HR Mixtape: Episode with Shari Simpson and Louis Lessig, Labor and Employment Litigator at Brown and Connery, 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 Louis Lessig, Labor and Employment Litigator from Brown and Connery, LLP. He frequently speaks on compliance, workplace investigations, and best practices to mitigate organizational risk. Louis' legal practice emphasizes guiding organizations through challenging employment and labor relations issues. Louis, thank you so much for sitting down with me, again, coming to the podcast and spending time chatting with me.

Louis Lessig:

I am so thrilled to be here, Shari. Thank you so much.

Shari Simpson:

I love having you, I really do. There are very few lawyers I have met in my life who are you and Kelly Dobbs Bunting. I don't know if you know her. Both of you just have this energy I've never seen out of lawyers before, and it's just, it's very, very approachable, so I really appreciate it.

Louis Lessig:

Thank you.

Shari Simpson:

So I want to talk today kind of about a whole bunch of different stuff, but I

want to start with what are some of the top HR-related legal risks that organizations commonly underestimate?

Louis Lessig:

So I think the biggest one that we're seeing right now is the whole question around retaliation. And the fact is that because it is either in every single employment law or if it's not in the employment law, then somebody filed an amendment and it's now required as part of that law. But the problem is that it's emotionally based. And so what happens is people react and they don't think through what they're doing. It's like a knee jerk reaction. The problem is that it's costly and it's never a small number. The EEOC has been talking about it for like a decade and we continue to have problems there. I think another area that we're having and continue to have issues with is intermittent leave and the concerns around, are we doing it right? If we're treating Jane one way and then we turn around for John, what do we do? Are we handling things the right way? And then beyond that, we have, I think, a massive shortage of legitimate management training and it's creating a nightmare. Well, I guess it depends on how you look at it, right? It's good for business, but that doesn't mean that it's good for organizations because they need to really think through what is required in their role and how they can best assist individuals going forward.

Shari Simpson:

The manager training thing is so interesting because every, you know, top trends for the next year always includes a leadership development component. I mean, it has been that way for years and years. And I'm always amazed at the tactics that HR takes to level up those managers. And sometimes they get very process oriented. You know, here's how you approve time off. Here's how you, whatever the thing is. but they don't spend a lot of time getting them up to speed on how does this policy actually come to life? How do you have to think about some of the language you're using as you talk to employees? What does actual documentation look like? Do you have to document a verbal or not? What does that look like? Those are a lot of skills that we miss teaching our managers.

Louis Lessig:

You're absolutely right. And I think the challenge of course is some are better than others and some need more upskilling than others. And to be fair, it's usually the first thing that gets cut. So when you're challenged, it's a very vicious cycle and it ends up putting us in a situation where you don't realize how much you're at risk until it's almost too late. And it may be as simple as saying, look, here's how we document information. And even if, let's say you're using a particular system online, where is information found? How do I log in information? What are the kinds of things I have to do? And it always puts us in a situation where we get nervous because you can't assume anything. And I think a lot of us do, at times, a little bit too much of that.

Shari Simpson:

How do we get better at being proactive instead of reactive in all of these scenarios? And I feel like a big question because there's so many different verticals or things we need to think about. But often, you know, HR is so focused on kind of the day to day that we're just responding to what's being thrown at us. And we do need to spend that time being proactive. What are some of the things we should tackle first?

Louis Lessig:

Well, to be fair, one of them should be subscribing to things like this podcast. Because, you know, it's so hard to stay on top of what's going on. I mean, it doesn't matter whether we're talking about things like policies or new laws or what are the top five things and pick whatever network you want to listen to. Even as simple as, well, simple, there's a particular AI podcast that I listen to that's daily. And they tell you in five minutes at the beginning of each episode what's going on in AI. And the stupid thing is there's always something every day. And I'm like, okay, who can keep up with this crap? So I think a lot of it is appreciating that. It's also, you know, it's different if you're an HR department of one, I think there's a, has to be a recognition of a combination of taking time for myself and what I need to learn as opposed to trying to step back. Because you know, if you have a team of folks, the hope would be your HR generalist is handling the tackle and it may even be the same way you may take time to go to the gym that you take time for yourself to look at, all right,

strategically, what do I need to think about? And every organization is a little bit different.

Shari Simpson:
As you've seen HR professionals who have really focused on leveling themselves up, where do you see maybe where they have the most lack of preparedness when it comes to legal issues that they need to be aware of or the ways they should be doing something to protect the organization?

Louis Lessig:
I think the biggest challenge that they find is that they're not necessarily thinking through, they're trying to get stuff done. How fast can I get off my plate? Because I'm doing more with less. And if they would just take the time, even to write it down, We joke about how much documentation do we have, and I don't care, use your phone, use your tablet, God forbid, use a pen and paper, and then scan it in if it would make you feel better. Just something that allows you to be able to step back. I get very concerned that many things that we talk about, even at conferences like this, it's not that it's massively new or different. It's that it's a reaffirmation of what we knew when we first got into it in terms of what's the slight tweak to make sure we don't miss what's coming at us.

