

# LAWYERS JOURNAL

PRACTICE AREA PROFILE: LABOR AND EMPLOYMENT LAW

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## Need credits by the end of the month?

*ACBA offering CLE sales in time for April compliance period deadline*

By Brian Knavish

Rest easy, procrastinators.

If you need CLE credits by the April 30 compliance period deadline, the ACBA has you covered. The ACBA is offering a Live Video Replay Sale on Tuesday, April 25 all day in the Koppers Building where attorneys can earn one to six in-person credits in one day. Additionally, the ACBA will offer a sale on previously recorded CLEs online from April 26-30.

**April 25**

The wildly popular Live Video Replay CLE sales – held near the end of each CLE compliance period – have become a staple for many ACBA members, because these events allow attorneys to grab a bunch of CLE credits in one day, helping lawyers to stay in compliance and/or get a jump on the next compliance period.

The next installment will be held on Tuesday, April 25 in the Koppers Building. It will kick off with breakfast at 8:30 a.m. then programs will begin at 9 a.m. and continue throughout the day. During the event, the ACBA will offer Live Video Replays of 12 popular CLEs from the past year, six ethics and six substantive programs.

These CLEs “count” as live credits – not distance learning credits – and are available at \$25 per credit for members and \$35 per credit for non-members (a \$10 discount from the regular price).

Throughout the day, an ethics program and a substantive program will play simultaneously in different

rooms, allowing attendees to pick and choose from various CLEs of interest. Spend the whole day and earn up to six credits, or stop by at any point throughout the day and select programs individually. Breakfast and lunch will be provided.

To register or for additional details, visit [ACBA.org/CLEsale](https://ACBA.org/CLEsale). Walk-ins are welcome.

**April 26-30**

If you can’t make it to the April 25 event, the ACBA also will offer a previously recorded CLE sale beginning April 26 and continuing through April 30.

During this sale, members can purchase select Previously Recorded CLEs at a discount and watch them any time from any location. These programs are “distance learning” programs, however, meaning they don’t “count” as live programs. Attorneys can earn up to six distance learning credits per year.



The programs are available for just \$25 per credit for members (a \$10 discount). Nonmembers can watch for \$35 per credit.

For more info or to register, visit [ACBA.org/PreviouslyRecordedCLE-Sale](https://ACBA.org/PreviouslyRecordedCLE-Sale).

**The Lineup**

The schedule of available CLEs is the same for both sales. The lineup is as follows:

- Substantive Programs**
- Effects of Sentencing Law and the Need for Reform
  - The Basics of Blockchain and Cryptocurrency
  - Moving Beyond the Pandemic: Successful Alternative Work Arrangements
  - Job Interviewing Best Practices: What Should Not Happen and What to Do if it Does
  - The Future of Privacy in America
  - Mediation 101
- Ethics Programs**
- Ethical Considerations for Lawyers Working Remotely
  - Social Equity Consideration in the Expanding Cannabis Industry
  - Understanding the Pennsylvania Disciplinary Board
  - How to Comply with Rule 8.4(g) and Advance Professionalism
  - Navigating Bias in the Profession as an Associate
  - Depression and the Legal Profession ■

## BENCH-BAR 2023

### Back, and better than ever!

By Joe Froetschel

Sixty years ago, lawyers and judges sojourned together in the cozy confines of Seven Springs Mountain Resort to discuss the current state of the courts, address issues impacting lawyers and litigants, and network outside their cases and courtrooms. And with that, the Allegheny County Bar Association Bench-Bar Conference was born. Since then – aside from a two-year hiatus due to a global pandemic – members of the bench and bar have made the annual pilgrimage back to the Laurel Highlands to continue that tradition.

Over the years we have seen it all: the ACBA Players putting on Oscar(ish)-worthy performances, comedians, magic acts, famous speakers, Judges Livingston and Justin Johnson consistently winning door prizes and Judge Manning singing “Friends in Low Places” into the wee hours of the night. There have been constants: engaging CLEs, karaoke stars in the making and fiercely competitive golf games; along with – at least in terms of its long history – new events like CJE’s, sporting clays, axe throwing and yoga. But above all, and for more than half a century, the Bench-Bar Conference has brought us together not only as colleagues, but as friends. It has fostered new acquaintances and solidified life-long connections.

It was a welcome return to some semblance of normalcy to make the trek back to Seven Springs last June, and Jay Blechman and his committee brought you top-notch programming,



Joe Froetschel  
Bench-Bar Committee Chair

even when the new ownership of Seven Springs lost its reservation system, lost power to the elevators, lost its internet connection and even lost its chef! With those kinks out of the way, we could not be more excited to bring you the 59th Bench-Bar Conference – Back, and Better than Ever!

From June 15 to 17, this conference will be reminiscent of the past – with hospitality suites, breakfast with the judges and lawyers cutting a rug on the dance floor – but will have some exciting twists, including pickleball and bocce, a mimosa bar and every lawyer’s favorite, trivia! Thanks to the efforts of Vice-Chair Holly Deihl, and the talented staff of the ACBA, there truly is something for everyone.

Thursday morning will kick off with the athletic events. The Highlands Golf Course promises that this year’s

tournament will be outstanding, with skill prizes and awards for the top teams. Shooters in the sporting clay competition will also vie for fame (and prizes) and will be treated to food and drinks before and after the big event.

Starting Thursday afternoon, the days will be jam packed with great programs featuring the best of the committees, divisions and sections of the Bar, offering up to eight hours of CLE credit. Among these are the Judges Only CJE, Tips on Overcoming Self-Doubt from the YLD and a general counsel program featuring prominent local in-house lawyers. But most exciting is a plenary session for the record book. We will hear from former-ACBA Player/newly installed Madam Chief Justice Debra Todd, who will be joined by Justice Christine Donohue, Duquesne University President Ken Gormley and some of the most prolific advocates in the ACBA to discuss best practices and advocacy at the highest level.

And if athletic competitions, CLEs and socializing are not enough to convince you to attend, what about entertainment? We’ve got that. DJ Loyal and Team will be there with music, trivia, karaoke and photo booths both evenings. This year will see a return of hospitality suites and the Bench-Bar Committee will provide the best mocktails in its alcohol-free suite. Wrapping up on Saturday, brunch will feature more than just mimosas and Bloody Marys, as we look to end the Conference on a high-note...

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Gender Bias Duty Officers

[ACBA.org/member-center/gender-bias-hotline](http://ACBA.org/member-center/gender-bias-hotline)  
If you have observed or experienced any form of gender bias in your role as an attorney or law student intern, you may contact any one of the following members of the Gender Bias Subcommittee of the Women in the Law Division on a daily basis. The duty officers will keep your report confidential and will discuss with you actions available through the subcommittee.

Kimberly Brown .....412-394-7995  
[kabrown@jonesday.com](mailto:kabrown@jonesday.com)  
Rhoda Neft .....412-606-8387  
[rhoda.neft@gmail.com](mailto:rhoda.neft@gmail.com)

Professional Ethics Hotline

[ACBA.org/OfficerAssignments](http://ACBA.org/OfficerAssignments)  
Wonder if your decisions, legal advice or other professional actions are ethical? Need guidance? The ACBA Professional Ethics Committee “Ethics Hotline” makes available Committee Members to answer ethical questions by telephone on a daily basis. *All calls are confidential.*

April  
Stanley W. Greenfield .....412-261-4466  
Lourdes Sanchez Ridge .....412-263-1841  
May  
Dan Fitzsimmons .....412-488-0833  
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THE PITTSBURGH LEGAL JOURNAL OPINIONS

provides ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. The *Opinions* can be viewed online in a fully searchable format at [www.ACBA.org/opinions](http://www.ACBA.org/opinions).

The latest cases loaded into the database involve the issues of:  
Allocation– Arbitration Award

Free paper-shredding April 20  
at Burns White Center

If you’re like most attorneys, you probably have a bunch of old papers lying around your office. You don’t want to just throw them into the garbage, because the documents contain confidential or sensitive information. Even shredding them in your office and then throwing them away presents security concerns.  
Here’s a solution: the ACBA is presenting a free paper-shredding event on Thursday, April 20 from 2 to 3:30 p.m. in the parking lot at the Burns White Center, 48 26th St. in the Strip District. The event, which is sponsored by Shred America Iron City



and Burns White, allows attorneys and other law firm staff to bring these sensitive documents to be destroyed onsite.

A team from Shred America Iron City will park their shredding truck onsite in the Burns White Center’s parking lot. This isn’t a regular truck; it’s loaded with shredding machinery. Participants can watch the papers get destroyed in real-time via a video screen, offering some peace of mind that the papers were, in fact, destroyed.  
There’s plenty of room and free parking in the lot, making it easy to swing by whether your firm is in downtown or the suburbs. Note that there’s a limit of five boxes of papers per person. ■

Volunteers Needed  
for Law Day Project





The ACBA Law Day Committee is seeking volunteers interested in giving presentations at local high schools in late April and/or early May. Volunteers will be asked to talk with students about this year’s law day theme – “Cornerstones of Democracy: Civics, Civility and Collaboration” – and to answer questions about becoming a lawyer and practicing law. Those interested should contact ACBA member Matt Oas at [matt.oas@gmail.com](mailto:matt.oas@gmail.com).

