Creating the Culture of Confidentiality
Embedding Client Confidentiality Into the Legal Workplace

2023 Labor and Employment Update for Lawyers in Limine
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Those of us in the employment and labor field - lawyers, Human Resources (HR) professionals, and union leaders - have been drinking from a firehose since late 2022. Arizona had extreme heat in the Summer of 2023, and so did the labor movement. Strikes by the UAW against the Big Three; SAG-AFTRA and the Writers Guild against the Hollywood Giants; and the UNITE HERE concession workers against Sky Harbor led the news. Over 300 Starbucks stores nationwide have unionized, but no collective bargaining agreements have resulted. Union membership in the U.S. is at an all-time low at only six percent of the private sector workers.

Why should a law firm care? If your firm grosses $250,000.00 in annual revenue, it is covered by the National Labor Relations Act (NLRA), which is enforced by the National Labor Relations Board (NLRB), my first legal employer. Your nonsupervisory employees have the right under Section 7 of the NLRA to engage in protected concerted activities dealing with wages, hours, and working conditions. If they want to gripe on social media together about working their fingers to the bone, they can do so. They just cannot breach client confidentiality – see your new Firm Confidentiality Agreement.

If your firm grosses $500,000.00 in annual revenue it is covered by the federal Fair Labor Standards Act (FLSA), which is enforced by the U.S. Department of Labor (USDOL). However, your firm's employees are **all** covered by the FLSA and USDOL rules because they are engaged in commerce (taking credit cards, using the Internet, answering the telephone). You must pay paralegals overtime unless they meet either the Administrative or Executive FLSA exemption.

Additionally, there are many Arizona laws about employees that your firm must obey (e.g., required Earned Paid Sick Time, payment at least twice per month, timing of payment after termination, required workers' compensation insurance).

Below is just a sampling of the changes to labor and employment law during the past 12 months that keep all of us in the HR World awake at night.

Congress Passes Three New Laws

The Speak Out Act, 42 USC §§19401, *et seq*., became effective December 7, 2022. It provides that no nondisclosure clause or non-disparagement clause agreed to before a dispute arises about sexual assault or sexual harassment is judicially enforceable when such conduct is alleged to have violated federal, tribal, or state law. 42 USC §19403(a). Note that post-litigation resolutions are not affected by this law. Note also this law protects employees, independent contractors, and consumers. There is an exception to protect trade secrets.

Pro Tip: Review your restrictive covenant agreements, and other types of agreements that require a nondisclosure, for clients with this in mind.

Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, 29 USC §218(d), became effective on December 29, 2022. It extends the 30-minute nursing mothers' break, which the Affordable Care Act added to the FLSA, to FLSA exempt employees. For up to one year after childbirth, an employee can have an additional unpaid [if she is FLSA nonexempt] 30-minute break to express milk – so long as she is not relegated to the restroom.
Pro Tip: See: www.dol.gov/agencies/whd/pump-at-work for details.

The Pregnant Workers Fairness Act, 42 USC §§2000gg, *et seq*., became effective on June 27, 2023, and amends Title VII of the federal Civil Rights Act (which is applicable to employers of 15 or more employees) to expand reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions. Covered employers will now need to engage in the interactive process with these employees just as though they were under the Americans with Disabilities Act. Undue hardship is the exception to this requirement and it will be difficult to prove.
Pro Tip: See: www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

The War on Non-Competes

This began with President Biden's July 19, 2021 Executive Order on Promoting Competition in the American Economy which directed the Federal Trade Commission (FTC) to ascertain whether it could ban non-compete agreements. So, the FTC issued a proposed rule on January 5, 2023 which categorically bans all non-compete agreements. These restrictive covenants prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment.

The proposed rule defines "worker" broadly; including independent contractors, interns, volunteers, and even sole proprietors who provide services to a client or customer. There is an exception in the sale of a business where the seller's stake is large enough that a non-compete agreement may be necessary to protect the value of the business acquired by the buyer.

