NELC Annual Conference
Wednesday May 3, 2023 – 10:30 a.m. – 11:45 a.m.
Influencing the Labor and Employment Legislative and Regulatory Process Through Advocacy and Litigation

Every year new legislation and regulation is passed that can have profound impact on our clients and their industries. As labor and employment lawyers, our unique expertise and perspective enable us to provide invaluable insight and counsel to our clients regarding how proposed legislation/regulation could impact their employees, workplace, business, and employment strategies. This panel will offer a view from veterans of the legislative and rulemaking process, and how we advocates can help educate legislators, staff, and lobbyists on behalf of our clients. Topics will include best practices from insiders; identifying opportunities to raise these issues with clients; strategies for influencing successful outcomes; working with trade associations; and when the best strategy may require litigation on behalf of a client or an industry

I. THE LOCAL PERSPECTIVE – NEW YORK CITY

A. Litigation and Legal Challenges to New Regulations

1. ***International Franchise Association et al. v. City of New York*, 2020 WL 871402, 193 A.D.3d 545, 148 N.Y.S.3d 28 (N.Y. App. 2020)**

   A) Introduction

      1. In December 2018, the International Franchise Association, Restaurant Law Center and New York State Restaurant Association commenced an action against the City of New York challenging New York City's Fair Workweek Law ("FWWL") on the grounds that the city's regulations were preempted by New York State and therefore violated the State Constitution and Municipal Home Rule Law.

      2. The Plaintiff Associations asserted that the FWWL caused great harm to Plaintiffs' member employers in New York City's fast food industry by causing them to incur enormous penalties and significant administrative costs, and interfering with their ability to schedule employees so as to best serve the constantly shifting needs of consumers.

   B) What is the New York City's Fair Workweek Law ("FWWL")

      1. The FWWL mandates that fast food employers in NYC provide employees with a good faith estimate, in writing, of the number of hours the employee can expect to work per week for the duration of the employee's employment. The estimate must include the expected dates, times, and locations for the scheduled work hours.

2. The FWWL also requires fast food employers to provide a written work schedule to each employee that identifies regular shifts and on-call shifts. The schedule must span a period of at least 7 days. All subsequent schedules must be provided with at least 14 days' notice.
3. It also contains penalties for fast food employers who modify shifts with less than 14 days' notice and contains a penalty for scheduling employees to work "clopenings" (i.e. closing a business at night and returning in the morning for an opening shift without much rest in between)
4. The law also affords NYC fast food employees the right to progressive discipline and access to newly available hours before hiring new employees.
5. Problem: The FWWL has caused harm to the members of the above-named Plaintiffs in NYC's fast food industry, causing them to incur economic penalties and significant administrative costs. It also interferes with their ability to schedule employees so as to best serve the constantly shifting needs of consumers. The law also restricts fast food employers' ability to hire new staff to meet emergent business needs by requiring employers to offer new shifts to existing workers first, regardless of their qualifications.

C) Plaintiffs' Argument Against FWWL

1. The Complaint argued that NYC's FWWL is preempted by New York State Law and therefore violates the State Constitution and Municipal Home Rule Law. Accordingly, the Complaint requested relief in the form of a declaration that the FWWL is invalid, null, and void.
2. The Complaint argued that employee scheduling and compensation requirements were governed exclusively by the NYLL Sections 160-162 and 650-665

D) Outcome

1. The Defendants' motion to dismiss the Complaint was ultimately granted and the Plaintiffs' cross-motion for summary judgment was denied.
    a) The Court reasoned that the State law does not include an overarching statement of intent to cover the entire "waterfront," the FWWL Is narrowly tailored and regulates a few discreet facets of employer-employee relations, does

not infringe on State prerogatives, and the State and City laws and regulations are harmonious.

2. Plaintiffs appealed the decision to an intermediate state appellate called the New York State Appellate Division, First Department (covering Manhattan and Bronx trial courts). While the lower court's decision was mostly affirmed, the First Department noted that the State has preempted the field of minimum wages but neither scheduling premiums nor any other aspect of the FWWL are preempted by state law.

    a) The First Department also noted that while the State has preempted the field of minimum wage, the FWWL only has a "tangential" impact on the state's interests because the purpose of the scheduling premium is not to boost workers' wages and is merely a mechanism for incentivizing employers' compliance.

