

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with trees and a bright sky.

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**WORKPLACE 2024**

# TODAY'S AGENDA

**Kristen Smith – (12:00PM-12:05PM)**

- Introduction

**Alison Roach – (12:05PM-12:15PM)**

- Solar Eclipse Considerations for Employers

**Howard Miller – (12:15 PM-12:25PM)**

- U.S. Supreme Court Weighs in in Social Media Use by Public Officials

**Michael Kratochvil – (12:25PM-12:35PM)**

- Proposed NYC Bill to Ban Non-Compete Agreements

**Kristen Smith – (12:35PM - 12:45PM)**

- Questions

# Solar Eclipse Considerations for Employers



## Alison K. Roach

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# What is a total solar eclipse?

- On April 8, 2024, many regions of New York State will experience a total solar eclipse.
- The Sun and Moon will align, and the Moon will block the entirety of the Sun as it passes between the Sun and the Earth.
- Totality will last for a few minutes. The sky will go dark. Observers will notice changes in wind direction, shadows, and temperature.
- Once-in-a-lifetime event – the next total solar eclipse will be in 2144.

# How will workplaces be affected?

- Extremely heavy traffic is expected throughout areas in New York State in the path of totality.
- Local guidance recommends that residents stay at home or at a location where they can comfortably stay for a while before, during, and after the eclipse.
- We expect employers will see a large spike in requests to work remotely and workplace absences.
- Employers should consider the safety risks involved with viewing an eclipse.

# How should employers deal with requests for time off?

- Employers should follow their normal practices and procedures regarding time off requests on Monday, April 8 and enforce their policies consistently.
- Consider whether a request for time off is based on religious beliefs and practices.
- To incentivize attendance at work, consider hosting an eclipse viewing party or offering employees breaks to view the eclipse.
  - Any eclipse viewing party should be voluntary, and employers should provide eclipse glasses to employees.



# Safety Risks and Workers Compensation Liability

- Because staring at the sun can result in permanent eye damage and blindness, all observers should view the event indirectly with eclipse glasses.
  - Consider educating employees about the risks of viewing a solar eclipse without proper eye protection and offer guidance on safe viewing practices.
- Depending on numerous factors, an employer could hypothetically be on the hook for workers compensation liability for injuries suffered at a work-sanctioned eclipse event.
- If you have employees who work outdoors, provide glasses and require employees to wear them.

# U.S. Supreme Court Weighs in on Social Media Use by Public Officials



## Howard M. Miller

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# Social Media and Public Officials

- The issue of social media and the use of social media by public officials is a hot topic. It has attracted the attention of the United States Supreme Court, which heard arguments on two significant cases on October 31, 2023.



## Garnier v. O'Connor-Ratcliff

- The two cases are titled Garnier v. O'Connor-Ratcliff, 41 F.4th, 1158 (9th Cir. 2022). The second is Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022).
- In Garnier, the Court addressed the issue of two members of the Poway Unified School District who created a public Facebook and twitter pages to promote their campaigns for office. Once elected, they continued to use these social media pages to inform constituents about Board activities.

# Garnier v. O'Connor-Ratcliff

- Two parents of children in the school district frequently left critical comments of those trustees and the Board and made disparaging remarks about the Board members. The trustees eventually blocked the Garniers entirely from their social media pages. The Garniers sued.





## Garnier v. O'Connor-Ratcliff

- Following a bench trial, the District Court agreed with the Garniers that their First Amendment rights had been violated.
- The Board members subsequently appealed to the 9th Circuit Court of Appeals which upheld the finding of the District Court that the Board Members had violated the First Amendment rights of the Plaintiffs.

## Lindke v. Freed

- The second case before the Court achieved a different result. In Lindke v. Freed, Freed was a city manager. Before becoming a city manager, for the City of Port Huron, Michigan, he had a Facebook page which listed him in his roles as father, husband, and city manager. He posted a variety of materials. Many of them had to do with family matters, such as his daughter's birthday and various other personal issues.

## Lindke v. Freed

- Occasionally, however, Freed posted information about city business, in particular various administrative directives that he issued the city manager. When COVID-19 hit, he posted information about the policies of the city regarding COVID-19.

## Lindke v. Freed

- Kevin Lindke, a resident of the city, didn't approve of how Freed was handling the pandemic. He began to write criticisms in the comment section. Eventually, Freed blocked Lindke from the page. The block prevented Lindke from commenting on Freed's page and his posts.
- Since he could no longer use Facebook to engage with the city manager, Lindke sued Freed in Federal Court and argued that Freed had violated his First Amendment rights by deleting his comments and blocking him from the page.