The proposed rule also defines a non-compete clause to include contractual terms requiring a worker to pay for training costs if the worker's employment terminates within a specified time period where the required payment is not reasonably related to the costs of training the worker.

The proposed rule requires rescission of such non-compete agreements, as well as non-enforcement. The FTC received over 27,000 comments and is reported to have postponed a vote on the proposed rule until April of 2024.

The NLRB decided to join the battle on May 30, 2023, with General Counsel Memo 23-08. General Counsel Jennifer Abruzzo gave her opinion that non-compete agreements chill employees from exercising their rights under Section 7 of the National Labor Relations Act (NLRA) to engage in protected concerted activities. She also believes that non-solicitation of employees clauses (aka no piracy covenants) also violate Section 7.

This recent campaign by the Government and the states can probably be blamed upon Jimmie John's imposing non-competes upon its minimum-wage sandwich makers. Per the FTC Fact Sheet:

> Evidence shows that noncompete clauses bind about one in five American workers, approximately 30 million people.
> When employers use noncompete clauses to restrict workers from moving freely, they have the power to suppress wages and avoid having to compete to attract workers. Based on existing evidence, noncompete clauses also reduce the wages of workers who aren't subject to noncompetes by preventing jobs from opening in their industry. According to FTC estimates, the proposed rule could increase workers' earnings across industries and job levels by $250 billion to $296 billion per year. Researchers also find that banning noncompetes nationwide would close racial and gender wage gaps by 3.6- 9.1 percent.
> https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf

Some 88 bills have been introduced in 33 states and Congress is considering two laws about non-competes. These agreements are only banned in Arizona for broadcast employers.

> ARS §23-494. Noncompete clause prohibition; broadcast employees; definitions
> A. As a condition of employment, it is unlawful for a broadcast employer to require a current or prospective employee to agree to a noncompete clause.
> B. For the purposes of this section:
> 1. "Broadcast employer" means an employer that is a television station, television network, radio station or radio network.
> 2. "Noncompete clause" means a clause in an employment contract with a broadcast employer that prohibits an employee from working in a specific geographic area for a specific period of time after leaving employment with the broadcast employer.

The Day the Earth Stood Still for Severance/Settlement

The NLRB decided on February 21, 2023, in *McLaren Macomb*, 372 NLRB No. 58, that a Michigan hospital violated the NLRA by offering a severance agreement to 11 workers which contained paragraphs requiring confidentiality of the terms of the agreement and a promise not to disparage or harm the image of the employer. Labor lawyers all over the country began scrambling to ascertain workarounds because the NLRB refused to state in its opinion what language should have been used by the hospital in order to be legal. Please note that while most private business and nonprofit entities are covered by the NLRA, independent contractors, managers, most supervisors, public sector employees, and some agricultural workers are not covered.

The NLRB 3 to 1 Democratic majority found the following clauses to be unlawful, and even offering them to be unlawful:

6. Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

7. Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make

statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

8. Injunctive Relief. In the event that Employee violates the provisions of paragraphs 6 or 7, the Employer is hereby authorized and shall have the right to seek and obtain injunctive relief in any court of competent jurisdiction. If Employee individually or by his/her attorneys or representative(s) shall violate the provisions of paragraph 6 or 7, Employee shall pay Employer actual damages, and any costs and attorney fees that are occasioned by the violation of these paragraphs.

The majority did not give any guidance as to what would be legal other than:

> Footnote 38 We are not called on in this case to define today the meaning of a "narrowly tailored" forfeiture of Sec. 7 rights in a severance agreement, but we note that prior decisions have approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement. See Hughes Christensen Co., supra, 317 NLRB 633; and First National Supermarkets, supra, 302 NLRB 727.
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> As we explained above, however, employee critique of employer policy pursuant to the clear right under the Act to publicize labor disputes is subject only to the requirement that employees' communications not be so "disloyal, reckless or maliciously untrue as to lose the Act's protection." Emarco, Inc., 284 NLRB 832, 833 (1987).

