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Texas
Employment Law Letter

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LITIGATION

# Lawyers behaving badly: The Texas Supreme Court chimes in

by Michael P. Maslanka, UNT-Dallas College of Law

*Recently, the Texas Supreme Court set aside a verdict against an employer when the plaintiffs' lawyer made appeals to racial prejudice and gender bias during the trial.*

## Car crash

An employee of New Prime Inc. rear-ended Christine John, a black woman, and Christopher Lewis, a black man. New Prime conceded negligence, and the court held a trial solely on damages. That's when the bad behavior started.

The plaintiffs' lawyer commented, "There are studies where women are awarded for the same injuries less than men." Later in jury selection, the lawyer reiterated that "there are studies that show a woman --- her damages are less than man for the same injuries, and sometimes it's like a woman --- her damages are actually less than a man for the same injuries, and sometimes it's like if someone is --- does it matter if my client is African-American?"

So far, these are odd comments but nothing improper. But, as Sherlock Holmes would say, "The game is afoot, Watson!"

Evidence was taken on damages, then came the closing argument. The plaintiffs' lawyer argued that New Prime's defense lawyer wanted a discount on his client's actual damages. "[T]hey want a discount, and I don't think you have to discount a human beings life. And I ask you to award full damages." The lawyer predicted that the defense lawyer would ask for "like $4 to $5 million."

The defense lawyer did argue for a lesser amount, as you would imagine. (That's the defense lawyer's job.) But the lawyer asked for $250,000. Then, the plaintiffs' lawyer got up in rebuttal and blamed the defense for improper bias:

"We don't want the 4 or 5 million dollars." (Geez, the defense lawyer never asked for that!) "We don't want their $4 or $5 million dollars. That's not fair. Because it's a woman, she should get less money? Because she's African-American, she should get less money? No. We're going to fight because we believe in the jury system."

Of course, the defense lawyer never made these arguments. But the jury apparently didn't appreciate this and awarded $12 million to John and $450,000 to Lewis. The case was appealed, and the Texas Supreme Court had none of this tactic. Here's the court:

> One need not be a linguistic expert to understand the subtext of this argument. Counsel pointedly insinuated that [New Prime] sought a lower damage amount because John is a Black woman. That is not a request for the jury to set aside implicit bias [as argued by the plaintiffs]; that is a charge of race and gender discrimination. . . . Extreme and unsupported personal attacks on the opposition "damage the judicial system itself"

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> by striking at the impartiality, equality, and fairness of justice rendered by the court.

The case was sent back to the trial court to do it right. *Alonzo and New Prime Inc. v. John and Lewis* (Tex. May 10, 2024).

### Bottom line

Lawyers need to let the justice of their cause speak for itself. The jury could have awarded the amount the plaintiffs sought without the use of this tactic. Did the plaintiffs' lawyer snatch defeat from the jaws of victory? We'll never know, but that's likely the case. Look out for this tactic in your trials, and, as the employer did here, object when used.

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*LITIGATION*

# Lights, action, discovery dispute: A Texas tale

by Michael P. Maslanka, UNT-Dallas College of Law

*A TV host resigned because her employer didn't respond when she complained about her cohost's behavior. After her cohost was fired a few months later, she sued. During the pretrial fact-finding stage (discovery), the parties disagreed over what information they were required to exchange. Let's take a look.*

### Combustible

Sydney Watson was the cohost of a TV show for Blaze Media, located in the Dallas-Fort Worth area. She and her cohost, Elijah Schaffer, clashed. According to Watson, he was "aggressive" and "overly misogynistic" toward her and demonstrated "anti-Jewish" bias and made "antisemitic" comments.

Watson complained to management, which allegedly was unresponsive, and she ultimately resigned because of the working conditions. Schaffer was fired a few months later, and Watson then filed a lawsuit alleging sex and religious discrimination. This brings us to the pretrial fact-finding dispute.

### Fight over answering written questions

In a lawsuit, each side can send written questions to the opposite party (i.e., "interrogatories," from the root word "interrogate"). Here, Watson's lawyers wanted to know, among other items, the following information:

- Interrogatory No. 4: State all reasons Blaze ended its business relationship with Schaffer.
- Interrogatory No. 8: Identify every person who made a complaint about Schaffer's conduct.
- Interrogatory No. 9: Describe all actions Blaze took regarding all complaints made to Blaze about Schaffer's conduct.