Shari Simpson:
Well, and that, it makes me think about my own education in HR, you know, having gone and done my master's work and then getting my certification. Those were really great moments, and you learn the names of the concepts that you probably have kind of already been doing. But unless you go back and revisit that, you know, if somebody came to me and was like, hey, do you remember that leadership style, that specific methodology? I'd probably have to go look it up, if I'm being totally honest, right? I don't memorize all that stuff. but it brings up the point of like, what podcasts are you listening to? What ways are you staying current? You know, I think of, I think of doctors, right? I want doctors to be reading the most, you know, important medical journals on the regular because they're dealing with my body. why don't we have the same mentality in HR? Like our whole job is dealing with people,

right? With humans. So such a good point about really staying close to that. As that evolves though, and we move from kind of like the traditional way of doing stuff, as I think about, you know, all the ways HR has changed even in my career, you know, things like, you know, I joked when I first got in that like HR was seen as like the policy place. And, you know, there was like, how do we get a seat at the table? And now it's like, well, you're at the table. How are you showing up from a strategic business mindset perspective? What's the next innovation or evolution that you think might be coming for this group?

Louis Lessig:
I think at the end of the day, in order to make sure HR appreciates what's going on, they need to be more focused on the end. Meaning we get the tactical, the day-to-day pushing paper, the basic, here's the FMLA paper and you got to fill out. But I think at some point you got to start looking at, well, How do you make money in your organization and how do you support that going forward? Because if otherwise, what are you doing?

Shari Simpson:
Yeah.

Louis Lessig:
And, and so often that becomes the critical point. In fact, yesterday I was, while we were here, I was talking about retaliation and one of the, a couple of slides were specific towards, look, you need to do this because it's going to directly impact the profitability of your organization.

Shari Simpson:
I've talked about this before. I don't know if I've talked about it on the podcast, but this concept of HR coming to conversations with more data, but related to people. And I'll give you an example. So you know your organization is potentially going to create a new product next year, right? They know it's on the docket. They want to start doing it. They know that they need X number of skills to be able to create this product, right? HR is in a very unique role to look at the population and go, hey, we have maybe 20% of the skills we need. And so I'm going to come into the organization, the leadership team and say,

hey, you know, for us to meet this business objective, we need to hire this many people with this skill set and increase retention in these roles by X percentage. And, you know, really starting to talk about data differently because that's, that's the business side of it.

Louis Lessig:
It is. And it's appreciating even how the work that you do impacts it.

Shari Simpson:
Yeah.

Louis Lessig:
Right. Like how long does it, what's the ROI on recruitment? How long does it take for you to get somebody not just hired, but when did they become profitable for the organization? And, and what are the metrics you're looking at to do that? Or, and I think we all see this a lot now, which is this idea around how many people on a given day are out of work for whatever reason. And A, how are you covering? But B, what is that doing to the culture? And how do you change that? And that's very much the lifeblood of what HR is supposed to be doing. To your point, there's so much more data available today than there ever was before. And I think some of the challenges relate to how large your organization is to appreciate the data that you're assessing, if it's not your own. Because even now, if you take a look at, let's say, a KPMG report, that's great. But they're looking at global organizations, which tend to have more than 25,000 employees. That's a bit of a challenge. Not everybody's that big.

Shari Simpson:
Yeah.

Louis Lessig:
So it, it makes life interesting. But I also think that with a lot of systems, there is so much more data available and the way in which you manipulate that data that drives right into my world. There is so much more data available.

Shari Simpson:

Yeah, for sure. I wanna switch gears just a little bit to talk about some policies. And the one I wanna ask you about is social media policies. And I feel like they're so complex for good reasons, but it's just a different world than when I was growing up and the things that HR needs to consider and what's... What is them speaking just from free speech? What is the, hey, you're not allowed to say that. Hey, that's proprietary. First, how do we create a policy? That's part A. And then part B is how do we manage it? Are we supposed to be watching everybody's social media?

Louis Lessig:

Let's break it apart this way. First of all, I don't think that you want to start with, let's build a policy. I do think you want to start with, what do we think is realistic? What do we actually want to manage? Because if you have an organization that's going to say, we want your password to LinkedIn, we want to know that you're biographical information is managed in a certain way, most of your employees are going to flip you the bird and say, forget about it. I mean, I know from Jersey, but come on. So you need to be able to look at it and say, what are we actually trying to evaluate? I do think that there is a world where we can talk about the kinds of things generally that you want to say and manage and let folks know, hey, if it's not putting you in a bad light and it's not putting us in a bad light, that's fine. If you're going to have a marijuana plant on your desk and take a picture and post on social media, probably a problem, it doesn't send the right message. In the same way, by the way, that if you're using AI, well, what can you or can't you do? when you're trying to switch though from okay we know how we want to do it in your part B and switch to your part A that's when I think you do need to sit down with whoever your employment counsel is or if you don't have one touch base with one because A the laws change quickly but B it may be that you want to control one piece that you can and one piece that maybe you can't or maybe there's a way to manipulate behavior in a different way. I think it's become much more complex. You know, it used to be, unless you were the social media person, nobody's on it. And that's insane. No one's going to do that. And it's also, you know, when you start looking at things like LinkedIn and the amount of business that is done on LinkedIn, the preclusion from utilizing

that platform, or do we hide the people we're connected with, or don't we hide? Those are things that become very personal to individuals. And controlling that information just seems problematic culturally. So there's an awful lot, I think, to consider around just that one policy.

