

The HR Mixtape: Hosted by Shari Simpson with Guest Kelly Dobbs Bunting, Labor and Employment Attorney at Greenberg Traurig LLP

Announcer:

You're listening to the HR Mixtape. Your podcast with the perfect mix of practical advice, thought-provoking interviews, and stories that just hit different so that work doesn't have to feel, well, like work. Now, your host, Shari Simpson.

Shari Simpson:

Joining me today is Kelly Bunting, labor and employment attorney from Greenberg Traurig LLP. Kelly co-chairs her firm's labor and employment practice, advising organizations on employment law compliance, workplace investigations, and complex litigation. Her insights help HR leaders navigate evolving employment regulations effectively. Kelly, thank you so much for coming back on the podcast.

Kelly Bunting:

Shari, I would follow you anywhere.

Shari Simpson:

I love that. I love that. We have such great, rich conversations. And with your background and everything that you're touching, I know this is a big, big, big question to get us started. But when you think about the landscape right now, what are the emerging compliance issues that HR should be really focused on to stay, you know, kind of ahead of making sure that they're not wading into some potential legal challenges?

Kelly Bunting:

You want just one? I mean, there's so many compliance challenges now, but

okay. I'll tell you what I think the biggest one is, is changing your DEI policies, changing your training, trying to keep up with the changing guidance on DEI. So I don't know if I can say this. I am going to put it out there. I do not consider DEI to be illegal. I do kind of chuckle at that term. DEI is a way of life. It's a way of looking at the world. It shouldn't just be a checkoff policy. So I mean, you know, to that end, look, if you look at your policies and you realize, oh, maybe you were just checking off boxes. Well, that's not what it's supposed to be. That's not what DEI is supposed to be. So, you know, then I understand some of these new rules and laws and executive guidance coming out because, no, you shouldn't be doing it just to show people, oh, yeah, see, look, we have these policies. You should be living it. So, you know, a lot of clients have come to me saying, well, what do we do? Do we still train on DEI? You know, I have employees who are scared. You know, we've worked so hard to have a respectful workplace culture. And so I say, well, that's where you start from. That was the end goal. Now it's where you start from. So, you know, sure, yeah, you can change the names of what you call things if you want, but come at it less from, okay, DEI, we're checking boxes. You know, we have so many women and so many Hispanics and on and on. Come at it from how do I approach all of these new laws and all the new guidance and still maintain a respectful workplace. So that's what my advice is, is get away from the weeds of DEI and get back to what was your original purpose? To make everyone feel welcome at work? To make everyone want to come to work? You know, that's what I think is probably the most challenging thing right now, but there's a long list.

Shari Simpson:

Yeah. Do you see that organizations who have government contracts are responding in, I guess, a fearful way? Meaning that, like, I've seen organizations pull it back, but then just rename and stuff, and now it meets the criteria. Like, is that some of the things that we're seeing happening or some of the advice that you're giving, like, cause you said, it's like, it's not necessarily you're changing what you're doing per se. You might just talk about it different.

Kelly Bunting:

You're exactly right. And that's the best way to put it. Are they fearful? Yes. Yes, I definitely have seen federal contractors literally pull back completely, which is a shame. I would not recommend that. Changing the name, I don't know if I'd recommend that either. I mean, I get it. That's like a first step for everybody. But again, it's rethinking the way you are approaching it. What is your ultimate goal? And the ultimate goal, and again, this is harder for federal contractors for sure, and I get it. They may actually need to get rid of their policies, at least get rid of them on the website. You know, don't advertise that you have these policies. But federal contractors, this is their money. You know, this is the way they survive. So I understand completely if they are simply removing their policy, simply not, you know, but you can still have an overall respectful workplace policy and don't hit any of the key words that upset people. And definitely, go back to respectful workplace. Where do you want to work? You know how what what kind of? Culture atmosphere do you want to work and it's probably what your employees want as well is a respite, let's say, where they can come and get away from the noise and the anger, so much anger in the country today. Because you know what? We're all on a team here, and we're focusing on work so all the noises should go away. We're just here to work and to support each other as colleagues.

Shari Simpson:

I mean, that's so powerful. And it does lead into my next question, which is around thinking about these new environments that we have where we're having hybrid work and high flexibility, those types of things. What are some changing ways that we're seeing employment law affected by those new dynamics?