# Lindke v. Freed

- The U.S. District Court agreed that Freed did not violate Lindke's rights and granted dismissal to Freed. Lindke appealed.
- That appeal went to the Appeals Court known as the Sixth Circuit Court of Appeals.



## Lindke v. Freed

- The Circuit Court of Appeals ruled that Freed didn't transform his personal Facebook page into official action by posting about his job. Instead, they ruled that his page remained personal and did not give rise to liability for violating the First Amendment rights of Lindke.

- These two cases achieved opposite results. This is one of the reasons why the Supreme Court agreed to review this matter.

## Unanimous Decision in *Lindke v. Freed*

- On March 15, 2024, the Supreme Court unanimously held in *Lindke v. Freed* that a state official who blocks someone from commenting on the official's social media page can constitute state action liable under 42 U.S.C. § 1983, including for deprivation of their First Amendment rights, if the official both:
  - (1) possessed actual authority to speak on the State's behalf on a particular matter, and
  - (2) purported to exercise that authority when speaking in the relevant social media posts

# Proposed NYC Bill to Ban Non-Compete Agreements



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# New York City Proposed Non-Compete Ban

- On February 28, 2024, an amendment to the New York City Administrative Code was introduced in the New York City Council concerning non-compete agreements.
  - Int. No. 0140-2024 - proposed amendment to Section 22-511
  - Would effectively ban noncompete agreements
  - Applies to all employees
- Comes after the failed New York State Bill prohibiting non-competes



# New York City Proposed Non-Compete Ban

- **New York State Bill**

- Proposed amendment to New York Labor Law Section 191-d
- Passed by the NYS Legislature in June 2023
- Part of a new wave of non-compete bans:
  - California, North Dakota, Oklahoma
  - Federal Trade Commission Proposed Rule
- Extremely far reaching and restrictive:
  - Every contract restraining an individual from engaging in a lawful profession, trade or business of any kind would be void to the extent of the restraint.

# New York City Proposed Non-Compete Ban

- **New York State Bill (cont'd)**

- Provided for a private Right of Action, which would subject employers to—
  - (i) liquidated damages of up to \$10,000 for each violation;
  - (ii) payment for lost compensation;
  - (iii) damages resulting from the non-compete agreement's effects, and
  - (iv) attorneys' fees and costs.
- Did ***not*** apply retroactively
- Governor Hochul vetoed on December 22, 2023
  - Wanted to instead strike a balance that would protect lower- and middle-income employees

# New York City Proposed Non-Compete Ban

- New York City proposed amendment is similarly broad:
  - Includes agreements that prevents, or effectively prevents, a worker from seeking or accepting work for a different employer, or from operating a business, after the worker no longer works for the employer.
  - Applies to all workers, whether paid or unpaid
    - Includes independent contractors
  - No exceptions based upon salary thresholds
  - No sale of business exception

# New York City Proposed Non-Compete Ban

- Specific Prohibitions of New York City Proposed Bill:
  - (i) cannot enter into or attempt to enter into a non-compete agreement with a worker (the term worker being defined broadly);
  - (ii) cannot maintain a non-compete agreement with a worker;
  - (iii) cannot represent to a worker that the worker is subject to a non-compete agreement clause where the employer has no good faith basis to believe that the workers is subject to an enforceable non-compete agreement; and
  - (iv) cannot attempt to enforce any existing non-compete agreement.

# New York City Proposed Non-Compete Ban

- New York City proposed amendment would apply retroactively
  - An employer must rescind a non-compete agreement no later than the date that the law goes into effect.
  - Effective Date: 120 days after signed into law.
- Remedies for Violations:
  - Civil penalties of \$500 per violation
  - Enforced by the Department of Consumer and Worker Protection (DCWP) Office of Labor Policy & Standards (OLPS)
  - No private right of action



# New York City Proposed Non-Compete Ban

- **FTC Proposed Rule**

- Announced on January 5, 2023
- Final rule pending and expected in Spring or Summer 2024
- Far reaching and restrictive:
  - Prohibits noncompete agreements between employers and all workers
  - Extends to contract provisions having the effect of prohibiting employees from seeking or accepting other employment
  - Applies retroactively
  - Supersedes all contrary state laws
  - Applies to most employers
- Sale of business exception
- Goes into effect 60 days following publication
  - Employers would have 180 days after publication to comply

# Questions?



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