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Trends in Employment Law: Foundations and Nonprofits

Presented to The Funders Alliance

Presented by Hayley Haldeman and Carsen Ruperto

May 2023

Welcome & Panelist Introductions



Hayley A. Haldeman

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Hayley Haldeman

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Hayley serves as Counsel in the Firm's Nonprofit and Tax-Exempt Organizations Group. She is an attorney and nonprofit leader with a decade of hands-on experience in nonprofit governance, law, and strategy.

From 2019 through 2022, Hayley served as interim, then permanent, Executive Director of the Mattress Factory, a contemporary art museum in Pittsburgh, PA. During her tenure, she steered the organization through institutional transition and the COVID-19 pandemic, erased a significant projected deficit and grew the organization's endowment, and established and strengthened partnerships with community stakeholders. Through this role, Hayley has strong first-hand experience managing the unique challenges that nonprofit boards and leaders face.

Prior to her role at the Mattress Factory, she was a litigator for seven years in the Pittsburgh office of a large international law firm. Her pro bono practice focused on nonprofit formation and governance, and she counseled various regional nonprofit organizations on a variety of issues. Pennsylvania Super Lawyers recognized Hayley as a "Rising Star" throughout her practice (2014 – 2019).

Hayley is an adjunct faculty member at Carnegie Mellon University's Heinz College of Information Systems and Public Policy. Her current courses focus on museum operations and workplace management for nonprofits, respectively.

A Pittsburgh native, Hayley is active in civic and community affairs and currently sits on the Board of Directors for the United Way of Southwestern Pennsylvania, among other engagements. She has previously served in leadership and board roles with various nonprofit organizations and civic initiatives, including as the former chairwoman of the Allegheny County Bar Association's Arts & Law Committee. *Pittsburgh Magazine* recognized Haldeman as a "40 Under 40" awardee in 2018.

Recognition

- Awardee for Community Service, Josh Gibson Foundation (2021)
- *Pennsylvania Super Lawyers* Rising Star (2014-2019)
- *Pittsburgh Magazine* 40 Under 40 (2018)

Activities and Affiliations

- Board of Directors, United Way of Southwestern Pennsylvania
- Steering Committee, 2022 Eradicate Hate Global Summit

- Allegheny County Bar Association Arts & Law Committee (Committee Chair: 2016-2018)
- Weekly mentor for Sarah Heinz House MACS student, Be a Middle School Mentor (2014-2019)

Presentations

- Co-Presenter, "Strengthening Nonprofit Boards & Committees," CFA Society Pittsburgh 2023 Endowments and Private Foundations Conference, May 10, 2023
- Presenter, "Nonprofits 101: Structure, Administration, and Governance," Pennsylvania Advocacy and Resources for Autism and Intellectual Disability, April 26, 2023
- Co-Presenter, "Governance and Legal Trends for 2023: Foundations," Grantmaker Toolkit webinar series, March 30, 2023

Prior and Present Employment

- Adjunct Professor, Carnegie Mellon University – Heinz College of Information Systems and Public Policy

Areas of Focus

Practices

- Charities and Nonprofit Taxation
- Corporate Governance

Industry Sectors

- Nonprofit Entities

Education

- University of Virginia School of Law, 2012, J.D
- George Washington University, 2009, B.A., *summa cum laude*, International Affairs with Minors in History and Art History

Admissions and Qualifications

- Pennsylvania
- US District Court for the Western District of Pennsylvania



Carsen N. Ruperto

Shareholder, Pittsburgh

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Website bio: <https://www.dentons.com/en/carsen-ruperto>

Carsen is a Shareholder in the **Employment and Labor** Group and Chair of the Dentons Cohen & Grigsby Labor and Employment Group. She recognizes the importance of a productive workforce to a successful business. She focuses her practice on helping her clients develop, improve, and maintain quality relationships with their employees to create an atmosphere in which both employees and businesses thrive. She also serves as a strategic advisor when the employment relationship faces difficulties, working to find the best resolution to the many problems that can arise.

Carsen understands that employment-related decisions are often sensitive ones. She serves as a business partner from the start, working to avoid major litigation by providing training on employment issues and advising management teams on compliance with workplace laws and regulations. Carsen thrives when navigating the day-to-day concerns facing clients in the human resources space.