Kelly Bunting:

I'll tell you what, we're getting a heck of a lot of ADA claims, you know, because, yeah, people got, you know, COVID. How many years? That was like three years? Going on four years, people were told work from home. I didn't want to come back to the office. I'm going to be honest, you know, it's like, well, wait a minute. I've gotten really comfortable, you know, letting the dog out every three hours. Hold on. But yeah, I definitely see the benefit of being

in an office, collaborating with people, feeling like you're on a team again. Instead of just staring at people's bedroom walls on Zoom, you want to feel part of an overall strategy again. Like, yeah, hey, it's great to see you. Oh, man, your kids got big. Things like that, all the things that make you want to come to work. I always told my kids, you don't have to have friends at work. You just have to be civil. You have to get along with people. They don't have to be friends. But it surely is nice if you do have friends at work. And it makes it just a better experience overall. So you're not going to make friends on Zoom. You know, you have to come back to work. What I'm seeing, though, from all of these work-from-home policies now saying, oh, you've got to come back, two days, three days, and then you see how many companies are saying five days, five days in the office. We're seeing a huge rise in disability claims under the ADA or under state law saying, oh, well, my doctor says I have to work from home. Now, I'm not saying that they're all illegitimate. Certainly, there are many instances when I can think, well, there's a medical necessity to work from home. But I'm seeing some pretty bizarre reasons. And, you know, you kind of question the health care provider's paperwork. I've had some HR folks go as far as to look these people up and realize that there is no such doctor at this particular hospital. Oh, yeah, yeah. I don't know if I'd go that far. You know, you have to be careful. You don't want a retaliation claim or a discrimination claim. But I think you're somewhat justified because just like the COVID vaccine, huge rise in religious objections. And you're thinking, wait a minute, they weren't religious before and now they are. You really have to be careful in that thinking because there are plenty of people that have legitimate reasons not to get the vaccine. There are plenty of people, medical and religious, and plenty of people that have reasons to be able to continue to work from home. So you have to sort that out. Don't automatically go into the accommodation, the interactive process, the accommodation meeting, you know, thinking, okay, you just want to stay working from home. I know what's going on here. You know, you have to approach it with an open mind like you would any interactive discussion, and then make a decision based on the facts, understanding that what you decide for this person, you know, is really going to have repercussions across the entire workforce. So that's what I'm seeing with the work from home. It's not so much people being resistant to it

anymore. I think there's this grudging realization that we're all going back. But now it's ways to get out of going back to ourselves, right? We have to say like, hey, we've done the same process for everybody. We followed the same rules. And this is the outcome that we're going to get.

Shari Simpson:

Their application of policies means the fair application of policies. You know, you can't say, oh, yeah, man, you're such a good employee. And, you know, I love you. You always show up no matter what. I'm going to excuse you, but this guy that has excuse after excuse and is just such a downer and nobody likes him, nah, forget it. Maybe he is the one you want to work from home. Potentially, yeah. Keep him out of the workplace. You really have got, and it's so hard, everything we ask of HR is so hard, but this is really hard because you're overcoming your own perfectly acceptable human bias, you know, towards good workers as opposed to quote-unquote bad workers. But you got to do that in every instance because you will get sued and you're going to lose if somebody is able to show that you have applied the policies differently according to different criteria. It shouldn't be that way.

Shari Simpson:

What are some areas, some compliance areas, that HR overlooks or doesn't think about as much as they should?

Kelly Bunting:

I would say documentation. It's easy. It's easy if you do it contemporaneously. You have to keep up with it. You have to, have to, have to. And I say this all the time to my clients. You thinking about it two weeks down the road, I can guarantee it's not going to be, oh, we'll all write it up when I get home, or I'll write it up tomorrow. It's going to be a couple of months by the time you remember, if at all. Under the law, it's got to be contemporaneous. So you spoke to somebody in the hallway about being late again. Just sit down at your computer and shoot yourself an email. I blind copy myself on emails to employees or sometimes the clients. You have a little e-folder, if you don't have too many employees, on everybody and just put it in there. Spoke to so-and-so today, 10:30, late again, you know, second time this week, told him

next time I was gonna write him up. So people say, wait a minute, you want me to document the verbal warning? Yes, yes, because it's really hard to put as an exhibit in court a verbal warning. You're going to have to do that through testimony. And the HR does not want to be deposed. So if I've got an e-folder that has all the times that I stopped so-and-so in the hallway and said, hey, this is like the third time you've been late. Then I can show, all right, you know, as you know, and you look back in your file on 6-2, on 6-7, on 6-17, I stopped you in the hallway and I spoke to you. You know, that was a verbal warning. We're now escalating to a written warning. That's as simple as documentation can be. An email is documentation.

