

Unions, AI, workplace changes trending in local litigation

■ **Caurie Putnam** SPECIAL TO THE DAILY RECORD

Among eight trends identified in the BTI Litigation Outlook 2023 is one the report calls “new types of litigation.”

“Clients are experiencing new types of litigation issues including backlash from social media posts, ESG, workplace dynamics, and the highest union activity in more than 40 years,” said the report, which is published annually by Massachusetts based BTI Consulting Group, Inc.

Are litigators from leading local law firms seeing these same trends? We checked in with three to find out.

KIM HARDING – NIXON PEABODY LLP

Kim Harding is a partner at Nixon Peabody LLP and deputy leader of the firm’s litigation practice. He calls the organized labor movement “increasingly active right now.”



Kim Harding

Data released by the National Labor Relations

Board (NLRB) showed the number of union elections held in the United States in 2022 increased by 50% over the previous year and 72% of these elections were in favor of the union.

Additionally, labor strikes increased significantly between 2021 and 2022, and, per Gallup, 71% of Americans approved of labor unions in 2022, the highest percentage the analytics organization has recorded since 1965.

Harding attributes the rise in organizing to several factors, including effective use of social media by prominent politicians who use the platforms to advocate for union activity and who claim the makeup of the current NLRB as “very employee friendly.”

Harding says it’s important to also keep in mind that organizing activity does not always rise to the level of union organizing. In fact, in 2022 Bureau of Labor Statistics showed union membership at an all-time low despite strong organizing activity nationwide.

It’s also important that union-free employers pay attention to labor activity and keep their pulse on employee satisfaction and engagement. Per Harding:

“Organized labor is savvier than ever and is particularly attuned to employers’ traditional anti-union strategies. Their effective use of social media, and anticipation of traditional ‘union-busting’ strategies, has made waging an anti-organizing campaign increasingly difficult for unsuspecting employers. Employers must stay vigilant and attuned to employee satisfaction and engagement to prevent any incentives to unionize in the first instance and adopt innovative strategies.”

Another growth area in litigation over the past year or two has been data privacy, which Harding attributes to an increase in state laws and more breaches. The acceleration of data privacy concerns from clients prompted Nixon Peabody LLP to elevate its longtime cybersecurity and privacy team to a group practice in February 2022.

WILLIAM G. BAUER – WOODS OVIATT GILMAN, LLP*William G. Bauer*

William G. Bauer is a partner at Woods Oviatt Gilman, LLP in the firm's labor and employment and litigation departments and is chair of the litigation department. In practice since 1982, he's seen litigation from many different angles, including four years he spent as a United States Magistrate Judge for the Western District of New York.

Some of the areas he's seeing the biggest uptick in litigation right now are real estate, employment, environmental, intellectual property, and cybersecurity.

"The tentacles from businesses in Rochester go out into a global economy," Bauer said. "The more people businesses invite into their cyberspace the more protections they need."

Related to cybersecurity, Bauer thinks an important emerging area to watch is artificial intelligence (AI) and how it's beginning to creep into the litigation world as companies are using it more and more for things like research and writing. He anticipates more

litigation will be spawned in the next few years from AI activity.

Bauer, who concentrates his practice in general business and civil litigation, including corporate/partnership disputes, employment law, intellectual property, securities and federal court litigation, also sees more companies putting alternate modes of resolving disputes like mediation and arbitration (known as ADR) into their contracts.

He recommends that businesses always be proactive from the outset to minimize risks that could lead to litigation or ADR. "When you see a problem on the horizon be agile and flexible," Bauer said. "Don't ignore the problem. Always avoid the expression, 'This is the way we've always done things.'"

CHAD FLANSBURG – PHILLIPS LYTTLE LLP*Chad Flansburg*

"I haven't seen any new types of litigation, but certainly there are areas we are seeing more litigation," said Chad Flansburg, a partner in the Litigation Practice Group at Phillips Lytle LLP, where his practice concentrates on cases relating

to commercial and business disputes, real property disputes, construction, foreclosure, employee disloyalty matters and insurance coverage work, as well as general corporate and business law.

Flansburg sees more commercial litigation activity in cybersecurity due to increased risk of data breaches, remote working challenges, supply chain disruption in the construction industry and others, and regulatory changes, such as modification in paid leave, paid vaccination leave, and protected absences.

Businesses often want to avoid litigation when it comes to these issues and others and the goal is to work together to come up with a solution. Identifying solutions, being a problem solver, and working closely with clients are what Flansburg enjoys most about being a commercial litigator.

"Communicate," said Flansburg, identifying the biggest tip he has for businesses looking to avoid litigation, which can be expensive and time-consuming. "Once there's a problem identified gather information and communicate with your attorney. Litigation occurs when parties aren't able to resolve a problem voluntarily through negotiations."