

# Ballard Spahr Capabilities

## Labor and Employment

Our attorneys work with clients to provide day-to-day counseling on labor and employment issues, take steps to avoid claims and litigation, and if workplace issues turn into disputes, we evaluate potential business impact to devise the next steps that will produce the best outcome for our clients. The scale of our nationwide practice is matched by the depth of its experience in the following areas.

### COVID-19

Questions abound for employers who want to resume or expand operations, reopen facilities, or return employees from furloughs or layoffs. We're advising on vaccine and mask questions, unemployment and leave compensation, requests for accommodations, tax credits and considerations, immigration, government loans and aid programs, payroll issues, safety mandates, and insurance issues. COVID-19 has had a huge impact on employee compensation and benefits. We're counseling clients on compliance issues, options for health and retirement plans and packages, benefits funding, and disputes with service providers.

We're also talking with clients about workplace safety and productivity issues that existed long before the pandemic emerged—and require sustained attention. We help clients develop and implement diversity and inclusion programs and advise on matters involving misconduct and discrimination. On the litigation front, we are helping schools, governments, and businesses prevent and respond to lawsuits stemming from the decision to resume—or not resume—onsite operations. We have extensive experience in ERISA litigation, including counseling on breaches of duty, cutbacks in pension and retiree health and welfare benefits, cash balance pension plan conversions, and withdrawal liability.

At a time when layoffs and salary reductions are common, we're helping companies secure their valuable trade secrets, avoid antitrust violations such as price gouging or collusion, and recoup losses stemming from competitors engaging in anti-competitive activity.

Visit the firm's [Navigating the New Normal](#) page and [COVID-19 Resource Center](#) for an array of helpful materials for employers, including return-to-work and other checklists, sample leave request forms, sample workplace policies, articles and webinars.

### Employment Counseling

Preventive counseling is as necessary to employers as a skillful defense against employee and government claims and actions. We advise clients across the country on the full scope of employment issues.

In many cases, issues raised in the context of day-to-day counseling can result in a grievance, lawsuit, or other dispute. Our experience enables us to provide practical and accurate advice and to develop effective strategies to resolve the

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immediate issue, position the employer should a grievance or other adversarial proceeding result, and develop a plan of action to address future issues.

We counsel employers in:

- Affirmative Action Plans and Federal Contractor Compliance
- Compliance audits
- Discrimination claims
- Diversity and inclusion
- Drug and alcohol testing
- Sexual harassment
- Employment counseling
- Employment litigation and arbitration
- Executive compensation
- Health and welfare benefit plans
- ERISA, MEPPAA, and benefits litigation
- Executive agreements and compensation
- Employee Stock Ownership Plans
- Immigration
- Incentive compensation plans
- Labor/Management relations
- OSHA and workplace safety
- Policies, handbooks, and trainings
- Trade secrets, confidentiality, non-competition and non-solicitation agreements and litigation
- Restrictive covenants
- Wage and hour audits, investigations, and class/collective action litigation
- Workplace investigations
- Qualified and non-qualified retirement plans

## Discrimination and Harassment

The number of workplace discrimination and harassment lawsuits has risen sharply over the past few years and the stakes for employers have never been higher. Ballard Spahr attorneys manage internal investigations, defend against misconduct claims, and work with clients to develop strategic plans that minimize damage and restore confidence.

Our employment litigators have experience defending companies and their employees against claims of discrimination, civil rights violations, defamation, harassment, and retaliation. We have represented clients from family-owned businesses to Fortune 100 companies and have a track record of success defending individual and class action lawsuits in state and federal court and in front of the Equal Employment Opportunity Commission (EEOC).

The team includes more than 20 female attorneys, including former prosecutors and lawyers who honed their considerable investigative skill at government enforcement agencies such as the EEOC and the U.S. Department of Education's Office for Civil Rights.

We assist with issues arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and similar state anti-discrimination statutes, in state and federal court as well as in front of the EEOC.

Training is critical to risk avoidance. We use our knowledge gained from decades of experience litigating discrimination and harassment claims across the country to help employers identify risk and take preventive action.