Blaze objected to these interrogatories. Ask yourself: What could the basis of the objections be? How do you think a court might rule on the objections and why?

OK, now back to regularly scheduled programming!

### No. 4: Reasons for ending relationship with Schaffer

Blaze argued this question invaded Schaffer's privacy concerns. Also, he was fired after Watson resigned, so the information was irrelevant, and it didn't need to answer.

Not so fast, said the court. Central to Watson's claims is whether Blaze knew about Schaffer's alleged conduct. Maybe Blaze fired him for his conduct, or maybe it was for another reason. After all, he was fired just months after she left.

Privacy concerns? The court noted the parties can always agree to a protective order on the dissemination of the information and any exception to disclosure (such as private medical information). As an aside, it strikes me that Blaze protested too much on this item. Watson's lawyers are going to think the company has something to hide.

### No. 8: All persons who made complaints about Schaffer's conduct

Way too broad a request, argued Blaze. The court agreed. Here's some great language from the court's opinion that you, too, can use:

> [Employees] in employment discrimination cases do not have an "unlimited ability to delve into their employers' policy and personal records, even when [they] have alleged a pattern of discrimination." . . . In discrimination cases, "the relevance of co-workers' discrimination complaints is a fact based determination" limited to "(a) the same form of discrimination, (b) the same department or agency where [the employee] worked; and (c) a reasonable time before and after the discrimination complained of."

Applying this legal principle to this case, the court limited the answers to complaints of sexual or religious discrimination for the two calendar years covering Watson's employment and shortly after her resignation.

### No. 9: Blaze's responses to complaints

How Blaze treated other complaints is relevant to Watson's claims. Did Blaze treat claims about Schaffer seriously? Were they ignored? Why? *Watson v. Blaze Media, LLC*, Case No. 3:23-CV-00279 ( N.D. Tex., May 3, 2024).

### Bottom line

Fact-finding is important. A party to a lawsuit needs to know the facts to argue their case or to use them as leverage for a settlement.

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*DISCRIMINATION*

## Will the tail wag the dog? Pretext vs. pretext plus

by Michael P. Maslanka, UNT-Dallas College of Law

*How does an employee prove discrimination to get to a jury? The Texas Supreme Court has agreed to answer this question, and they'll make a choice between pretext alone versus pretext plus something more. Read on.*

### Big picture

An employer offers seemingly valid reasons for taking an adverse employment action. But that isn't the end of the analysis. An employee is entitled to show the employer's reason is a pretext—that is, a false front for unlawful discrimination.

But to get to a jury, is it enough to cast doubt on the reasons, or must the employee show some evidence of unlawful discrimination, as well? This is what the Texas Supreme Court will be deciding in interpreting the Texas Labor Code.

### Facts

Loretta Flores works for the Texas Health Sciences Center in El Paso and applied internally for a new job as the chief of staff to its president. The position required an advanced degree plus 10 years of progressive experience in a complex organization. She is an incumbent employee, but a younger applicant was selected, so she sued for age discrimination.

Both Flores and the selected candidate met the minimum qualifications for the position, but the president selected the other applicant because she had earned an MBA and was a certified public accountant (CPA). The president honestly believed these qualifications would aid in her performance in the new role.

Flores argued she believed she was nonetheless better qualified than the selected candidate while acknowledging she doesn't have an MBA and isn't a CPA. Also, the president did make a comment about her age—namely, asking how old Flores was in reference to an earlier age discrimination complaint she had made.

The El Paso Court of Appeals held these arguments on pretext were enough to get her claim to a jury. The university appealed to the supreme court, arguing that, in these circumstances, pretext alone was insufficient to get to a jury; instead, there must also be some evidence of age discrimination (pretext plus). *Texas Tech University Health Sciences Center-El Paso v. Flores.*

### Bottom line

Something tells me the supreme court didn't take this case to say, "Good job, appeals court!" I'll keep you posted. My prediction: The court won't allow the tail (i.e., minor issues) to wag the dog (i.e., the rest of the case). Stay tuned.

