Podcast

Live from Workplace Horizons 2024 — Episode 2: What Employers Need to Know About Litigation and Investigations

By Stephanie L. Adler-Paindiris, Lisa Barnett Sween, Scott M. Pechaitis, Christopher T. Patrick & Adrienne L. Conrad

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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 2: What Employers Need to Know About Litigation and Investigations

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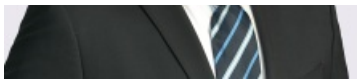
Transcript

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 litigation and investigations. Stephanie Adler-Paindiris and Lisa Sween discuss SCOTUS and the circuits, pivotal cases having a far-reaching impact on employers in 2024. Scott Pechaitis and Chris Patrick share important information for all employers on OFCCP's new investigation techniques, why even non-federal contractors should take note. And Adrienne Conrad provides important insights into the currently volatile regulatory landscape of non-competes.

This afternoon, we're talking to Stephanie Adler-Paindiris and Lisa Sween, principals in the Orlando and San Francisco offices of Jackson Lewis. Good afternoon, Stephanie and Lisa. Can you each tell us a little bit about yourself and your practice at Jackson Lewis?

Hi, everyone. Lisa Sween. I am the office managing principal of the San Francisco office. I primarily practice single plaintiff litigation and do advice and



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counsel for clients all over the country. Stephanie. Thanks Alitia. I'm Stephanie Adler-Paindiris and I am on the opposite side of the coast in Orlando, Florida. I am the co-leader of the litigation practice group here at Jackson Lewis and also a member of our board of directors and handle primarily class and collective actions, as well as some advice and counsel and other types of litigation. And really happy to be here.

Thank you. Stephanie, the title of your presentation at the conference was SCOTUS and the Circuits, Pivotal Cases Having a Far-Reaching Impact on Employers in 2024. Can you provide our listeners with a brief summary of what you shared with our attendees during your presentation and why it was important to present this topic at Workplace Horizons?

Sure. So Lisa and I had the great pleasure of sharing with our group some really key important Supreme Court decisions that are coming out or were argued recently. And we think these opinions are very important, pivotal, and will change the landscape of workplace law quite dramatically, actually. Funny enough, one of them, the Muldrow case was decided while I was on the plane traveling here. So quickly had to read that decision and kind of digest that for our presentation. But I would say, you know, we really focused on the key cases coming out of the Supreme Court. But two of those that I would mention here are the Muldrow opinion that recently was just decided on April 17th and the Chevron cases that have not yet been decided.

And just so our audience knows, the Muldrow case was a Supreme Court decision that was challenging a job transfer under Title VII. Approximately six or so circuits had previously held that in order to show a job transfer was actionable under Title VII, the plaintiff had to show a heightened level of injury. They had to show it was a material change in the terms and conditions of their employment or that they were in a disadvantage by that transfer as opposed to a case, for instance, where you show that you were hired or not hired, you got your pay cut, you were disciplined, things like that. And essentially, the Supreme Court was tasked with deciding whether or not the plaintiff had to show any additional harm.

The plaintiff in that case, which was a sergeant in the police department in St. Louis, essentially had a transfer against her wishes. She did not seek that transfer. And she alleged that it was because of her gender. And she alleged that there were a number of disadvantaged things, but both the district court and the circuit court of appeals said, no, you have the same rank, same pay. You're still a police officer. No claim. Well, the Supreme Court disagreed with that. And ultimately in a 9-0 decision, which is quite rare these days that the nine justices agree on anything, held that the Eighth Circuit was likely wrong and remanded it. What's interesting is that seven of the justices decided that the standard is now that a plaintiff has to show that a transfer results in some harm. That's the new standard, some harm. It doesn't need to be significant, but there needs to be some. Justices Thomas and Alito wrote concurring opinions and essentially, although they agreed to remand the case, Justice Thomas felt that really it wasn't a big change in what the circuits were already deciding. And Justice Alito, interestingly, felt that there should be no harm shown, that just the

discrimination alone was enough. Very monumental decision. Still digesting it, it's a massive sea change for lots of us in the country. I think it's gonna have a big impact on people's diversity plans and just kind of how they manage their employees.

And then just quickly, the other cases that have not been decided are two cases that went up to the Supreme Court to decide whether or not Chevron deference, which we all remember from back in law school, should either be maintained or overturned. And that really impacts whether or not courts are required to give agencies who are delegated to interpret statutes deference in their interpretation of statutes. It's a very big deal and we're just excited to see how that comes out.

So it sounds like it's going to be a pretty exciting June, Stephanie. Yes, a busy one. A busy one. Lisa, considering everything Stephanie just shared, can you share what you believe to be some of the more significant developments since we met last year at the conference?