3. Plaintiffs appealed the First Department's decision to the NY Court of Appeals (the state's highest court), but this appeal was dismissed.

E) Lessons

1. While the Court did not find in favor of the Plaintiffs –counsel was able to advocate, raise and test arguments on behalf of these associations and member employers to the New York Supreme Court and the First Department.

2. Challenging the FWWL was an uphill battle because all laws enjoy a presumption of constitutionality. Accordingly, the burden was high for the Plaintiffs to show that the law was unconstitutional.

3. Nevertheless, without counsel's involvement and the banding together of multiple associations the arguments against the constitutionality of the FWWL might not have otherwise been heard before a Court, much less the First Department.

4. The Court's decisions will also create roadmaps and provide guidance for employers and trade associations seeking to challenge future regulations impacting this industry.

5. Employers and trade associations must also be willing to challenge regulations through litigation and put the necessary political pressure on elected officials, government entities and regulators when they pass burdensome and unnecessary laws that negatively impact the employer community.

6. While elected officials and regulators may have good intentions when passing pro-worker legislation, the related regulations and implementation by enforcement divisions are often unclear, burdensome, and costly and the related penalties are excessive and completely punitive (as opposed to educational).

2. ***Restaurant Law Center v. City of New York,* 585 F. Supp. 3d 366 (2022)**

A) Introduction. On January 5, 2021, New York City Mayor Bill de Blasio signed legislation that effectively ends at-will employment for fast food employees in New York City. The Wrongful Discharge Law ("WDL") took effect on July 4, 2021, and made New York City the nation's first jurisdiction to create job protections for a particular industry.

B) What is the Wrongful Discharge Law ("WDL")?

1. Prohibits fast food employers from discharging employees or substantially reducing employees' hours without "just cause" outside of a probation period.

2. Defines "just cause" as "the fast food employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests."

3. A covered reduction in hours is any reduction "totaling at least 15 percent of the employee's regular schedule or 15 percent of any weekly work schedule."

4. If an employee is working within a probation period ("not to exceed 30 days from the first date of work"), the employee is not subject to the just cause standard.

A) Legal Issues Examined by the U.S. District Court

(1) Preemption Under the National Labor Relations Act ("NLRA")

(a) The Court found the Wrongful Discharge Law was not preempted by NLRA.

(b) Under the Machinists Doctrine developed by the Supreme Court, the NLRA preempts state and municipal laws that regulate conduct Congress intended to be left unregulated. But laws that provide "minimum labor standards" and do not intrude on the bargaining process are not preempted.

(c) Plaintiffs argued that the law interferes with the collective bargaining process, by legislating on issues traditionally

subjected to bargaining and essentially providing a collective bargaining agreement to workers through a municipal law.

(d) Plaintiffs further argued, this law is not generally applicable as a "minimum labor standard" because it applies narrowly to a particular industry and its provisions go far beyond establishing "background rules" against which employers and workers may negotiate.

(e) The Court disagreed stating, this law does not disrupt any balance of power that might interfere with those processes because it applies equally to union and to non-union workers across the entire fast food industry. The court characterized the law as a "minimum labor standard" of general applicability aimed at promoting job stability for hourly employees in a particular sector — the fast-food restaurant industry."

(f) The Court also defined the law as dealing with termination, not the process of collective bargaining, peeling it away from the preemptive scope of the NLRA.

(2) Constitutionality Under the Dormant Commerce Clause

(a) The Court ruled that the WDL did not violate the Dormant Commerce Clause.

(b) Plaintiffs argued that the law discriminates by means of its statutory definition of a "fast food restaurant." The underlying law (New York's Fair Workweek Law) defines a "fast food restaurant" as a chain with 30 or more restaurants nationwide.

(c) Plaintiffs argued that this definition limits the law's application only to interstate food chains, thereby discriminating against these operators.