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*FAMILY AND MEDICAL LEAVE*

## Texas court declares: No FMLA notice, no FMLA claim

by Michael P. Maslanka, UNT-Dallas College of Law

*Recently, the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) reaffirmed its commitment to the principle that no Family and Medical Leave Act (FMLA) claim exists unless the employee gives notice of an intent or a desire to seek or take FMLA leave. Texas employers aren't required to be "clairvoyant."*

### Hallway conversation

Elizabeth Cerda worked for Blue Cube Operations. In 2018, she told her supervisor she was going to visit her ailing father during her 30-minute lunch break to "make sure he had his medicines and something to eat." After a while, the supervisor helpfully suggested she check with HR to determine if she could use FMLA leave for this purpose.

Sometime in 2020, Cerda approached an HR manager in the hallway and, in a very brief conversation, expressed a desire to explore "possibly getting FMLA for [her] dad." That was it, and she continued to use her lunch breaks to visit her father.

One problem: Cerda consistently exceeded her allocated lunch break without reporting that she was doing so. Coworkers became upset and informed management of her conduct, and the company concluded she had been paid for at least 99 hours she didn't work.

Upon being told she needed to use personal sick days to cover her absences, Cerda threatened to infect her coworkers the next time she was sick. (At the time, she had contracted COVID-19.) She was fired.

### FMLA violation?

Under the text of the FMLA, employees can sue their employers for failing to give them FMLA leave if requested or for frustrating their access to FMLA leave by failing to give them sufficient information on how to ask for it. These are called interference claims. And Cerda made one in a lawsuit against her former employer.

Here's the test:

> [For there to be an interference claim,] the employee must give the employer notice of an intention to take leave. . . . The critical question is whether the information imparted is sufficient to reasonably apprise it of the employee's request to take [covered FMLA leave]. . . . While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant.

Note the key modifier here: "Reasonably" modifies "apprise." It isn't merely "apprise" or "tell" but rather do so in a reasonable manner—that is, a manner that gives a true heads-up to the employer about the employee's intentions.

And what do we have here? A desire to "possibly" obtain FMLA leave. Aspirations don't count. Listen to the court: "Even drawing all inferences in Cerda's favor [this is what courts are required to do in deciding whether to grant a knockout punch for the employer], the record shows, at most, that Cerda sought to meet with [HR] to obtain more information about [her] potential FMLA eligibility." Not even close! Case tossed. *Cerda v. Blue Cube Operations, L.L.C.* (5th Cir., 2024).



### Bottom line

Words matter, and they matter a lot. Or, as I tell my students, "Surgeons have scalpels, and lawyers have words." HR professionals also have words, so pay attention to their use or lack of use. You'll be glad you did.

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*DISCRIMINATION*

## Key element missing from IT worker's accommodation and retaliation claims

by Michael P. Maslanka, UNT-Dallas College of Law

*The U.S. 5th Circuit Court of Appeals (whose rulings apply to Texas employers) recently issued an opinion identifying the key element of reasonable accommodation and retaliation claims. What do you think it is? As you read through the facts, consider your answer.*

### Suffering from depression

Quincy Taylor, a black man, worked for the University of Mississippi Medical Center's IT department. Here's a timeline:

- 2012: Taylor applies for a job and states in his application that he's "being treated for depression."
- 2014: He tells his supervisor it was mentally and physically exhausting to provide "ongoing [IT] support" to "multiple departments" and suggests a reduced workload.
- 2018: He's passed over for promotion and complains to HR about "mismanagement of personnel and unequal compensation [that] has led to burnout, physically and mentally."
- 2018: At the same time, he emails his supervisor, "Although no other technician has had this type of [increased] workload, I've done this willingly for the past two years in order to support the mission of [the hospital] while under much stress."
- April 2018: He meets with his supervisor and resigns, telling them he's suffering from depression. He then sues for disability discrimination and retaliation.

### Failure to accommodate a disability claim? What's missing?

The failure to accommodate a disability is a separate violation of the law. Here, depression is a legally recognized disability, but there's no failure-to-accommodate claim.

Why not? After all, Taylor told the hospital he suffered from depression! But the hospital can't accommodate a conclusion, only specific limitations from the disability. (I tell my students that a conclusion is like a sprinkle-covered doughnut: It looks pretty, is very tasty, and has zero nutritional value.) And it's the employee's duty to inform the employer about those limitations. Taylor never did, so claim dismissed.