Shari Simpson:

So let me ask you this then. I love that idea. My question is, I guess then, if that doesn't sit in the employee file, right, that sits on your email, what are the things we have to think about from that perspective?

Kelly Bunting:

I would definitely put it in their file. I would definitely do that. So you're blind copying yourself. You know, you're putting it into your own file. Print it out if you have. Most people don't have those file folders anymore. If you do print it out, stick it in there. If not, you've got an e-folder on that employee somewhere. It's really easy to move that into their folder as well. And then that way, it is when you come back, and you have the really serious discussion, like, look, we're talking termination is the next step. Come on, you've got to work with me here. And they come up with, oh, didn't I tell you? So my kid has autism and so I actually have them in a special school. And so the school doesn't start until later. So on the days that my ex brings them, no problem. On the days that I have to bring them, I have to come. I'm going to need intermittent FMLA. What? You know, and the HR person is stunned because it's the first time you heard it. So, assuming that's true, okay, probably, yeah, sure, I'd give you intermittent FMLA for that. It doesn't happen all the time. Thanks for telling me. You know, it would have been great before I had to write you up. But you've got evidence now that well before they made any sort of protected claim, you dinged them for other things. Because you look back, it wasn't every day that they were dropping their kid off at the

special school, you know? And they may end up using that as an excuse down the road. I know I sound jaded. No, I really do believe in the goodness of humankind, although that belief has been tempered, shall we say, over the 20 years I've been doing employment law?

Shari Simpson:

Well, and it's so complex because you're right. Maybe, maybe that was the scenario all the time and they didn't feel comfortable sharing it, right? Maybe, you know, maybe you're right when you do look at it and you go back and you look at the documentation, you go, okay, well, you know, one week we had this conversation four days in a row. Maybe what happened that week is the ex was traveling, right? So maybe there is stuff you don't know.

Kelly Bunting:

Could always be an explanation.

Shari Simpson:

Yeah, so that's really good. So you talked about documentation and I'm gonna get into kind of I think a sticky topic next. With all of the news that we are seeing right now around ICE raids, and not every organization is going to experience this or be in a position where they need to consider it, but those that might, what do we need to consider from an HR perspective?

Kelly Bunting:

Speaking of documentation, I see why you let into this. You know, what I would do right now to be proactive and what I am telling my clients is do your own I-9 audit. Go, you know, it doesn't have to be some big overblown thing and you hire some outside company to do it, although you certainly could if you wanted to. If you're a large organization, I would suggest that. It's really too much. Insurance got way too many things on their plate. But you, if you're small enough, go through your I-9 folders, which should be kept, of course, separate and under lock and key. So if you have physical folders, go through them, take the time to do it. Especially companies, smaller companies sometimes have very long-term employees. So you look in the file and you think, oh my gosh, he's been here 18 years. I never got anything from him

because 18 years ago it was you and two other people. So, you know, that's what happens, right? You look at these old offer letters and you think, what was I thinking? Because times change and laws change. And we're seeing a huge shift in the law in immigration. So just be on the safe side. I'm glad you brought that up because some people probably will never experience this. You don't know that. You don't know that. ICE has been going after, and this is nothing against ICE. ICE is doing what it's told to do. It's job. You know, I do feel bad for the guys because, you know, people, they are the visible presence. And so people throw things at them and scream at them and all. And it's like, okay, so he is trying to do his job. You know, we need to come at it from a higher level if we're going to try to change what's going on. However, you don't know what they're going after now. And it does seem there are a number of U.S. citizens that are being swept up in these raids. You want to try to guard against that because once they're gone, my experience with a couple of my clients that have had this, they're gone. You cannot find these folks, and you can't, there's no place to appeal. Like, okay, look, I have the I-9 folder. I've got all this proof that this person is a U.S. citizen or has a green card, which is almost as good. And look, I've got the paperwork, and sure, it's expired, but you don't have to. That's what the law says. You don't have to go back and renew it if they should tell you. Well, there are certain things they have to renew. Like for a U.S. citizen, your passport's expired, your driver's license expired, okay. You don't go back to that person. It's actually against the law. You don't go back to that person and ask for, hey, I need another driver's license. Now, you can send an email and say, by the way, you know, it's expired. If they bring it in to you, great. If they don't, you don't hound them over it. But you can show, look, they had a U.S. passport when they first came to work for us. Yes, it expired last year, but that means they were a U.S. citizen and still are. But you, even if you have that paperwork, you don't know where to go to appeal the, you know, the grabbing of the employee. And that's what I find so frightening. We always had processes in place, you know, you could, you could, you get a hearing and the employer is allowed to say, no, no, no, it's been with us five years, here's the paperwork, you know, I think you made a mistake. And you can see there have been a lot of mistakes made. We don't even have that. So to guard against it, to be proactive, to do