(d) The Southern District concluded, that the WDL is a general welfare statute that bears no substantive differences in effect for interstate versus intrastate employers.

(e) The court relied heavily on a case in the Second Circuit, *Vizio v. Robert Klee*, which declined to find the similar requirement of a "national market share" as discriminatory against interstate actors. The court intimated that there could be — at most — an indirect burden on interstate restaurants but said this was not enough.

(f) The Southern District held that the law affects all fast-food companies equally and is not discriminatory against out-of-state actors.

(3) Preemption Under the Federal Arbitration Act

(a) The Court held that the law was not preempted by the Federal Arbitration Act ("FAA"). The FAA prohibits regulations that limit the enforcement of private arbitration agreements.

(b) Plaintiffs argued that the FAA requires arbitration agreements to be consensual. Because the WDL mandates arbitration over alleged wrongful terminations, the WDL violates that consent principle.

(c) The court found the FAA silent on non-consensual arbitration and held that plaintiffs failed to prove preemption.

(4) Impact of the Southern District of New York's Decision

(a) The case was appealed on March 8, 2022.

(b) In December 2021, NYC's Department of Consumer and Worker Protections announced it had resolved its first case under the WDL by securing a settlement with a Subway franchisee that illegally terminated two employees.

(5) Similar legislation contemplated in other States.

a) California's *Displaced Janitors Opportunity Act* has limited at-will termination of janitors during changes in building contractors.

b) Los Angeles County passed a *Right of Recall* ordinance that provides a right to return to certain workers after a COVID-19 related layoff.

c) Philadelphia's *Just Cause Law* that requires employers to provide a reason for termination to parking workers.

5. ***Delta Airlines, Inc. v. New York City Department of Consumer Affairs*, 564 F. Supp. 3d (E.D.N.Y. 2021)**

a) Introduction

(1) New York City Earned Sick Time Act (the "Act") took effect in 2014 and requires employers with five or more employees to provide paid sick leave to Manhattan-based workers.

(2) Delta challenged the application of the Act to Delta's in-flight crew and did not challenge the application of the Act with respect to its ground-based crew.

b) **Arguments to the U.S. District Court, Eastern District of New York**

(1) Plaintiff argued that the law runs counter to the Airline Deregulation Act (the "Deregulation Act"), the broad federal law that bars any state regulations "related to a price, route or service of an air carrier."

(2) Defendants argued that the Deregulation Act's preemption provision does not apply to the Act because it does not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services. They claimed that a state law is "related to" an airline's rates, routes, or services only if it has a "connection with" the carrier's routes, rates, or services that causes a "significant impact."

(3) Eastern District found the mandate is preempted by federal law because it could cut into the airline's ability to compete with rivals.

c) **Ninth Circuit Precedent**

(1) The Ninth Circuit decided a case that was on point with Delta's Case. In *Air Transport Ass'n of Am. v. The Wash. Dep't of Labor & Industries*, the court addressed whether or not Washington State's paid sick leave law was preempted by the Deregulation Act.

(2) While noting that the state law "regulates the airline-employee relationship in a way that may ultimately affect the airlines' competitive decisions in the free market," the court found that the state law was not preempted because it did not "bind" airlines to particular prices, routes, or services. Rather, because the Washington law was a "generally applicable labor regulation" it was "too tenuously related to airlines' services to be preempted."

d) **Second Circuit Court Declined to Follow the Ninth Circuit's Decision**

(1) The Second Circuit disagreed with the Ninth Circuit that a state or local law is preempted only when the law "binds" an airline to a particular price, route, or service.

(2) No other circuit, including the Second Circuit, has adopted such a narrow standard. Rather, the Court found that the proper test is whether the state or local rule frustrates the Deregulation Act's deregulatory purpose.

e) **Preemption Under the** Deregulation Act

(1) **Introduction**

(a) Congress enacted the Deregulation Act in 1978, loosening its economic regulation of the airline industry after determining that maximum reliance on competitive market

forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation.

(b) To ensure that the States would not undo this deregulation with regulation of their own, Congress included an express preemption provision. This provision prohibits any non-federal laws or rules that are "related to a price, route, or service of an airline covered by the statute.

