INSIGHTS INTO LABOR & EMPLOYMENT

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Matt Stiles | Maynard Cooper & Gale

Matt Stiles is a Shareholder and member of Maynard Cooper's Employee Benefits & Executive Compensation Practice and Labor & Employment Practice groups. He represents employers in all facets of the employment relationship, including labor and union relations, employment litigation, employee benefits and executive compensation, trade secrets and restrictive covenants, SCA and federal contract employer compliance, and PEO and staffing industry law.
Matt has successfully resolved complex labor negotiations on behalf of his clients. He regularly advises employers and benefits consultants in strategic employee benefit plan design, implementation and compliance. He has extensive experience counseling employers involved in federal and state agency investigations, including his current appointment as Deputy Attorney General to represent the State of Alabama's interests in litigation pending against a prominent state Commission.

Trip Umbach | Starnes Davis Florie

Trip Umbach chairs the firm's labor and employment law practice group. Trip represents both public and private employers in all types of labor and employment disputes, from defending discrimination claims to handling traditional union labor relations matters. In response to the recent surge in overtime litigation, he has developed extensive experience in wage and hour matters. He regularly advises clients concerning non-competition agreements and litigates cases arising from the interpretation of such agreements. A significant aspect of his practice is helping clients make employment decisions and develop policies that reduce the risk of being sued by employees or becoming unionized.

Q: What are some of the top issues employers face regarding labor and employment law?

Trip Umbach: A lot of the issues are familiar ones that have been around for the last 20 to 25 years. Examples would be discrimination issues, wage-and-hour issues, overtime issues. But there are some new ones that are probably going to get more emphasis this year. Immigration, with the new administration, is a big one. That's just going to get more attention given the recent presidential election. There is a new OSHA rule that a lot of employers are trying to come to grips with that relates to the reporting of accidents and retaliation claims. The area that's probably going to require the most change by employers relates to post-accident drug testing. Almost all employers reflexively have an employee who is involved in an on-the-job accident take a drug test. Now employers have to rethink that and not just automatically do it. A lot of employers are deciding to do away with post-accident testing altogether and just do reasonable-cause testing. National Labor Relations Act issues involving social media, even in non-union workforces, is a big issue, though it may get less emphasis with the new administration. I'm seeing more and more sexual orientation and sexual identity issues, which is a relatively new thing. Leave issues are still big. The interaction between the Americans with Disabilities Act and the Family and Medical Leave Act is a challenge in this area. And now a lot of employers are doing more in the area of paid leave. The laws right now, at least in Alabama, don't require paid leave. But a lot of employers are feeling the trend across the country to do that. Even in Alabama where it's not required, I'm seeing employers think hard about that and a lot are doing it. And finally, non-compete agreements that affect employees – particularly sales people – who leave a company and go to work for a competitor is a top issue.

Matt Stiles: Among the issues Trip identified, the one I see employers struggle with the most is employee leaves of absence. Increasingly when employers struggle with issues, it's not discrimination. Employers are trying to do the right thing. When it comes to leaves of absence, formerly rigid policy or statutory requirements have been blurred in recent years by court decisions and agency action, particularly in the areas of pregnancy and disability accommodations. Successfully administering leaves of absence has become complicated work. Although the courts and agencies are at least partially to blame for this, the millennial workforce also demands greater flexibility. They're demanding that employers change policy and go beyond their precedents to accommodate individual needs and achieve work-life balance. So the challenge is both to comply with the law and to be attractive to and retain a millennial workforce.

Q: What are some ways labor and employment law concerns could change under the new administration in Washington?

