

The Year Ahead 2024: ESG Audits

By Laura A. Mitchell & Monica H. Khetarpal

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, [JacksonLewis.com](https://www.jacksonlewis.com), or listen to the podcast series on whichever platform you turn to for compelling content.

Monica Khetarpal:

Good afternoon everyone, and thank you for joining us for this special episode of We get work™ The Year Ahead 2024 special report. Today we are talking about ESG audits. I am Monica Khetarpal. I'm a principal in Jackson-Lewis's Chicago office, and I co-lead our ESG client services group with my friend and colleague Laura Mitchell. So diving right into this, Laura, tell us about ESG audits and in particular, in 2024, why is this something that our clients are really looking for?

Laura Mitchell:

Yeah, thanks. Hi, Monica. Nice to be speaking with you. So I think this landscape in 2024 has really been shaped and informed by what happened in 2023. We had most notably the Students for Fair Admissions US Supreme Court decision, which really put a spotlight on DE&I, but it was a narrow decision. And so I think employers are still trying to understand and wrap their heads around what is the impact of that decision for my organization? Because the decision really only applied to college admissions, but the fallout from it, we saw letters going to organizations, publicly traded companies, referencing that decision with respect to their DE&I programs.

And so I think there was a lot of confusion around what are we still able to do? What should we be doing? What's lawful? What's unlawful? So I think 2024 is starting out where we left 2023 with just understanding the landscape of what we should be doing. And I would say that the legality of most organizations, DE&I programs hasn't changed, but the risk profile has shifted. So what you were doing before still may not have run afoul of the law. It doesn't still today, but it could

draw more scrutiny to your organization than it did before. And that's part of the calculus now.

Monica Khetarpal:

But we know that that is potentially changing with the Muldrow decision that we heard oral arguments for at the Supreme Court just a few weeks ago. Tell us about how that could change basically everything.

Laura Mitchell:

Right, exactly. So the Muldrow decision is really turning on what type of action can an employee use to bring a claim of discrimination against their employer? And it's really about where is that threshold? Where is that floor? What amount of harm or impact does the employee have to receive in order for it to be actionable? And the Muldrow case, consistent where we were seeing decisions before, is just lowering that bar so that it is easier for plaintiffs to allege discrimination against their employers. And so that can have benefits to a number of different protected groups and organizations to use that. But what that means with respect to our audits and really this lens that we're looking through as far as what should I do as an organization to prepare now as we start 2024, is really to evaluate where you are with your programs and your policies, DE&I specifically, but also with some of your other governance type programs to see, do we have objective policies and criteria that we're applying consistently without regard to race or gender or another protected class?

And if not, are we comfortable with the potential risk that allows us now? So for example, I know you're doing a lot of work in this space when we think about mentorship programs or sponsorship programs for upward mobility within an organization, is that a program that you have open to all of your employees or was it designated just to benefit a specific demographic? So taking stock of all of these different kind of policies of your organization is really going to be important in 2024. And it's not just what you disseminate to employees, but what are you saying on your websites as to what you do or goals that you are establishing for yourself? We have worked on a number of projects together where clients have grappled with what do we want to commit to as an organization in 2024 under this new landscape?

Monica Khetarpal:

And I think a lot of companies took a certain stance and did a lot of aggressive things with the best of intentions in 2020. And at this point, they're reevaluating and they're saying, "Well, let's take a look at it again." And this isn't the end of DEI by any stretch, but we do need to take stock and look at where we are three years later. And the work that we've been doing has been following the life cycle of the employee. So tell me a little bit, if somebody says, "Okay, that's great, an ESG audit. We're going to take stock of our risk and see where we're at and recalibrate." But what does that actually mean? What are the types of things that we're looking at?

Laura Mitchell:

Yeah, I love the word life cycle because it really visualizes for me everything that we're trying to encompass in these audits. So we're talking about how do we go about recruiting talent? What do those practices look like? What are those communications look like? What do our programs look like? Where are we recruiting? Even our job descriptions, we want to make sure that we're not running afoul of any of our laws from Title VII to the ADA, to any of the pay transparency laws that we now have in effect in a number of states across the country. Once we start interviewing candidates, are we looking for our processes to determine whether they have adverse impact? This is where we get into the statistical analyses and validation and whether or not our selection criteria is objective or if it's causing adverse impact. Once individuals are within our organization, how are we supporting them through those mentorships or fellowships, or what does our ERG program look like, process look like?

Do we allow anyone who wants to organize an ERG to submit an application for that? What is our construct around that? How are we selecting people for promotions? What do our performance ratings look like? A lot of organizations have moved away from hardcore performance ratings and gone to more soft touches throughout the year. That's great. But if you come down to your merit cycle and you're trying to align pay increases with performance, what are you going to rely on and what is the criteria and the proof of that if someone challenges you from a pay perspective? And then of course, we're seeing a lot of reductions in forces as the economy takes these swings. So how are you looking about evaluating your talent to decide who is going to be subject to this reduction in force and who's going to keep and these restructuring? So we have all of these different goals, but again, it's from the beginning to the end of this employee life cycle and everything in between.

Monica Khetarpal:

And I always think of it as both so many opportunities throughout the life cycle to be challenged and risk, but also so many opportunities to really advance your organization's values. So a new year is a good time to take stock. What about outside the employment cycle? We've heard about initiatives with vendors and human trafficking and workplace safety and wage hour, throw some labor in the mix. It's a little bit of everything.

Laura Mitchell:

The answer is yes. Yes to all of that. Supplier diversity, we are seeing a lot of uptick in questions around that following Students for Fair Admissions. So I think every aspect of what employers do and their interactions with their employees and the creation of their workforce environment needs to be reevaluated at certain levels.

We have guidance that's been on the books and regulations for years in some of these spaces. In others we don't have any, or it's brand new with respect to human capital disclosures that we're waiting from the SEC for. So a lot of this is, again, coming back to the beginning and taking stock of where you are and what your current compliance landscape is, and then evaluating the pieces that need to be updated or maybe the new pieces that you need to fill in. But I would just say that, as a closing thought, that there's no way to eliminate risk completely.

Monica Khetarpal:

That's right. That's right.

Laura Mitchell:

We're in the business of helping to mitigate risk and to ensuring that your practices align with your risk profile. We're talking more and more about this risk profile. I feel like in every conversation, who are you as an organization and where are you comfortable operating? And then making sure that your practices and your policies are in line with that.

Monica Khetarpal:

Yeah. We try and eliminate surprises if not risks.

Laura Mitchell:

Exactly. Exactly. Yep.

Monica Khetarpal:

Well, thank you so much for chatting with me. I know we'll talk again soon.

Laura Mitchell:

Yes, always a pleasure.

Alitia Faccone:

Thank you for joining us for The Year Ahead 2024 special edition podcast series. Please tune into our next episode, where we will continue to tell you not only what's legal, but what is effective. All of our Jackson Lewis podcasts are available to stream and subscribe on Apple Podcasts, Google Podcasts, Libsyn, Pandora, SoundCloud, Spotify, Stitcher, and YouTube.

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