Carsen also has a unique understanding of the needs of employers with a unionized workforce. She leads management teams in collective bargaining, handles unfair labor practices, and strategizes with employers during union avoidance campaigns. Carsen routinely defends her clients in grievances and union labor arbitrations. She also assists clients when civil litigation arises, representing employers in their defense of discrimination, retaliation, harassment, wage and hour, and other employment-related claims.

Experience

- Defends employers against union grievances and in labor arbitrations
- Counsels employers on compliance with state and federal employment laws, including the FMLA (family medical leave), FLSA (wage and hour), USERRA (military leave and reemployment), and ADA (disability)
- Represents employers in unfair labor practice proceedings in front of state and federal labor boards
- Defends employers against charges of discrimination in front of the EEOC and PHRC
- Conducts internal investigations for clients needing support in the face of a complaint
- Represents clients in unemployment compensation eligibility determinations and hearings
- Defends clients in state and federal employment audits
- Counsels employers regarding employment policies, agreements, non-competes and restrictive covenants

Honors and Awards

- Selected to the Pennsylvania Super Lawyers Rising Stars list for Employment & Labor, 2018-2021 and 2023

Insights

- Co-Author, "**Update: NLRB General Counsel Issues Memo to Regions Advising on Severance Agreements and Beyond**," Dentons Insights, March 29, 2023
- Co-Author, "**The Sound of Silence: National Labor Relations Board Rules that Employers Cannot Offer Employees Broadly Worded Severance Agreements**," Dentons Insights, February 24, 2023
- Co-Author, "**Available Once Again: Provisional Employment Under the Pennsylvania Child Protective Services Law**", Dentons Insights, February 22, 2022
- Co-Author, "**Five things employers need to know about Allegheny County's paid sick leave ordinance**," Dentons Insights, December 14, 2021
- Co-Author, "**Pennsylvania Supreme Court rules that employers may be liable for workers' security check time**," Dentons Insights, August 12, 2021
- Contributor, "Developing Labor Law Treatise"
- Author, "NLRB Considers Graduate Students 'Employees' and Permits Union Organizing," Dentons Cohen & Grigsby Bulletin, September 1, 2016
- Co-Author, "Pennsylvania Legislature Passes Significant Amendments to Act 153 Clearance Requirements," Dentons Cohen & Grigsby Bulletin, July 8, 2015

Presentations

- Presenter, "What's Happening at the NLRB? What Every Employer Needs to Know," Dentons CLE webinar, November 9, 2022
- Presenter, "The Great Resignation: Why Employee Retention Isn't Just Good Business, It's a Legal Necessity," Dentons In-House Counsel CLE Program, February 2022
- Presenter, "The Changing Landscape of Employee Organizing: What Labor and Employment Attorneys Need to Know," Allegheny County Bar Association CLE program, May 2021
- Presenter, "The Life of a Labor Contract: Negotiating the Contract," Allegheny County Bar Association CLE, March 2020
- Presenter, "Harassment and HR Investigations in the #MeToo Era," Penn State Beaver's Continuing Education Series, October 2019
- Presenter, "How Innovative Cohorts Can Build Vital Connections Within Communities," PA Downtown Center's Innovation, Entrepreneurship & Economic Vitality Conference, June 2019
- Presenter, "Pregnancy Discrimination: Claims and Defenses," Cohen & Grigsby CLE Day, April 2019
- Presenter, "Best Practices in Managing HR Risk Exposure," Cohen & Grigsby Business Insights for Nonprofit Professionals Seminar, April 2019
- Presenter, "Wage & Hour, Independent Contractor/Joint Employment Issues and Changes at NLRB," Compliance During the Trump Administration Seminar, October 2017
- Presenter, "What's Happening at the NLRB, Recent Case Law Under the "Obama Board" and What to Expect with the New Administration," Healthcare Council of Western Pennsylvania's Annual Labor & Employment Update, May 2017