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We work with business leaders and human resources professionals to objectively assess their workplaces and take the necessary steps to develop a culture that promotes inclusion, provides a clearly articulated structure for reporting allegations of misconduct, and supports a company's reputation in the marketplace.

## Employment Litigation and Arbitration

Our labor and employment attorneys have significant experience in single- and multi-plaintiff, as well as class and collective action litigation, in state, federal, and appellate courts.

We defend employers in all forms of employment litigation, including:

- Discrimination, harassment, and retaliation claims based on every protected class (including age, race, gender, sexual orientation, disability, religion, and national origin) and arising under Title VII of the Civil Rights Act of 1964, the ADEA, the ADA, and similar state anti-discrimination statutes
- FMLA, USERRA, and various state and local leave laws
- Equal Pay Act
- Whistleblowing
- Employment at-will, wrongful discharge, and employment tort claims, including claims for defamation and emotional distress
- Employment and executive compensation agreements
- FLSA as well as individual state wage and hour claims and investigations
- Defense of employee benefits disputes arising under ERISA
- Employment-related class actions
- Noncompetition and confidentiality agreements

In addition to our representation in state, federal, and appellate courts, we have successfully represented clients against administrative charges before the:

- Equal Employment Opportunity Commission
- Department of Labor
- Office of Federal Contract Compliance Programs
- Occupational Safety and Health Administration
- National Labor Relations Board

## Labor/Management Relations

Ballard Spahr possesses formidable experience in the arena of traditional labor law. For decades, Ballard Spahr has represented private, public, and nonprofit employers in their dealings with unions and unionized workforces.

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Our attorneys represent employers in collective bargaining negotiations, interest arbitrations, private and American Arbitration Association labor arbitrations, and unfair labor practice proceedings before the National Labor Relations Board (NLRB) and state labor boards. We also provide advice and counseling on National Labor Relations Act (NLRA) and state labor law compliance issues; the labor implications of mergers, acquisitions, and asset purchases; strike prevention and control; union campaigns; strategic expansions; and union-free training of management and supervisors.

We are familiar with the sensitive nature of complex labor relations issues and have the experience to bring about resolution. We forge positive relationships with organized labor, while at the same time aggressively advocating the legal positions necessary to achieve our clients' goals.

## ***Collective Bargaining and Arbitrations***

Our team takes an aggressive yet practical approach in collective bargaining and interest arbitrations. In all cases, our strategy is driven by our clients' business goals. Our approach to achieving success involves carefully developed and detailed strategies including preparation, alignment, relationships, commitment, creativity, and assessing the best alternative to a settlement.

We have a track record of success in handling:

- Wage freezes, signing bonuses excluded from base pay, and decreases in or freezing of longevity and salary increments
- Changes to health care for current employees, resulting in significant cost reductions for the employer
- Elimination or reduction of post-retirement health care benefits
- Programmatic overhauls designed to reduce absenteeism and overtime
- Preservation and expansion of managerial prerogatives for increased efficiency and fiscal health
- Retirement benefit cost controls

Arbitration of labor disputes is the core of a collective bargaining agreement, and awards can have a considerable impact on the collective bargaining relationship and can redefine a labor contract. We assist employers in every aspect of the labor arbitration process—in responding to grievances, deciding whether a case should be arbitrated, choosing an arbitrator, determining strategy, preparing the case, trying the case before the arbitrator, and filing briefs. As appropriate, we seek court enforcement of an arbitration award or petition to vacate an award. Our goal in labor arbitration is to achieve a successful result and to keep the process efficient for our clients.

## ***Unfair Labor Practices***

Ballard Spahr attorneys regularly represent clients before the NLRB and state labor relations boards in unfair labor practice cases. We have extensive experience representing clients in the full range of NLRB matters, including

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defending clients against allegations of discrimination based on union activities; allegations of interference with employees' protected, concerted activities; and allegations of failure to bargain in good faith with a union.