### Retaliation claim: What's missing?

A retaliation claim requires employees to show they engaged in "protected activity" and suffered an adverse employment action as a result. What's protected activity? It can be when employees oppose what they reasonably believe is a violation of the laws against discrimination.

Taylor did protest not getting the promotion but didn't claim it was because of any protected classification (here, race). Yes, he resigned, but he didn't claim he was resigning because of unlawful racial discrimination. He complained about unfairness but never tied it to a legal violation. The closest he came was complaining that a black woman received the promotion. He called her a "bright-skinned female." That's not race discrimination, and it's thin gruel when it comes to sex discrimination.

In effect, there was no opposition to an unlawful act, only opposition to being insufficiently appreciated. Claim dismissed. *Taylor v. University of Mississippi Medical Center* (5th Cir., 2024).

### Bottom line

Always scrutinize disability and retaliation claims to see if the employee is providing what I call the "secret sauce," without which there's no claim, no matter what other facts are alleged. It's your path to winning!

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*WORKPLACE ISSUES*

## Research evaluates whether #MeToo was bad for women

by Michael P. Maslanka, UNT-Dallas College of Law

*As a child, I loved listening to the radio. I still do. All sorts: sports radio, talk, interview programs, NPR. And it was on NPR that I listened to an interview by emerging scholar Marina Gertsberg on her new research, "The Unintended Consequences of #MeToo—Evidence from Research Collaborations," which she presented at a meeting of the American Economic Association in 2024 in San Antonio. You can find her PowerPoint with a quick Internet search.*

### How do you succeed as an academic?

A large part of academic success is how much research you publish. And getting published as a junior faculty member (mostly women) is often dependent on a senior professor's (mostly men) decision to bring you onto a project.

So Gertsberg posed the following question: Did #MeToo, on net, increase or decrease the amount of research collaboration between women and men? She found it decreased by a lot. (The stats and her methodology are in the PowerPoint.)

Why? According to Gertsberg, the #MeToo movement:

- Increased public pressures for institutions to side with accusers;

## Q & A: Regaining your balance when you loan money to employees

by Jacob M. Monty, Monty & Ramirez LLP

**Q** ***We loaned an at-will employee money as an advance, and they signed a repayment agreement that said if their employment ended before the loan was fully repaid, the remaining balance would be deducted from their final paycheck. What do we do if the remaining balance exceeds the total amount of the final paycheck?***

You are permitted to withhold an entire paycheck, even below the minimum wage requirements of the Fair Labor Standards Act (FLSA), for cash advances such as these. It's important to note, though, that only the principal may be deducted from the employee's wages because deductions for interest of administrative costs on the advance are illegal as far as cutting into the minimum wage requirement.

Also important to note is that this type of deduction must be authorized in writing by the employee to be valid under the Texas Payday Law. Seeing as there is a signed repayment agreement here, the withholding of the employee's paycheck is admissible. Refer to Section 30c10(b) of the Field Operations Handbook, regarding voluntary assignment of wages, loans, and advances, for additional details here.

Best practice for employers in this scenario is to secure the written agreement with the employee on a promissory note listing out the amount advanced, the date of the transaction, the full name and Social Security number of the employee, the amount and frequency of repayment installments, and—most importantly for this situation—language stating the company has the option of taking the former employee to civil court. Should the remaining balance exceed the total amount of the final paycheck, having this repayment enforcement in writing ensures the employee will remain on the hook for the outstanding balance.

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- Created a higher perceived risk of sexual harassment allegations when policies are unclear about which conduct or behaviors are violations; and
- Increased the probability of females reporting males.

Gertsberg's bottom statistical line from these findings: When sexual harassment policies are ambiguous and the number of reported sexual harassment incidents is high, then the decline in collaboration between men and women is larger.

## Vague policies

Gertsberg gives this as an example of a policy:

> Examples of verbal sexual harassment include conduct such as sexual flirtation, advances or submissions or propositions or requests for sexual activity or dates; asking about someone else's sexual activities, fantasies, preferences, or history; . . . turning discussions at work or in the academic environment to sexual topics and making offensive sounds such as wolf whistles; . . . invading a person's personal body space, such as standing closer than appropriate or necessary or hovering; displaying or wearing objects or items of clothing which express sexually offensive content; or delivering unwanted letters, gifts, or other items of a sexual nature.