Stiles: Unlike any administration in history, with this one we don't have decades of legislation, policy-making, or governing history to go on. To anticipate changes under the Trump administration, I think you have to start first with what kind of leader Trump has been in private enterprise. Prior to his election, among the many things he was known for, one of them is hiring good, capable people and letting them do their jobs. So perhaps a better way to predict what this administration will do is to look at the track record of his appointments to key labor and employment posts. Trump's initial Labor Secretary appointment, Andrew Puzder, is a true outsider. As the CEO of Carl's Jr / Hardee's, Puzder is a guy who is on the record as opposed to the minimum wage, and anti-union. At first blush, that appointment suggested a real shakeup in labor policy. But with the withdrawal of Puzder's nomination, Trump went in a totally different direction with Alexander Acosta, who is a career federal insider. He worked in the Bush Administration, was on the National Labor Relations Boards, and got a ringing endorsement from Lafe Solomon, President Obama's general counsel at the NLRB. Although of the same political party, Acosta is a really safe pick compared to Puzder. Ultimately, until we have a confirmed Labor Secretary we are not going to have a clear labor agenda. Despite the uncertainty, employers already have reason for optimism. Trump's recent executive orders indicate substantial regulatory reform is on the way. The day before the President issued his regulatory reform executive order, he met with a business council roundtable about what regulations they thought were most intrusive, and among the group's list of regulations that should be on the chopping block eight out of 10 of them were labor-and-employment related. Also, we now have a bill pending to repair the Affordable Care Act. The American Health Care Act would remove the employer mandate. It would ostensibly reduce some ACA reporting obligations, which have been a colossal burden to employers. So employers have reason for optimism. But overall I don't see this administration changing many of the developing equal employment opportunity trends that we saw in the last administration, simply because those trends may have been driven by top-down policy in places like the EEOC, but many of these policies are now baked into legal precedent through the court system. We also have to think there will be some focus on FLSA issues in the new administration. In the waning hours of the Obama administration, employers were scrambling to comply with a new FLSA white-collar exemption rule that set up a minimum-salary threshold double what the previous threshold had been. That resulted in a nationwide injunction from the courts barring the rule from being implemented. The Obama administration appealed it, and that appeal is still sitting in the Fifth Circuit Court of Appeals. We're likely to know by May 1 whether the new administration is going to proceed with the appeal. It seems most likely that the nationwide injunction will stand.

Umbach: We don't know exactly what's going to happen, but it's safe to say that life is going to get better for employers. You're typically always going to say that whenever a Republican administration comes into office. But there's reason to think that with this president, it's going to be the best we've seen in a long time for employers, primarily because of President Trump's stance on cutting back on regulations. We haven't seen that sort of aggressive approach toward deregulation in my lifetime. Matt is right that a lot of the protections for employees are baked into the law from prior administrations. But where President Trump can influence that and make life better for employers is in the enforcement area. He has quite a bit of discretion and power in terms of what to enforce and how well to fund the various agencies like the EEOC and the Department of Labor. I would suspect that those agencies are going to have less to work with than they used to, and there may be a different enforcement emphasis than they had a year ago. There is one exception to all that, and that's immigration. We can expect President Trump to really ramp up enforcement and possibly create new laws or reform the immigration laws. And that's an area where employers really need to have their eyes open. Five years ago, immigration got a lot of attention in Alabama. We had a new law passed, and everybody was rightfully concerned about what that meant. Then all of a sudden it just fell by the wayside and no one was really focusing on it. Now it's probably time for employers to refocus on their immigration compliance: their I-9s and E-Verify and all those sorts of issues. Unions are not going to be happy with this president in office. He's not going to do anything to help them organize workplaces like President Obama did. So overall life should get better for employers with maybe one big exception.

Q: How has technology affected the labor and employment law field?

Umbach: Technology has been both good and bad. It's created new problems, but it's also offered new solutions. For example, with the prevalence of social media and texting among employees, on the very negative side it creates opportunities for employees to violate company policy such as harassment policies. So we certainly see those kinds of issues. Technology can provide temptation and opportunities for employees to waste time. It has enabled employees to work remotely, which can be a nice thing in terms of efficiency and lifestyle issues, but it can create problems for employers in trying to accurately have a record of hours worked to be sure they're paying employees correctly. But there are also ways to record time worked through apps on your phone and GPS technology. So there are some technology solutions to problems that technology creates. There are opportunities to create efficiencies. I've seen an employer client recently begin using Twitter to communicate with employees in a very effective way, such as posting work schedules or even doing training by YouTube videos. The millennial generation wants to see it, not read about it, and technology allows that to happen. Another issue is that more and more workplace conversations are

recorded, for better or for worse. Most supervisors should assume that their conversations with their employees are being recorded on somebody's iPhone. We didn't used to worry about that. It can be good for the sake of accuracy, but it can also be bad for the sake of accuracy. Finally, technology offers some great ways to do training, which is a very proactive way to address legal issues in the workplace. The days of getting all the employees in the same room on a single occasion are going away. But now it's possible to use video conferencing and the Internet to do training on a more remote basis, so employees can do it on their time and they don't all have to be in the same room at the same time.

