



NEWS YOU CAN USE

Presented by Daniel B. McLane and Lindsey Conrad Kennedy
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

PITTSBURGH, PENNSYLVANIA

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PRACTICE AREAS:

[Litigation](#)

[Energy](#)

[Professional Liability](#)

[Product Liability](#)

[Regulated Substances](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

U.S. Court of Appeals for the First
Circuit

U.S. Court of Appeals for the Third
Circuit

U.S. Court of Appeals for the Ninth
Circuit

EDUCATION:

J.D., cum laude, Syracuse
University College of Law, 1995

B.A., Roanoke College, 1992



Daniel B. McLane

MEMBER

OVERVIEW

Dan McLane has extensive experience representing mid-size and large companies in complex commercial litigation, contract disputes, and business torts, energy litigation, oil and gas disputes, product liability, commercial lease disputes, professional liability, and business dissolution matters as lead counsel in numerous state and federal courts across the country and before the American Arbitration Association. His practice actively involves the counseling of businesses on a broad range of commercial matters, including the drafting and advising on commercial contracts, natural gas exploration, and related business agreements.

REPRESENTATIVE MATTERS

- Represents public and private corporations in commercial actions in numerous state and federal trial and appellate courts across the country and before the American Arbitration Association.
- Actively counsels on business disputes, restrictive covenants, insurance coverage, dissolutions, and breach of contract actions.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association

COMMUNITY INVOLVEMENT

- Blind and Vision Rehabilitation Services of Pittsburgh, Former Director

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers – Rising Star*
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Speaking Engagements:

- "Trials in the Real World: How Things are Done in the Federal Court in Western Pennsylvania," Federal Court Section of the Allegheny County Bar Association, March 3, 2011.

Media Coverage:

- "Equitable Facing \$320K Fine in Blast," *Pittsburgh Tribune-Review*, March 2, 2006.
- "PUC Blames Equitable for Ross House Explosion," *Pittsburgh Post-Gazette*, March 3, 2006.

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PRACTICE AREAS:

[Labor & Employment](#)

[Litigation](#)

STATE ADMISSIONS:

Pennsylvania
New York

COURT ADMISSIONS:

U.S. District Court for the Middle
District of Pennsylvania

U.S. District Court for the Western
District of Pennsylvania

U.S. District Court for the Southern
District of New York

EDUCATION:

J.D., magna cum laude, University
of Pittsburgh School of Law, 2010;
*University of Pittsburgh Law
Review*

B.S., summa cum laude, University
of Pittsburgh, 2007



Lindsey Conrad Kennedy

ASSOCIATE

OVERVIEW

Lindsey focuses on helping clients navigate various labor and employment matters, including state and federal discrimination litigation, design and implementation of employment policies, and other sensitive personnel matters.

She has represented management in all phases of litigation before federal and state courts and administrative agencies and in arbitration and mediation proceedings. She has handled disputes involving discrimination, harassment, and retaliation, interference or retaliation under the Family Medical Leave Act, failure to provide reasonable accommodations under the Americans with Disabilities Act, and unfair labor practices. Lindsey also counsels employers on how to avoid such litigation. She advises clients on day-to-day personnel matters, such as hiring and terminating employees, drafting and negotiating agreements, and ensuring employment policies and handbooks are compliant with the ever-changing employment law landscape.

Lindsey also has experience representing clients in the financial services and banking industries in a variety of matters, including regulatory counseling, enforcement actions, and litigation.

Prior to joining Eckert Seamans, Lindsey was a litigation associate at a large New York law firm.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association, Member

COMMUNITY INVOLVEMENT

- Big Brothers Big Sisters of Greater Pittsburgh, Volunteer
- Pennsylvania Women Work, Volunteer

NEWS AND INSIGHTS

Speaking Engagements:

- “The Potholes, Pitfalls, and Perils of Employment Policies, and How to Avoid Them,” co-presented with Clare Gallagher, Eckert Seamans’ Human Resources Forum, May 2015.
- “News You Can Use: A review of recent judicial, legislative, and regulatory developments of significance to employers,” co-presented with Clare Gallagher, Eckert Seamans’ Human Resources Forum, January 2015.

Media Relations:

- “Young In BigLaw: How To Use It To Your Advantage” quoted, *Law360*, March 2016.

News You Can Use

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May 19, 2016

Defend Trade Secrets Act (DTSA)

- Trade secrets were previously a matter of state law.
- DTSA creates a private right of civil action for misappropriation of trade secrets involved in interstate or foreign commerce.
- Belief that federal courts better equipped to deal with the rapidly changing world of technology and the rise in trade secret theft.