- Presenter, "The Fundamentals of Wage and Hour Law," Cohen & Grigsby CLE Day, April 2017
- Presenter, "The Fundamentals of Wage and Hour Law," C&G Academy, October 2016
- Presenter, "NLRB Decisions Affecting Unionized & Non-Unionized Workplaces," NBI Advanced Employment Law Seminar, December 2015
- Presenter, "Developments in Federal & State Laws," NBI Advanced Employment Law Seminar, December 2015
- Presenter, "Election Rules," NLRB, Cohen & Grigsby Academy, January 2015
- Presenter, "Document Retention Strategies," Warren Forest Higher Education Council, September 2014
- Presenter, "Affordable Care Act Refresher and Update," Healthcare Ventures Alliance Long-Term Care Seminar, May 2014
- Presenter, "EEOC Update," Human Resources Section of the PA/NJ Electric Cooperative, April 2014
- Presenter, "Affordable Care Act," Erie Regional Chamber and Growth Partnership's Business Growth Series
- Presenter, various training opportunities with individual employers

Memberships

- Vice President of Board of Directors, Valley Community Services
- Member, Dentons C&G Recruitment Committee
- Member, Allegheny County Bar Association
- Member, Pennsylvania Bar Association, Women in the Law Division
- Member, American Bar Association
- Co-founder, Athena Circle of Trust, Erie
- Former Member, Westminster College Alumni Council
- Participant, EDGE by Align Leadership, Leadership Development Program

Areas of Focus

Practices

- Labor Relations and Collective Labor Law Negotiation with Unions and Employee Representatives
- Human Resources Advice and Counseling
- Employment Disputes
- Internal Corporate Investigations
- Training
- Wage and Hour/Working Time/Overtime Litigation
- Employment and Labor

Industry Sectors

- Manufacturing

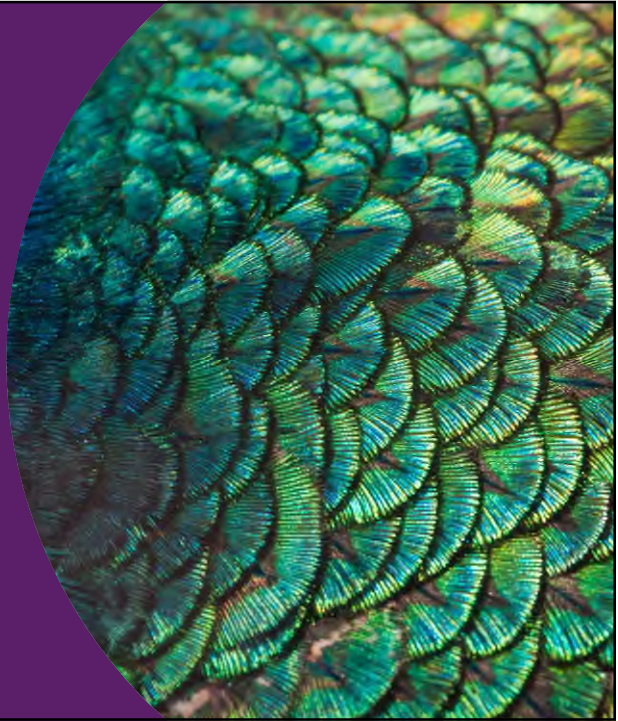
Education

- University of Pittsburgh School of Law, 2011, JD, *cum laude*
- Westminster College, 2008, BA, *magna cum laude*

Admissions and Qualifications

- Pennsylvania
- US Court of Appeals for the District of Columbia Circuit
- US Court of Appeals for the Third Circuit
- US District Court for the Western District of Pennsylvania

Introduction and Overview



Nonprofit Employment Law Trends Agenda

1. Introduction and Overview
2. Hybrid and Remote Work
3. Social Media
4. Independent Contractor Agreements
5. Hiring Practices and Job Descriptions
6. NDAs and Severance Agreements

Introduction and Overview

- Nonprofit employment law = employment law.
- Recognize unique aspects with governance and operations.
 - Board of Directors and fiduciary responsibilities.
 - Smaller organizations (under 50 employees).
 - Mission-driven organization.
 - (Greater) sensitivity to optics, credibility.
- Focus today on trends in employment law for small businesses (including nonprofits).
 - Both for organization/foundation itself AND as grantor.

