

The Future of Work

ACC Houston & Hunton Andrews Kurth LLP

January 5, 2023 – Key Takeaways

ACC Foundation
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SESSION 1: Changes in the Workplace



Scott Nelson

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Scott is a labor and employment partner in Hunton Andrews Kurth's Houston office. Scott advises America's top companies on their employee issues and defends them in court when employees sue. With over 25 years of experience, Scott has dealt with most employment law matters companies face. His mastery of the subject matter allows him to get to the heart of the issue quickly and provide sound, practical advice clients can trust. This, along with his drive to win, gives him a critical edge in the courtroom. Despite his strong record on summary judgment, Scott is a trial attorney at heart. He is comfortable and compelling in the courtroom, having prevailed for clients in cases ranging from simple labor arbitrations to jury and bench trials with hundreds of millions of dollars at stake. Among his more notable cases, Scott successfully defended multinational chemical companies in one of the largest employee trade secrets cases to go to a jury trial, a case in which plaintiffs sought \$800 million through economic espionage-type trade secrets claims. He also achieved a total bench trial victory for a multinational mining and chemical company in a large ERISA class action in which plaintiffs sought in excess of \$200 million. Scott has significant experience and has had great success with high profile domestic and international employment matters, as well as complex employment and commercial litigation. He is known for his ease in working with clients, his thoughtful strategic approach, his artful use of diplomacy, and his relentless pursuit of victory.



Kim Pilcher

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Kim is Executive Counsel, U.S. Labor & Employment Law Group for Exxon Mobil Corporation and deeply involved in ACC Houston, currently serving on the Board. Kim was previously President of ACC Houston. Kim is a lawyer with twenty plus years of experience with focus on labor & employment law matters in the oil & gas industry. As Executive Counsel, Kim's leadership role involves U.S. labor & employment law as well as coordination with her non - U.S. colleagues on global projects and issues involving policies stewarded in the U.S.



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Raj Duvvuri is an Investment Manager and Legal Counsel at Omni Bridgeway, a global leader in litigation finance with a \$15.0 billion portfolio value, \$1.8 billion in assets under management (AUM), and 18 locations in 10 countries. As part of the world's largest litigation finance team, Raj works with Omni Bridgeway's Chief Investment Officer to offer capital and project management services from case inception to post-judgment enforcement to clients in North America. Raj also coordinates with the global litigation finance and judgment enforcement teams located in Australia, Asia, the UK, and EMEA.



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Marc is the Vice President of Legal Affairs and a telecom lawyer who works for Bluepeak, a fiber optic cable company with a network in several Midwest states and corporate offices in Denver. He leads their legal department responsible for overseeing all contract drafting, review and negotiation as well as litigation, and is 100% remote in Houston.



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Savannah is a labor and employment associate in Hunton Andrews Kurth's Houston office. She previously served as a two-year judicial law clerk to the Honorable Lynn N. Hughes in the Southern District of Texas. Savannah guides employers and corporations through all aspects and stages of employment matters.

Session Takeaways:

- The FTC has proposed a rule that would ban most employee non-competes. Employers will need to closely watch this for developments.
- We are seeing a push to get employees back in the office. Each employer should assess its unique needs and goals, their employees' productivity when working remotely, and their employees' preferences when determining their return-to-office strategy and policies.
- Nationwide recruiting gives both employers and employees more options, making the job market highly competitive.
- During the COVID-19 pandemic, employee bargaining power skyrocketed, leading employers to offer more flexibility. Going into 2023, employers are recovering their bargaining power.
- Even with many employers forecasting layoffs, it is important to keep in mind that they will still need to retain top talent.
- Artificial intelligence has entered the American workforce and application processes. Employers will need to work with counsel to stay up to date on the legal developments that will undoubtedly arise as AI becomes a larger part of the conversation.
- Recruiting talent remotely is easier for employers, considering they can choose from candidates throughout the country instead of within a relatively small radius of the home office.
- Employing a remote workforce can come with additional cybersecurity risks.
- Social media is impacting the workplace.
 - The NLRA protects both represented and non-represented employees.
 - Employees may engage in protected concerted activity on social media platforms.
 - Employees may not release confidential or proprietary information outside the company on social media sites, which is why it's important for employers to label information appropriately.
- Courts have started to weigh in on one time or stray racial slurs.
 - 5th Circuit decided that MSJ was not appropriate after a one-time use of the N word in the workplace.
 - Spanish slurs also not acceptable.
 - Neuro diversity in the courts: May require reasonable accommodation pre- and post-employment. Reasonable accommodation may mean allowing applicants and/or employees to "present" and "communicate" differently than other employees.
- Be aware of benchmarking and other activities that regulators are scrutinizing.
 - Gun-jumping is high on the list no pre CIC conducting business jointly.
 - Follow DOJ safe harbor rules.
 - Anti-poaching agreements.
- Data privacy state laws are on the rise and go into effect in 2023.
 - Protect and be able to find private information upon request.
 - Laws are becoming more and more expansive.

