

# BUSINESS IN 2023

WEEKLY WEBINAR SERIES



2024

2022

2021

2020

# Introduction



**Kristen E. Smith**

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# TODAY'S AGENDA

## Kristen Smith – (12:00PM-12:05PM)

- Intros / Agenda
- Announcing the 2023 Workplace Seminar

## Peter Wiltenburg and Louis DiLorenzo – (12:05PM-12:35PM)

- Considerations for Severance Agreements
- Considerations for Layoffs

## Kristen Smith – (12:35PM-12:45PM)

- Employee Resource Groups
- Wrap Up





# **WORKPLACE 2023**

## **ANNUAL LABOR, EMPLOYMENT & HR CONFERENCE**

**Albany • May 31**

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**New York City • May 25**

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**Syracuse • May 11**

**Westchester • June 6**

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# Considerations for Severance Agreements



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Buffalo, NY

# Why Use a Severance Agreement?

- Formalize any severance payment
- Employee acknowledges other payments
- Release
- Other protective provisions
- OWBPA compliance

# Severance Payment

- In addition to any payment that employee is otherwise entitled to
- Separate from wages and unused PTO (if applicable)
  - \*Local rules on payout of unused PTO
- Separate from contract obligation (if applicable)
- Why consider it?
  - Assist employees during transition period
  - Induce them to sign severance agreement – most especially the release

# Release

- Employee gives up any claims that arose from events before the signing of the agreement
- Employee can still have a claim for anything that happens later
- Must have “consideration” (severance payment will cover this)
- How broad?
  - Always check local laws



## Other Useful Provisions (some examples)

- No future employment
- Neutral reference
- Cooperation
- Dispute resolution – waiver of jury trial

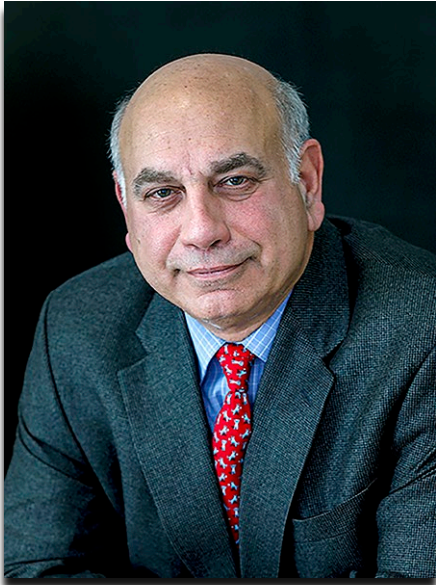
# Older Workers Benefit Protection Act (OWBPA)

- Protects in two main ways – disclosure and procedure
- Disclosure
  - Determine the “decisional unit” – the group of employees affected
  - Identify each position, age, and selected or not for layoff
- Procedural
  - Employee understands it and had opportunity to consult attorney
  - Timing: up to 45 days to consider, 7 days to revoke

# Recent Development: Confidentiality and Non-Disparagement Clauses

- NLRB decision: *McLaren Macomb* (February 21, 2023)
- Held: broadly worded confidentiality, non-disclosure, and non-disparagement clauses violate employee's Section 7 rights
- Even offering an agreement containing these provisions could be a violation
- Interpretation and impact are still unknown, but most likely these clauses should be limited

# Considerations for Layoffs



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Westchester, NY

# Employee Resource Groups

**Kristen E. Smith, Esq.**



# Employee Resource Groups / Affinity Groups

- Usually formed around a shared identity in an underrepresented group; can also be around a shared experience
- 90% of Fortune 500 Companies Support ERGs
- Benefits
  - Support retention
  - Enhance wellness
  - Address employee “pain points”

# Wage and Hour Concerns

- More complicated when non-exempt employees involved
- Is time spent in ERG group activities compensable?
  - ERG sponsored lecture by a financial wellness consultant
  - ERG sponsored time volunteering for earth day clean up
  - ERG planning meeting

# Wage and Hour Concerns

- Training/lectures/meetings compensable except when all four elements met:
  - Outside of employee's regular work hours
  - Is "in fact" voluntary
  - Not directly related to employee's job duties
  - Employee does not perform productive work during attendance
- Charitable work compensable if:
  - At the employer's request; or
  - Under the employer's direction; or
  - Performed while required to be on employer's premises

# Discrimination Law Concerns

- Membership cannot be exclusive to a particular protected category
- Be careful with messaging about group membership
  - “Intended to support...” versus
  - “Open to....” or “Limited to....”
- Be weary of discussions or communications from or within ERGs that may disparage other groups

# National Labor Relations Act (NLRA) Concerns

- Section 8(a)(2) prohibits employers from dominating or interfering with employee labor organizations
- Two-part inquiry:
  - Is the ERG functioning like an employee labor organization?
  - If so, is the employer supporting the ERG in a way that could be considered “dominating” or “interfering”



# National Labor Relations Act (NLRA) Concerns

- Employee Labor Organization
  - Does it represent employee concerns related to terms, conditions of employment?
    - Advocating for better wages, benefits, childcare, working conditions, safety, etc.
    - Speaking on behalf of its members
    - Presenting concerns to employer for a bilateral discussion
- Dominating / Interfering
  - Financial support?
  - Executive sponsor?

# National Labor Relations Act (NLRA) Concerns

- Section 8(a)(1) prohibits employers from interfering with employees' Section 7 Rights
  - Employees have a right to engage in “protected, concerted activity”
  - Rules that tell ERGs what they can/cannot discuss risks impinging on Section 7 rights

# Your Questions



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## Employee Resource Groups

Kristen Smith, [ksmith@bsk.com](mailto:ksmith@bsk.com)

## New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

# Thank You

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