

Navigating Employment Law Trends with Louis Lessig

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 Louis Lessig, partner at Brown and Connery LLP. Louis is an attorney whose practice concentrates in labor and employment litigation, counseling, negotiations, training, and speaking. Louis represents clients in all types of employment matters, including but not limited to claims of discrimination, harassment, hostile work environment, wage and hour irregularities, and retaliation. Louis has been a featured speaker at many events, including the Society for Human Resource Management, the Sherm State Council Conferences, Tri-State Human Resource Management Association, and a number of other organizations, both in the private and public sectors.

Shari Simpson: Louis thank you, as always, for jumping on the podcast with me.

Louis Lessig: Shari, always really exciting. I'm thrilled to be here with you on the floor at SHRM24

Shari Simpson: It's amazing. And you were giving a session about employment cases for 2024. And that's where we want to start. It's a riveting topic. I really think it is. I think that the more we can learn about the legal landscape, the better we prepare, the better prepared we are as HR professionals.

Louis Lessig: Well, here's the crazy part. And Johnny just said it from the stage. If you don't figure it out in your office, the courts will figure it out for you.

Shari Simpson: So true.

Louis Lessig: Oh my God, it is.

Shari Simpson: So what are the big trends or the big cases that you're following?

Louis Lessig: So I'm doing two sessions here. One is on wake up taking emotion out of retaliation, because that's a real big issue. And actually, Johnny touched on that. And then we got the top 10. And the cool part is, when we talk about the top 10, I totally reimagined both this year. So they're completely different than I've done before. But when you think about, there are certain issues that come up all the time. And then there are ones that you can't make up. So we have one right now, you talk about AI and what is AI, what's happening in AI. Last year for the first time, I actually courted a case that hadn't been decided. But it was out in California, it was the first filed case that dealt with AI. And I talked about it, I want to let people know what was going on. It's against Workday and the whole issue is the algorithm that they used, the notion that perhaps for gender as well as for age, there was a problem as well and disability. So it's all three. And the issue in the case initially was, well, your algorithm is artificially taking people out of circulation, if you will. Court dismisses it initially. And my thought was, that's what

I've been talking about this year. Oh, no, because the court decided, well, we're going to give you time to amend. And they did. And it's gotten much more specific. Okay. And so now it's a function of taking a look at both the vendor, meaning Workday and how they create it. the exact impact and how does that impact and is it enough to get over some judgment? And the fascinating part about this case is both how it's happening as well as what the court is doing, because we have certain circuits, as you probably know, around the country. They don't want any piece of stuff. They just want to move it off their desk. Yeah. Not in California. This judge is rolling up their sleeves and they're like, oh, let's get into this. Let's figure this out. Let's make new law. And so even though it's still going on and it's not quite done, It is the first of its kind. It is still sort of the seminal area in the evolution of what this is going to be. And I really think that it's a phenomenal case study for folks to follow because how it evolves doesn't just impact what are we doing in terms of finding people, but it's also what are the contracts with our vendors and what are we looking at and where's the indemnity? And, you know, some of the things that Workday said was, look, well, we make this package, we give it to you. What you do or how you customize it is up to you. Yeah. But what HR professional sits down and thinks through the impact that that might have if I check a particular box. Yeah.

Shari Simpson: How does that case align with or how how are those judges looking at what the EEOC has put out around employers being liable for AI that has a negative impact on their employees or the recruitment process?

Louis Lessig: So here's I'm so glad you asked that. Because actually, in this case, there's a new motion to dismiss the new complaint. Okay. And the EEOC submitted an amicus brief in support of the plaintiff. Wow. To have the case go forward. And their argument is, look, you are an extension of the employer, you're giving them the material. So you can't then walk away from the impact of what you did. Yes. And the challenge, of course, is I usually look at it sort of like electricity. I don't know about you, I'm not an electrician by trade. When I was, they tell me when I was in diapers, I took a sterling silver fork, stuck it in the wall in the dining room and blew myself across the way. So, but- That checks out.

