new year. Our host today are Sheri Giger and Jonathan Siegel, principals respectively in the Pittsburgh and Orange County offices of Jackson Lewis. Sheri has seen both sides now, having worked in human resources for a Fortune 500 company before joining Jackson Lewis. Jon, a labor practitioner, will likely have a lot to discuss with you when the new Biden administration moves into the White House later this month. Sheri and Jon, the question on everyone's mind today is, what are the top issues and trends facing employers in the new year, and how will my business be impacted?

Sheri Giger (01:39):

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Practices

Affirmative Action, OFCCP and Government Contract Compliance
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Services

Biden's Impact on Employers
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Thanks Alitia. There's lots to talk about surrounding that very loaded question. And Jon, I'm happy to be with you. How are you?

Jonathan Siegel (01:48):

I'm doing great. And, it's great to have this conversation with you and everyone on the line. There's lots of hot topics, so let's get to them.

Sheri Giger (01:58):

Let's do it. I'm excited to kick this off with you for Jackson Lewis, 2021, the year ahead for employers podcast series, so let's just dive in. 2020, of course, threw us all for a loop. And, I think I can say with confidence that everyone has high hopes for 2021, but employers will be in a bit of a crossroads this year, because we are still under the umbrella of the COVID-19 pandemic, and that will influence decisions that employers make throughout the year. In this kickoff podcast session, we are going to talk about some top issues and trends that we anticipate as we sit here in the first week of January 2021. Each of the upcoming weekly podcasts will take a deeper dive into the issues that we discuss briefly today. But, listeners get to dive even deeper into these topics in our written compilation and analysis, that will be on the Jackson Lewis website.

And, every week you get to examine a new podcast topic throughout February. Now, these will include, just as a highlight and an overview, litigation hotspots, which are claims we are anticipating will take off in 2021, the ever important issue of diversity, equity and inclusion in the workplace, which we anticipate will be front and center in 2021, and what I call the trend that keeps on trending, which is marijuana in the workplace. Also workplace safety, which is the prominent issue on everyone's mind as we continue to march through this pandemic. Also, the changes in the world of benefits as a result of COVID-19, the CARES Act and the SECURE Act. And then Jon, your personal favorite, anticipated labor law developments under a new administration.

Jonathan Siegel (03:47):

Well, that sounds like issue failed podcasts that will be great for everyone to tune into, but let's go back to one of the areas that we started with, which I think most organizations who are risk-averse want to take a look at is, Sheri, what are some of the trends you're seeing in litigation, class litigation out there in the workplace?

Sheri Giger (04:10):

Yeah, I'm happy to talk about that. So, let's first talk about COVID-19. As the pandemic unfolds, we see employers facing COVID-19 related lawsuits. As of late November 2020, there were almost 1100 COVID related employment complaints filed in federal and state courts. 59 of those were collective actions. We do anticipate these types of lawsuits to increase in 2021. Now, these claims can alleged various issues including retaliation claims by employees who raise health and safety concerns, failure to accommodate claims, whether that be religious or disability-based, or maybe even pregnancy-related. Also, failure to grant any required paid or unpaid leave in the midst of the pandemic, think FMLA, state paid family leave laws or ADA leave as an accommodation.

We also anticipate claims surrounding violations of the new COVID-19 related leave laws, or expansions of the current paid sick leave laws that were amended to include COVID-19 related reasons. And of course, there's discriminatory reasons, the standard anti-discrimination claims of discriminatory treatment based on age, disability, gender, pregnancy, race or national origin.

Jonathan Siegel (05:31):

What are some of the other trends you're seeing?

Sheri Giger (05:31):

Aside from COVID specifically, we do anticipate some wage in our class actions, and some of it is related to COVID as based on the dramatic spike in the sheer number of telecommuting employees. There are onsite issues such as waiting in line for temperature checks. Essential workers who work extended shifts, exempt managers taking on more non-exempt work in an effort to control payroll costs, and more in the wage and hour arena.

Other trends that we anticipate in 2021 are sexual and gender orientation claims in the wake of the Supreme Court decision and 2020 ruling that Title VII of the Civil Rights Act, prohibits discrimination on sexual and gender orientation; and also, ADA Title III website accommodation class actions. So in the midst of all of this, there has also been an incredible call for substantial change and action related to diversity, equity and inclusion, including pay equity issues. So, what challenges do you see for 2021, Jon?

Jonathan Siegel (06:33):

Well, I think when we look at diversity, equity, inclusion, I think those issues are really front and center.

Data Analytics
Disability Access Litigation and
Compliance
Drug Testing and Substance
Abuse Management
Pay Equity

And, I think looking to the year 2021 through this year, it's something that every employer needs to evaluate their efforts in DEI.

One of the most current things that is going on right now is President-elect Biden is trying to fill and create one of the most diverse cabinets that any administration has had. So, not only do we have a social call for justice, but we also were already seeing that in the potential makeup of the new administration.