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PRESIDENT’S MESSAGE

# Black history is American history

By Erica L. Laughlin

I know what you’re thinking. February was Black History Month. I didn’t miss the memo. Black history is American history and the discussion shouldn’t be limited to just one month. Beyond perhaps noticing the Black history display in Target last month, did you pay attention? Did you attend the Homer S. Brown Division’s Black History Month Celebration? Did you take the time to ask any questions or consider what the significance of Black history is for our Black friends and colleagues or what its significance should be to you?

I’m a white girl from the suburbs of Pittsburgh. I could count how many Black families attended my high school. I’d like to think that since then I’ve grown more educated about diversity and Black history, but who am I to write an article about it? So when I started preparing for this article I did what we lawyers do – I researched. I can tell you that Black History Month has its origin dating back to 1925 when the Association for the Study of Negro Life and History conceived of and announced Negro History Week, which was celebrated for the first time in February of 1926. I could tell you that it took 50 years for Negro History Week to be expanded to a month-long celebration in 1976 at the urging of President Gerald R. Ford who at that time told Americans to “seize the opportunity to honor the



Erica Laughlin  
ACBA President

too-often neglected accomplishments of Black Americans in every area of endeavor throughout our history.” But when it came time to write this article beyond reciting facts...I struggled and candidly was nervous. I wanted this article to be meaningful.

So I turned to my friends at the ACBA who afforded me the opportunity to sit in a room and ask them some very personal questions. Tell me about Black History Month, why is it significant to you, why should it be significant to our members and what more can we do in our Association and communities to expand the celebration of Black history beyond February. The discussion was raw, candid and even at times emotional. I repeated

several times that I wished it had been a panel discussion more of our members could have heard.

What I learned from ACBA Secretary Regina Wilson, ACBA Director of Diversity, Equity and Inclusion Kellie Ware, ACBA Homer S. Brown Division Chair Jesse Exilus and Past-Chair Morgan Moody I couldn’t learn from Wikipedia or Google. They stressed as an initial matter the recognition that Black history is American history.

Black people have been part of every war, women’s movement, and significant development in our country’s history. Too often we romanticize white heroes who stood up for Black rights, and while there certainly are white people throughout history who stood up for the rights of Black men and women in a powerful and impactful way, we need to be mindful not to overlook the Black heroes who collaborated with and challenged others and were instrumental in attaining the freedoms afforded to Black men and women today. Thinking beyond fundamental rights and liberties, you may not even realize that Black inventors impact your daily life from developing traffic lights to peanut products to super soakers among countless others. We need to elevate Black business and educate ourselves more on the hidden Black figures who helped shape American history.

Why should Black history be important to all of us? As Kellie Ware eloquently put it, “If you don’t know

our history you won’t understand why we have the challenges with race and diversity that exist today. Your diversity, equity and inclusion efforts may be well intentioned, but are apt to fail without an appreciation of Black history. Black History Month is a floor not a ceiling, but we have to start somewhere.”

Jesse Exilus had a perspective I hadn’t considered. He is a first-generation immigrant from Haiti. “Without knowing African-American history, it can be easy for Black immigrants to bypass the trauma that descendants of slaves in America have and continue to endure. Understanding how African-American history impacts people of color in this moment helps create a path to building an equitable future that works for everyone,” he said.


We have an obligation to educate not only ourselves and our children, but those who seek refuge in our country of how slavery impacted and shaped American history.

History may not always be comfortable, but you can’t understand if you don’t talk about it explained Regina Wilson. Morgan nodding her head indicated you may not understand the trauma of our people, but you can empathize. “You just need to care.”

They suggested it was enough to simply be curious and open to learning more. They encourage everyone to continue to ask questions. Even tough uncomfortable ones. Regina recommends

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# Strike Out Hunger set for April 26 at Shorty's Pins x Pints

By Ron Cichowicz

One of the Allegheny County Bar Foundation's (ACBF) most enjoyable events is raising its game even higher this year.

Strike Out Hunger has a new venue, offering a host of fun activities for ACBA members, their families and friends. This year the popular fundraiser will be held from 5:30 to 7:30 p.m., Wednesday, April 26 at Shorty's Pins x Pints on Pittsburgh's North Shore.

Strike Out Hunger: Game Night Edition is presented by the ACBA's Young Lawyers Division (YLD). All proceeds will benefit the 2022-2023 Allegheny County Bar Foundation's Attorneys Against Hunger (AAH) campaign. Launched in 1993, AAH annually helps 18 hunger services agencies provide food to people in need throughout the county.

The Strike Out Hunger Committee has expanded the 2023 event's offerings to attract a larger audience.

"In the recent past, Strike Out Hunger was solely a bowling event," said Rebeca Himena Miller, event co-chair and an associate attorney with Pietragallo Gordon Alfano Bosick & Raspanti, LLP. "This year, we want the entire community to join in. It'll be a fun night of games and networking."

"We hope having it on a Wednesday evening will be more inclusive. Weekend events can be hard for families to

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## STRIKE OUT HUNGER



EDITION

Wednesday, April 26 | 5:30 p.m.  
Shorty's Pins x Pints

All members and their guests are invited to enjoy an evening of duckpin bowling, foosball, shuffleboard and more, as the popular tradition moves to an exciting new venue.

Visit [ACBF.org/2023-Strike-Out](https://www.acbf.org/2023-Strike-Out) for more.

All proceeds benefit the ACBF Attorneys Against Hunger campaign.

attend," she said. In the past, Strike Out Hunger was held on a Sunday.

Miller, also a YLD Council member and Co-Chair of the Public Service Committee, said the event is open to all ACBA members, their families and guests. The venue offers activities for everyone, including children, featuring duckpin bowling, foosball, shuffleboard and more. Attendees will be able to win prizes and purchase tickets to win baskets.

Devyn Lisi, event co-chair and associate at Massa Butler Giglione, agreed that the fundraiser would benefit from the added attractions.

"This event has been going on for a number of years and has taken different forms," she said. "It's always been a family friendly event and we wanted to keep that aspect. But we also wanted it to be a bit more attractive for members of the Young Lawyers Division."

"There will be a Happy Hour so that people can stop in even if only for an hour after work. Or, if they want to be fully involved, perhaps they or their firms might even sponsor the event. It will be a casual, fun, awesome experience."

Lisi stressed that Strike Out Hunger is not just about having a good time.

"The ACBA holds a number of different events all year, and they're all wonderful," Lisi said. "Yet, this one is especially unique in that we are raising money for a wonderful campaign, Attorneys Against Hunger."

"It's sad to think in such a wealthy country that people suffer from hunger. To be able to give back and address a need that is truly prevalent is special."

Mallory Draisma, ACBF Programs and Projects Manager, credited the Committee, including Subcommittee Chairs Taylor Mosley and Brandi Suter, for enhancing the event format to make more of an impact.

"Strike Out Hunger, the YLD's contribution to Attorneys Against Hunger, is a specific way to reach this division of the bar in the way they are excited to be involved," Draisma said. "Not a lot of fundraisers are centered on these kinds of activities."

"This is broader than other fundraising events we host. We are hoping to appeal to a wider audience with a fun new venue and encourage members of the bar to get their family and friends involved."

Registration for Strike Out Hunger is available through the ACBF website ([www.acbf.org](https://www.acbf.org)) but will be limited. For more information, including ways to become an event sponsor, contact Rebeca Himena Miller at [rhm@pietragallo.com](mailto:rhm@pietragallo.com) or Devyn Lisi at [dlisi@massalawgroup.com](mailto:dlisi@massalawgroup.com). ■

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# Mediation preparation, part one: The plaintiff's perspective

By Frederick B. Goldsmith

The Allegheny County Court of Common Pleas has a new mandatory mediation rule, Rule 212.7, effective with the May 2023 trial list, requiring, with certain exceptions, the parties complete a mediation *any time* at least 45 days before your case's trial term begins. The U.S. District Court for the Western District of Pennsylvania has had in effect since 2006 a mandatory early ADR program, described in Local Civil Rule 16.2 and the Court's ADR Policies and Procedures, requiring the parties complete an alternative dispute resolution session, which can be a mediation, within 60 days after the Initial Scheduling Conference. This deadline is subject to adjustment by the presiding judge. This article describes my recommendations for best practices for mediation preparation from the *plaintiff's* perspective. In the next issue of the *Lawyers Journal*, I will present best practices from the *defense* perspective.

**1. Make sure it's the right time to mediate.** As to an Allegheny County case, if you and defense counsel agree to waive mediation or one party can show "good cause" to be excused by motion from mediation, then make these decisions early on. As to a WDPA case, if circumstances change, rendering the court-ordered deadline too soon to meaningfully mediate, then one or both parties should file a motion under Rule 3.5 of the ADR Policies and Procedures. The point is you should be discussing with opposing counsel *well in advance of mediation* what *both* sides will need in the way of



Frederick Goldsmith

written discovery and deposition testimony to evaluate the case sufficiently to have a productive mediation. If the timing is not right for *everyone*, then come to a consensus on what all counsel will be doing in response. If it can be avoided, do not waste your, your client's, and the mediator's time and energies and your client's money moving ahead with a mediation that is doomed to fail.

**2. Agree on a mediator early to get on their schedule.** Half or full day? Popular mediators' schedules fill up far in advance. Discuss with opposing counsel who would be a good choice to mediate your case, and then try to get on that mediator's schedule. Unless your case is of modest value, opt for a full day mediation. The mediation process, like any significant negotiation, takes time. Give the mediator the time he or she needs to help everyone work through all the issues of your case so

you can maximize the chances of achieving a settlement.