(2) **Preemption Test**

(a) Part one of the preemption test is to determine if the state or local law has "a connection with, or reference to," carrier rates, routes, or services, even if the state or local law's effect on rates, routes, or services "is only indirect."

(b) After determining that a state or local law is "related to" a carrier's rates, routes, or services, part two of the preemption test is to determine whether or not the relation is substantial enough to trigger preemption.

(c) The Supreme Court has not drawn an exact line with respect to how significant the relation must be in order to trigger preemption; rather, the Court has only marked an upper bound, noting that preemption "occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives."

(d) On the other hand, some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have a preemptive effect."

(e) To determine where on this spectrum a specific state or local law is, and whether its impact on an airline's routes, prices, or services triggers preemption, the Court evaluates whether the local law "would frustrate the purpose of the ADA," which was to promote competition and efficiency through a deregulated industry. If so, the state or local law should be found to be preempted.

(3) **Eastern District Findings**

(a) Here, the Court found that the Act does relate to a covered service.

(b) Secondly, the Court found, as a matter of law, the Act must be preempted because the Act threatens to subject Delta to a patchwork of state laws that will undermine its ability to compete in a deregulated marketplace, the purpose for which the ADA was enacted to achieve.

(c) Because the Court could resolve the issues on statutory preemption grounds, it refrained from ruling on Delta's contention that the Act violates the dormant Commerce Clause.

(d) However, the Court did find that the extra-territoriality analysis applicable to the dormant Commerce Clause analysis was also relevant for the Deregulation Act preemption analysis and considers it within that framework to bolster its conclusion that the Act impermissibly relates to a covered airline service.

B. <u>Ways Outside Counsel Can Assist</u> -- Policy-Making Initiatives

1. Advocate on behalf of the employer community and engages in legislative and regulatory advocacy to impact the workplace and effect meaningful change.

2. Work to overturn burdensome labor regulations and advocate for clients embroiled in government investigations and litigation.

3. Files lawsuits in a variety of jurisdictions to enjoin or declare newly passed statutes and regulations invalid.

    a) Challenges to state and local labor agreements, residential hiring preferences, and apprenticeship matters.

    b) Challenges to the 2016 federal overtime rule, the "blacklisting" rule, the injury reporting rule, the NLRB notice posting rule, and the home care overtime rule.

I. STATE PERSPECTIVE

A. Timelines and Process For CA Legislature

1. Bills introduced in January/February
2. Bills heard in policy and fiscal committees and voted on in March – August
3. Governor signs/vetoes in September

B. Case Study: AB 898

1. In 2019, the Assembly took up AB 1076 which started wholesale "criminal justice reform" involving automatically expunging various criminal records. Several companion bills quickly went through the legislature without much detailed analysis of impacts.
2. In September 2021 the California Commission on Teaching credentials began lobbying for amendments to AB 898 as the new law would have made it impossible for the CTC (and public school districts) to investigate and get relevant information related to expunge criminal records for making determinations of fitness to teach in public schools.
3. LAUSD and school districts across the state had to compile actual examples of applicants who had "plead down" from charged crimes that would have foreclosed the applicant from working for the school district, to plea agreements for lesser crimes that allowed the applicant to then get the record expunged. Under the new legislative scheme, districts would not have access to the records to investigate the circumstances of these convictions.
4. Even with coordinated efforts, public school employers only had approximately **four weeks** to compile data and examples to try and persuade legislators for carve outs/amendment or other legislative fixes to the new criminal justice reform package of bills passed and being passed.
5. Short time frame to produce "evidence" for position, plus momentum for the bills be presenting created significant challenge to lobbying efforts.

C. Lessons Learned and Practitioner Contributions to Successful Lobbying Efforts.

1. Impacts of Specific Legislation relevant for Employers Can Span Multiple Legislative Sessions. Expungement Bill first passed in 2019; AB 898 regarding access to criminal records (with unintended impacts for CTC and public school employers) signed in September 2021. SB 731 expanding automatic sealing of records for convictions was passed in

November 2022. (Getting involved in the "middle" of a multi-year legislative scheme overhaul process can limit impact of lobbying for amendments, carve-outs, or other legislative fixes).