Sure. So, one of the cases that I presented on was a case that came out of the Supreme Court last June, June of 2023. And that was the Students for Fair Admissions versus Harvard. And there was a sister case against the University of North Carolina. And the Supreme Court held last June that the use of race in admissions by Harvard and by UNC was unconstitutional under the 14th Amendment. And in those cases, both of the universities had used race in the selection process, both by rating admissions candidates and in making their final decisions based on what they wanted as a desired racial composition of their newly admitted class. And while those cases are limited to the college admission process, and they interpreted different statutes than we typically use in our everyday lives, the decision has definitely led to a heightened increase in challenges to private employer DEI programs. So what we're seeing is the logic and the language that was used in the Harvard and UNC decisions is now being used by government and private activist groups attacking various employer DEI programs. For example, shortly after the decision last June, the attorney general for 13 states sent letters to various Fortune 100 CEOs reminding them of their obligations, and this is a quote, to refrain from discriminating on the basis of race, whether under the label of diversity, equity, and inclusion or otherwise, end quote. So that's a pretty big deal when you're getting a letter from an attorney general and you're a private employer and you think you are doing a good thing by looking at your DEI programs and opening up opportunities. And now you are faced with a potential reprimand by the attorney general.

Then earlier this year, actually in February, another activist group, the America First Legal, which is a nonprofit founded by former Trump advisor, Stephen Miller, America First Legal sent a letter to the EEO, the Equal Employment Opportunity Commission requesting that the EEOC open an inquiry into the NFL's Rooney Rule. And as some of you probably know, the Rooney Rule requires football teams to interview at least two external minority candidates for head coach and general manager positions, and at least one minority or female candidate for team senior level positions. And the AFL letter to the EEOC alleges that the NFL's Rooney Rule constitutes an unlawful employment practice under Title VII. So this is just one of several challenges by the AFL and

similar organizations to various DEI initiatives in the private sector. So we are expecting to continue to see those types of activist organizations taking a close look at employer-related DEI programs.

Thank you, Lisa. One final question, given the significance of all of these decisions and what you covered in your presentation. Can you share how else Jackson Lewis and Jackson Lewis lawyers are providing assistance to employers and their organizations on these issues?

Well, one matter that we did not discuss during our session, but is an important topic. And I know Jackson Lewis has a variety of authors writing blogs and webinars about is the recent Pregnant Worker Fairness Act and the EEOC's final regulations with respect to that. The final regulations came out on April 15th, so right smack dab in the middle of our program this week. And the final regulations and the interpretive guidance implementing the Pregnant Workers Fairness Act is being seen as a very broad brush stroke. So these regulations, as many of you may know, require employers to provide reasonable accommodations for employees affected by pregnancy, childbirth, or related medical conditions. And it's that last phrase, related medical conditions, that is causing quite a stir. The regulations clarify the criteria for determining both the necessity and the appropriateness of various accommodations. And shortly after the regulations, the final regulations were announced, several states, we understand, are looking to file suit seeking to enjoin these regulations as they relate specifically to abortion. So more to come on that. The final regulations clarify and in some instances expand the circumstances in which an employer can or must reasonably accommodate an employee absent and undue hardship. So these regulations are definitely worth a look. Jackson Lewis is planning to host a webinar for clients covering the new regulations.

The webinar will be on May 10th and you can access the registration information on Jackson Lewis website. And also, I don't want to end without saying to make sure to check out all the various articles and blog posts that we have on our website regarding various things such as our prediction with respect to new overtime regulations being issued by the DOL. And of course, Stephanie co-authored a great article on the Muldrow decision that she just mentioned. So a lot of information on Jackson Lewis's website. Please join us for our webinars and check out our blogs. Lisa and Stephanie, thank you so much for sharing some time behind the podcast mic with us today. I know you'll be following the decisions as they come in throughout the remainder of the Supreme Court term. And we look forward to hearing what you have to say and all the information and resources that you can share for our clients. Thank you very much. Thanks, Alitia. Thanks, Alitia.

This morning, we're talking with Chris Patrick and Scott Pechaitis, principals in the Denver office of Jackson Lewis. Good morning, Chris and Scott. Can you please introduce yourselves? Scott.

Good morning. Thanks so much for having us. My name is Scott Pechaitis. I'm a principal in the affirmative action in OFCCP Defense Practice Group. I'm also a member of the Pay Equity Resource Group. And we assist companies with

preparing affirmative action plans, conducting pay equity analyses, defending OFCCP audits, and all-around general data analysis and good fun.

Chris?