Shari Simpson: I don't know why that checks out.

Louis Lessig: But it's so funny because really, you just want to flip a switch and have the power of the want. Yeah. And in the same way, if you're an HR professional, given the current climate and what we know about the talent shortage, you are not going to take the time to sit down and figure all this stuff out. And so to have the EEOC go here is very telling in terms of how they're viewing it and sort of where the landscape is going. And so I think it's honestly, the tip of the iceberg of where we're going to be.

Shari Simpson: Well, and it's a little bit of a plug for HR from a business acumen standpoint to make sure that when they're reading contracts, they're digging into some of those things. They're thinking

more strategically about the buttons they click and the impact it's going to have. They're looking to see if their vendors have an ethical AI statement. That's really important. I've talked about that before. If a vendor has AI built into their tool and they don't have an ethical AI statement, you got to ask questions. You got to understand where that data is coming from. How do you encourage or how do you train HR professionals to stay updated on everything that's happening in legal? And I will ask this question with the caveat, especially if you are an organization that is in 50 states or multiple countries or all the things, you know?

Louis Lessig: There are a couple of different options. Obviously one is leaning on and pressing on whoever you're using for employment work to keep you up to date. I think the other question is going to a conference or being involved in a chapter or wherever you can get that information from. Sometimes the challenge is that certain people are looking at things myopically through their own view. And so the real issue becomes what, where is your sphere and what do you really have to worry about? And then take a look at how do I best dig into that? And it may be as simple as surfing different law firm pages. It may be checking out the, either the EEOC or the USDOL or the DOL in your state. You know, the problem that I tell people all the time is when we talk about discrimination laws and EEO laws, whatnot, they're the floor. If you want to be that best places to work kind of joint, you're not going to have a problem, but then you got to get there. And so it's really looking around and staying engaged and involved. And I think the challenge is people say, well, I'm too busy. This is an area you've got to make time for because it truly is as cutting edge as the initial AI is in the first place.

Shari Simpson: Yeah. You mentioned the case in California and HR professionals are taught a lot of cases over their education that they should know. What are some landmark cases that you think would be important for HR to have a really good grasp on?

Louis Lessig: Well, there's one that just came out that's in the top 10. that everyone's going to need to know because between now and the time we next sit down, I bet you there's going to be new stuff there. And it's the Muldrow case, which the Supreme Court dealt with earlier this year. This is that case where they look at, they looked at title seven and whether it's the general thought process is that it's how severe and pervasive was whatever happened. Okay. Okay. And the issue was that meant that the activity had to be that severe, pervasive, but you look at it in each individual case. The court took a lot of time to say, oh no, nowhere in Title VII does it say severe, pervasive, and you're all making it far too restrictive. It should be much broader. Really? And so they came out and said, you only need to show some harm. Now, Shari, I don't know. We've been at this for a while, respectively. I have no idea what some harm is. But I'll tell you what, we got at least 50 different states that are going to decide what they think some harm is until it goes back to the Supreme Court. Yeah. So that's the big area, I think. when we think about the amount of discrimination claims people make. And ironically, as I was walking

over here, I got an email from a client that now has an issue with somebody. And I'm thinking to myself, this is the problem. Like it used to be, if you ask something that was a roll your eyes kind of issue, you didn't worry about it. You need to get on the summer judgment. Now with this threshold, the question becomes how low is that threshold? And we just don't know.

Shari Simpson: Yeah. How do you think that will change the way employees approach things like harassment and discrimination in the workforce? I don't know. Is there a sense that employees might be more quick to push for legal action?

Louis Lessig: I think that some may. I think that, you know, one of the things that Johnny talked about today in his keynote was this idea that we're reaching a place where there's going to be a lot of turbulence in the overall market. And let's be fair, employers are the deep pocket, whether we want them to be or not. I do think that that knowledge, uh, you know, as we all know, a little bit of knowledge is the worst.

