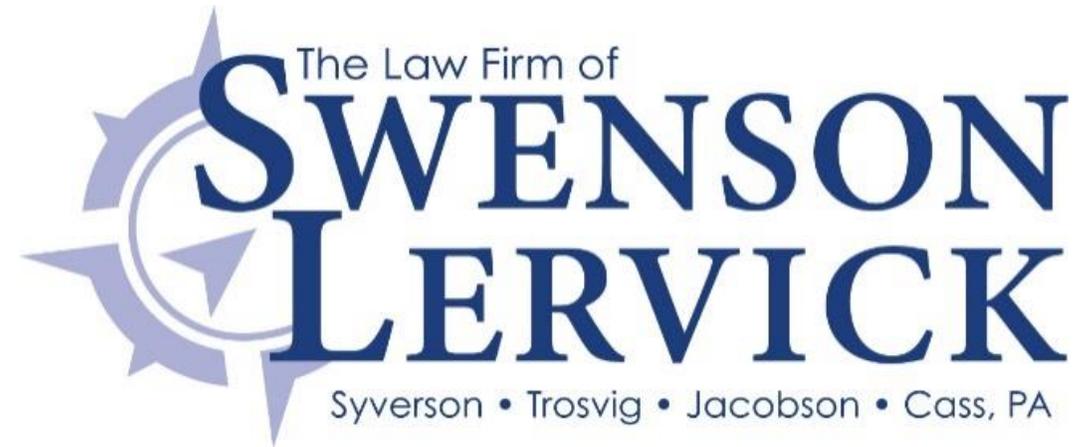

**Can we get
along?**

**Seven lessons learned from
two years of chaos**



Lesson No. 1

- When times get tough, do not be an ostrich.

Remember the FFCRA?

- Expanded leave rights for certain C19 related issues.
 - Was complicated.
 - Was passed at the height of the pandemic.
 - Was temporary.
 - Incorporated FLSA consequences for violations.
-

Example 1

- Employee claims to have exercised FFCRA rights due to C19 symptoms.
 - Employee believes employer made no effort to find out what employee's rights were.
 - Employer gave employee some time off but did not bring employee back, which employee claims was required by the FFCRA.
 - Employer and employee dispute whether employee quit or was fired.
 - Lawsuit resulted in employer paying over \$40,000.00 in damages and attorney fees to the employee.
 - The whole mess could have been avoided had the employer not let the pandemic chaos get in the way and had paid attention to the employee's very manageable leave rights.
-

Example 2

- Employer struggles to find employees due to the ongoing labor shortage.
 - Employer hires minor to fill the gap.
 - Employer ignores child labor laws and requires minor to work more than what the law allows.
-

Lesson No. 1 Takeaways

- **In turbulent times, employees seem more likely to challenge an employer's decisions.**
 - **Therefore, in these times, employers need to be even more attentive to their legal obligations.**
 - **Sometimes laws (like the FFCRA) are temporary, but that does not make them less important.**
 - **A tight labor market is not a defense to violating labor and employment laws, such as working hour restrictions for minors.**
-

Lesson No. 2

- In a tight labor market, do not misuse your exempt employees.

Example 3

- Employer struggles to find employees due to the ongoing labor shortage.
 - To get non-exempt tasks done, employer changes an employee's pay from hourly to salary and gives employee a new title that sounds "managerial."
 - Employer assigns some "exempt" tasks to employee but employee still must do many "non-exempt" tasks.
 - Employee then works overtime but does not get paid for it because employer treats them as exempt.
 - Employee claims entitlement to unpaid overtime; employer claims that despite some non-exempt duties, exempt duties were primary focus, so employee not entitled to overtime.
-

Lesson No. 2 Takeaways

- **A tight labor market is not a defense to violating labor and employment laws, such as the Fair Labor Standards Act.**
 - **Misclassifying a non-exempt employee as exempt is very costly. Aggrieved employees can recover 2X lost earnings (3x in some cases), plus attorney fees and court costs.**
-

Lesson No. 3

- Don't let the combative attitude in society carry over and become how employees are treated.

Example 4

- Same facts as Example 2 (overworked minor), plus ...
 - Minor's parent complains to employer about child working more than law allows.
 - Employer fires minor/employee.
 - Employee/minor claims termination was in violation of the state's Whistleblower Act; employer denies any wrongdoing but pays \$15,000.00 in damages, attorney's fees, and court costs to settle the claim.
-

Lesson No. 3 Takeaways

- Under the MN Whistleblower Act employees are protected when **they or a person acting on their behalf** “reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule.”

Lesson No. 3 Takeaways

- **The state's Whistleblower Act also says that private sector employers shall not take adverse action against the employee because:**
 - **the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;**
 - **the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;**
 - **the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm;**
 - **The MN Whistleblower Act allows an aggrieved employee to “recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equitable relief as determined by the court.”**
-

Lesson No. 3 Takeaways

- **The MN Whistleblower Act allows an aggrieved employee to “recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equitable relief as determined by the court.”**
 - **Many other employment-related laws have anti-retaliation/reprisal provisions that also allow employees to recover damages, attorney’s fees, and court costs.**
-

Lesson No. 3 Takeaways

- **Despite our combative society, do not allow retaliation against employees who lodge complaints.**
 - **When an employee lodges a complaint, take it seriously, and before taking any adverse action against the employee, make sure the complaint was not protected under the Whistleblower Act or any other law.**
-

Lesson No. 4

- The pandemic has made remote work and other work-related technology more mainstream. However, be extremely cautious with texting and other forms of communication.