Let me ask the reader: Does any of this policy seem overly broad? Too ambiguous? Unduly subjective? A policy that could be twisted to fit a predetermined outcome? Would you change it as a result of your answers and how?

## What to do?

Gertsberg's research is corroborated by research at Cambridge University. It poses a very real concern not only in academia but also in the corporate world, where advancement depends on analogous metrics.

Women shouldn't be penalized because of this apparent #MeToo dynamic. Here are some suggestions:

**Get rid of zero-tolerance policies,** for which I have zero tolerance. These policies tend to drive decision-making, resulting in the alleged harasser's discharge. They unduly limit an employer's available options.

**Squeeze out overly broad and subjective language for the antiharassment policy.** Male managers will hesitate to mentor women (such as taking on a business trip for client development) with policies like the one above, as Gertsberg believes her research demonstrates.

**Explain the rationale for the policy.** Don't seek to engender fear; rather, look to inspire mentorship.

**Consider why you have a given policy.** It benefits all of us—men, women, and the organization—to ensure all employees' full potential is realized. There are few sadder sights than truncated hopes, wasted talent, and dashed expectations.

And speaking of mentorship, we do what we're incentivized to do. Evaluate managers' effectiveness in how well they mentor those coming up the ranks, both men and women. Make this a valued mindset, and the rest will take care of itself.

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ELECTRONIC WORKPLACE

# AI: Take these steps now to safeguard your organization

by James D. Meaders, Parsons Behle & Latimer

*No other technology today has the level of hype artificial intelligence (AI) has. Countless news articles, blog posts, and videos have predicted everything from drastic changes in the workplace to the complete destruction of humanity. With all this discussion, it can be difficult to determine exactly how, and to what extent, your organization will be affected. Work product created by AI is fraught with risk. For example, some AI tools can "make up" information (known as "hallucinations"), rendering it unreliable in certain contexts. Also, if AI is trained based on someone else's intellectual property, it may produce results that infringe on that intellectual property. And, information provided to an AI tool, if used to train future versions of it, can potentially be extracted, risking trade secret exposure.*

*With so many unknowns, here are three practical (and reasonable) actions you can take to ensure your organization is protected.*

## Three steps

First, ensure your organization has a policy to govern how AI is to be used or not used. A starting point may be creating a blacklist of AI services that aren't permitted, including free online AI services whose reliability, data privacy policies, and AI training methodologies can't be easily determined.

Also, as AI is incorporated into your organization's software and services, it may be helpful to train employees on how confidential information is to be used with these tools and services.

Second, as your own providers add AI tools to their services, review how your current service agreements allocate the additional risks. Ensure the terms in your service agreements clearly indicate how information provided to the AI may and may not be used, and ensure you have some level of notice and control over updates and changes to the underlying AI that may affect your organization.

Third, develop a rubric for evaluating new AI tools for use in your organization. AI is inherently less predictable than other forms of software. You may wish to evaluate AI tools in the same way you might evaluate a new employee rather than a new productivity tool. What training has the AI received? What are its strengths? Weaknesses? What are its liabilities and work history? Any references?

### Takeaways

Although no one knows what AI's full effect will be, taking these steps can put your organization in a better position to safely adopt and use the latest in AI technology. ■

*WORKPLACE ISSUES*

# Despite popularity of remote work, employer comfort levels often still shaky

by Tammy Binford

*Legions of office workers have been skipping the commute for a few years now, working remotely in the comfort of their homes and relying on technology to keep them connected to their colleagues. Especially during the pandemic, employers and employees alike were relieved that work could go on without people gathering in the office. But now, employers are showing signs of discomfort with so much remote work, leading to questions about how the remote-versus-in-office debate will shake out.*

### How employees are feeling

A survey from Resume Builder released in December found that remote workers were 24% less likely to be promoted in 2023 than hybrid or in-office workers. The company polled 1,190 full-time employees who worked jobs that were possible to do remotely. The survey consisted of 417 remote workers, 567 hybrid workers, and 206 fully in-office workers.

The survey results showed that remote workers were the least likely to be rewarded with promotions and raises, but the remote workers were equally as likely or more likely to report being more productive, happier, and less stressed than their in-office or hybrid colleagues.