**3. Consider a focus group.** As plaintiff's counsel, if your case has significant value, consider focus grouping your case. Focus groups can provide you and your client with insights into the strengths, weaknesses and value of your case, as well as help inform strategy and theme decisions.

**4. If an MSA is needed, have it performed at least a month ahead of time.** If your client has a serious injury which will require future medical care, prescriptions and/or medical appliances, commission an outside Medicare Set Aside Analysis and provide to the firm preparing it all the medical records and other data they need to perform the analysis. If there are no such future medical needs, have your client's treater(s) put that in writing.

**5. Is a lifecare plan needed?** If your client's injuries are significant and will require expensive, long-term, future medical care, home caregivers, prescriptions, home alterations, prostheses and/or medical appliances, retain a lifecare planner and obtain their written analysis, which will help inform case value and factor into your settlement demand.

**6. Determine if there are outstanding spousal or child support obligations, tax, healthcare, disability insurance and/or other liens.** Find out this information well ahead of time. Each case is unique, so I cannot list here all the potential liens plaintiff's counsel must consider but ensure you and your client are aware of *all* liens, and all outstanding obligations, including


an MSA if one will be required, so your client knows how much money from any given dollar value settlement will have to be paid to others or set aside and thus be untouchable.

**7. Make sure your client knows what their net will be.** Send your client an up-to-date case costs sheet well before the mediation, and include anticipated costs through mediation, any bills in the pipeline, such as court reporter and expert invoices, their estimated share of the mediator's fee, a discussion of all liens and, if applicable, the cost to fund and administer an MSA, along with your attorney's fee. Provide to your client well before the mediation all the information and numbers they will need to determine how much money they will net from any given settlement offer.

**8. Videotape all depositions.** Witnesses can die or disappear when you need them most. A lawyer's or another person's reading or quoting from a deposition transcript in a demand email, or at trial, does not have the same impact of a video deposition clip. Strongly consider incorporating clips from video depositions into a pre-mediation video "story" to send to the other side. If the case does not settle, you will have the videos for presenting testimony of unavailable witnesses and impeaching witnesses at trial.


**9. Prepare a pre-mediation video.** If your client's case has significant value, strongly consider preparing a pre-mediation video, which you will share with defense counsel, who can then share the video with those with

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# A message from the ACBA Labor and Employment Law Section Chair

By Nikki Velisaris Lykos

Labor and employment law is truly about people. Whether representing employers or individuals, human interest is at the heart of our practice area, which touches every aspect of the employer-employee relationship from wages and benefits to safety to discrimination to unemployment compensation. These issues affect nearly every employee and employer across the country, and the Labor and Employment Law Section of the Allegheny County Bar Association is pleased to highlight our practice area through this issue of the *Lawyers Journal*.

Labor and employment law is constantly evolving, and 2023 promises to be yet another year of changes and developments in the field. I will take this opportunity to briefly highlight just a few recent updates in employment law.

In December 2022, Pennsylvania's Independent Regulatory Review Commission approved amendments to the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act regulations providing new definitions of race, gender and religious creed. Most notably, the new regulations expand the definition of race to include hairstyles associated with race such as braids and locks and the definition of sex to include sexual orientation, categories which were not



Nikki Velisaris Lykos

previously covered under express provisions of the Pennsylvania laws. These new regulations will become effective within 60 days of publication in the *Pennsylvania Bulletin*.

The Pregnant Workers Fairness Act (PWFA), another new development in the area of employment law, will go into effect this summer. The PWFA requires employers with at least 15 employees to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth or other related medical conditions unless the accommodation would cause an undue hardship. The PWFA also prohibits employers from requiring an employee to take leave if

another reasonable accommodation can be provided and from retaliating against an employee for reporting or opposing discrimination under the PWFA or participating in an investigation. Employees will be able to file PWFA claims with the Equal Employment Opportunity Commission beginning on June 27, 2023, provided that the situation complained about in the charge occurred on or after that date.

Most recently, on Jan. 6, 2023, the Federal Trade Commission (FTC) proposed a new rule prohibiting non-compete agreements. The FTC's proposed rule would prohibit employers from entering into non-compete clauses with workers, maintaining existing non-compete clauses or representing to workers that they are subject to a non-compete clause. The proposed rule defines non-compete clauses as any contractual term that prevents a worker from obtaining employment with a person, or operating a business, after the conclusion of the worker's employment with the employer. Other restrictive covenants such as non-disclosure and non-solicitation agreements would not be prohibited as long as they are not so broad as to effectively prevent workers from obtaining employment or starting a business. While it is unlikely that a complete national ban on non-compete agreements will be passed, the FTC's

proposed rule is another example of the continued trend toward disfavoring restrictive covenants.

As the employment law landscape is ever-changing, the ACBA Labor and Employment Law Section strives to provide programming that will keep our attorneys apprised of all new developments and hot topics in the practice area. On behalf of the Labor and Employment Law Section council, I encourage all members of the section to attend our monthly meetings, which are held remotely on the first Tuesday of each month. We welcome your ideas for programming or events that will benefit our members. ■

*Nikki Velisaris Lykos is a founding member of Ramage Lykos, LLC and Chair of the ACBA Labor and Employment Law Section.*

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# The hammer and the nail

By Jared D. Simmer

I went to law school with hopes of eventually becoming a professional arbitrator. So, in my last year of school, I sought career guidance from a local professional neutral. His advice? I had to “get my hands dirty,” and learn the field of labor and employment from the inside out. In other words, I had to get to know what I didn’t know.

So, after graduating from law school, I relocated to North Carolina where I spent the next seven years in labor and employee relations administration for the largest private employer in the state. When you’re responsible for 15,000 employees, including 1,100 bargaining unit members, you learn very quickly what it is you don’t know.

On my first day on the job, my boss walked me into my office, and pointing at my desk, said, “Simmer, that pile is your first order of business.” And when he left, I learned that what I’d inherited was a stack of 240 pending grievances. Having to spend the next year wading through the full gamut of disputes very quickly convinced me that there had to be a better way to anticipate, prevent and solve workplace problems in a way that didn’t do further damage to the employment relationship, and lead to potentially disruptive problems later. But, what? Certainly, nothing that law school had taught me.

And yet, more than 35 years later, legal education still doesn’t adequately



Jared Simmer

prepare attorneys to practice in the labor and employment law field in ways that minimize conflict for their clients rather than prolong it. The reason is simple – because for some reason, we’re still training law students to be “carpenters” where we’re the hammer and all problems are the “nail.” This litigation-centric approach is reflected in an emphasis on offering a plethora of required and elective litigation-related coursework, but few, if any, courses that cover the day-to-day dispute-resolution skills like negotiation and mediation that attorneys use every day in their practice. I dare say, if medical school education followed the same misguided approach, the curriculum would have a similar overpopulation of coursework on surgical skills, and next to none on diagnosis, nutrition, or drug therapy.

Sadly, as I’ve seen time and again, adopting the hammer approach to every dispute can lead clients down the path of further avoidable conflict, with the collateral damage of damaged relationships, out-of-control legal costs and unnecessary reputational damage. So, instead of a continued emphasis on “winning” every legal dispute at all costs by hammering the other side into submission by threats and bluster, perhaps it’s time to consider a different approach. A time, so to speak, to know what we don’t know. So, while I didn’t realize it at the time, having to work through that pile of workplace disputes 35 years ago started me on the journey of realizing the full potential of ADR, particularly in fields like labor and employment law where relationships matter the most.

So, no matter what stage of your career you’re in, pick up where your legal education left off and start educating yourself on the broad array of alternative dispute resolution (ADR) options that are available to help you and your clients such as the ombuds role, assisted negotiation and fact-finding. Learn how and when to avail yourself of these techniques, and then, fitting the forum to the fuss, use them to start achieving better, faster, and more cost-effective solutions for your labor and employment law clients.

A good place to start is, of course, to become active in the ACBA Alternative Dispute Resolution (ADR) Committee to learn more about the

broad array of ADR options that are available to help you in your practice. In a future *Lawyers Journal* article, I’d like to share what some of those ADR techniques are, how they’re being used, and how to customize them to fit your particular needs. In the meantime, please put away that hammer before somebody gets hurt. ■

*Jared D. Simmer, MLIR, JD, EdD has been a practicing neutral and educator since 1993. His experience includes many years of teaching introductory and advanced negotiation coursework and conducting executive education workshops on a variety of conflict resolution techniques. He continues to serve on numerous panels in the fields of labor, employment, construction, commercial, energy and health care law, as a mediator, fact-finder and arbitrator.*

## Articles wanted for the *Lawyers Journal*

If you have an idea for a substantive law article or would be interested in authoring one, please email Jennifer Pulice at [jpulice@acba.org](mailto:jpulice@acba.org).

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BENCH-BAR 2023  
continued from front page

will it be a fire-baton twirling Justice, a Federal Magistrate Judge in a boxing match or a Presidential cheer routine? There is only one way to find out, and you will have to be there to believe it!

Regardless of your years or area of practice, Bench-Bar is a unique and invaluable opportunity to connect with judges, share ideas with colleagues and forge friendships. I hope to see everyone at this year's Bench-Bar Conference. I also hope that all of you will take the time to encourage your coworkers and friends to attend as well. Visit [acbabenchbar.com](http://acbabenchbar.com) for all the details.