SESSION 2: New Cannabis Laws and Workplace Drug Testing



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Holly is a labor and employment partner based in Hunton Andrews Kurth's Houston office. Following Holly's clerkship with the Honorable Edith H. Jones of the United States Fifth Circuit Court of Appeals, she began her practice in the area of employment litigation, where she has successfully tried to juries and to the bench all forms of employment litigation from unfair competition, theft of trade secrets, sexual harassment and discrimination, race and ethnicity discrimination, retaliation, Sarbanes Oxley, age discrimination, disability and FMLA claims of discrimination and harassment, and collective actions under the FLSA, and ERISA benefit claims. For the past 15 years, Holly has also focused on drug testing cases – where of course, no one ever uses the drugs for which their hair or urine has forensically proven that they have. In addition to litigation, Holly has a strong appellate background and provide counseling to clients in all aspects of employment law and drug testing.



Michael Reed

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Michael is an labor and employment associate in Hunton Andrews Kurth's Houston office. Michael's practice routinely involves navigating clients in all industries through the everchanging landscape of drug testing laws.

Session Takeaways:

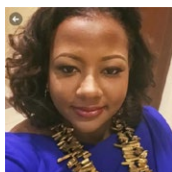
Legal Landscape

- Recent wave of legalization (medical and recreational) and decriminalization; States that recently legalized marijuana (in some form): Arizona, Mississippi, Montana, New Jersey, New Mexico, New York, South Dakota, and Virginia; Dozens of other cannabis policy reform bills have been proposed in other states.
- Legality is not the issue—marijuana is still a federal Schedule 1 drug and therefore illegal under federal law—it's figuring out how to prevent employees from coming to work intoxicated; What policies and practices are acceptable
- Different challenges for particular employers (i.e. energy infrastructure) where workers move between job sites on a weekly basis and are performing tasks that are inherently dangerous or possibly damaging to the environment if not performed properly; These challenges get overlooked in a lot of the legal analysis about these laws (and in the laws themselves)
- Testing technology could obviously change all of this (i.e., a method for spot-testing intoxication), but we are not there yet.

Impact on Workplace Drug Testing

- Testing-Based Decision Making May Be Restricted. Generally, employers can still test for marijuana and are not restricted from complying with federal (i.e. DOT) testing requirements. Some laws also have carve-outs for safety sensitive positions, but employers may no longer be able to support adverse employment decisions with a marijuana positive drug test.
- Testing Is Complicated. Marijuana remains detectable for long periods of time and detectability and period of usage vary with the type of testing performed. Current testing methods, although accurate, won't establish whether an employee was under the influence of marijuana during work hours.
- Testing Across State Lines / Third Party Administrators. Often overlooked is the impact they could have on particular industries. For example—and closest to home—fossil fuel production, storage and transfer, and refining.
- Until we have the ability to spot-test for intoxication, these challenges will continue to mount as more states decriminalize/legalize cannabis.

SESSION 3: Layoffs – What to Expect and How to Do Them

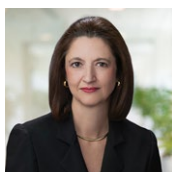


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Latasha is Supervising Counsel - Labor/Employment & Health, Exxon Mobil Corporation - Latasha graduated from Texas A&M University with a BBA in Business Management in 2001. She attended law school at South Texas College of Law in Houston, Texas. After graduation from law school, she joined Exxon Mobil Corporation (“ExxonMobil”) in the Litigation Section of the Law Department. Throughout her career, Latasha has worked in various roles at ExxonMobil gaining experience in litigation and upstream commercial transactions. She also did a rotation at ExxonMobil’s refinery in Beaumont, Texas serving as site counsel. She is currently Senior Counsel in the Labor and Employment Section where she provides day-to-day advice and counsel on matters related to anti-discrimination laws, recruiting, and equal employment opportunity. She specializes in global outsourcing, divestments, and reductions in force. As a fun fact, Latasha enjoys festivals, especially those with good food!