The survey also showed that in-person workers were more likely to be unhappy and struggling with stress. The remote and hybrid workers reported better mental health and work-life balance, as well as increased happiness on the job.

The poll was conducted in November 2023, and the in-office workers were more likely to say they planned to look for a new job in 2024. Remote workers were least likely to say they would look for a new job, and most said they were content with their remote work arrangement.

Since the proliferation of remote work, managers have struggled with how to cope with the change, according to Resume Builder's Chief Career Advisor Stacie Haller.

"This is resulting in some workers losing out on advancement and raises," Haller said in a statement about the survey. "Remote workers need to be more proactive when working remotely. Scheduling weekly or periodic meetings with managers to review their work and get feedback on how to achieve a promotion or higher salary is one way to make progress."

### How employers are feeling

Some employers are showing signs of discomfort with so many remote workers and are looking at how work-from-home is going. Some are trying to entice workers back to the office, but others are insisting on a return. And employees who appreciate the benefits of working from home are pushing back.

Computer maker Dell made headlines in March when it was reported that fully remote Dell workers would not be eligible for promotion. That seems to fly in the face of what Dell Chairman and CEO Michael Dell wrote in a September 7, 2022, post on LinkedIn chiding CEOs who were pushing employees to return to the office.

Dell said from his experience, "if you are counting on forced hours spent in a traditional office to create

collaboration and provide a feeling of belonging within your organization, you're doing it wrong."

News reports say the new Dell policy requires employees to come into the office at least 39 days a quarter, which roughly works out to three times a week. Workers can still stay fully remote, but they won't be considered for promotion, according to the reports.

Dell isn't the only employer focusing on getting employees back to the office. Giants including SAP, Google, Bank of America, AT&T, Goldman Sachs, UPS, and others have taken steps to get employees back in the office.

In February, *The Washington Post* quoted Joellen Perry, a spokeswoman for SAP, as saying "Striking the right balance between remote and onsite work helps drive productivity, innovation, and employee well-being. We're evolving our flexible work policy to align with best practices in the market and our own experience as a frontrunner in hybrid work."

## *Tips for making remote work*

The rise of remote work began before COVID hit, but the pandemic put the change in high gear. How it will all shake out is anybody's guess since the situation keeps evolving, but some lessons have been learned that employers can draw on.

At the height of the pandemic, *MIT Sloan Management Review* published a list of principles to help manage a remote workforce. Among the suggestions: "Maintain frequent, transparent, and consistent communication."

Also, "manage the paradox of remote work-life balance." The article pointed out that working from home has its advantages (no commute and schedule flexibility, for example), but remote work also can make workers feel like the lines between their professional and personal lives are blurred in a harmful way.

How can employers help? The article suggests employers should provide flexibility in work time rather than insisting on rigid work hours. Also, allowing team members an extra paid time off day to promote rest can help. ■

## Q & A: Implement fair, transparent compensation practices

by Jacob M. Monty, Monty & Ramirez LLP

**Q** ***Are there any laws regulating whether managers and supervisors are allowed to know the compensation of the employees they supervise?***

There's currently no law that regulates whether managers and supervisors are allowed to know the compensation of the employees they supervise. Employers may therefore implement policies restricting the sharing of this information. However, you cannot restrict employees in nonsupervisory positions from discussing their compensation with their coworkers.

Section 7 of the National Labor Relations Act (NLRA) ensures employees, even in non-union settings, can "engage in other concerted activities" such as the right to discuss wages amongst themselves. Most employees in the private sector are covered under the NLRA. However, the law doesn't cover government employees, agricultural laborers, independent contractors, or supervisors.

Under the NLRA, the term "supervisor" means any individual having the authority to hire, fire, transfer, suspend, or to effectively recommend such action along with the use of independent judgment. Therefore, supervisors generally cannot assert claims for violations of "concerted activity" rights.

Employers may not want their employees sharing their compensation with their supervisors or their coworkers. However, it would be difficult if not impossible to prevent such information from leaking. In addition, employers may stifle employee morale or create an unwanted narrative of disparate treatment. As a best practice, you should implement clear and consistent compensation guidelines. Being fair and transparent with compensation may incentivize employees to progress with an employer and likewise promote employee retention.

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