Seeking Nominations for  
Amram Award to be Presented  
at Bench-Bar

One of the highlights of the annual Bench-Bar Conference – set for June 15-17 at Seven Springs Mountain Resort – is the presentation of the Philip Werner Amram Award, which is given to an ACBA member who personifies excellence and who has demonstrated substantial commitment to the ideals of the ACBA and to the betterment of the greater community. The award is given without the recipient knowing in advance, often leading to an emotional, heartwarming surprise acceptance.

Now is the time to submit nominations for the 2023 Amram Award. For more on requirements and the nomination process, or for a list of recent Amram recipients, visit [ACBA.org/amram-award](http://ACBA.org/amram-award) or email Mary Ann Fiorilli at [mfiorilli@acba.org](mailto:mfiorilli@acba.org). Deadline for nominations is Sunday, April 30. ■

PRESIDENT'S MESSAGE  
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the book, *How the Word is Passed: A Reckoning with the History of Slavery Across America*, by Clint Smith, to help understand slavery, its imprint on American history and some of the essential yet often unknown or overlooked stories.

Looking back on our discussion, it struck me that Regina, Kellie, Jesse and Morgan all thanked me for asking questions when clearly they are the ones who deserve the thanks for affording me the opportunity to hear their perspectives. The discussion profoundly moved me. Each one of us can ask questions and educate ourselves. We can be curious. We can care. We can become allies. As we start talking about the next cohort of the ACBA ALLY Initiative certification program I encourage you to speak with the leadership in your firms and legal departments and consider participating in this program.

For more information visit [ACBA.org/allyinitiative](http://ACBA.org/allyinitiative). Certainly we have made great strides in Allegheny County toward increasing diversity among our bench and bar, and bringing relevant related programing and opportunities to our members – but the commitment to allyship and DEI is an ongoing process, and it's something that's earned. Understanding Black history is a powerful first step. For more information on Black History Month visit [blackhistorymonth.gov](http://blackhistorymonth.gov). For more ways to be mindful of Black history, becoming an ally and increasing or implementing DEI efforts in your firm or legal department contact Kellie Ware, at [kware@acba.org](mailto:kware@acba.org).

Black history is American history. Let's keep the discussion going. ■

MEDIATION PREPARATION  
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ultimate settlement authority. This enables the decisionmakers on the other side to see and hear how your client and other key witnesses will come across in the courtroom if the case does not settle.

**10. Prepare a timely and credible demand email or letter.** Allow at least two weeks, ideally even longer, before the mediation, to enable defense counsel to evaluate the demand for the defendant or insurer, and to request or be provided with settlement authority. Be direct, professional, reasonable and collegial. Show the other side you know your case and theirs, and how and why you will be prepared to try it absent an appropriate settlement. Address your case's strengths, and also frontally address its weaknesses. If you have prepared a pre-mediation video "story" or summary of key deposition testimony, send it along with the demand. Make a reasonable demand, one which takes full account of the facts, law, witnesses, evidence and venue.

**11. Prepare a credible and helpful confidential mediation position statement.** Include along with your position statement your demand letter or email and, if you have one, your pre-mediation video. Send all this to the mediator at least by their deadline. Even though the WDPA ADR rules do not *require* position statements, I believe they're essential. Write succinctly. Make it easy for the mediator to grasp the high points of your case. Make it apparent you have looked at your case dispassionately, that you have considered your case's strengths, weaknesses and your opponent's defenses, and explain why

you believe you would prevail at trial and for an amount at least approximating your demand. If the law is specialized, provide to the mediator a primer on applicable law. If the operations or equipment involved in your case are unique, explain such. Include photos or illustrations. If there are important expert reports or deposition excerpts, photos, videos, or documents, send them, or excerpts of such, to the mediator. But only send to the mediator what they will need to appreciate your key evidence. Do not overwhelm the mediator. You will have ample time at the mediation to explain what other evidence will be available for trial.

**12. Fully prepare your client and other key family members.** Explain the mediation process early on to your clients, ideally during an in-person meeting, so they will be acclimated to the process and in a position to calmly evaluate offers and ultimately decide if the best offer achievable at the mediation makes sense for their particular circumstances. Warn them that the defense's initial offers may seem incredibly low, and not to get upset. Explain to your clients this is a *negotiation* and they have to maintain patience and emotional intelligence. Make sure *you* know your client's settlement expectations, *and that such are reasonable*. If you sense your client's settlement expectations are unreasonable, tell them so, and why, in a compassionate but firm manner, well before the mediation.

**13. Fully prepare the lienholder for the mediation.** Keep the lienholder(s) updated on the progress of your case and ask they keep you apprised of the lien amount. If you plan to ask the

Continued on page 12

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# Underfunding and understaffing at the NLRB prevent timely justice

By Joseph S. Pass

“Justice delayed is justice denied.” This well-known maxim, dating back to the Magna Carta, perfectly describes the current state of affairs at the National Labor Relations Board (NLRB) and its processing of unfair labor practice charges nationwide. The NLRB has been severely underfunded and understaffed for the last decade. While this is (unsurprisingly) quite concerning to the organized labor movement, it should also be concerning to every employer that takes its obligations under our nation’s labor laws seriously. In the absence of timely, effective NLRB enforcement against employers that regularly violate labor laws, employers who take their obligations under the law seriously are placed at a competitive disadvantage.

Like many governmental agencies, the NLRB suffers from a deplorable lack of funding, which in turn causes a crippling want of manpower. This twin failing is exacerbated by the concurrent increase in cases filed with the Board. For example, up until 2023, the NLRB received the exact same appropriation since 2014. Yet, in 2022 alone, the total case intake at the Board’s field offices increased a whopping 23%. This represented the largest single-year increase since 1976 and the largest percentage



Joseph Pass

increase since 1959. Moreover, the number of cases submitted to the Board Members increased 13% from 2021 to 2022. As funding over the past 10 years remained stagnant and cases skyrocketed, staffing shrunk. Specifically, agency staffing levels dropped 39% since 2002 and staffing in the Board’s field offices dropped by a staggering 50%!

The perfect storm at the Board caused through inadequate funding, want of manpower and increased case load has made landfall on the very people the Board was originally created to serve. They are the victims of justice denied. As Chief Justice of the U.S. Supreme Court, Warren E.

Burger, noted in an address to the American Bar Association in 1970:

“A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.”

Delays in case handling can cause devastating and irreparable impact on everyday people and their families. Lives can be irretrievably altered and families forever broken. The delay in the Board’s case handling has shaken the confidence in those the Board was meant to serve. For the ordered liberty of free people to prevail, we cannot continue on this same path. ■

*Joseph S. Pass has been practicing with Jubelirer, Pass & Intrieri since 2002. He provides counsel to clients in all areas of labor and employment law. He works for labor organizations representing public and private employees in a variety of*


*settings: at the bargaining table, in grievance and interest arbitration hearings, and in state and federal court. Additionally, Pass practices in the areas of general civil litigation and criminal law.*

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# House bill would have Congress redefine “employee” *Law would carve out exception for workers who entered into “worker flexibility agreements”*

By Robert A. Krebs

Last year the House of Representatives introduced the “Worker Flexibility and Choice Act” (U.S. H.R. 8442) a bipartisan bill which would provide for a new classification of workers in between employee and independent contractor. The classification allows businesses to continue treating certain workers as independent contractors, while also providing some benefits typically provided to employees. The Act was supported by gig economy and app-based companies such as Uber, Lyft, Door Dash, and the construction and trucking industries. It is opposed by organized labor. It is expected that the bill will be introduced again in the current Congress.

Under the provisions of the Act, employers and employees can enter into a “worker flexibility agreement” that defines their work relationship. The idea is to recognize the changing nature of the workplace given the realities of the gig economy in this century. Critics argue that the law has the potential to strip a large segment of the economy of their hard-fought worker protections.

Although such “flexibility agreements” would presumably grant workers their rights under privacy, anti-discrimination, anti-harassment, anti-retaliation, safety, and family and medical leave laws, these arrangements



Robert Krebs

would not grant workers the same wage and hour protections. Workers would not be treated as employees for federal tax purposes.

Most importantly, this federal law governing the employment relationship would supersede all state laws attempting to define such new economy workers as employees, including California’s “ABC” test.

The ABC test permits businesses to classify workers as independent contractors only if they (a) are free from direction and control of the hirer, (b) perform work that is outside the usual course of the hiring entity’s business, and (c) are customarily engaged in an established trade,

occupation, or business. If a business cannot make that showing, its workers are deemed employees in which case the business must comply with the usual requirements of paying federal Social Security and payroll taxes, unemployment taxes and workers’ compensation insurance. The California legislature codified the ABC test and expanded its applicability through the enactment of AB 5. The legislature did this to prevent the “misclassification that caused workers to lose significant workplace protections, deprived the state of needed revenue and ultimately contributed to the erosion of the middle class.” American Society of Journalists and Authors (ASJA) et al. v. Bonta, 15 F.4th 954 (9th Cir. 2021), cert. denied, \_ U.S. \_ (2022).

In Bonta various photojournalists, photographers and videographers working in the entertainment industry sued, claiming that the California Act violated their first amendment and equal protection rights by not exempting them from being deemed employees where the act had exempted other professions, including grant writers, graphic designers, and fine artists. The plaintiffs’ position was that if classified as employees, their work opportunities were reduced, whereas, as freelancers, they had opportunities to work on more projects. The Court dismissed their arguments saying that the law did not regulate speech but

economic activity, and therefore as a fundamental right was not implicated, California only needed to show a rational basis for its legislative action. In this case, the court held that addressing the issue of employee misclassification was a legitimate aim of the legislature.

