

- 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.

- Joining me today is Louis Lessig, partner at Brown & Connery, LLP. Louis is an attorney whose practice concentrates in labor and employment litigation, counseling, negotiations training, and speaking. Louis represents clients in all types of employment matters, including but not limited to claims of discrimination, harassment, hostile work environment, wage and hour irregularities and retaliation. Louis has been a featured speaker at many events, including the Society for Human Resource Management, the SHRM State Council Conferences, Tri-State Human Resource Management Association, and a number other organizations both in the private and public sectors. Louis, thanks so much for jumping on the podcast with me today.

- Shari, I am so thrilled to be here with you.

- I am excited you're here as well. We crossed paths a lot in our conference season and we've got to spend some time behind the mic with each other before, and it's always such a great, insightful conversation for myself and hopefully for our listeners. So I'm so glad we were able to do this. You know, we are recording this episode in September, but we're not launching it till December. As I think about kind of the things that are coming for 2024 for our HR professionals, and with your expertise and your background, are there major legal changes that we should kind of anticipate as we head into 2024?

- Well, funny you should ask that. There's nothing going on at all.

- Great, great, end of episode.

- Okay, click, we're done, we're good.

- Right.

- And then we rolled over and realized that that is so not the case. I think there are a couple of major buckets, and I think the biggest one that will impact every single person that listens to your podcast is the issues around over time and how that's gonna change and the fact that when we look at whether it's the comment period or when it actually is gonna go into effect, the real issue here is that what do we have in the back of our minds? 2016. And we all remember what happened. We were all going crazy. We're running around like, oh my God, we have to figure it out. And are they exempt? Are they not exempt? What are we gonna do with them? How are we changing our policies? And I just remember the frenzy. In fact, there was one new

client that came in literally two weeks before the deadline, and we were pushing to the end, and as we all remember in 2016, that illustrious Texas judge that was kind enough to put the whole kibosh on the whole thing. And then the Fifth Circuit just said, well, we're gonna do it later. And it all went away. And so I'm sure there are certain listeners that you have and of course it's a podcast, so people can't see us smiling, but they're anticipating maybe a small little thing in the back of their head saying, is it ever really gonna happen? And I think the problem that we have to appreciate is it is gonna happen and it is gonna change. It may not be in the same form that we've originally seen it released by the government, but you know, it's, relatively speaking, due. I think there's a lot, we could spend an entire podcast just on this one topic, but if there's anything that's gonna impact everybody, that's gonna be it. And I also think that we need to be careful because there are a lot of major issues for employers and particularly for HR. And there's probably never been as important a time to be in HR than now, because with the federal government taking a backseat on a lot of major issues, we're seeing a lot more stuff driven down to the stage. And for those of you who have multiple locations across the country, it is to say the least, a little bit hectic, particularly for issues like paid leave, wage and hour changes, even the illustrious cannabis, if you will. And then of course, we have non-competes and many of those issues are being dealt with in various states, whether we think about Maryland or New Jersey or Illinois or California. And it almost doesn't matter where you are. And so the challenge for HR is to try and find the best way to stay on top of stuff because it's just gonna get crazy.

- You know, one of the things I've really appreciated over the years with my SHRM membership is that they have a state by state comparison tool on their website. So if you're a SHRM member and you didn't know that, it's actually a really great resource, not the be all end all, but a really great sense for you to kind of get a sense of what the differences are. And if you are going from single state to multi-state, it's a really great resource. So I couldn't agree more. And it's funny, as you were talking about 2016, I was talking to somebody the other day about that and like the trauma that those of us that went through that, because you're right, we did all this work and we pushed and pushed and pushed and then for it to get pulled back, some organizations weren't able to pull it back, just based on how far they were done in the process. So it's interesting to see what's gonna happen next. You know, as we've looked at the last couple years, I feel like definitions and understandings of a lot of different things have changed. And specifically, workplace discrimination, harassment, I'm curious how companies can adapt their policies to really stay compliant and proactive in that specific states.

- It's interesting. I think when I go back and look at my career where it's evolved to at this point, the very first thing I wrote about were the US Supreme Court decisions around this whole idea of doing

training in the discrimination harassment space, and both of those seminal cases and sort of where we've come all these years later. And I think that one of the realities that employers need to appreciate is that we sort of had two tracks. On the one hand, you've had individuals who've done training that's been very tailored to their organization, very customized. And on the other hand, we have the cookie cutter watch a video, check a box, and move on. And I think we start to think about how we need to evolve the same way we're now learning good, bad, or indifferent, that AI is everywhere, we need to appreciate the fact that this kind of training needs to be done in a way that is individualized and does take into account all of the different uniqueness, if you will, of not just an organization, but of the people and what they do and how they view the world. And I think that becomes a real challenge because you start to think, well, it doesn't happen in our organization. And we were talking before we went live about our kids and if you look at it from the perspective of, if this happened to one of my kids or to one of my relatives, how would I feel? And what would I want to happen? And I do think that there's a component of holistic assessment that organizations need to do in order to stay ahead of the curve.

