

# Live from CCC2023 Ep. 7: Top Employment Law Topics for 2023 – a Quick Survey (Part II)

By Howard Shapiro, Clifford R. Atlas, Scott P. Jang &

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## Meet the Authors



### Howard Shapiro

(He/Him)

Principal

504-208-5835

Howard.Shapiro@jacksonlewis.com



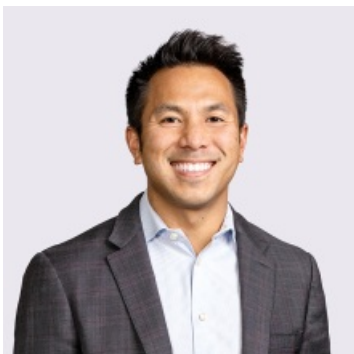
### Clifford R. Atlas

(He/Him)

Principal

(212) 545-4017

Clifford.Atlas@jacksonlewis.com

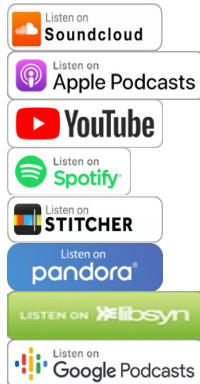


## Details

May 3, 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. 7: Top Employment Law Topics for 2023 – a Quick Survey (Part II)



## Transcript

Alitia Faccone:

Welcome, and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis's 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. 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. Howard Shapiro talks ERISA, preparing for the avalanche of class action litigation, Scott Jang discusses arbitration agreements and class action waivers, the when, why, and how for employers in 2023, Cliff Atlas shares the latest on non-competes, hiring the talent you need and minimizing the risk you don't, and Paul Kelly talks us through employee misconduct, how to prevent and respond to criminal behavior. I'm here with Howard Shapiro. Good morning, Howard. Can you tell us a little about you, where you're from and your practice at Jackson Lewis?

Howard Shapiro:

**Scott P. Jang**

Principal

(415) 394-9400

Scott.Jang@jacksonlewis.com

I am pleased to do that and glad to be here today. So I am the co-lead of the ERISA Complex Litigation Group. We operate out of the New Orleans office and all throughout our 60 offices at Jackson Lewis. Our ERISA Complex Litigation Group functions all over the country. We defend class action ERISA cases nationwide.

Alitia Faccone:

Thank you, Howard. The title of your presentation at CCC was ERISA: Preparing for the Avalanche of Class Action Litigation. Can you provide our listeners with a brief summary of what was covered during your presentation and why you believe it was important to present this topic at CCC2023?

Howard Shapiro:

Plan sponsors, employers, other defendants, which include fiduciaries, plans themselves, during the last three years have seen an avalanche of close to 300 ERISA class actions filed against 401(k) plans, 403(b) plans, 403(b) plans are the same type of defined contribution plans sponsored by not-for-profit entities. This is truly a stunning amount of class action cases that have been filed in roughly a three-year period. When you have this much class action litigation filed in such a short period of time, there are repercussions across the entire retirement spectrum, repercussions for the plan sponsors, our natural client constituency, but there are also repercussions for retirees, plan participants. There are repercussions for the insurers. They are important for our natural defendant constituencies because without insurers, how can our clients offer these plans? So this amount of cases that have been filed, this is a truly startling number of cases, unprecedented in my 40-year career.

Alitia Faccone:

Thanks. So Howard, given the significant numbers you just shared with us, what are the important issues in ERISA litigation today?

Howard Shapiro:

The really important issues are having our plans, the fiduciaries, and of course, for the people who are not fully conversant in this area, think of plans as many corporations. So as in a corporation, there is a board of directors, and for the plan, these board of directors are known as the fiduciaries. And these fiduciaries have individual responsibilities and they are individually liable, and it's their job to keep the plans running as they should. So these fiduciaries have to be vigilant, they have to do their job, they have to be very conversant with the ERISA standards for doing their job. They have to be well-advised, they have to have advisors who are at the top of their game. These lawsuits have pointed out the need for fiduciaries to be well-advised, for fiduciaries to be engaged. And one of the things that Jackson Lewis does and helps fiduciaries with is being well-advised and being prudent, a very important word in the ERISA community, being prudent in how plans are managed. So that is something that is important for all fiduciaries who have responsibilities with respect to the management of ERISA plans.