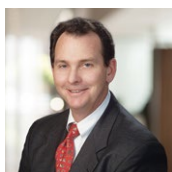


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Robin serves as Deputy Managing Partner of Hunton Andrews Kurth and has extensive experience in all aspects of bankruptcy and restructuring from bankruptcy litigation to distressed asset acquisitions and divestitures. A Chambers “Imminent Practitioner” in Texas Bankruptcy and a fellow in the American College of Bankruptcy, she has represented debtors, public boards of distressed companies, bank groups, DIP lenders, investors, official committees of creditors and equity holders, landlords, strategic and financial buyers of distressed assets, contract counter parties and other major creditors, Plan administrators and Litigation Trustees.

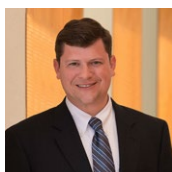


Mike O’Leary

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Mike is Co-Head of the Hunton Andrews Kurth’s Corporate Team and is a corporate securities and M&A lawyer with over 35 years of experience. He is in the firm’s Houston office and works primarily with strategic companies and underwriters, placement agents and financial advisers in the energy industry.



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Marshall is labor and employment associate in Hunton Andrews Kurth’s Houston office. As part of his practice Marshall provides advice and counseling to employers of all size and across all industries regarding WARN Act notifications and compliance.

Session Takeaways:

Industry Insights – Mike O’Leary

- Worldwide Recession Expected – US Will Not Be Spared
- Energy Industry Not Likely To Be Materially Adversely Affected – Recessionary Demand Destruction May Cool the Industry
- Energy Transition and Related Infrastructure Development Will Help Bolster Energy Overall
- Real Estate and Technology Likely to Continue to Suffer
- Banking and Financial services (including Investment Banking) Likely to Experience Downturns
- Restructurings (including out-of-court) to Increase

Top Five L&E Bankruptcy Issues – Robin Russell

1. Rejection of Prepetition Employment Agreements
 - Severance
 - Non-Competes
 - Trade Secrets
2. Retention of Employees: Messaging and Court Approval of Compensation
3. Employee Claims
 - Back Wages and Limited Priority
 - Health Plans/COBRA
 - Pension Plans
4. The Automatic Stay: Litigation v. Governmental Investigations and Actions
5. Layoffs, Notice and the WARN Act
 - Unforeseen Business Circumstances
 - Faltering Company
 - Natural Disaster

Layoffs – What to Expect? – Marshall Horton

1. The legal framework for reductions in force includes many statutes for employers to be aware of, including the WARN Act, state mini-WARN laws, and the OWBPA, among other considerations.
2. Layoffs are expected to continue for companies of various sizes, and in various industries, in 2023.
3. The Federal WARN ACT offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs.
 - WARN Act Triggers are events such as plant closings, mass layoffs, and the sale of a business.
 - Exceptions to when WARN Act notice is required are the faltering company, unforeseeable business circumstances, and natural disaster exceptions.
 - Employers should also consider so-called state-specific “mini” WARN Acts, which often have different requirements than the Federal WARN Act.
4. Some courts have examined whether COVID 19 was a natural disaster, and the apparent result is that COVID 19 was not a natural disaster as that term is defined under the WARN ACT.
5. Employers should also consider the OWBPA.
 - For group layoffs, employers offering severance pay in exchange for a valid release of age claims must comply with the technical requirements of the OWBPA.
 - For group programs, employers need to identify their decisional units, determine selection criteria to use when evaluating who should be selected for separation, conduct an adverse impact analysis, and then prepare RIF paperwork.
6. Trade Secrets and Restrictive Covenants.
 - Employers undergoing RIFs should evaluate whether or not they have restrictive covenants and confidentiality agreements with employees.
 - Employers should continue to consider whether confidentiality agreements and non-competes are appropriate for new-hires.
7. To help avoid layoffs, employers may consider pre-layoff strategies such as hiring freezes, wage and bonus freezes, deferring wage increases, reducing overtime, furloughs, reducing independent contractor staff, voluntary retirement incentive programs, and voluntary resignation programs.