Other things I think employers need to be looking at, is that many prominent companies have already announced new commitments to DE&I, and they've done that in all kinds of different ways. So, for our listeners, what are some of the things you want to be thinking about for your organization? Increased leadership, diversity, new programs, mentorships, diversity scholarships, reviewing selection criteria. Data analytics has become a useful tool in measuring organizations, and also partnering with the community. And as an organization, Sheri, I think every company needs to ask, who am I working with in the community? Who am I partnering with? And, that's something you want to be able to answer.

Sheri Giger (08:01):

Well, I think that's really important, Jon. And, what do you think that means in the long-term?

Jonathan Siegel (08:06):

Well, I think in the long-term, it's an interesting time, because we have the social call for justice. But then, when you look long-term and you look at some of the statistics coming out of the U.S. Census, what are they saying? Well, the U.S. Census has reported that in 2042, the United States for the first time is going to be a minority-only country. What do I mean by that? Well, we mean that there'll be no majority group in America. They will be made up of a number of minority groups and that's a new, unique situation for our country.

It also means that, I think as an organization, we really want to accelerate our DEI or diversity efforts, because by 2042, they will be predicted to be a minority-only country. Some of the other developments that I think organizations want to look at, is that in our federal agency, that audits federal contractors, the OFCCP, the OFCCP has already stated and started an initiative to audit employers in several key areas. And specifically federal contractors, those two areas is pay and promotion treatment of veterans, and pay and promotion treatment of individuals with disabilities. So in those two areas, I think every organization, regardless of being a federal contractor, I think it's a good idea to review those areas.

For you, Sheri, I know there's been numerous other concerns and sensitivities for employers. What's another major area that you think employers need to have on their radar?

Sheri Giger (09:51):

One of the important areas that keeps popping up, and this just keeps trending from prior years and I don't see it stopping, is marijuana in the workplace. In a November 2020 Gallup poll, 68% of Americans were in favor of legalizing marijuana. That's a pretty high number. Now, let's go to the federal level, The Marijuana Opportunity Reinvestment and Expungement Act, let's call that the MORE Act, M-O-R-E, the MORE Act was introduced in 2019.

In December of 2020, very recently, it was passed by the U.S. House of Representatives, so we expect something to happen in 2021, so we need to keep an eye out for that. The MORE Act, interestingly, would basically remove marijuana from the Controlled Substances Act. It would also provide a process for expungement of certain federal cannabis related arrests and offenses, and it would impose a 5% tax on cannabis products, always the taxes, right. So, we will have to wait and see what happens with the MORE Act. I'm pretty curious to see what develops.

Jonathan Siegel (11:00):

When you talk about the federal development to the MORE Act, it would be interesting to see how much traction that gets in the administration in terms of the political change and climate. What are you seeing, or what are we seen on the state level, Sheri, in terms of the developments with marijuana or medical marijuana?

Sheri Giger (11:20):

There are some state developments in case listeners haven't heard. South Dakota had a successful ballot initiative resulting in a law under which medical marijuana card holders are entitled to all of the same rights under state and local laws as if they received a pharmaceutical prescription. So, this relates to interaction with an employer and drug testing, so that could be the start of a trend in new measures. Other states with new marijuana laws include Arizona, Mississippi, Montana and New Jersey, so we can look for potential guidance coming out from the state entities in those particular states.

Now on the testing side, employers from a federal level, we're jumping back to federal, employers can expect some new regulatory developments related to DOT flexibility in a pandemic as this pandemic continues. And, the DOT has indicated some flexibility. So, that revolves around oral fluid testing, and we

also see hair testing guidance on the horizon. So, we'll have to keep an eye out for that as well. This is one podcast that I will not miss, because it's such an evolving area as well. But now after marijuana, the next natural topic that usually arises is safety in the workplace. So Jon, what are some hot topics in safety coming up for 2021?

Jonathan Siegel (12:41):

Yeah, I think when we deal with workplace law issues and things to look forward to, I think one of the most unique things about 2020 was that we've never seen such a spotlight on safety and health as we have this year or last year, I should say 2020. We rarely have ever had a president campaign on safety, which is what we saw in the 2020 campaign, President-elect Biden pledged to enact the emergency temporary standards to address COVID-19. So, it's very unusual that safety is, what we would call, a focus in the first hundred days of an administration, but we believe it absolutely will.

So from employers, what do you want to look out for? Well, the emergency temporary standards or regulations that could be passed may follow what really is going on in California, and some other states which have passed emergency regulations, dealing with employer funded testing, paid time off. You must have detailed prevention and response plans. Those are all things that could be covered in the emergency temporary standards.

The other area that obviously we're all struggling with now and I think we will, unfortunately for the next couple of months or a year, is vaccine management, and how are you going to handle that? And, that may be an area also addressed by the temporary standards.

Sheri Giger (14:14):

What other trends beyond the pandemic do you think we can expect Jon?

Jonathan Siegel (14:18):

Well, I think the new administration, we anticipate being more restrictive towards workplace safety incentive plans. So, employers who maintain incentive or bonus plans regarding workplace safety, I think you want to keep an eye out for this administration's approach to those kinds of plans. And also, I think they may be more restrictive towards post incident drug testing, and where it is, or isn't permissible. Now in pandemic management, as we all know another area that has been a focus of employer compliance and activism is benefits. And Sheri for you, what do you think are some of the key benefit issues that employers need to navigate?