The Ninth Circuit rejected a similar First Amendment challenge in Mobilize the Message, LLC et al. v. Bonta, 50 F.4th 928 (9th Cir. 2022), where a political organization challenged the California law. Plaintiffs argued that by making their canvassers and petition gatherers employees rather than independent contractors, the law violated their free speech rights as they would be subject to increased costs, limiting the number of people they could hire. In upholding the district court’s denial of a petition for a preliminary injunction to restrain the enforcement of the law, the court of appeals stated that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech and recognized that the Supreme Court has likewise rejected challenges to the Fair Labor Standards Act, the National Labor Act and the Sherman Act.

The sheer size of California’s economy and its willingness to broadly codify the definition of employee sent

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# Dealing with anonymous employee reviews: Defamation or blowing off steam?

By Samantha Cook

Online employee reviews can quickly undermine the most well-intentioned recruiting attempts. In a world where online reviews are consumers’ first line of defense against shoddy products and services, potential applicants are relying on anonymous insider intel to get the low-down on a workplace before deciding whether to apply.

As an employer, online reviews about your workplace may seem totally out of left field. After years of building what you see as a successful and inclusive workplace, it can feel very personal to see someone anonymously criticizing – or even flat-out insulting – your company and the individuals who work there. Employers are increasingly engaging counsel wondering what they can do about these reviews.

**Fight Back or Ignore?**

Seeing disparaging remarks online sometimes causes employers to have a knee-jerk reaction. It seems obvious that there should be consequences for especially hurtful online attacks. A few employers have pursued legal action against internet review companies or the employees who posted the reviews – lessons from their attempts follow.

*Lesson 1: ISPs Are Immune from Civil Liability*



Samantha Cook

Glassdoor and other internet service providers (ISPs) are shielded from liability under the Communications Decency Act of 1996, which protects online publishers from liability for the content of third-party posts on their websites. Glassdoor has successfully established in court that it is generally protected under this act, so employers should not expect the website operator to be on the hook.<sup>1</sup>

*Lesson 2: ISPs Will Defend Their Reviewers*

Glassdoor’s business relies on the anonymity of its reviewers. If anonymity is threatened, Glassdoor’s purpose would be defeated. Glassdoor states that it will cooperate when legally required to, but it will almost always fight to protect reviewers’

anonymity. Glassdoor publicly advises that it does not disclose identities of reviewers upon request and that courts “almost always ruled in favor of Glassdoor and its users...”<sup>2</sup>

*Lesson 3: Be Prepared to Litigate*

Some employers have succeeded in having courts order ISPs to disclose anonymous reviewers’ identities. In every case, however, the disclosure is pursuant to a subpoena related to pending litigation. ZL Techs., Inc. v. Does 1-7,<sup>3</sup> illustrates the relatively high bar an employer must meet before a court will order Glassdoor to disclose a reviewer’s identity.

In ZL Techs., Inc., seven current or former employees posted reviews about the employer on Glassdoor. The reviews criticized the work environment and management of the business, prompting the employer to file a libel per se complaint against the anonymous reviewers.<sup>4</sup> The employer subpoenaed Glassdoor, seeking the identities of the reviewers. Glassdoor objected.

The court’s opinion in this case discusses the test for compulsory disclosure of an anonymous speaker’s identity. While “vigorous criticism” online is generally protected by the First Amendment, courts acknowledge that when that criticism “descends into defamation, constitutional protection is no longer available.”<sup>5</sup> The court’s proffered solution: file suit against the anonymous reviewers, and then show the court that you can make a prima facie claim.<sup>6</sup> Under this

approach, the employer must properly allege all elements of a prima facie claim for defamation, including damages.

Defamation is a state law claim with elements that may vary by jurisdiction. Generally speaking, the claimant must prove that the defendant intentionally or negligently made a false statement of fact about the claimant to a third person that damaged or caused the claimant harm. In ZL Techs., Inc., the court found that six of the seven reviews contained “statements that declared or implied provably false assertions of fact, providing a legally sufficient basis for a defamation cause of action.”<sup>7</sup> These statements included assertions that the company “purposefully hired inexperienced personnel, paid below industry standards, publicly disparaged staff, and had high staff turnover rates.”<sup>8</sup> Because the employer made out a prima facie claim of defamation, the court compelled Glassdoor to comply with the subpoena.

On the other hand, Glassdoor touts many examples of cases where it defeated a subpoena and protected the anonymity of its reviewers. These are typically cases where the employee was just sharing an opinion – right or wrong – about their experience with the company. Unfortunately, there is not much employers can do in these situations besides take one on the

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MEDIATION PREPARATION  
continued from page 8

lienholder to reduce their lien by more than a contract, policy, or applicable law requirement, prepare the lienholder(s) for this well ahead of time. If the case will not settle if they insist on recovering their full lien, make sure the lienholder(s) know this. Ensure the lienholder(s) will either attend the mediation or be readily available during it.

14. **Plan for you and your client(s) to attend the mediation and to stay for as long as it takes.** Mediations can fail when all the required players have not committed the *full* day or half day to the process. Make sure you and your clients have cleared your schedules to allow for an undistracted mediation.

15. **Have a pre-mediation call with the mediator.** Unless your client's case is simple, involving well-traveled law and non-complex facts, ask the mediator for a brief *ex parte* phone call a day or so before the mediation, to cover logistics, the gist of your case and/or any issues unique to your case. The WDPA's ADR rules require such conferences and many mediators believe such conferences enhance the chances for a successful mediation. If you will need the mediator's help explaining to your client their case's value or lack thereof, address this during a pre-mediation call with the mediator. Let the mediator know what they are walking into. Good mediators appreciate candid and well-prepared lawyer advocates and well-prepared clients.

16. **Whether the case is going to settle, or not, be prepared for trial.** Ensure you are ready or will be ready to try your case. Cases settle when the other side knows you are or will be prepared to try your case. Try to avoid

walking into a mediation *having* to settle.

17. **Bring or have access to key file materials at the mediation.** Often at mediations the mediator will walk into or click into (if it's a remote mediation) your room asking about a particular record or telling you and your client(s) that the defense says a witness testified a certain way or what a document states. Bring your laptop to in-person mediations and have it or a flash drive loaded with key file materials such as deposition transcripts, key documents, medical records and expert reports.

18. **If the case settles at mediation, don't leave the mediation without a signed term sheet or another enforceable written contract.** People's memories can fade or differ. Put the agreements reached at mediation in writing, or at least get and save assenting emails, before everyone leaves, with all lead lawyers signing and the signatures of your client(s).

**Conclusion** – Prepare for mediation with diligence and attention to detail. It will take a lot of work. Put in the necessary time. Cover all the necessary bases. Just like preparing for a trial, you maximize your chances for a successful outcome at mediation *only* if you and your client(s) are fully prepared. ■

*Frederick Goldsmith, licensed in PA, WV, OH, TX, and MA, is a former federal judicial law clerk, has practiced in the roles of civil defense, in-house and plaintiff's counsel for 32 years, and has tried personal injury, property damage and insurance coverage cases on both sides of the docket. He is an attorney and formally trained mediator with Goldsmith & Ogradowski, LLC (www.golawllc.com), approved to serve*

as a mediator, arbitrator and early neutral evaluator by the U.S. District Court for the Western District of PA. He is also listed as a qualified mediator by the West Virginia State Bar and serves as a member of the ADR Committee of the ACBA, the W.V. State Bar and the Maritime Law Association of the U.S.

**HOUSE BILL REDEFINES "EMPLOYEE"**  
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ripples throughout industry, creating unlikely coalitions on both sides, and attracting federal attention.

On a more immediate note is the potential impact of such federal legislation on preemption of state law including workers' compensation on the threshold issue of whether the claimant is an employee. Independent contractor agreements are not favored in Pennsylvania as there are questions of whether the worker fully understood the ramifications of the agreement and whether it was entered into voluntarily. Our Supreme Court has repeatedly admonished that "Neither the compensation authorities nor the courts should be solicitous to find contractorship rather than employment, and the inferences favoring the claim need make only slightly stronger appeal to reason than those opposed." *Universal Am-Can v. WCAB (Minteer)*, 762 A. 328, 330 (Pa. 2000), citing, *Deihl v. Keystone Alloys Co.*, 156 A.2d 818, 820 (Pa. 1956). Federal legislation presumably passed under the Commerce power provided in Article I of the U.S. Constitution defining the employer-employee relationship opens the door to a new chapter in this area. ■

*Robert A. Krebs is a Commissioner and former Chairman of the Pennsylvania*

*Workers' Compensation Appeal Board. He is an Adjunct Professor of Law at the Thomas R. Kline School of Law of Duquesne University where he teaches employment law.*

**ANONYMOUS EMPLOYEE REVIEWS**  
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chin, or respond using a free employer account.


**Lesson 4: Creating an Employer Account Waives Certain Rights**

Glassdoor offers employers the opportunity to publicly respond to employees' posts, but there are strings attached. By signing up for a free employer account with Glassdoor, employers consent to jurisdiction and venue in California for discovery disputes related to identifying the online reviewers. More significantly, however, the terms of service also require employers to waive their right to pre-litigation discovery.<sup>9</sup> Employers lose the right to identify the reviewer before filing a lawsuit against them. If an employer accepts Glassdoor's terms of service, it must be prepared to file a lawsuit against a John Doe before it can expect Glassdoor to comply with a demand letter or a subpoena.