Alitia Faccone:

So Howard, what do you believe are the key takeaways that employers should keep in mind when discussing and thinking about these issues in their organization?

Howard Shapiro:

The key takeaways clearly are this litigation is not going away. Even though close to 300 cases in three years feels like a shocking number, and it is a shocking number, I don't want anybody to get content with that. It's a shocking number, but because of the legal standards that are emerging, I believe that this number of cases filed is going to continue to trend upward, hence my use of the word avalanche. This avalanche is going to continue to beset the employer and plan community. This means that the employer community and the plan community must continue to be vigilant as to their fiduciary practices and has to remain at their A game. We cannot stop plaintiffs' lawyers from suing plans, we can be ready with vigilant and excellent fiduciary practices when the lawsuits come.

Alitia Faccone:

So considering this trend upward, how are you and your Jackson Lewis colleagues providing assistance to organizations?

Howard Shapiro:

The litigation team at Jackson Lewis works closely with the transactional benefits lawyers at Jackson Lewis to help educate and evolve upward the fiduciary practices of our clients so that our clients continue to evolve upward and meet the trends that responsible fiduciaries are practicing on a daily basis. In this way, the fiduciaries that we represent are continuing to do an A job and be engaged so that the plans continue to be at the top of their game.

Alitia Faccone:

Thank you very much, Howard, for joining us behind the podcast mic today, and please enjoy the rest of the conference.

Howard Shapiro:

My pleasure, thank you for inviting me.

Alitia Faccone:

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

Scott Jang:

Good morning, Alitia. It's great to be here. My name is Scott Jang and I am a principal in the San Francisco office. And my practice area focuses mostly on class actions and I also do a lot of arbitration, class action waiver, advice and counsel work.

Alitia Faccone:

Well, coincidentally, the title of your presentation at CCC was Arbitration

Agreements and Class Waivers: The When, Why, and How for Employers in 2023. Can you provide our listeners with a brief summary of what was covered in your presentation and why you believe it was important to present this topic at CCC?

Scott Jang:

It was a perfect match, Alitia. A lot of employers in California and across the nation really look to their class action waivers and arbitration agreements as a way to mitigate risk, especially with respect to wage and hour class actions. And there were several key developments in 2022 which will affect how employers move forward and mitigate their risk in the class action space. So it was very important that employers realize and understand the roadmap for 2023 and what 2023 had in store.

Alitia Faccone:

What were some of the issues that really resonated with our audience during your presentation? In other words, what did they really want to know?

Scott Jang:

Well, funny enough, a lot of conversation was about EFASHA and that fun acronym that no one knew how to pronounce. But more substantively, a lot of the discussion really focused on something more fundamental and that was whether arbitration agreements were right for the employer themselves in the first place. So a lot of conversation was really just about the fundamental pros and cons of arbitration and whether or not to adopt arbitration agreements.

Alitia Faccone:

Well, that's an interesting term that I'm sure many people haven't heard before unless they're in this area. Can you tell our audience what EFASHA is and how it might affect them?

Scott Jang:

EFASHA Sasha stands for the Ending Force Arbitration of Sexual Assault and Sexual Harassment Act. And this was a statute passed by Congress and President Biden in March of 2022 that effectively carved out from arbitration agreements disputes and claims with respect to sexual assault and sexual harassment. But the statute does have some ambiguity and so employers will need to grapple with how courts deal with ambiguity in terms of the scope of the statute, both in terms of the carve out of the claims as well as the class action and class waiver component of the statute.

Alitia Faccone:

Thank you. Scott, what do you believe are the key takeaways employers should keep in mind when addressing these issues in their organizations?

Scott Jang:

I think the key takeaway is really to look forward to a lot of activity in the courts with respect to class action waivers in their arbitration agreements. Specifically one

of the big issues that all our eyes are looking at is the enforceability of PAGA waivers in arbitration agreements. A key California Supreme Court hearing is scheduled for sometime in May or June of this year and we expect a decision probably in the fall of 2023. And this decision will have a large impact on whether employers can use arbitration agreements to really mitigate that risk created by PAGA actions in California and potentially PAGA-like statutes in other states.