Shari Simpson:
I mean, it's complex for sure. You know, when I think about some of the other pieces, when I think about compliance, and policy related stuff. We saw a lot of changes in remote policies during COVID, right? I mean, I know even for Paylocity, we had a, not stringent by any means, but it was like, you know, you can't be the main caregiver. You like, there was all these kind of like, hey, we need to make sure you have a dedicated working space if you're going to work remote. We had to throw that all out for COVID, right? Like during that time, you know, because of our culture and how we value our employees, we understood that like that quick transition, you're not going to be able to do those things, right? You're having to manage that. But now we're several years away from that. Those policies have changed. We're seeing a lot of return to office stuff. But that hybrid environment is more prevalent than it was before. And so what are some of the things that we should be thinking about when we want to create these remote policies? And again, it's going to depend on your culture, right? Because there's things that you might be more comfortable with than other things. But what are kind of like the big things we need to think about?

Louis Lessig:
You definitely need to start off by thinking about how much face time do you believe is required and why? If you can't explain to your employees why they've got to be in the office, it's not going to fly. The idea of, I want to be able to come out of my office and walk down the hall and talk to a person, God forbid, there is value to that. I think we also found that in COVID, right? You can Zoom, fantastic. But at the same time, having even the two of us sitting here now, We couldn't do that. And I think we all crave that. So there needs to be a balance and an understanding of probably the larger question in terms of what roles are we specifically talking about and what are we trying to drive? Are there reasons to have people, let's say maybe it's a three and a

two, and in terms of the three days that you're in, presumptively people want to be in Tuesday, Wednesday, Thursday, and out Monday, Friday, so they can have an allegedly a longer weekend. What does that do to work? How are you engaging that work? And at the same time, well, Do we need to flex those days? Do we need to make sure that there's physically a body here? I mean, look at Sharm. Sharm currently, Mondays and Fridays, people wore Promote. I mean, even when I had the opportunity to be on the Mac, we had gone in to, I think on a Sunday and it was like their Sunday and Monday, Tuesday, well, Monday, they had to get a special dispensation to open the building to have us in there. Like that's the kind of stuff you start to look at, well, all right, maybe there's a reason because you can change the HVAC and whatnot. Or maybe it's, no, we need a physical presence every day for our clients. And so a lot of that I think is going to depend on the industry that you're in. So many of us, I mean, I know so many people right now, they're like, well, I'd love to find a job that's fully remote. And to me, I cringe at that. Like I want to be in. So some of it is looking at where you're located. Some of it is, I think, a reality around what can happen, but I think we also have to caution folks, particularly in HR, that are dealing with the C-suite to say, listen, we can decide we want everybody back, or we can be hybrid, or however you want to structure it. But we still need to be flexible. There's a level of need, and whether we're talking about the ADA or we're talking about whatever state or local law applies, we still need to be able to work that out. Even if we've got this, hey, we're going to shift and this is the new way we're going to operate.

Shari Simpson:
It's fascinating. It really is all the complexities that we have to deal with. You know, as we wrap up our conversation, I'm curious as you look forward, and I've joked about this before, like five years seems like a super long time. So like maybe just the next 12 months, what are some legal trends that you think HR leaders should really keep an eye on to see how they come to life?

Louis Lessig:
Well, I would be a fool if I didn't say that AI is redesigning everything. So, in some way, shape or form, appreciating not just AI within the business, but how your vendors are dealing with AI. And I think that when you look at the

case that Workday is currently dealing with here in California, That's going to drive a lot. And where are the liabilities? Make sure if in HR, you don't necessarily read the contract. You may send that to legal or somebody else, but whoever you send it to needs to appreciate the employment law aspect of those concerns. And that's one area. I do think that we have not seen the end or shrinkage at all of leave concerns and independent of whether or not there is a component of the FMLA that becomes paid. It begs things that you and I worry about, like, okay, how do we pay for it? And what does that do to other things? Been dealing with a lot of stuff, particularly in the union setting, where we're concerned about stacking of time. Because the last time I checked, as much as everybody likes to go to the beach around here, you gotta work at some point. So, you know, we gotta deal with that. And then I think the other thing is that We joke to some degree about the challenges we have interpersonally right now, whether it's civility, whether it's politics, whatever it may be, people are afraid. And it's incumbent upon HR to recognize that over the next 12 months or so, that turbulence isn't going to change. And it's going to impact a lot more than we think. The same way as I talked to my 13-year-old playing AAA ice hockey, you need to be out there on the ice with your head on a swivel, and in the same way, HR has to have their head on a swivel right now.

Shari Simpson:
Such a good analogy. I love that. I love that. Well, Louis, as always, it was great having you on the podcast today.

Louis Lessig:
Always a pleasure, Shari. Thank you so much for having me.

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.