that I-9 audit, absolutely, that would be my biggest recommendation. Because you don't want to be in that position.

Shari Simpson:

No, no, you definitely don't, for sure. Do you think, I'm curious just from your future forward thinking, do you think we're going to see a change in I-9 re-verification laws?

Kelly Bunting:

Could be. Yeah. It could be really interesting that that could be a change that we see coming. It's something right now that so many HR folks let go because they, you know, again, overwhelmed with everything else they have to do. And if you're not required to do that, why would you? But to me, that would be an easy, an easy place for the administration to say, hey, wait a minute, you know, we've never required re-verification of U.S. citizens. Let's do an executive order or whatever. It would take a while to pass a law, but let's start requiring this, which would again add a huge burden to an already overburdened HR staff. So I hope that that doesn't happen, but could it happen? That was your question? Absolutely.

Shari Simpson:

And again, Kelly, you and I could talk for hours and hours. What are some upcoming legislations or regulatory changes that you believe HR leaders really need to get kind of proactive and prepare for?

Kelly Bunting:

I am seeing, well, the DEI, of course, is huge. And I think that that is going to remain under attack for a while. Immigration will remain under attack. So, you know, you have to be very vigilant about that. There are a number of cases coming up, Supreme Court cases, that could affect the workplace. One thing I want to point out is a Supreme Court decision that was already made, was made two years ago, and that was the Groff v. DeJoy case, which really raised the standard of undue burden for a religious to get out of accommodating someone's religious beliefs. So if you have not gone through your files, you know, in the past, looked at your policies, looked at your handbook in the past

two years, because trust me, the law has changed. I would do that because so many things have changed. And understand how you disseminate new policies, whether you send them around by email, whether you've got an online handbook. Be ready and pay attention to some of these decisions coming out of the court now they finish for the year. Although there's talk that they might issue a few more decisions over the summer because there are so many pending cases. Yeah, but they pick up again in October. So be aware in October. One of the things I do every morning, and again, sorry, HR, because you have many things to do, but I come in a little early. I literally, I'll read three newspapers online. I read the blogs. I read SHRM, the daily SHRM thing, like, okay, what fresh hell is this? Like, what are we dealing with today? What new laws are out there? And be proactive about keeping up with the laws. There's a couple of really good legal blogs that are written for HR, and it doesn't have all the boring legal stuff, but it has the really pertinent stuff for HR. I would sign on to some of those laws. Don't you guys have one of those blogs too?

Shari Simpson:

We do. We do.

Kelly Bunting:

You know, and that'll keep up with your wage an hour, which very well could change, but keep up with it. And again, you don't have to be a lawyer. You don't have to be a lawyer. You're already an engineer with AI. You're a doctor with COVID. You're a religious expert now. You're a psychologist with all the mental health issues in the workplace. So you don't have to be a lawyer, too. But you might consider some of these legal blogs that are written for HR. They do a morning summary, and it just puts at the top of your mind, okay, wait a minute. If that's going to change, should I revise my policies now? Because lots of times when these laws go into effect, they're not retroactive. So like if you've got a non-compete already in place, you can keep that non-compete. Yeah. Because that law is not going to be retroactive. So things like that, just a quick morning scan, keep ahead of the curve.

Shari Simpson:

Man, non-compete. We could do a whole podcast on that. Kelly, as always,

this is great. Thanks for sitting down and chatting with me about what we should be considering in the employment law space.

Kelly Bunting:

Thank you, Shari. It's always a pleasure.

Shari Simpson:

I hope you enjoyed today's episode. You can find show notes and links at thehrmixtape.com. Come back often and please subscribe, rate and review.