Shari Simpson: Yes. Yes.

Louis Lessig: And so I, I, I do think that it's going to create a problem because on the employer side, what you thought was a de minimis settlement before maybe a larger number or a bigger problem when you used to think, Oh, they're just parking at the wrong tree. We're going to get out. Yeah.

Shari Simpson: What's your best advice for HR departments to mitigate legal stuff? I'm sure you probably have a million things you could tell us. Maybe your top one or two that you're like, hey, this is the thing you need to make sure is really locked up in your organization.

Louis Lessig: The biggest thing is they have got to talk. You know, we joke at times where certain departments are in silos. The biggest issue I see is people coming to a supervisor. We're arguing amongst themselves. Here's my issue. This is my problem and no one does anything with it and it only gets worse and it's no different when we think back when we were little kids, right? You would talk to your mom and dad or try to not have them find out you did something. I did that once with cranberry juice and I took it upstairs in my room. The problem was it spilled on the tan rug. Oh, no. And cranberry juice stains. And so at two o'clock in the morning, my father woke up and said, clean the rug. Yeah. And in the same way, we've got to communicate in a way that we haven't before. You know, we've come through that age of don't ask, don't tell. And now it's really a function of, listen, if there's something bothering you as much as it may be make you feel uncomfortable to say something, you've got to get up. You've got to say something because if you don't, that's when the person's going to get pissed. That's when they're going to call the EOC. That's when they're going to say, do you believe what happened to me when they were out with a friend for beer? And then the next thing you know, you're staring down the lawsuit.

Shari Simpson: Yeah. Have you seen a shift or has HR people called you more around employees who are asking those tough questions, but they're doing it in a way that's super public or super inappropriate

or not helpful. And, and now HR is stuck with, okay, the question, the core of the question was good, but the execution of it was terrible. And maybe you're in leadership and maybe I have to think about discipline now, but I don't want to negate the question. Are you getting anything like that yet?

Louis Lessig: I am. And the challenge is you have to parse it out. And this is where, you know, we all, the old adage that, Oh, we're going to have a paperless workplace. Please. What you and I want, whether you do it on an iPad or you do it on a piece of paper, old school. Right. Is that you need to write down copious notes. You have to take the time to remember every little thing that happened or brainstorm everything you can think of, because what you thought mattered may not actually be what mattered. And there may be nuances where, you know, in a write up, you may say to someone, listen, you did a great job on A, B and C. The challenge we've got is what happened in D, and you were all right on E, but we got to deal with D. Yeah. And the issue for the employee is to make sure that it's clear that they understand it, that they can then embrace, okay, I understand why I'm getting penalized, however you do it. But to me, that's the functional issue that HR has got to deal with.

Shari Simpson: Well, and it's it's the same example as if you have somebody who has a performance issue and they go out on FMLA. You treat those separately. You don't mix them because they're separate things. And so you got to deal with the FMLA. And when they come back, then you deal with the performance. You know, you can't marry them.

Louis Lessig: what you would like to, that doesn't mean that everyone does that.

Shari Simpson: That is true. Totally true. How do you foster a company that's keen, I don't know, maybe that's not the right word, but who leans into compliance, who gets ahead of it, who's kind of excited about making sure that they're at the forefront of being compliant on different things. I've worked in organizations where compliance training was like an afterthought. And I'm fortunate I work in an organization now where we're very at the forefront of it. And I see the positive impact of having an organization that is more compliance focused. If you're struggling with that as an HR person, what are some advice that you have to help them work with their leadership team on that?

