

2024

# BUSINESS IN 2023

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# Introduction



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# **WORKPLACE 2023**

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

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# TODAY'S AGENDA

**Kristen Smith– (12:00PM-12:05PM)**

- Introduction / Agenda

**Andrew Bobrek – (12:05PM-12:15PM)**

- Role of Salts in Workplace Organizing

**Stephen Sharkey – (12:15PM-12:25PM)**

- The Intersection of Employer Counterclaims and Retaliation

**Claire Bopp – (12:25PM-12:35PM)**

- Breach of Implied Contract for Wrongful Discharge Based On Employee Handbook

**Brody Smith – (12:35PM-12:45PM)**

- Real Property Taxation: How and When to Challenge Your Assessment

**Kristen Smith – (12:45PM)**

- Wrap Up

# Role of Salts in Workplace Organizing



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# Notable NLRB Activity

- ULP Filings Up 19% in FY22
  - Up another 16% in FY23 (4/1/23)
- Election Petitions Up 53% in FY22
  - Up another 14% in FY23 (4/1/23)
- Union Victory Rate = 77% in FY22
- \$25M Increase for FY23 Budget totaling \$299 million
- 71% of Americans Approve of Labor Unions (Gallup), but...





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# 1954

## Union Membership Peaks at 34%

More than 1 out of every 3  
American workers is  
represented by a labor union

Unions dominate mining,  
steel, auto, construction &  
trucking industries



# 2022

## Private Sector Union Membership Rate Down to 6.0%

Today 14 out every 15  
workers in private sector  
are union free

Unions mostly limited to  
public sector and  
healthcare industry





# Union “Salting”

- Don't Forget: Unions Are Businesses
  - Dues, Dues, Dues
  - Dues -> Political Support
- Pay Professional Organizers – a.k.a., “Salts” – to Infiltrate Targeted Company
- Well-Established “Big Labor” Organizing Tactic
- Gather Information, Sow Seeds of Discontent, Build Union Support
- Trap Employers Into Committing ULPs
- Goal: Organize Workplace (Secure More Dues)

# Union “Salting”

- Making a Comeback
- “Workers Rights”
- Amazon, Chipotle, Starbucks
  - Chris Smalls & Justine Medina
  - Jaz Brisack
- Smaller Scale Activity



It is unlawful to discriminate against  
“salts”  
based on their union activity.

What would you do, if an applicant interviewed wearing a union shirt and hat?



What if the applicant also told you she wants to create a labor union at your facility?

# Some Tips to Counter Union “Salting”

- Kindness & Grace
- Fairness & Accountability
- Employee Engagement & Agency
- Clear & Consistent Hiring Practices
- Effective & Compliant Job Applications
- Supervisor Training
- Remember: The Rules Have Changed!

# The Intersection of Employer Counterclaims and Retaliation: An Analysis of the Second Circuit's Recent Decision in Kim v. Lee



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# Do claims/counterclaims against an employee amount to retaliation?

- Historically, this is a murky area of law
- Can otherwise legitimate counterclaims/claims against an employee be construed to be unlawful retaliation?
- The fear of being subjected to a retaliation claim often deters employers from bringing them against the employee
- Second Circuit's recent decision in *Kim v. Lee* (March 2, 2023) addressed this issue



## Kim v. Lee - Facts/Background

- Kim sued his employer for failing to pay him OT in violation of the FLSA and NYLL
- During the course of the litigation, his employer's attorney asked him "threatening" questions about his retention of copies of work-related documents following his employment
- After the deposition, the defendant amended its answer to assert counterclaims against him for breach of contract (violation of a confidentiality agreement) and for conversion.
- Kim maintained that these counterclaims were "frivolous"
- So, Kim filed a separate action for retaliation against not only his employer but its outside attorney
- The district court dismissed the retaliation claims, concluding that they were not objectively baseless
- Kim then appealed that ruling to the 2<sup>nd</sup> Circuit, claiming that these actions were retaliatory and objectively baseless

## *Kim v. Lee* – Court's Ruling

- The 2<sup>nd</sup> Circuit disagreed with Mr. Kim and affirmed the ruling
- Looked at what a plaintiff must show to establish retaliation under FLSA:
  - Participation in protected activity known to the defendant;
  - An employment action disadvantaging the plaintiff; and
  - A causal connection between the protected activity and the adverse employment action.
- Court noted that Kim had undoubtedly satisfied the first prong, but the contested issue was whether Kim had sufficiently alleged an employment action which disadvantaged him.