Stiles: There is a paradigm shift in communication right now. Businesses are aggressive in using technology to communicate with customers, whether that's through social media or otherwise. Employers also are increasingly using technology to communicate with their internal customer, their employees. As a result, many of the employment cases that I defend start with poor communication. We have a growing millennial workforce today where many of the critical conversations they've had in their lives have not been face-to-face, but through text messages and emails. That creates an even greater challenge for human resources, with an emphasis on the human aspects of management. Tough decisions need to be communicated face-to-face. An email is not a substitute for a counseling session. Text message discipline is too informal to influence employee accountability. And yet, because of the convenience of that technology and the demands for workplace efficiency and productivity, management tends to use technology more for convenience, without much deliberation on the specific content of the communication. The bottom line is that employers are embracing technology in employment communications, but should not let the informality of e-mail and text messages substitute for good, thorough and deliberate discussions of things like employee performance, attendance, and discipline.

Q: How can employers work with their attorneys throughout the year to minimize the risk of labor and employment litigation?

Stiles: I take great pride in being there to help dig my clients out of the ditch when they find themselves in it. But as a risk management strategy, I think they would really prefer to keep their wheels on the track. Too many decision-makers are hesitant to get legal counsel involved in the process of making a tough employment decision that implicates risk. It may be that some lawyers have given business the perception that legal counsel is the department of "no," or maybe decision-makers believe getting legal advice is just too expensive. But when you start evaluating the cost of making the wrong decision, or making the decision the wrong way, those costs are exponentially greater than getting sound legal advice along the way. So it starts by having a culture where decision-makers are empowered to contact the right people – either internally or externally – to help them make a good decision that's going to comply with the law. Employers almost always get to build the factual record that they will defend in the event of a claim. If employers and their legal counsel don't do that deliberately, then employers frequently find themselves without the sort of evidence they need to support an otherwise legally compliant decision. The second key to minimizing employment risk is to train supervisors and managers. Look, employers are smart, they hire or promote supervisors and managers with good interpersonal skills, instinct, and judgment, and employers want to let them do what they've hired them to do. But in many instances, new supervisors and managers haven't really been trained on how to be effective, including legal compliance. And unfortunately the developing employment law just isn't intuitive anymore. Simply doing the right thing is no longer enough. To minimize employment risks, employers really should be training, on at least an annual basis, their supervisors and managers on the laws of the workplace, how to identify issues, how to get those issues to the right place, and where to get assistance and advice in making tough decisions.

Umbach: The word that comes to mind to me is "partnership." The more the employer can partner with a labor and employment attorney on these issues, the better off they're going to be. They need an attorney who is going to work towards finding ways to do whatever it is they want to do. Find a way to get to "yes." There's usually a way to do that in a manner that improves the risk picture. There are almost always some changes or tweaks that can be made in the process that improves the picture and minimizes the risk. I look at the lawyer as part of the decision, but the legal piece of it is rarely the number one factor. There are a number of business considerations as well. Also, minimizing the risk of employment issues is often consistent with just being a good place to work. Happy employees don't sue, and places that are viewed as good places to work rarely find themselves in lawsuits. One metric to look at is turnover. If an employer has very high turnover, that is a high-risk indicator. But if they can do things to decrease the turnover – whether it's employee benefits or doing simple things like having social events or company outings or providing gift cards – little things like that can make it a better place to work and help manage the risk of employment claims. And then just basic fairness. Employees appreciate employers who are firm but fair. Where they tend to get upset is when they feel like someone else is getting away with something that they can't.

"Technology has created new problems, but it's also offered new solutions."

-Trip Umbach

Q: What are some ways companies can navigate the hiring/firing process while reducing the risk of litigation?