Alitia Faccone:

Scott, how are you and other Jackson Lewis lawyers providing assistance to organizations on these issues?

Scott Jang:

Well, our arbitration team, which is comprised of Samia Kirmani and Mia Farber are really looking at the court cases that are coming on the docket in 2023. We're closely monitoring those cases and of course whenever we have decisions in those cases, we'll be sure to update clients through articles and blogs. So please stay tuned, we'll have important information.

Alitia Faccone:

Thank you so much, Scott, for joining us behind the We Get Work Podcast mic and have a terrific rest of the conference.

Scott Jang:

You too. Thanks, Alitia.

Alitia Faccone:

What follows is a podcast with Cliff Atlas recorded live at CCC2023 and supplemented on April 26th, 2023. I'm here with Cliff Atlas. Good afternoon, Cliff, can you tell us a little bit about you, where you're from and your practice?

Cliff Atlas:

Hi, I'm a partner in the New York City office of Jackson Lewis. I am co-leader of the Restrictive Covenants, Trade Secrets and Unfair Competition Practice Group. I focus a significant part of my practice to drafting agreements, litigating matters in this practice area and advising clients on hires and separations and other related issues.

Alitia Faccone:

Cliff, the title of your presentation this afternoon was Non-Competes: Hiring the Talent You Need and Minimizing The Risk You Don't. Can you provide our listeners with a brief summary that was covered in your presentation this afternoon and why it was important to present this topic at CCC2023?

Cliff Atlas:

Alitia, it's interesting because when I was asked to do this program back in November, I thought that I was going to talk about the topic that you just said, but

times change and things happen, and in January of 2023, the Federal Trade Commission issued a notice of proposed rulemaking for a rule that bans all non-competes in all industries for all levels of employees. It is an earth-shattering event. And so I used the 15 minutes that I had to talk about that, the implications of that and where things stand now.

Alitia Faccone:

So what do you believe to be the key takeaways? What do employers need to know based on what you just shared and what should they keep in mind when addressing these issues and what's upcoming in their organizations?

Cliff Atlas:

Well, the FTC's proposed rule is not enacted yet. When I spoke at the conference, the FTC's comment period was still open, so I discussed the importance of submitting comments to the FTC, especially for those employers who might want to or need to legally challenge the validity of any rule that the FTC might ultimately implement. The comment period closed on April 19th and the last I looked, there were nearly 27,000 comments, but we noticed that the FTC has been slow in processing the comments. Once the comment period has closed, as it has, the FTC may reopen the comment period or issue a new proposed rule, or terminate its rulemaking or move on to a final rule. I think that there will be a final rule that will be issued here. Prior to the publication of the final rule, the FTC has to review and consider all of the comments.

Then there's a process involving the Office of Information and Regulatory Affairs. The final rule will ultimately be published in the Federal Register. Major rules, and we think this is a major rule, have to be made effective at least 60 days after publication in the Federal Register, allowing time for congressional review. If the House and Senate pass a resolution of disapproval and the President signs it, or if both Houses override a presidential veto, the rule would become void and could not be republished by the agency in the same form again without congressional approval. In addition to government review, the FTC rulemaking will likely be challenged through litigation. So all of this is to say that any FTC rule on non-competes is unlikely to happen very soon. Of course, the FTC does have authority to bring enforcement actions, as it already has, to pursue what it deems to be egregious or abusive overreaches by employers in their use of non-competes.

Alitia Faccone:

What else can employers do to prepare for an eventual rule change that might come to pass?

Cliff Atlas:

Well, what I told the group inside was that until the rule takes effect, it isn't in effect, and you should stay the course and you should do all of the things that we've been telling employers to do for the last 20 plus years, which is to draft these agreements carefully, to keep them narrow, to keep them focused in on the employer's actual confidential information and trade secrets, because not every shred of information is confidential, to make the agreements hue towards the

actual business of the company, to make sure that they're reasonable in terms of geographic scope and duration and scope of activities, and to not use these agreements with low-level employees unless there's a really compelling reason to do so. I'm not sure I know of one, but I suppose that it's possible. But if you do use non-competes with low-level employees, I think an employer should be prepared to explain that.

Alitia Faccone:

Cliff, how else is Jackson Lewis providing assistance to clients on these issues?