2. Even with strong coalition for lobbying, legislative priorities with "momentum" by sponsors and legislators can be difficult to counter at later stages of legislative calendar.

3. From "ban the box" changes starting in 2015 to SB 731 in 2022, signs of a legislative shift on criminal justice reforms impacting employers started slowly with seemingly innocuous and inconsequential law changes, to significant changes. Important for practitioners to build internal portfolios tracking these trends nationally.

4. Practitioners Contributions: (1) Training on Changes in the law—analysis beyond explaining new laws and looking forward to legislative tendencies; (2) Keeping file on examples intersection of litigation and proposed legislative changes; (3) monitoring legislative sessions for analysis on other related and connected legislation—national trends.

III. FEDERAL PERSPECTIVE

A. Legislative Powers – Laws Effect Change in the Workplace

- Discussion of most recent substantive labor and employment legislation passed by Congress

B. Executive Orders – Laws/Regulations Effect Change in Workplace

1. Mechanics of the Power

   - Has the power of federal law
   - Issued to govern actions and/or require actions by Government and Agencies
   - Must be published in Federal Register
   - Typically will require agency action, implementation of new regulation
   - Can be overturned by
     - Incumbent President revoke predecessor (Biden revocation of Trump EOs upon inauguration)
     - Congress pass legislation invalidating it (President can veto legislation if Congress does not have votes to override – 2/3 vote)
     - Congress can make EO ineffective by not funding if the EO requires funding
     - Courts can stay enforcement or overturn it if the EO is beyond the President's constitution Authority

2. President Trump's EO 13769 suspending entry of non-citizens from several Muslim-majority countries

   a) Background

      - Suspends for 90 days the entry of aliens from seven countries (Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). Aliens is a legal term to describe non-citizens, including visa holders and lawful permanent residents (greencard holders);
      - Suspends for 120 days the United States Refugee Admissions Program;
      - Directs the Secretary of State, upon resumption of the refugee program, to prioritize refugee claims based on religious persecution where a refugee's religion is the minority religion in the country of his or her nationality;

- Suspends indefinitely the admission of Syrian refugees;
- Allows the Secretaries of State and Homeland Security to make case-by-case exceptions to these provisions "when in the national interest";
- States that situations in the national interest include "when the person is a religious minority in his country of nationality facing religious persecution."

b) TRO issued in USDC Western Dist. WA; Ninth Circuit rejected fed gov't argument that courts lacked authority to review Executive Orders on immigration policy and that the states lacked standing to bring the constitutional claims.

3. EO 14043 requiring COVID vaccination for all federal government workers and companies that have workers placed at federal agencies or on federal property

a) Feds for Medical Freedom v. Biden

(1) TRO issued in S.D. Tex.

(2) Fifth Circuit rejected appeal

(3) Injunction lifted by Supreme Court

B. Proclamations – more ceremonial in nature

C. Executive Memorandum – Similar to EO except not required to be based upon law and published in federal register; typically does not require agency action

D. Agency Rule Making

1. Mechanics

- Administrative Procedure Act (APA) allows a federal agency to revise, amend, or repeal regulations, thus creating/changing existing law.
- Notice of Proposed Rulemaking (NPRM) requires (unspecified length) comment period, typically will be at least 30 days.
- Purpose of the notice period is for public engagement (other ways requiring engagement include among other ways, Federal Advisory Committee Act and Negotiated Rulemaking Act)
- Many trade organizations, such as US Chamber Labor Relations Committee, Board of Trade, Manufacturers Association submit comments

2. DOL Notice of Proposed Rulemaking on independent contractors; clients submitted comments with Chamber LRC.

   - Discussion of the Court's rejection of DOL's withdrawal of Trump rule forcing DOL to issue NPRM to get back to economic realities test

3. Agencies may issue requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) or hold meetings/information sessions with affected interests.

   a. DOL Occupational Safety and Health Administration and HHS Centers for Medicare and Medicaid Services held several meetings with employers, industry heads and associations prior to implementing the emergency temporary standard (ETS) on the COVID Vaccine.

   b. Discussion of CMS allowance and ETS overturning.