**Lesson 5: Be Careful About Referencing a Confidentiality or Non-Disparagement Agreement**

Some employers may think that because the online reviewer was likely subject to a confidentiality or non-disparagement agreement, a negative review may be a basis to enforce them. However, there are a number of potential legal challenges to such contract provisions under state and federal laws. For example, the National Labor Relations Board recently ruled

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# If there’s something weird and it don’t look good, who you gonna call? Outside investigators!

By Marla Presley and Emily Town

Every good lawyer wants to be the first call their client makes when the client’s employee lodges an internal complaint of harassment or discrimination. Those lawyers jump immediately into action: giving instructions on preserving evidence, gathering facts, and beginning to formulate the eventual defenses to the lawsuit they see coming ahead.

But that’s why those lawyers are not the best option to conduct a workplace investigation for the client.

There are significant differences between how lawyers must approach an investigation into a complaint of discrimination that is already filed in a court or with an administrative agency and an investigation of an internal complaint. The goal of an internal workplace investigation is not defense against a legal claim. The client must tread carefully to make sure any actions taken with respect to their employees are based on an unbiased, thorough review of the facts.

Most lawyers are able to see “both sides” to every issue. That’s how we are able to anticipate (and address) opposing counsel’s arguments. But investigations of internal workplace complaints for a long-time client are ripe with potential conflicts.

First, the lawyer has likely worked with the client to develop workplace policies or to defend against prior lawsuits. This history with the client



Marla Presley

can be a double-edged sword: the lawyer may have developed a close, trusting rapport with an executive who they now must investigate for allegations of misconduct, or the lawyer may have developed an opinion that their client often “gets it wrong” or makes decisions that result in viable claims against the company. No matter the history – a good rapport or a bad feeling – this biased opinion of the client is a conflict for the lawyer when it comes to conducting an internal investigation.

Second, a lawyer’s long-standing relationship with their client naturally results in the lawyer gaining knowledge about how the client operates, which employees are favored or disfavored, and which members of management



Emily Town

are most likely to have issues with their employees. This is helpful in providing efficient advice and counsel but can lead to shortcuts being taken when investigating an internal complaint. Imagine the lawyer who has defended against a lawsuit centering on one manager. Even if the lawsuit is resolved successfully, the lawyer now knows all of “the warts” associated with that manager’s workplace conduct that they’ve had to develop strategies to address throughout litigation. If an internal complaint about the manager follows, there’s no way for the lawyer to set aside all of that knowledge to perform an unbiased investigation.

Third, it is entirely possible that the investigator becomes a witness in

a subsequent lawsuit or charge. Even with an ethical wall, having a lawyer defend a case and cross examine one of her own colleagues is sure to raise eyebrows with a jury.

Finally, we naturally want our clients to succeed – their success often means more work coming our way. When your interests are aligned with your client’s, delivering bad news about litigation can be tough but at least it is softened by the knowledge that you were in the fight together. When it comes to investigating internal complaints, the bad news you must deliver can sometimes be devastating to your client’s bottom line – and the decision is coming from you, not a court. Telling your client that they should fire their top salesperson because you’ve been able to verify that he has harassed several subordinate employees is not an easy message to deliver. This can lead a lawyer to try to come up with alternatives or to ignore glaring issues – which ultimately puts the client at more risk later.

The better approach is to hire an outside investigator with experience conducting interviews and managing a focused investigation of a discreet complaint. And although it can feel strange to recommend to your client that they should hire another attorney to do a job the client will expect you to be able to do, it is in your client’s best interests to use an outside investigator

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# The interplay of workers’ compensation, FMLA and ADA

By Mary-Jo Rebelo and  
Courtney C. Brennan

When an employee becomes injured on the job, becomes ill, or has a disability they may be entitled to medical and/or disability-related leave under the Americans with Disabilities Act (ADA) and/or the Family and Medical Leave Act (FMLA). In addition, state workers’ compensation laws have leave provisions that may factor into the analysis. These cases must be evaluated on a case-by-case basis and depending on the circumstance, one or more of these laws can apply to the same employee. This article explores the interplay between the ADA, FMLA, and workers’ compensation and the considerations to assist employers in determining their responsibilities regarding medical and disability-related leave requests.

Although the ADA and FMLA are both structured to support employees with physical or mental ailments, they have different leave requirements. The purpose of the ADA is to bring qualified individuals with disabilities into the workforce and retain them by requiring employers to make reasonable accommodations, so long as it does not create an undue hardship. The goal of the FMLA is to permit workers time off for family or health reasons that constitute a serious health condition. Workers’ compensation provides compensation for lost wages and medical treatment for employees facing a work-related injury.

Understanding the intersection of these laws begins by understanding



Mary-Jo Rebelo

when an employee qualifies for leave or reasonable accommodation:

- **The Americans with Disabilities Act (ADA)**  
*Employer Coverage:* Applies to employers with 15 or more employees  
*Employee Eligibility:* Applicants or employees who are qualified individuals with a disability who can perform the job’s essential functions with or without a reasonable accommodation; No length of service requirement  
*Leave Rules:* Requirement that employers make reasonable accommodations for qualified employees with disabilities, which can include modification to work schedules, such as leave
- **The Family and Medical Leave Act (FMLA)**  
*Employer Coverage:* Applies to employers with 50 or more employees  
*Employee Eligibility:* Employees who work at a worksite with 50 or



Courtney Brennan

more employees within a 75-mile radius, have worked there for at least 12 months, and have worked at least 1,250 hours in the 12 months immediately preceding the leave

- **Workers’ Compensation**  
*Employer Coverage:* Any employer with at least one employee  
*Employee Eligibility:* Employees who have a work-related injury or illness  
*Leave Rules:* No defined limit to leave

**Overlap Between the Laws**

Under certain circumstances, provisions of these laws may overlap. This overlap generally stems from the use of the terms illness, injury or disability in each statute. It is important

to note where the definitions differ. The ADA’s definition of “disability” is different than “serious health condition” under the FMLA. If an employee has a serious health condition that also qualifies as a disability, the ADA and FMLA protections overlap. If an employee suffers a work-related injury that requires hospitalization for more than three days and qualifies as a serious health condition, the FMLA and workers’ compensation will overlap.

An employee who is protected by both the ADA and FMLA, for example, is entitled to the rights afforded by both laws. In other words, 12 weeks of job-protected leave with benefits continuation under the FMLA, and a reasonable accommodation to allow the employee to perform the job’s essential functions under the ADA. Importantly, if the law allows different rights in the same situation, the employee is entitled to whichever provides the greater benefit. Managers and Human Resource professionals should note this may depend on what the employee desires. If, for example, an employee is qualified for FMLA leave but wants to work with a reasonable accommodation, the employer must provide the accommodation. If the employee could work with a reasonable accommodation but chooses to take FMLA leave, employers must allow the leave.

If an employee’s work-related injury or illness is also a serious health condition, state workers’ compensation and FMLA may both

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# What you need to know about remote work as an ADA accommodation

By Rachel L. McElroy

In 1979 IBM came up with a novel concept: it installed state of the art terminals in the homes of five employees. The terminals allowed the employees to work remotely from home. The idea that you could work remotely was just starting off as concept in the late 1970s and largely unobtainable for most Americans. By the 1990s, with the advent of personal computers and the internet, more and more employers and employees explored the idea of remote work including the federal government. In 1990, the Office of Personnel Management began studying the advantages of what it called “flexiplace.” (Telework in the Federal Government: The Overview Memo, Workplace Flexibility, 2010, Georgetown University Law Center). The idea of working remotely appealed to both employees and employers grew steadily throughout the 2000s but still made up a small percentage of the overall workforce. Enter the COVID-19 pandemic, and suddenly many more employers had their employees working from home.

Remote work benefits many individuals, especially individuals with a disability. It can remove barriers to work such as transportation difficulties and inaccessible or difficult to access buildings and infrastructure. It can ensure privacy to treat medical



Rachel McElroy

conditions. And remote work can allow greater flexibility over the environment including managing workplace distractions that affect concentration. The Job Accommodation Network recommends remote work as an accommodation option for many different situations. Employers like remote work as it can cut expenses and improve employee morale. With the passage of the Americans with Disabilities Act in 1990 (ADA), employees began requesting to work remotely as an accommodation for a disability. The Equal Employment Opportunity Commission in 1999 weighed in on the issue stating, “allowing an individual with a disability to work at home may be a form of

reasonable accommodation.” (Work at Home/Telework as a Reasonable Accommodation Issue date 02/03/2003 [www.eeoc.gov/laws/guidance/work-home-telework-reasonable-accommodation](http://www.eeoc.gov/laws/guidance/work-home-telework-reasonable-accommodation)). However, the courts were cautious to adopt the same stance as the EEOC. The Circuits split on whether in-person work is an essential function of most jobs. The Fourth Circuit considered the topic in 1994 and stated “...who does not come to work cannot perform any of his job functions, essential or otherwise.” Tyndall v. Nat’l Educ. Centers, Inc. of California, 31 F.3d 209, 213 (4th Cir. 1994). Conversely, in 2001 the 9th Circuit found that an employer failed to engage in the interactive process when it denied a work from home request. See Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1139 (9th Cir. 2001). The Tenth Circuit later found in 2005 working from home to be unreasonable. Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1123 (10th Cir. 2004). In 2010, the Third Circuit took a more nuanced approach in Kiburz v. England, 361 F. App’x 326, 333 (3d Cir. 2010). The court did not find working from home per se unreasonable but did find the essential functions of the plaintiff’s particular job did not permit remote work. In 2015, the Sixth Circuit found working in-person to be an essential function of most jobs. See E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015).