Louis Lessig: I think the first thing they need to do is realize that compliance is not a bad word. Yeah. And it's not a word that is necessarily tactile, that really it can be a strategic word. And that if we're truly trying to measure up and level up our employees and help them do better, a part of that is helping them be a better human being. Right. And that means you got to invest. And some of it isn't how you do it. So for example, I recently did an investigation where I interviewed 27 people and you know what they all told me? We have this compliance video we have to watch and we leave it on and it just goes and no one cares. And then you're done and you're like, okay, bye bye. And the problem is, It's insane because everyone thinks it's a joke. As opposed to, let's sit down in the room, let's have a conversation.

Whatever it costs to bring those speakers in live and in person, there's something, even as we sit here across from each other now, it's way more fun to do this than we are on Zoom. Not that I mind chat with you, because I love doing it. But there's a level of that. I think some organizations haven't learned the lessons of COVID as well as they could. And it's one way to really embrace what's going on folks.

Shari Simpson: Yeah, I got to interview somebody, this is probably two years ago now at HRTAC, and they were piloting a anti-harassment VR training. And it was such a fascinating discussion because as she was showing me the software, one of the questions that I asked her was like, hey, aren't we kind of like harassing our employees by making them like sit through this virtual experience? Like did you, how does that work? And she had a great answer. They had consulted with psychologists and so they had, they had a plan in place for the level of uncomfortableness that was going to be introduced during this training. But I just thought it was really creative to think about what a different spin on learning about maybe microaggressions or something like that, like just something that maybe you haven't experienced. How do we give you a glimpse into it in a way where it flex and you're like, oh man, I really see that connection between what I'm doing and the success of our organizations for sure.

Louis Lessig: Well, I also think some of it is. We all know that people learn in different ways. Yes. And so there may be understanding your workforce and knowing how they learn and mixing it up. I mean, listen, not for nothing. If we have to sit in an eight hour lecture, we're going to be asleep. After like the first 45 minutes, doesn't matter how good the speaker is.

Shari Simpson: Not to mention an AR Zoom.

Louis Lessig: There you go. So, but to mix it up and do different things and having that not just vocal variety, but stimulation variety is a good thing.

Shari Simpson: Yeah, for sure. We have about four minutes left. I have a bunch more questions, but I will do this. What is your take or your future forward looking at HR law? What are some things that you think are coming we should be prepared for?

Louis Lessig: I think we have not seen but the tip of the iceberg of the level of retaliation issues. As we talk about civility in the workplace and inclusion in the workplace, and managers feel more pressure, they're going to pop. And that's, to me, over the next 24 months or so, that's going to be the quintessential issue on top of this issue around some kind of, you know, some kind of level of harassment or what we define because of the module case, because we don't know what that threshold is. Yeah. And I think those two areas have been really big, AI aside.

Shari Simpson: Yeah. What's your prediction on if non-competes will go through and new overtime threshold will go through? Will it make it all the way, either one of them? What do you think?

Louis Lessig: Nothing like a little pressure, right? So, you know, I think we look at these, first of all, there are two different issues.

I do think that fundamentally the non-competes are problematic. That doesn't mean though that at the state level, it's not going to go away anyhow. And we already have states that have done that. So while I don't necessarily think the FTC is going to be successful in getting everything through, we're already seeing in other ways. On the flip side, we take a look at overtime. It's hard to argue that the number shouldn't go up. The difficulty that I find, I think, if we're going to be pragmatic, the escalator, it's not that it's a nightmare. It's not that it's a problem. It's that it never goes down. It only goes up. And we've seen changes in economies over the years. Yeah, it's it's too much. We're going to I think we're going to put more business out of work and out of business. And then we're creating our own self-fulfilling prophecy. So hopefully that part doesn't survive. I do think we'll go up one step. I'm not so sure we're going to get to, but the courts are going to tell us. So we'll wait and see.

Shari Simpson: Absolutely true. Well, Louis as always, this was great. I'm glad that you were able to swing by and chat with me a little bit on the Sherm floor.

Louis Lessig: Thank you so much. I cannot wait to talk to you again, Shari. Have a great rest of the time here at SHRM24