Cliff Atlas:

Well, we are monitoring not only the FTC issue, but also federal legislation that's pending, myriad state legislation that's pending. There are bills pending in at least 24, 25 different states, and there are multiple bills in some states. Some of these bills may never see the light of day, but some might.

Alitia Faccone:

Cliff, thank you so much for being here at CCC2023 and behind the podcast mic today.

Cliff Atlas:

Thank you very much.

Alitia Faccone:

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

Paul Kelly:

I'm in the Boston office of Jackson Lewis. I lead the White Collar and Government Enforcement resource group as well as the Collegiate and Professional Sports Group. I've been practicing law for 40 years. I spent 10 years as a federal prosecutor with the Department of Justice and I also spent five years in the sports world, including several years as the Executive Director of the National Hockey League Players Association.

Alitia Faccone:

Thank you. The title of your presentation was Employee Misconduct: How to Prevent and Respond to Criminal Behavior. Can you provide our listeners with a brief summary of what was covered in your presentation and why it was important to present this topic at CCC?

Paul Kelly:

We talked about the fact that 30% of corporate bankruptcies are attributable to employee misconduct, typically embezzlement theft, and why it's critically important for employers to be thinking about these issues. We talked first about prevention, steps that employers can take to prevent employee misconduct, and



then we talked about once employee misconduct is reported, the steps that need to be taken to investigate, to tighten up the controls, to take certain employment actions, to freeze access to sensitive data, credit card accounts, things of that nature while the investigation is proceeding, we talked about whether or not if you find sufficient evidence that there has been serious misconduct, whether the matter should be referred to law enforcement and some of the issues that that presents. And then we talked about some of the key takeaways and how employers can turn what is a negative situation into a positive by improving their compliance programs, having better policies in place, having more hands-on management.

Alitia Faccone:

What do you believe are some of the key issues or concerns that were raised during your presentation?

Paul Kelly:

One of the key issues is when an employer or a company decides to embark on an investigation, how do they want the conclusion, the findings of that investigation to be reported? Do they want it to be reported in a detailed written document that may get published someplace or may be discoverable in civil litigation? Or do they want the investigators to report their findings and conclusions and recommendations in some type of either a verbal manner or some kind of a very brief PowerPoint presentation, and what are some of the considerations that goes into that? And then as I mentioned earlier, we talked about whether you refer these matters to prosecutors and some of the issues that get presented there, which is, one, that means that they're going to have to interview several of your employees, which is going to be a little bit of a distraction. You inevitably will have to turn over documents pursuant to subpoenas.

Companies worry about whether they get listed in charging documents as a victim company or whether there's a way to refer to the company as, say, Company A anonymously, so the world doesn't discover that you had some kind of misconduct occurring in your midst. So we talked about those types of issues.

Alitia Faccone:

You mentioned some key takeaways. What do you believe employers should keep in mind when addressing these issues in their organizations?

Paul Kelly:

I think it's important for employers to periodically review their policies to make sure that they are clear, written in plain English, that's easily understood by employees, that makes it very plain that what the consequences would be of employee theft or employee misconduct. And it includes theft of sensitive data, theft of trade secrets, proprietary information. We see it a lot from departing employees that try to take valuable information as they're leaving. And so employers need to be alert to those types of issues. Employers also should periodically review their insurance situation, make sure they have commercial crime insurance, EPLI insurance, that might provide coverage in the event that there's an unfortunate employee misconduct issue. And we talked about just the



importance of the culture of the business and making sure that you have managers and supervisors that are alert to what's occurring around them.

Alitia Faccone:

Thank you. How are you and other Jackson Lewis lawyers providing assistance to organizations on these issues?

Paul Kelly:

We handle a multitude of these types of matters each year. I mean, I get called several times a month by companies and organizations that have believed that they've been the victim of some serious offense, and we investigate these matters. We give advice and counsel to the companies as to the steps that need to be taken, how to obtain restitution, what types of employment actions need to be taken, and we commonly refer these types of matters to prosecutors, both at the federal level and at the state level. So it's a very active portion of our practice.

Alitia Faccone:

Well, Paul, thank you for joining us this morning, and please enjoy the rest of the conference.

Paul Kelly:

Thank you very much.

Alitia Faccone:

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