Defend Trade Secrets Act (DTSA) (cont.)

- Key provisions of DTSA:
 - Original jurisdiction in federal court.
 - Definition of “misappropriation” is similar to UTSA.
 - Broad remedies.
 - *Ex parte* seizure of property:
 - Government may seize property before notice to defendant.
 - Concern with abuse – only available in “extraordinary circumstances.”
 - Damages available for wrongful and/or excessive seizures.
- DTSA does not enforce non-compete agreements.

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Babcock v. Butler County

- When are meal periods compensable under the FLSA?
- The facts:
 - Prison guards received an hour-long meal break, 15 minutes of which were unpaid.
 - Required to remain on premises (unless they received permission from warden), in uniform and prepared to respond to emergencies.
 - Prohibited from running errands, sleeping, smoking, or otherwise leaving building without permission for supervisor.

Babcock v. Butler Cty., 806 F.3d 153 (3d Cir. Nov. 24, 2015)

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Babcock v. Butler County (cont.)

“The employee must be completely relieved from duty for the purposes of eating regular meals ... The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.” Dept. of Labor Regulation, 29 C.F.R. § 785.19(a).

vs.

“Whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.” Supreme Court case, *Armour & Co. v. Wantock*, 323 U.S. 126 (1944).

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Babcock v. Butler County (cont.)

- “Predominant benefit test”
 - Did the meal break, with all of its restrictions, predominantly benefit the prison? In other words, was the entire meal period compensable time?
 - Under the totality of the circumstances, **no**.

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Babcock v. Butler County (cont.)

- Obvious takeaway:
 - Review any restrictions placed on employees during unpaid breaks.
- Other reminders:
 - Recall that the FLSA requires that rest periods of less than 20 minutes be counted as “hours worked” for overtime or minimum wage purposes.
 - Revise break policies to specifically state that employees will not be paid for missed breaks (*Braun v. Wal-Mart Stores, Inc.*).

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FLSA Overtime Regulations

- Timing: mid-June – early July?
- “Exemption” depends on:
 - How an employee is paid – salary basis
 - How much an employee is paid – salary level/threshold
 - What kind of work does the employee do – job duties test
- New regulations would increase the salary level
 - \$23,660 → \$47,476
 - “Highly compensated employee”: \$100,000 → \$122,148
 - Increases every three years

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FLSA Overtime Regulations (cont.)

- What can you do now to prepare?
 - Identify employees who will need to be reclassified, determine the number of hours they work, and do the math.
 - Check your time-keeping methods.
 - Craft a unified message to employees.
 - Develop a plan to ensure compliance.

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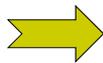
PA's Medical Marijuana Act

- General employment-related provisions:
 - Prohibits discrimination and retaliation against an employee based *solely on the basis* of an employee's status as a certified user.
 - Does not require employers to allow employees to use medical marijuana at work.
 - Does not limit an employer's ability to discipline an employee "for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for the position."

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PA's Medical Marijuana Act (cont.)

- Task-specific employment provisions (while under the influence of medical marijuana):
 - Patient prohibitions:
 - Operation or physical control of certain chemicals, high-voltage electricity, or other public utility.
 - Performance of duties at heights or in confined spaces.
 - Employers may prohibit employees from:
 - Performing tasks that are “life-threatening, to either the employee or any of the employees of the employer.”
 - Performing tasks which could result in a “public health or safety risk.”



Not an adverse employment decision, even if prohibition results in financial harm to employee!

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PA's Medical Marijuana Act (cont.)

- Takeaways:
 - Revise policies/trainings.
 - Do not ask whether employee or applicant is user of medical marijuana.
 - If you believe an employee is working while under the influence, record articulable symptoms.
 - Stay tuned for additional guidance.

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Socko v. Mid-Atlantic Systems of CPA, Inc.

- Restrictive covenants:
 - What consideration is sufficient when an existing employee enters into a restrictive covenant?
 - Under PA common law, need more than mere continuation of employment.
- Uniform Written Obligations Act (UWOA)
 - Magic language – “intending to be legally bound”
 - Can the magic language alone save a non-competition agreement entered into after employment has commenced?
 - **No.** “New and valuable consideration” is required.

Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266
(PA Supreme Ct. Nov. 18, 2015)

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Socko v. Mid-Atlantic Systems of CPA, Inc.

- What is “new and valuable consideration”?
 - Salary increase
 - Other favorable change in compensation – bonuses, stock options, enhanced benefits
 - One-time payment
 - Promotion
 - Change from part-time to full-time
 - Etc.

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Questions?

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