Hybrid and Remote Work



Hybrid and Remote Work- Considerations

Remote
Work Policy

Collaboration
and Issues

Security and
Privacy

Pay, Leave,
and WC

Hybrid and Remote Work – Remote Work Policy

- **Recognize that hybrid/remote work is a benefit and requires set guidelines.**
- **Policy:** Realistic and flexible for employer
 - Definition of “remote” or “hybrid”
 - Eligibility and process.
 - Hybrid/remote at discretion of supervisor; in-person work still required from time to time.
 - Identify any standing in-person requirements.
 - Endeavor to provide advance notice.
 - Expectations and responsibilities.
 - IT and security
 - Protocol and modifications – Request process, “one offs”

Hybrid and Remote Work – Collaboration and Issues

Collaboration

- Alternatives to meaningful in-person opportunities
- Particularly important with new and/or junior employees
- Onboarding, feedback

Issues

- Recognize different learning and interaction styles for everyone
- Ensure approval is revocable and/or can be modified.
- Recommend standing review of hybrid work arrangement as part of annual performance eval.

Hybrid and Remote Work – Pay, Leave, and WC

- **Pay**
 - Non-exempt employees: Time tracking and reporting
 - Prohibiting work outside business hours
 - Business expenses
 - Exempt employees: Business as usual
- **Leave:** State and local law applicable
- **Workers' Compensation**
 - Injuries or occupational illnesses at home
 - Specify job duties, work area, work hours, break times
 - Reporting obligations
- **Notice Postings:** Electronic access

Hybrid and Remote Work – Security and IT

- Policy should outline what employer does and does not provide (e.g., laptop, hotspot, install).
 - Also create and/or review IT Policy.
- Additional concerns around cyber security and data breach
 - VPN, IT protocol, etc.
- Privacy in shared spaces
 - Headphones, privacy screen, etc.
- Take steps to prevent harassment and discrimination “online”

Social Media



Social Media – Background

- **Potentially outsize significance for foundations**
 - Need for extra caution regarding reputation in community, appearance of bias, etc.
 - In addition to same concerns for more workplaces:
 - Brand representation
 - Offensive, discriminatory, and harassing comments
 - Productivity

Social Media – Avoiding Legal Risks

- **Understand relevant legal parameters**
 - Likely not relevant: First Amendment
 - Relevant:
 - Discrimination and harassment laws
 - National Labor Relations Act
 - Whistleblower laws
 - State off-duty conduct laws
- **Prevent misuse or abuse of confidential or proprietary information (yours and third party)**
- **Treat like any other disciplinary issue**

Social Media – Policy

- **Create/review clear and positive policy**
 - Proactive guidelines
 - Define prohibited conduct
 - Address which/when employees can speak on behalf of foundation
 - Personal social media = personal capacity (but does it matter?)
 - Make permission explicit and direct to authorized reps!
 - Relationship with productivity
 - Focus on tone and foundation’s discretion to review

Independent Contractors



Independent Contractors – Definition and Overview

- IRS: “People ... who are in an independent trade, business, or profession in which **they offer their services to the general public** are generally independent contractors. ... The general rule is that an individual is an independent contractor. if the payer has the **right to control or direct only the result of the work and not what will be done and how it will be done.**” (emphasis added.)
 - In other words - Independent contractors are not employees (and should not be treated as such!).
 - Independent contractors are self-employed and handle their own taxes; employer issues a 1099.
- **Benefits to employer who engage ICs:**
 - No payroll taxes (Payroll taxes – 15.3% of paycheck to Social Security and Medicare; employer pays half)
 - Does not provide benefits for ICs (e.g., medical insurance, PTO, disability)
 - Limited legal responsibility/relationship
 - Expertise and more precise scope of work

Independent Contractors – Examples and Risks

- Nonprofits, including foundations, increasingly rely on independent contractors:
 - Consultants
 - Marketing/PR
 - Job search firms
 - Attorneys
 - Auditors
 - IT
- Risks of misclassification (IC claims they were actually an employee; can request free assessment by IRS)
 - Dept. of Labor, IRS, respective state fines and penalties
 - Back payment on taxes