SESSION 4: The Rise of Labor Unions



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Amber is a labor and employment partner based in Hunton Andrews Kurth's Dallas office. Amber's national practice focuses on both employment and traditional labor, she has represented some of the country's largest employers before the National Labor Relations Board. Amber is experienced at defending unfair labor practice charges from the investigation phase through circuit court appeals, and she has represented clients in some of the largest representation elections in the country. Amber routinely advises clients during negotiations, providing strategic day-to-day advice and counselling. As part of her practice, Amber partners with clients to coordinate labor training and education for company leadership and management.



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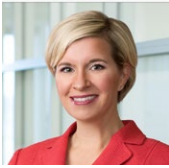
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Alan is a labor and employment partner based in Hunton Andrews Kurth's Dallas office. Alan has Substantial experience in traditional labor matters, including collective bargaining, negotiation and strategy, union avoidance and matters before the National Labor Relations Board.

Session Takeaways:

- Captive audience meetings are currently legal; however, the NLRB's General Counsel took the position in a non-binding memorandum that captive audience meetings are unlawful and has advocated for a change in law to reflect that position. Therefore, employers need to stay apprised of changes in this area that could come quickly and alter the legality of such meetings.
- Ensure that employees required to attend captive audience meetings are paid for their time spent in the meetings, and use the meetings to inform employees about potential drawbacks to unionization, including union dues, conflict resolution procedures, and the collective bargaining process.
- Caution company representatives conducting captive audience meetings that they must refrain from coercing employees from exercising their Section 7 rights under the NLRA by threatening employees for supporting a union, making promises to employees in exchange for not participating in union activities, or interrogating employees regarding their union activities.
- Be aware that the NLRB's General Counsel construes captive audience meetings broadly to include both the traditional format (mandatory speeches to groups of employees) and the less traditional cornered employee meeting (informal, spontaneous meeting with fewer employees). Should a change in law occur, it will be important to identify whether one or both of these types of meetings are deemed unlawful and adjust employer's practices accordingly.

SESSION 5: Legal Issues Surrounding the Use of Artificial Intelligence in the Workplace



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Lindsay Hedrick is Chief Labor and Employment Counsel in Houston at Honeywell, a Fortune 100 software industrial company with about 100,000 employees, in 750 sites, across 80 countries. She was previously a partner at Jones Day in Dallas.



Kevin White

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Kevin Co-Chairs the Hunton Andrews Kurth Labor and Employment practice and is a Houston native. He currently splits his time between both our Houston and Washington, DC offices but his practice and client representation is nationwide. Kevin has extensive experience assisting energy and retail clients through a myriad of traditional labor and employment issues, including complex class actions and internal investigations, he also routinely advises on the use and influence of technology in the workplace.

Session Takeaways:

- AI in employment includes: sourcing and recruiting; screening and hiring; onboarding; training and development; virtual assistant chatbots; employee monitoring; promotions and succession; performance; attrition risk.
- Discrimination and bias can occur, remember, garbage in → garbage out.
- EEOC and DOJ have issued technical guidance advising on ADA implications.
- Patchwork of state and municipal laws – Illinois, NYC, California, Maryland, San Francisco have passed existing restrictions. DC, ID, NJ, and NY are on the horizon.
- To mitigate risk: (i) test the AI tool for disparate impact; (ii) prepare vendor contracts with broad indemnity rights and other protections for the employer; and (iii) ensure that employee data is collected in permissible ways.
- The law governing AI is evolving rapidly and employers need to monitor the changes.

SESSION 6: Complying with the New Pay Transparency Laws



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Latasha is Supervising Counsel - Labor/Employment & Health, Exxon Mobil Corporation. Latasha had the pleasure of participating in “The Future of Work” program in two sessions! You may remember Latasha as the moderator from Session 3 Layoffs – What to Expect and How to Do Them.



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Meredith is a senior attorney with Hunton Andrews Kurth’s Labor and Employment group in Austin. Meredith’s practice focuses on affirmative action, pay equity, and diversity and inclusion. Prior to joining Hunton Andrews Kurth, Meredith was in-house counsel at a mutual fund where she addressed day-to-day employment law issues, managed employment matters in international offices, and helped develop employment policies.

Session Takeaways:

- Understand the compensation playing field and what is on the horizons moving forward.
- Understand best strategies for handling the patch-work of pay equity reporting and transparency initiatives.
- Understand high-level best practices in performing pay equity analyses.
- Understand the Biden Administration’s focus on this area.
- EEOC’s and OFCCP’s strategy for investigating pay complaints.
- Understand the importance of partnering with expert to know appropriate defenses and pitfalls.