Sheri Giger (15:02):

Right, I agree with you, Jon, no area of workplace law really escaped the effects of the pandemic, and the world of benefits was with no exception. So we've seen health plans, impacts will continue into 2021. The CARES Act requires COVID testing and all costs of the FDA approved vaccines to be covered by health plans. We also are going to see some changes in the health FSA's, flexible spending account. The amount that an employee can contribute into a health FSA remains the same in 2021, but plans that have a carryover provision will see an increase in the carryover amount in 2021. And, we may see additional guidance from the IRS permitting even additional flexibility, just due to the ongoing nature of the pandemic as well.

Jonathan Siegel (15:52):

There's very few things to look forward to than guidance from the IRS.

Sheri Giger (15:58):

Right. Another health topic is COBRA. And, if anyone recalls, the U.S. Department of Labor and the IRS issued a joint notice in 2020, extending certain time frames regarding a participant's right to continue group health insurance coverage. And, these changes are intended to last through 60 days after the end of the national emergency. So that's pretty significant, because we are not sure when the end of the national emergency will be. So, we'll have to keep an eye out for that as well. Also, the SECURE Act, in part, provides for expanded access to retirement plans for certain part-time employees. That's pretty significant. So, employers will need to start tracking those hours in 2021, and we need to keep abreast, and keep out for some guidance as well. And, that will be discussed in more detail in the podcast for that topic also.

And then, there some other developments that we anticipate in 2021 relating to 401(k), 403(b) contribution limits, defined benefit plans. And, we also think there will be a call for legislation related to the PBGC, the Pension Benefit Guaranty Corporation whose program for a multi-employer plans is still predicted to become insolvent by 2026, which sounds like it's so far away, but it's really right around the corner. So, the Benefits podcast is a must for all benefit related topics. Another must is a podcast on labor. And Jon, labor law is your heart and soul, and I think we can expect some significant developments in 2021. Am I right?

Jonathan Siegel (17:37):

You're correct Sheri. And, I think the labor Podcast will also be landing at an interesting time in the President-elect Biden's administration. Why do we think is going to be so relevant? Because, President-elect Biden has campaigned to be the most pro-union president ever. And, that's unique just like how president-elect had campaigned on safety, we believe this will be a focus of his administration, and we think there'll be fundamental shift in many different areas of labor.

One of the areas that most private and sector employers will have to deal with is the change in the makeup of the National Labor Relations Board, which enforces federal labor law, which is subject to most private sector employers. Why are we talking about this? Because, the current makeup is three republican nominees and one democrat nominee. We believe as soon as Biden takes over, he'll nominate a second democratic nominee, so the board will be three, two. It's a five person board that decides labor issues under the NLRA.

And then, we believe by August of 2021, the makeup of the board will change from two to three, which being three democratic nominees. And at that point, we believe it'll be a much more pro-union board. And, what does that mean? I mean, what are we really talking about? I think we're going to see an increase in union organizing. I think we'll see an increase in union litigation, they're much more apt to challenge issues. And, I also think that a new board, especially post August 2021, we'll be revisiting a number of issues that were overturned under the prior administrations. There are a lot of issues that could come up, but some of the key issues could be for example, a return to a very restrictive joint employer standard, a revisit of the NLRB election rules.

We could see the expansion of mail balloting, which tends to favor unions, and whether they win or lose an election. We also may see a revisit, or to go back to the NLRB allowing more micro-units in determining union elections. And, we also believe that unionized employers, or partially unionized employers should keep a look out under the new NLRB about whether they're going to revisit when an employer could make a unilateral change under their contract. The NLRB would go back to the clear and unmistakable waiver standard, as opposed to what we have now, which is a new development, the contract cover standard. Now, that's a mouthful, and that means a lot to a different people, but those are just some of the issues that this board may revisit. One of the things that Sheri and I are excited about the podcast series is that, one, we're going to have one a week for six weeks.

And also two, we really have an outstanding document that you should download from our website, and you can also obtain it from the Jackson Lewis attorneys you work with, called 2021: The Year Ahead for Employers. This document is going to in detail, really cover many of the topics we talk about, but many more that we really haven't. And so, that's something to keep in mind, and we hope you do. We want you to tune in to the podcast series, Sheri and I know that it's going to be outstanding. I also wanted to thank Sheri Giger for participating in this conversation with me and everyone else who's tuning in. Sheri, thank you.

Sheri Giger (21:44):

Jon, thank you. It's been a pleasure to talk with you as always. And hopefully, it's not too long before we're all able to see each other in-person versus only over video.

Jonathan Siegel (21:54):

Well Sheri, it's been great to have these few minutes with you, and I want to wish everyone and hope that we have a better 2021. Let's all hope for that. Thank you and take care.

Sheri Giger (21:54):

Thank you.

Alitia (22:08):

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