Fortunately (or not, depending upon which side you represent), General Counsel Abruzzo issued GC Memo 23-05 on March 22, 2023, to clarify the NLRB prosecutorial stance after *McLaren Macomb*. She said that Memorandum OM 07-27 (12/27/2007) about "Non-Board" settlements in cases before the NLRB was consistent with *McLaren Macomb*. Some pertinent provisions of OM 07-27 are:

One exception to the rule of prohibiting waivers of future rights is a release in which an employee gives up his right to seek future employment with the employer with whom he/she is signing a release resolving current claims. Such a waiver clearly involves releasing future rights, but it does not squarely implicate the right to file a charge with the Board. While the waiver of these future employment rights should be discouraged, the employee is in a position to evaluate whether he/she wishes to give up his right to work for the employer in the future.

Non-Board adjustments that contain clauses that prohibit discriminatees [NLRB-speak for claimants] from generally disclosing the financial terms of a settlement continue to be appropriate. Thus, confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable. However, any prohibition that goes beyond the disclosure of the financial terms should not be approved, absent compelling circumstances.

So:

a. Employers are still able to prohibit the departing nonsupervisory employee from disclosing the amount of money in the settlement/severance/resignation/farewell Agreement, and
b. Employers may still be able to pay the departing employee to never return to employment.

General Counsel Abruzzo's Memo 23-05 said waivers of the right to file NLRB charges on future unfair labor practices and on future employment, assist other employees in investigation and trial of NLRB cases, broad confidentiality clauses (except for the amount of the settlement/severance), clauses that prohibit non-defamatory talk about the employer, and unduly harsh penalties for breach violate Section 7 of the NLRA. General Counsel Abruzzo even said that clauses that prohibit employees from communicating with the media are unlawful. Her standard is the same

as in *New York Times v. Sullivan*, 376 U.S. 254 (1964): maliciously untrue made with knowledge of falsity or reckless disregard for truth or falsity.

So:

a. Employers can still prohibit the departing employee from defaming the Employer, its Management, and co-employees. See e.g., *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 477 (1953) ("sharp, public, disparaging attacks upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income") and *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966) (statements that are knowingly false or made with reckless disregard for the truth), or per *McLaren Macomb*, citing *Emarco*, 284 NLRB 832, 833 (1987), so "disloyal, reckless or maliciously untrue as to lose the Act's protection."
b. Employers can still hold the departing employee to breach of the Agreement remedies under Arizona law, which include paying attorney fees to the prevailing party.

According to Fisher Phillips attorneys' comments on the Internet after The Day The Earth Stood Still:

> The kinds of factors you should take into account include your risk tolerance level, the backdrop of the Board's remedial authority when it comes to your organization and industry, the potential vulnerability of the decision on appeal, and the deterrent value that any disclaimer or safeguard language will bring you in the interim.
> https://www.fisherphillips.com/news-insights/employers-must-draft-severance-agreements-with-caution-nlrb-renders-critical-provisions-unlawful.html

McLaren Macomb is an excellent example of how elections have consequences. The NLRB's five members (only three can be of the same political party) are appointed for five-year terms by the President and subject to confirmation by the U.S. Senate. The Trump appointees overruled about 40 NLRB case precedents set by both parties' NLRB majorities. The Biden appointees are now overruling the Trump Era NLRB decisions. And the pendulum swings…..

Mars Attacks! The NLRB wants to change your Employee Handbook.

In *Stericycle, Inc.*, 372 NLRB No. 113 (August 2, 2023), the NLRB's 3-1 Democratic majority overruled some Trump Era cases and enlarged some Obama Era cases about employee handbooks.

Work rules in an employee handbook that explicitly violate Section 7 of the NLRA are still unlawful. However, work rules which at first blush seem to have nothing to do with protected concerted activities, are presumptively unlawful if the General Counsel can prove that the rules have a reasonable tendency to interfere with, coerce, or restrain an employee, who is economically dependent upon the employer, from even contemplating engaging in protected concerted activities under Section 7 of the NLRA. To rebut the presumption, an employer must prove:

1. The work rule advances a legitimate and substantial business interest and
2. That interest cannot be advanced by a more narrowly tailored rule.