During the COVID-19 pandemic in 2020, many workplaces shut down and all employees who could work remotely moved to remote work. Employers and employees had to adapt quickly from a mostly in-person working environment to an entirely remote working environment. Suddenly, tasks that were often performed mostly in-person in 1994 such as meetings, trainings, and other interactions happened entirely online. In 2022, the Pew Research Center found that “six in ten U.S. workers who say their jobs can mainly be done from home (59%) are working from home all or most of the time.” ([www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america](http://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america)). With technologies such as Zoom, Teams, and Slack many employees can stay connected with team members and the office without the need for in-person attendance. Furthermore, many offices are outfitted to accommodate hybrid meetings between individuals at different locations. Working from home in 1994 is very different from working from home in 2023. The Eighth Circuit recently weighed in on the matter in November 2022. In Mobley v. St. Luke’s Health Sys., Inc., 53 F.4th 452, 456 (8th Cir. 2022), the court concluded “...that a genuine dispute of material fact exists as to whether he was able to perform

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# New laws protecting pregnant and nursing workers take effect this year

By Christine T. Elzer

Congress has passed two new federal laws providing additional protections for pregnant and nursing employees. The Pregnant Workers Fairness Act (PWFA), effective June 27, 2023, will require employers to make reasonable accommodations for pregnant workers. The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which went into effect at the beginning of the year, requires most employers to provide breaks to express breast milk. Both laws passed as part of the Consolidated Appropriations Act of 2023, HR 2617, in the final days of 2022.

The PWFA will require employers to make reasonable accommodations to employees’ known limitations related to pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s business. The law fills a gap between the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102 et. seq., by requiring employers to accommodate pregnant workers, regardless of whether they accommodate others, and regardless of whether the pregnant worker is disabled. However, it does not replace these laws, nor does it preempt more protective state or local laws.



Christine Elzer

The PWFA will apply to all employers with at least 15 employees, including private, federal, state, and local government employers. The statute provides that “reasonable accommodation” and “undue hardship” will have the same meanings as under the ADA. 42 U.S.C. § 12111. The House Committee on Education and Labor Report on the PWFA provides several examples of reasonable accommodations, including unpaid leave to recover from childbirth; extra breaks to drink water, use the restroom, eat, rest, or sit down; flexible hours; closer parking; appropriately-sized uniforms and safety apparel; and being excused from strenuous activities or exposure to dangerous compounds. An employer has a

defense if it can establish that an accommodation would cause an “undue hardship,” which is an action requiring significant difficulty or expense, when considered in light of certain enumerated factors such as the nature and cost of the accommodation, the employer’s overall financial resources, the number of employees at a particular facility, and related factors. See 42 U.S.C. § 12111(10)(B).

The statute will require the employer and employee to engage in an interactive process to find an appropriate accommodation. Employers will be prohibited from requiring employees from accepting accommodations not reached through this interactive process. Employers will also be prohibited from requiring employees to take leave if another reasonable accommodation will allow the employee to continue performing her job. While these concepts have been expressed in case law and regulatory guidance regarding the ADA, they are explicitly codified in the PWFA with respect to pregnancy, childbirth, and related medical conditions. The PWFA also will prohibit retaliation for opposing discrimination, participating in a PWFA proceeding, or exercising any right provided under the statute.

The same remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1991, 42 U.S.C. §

1981a, will be available under the PWFA. This includes back pay, front pay or reinstatement, compensatory and punitive damages, attorneys’ fees, and costs. However, the employer will have a defense to compensatory and punitive damages if it demonstrates good faith efforts to provide a reasonable accommodation. Title VII’s damage compensatory and punitive caps, which range from \$50,000 to \$300,000 depending on the size of the employer, also apply.

The Equal Employment Opportunity Commission (EEOC) will enforce the PWFA. The EEOC has been directed to implement regulations by January 3, 2024. The EEOC has already published *What You Should Know About the Pregnant Workers Fairness Act*, available at [www.eeoc.gov](http://www.eeoc.gov). The EEOC will start accepting charges under the PWFA on June 27, 2023.

The PUMP Act amends the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(r), by requiring employers to provide breaks and a private space, other than a bathroom, to express breastmilk for up to one year after the birth of an employee’s child. The Affordable Care Act already included this requirement for non-exempt employees, but the PUMP Act expanded coverage to include exempt employees, effective immediately.

Nearly all employers are covered by the PUMP Act, with the exception

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ANONYMOUS EMPLOYEE REVIEWS  
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that an employer committed an unfair labor practice by offering furloughed employees severance agreements containing confidentiality and non-disparagement clauses that have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their right to engage in concerted activity protected by Section 7 of the National Labor Relations Act.<sup>10</sup> ISPs are well aware of these developments. Employers should consult with counsel and use caution before attempting to rely on confidentiality or non-disparagement provisions to stop a current or former employee’s on-line discussion about the terms and conditions of employment.

Key Takeaways

Before pursuing legal action, employers, with the assistance of counsel, should take a breath and look at the posts objectively. Do they assert anything that you can prove to be false? Or do they convey hyperbolic opinions with which you disagree? Courts are not likely to expose the identity of a disgruntled employee who is blowing off steam. However, when a reviewer improperly uses an anonymous profile to make false statements of fact (as opposed to opinion), disclose trade secrets, or make threats, the employer should consider its legal options, as there may be a basis to seek removal of those posts or compel disclosure of the reviewer’s identity. Employers must be prepared to follow through on that legal action, because Glassdoor and its fellow ISPs typically will not cooperate without a court order. Before responding with a free account, employers should carefully read the terms of service and avoid accepting any terms that may impair their ability to bring actionable claims. It may make more sense to ignore an anonymous post, unless there is a clear path for accomplishing a positive result. ■

Samantha Cook is an associate attorney in the Labor & Employment group at Dentons Cohen & Grigsby in Pittsburgh, PA.

<sup>1</sup> Craft Beer Stellar, LLC v. Glassdoor, Inc., No. CV 18-10510-FDS, 2018 WL 5505247 at \*2 (D. Mass. Oct. 17, 2018).  
<sup>2</sup> [https://help.glassdoor.com/s/article/I-wrote-a-Glassdoor-review-Will-Glassdoor-protect-my-identity-if-an-employer-asks-or-if-someone-takes-legal-action-to-find-out-who-I-am?language=en\\_US](https://help.glassdoor.com/s/article/I-wrote-a-Glassdoor-review-Will-Glassdoor-protect-my-identity-if-an-employer-asks-or-if-someone-takes-legal-action-to-find-out-who-I-am?language=en_US)  
<sup>3</sup> 13 Cal. App. 5th 603, 220 Cal. Rptr. 3d 569 (2017).  
<sup>4</sup> Id. at 576-77.  
<sup>5</sup> Id. at 579 (citing Krinsky v. Doe 6 (2008) 159 Cal.App.4th 1154, 1164).  
<sup>6</sup> Id.  
<sup>7</sup> Id. at 591 (internal citations omitted).  
<sup>8</sup> Note that the non-actionable statements, however, were comments such as “Don’t Work Here,” “bizarre vacation policy,” “senior leadership is not great,” and referring to work as a “bloodsport” or a “nightmare.”  
<sup>9</sup> <https://www.glassdoor.com/about/terms/>  
<sup>10</sup> McLaren Macomb & Loc. 40 Rn Staff Council, Off. & Pro. Emps., Int’l Union (Opeiu), Afl-Cio, 372 NLRB No. 58 (Feb. 21, 2023).

OUTSIDE INVESTIGATORS!  
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who is also a lawyer. There are plenty of non-attorney investigators who do this work, but without an understanding of workplace law they often write reports using terms of art that can have negative implications in later litigation or include “side issues” not relevant to the underlying complaint – creating a record that puts your client on notice. An outside attorney investigator is sensitive to such issues and will conduct an unbiased investigation with a careful eye to avoiding unintended issues for your client. Attorney investigators understand that their reports can turn into evidence and that evidence can lead to testimony in court. When handing over the reins to an investigation to someone else, it

can be advantageous to choose an investigator who has experience handling such issues on behalf of their own clients. ■

Marla N. Presley is the office managing principal and the litigation manager for the Pittsburgh office Jackson Lewis P.C. Her practice focuses exclusively on the representation of employers in wage and hour disputes, class and collective actions, and claims of discrimination under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and various state tort theories. She also appears regularly before administrative judges and agencies. Emily E. Town is an associate in the Pittsburgh office of Jackson Lewis P.C. Working on behalf of employers, Emily brings to her practice experience representing employees and labor unions in state and federal courts, before administrative tribunals and at the National Labor Relations Board.

OFFERING SEVERANCE AGREEMENTS  
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union information requests related to customer complaints; and (iii) mandatory arbitration agreements. Many of her other priority areas have been presented to the Board and are simply awaiting decisions, such as cases dealing with rules in an employer’s handbook.

Thus, labor lawyers should buckle up. This Board is doing its work in an administration led by a President who has proudly promised to be the most pro-labor President in history. The five-member Board will almost certainly keep its Democratic majority for the remainder of President Biden’s tenure in office. And this General Counsel’s term has several years remaining. So the stars have aligned for Democrats to develop labor policy through the Board, the body that has the primary responsibility for developing and applying national labor policy. And the Board has shown that, like its predecessors, it will not let precedent stand in its way. The case involving severance agreements is only the latest example.