I couldn't have said it better myself, Scott. Scott and I do have very similar practices substantively. We do things a little bit differently as all lawyers do but we practice in the same space and service the same kinds of clients on the same kinds of issues.

Great. Terrific. Thank you. The title of your presentation is OFCCP's new investigation techniques, why even non-federal contractors should take note. Chris, can you tell our listeners why it was important to cover this topic at our Workplace Horizons conference in 2024?

You bet. So let me start this with talking about what our conference or what our session was about. At first, we look back at the evolution of OFCCP's areas of focus and enforcement practices over time to show that such a niche agency that many think is only relevant to federal contractors really operates as a canary in a coal mine for the direction of other enforcement agencies and plaintiffs litigation. Then we shifted to what we can learn about OFCCP's current focus, really the increased focus on artificial intelligence, pay equity analyses and enforcement and discrimination claims favoring traditionally disfavored groups and what that's likely to mean for all employers in the future. So to answer your initial question, I think it's an important session because many aren't thinking about it. And we really have a lot of information out here about where the puck is going to be. And this kind of session in retrospective allows us to highlight that and be thinking about what we need to do to prepare today.

Scott, Chris just listed a whole bunch of things, whole bunch of different issues that you covered in your presentation. What really resonated with the audience and what are they most concerned about knowing?

I think what most resonated with the audience was the fact that OFCCP has really laid the groundwork for EEOC and potential plaintiffs to now take the ball and run with issues involving selection biases, particularly systemic selection biases. And in that regard, OFCCP has always been a bit of a canary in a coal mine, where they will develop programs, they will develop enforcement techniques, investigative techniques. They use their proactive auditing ability to really test out a lot of new novel theories. Some of them stick, some of them don't, but ultimately the ones that work well get adopted by the other federal agencies, including EEOC. And we even see private plaintiffs use the same techniques.

So given the OFCCP's techniques, what are some key takeaways that employers should keep in mind when addressing these issues in their organizations?

Yeah, great question. So there's really three main takeaways that we want to make sure everyone's comfortable with. The first one is going to be OFCCP's focus on artificial intelligence. Artificial intelligence is hot everywhere right now in the employment space because it has a propensity or maybe even an ability to

take in individual humans conscious or subconscious bias and then amplify it and make decisions on a repeated basis, mimicking those biases. So that's one thing that OFCCP is really focused on and is now requiring federal contractors to provide information on upfront in audits, not waiting to see if there's an issue and then investigating, but rather proactively requiring companies to provide that information and disclose it so OFCCP can look at it.

The next area is going to be pay equity. Pay equity is another one that's been hot for a long time, and OFCCP really led the charge with this one. In fact, back in 2014, President Obama issued an executive order around pay transparency for federal contractors. And it was a rather minor requirement where we were required not to take adverse action against employees for talking about pay or asking about pay. I mean, arguably the NLRB has similar protections, but only for non-supervisors. This really charged OFCCP as being the first agency to investigate pay transparency. And now look where we are today with pay transparency, where it seems like every other day there's a new state coming out with a pay transparency law. I think most states have now banned inquiries into salary history. And we have a new standard coming out, a new FAR clause for federal contractors around pay transparency. So a lot there.

And then finally, just briefly, DEI programs. Another trend we're seeing a lot of activity in. OFCCP has always looked at diversity holistically. And I think, you know, we were joined by Commissioner Lucas yesterday from the EEOC. I think she said it best when she said EEOC does not believe in reverse discrimination. There's just discrimination. There's no such thing as reverse discrimination. And that has been OFCCP's philosophy for a long time.

So a lot changes very quickly in this space. Chris, what do you think is the most significant development in your area since we all met last year at the firms conference.

Thanks for the qualification on in your area because when you're a hammer everything looks like a nail. And I know my space. I also know there have been very significant developments in other spaces and I don't want to diminish the importance there. But I think that the most interesting development that is really affecting the most employers and you're going to hear this in a lot of these post workplace horizon session readouts is the shifting focus on DEI, I think that historically employers have really leaned in to be more diverse and prioritize diversity over status quo. I don't want to suggest that employers are making decisions based on race and gender, but when we think about the messaging and the focus, the encouragement of increased diversity throughout organizations, I understand why some think that that is the objective and is what's going on.

I say that to say this, I think that the most interesting development is the pullback from that kind of diversity at all cost initiatives. I think we're seeing a lot of legal departments really be more involved in the discussion and planning of HR and DEI related initiatives about a year ago or longer. Many of these programs were rolled out within a diversity group or rolled out within HR leadership. And it wasn't until they were final stages and wanting blessing from

legal departments that legal got read in on what they were planning to do. And I think that that is shifting. I think that legal is involved earlier. I think that with the increase in lawsuits challenging DEI programs and not just employment related, if we're talking supplier diversity, fallout from Students for Fair Admissions. All of those kinds of trends that may not be in traditional employment spaces still implicate some of this DEI pullback. And I think that that's what I'm hearing most questions about these days. A lot of federal contractors, I don't want to say they have it down for affirmative action planning, but they're 80, 90% of the way there on their own. But everybody is learning the new ropes about what DEI means and how we can implement it in our organizations.