Example 5

- Same facts as Example 2 (overworked minor; parent complains), plus ...
 - Parent texted their complaint to employer.
 - Employer responds via text essentially admitting the violation.
-

Lesson No. 4 Takeaways

- **Recognize that employees have a right to complain about wages, hours, working conditions, and things that they have a good faith basis for believing are unlawful.**
 - **Don't text your admission to the plaintiff.**
-

Lesson No. 5

- Any societal issue has the potential to have protected class elements, so be wary of workplace discussions on “hot button” topics.

Example 6

- Employer adopts a C19 vaccine or mask mandate.
 - Cultural divide over the vaccine itself.
 - Cultural divide over vaccine mandates.
 - Employee opposes on religious grounds.
 - Employer requires employee to establish the sincerity of their religious belief that prevents them from getting vaccinated.
-

Example 7

- Employer is publicly known to be strongly against vaccine mandates.
 - Some employees feel strongly that vaccines are a good thing and want mandates.
 - Some employees are OK with vaccines but don't like the idea of mandates.
 - Some employees think C19 and vaccines are a hoax.
-

Example 7

- Some employees get into arguments over C19 and/or vaccines, each voicing their positions based on religion, medicine, etc.
 - Employees break into cliques, each with its own attitudes about vaccines.
 - Someone is diagnosed with C19, takes time off, and is then harassed or given the cold shoulder upon their return to work.
 - Morale suffers.
 - Unhappy employees quit.
 - Employee who had C19 sues for disability discrimination, harassment, and reprisal.
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Example 8

- Same as example 7, except fill in the C19/vaccine blank with any societal “hot button” topics.

Example 8

- Political discussion turns into debate over religious or racial issues.
 - Political discussion touches on abortion, which leads to argument over religion and/or gender issues.
 - Discussion about a protest, riot, demonstration, etc., spills over into commentary about race or national origin.
 - Employees post their views about [fill in the blank issue] on social media, and those views clash with management and/or co-workers.
-

Lesson No. 5 Takeaways

- **People seem emboldened to share their views on just about anything, and this can carry over into the workplace.**
 - **Be wary of any workplace conversations about hot button topics. These discussions have the strong potential of crossing over into conversations about topics that are generally off-limits at work (race, religion, disability, gender issues, color, etc.)**
 - **Be comfortable knowing that the workplace is for work, and off-topic discussions that are not productive workplace discussions can be stopped.**
 - **This does NOT mean that these topics are always strictly off-limits but know that heading down these paths can become a slippery slope.**
-

Lesson No. 6

- Contrary to popular belief, the First Amendment does not apply to private sector employers.

Example 9

- Employee A is convinced that the 2020 presidential election was rigged, that Pres. Trump won, and the Pres. Biden is not our president. Employee B has the opposite opinion and is bothered by A talking about it all the time at work.
 - Because of their religious beliefs, Employee C is bothered by the draft abortion opinion that was leaked from the Supreme Court and talks about it at work.
 - Employees D and E disagree at work about “Black Lives Matter” and “All Lives Matter.”
 - Employees A-E all say, “It’s a free country” and that they have a constitutional right to say what they want.
-

Lesson No. 6 Takeaways

- People seem emboldened to share their views on just about anything, and this can carry over into the workplace.
 - Even though we live in a “free country,” private sector employees do not have a First Amendment right to say whatever they want on the job.
 - Caveat 1: If an employer is going to take adverse action against an employee because of something the employee said at work, the employer must be **even-handed**. Acting against only those one side of the issue will appear to be biased, and if the issue relates to a protected class, the action will be used as evidence of unlawful discrimination (e.g., only those the “Black Lives Matter” camp are fired).
 - Caveat 2: An employee’s may be protected under other laws (whistleblower, NLRA, Title VII, MRHA, etc).
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Lesson No. 7

- Be prepared to deal with troubling social media posts about troubling social issues.

Example 10

- Employee attends protest and posts about it on Facebook.
 - Employee has strong opinions about political issues and tweets about them.
 - Employee blogs about white supremacy.
-

Lesson No. 7 Takeaways

- **People seem emboldened to share their views on just about anything, and this can carry over into the workplace.**
 - **Social media makes it easy for anyone to share their perspectives with the world, and sometimes those views will clash with management and / or co-workers.**
 - **Employers need to understand what they may and may not do in terms of social media policy, and they need policies to address these issues before they arise.**
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Final takeaways

- **The last two-plus years have been chaotic.**
 - **Through the chaos, many people have become entrenched in their positions, and they are emboldened to speak their minds.**
 - **Our culture seems to be more divided and combative.**
 - **These issues are spilling over into the workplace.**
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Final takeaways

- **Prepare now!**
 - **Pay attention to what is happening in your workplaces.**
 - **What's the coffee / water cooler talk?**
 - **Why do people leave?**
 - **How is morale, and what's driving it?**
 - **Know your limits.**
 - **Review and update your policies.**
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Disclaimer

The information in this presentation is for general information purposes only and is not to be used as legal advice.