Umbach: Hiring decisions are relatively low risk, when you consider all the employment decisions an employer can make. Firing decisions are probably the highest risk. So I encourage employers on hiring decisions to be thorough and aggressive, because that's often their best chance to head off an employment claim down the road. A bad hiring decision often ends in the need to make a termination decision. So even though we defend very few hiring cases, I encourage employers to really focus on those decisions, because sometimes they can be the most important. There are a lot of compliance issues that relate to hiring decisions, but they're all manageable. Employers just need to be thorough and do their homework. In terms of firing and how to reduce the risk there, the number one rule is consistency. That solves a lot of problems. Treating employees who are in the same boat in the same way is the cardinal rule. Second, the paper needs to support the decision. Somebody needs to look at the personnel file and see if it's consistent with the decision that's being made. Because often you see an employee being terminated for poor performance, but nobody has gone back to look at the written evaluations, which often make the employee look like they're one of the best ever. The other misconception that gets a lot of employers in trouble is the employment-at-will rule. It is the law in Alabama, but I try to get my clients to forget they ever heard of it, because it's virtually of no value. I can't recall a case I ever won by walking into court waving the employment-at-will flag. It just doesn't work, because there are so many exceptions and laws that prevent employees from being fired. And then finally, just basic due-process or fairness considerations helps manage the risk of firing decisions. By that I mean give an employee notice of what they're doing wrong and an opportunity to correct it. Or if they've been accused of misconduct, give them the opportunity to explain themselves. Give them the chance to tell their side of the story. Usually it doesn't change the decision, but having allowed that opportunity and giving the employee the chance makes it a much fairer decision and it sells better to a jury.

Stiles: The longer the employee is with you, the greater the risk that a bad decision will trigger some sort of claim against the employer. A lot of employers might use a probationary period that reflects how a new hire has the burden of establishing that the new employment relationship is going to work. If an employee is with you a very short period of time and is already performing poorly, there's almost this unwritten rule that agencies and courts won't as closely scrutinize employer decisions to terminate and cut their losses. Early in the employment relationship, the burden is on the employee to prove that he or she can do the job. The longer that employee is with you, the more the scrutiny on a termination decision focuses on the employer's ability to demonstrate with good corroborating evidence that the employee was a poor performer and there was nothing legally impermissible about the decision. Again, these are the unwritten rules, and I think too many employers overlook it. When someone calls to tell me they're working on a termination decision, I always want to know the date of hire. How long has this employee been there? How long have there been performance issues? What prior efforts has the employer made to correct them? And what sort of documentation do you have that backs up the employer's story? For long term employees, this is the sort of information that shows the termination decision is not likely to come as a surprise and that will substantially reduce an employer's exposure to risk.

Q: How can a company determine if it needs a specialized labor and employment law firm?

Stiles: If you ask your attorney to advise you on an employment issue, and you get back a three-page treatise on what the law is, it's time to get a specialized labor and employment attorney. When a client calls me with a question, I know they probably have Google and can figure out what the law is. Usually what they're asking is, "Can I do what I want to do?" If your attorney doesn't have the comfort level with labor and employment to ask you what you want to do and find you a way to get there, then you need a specialized labor and employment attorney. The legal profession is no different than other industries where there's consolidation occurring everywhere and everything is becoming specialized. And virtually all lawyers are now specialized in some specific type of law regardless of what kind of firm they work for. So the question really should be whether a business should be engaging specialized employment law attorneys, which can be found at virtually every firm. If a lawyer's specialization is too narrow, there's perhaps a risk the lawyer could lose sight of the big picture, what your business is about, or manage one risk only to overlook another in a related area of the law beyond the lawyer's expertise. As employment law becomes increasingly complex, having a lawyer with depth in all facets of labor, employment, and employee benefits law and access to other capable colleagues with related specialties like tax, executive compensation, and contract law, assures you will have more complete advice.