Practical Tips for IC Agreements and Operations

- **Agreement**
 - Explicitly define relationship as IC, not an employee
 - No employee benefits
 - IC responsible for own taxes
 - Scope of work
 - Timeline
 - Communications
 - Terms for payments
 - Confidentiality/IP
- **Operations**
 - Provide relevant staff with agreement and scope of work
 - Understand employee/IC distinctions
 - Employee policies and organization
 - Meetings / progress reports
 - Materials / access

Bonus! Interns and Volunteers

- General rule: Interns and volunteers should not displace employees.
- **Internships**
 - Private sector: Must be paid if employer is “primary beneficiary”
 - Assess opportunities, training comparable to educational institution, complements (not replaces) existing work
- **Volunteers**
 - No expectation of payment (avoid PT employees also “volunteering”)
 - Hidden risks
 - Trainings
 - Social media/press
 - Insurance and unemployment compensation
 - Audits
 - Create volunteer handbook/identify applicable policies

Hiring Practices and Job Descriptions



Hiring Practices and Job Descriptions – Overview

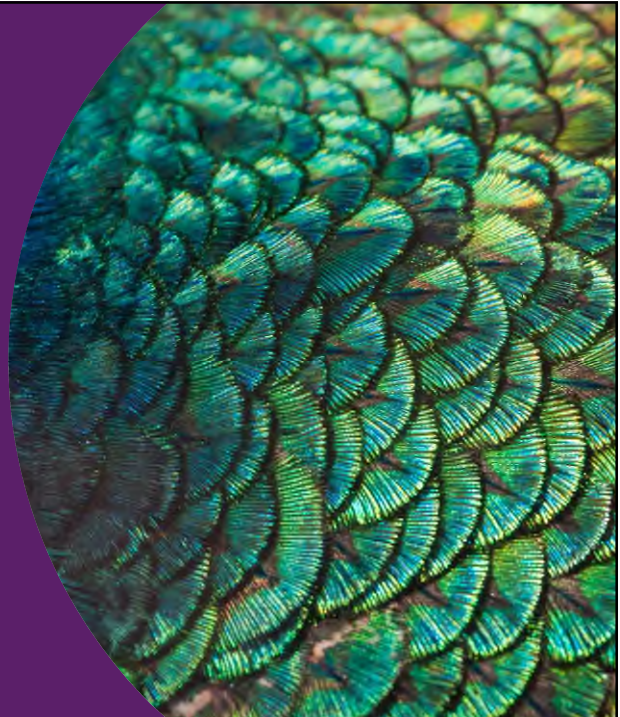
- Positive, across-the-board shift to more inclusive, equitable, and transparent hiring practices
 - Salary transparency laws in increasing number of jurisdictions:
 - Prohibit asking candidates for salary history *and/or*
 - Require disclosure of salary/wage range for current/open positions
 - Softening of “requirements”
 - E.g., educational requirements; physical requirements
 - Implicit bias training and awareness
 - Expanding EEOC statements/DEAI messaging

BUT – no good deed goes unpunished.

Hiring Practices, cont. – Risks and Examples

- **Exercise caution with hiring “preferences” and inadvertently discriminatory language.**
 - Interested in this role, but it’s not quite the right match? Applicants who meet some but not all of the above criteria are encouraged to apply! We are eager to speak with candidates with diverse backgrounds and can assess abilities and skills on an individual basis.
 - Those who self-identify as members of marginalized communities are encouraged to apply.
 - Our organization supports women in crisis and all individuals who identify as female. We prioritize hiring and engaging individuals who identify as female, in order to best ensure a supportive and empathetic staff.

NDA's and Severance Agreements



Non-Disclosure Agreements

- **Typically used at the beginning of employment**
- Secures confidentiality of proprietary information and trade secrets
- Exceptions:
 - NLRA: Wages, hours, and working conditions
 - Filing charges with employment agencies
 - Speak Out Act: Sexual harassment claims

Severance Agreements

- **Typically used at the end of employment**
- Non-disparagement provisions – limited
- Confidentiality – limited
- Release of claims – limited