## Kim v. Lee – Court's Ruling (con't)

- The Court concluded that the counterclaims did not satisfy this prong, as the Court held that “Kim had failed to allege sufficient facts to support his claim that the counterclaims filed against him constituted actionable adverse conduct.”
- Court noted that, under the FLSA, an employment action disadvantages a plaintiff if it well might have dissuaded a reasonable worker from making or supporting similar charges.
- Court further noted that district courts in the 2<sup>nd</sup> Circuit have held that *baseless claims or lawsuits* designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions, even though they do not arise strictly in an employment context.

## *Kim v. Lee* – Court's Ruling (con't)

- Hence, the Court noted that “[t]he critical question is whether any of the [defendants’] counterclaims are ‘baseless’.”
- This is a very exacting standard to meet
  - To be baseless, a counterclaim must “[h]av[e] no basis in fact or sound reason.”
  - A claim is frivolous if it is based on an “inarguable legal conclusion” or a “fanciful factual allegation.”



## **Kim v. Lee – Court's Ruling (con't)**

- The Court then examined the defendants' counterclaims to determine whether they met this standard and determined that the plaintiff had failed to plausibly allege that the factual allegations in the challenged counterclaims were frivolous.
- Court found that the questioning of plaintiff by defendant's attorney during the deposition likewise did not constitute an actionable adverse employment action, as they "were within the scope of permissible discovery" and "were potentially germane to his credibility and conduct during his prior employment."

# Implications of *Kim v. Lee*

- Is there a distinction between claims asserted under the FLSA and NYLL?
  - Court's analysis was focused solely on retaliation under the FLSA
  - It expressly noted in a footnote that “the parties treat the analysis under the NYLL as coextensive with our analysis under the FLSA and have not independently briefed any arguments under the NYLL. We accordingly assume without deciding that our disposition of the retaliation claims under the FLSA is dispositive of the NYLL claims as well.”
  - So, you may get creative employment lawyers arguing that this ruling does not apply to claims under the NYLL, but the analysis seems to apply equally to both.

# Implications of *Kim v. Lee* (con't)

- More importantly, though, does this ruling extend to non-frivolous counterclaims or claims against an employee who has engaged in protected activity?
  - The Court held that baseless and/or frivolous counterclaims are retaliation, but is the inverse necessarily true (i.e., are non-frivolous counterclaims not retaliatory?).

# Implications of *Kim v. Lee* (con't)

- Unfortunately, it does not. The 2<sup>nd</sup> Circuit expressly noted in another footnote that the parties did not submit any arguments whether a non-frivolous counterclaim could constitute retaliation and the Court “did not decide whether and under what circumstances a non-frivolous counterclaim may constitute unlawful retaliation.”
  - Hence, the question is still up for debate and there *are circumstances in which even a non-frivolous counterclaim could potentially still amount to retaliation*. See, e.g., *Nunez v. Metro Learning Inst., Inc.*, 2021 WL 1176219, at \*5 (E.D.N.Y. 2021) (noting that whether a non-frivolous lawsuit amounts to actionable retaliation under the FLSA is an “open question in the Second Circuit”).



# Implications of *Kim v. Lee* (con't)

- So, while this decision provides some guidance to employers on this point, careful consideration should be given to the assertion of any counterclaim/claim against an employee who has sued their employer to avoid a retaliation claim and will likely need to take into account a number of factors, including the nature and timing of the counterclaims/claims, to assess this issue.

# Breach of Implied Contract for Wrongful Discharge Based On Employee Handbook



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# Real Property Taxation: How and When to Challenge Your Assessment



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# Your Questions



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## Role of Salts in Workplace Organizing

Andy Bobrek, [abobrek@bsk.com](mailto:abobrek@bsk.com)

## The Intersection of Employer Counterclaims and Retaliation

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### **New York Employment Law: The Essential Guide**

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

# Thank You

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