- And it's definitely top of mind because I think of, I think of that term harassment, and I think about as we're heading into our next political climate with the presidential election that will probably be contentious, is just kind of the assumption as we talk about things. And even that can be something that we have to be really on top of in the HR space and think about how are we protecting free speech, but also making an environment where our employees don't feel like they're being ganged up on because of their political views. It's definitely complex, we see things like generative AI and gen Z and gen Alpha coming on board, I'm consistently amazed at the push for individuality in the way we're approaching things. And I think it's good, but like you said, it comes with a lot of complexities because I am who I am and my worldviews and I don't have all those perspectives or all those complexities. And so making sure that you're aligning with different groups of people, it's good. It's kind of forcing us to think about diversity differently.

- Well, it is and it's interesting, one of the things, there are two major keynotes I've been working on a lot, and one of them is related to this particular issue around retaliation and the concern, because to your point, retaliation is based on, if you think about it, how everybody feels individually. And so when we get really specific, it's almost in our DNA, we look at it and say to ourselves, it's the fight or flight response. You know, when you read something and if your name is in that complaint or in that charge, or somebody's saying, oh my God, this is what Shari did to me, the first thing you do is get defensive and how do you react? And working through that is one of those areas that we really need to spend a lot more time on than we have in the past.

- You know, you have a really unique experience with the Pinnacle Employment Law Institute and you're a recognized speaker. You do a lot of speaking, we've talked about that. As you think about HR professionals preparing, what is the training they need to do on their side? I mean, obviously there's training we need to give to our employees, but I think about ourselves and how we need to evolve our own awareness. What are some things that you're seeing or some trends where you're like, hey, you know what, you gotta really dig into this so that you can upskill yourself in these kind of topics and protect your organizations?

- So I think there are two or three that are really important. The first one, and I think we touched on a moment ago, is this issue of retaliation, it is by far the largest area that the EEOC deals with in terms of charges. And I can't tell you the number of cases I have in my office right now where the only reason why the case is still surviving is because somebody said something or did something stupid after whatever it was, and the rest of the case is thrown out, but the retaliation is still there. So that's one component. I also think that there is a level of AI understanding that we need as organizations. We can't be an ostrich, you can't stick your head in the sand and say, we're not gonna deal with this. I think the reality is we need to find what is it that our organization is going to use? How are we gonna use it, and what skill sets do our own folks need to have? And to your point of upskilling them to be on the forefront of what we need to do? There are things that you do and that I do on a daily basis, certain things of which can be done with AI support to free us up to do other things, which is all good. But there's that downside too. If we think about the very first case that was filed in this space was a Mobley decision that's still working through the California courts. And the whole issue was or is how the algorithm is getting put together. And the EEOC recently settled the case in similar fashion as it related to age. And so we start to look at these pieces and the only way HR is gonna get it is to sit down and delve into it and become not necessarily experts because it's gonna evolve so quickly, but to have an idea of, hey, here are the hot button issues that we need to be aware of, not just internally. And I think this was an important part of what the EEOC was looking at. You can't copyright an algorithm, so you have to appreciate the fact, well, it's like we all joke in our old HRIS systems, right? Bad information in, bad information out, and AI's the same way. So that's another area I think that folks need to really take a look at. And the other, the last area I think that people really need to dive into is to appreciate that compliance is not a bad word. And what I mean by that is, look, if you view the federal laws and the state laws where you're at as the floor and look at the culture that you wanna have, they're really a guidepost to help you get to where you want to go, as opposed to, oh my God, there's all this tactile stuff I have to do.

- You know, it's funny, as you were talking about AI, and so we're both of an age, I'm not gonna write us out on how old we are, but we're both of an age where we didn't have the internet when we were young. So, you know, we saw the internet come to life, we saw those tools, we are kind of the first generations to have cell phones and all that kind of stuff. And it's funny, I think about using things like ChatGPT is I wonder if it's akin to how people who are our age felt when search engines started and they were like, oh my gosh, I don't know how to use this. Is it safe? I'm putting information. How do I run queries? And like all of that stuff. And it's really the first time I've thought that is like, I can't live without my search engine now. Like, you know, I spend half my day in Google googling different things and doing research and it's such a great tool. So I think AI, like you said, it's not going away. We have to figure out how to use it. And I think some of the fears are genuine because we've learned about technology design bias as we've gotten older and things like deep fakes, which I haven't seen any in my organization. So I mean, that's a whole nother like thing that I don't know enough about. But you're right, like we as HR professionals really need to dig into some of this stuff and be more aware of what's happening to a point where we can articulate how we wanna handle it in our organization. So I really appreciate that. You know, I wanna switch gears a little bit. You have a really unique role with SHRM, you're part of the Northeast Membership Advisory Council, so MAC, they have a couple different regions where there are MAC representatives and you get to spend some time really helping specify legal changes or trends that you're seeing. And you are in the Northeast so I'm curious specifically about New Jersey, that area. What are some big things you're seeing at the state level that those that are located there should think about?