Umbach: If you have any employees, you need a specialized labor and employment lawyer. And the more employees you have, the greater your need. It's as simple as that, in my mind. A lot of lawyers have handled discrimination cases at one time or another. But what we're talking about here is lawyers who have the big picture in mind. An employer needs a lawyer who has both defended claims brought by employees in court in front of juries, and then one who can step back and look at things practically and help the employer do what it is they want to do with an acceptable level of risk. It's important to have both experiences. It's hard to be very good at avoiding the courtroom if you haven't been in it. And if you haven't helped an employer out of the ditch, it's hard to know how to keep from getting in it in the first place. That's what a specialized labor and employment lawyer can offer.

Q: When choosing a labor and employment firm, what are some specific questions companies should ask during the selection process?

Umbach: I would certainly ask about basic experience, specifically courtroom and trial experience. You want a lawyer who can tell your story to a jury in a convincing way and stand up for you in that context. But you also want a lawyer who can find creative, constructive ways for you to avoid being in a lawsuit and a courtroom. Probably what I enjoy most about being a labor and employment lawyer is the relationship with the client and trying to help them solve their business problems in a way that keeps them out of the courtroom and allows them to do what it is they want to do. I would also ask what other lawyers work with you. What if I can't get you? Who is my call going to be transferred to? Can I call that person directly? Am I dealing with one person, or is this a team? I would want a lawyer who is accessible. How do I reach you on weekends? And all clients want to know about the economics. What are the hourly rates? Are there ways we can do business through alternative fee arrangements and that sort of thing? What experience do you have in my industry? If I'm a nursing home client, do you understand the regulatory issues that we deal with? Are you going to understand more than just our labor and employment issues? And then I'd also want to know how enthusiastic this lawyer is about my concerns. This is hopefully going to be an ongoing relationship where there can be give-and-take on both sides and a true partnership. Enthusiasm for the mission should be part of that equation.

Stiles: It's important for your lawyer to know and understand your industry, if not your specific business. With knowledge of your industry, knowledge of your business will come over time. Trip touched on the importance of being able to rely on the responsiveness of your lawyer. The use of technology combined with the focus on productivity results in employees working at all times, regardless of your office hours. Employment law issues don't

limit themselves to Monday through Friday, 8 to 5. Your employment lawyer needs to be accessible and accountable to you whenever those issues arise. New clients almost always tell me a horror story about their former lawyer's inaccessibility or lack of responsiveness. Now, we have a great employment law bar in Birmingham. But the state bar association consistently gets a high volume of complaints about lawyer responsiveness. So I think you have to make knowledge of your business or industry and accessibility and responsiveness key parts of choosing your employment lawyer.

Q: How can a company avoid wage-and-hour litigation issues?

Stiles: Are they avoidable? Unlike any other category we deal with in the employment world, wage-and-hour cases are the ones that can be filed at a moment's notice and go straight to court. And if you owe that employee one red cent, you will pay that employee's legal fees to sue you, in addition to damages and your own legal costs. That is a pretty horrible prospect for most employers. Let there be no misunderstanding: employees know where to find plaintiffs lawyers, and these lawyers are chomping at the bit to take wage and hour cases. The only effective way to protect against it is to be constantly self-critical and self-auditing of employee classifications. The default rule is that everybody gets minimum wage plus overtime. If an employer wants to do something different, the employee has to qualify for an FLSA exemption. And while those exemptions might seem straightforward, they are not intuitive, and every single word in the definition for a particular exemption has hundreds of cases that interpret that word. So self-auditing is important, starting with scrutinizing job content, looking at job descriptions to make sure they are consistent with applicable exemptions, and making sure your job titles line up. If you have two employees with the same job content but different job titles or vice versa, it's a red flag. Once you are confident that you have classified employees correctly, the next step is to build a company culture of wage and hour compliance with a commitment to paying people the right way. It might be reflected in good employee handbook policies, reflected in management performance appraisals, or reiterated verbally in company meetings. To nearly all employees, getting their paycheck on time and getting it right are essential components of the employer-employee relationship. When there are complaints about a paycheck, employers should make those a priority, handle them promptly and effectively, and follow up with the employee to confirm resolution.