For now, employers should carefully analyze a severance agreement before offering it to an employee. Are its terms narrowly tailored? Does the confidentiality provision relate only to things that occurred during the person’s term of employment or does it stretch more broadly? Does the anti-disparagement provision prevent an employee from talking with the Board, their union, and their peers about potentially unlawful labor practices and the terms and conditions of employment more generally? These are just a few of the questions that employers must ask. And employers would be wise to ask them before offering the agreement to a departing employee because once the agreement has been offered, the train might be out of the station. ■

Brian W. Castello is an Associate at Marcus & Shapira, which provides practical, sophisticated, and cost-effective advice on all aspects of traditional labor and employment issues, to both unionized and non-unionized employers.

INTERPLAY WORKERS’ COMPENSATION  
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apply. Light duty assignments are one area where FMLA and workers’ compensation differ. Under the FMLA, an employee is entitled to 12 weeks of leave. The employee does not have to come back to work early to a different position or “light duty” work. Under workers’ compensation, however, if the company offers light duty work that the employee is medically capable of doing, the employee typically has to accept that position or lose benefits under workers’ compensation. Importantly, an employee who accepts a light-duty position as opposed to remaining on

FMLA leave does not give up their right to be reinstated to their former position, at least for the 12-month FMLA period.

Additional Leave Time

If an employee has exhausted their FMLA time, consider whether the employee qualifies as an individual with a disability. If so, the ADA may entitle this employee to additional protections, such as additional leave time or a reasonable accommodation to the job for the disability. Employers should always consider whether the ADA factors into the FMLA equation. Employers should revisit their documentation process for handling employees’ leave requests. Companies that outsource their claims handling to third parties should not neglect in-house record keeping. Implementing training for managers on these laws can lower exposure in what can otherwise become costly litigation for leave-interference claims. Violations of these laws can trigger lost wages, back pay, reinstatement, compensatory damages and punitive damages. In short, guide employers to carefully consider each law individually when an employee needs to take leave. ■

Mary-Jo Rebelo is Burns White’s Chief Executive Officer, Co-Chair of the firm’s Employment Practices Liability and Complex and Commercial Litigation/Dispute Resolution practice groups, and a senior member of the Business Practices and Litigation groups. Rebelo has successfully represented manufacturers, distributors, retailers, property owners, business owners, boards of directors and other governing bodies, physicians, physician practices, health systems, and other medical service providers in a broad range of matters. Courtney C. Brennan is an Associate in the firm’s Litigation Practice Group focusing in the areas of employment, business and complex and commercial litigation. Brennan is frequently involved in actions regarding race, sex, age, religious and disability discrimination, as well as claims for harassment, sexual harassment, wrongful discharge, retaliation and breach of employment-related contracts, including but not limited to employment agreements, non-compete agreements, non-solicitation agreements, trade secrets, and confidentiality/non-disclosure agreements.

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REMOTE WORK ADA ACCOMMODATION  
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the essential functions of his job through his proposed accommodation of teleworking while he experienced a flare-up of his condition.” While summary judgment was ultimately granted on other grounds, the court did not find telework to be unreasonable per se. Given the long history of remote work requests, if an employee makes a work from home request on the basis of a disability as defined under the ADA, the best practice for both employees and employers is to treat a work from home request the same as any other accommodation request under the ADA. Both sides should focus on engaging in the interactive process to find an accommodation that is reasonable and does not create an undue hardship. ■

Rachel L. McElroy primarily focuses her practice on employment-related claims such as discrimination, harassment, and retaliation in the workplace. She represents both plaintiffs and defendants in state and federal court. She is an active volunteer and strives to serve not only her clients but her community as well.

PREGNANT AND NURSING WORKERS  
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of certain airline, railway, and motor-coach workers. Employers with less than 50 employees are exempt from the PUMP Act if providing breaks would impose an undue hardship. Effective April 28, 2023, all FLSA remedies, including lost wages, reinstatement, promotions, liquidated damages in the form of double lost wages, and attorneys’ fees, will be available under the PUMP Act. The Department of Labor (DOL) enforces the PUMP Act. A fact sheet regarding the PUMP Act is available at [www.dol.gov](https://www.dol.gov). If you or your client has experienced pregnancy-related discrimination before the effective dates of these new laws, you should consult an employment attorney about the applicability of other laws, including the PDA, the ADA, the Family and Medical Leave Act (FMLA), the Pennsylvania Human Relations Act, and/or the City of Pittsburgh Unlawful Employment Practices Ordinance. ■ Christine Elzer represents workers in employment matters, from the pre-litigation stage through trial and appeal. She also mediates employment and other civil cases.

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# The Defend Trade Secrets Act turns seven: What every Pennsylvania lawyer and employer needs to know

By Shane Miller

Almost seven years ago, President Barack Obama signed the Defend Trade Secrets Act (DTSA) into law. This statute allows a trade secret owner to sue in federal court for the alleged misappropriation of its trade secrets. Trade secret cases often arise when an employee leaves an existing job and joins a competitor. If the former employer suspects that its ex-employee shared its confidential information with the new employer, it may choose to file a trade secret misappropriation claim. Federal courts have seen a surge in DTSA cases in recent years. Pennsylvania lawyers and employers thus should understand its main provisions, especially since DTSA actions can carry severe penalties and often are expensive to defend. To that end, this article discusses seven key questions about the DTSA.

**1. What are the elements of a DTSA claim?**

A DTSA claim has three elements: (1) the existence of a trade secret, defined generally as information with independent economic value that the owner has taken reasonable measures to keep secret; (2) that is related to a product for service used in, or intended for use in, interstate or foreign commerce; and (3) the misappropriation of that trade secret, defined broadly as the knowing improper acquisition, or use or disclosure of the secret. 18 U.S.C. § 1836, 1839; Mallet & Co. v. Lacayo, 16 F.4th 364, 380 (3d Cir. 2021); Oakwood Labs LLC v. Thanoo, 999 F.3d 892, 905 (3d Cir. 2021).

**2. What is a “trade secret?”**

The DTSA defines a “trade secret” broadly; it includes “all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas,



Shane Miller

designs, prototypes, methods, techniques, processes, procedures, programs, or codes ...” 18 U.S.C. § 1839. To prove that information qualifies as a trade secret, a plaintiff must show four things:

- it took “reasonable measures” to keep the information secret;
- the information derives actual or potential independent economic value from being kept secret;
- the information is not readily ascertainable by proper means; and
- others who cannot readily access the information would obtain economic value from its disclosure or use.

18 U.S.C. § 1839; Pharmacia Corp. v. Sturgeon, 2:16-cv-1481, 2018 U.S. Dist. LEXIS 43236, at \*11 (W.D. Pa. Mar. 16, 2018).

**3. What does it mean to “misappropriate” a trade secret?**

The DTSA defines “misappropriation” in detail at 18 U.S.C. § 1839(5). But, in sum, a defendant can “misappropriate” a trade secret in three basic ways:

- Improper acquisition of the trade secret;
- Disclosure of the trade secret; or
- Use of a trade secret without consent.

Oakwood, 999 F.3d at 907-08.

**4. What does “improper acquisition” of a trade secret mean?**

Under the DTSA, “improper acquisition” occurs when a person or entity acquires a trade secret and knows, or has reason to know, that it was obtained by “improper means.” A trade secret is obtained by “improper means” if acquired by theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. 18 U.S.C. § 1839(6). Conversely, the following actions do not constitute “improper acquisition:”

- The defendant reverse engineers the trade secret;
- The defendant independently derives the trade secret; or
- The defendant acquires the trade secret through lawful means.

Id.

**5. What does it mean to “use” a trade secret?**

The Third Circuit has defined the “use” of a trade secret broadly by stating that it includes “any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant...” Oakwood, 999 F.3d at 908. Thus, “use” of a trade secret encompasses “all the ways one can take advantage of trade secret information to obtain an economic benefit, competitive advantage, or other commercial value, or to accomplish a similar exploitive purpose, such as assisting or accelerating research or development.” Id. at 910. For example, the following activities constitute “use” of a trade secret:

- marketing goods that embody the trade secret;
- employing the trade secret in manufacturing or production;
- relying on the trade secret to assist or accelerate research or development; or

- soliciting customers through the use of information that is a trade secret.

Id. at 909.

**6. What damages are available under the DTSA?**

A court may award the following damages under the DTSA:

- “actual loss” caused by the misappropriation of the trade secret; and
- damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for “actual loss.”

18 U.S.C. § 1836(b)(3)(B)(i).

Alternatively, a court may award the damages caused by the misappropriation by imposing a reasonable royalty for the misappropriator’s unauthorized disclosure or use of the trade secret. 18 U.S.C. § 1836(b)(3)(B)(ii).

If the trade secret is “willfully and maliciously” misappropriated, the court may award punitive damages up to two times the amount of the damages awarded for actual loss and unjust enrichment. 18 U.S.C. § 1836(b)(3)(C).

**7. Can the court award attorneys’ fees in a DTSA action?**

Under the DTSA, the court may award reasonable attorneys’ fees to the “prevailing party” if a misappropriation claim is made in bad faith, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated. 18 U.S.C. § 1836(b)(3)(D). ■

*Shane Miller is an associate in the Pittsburgh office of Lewis Brisbois and a member of the Labor & Employment Practice Group. He routinely defends employers in trade secret, discrimination, harassment and retaliation claims.*

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