- Well, I'll tell you, it's always fun to be home and focusing in the Garden State. We've got this crazy new law here in Jersey that I think every organization has to pay attention to, even if they're not currently utilizing it. And a lot of it has to do with looking at the current full-time employees or FTEs that you have, because we now have a temporary bill of rights for temporary employees and regulations that are not as helpful as they could be. And between the staffing agencies and the employers, the challenge with this law is that it requires a level of intimacy between the staffing agency and the organization like we've never seen before. So for the biggest component of this is of course about cash. And so what they're requiring is paying a temporary employee the equivalent not just salary to the FTE they're working next to, but the benefits.

- Wow.

- Which means that you then have to share information with your staffing agency that you never would ever do in the past, let alone with a competitor. So now it's a level of intimacy that these organizations have never considered doing. And when we were younger,

it was easy. You pick up a phone, you call the person you know at the local staffing agency, "Hey, I need two or three people to come in and file." It's not that simple anymore. And it's a challenge when we start getting into all of these other issues that a lot of organizations haven't thought about because, well, if I don't have a temp or a temp agency or whatever, till I need it, it doesn't matter. And oftentimes, as you know, if you don't use a lot of temps, that time when you do, the last thing you're thinking about is, oh, well, what is my benefit package like, and how do I make sure that it's equal? And then when the staffing agency turns, now you're gonna start shopping staffing agencies, because now you need a level of comfort with a staffing agency that's very different today than it was 10 years ago.

- Yeah, I can't imagine giving that information to a staffing agency 10 years ago. I'd be like, you want what? No, I'm not sharing that. You're gonna go share that with somebody else. So how are those legal agreements looking? Is there requirements on the staffing agency side not to share that information to other companies? I'm just curious if you know, if there's information around that.

- Well, it's been interesting because the most recent draft of regulations that came out as proposed regulations did not address to any significant degree what you're asking about and what it has caused is a real conundrum between organizations and their staffing agencies and how do we do this? And what I've been telling people is, listen, no matter what side you're on, you need to have that moment where you sit down and say, how do we really wanna work this out? And the agreement now between the staffing agency and the organization becomes really important because now we start talking about all the other things that we deal with in HR, like PHI, and you know, I know and acronyms, so personal information that may be going back and forth with folks. And people start sounding like, blah blah-ing idiots, because they have no idea what they're saying. So I think that's sort of where it starts for me here in Jersey. It doesn't stop there. We had some of the same issues that we're seeing around the country. We talk about, we've already got the paid leave component, but how it evolves and the whole cannabis thing, and the certainly non-competes are big, or the lack thereof. But that temp agency piece is sort of the newest fun we're dealing with in the Garden State.

- As you think about temp agency, it makes me think more about the shifts we've seen in remote work, the gig economy, other employment trends, how do you see, how do you see workplaces or workplace policies changing? You know, I think about gen Z, especially, as they're kind of like crafting their own roles. I'll take a little bit of this, I'll do a little bit of that and I'll create my own income and I can use healthcare.gov for my insurance. So that's not even necessarily a ticket that you need to check off as an employer, how do you see that kind of evolving as we think about workplace policies?

- I think it's gonna be a real challenge, and maybe I can put it this way, I mean, earlier today I was working on some RFPs for some of our clients, and I recognize that some of my colleagues have been taking last year's version and slapping this year's year on it. I'm like, hold it. There are evolutions. And in the same way, I think we need to be very thoughtful. I've certainly had clients, and I'm sure you have as well, that have come in and said, listen, we have the ability now to hire from anywhere and we wanna hire from anywhere. And the challenge with that is they don't appreciate what that does to a handbook or to a policy or to an investigator that needs to take a look at harassment concerns, that's all virtual, and what are the platforms we're using and how are we connecting? And then we get into things like natural disasters or what we saw happen in Hawaii recently, where you have issues going on and where are the redundancies and how do we do things? And so I think the biggest challenge is gonna be to convince HR that we need to step back. We are much more important today than we ever were before. The operation is not going to work if we can't come to the table and say, listen, we can be pragmatic and we can be agile, but we need to build that in a little bit and be much more intentional in how we do it.

- I think that is the best way to end our conversation on a high note as to all the amazing things that HR can and will be doing in the next couple years. You know, I'm excited to be part of this industry and I'm thankful for the person who got me hooked on HR to begin with. So this has been a great conversation as always, and thanks for joining me on the podcast.

- Shari, it's been my absolute pleasure. I always enjoy spending time with you.

- 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.