Umbach: I have told many clients that the Fair Labor Standards Act is impossible to comply with fully. It's outdated. It doesn't fit the modern workplace and the modern way of doing business. It's stifling to innovation. But it's here to stay. So while it might be impossible to comply with, there is a clear step that employers should take to put themselves in the best position possible. It's the one Matt mentioned, which is to audit yourself. Make sure that you are classifying all employees correctly in terms of overtime eligibility. It's a relatively easy audit to do. It's as simple as making a list of everybody, looking at their job duties and what they're paid, and making sure that those classifications are correct. In addition to getting it legally correct, by doing that review you set up some potential defenses for yourself to limit the amount you have to pay if you do get sued and lose.

"Trump's recent executive orders indicate substantial regulatory reform is on the way."

-Matt Stiles

Q: What should a business regularly be discussing with its labor and employment firm, but often doesn't?

Umbach: My number one response to this question is a pet peeve of mine. There is an opportunity that many employers are missing out on, and it's the best loss-prevention strategy going for the money. That's to do regular training of employees and supervisors on the company's discrimination and harassment policies. It sounds simple. Heck, it might work. It might get people to change their behavior and what they say in the workplace. But the part that employers are not understanding is that just by doing that training, they help themselves in their ability to defend against a case. It's called "making good-faith efforts to comply with the law." That's a phrase the Supreme Court came out with in 1999, saying if employers do that, then they can't be liable for punitive damages. That is the biggest risk that employers have in employment cases. And there is a way to avoid it, and it's relatively inexpensive and has some tangible benefits beyond just defending a lawsuit. It might actually benefit the work environment. So I hammer on that because I am constantly surprised at how few employers take advantage of it.

Stiles: Risk tolerance and risk management. And by that I mean insurance. There is a high level conversation that goes on in virtually every organization about what their tolerance is for certain risks. In most organizations, the person responsible for managing employment law risk is an HR director or someone responsible for human resources. And that's frequently not the person who is developing the organization's risk-management strategies, including the purchase of insurance. Employment-practices liability insurance has been around for a long time. It is a very smart strategy for organizations to manage their employment risks. But they frequently set policy limits and deductibles based on information that comes from someplace other than their HR stakeholders and their employment lawyers, who are the ones actively preventing or otherwise defending employment claims. Sometimes businesses choose insurance policies that could result in them having to compromise with a plaintiff before they're ready, based on where they set their deductibles. Also, frequently a business forgets to include its regular employment lawyer as an indorsement to their insurance policy. Overlooking this step may result in the business having to use a lawyer selected by their insurer rather than the business's regular lawyer who has substantial knowledge of their business and legal matters.

Q: What are some issues that often cause employment litigation for businesses that they don't often think about until it's too late?

Stiles: Increasingly, businesses are so well-prepared to defend their intellectual property and their trade secrets, and they have very good non-disclosure, non-solicitation, and non-compete agreements in place with their employees. But they take a set-it-and-forget-it approach to these agreements. The law of non-competes is determined state-by-state, and it is judge driven. A judge in Jefferson County may view our non-compete statute as being more expansive than a judge in Blount County views it. So employers need to realize that this is a constantly evolving area of the law. Even when legislatures like ours try to standardize the law with a new statute, every word of that statute is still subject to the interpretation of judges. Employers need to have a policy of at least annually revisiting the agreements they use to protect their trade secrets and intellectual property. And they need to make sure those agreements are reviewed for each state in which they employ people. Secondarily, in industries where these agreements are common, employers should expect that newly hired employees may have already signed one of these agreements for a former employer. Often those agreements can restrict that new hire's ability to fully perform the job he or she was hired for. If employers don't take appropriate steps to find out what agreements their new hires have signed for prior employers, they risk interfering with those agreements in a way that creates liability for the company, too.

Umbach: I agree with Matt that non-compete agreements are something that can catch employers off guard. The other situation that comes back to bite employers is the employee who should have been terminated sooner. Some employers are afraid to fire someone. Either they are scared of a lawsuit or they are just too nice. By allowing the bad employee to stick around, it only gets worse. If you tolerate poor performance, you set a bad precedent for other employees. It makes it harder to terminate other employees down the road, because they point to this person who you let slide for so long. Also, a long-term employee is more sympathetic to a jury. It is usually better to pull the trigger sooner rather than later.