4. Interpretative Rules

   a. *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, 135 S. Ct. 1199, 574 U.S. ___ (Mar. 9, 2015) – Regulations can be revised in informal agency pronouncements rather than through the notice-and-comment process.

   b. *State of Texas* v. EEOC, No. 21-00194 (N.D. Tex., Oct. 1, 2022) – Overturned EEOC guidance excepting LBGT employees from workplace policies regarding bathrooms, dress code and locker rooms as unlawful; held that the EEOC guidance misinterpreted SCOTUS decision in *Bostock v. Clayton County* prohibiting job place discrimination on the basis of sexual orientation and gender identity

E. <u>Case Study on Artificial Intelligence</u> – All of these initiatives/hearings are touch points where clients should look to advance their position on regulations and enforcement of artificial intelligence and automation prior to enactment of law and/or enforcement regulations.

1. Legislative Hearings

   a. Senate Artificial Intelligence Caucus and Congressional Artificial Intelligence Caucus

   b. House Committee on Education and Labor, Subcommittee Civil Rights and Human Services has been having hearings on artificial intelligence as part of its Future of Work: Protecting Workers' Civil Rights in the Digital Age Series.

c. National Artificial Intelligence Initiative Act of 2020 (NAIIA) - President, acting through the NAII Office, interagency committee (Select Committee on AI) and agency heads, to sustain consistent support for AI R&D, support AI education and workforce training programs, support interdisciplinary AI research and education programs, plan and coordinate Federal interagency AI activities, conduct outreach to diverse stakeholders, leverage existing Federal investments to advance Initiative objectives, support a network of interdisciplinary AI research institutes; and support opportunities for international cooperation with strategic allies on R&D, assessment, and resources for trustworthy AI systems

2. Executive Branch – EO 13859, Maintaining American Leadership in Artificial Intelligence – AI policy of federal government

   a. American AI Initiative

   b. The U.S. Department of Commerce's National Institute of Standards and Technology (NIST) released its Artificial Intelligence Risk Management Framework (AI RMF 1.0), a guidance document for voluntary use by organizations designing, developing, deploying or using AI systems to help manage the many risks of AI technologies.

   c. EEOC Hearings Exploring Potential Benefits and Harms of Artificial Intelligence and other Automated Systems in Employment Decisions at the end of January as part of its AI and Algorithmic Fairness Initiative; published in federal register notice of Draft Enforcement Strategy that will encompass its enforcement against technology-related employment discrimination (comment period ended February 9).

IV. DISCUSSION POINTS

A. How do judicial appointments and elections affect challenges to EOs and rulemaking?

B. What strategies are effective in shaping legislation in a more favorable way for your clients?

C. What relationships are helpful to build to become an influential advocate of labor and employment policy and legislation?

D. How can/should we respond to national sentiment toward pay equity, fair pay, and other social/labor movements as we advocate our clients' interests at the legislative level?

E. What are the ethical lessons or guideposts in leveraging prior public service experience and connections to advance the interests of private clients?

F. What are some lessons to help avoid potential failures in efforts as a legislative advocate?

G. How does the approach to advocacy differ, if at all, when looking to influence outcomes at the local, state, or federal levels?

H. At what stage should companies partner with outside counsel when looking to influence legislation and policy?

I. Should we look at legislative advocacy much like a litigator approaches mediation (i.e., seeking compromise to reach a resolution - - a bill that suits all parties interests as best as possible)?

J. How can we shape legislation so that less time and effort is expended on resolving gaps in the guidance or application of otherwise well-meaning laws?

K. How can we prevent laws from being passed that are not well thought out and that require an extensive review by the courts and/or regulatory guidance?

L. Is there a way to standardize legislation so multi-jurisdictional employers can better field the challenges of complying with the patchwork of laws at the local, state, and federal levels?

M. What role do trade associations play in the shaping of legislation and how can labor and employment lawyer play a more visible role in these organizations?