Thank you very much. Scott, one final question. How is Jackson Lewis providing assistance to employers on the full panel plea of these issues?

Sure. Well, as you just heard from Chris, we're getting a lot of questions. We're on the phone a lot helping companies talk through these issues, figure out what's best for them, figure out the risk tolerance balances. But we also have a great podcast series, and I would encourage everyone listening, if you're in this space at all, or if you're even interested in it at all, sign up for our blog. It's called the Affirmative Action Law Advisor. We are extremely active. We are very much geeks in this space. We love this topic, and we're writing about it frequently. So stay up to date on all the developments by signing up for our blog.

Scott, Chris, thank you so much for joining us this morning. And I hope you enjoy the rest of the conference. Thank you. Thanks, you too.

This afternoon, we're talking to Adrienne Conrad, principal in the San Diego office of Jackson Lewis. Good afternoon, Adrienne. Can you tell us a little bit about you and your practice at Jackson Lewis?

Good afternoon. Glad to be part of this podcast. My area of practice that I specialize in is unfair competition and trade secret litigation, but I'm also part of the trial practice group and I do internal investigations and also HR operational audits.

So it will be no surprise to our listening audience that the topic of your presentation at the conference was all about non-competes. Can you provide our listeners with a brief summary of what you covered during your presentation and more importantly, why it was critical to present this topic at Workplace Horizons this year?

Well, I guess I'll start with the last part of that first in terms of non-competes and why it is so critical to present. And that is because it is just a really changing area of law, constantly changing at both the federal level and the state level. So what I covered in the summary was what the Federal Trade Commission is doing with its proposed rule on banning non-competes altogether across the board. And then also I touched on at the state level all of the legislation that has been coming up attempting to severely restrict or ban non-competes. And specifically, just from the beginning of this year, there's been 72 pieces of legislation introduced in 32 states. So it's one of those things that employers

have to stay on top of.

So Adrienne, given the amount of regulation being proposed in this area, what is some advice you could give to our listeners? What are some key takeaways they should know about how to meet these challenges?

The most important thing is that they have to know what agreements they have out there that might have restrictive covenants in them that could be problematic. So one of the things our clients have struggled with is not realizing that they might have incentive agreements that have restrictive covenant provisions in them that have to be reviewed. And even once they review them, then they have to determine, well, what do we do next?

Once we figured out that, uh-oh, we have some provisions here that are going to be problematic in whatever state we may be in. So they have to have somebody to review those agreements and advise them on, you know, does their state require them to give a notice to rescind that provision or at least notify the employee that that provision is void and not enforceable. And they have to know where their employees are.

During COVID, you had a lot of employees just kind of move around like willy-nilly, not tell the employer where they went, and they could have moved to California and you don't know it. And now you have a provision that can't be enforced against that employee. And on top of that, there are stiff penalties now being imposed in many states for having unenforceable provisions with employees.

Adrienne, since we spoke about the topic of non-competes at last year's conference, what do you believe has been the most significant development affecting employers in this space?

California, California, California. You know, there were two new laws that went into effect at the beginning of this year in California that caused so many employers pain and not just California employers. It was employers based in other states that had California employees that then had to say, oh, we've got to do a notice by February 14th of this year telling employees that we have these provisions that are unenforceable and void. How do we go about doing that? So I spent a good part of the last part of last year and the beginning of this year on phone call after phone call with our clients, walking through them through the process, helping them with those draft notices to get those out in a very short time period.

Perfect segue to my final question. How is Jackson Lewis and other lawyers that practice in this area providing assistance to employers on these issues, helping them navigate through these challenges?

So in addition to doing those reviews of their restrictive covenant agreements, revising them as needed, helping them with those notices, our group, our unfair competition group has been really keeping our eye on all of the pending legislation. For example, this coming Tuesday, there's likely going to be a rule coming out from the Federal Trade Commission on this proposed rule banning

non -competes across the board. So we're going to be listening in on that meeting on Tuesday and immediately issuing a blog as soon as we can to help our clients navigate that. So that's one thing that we do is. We send out blogs, we send out information to help our clients stay on top of it.

Adrienne, thank you so much for your time at the conference and behind the podcast mic and good luck on Tuesday. Thank you. Thank you for having me.

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