The *Stericycle* Board proscribed the following work rules to be unlawful:

All parties involved in the investigation [of a harassment complaint] will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

Engaging in behavior that is damaging to Stericycle's reputation.

Stericycle will not retain a team member who directly or indirectly engages in the following:
An activity that . . . adversely reflects upon the integrity of the Company or its management.

The underlying case before the NLRB's Administrative Law Judge (ALJ) also dealt with rules involving cameras in the workplace, limits on Company email usage, and use of cellphones. The NLRB remanded these issues to the ALJ. Although not mentioned in the ALJ opinion, the Board Majority also mentioned outside employment work rules as being problematic.

What's next? Everyone investigating a workplace complaint in the private sector must not end the investigative session by saying, "Please keep this confidential," if the person being interviewed is a nonsupervisory employee. Conflict of interest and civility policies need to be reviewed to omit offending language.

Danger Will Robinson! New Union Recognition Law; New Rules from NLRB and USDOL

Two days after Stericycle, the 3-1 NLRB Majority overruled 50 years of precedent in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).

> Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly [footnote promptly = 2 weeks] files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).
> …we conclude that an employer confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union. However, if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order.

General Counsel Abruzzo issued her GC Memo 24-01 to clarify that employers who are approached by a union saying it has majority support of the workforce, and the authorization cards to prove it, MUST
1) agree to recognize a union that enjoys majority support;
2) promptly file an RM [employer filed] petition to test the union's majority support and/or challenge the appropriateness of the unit; or
3) await the processing of an RC [union filed] petition previously filed.

It will be interesting to see what the U.S. Supreme Court will do with the *Cemex* case because it overrules a prior NLRB case from the late 1960s that was enforced by SCOTUS in 1971. In addition to union-friendly caselaw, the NLRB has issued its final rule changing election procedure

which is effective December 26, 2023. The NLRB has also issued its joint-employer rule, 29 CFR §103.40, which returns to the "right to control" without actual control.

Meanwhile, the USDOL resurrected a proposed rule about raising the salary minimum for Part 541 exemptions from $684 per week to $1059 per week. The USDOL also has proposed a new Part 795 in 29 CFR to define independent contractor, resurrecting the economic realities test from the superseded Trump Era rule.

Some More Pro Tips

To better supervise employees as required by ERs 5.1 and 5.3, it helps to have written policies that address:

1. Client confidentiality. This appears in your new Firm Confidentiality Agreement. It also should be embedded in your social media policy and your business and professional ethics policy.
2. If you don't have written contracts for employees, be sure they know they are employed at will.
3. Reporting and prevention of sexual harassment (all firms) and other types of harassment (firms with 15 or more employees).
4. Handling money, particularly IOLTA funds.
5. Description of misconduct for unemployment compensation purposes.
6. Outside employment restrictions. I recommend not having an absolute prohibition – just one that forbids your employee working for herself or another on your time and on your premises. You must know if your employees are working for other lawyers because of the obligation to check for conflicts and at least screen the employee from working on files where that other firm is adverse – even if they're only doing work for the opposing counsel on the weekend.
7. Do not permit employees to use firm email or letterhead for personal use – again because of conflicts and also impermissibly holding out the firm as representing them in a personal matter.

The best prediction for the future is to vote in the Presidential Election next November.

Understand that remote work is here to stay:

65% of workers want it BUT
75% of executives don't want it AND
90% of companies surveyed by Forbes will require full return by 2024 BECAUSE
Only 37% of jobs can plausibly be done entirely at home.

There is more to employee retention than an annual bonus:

Consider whether remote/hybrid work is possible.
Have equipment that is up-to-date, easy to use, and good seating arrangements.
Create a culture of civility – *please*, *thank you* and *excuse me* are not old-fashioned.
Spot bonuses are great motivators.
Praise in public; constructively criticize in private.

If you need help, ask for it! Remember your Lawyers in Limine resources!