## ***Union-Organizing Attempts***

Because we have represented management in hundreds of union-organizing attempts, we know how to help clients effectively manage these sensitive situations. We work with management to assess both the legal and campaign issues and develop an effective strategy to help avoid a petition or respond if one is filed. If a petition is filed seeking a representation election, we advise on employer rights and responsibilities during the critical pre-election period, represent the employer in all labor board proceedings, and work closely with management to design and carry out an effective election campaign. We frequently litigate representation cases before the NLRB and the appellate courts, as well as post-election issues involving challenges to the results of an election. We are exceptionally knowledgeable regarding NLRB procedures and the boundaries of what employers and labor unions are permitted to do in organizing situations.

## ***Decertification and Withdrawal of Union Recognition***

We advise employers on their rights and responsibilities when decertification or withdrawal of recognition is appropriate and represent them before the NLRB in unfair labor practice proceedings that involve decertification and withdrawal of recognition.

## ***Prevention and Control of Strikes and Picketing***

We show clients how to prepare well in advance for a strike or lockout, as well as for any picketing. An effective strike plan addresses issues such as security, continuation of work, deliveries in and out of the facility, and many other factors. Our attorneys also are experienced in preparing injunction papers and securing injunctions to counter unlawful picketing so as to minimize disruption to the employer's operations.

## **Policies, Handbooks, and Trainings**

Effective policies and practices serve as the best offense and defense against employee claims. Our attorneys advise clients on instituting and enforcing policies and procedures and steps to take when employees violate them.

We draft policies and procedures that eliminate ambiguity around employee expectations, limit employer liability from certain claims, and reaffirm an employer's commitment to comply with state, federal, and local laws.

Our work in this area includes addressing issues involving:

- ADA, FMLA, OSHA, and EEO
- Affirmative action plans and federal contractor compliance
- Internal investigations
- Interviewing, hiring, and termination
- Performance evaluations

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- Attendance, vacation, holidays, and sick leave
- Conflicts of interest
- Discipline and termination
- Discrimination
- Diversity and inclusion
- Drug and alcohol testing
- Employment application process, including criminal background and credit checks
- Immigration, including form I-9 compliance
- Permissible use of email and the internet
- Restrictive covenants
- Sexual and other prohibited harassment
- Wage and hour
- Workers' compensation
- Workplace violence

## *Workplace Training*

We regularly conduct interactive, on-site, and virtual training in group and individual settings for every segment of the workforce, from senior management to hourly staff. We often customize training programs to meet a client's particular needs. Recent programs we have conducted address:

- Electronic communications
- Collaborative partnerships
- Diversity and inclusion
- Employee benefits
- Employee handbooks
- Employment law changes under the Trump administration
- ADEA developments
- Anti-harassment and discrimination training for employees
- Anti-harassment and discrimination training for managers
- Hiring and firing
- Independent contractor misclassification
- Investigation tips and techniques for managers and supervisors
- Leave as a reasonable accommodation and navigating the interplay between the ADA and the FMLA
- Management basics
- Pay equity
- NLRB updates
- Political issues in the workplace
- Joint employment, temporary employment, and independent contractors
- Social media in the workplace
- The ADA and FMLA for managers
- ADA accessibility
- The NLRA and the non-union workplace
- Wage and hour developments
- Wage and hour self-audits
- Workplace sexual harassment policies

## *Employment Agreements*

We draft, review, and revise employment agreements to streamline hiring, firing, discipline, compensation, and benefits decisions and protect trade secrets, customer and vendor relationships, and other proprietary information.

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## Affirmative Action Plans and Federal Contractor Compliance

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has become increasingly active—and every company and organization that does business with the federal government is required to comply with its complex and changing array of laws and regulations. We can help.

Our attorneys guide clients of every size—from local or regional employers to national corporations—on the government's affirmative action and equal opportunity requirements. We provide OFCCP audit support and assist in the development of Executive Order 11246, Veterans, and Individuals with Disabilities (Section 503) affirmative action plans (AAPs) for clients across the country.

We advise clients to take a thorough, proactive approach to developing Affirmative Action Plans (AAPs), which includes robust applicant and personnel tracking systems, action-oriented programs, personnel practice reviews, and adverse impact analyses. We work with employers to develop effective procedures for gathering employee data, analyze and organize that information to account for every contingency and regulatory guideline, and develop customized, defensible plans that will hold up under OFCCP review.

In addition, our team monitors the latest developments in the OFCCP regulatory and enforcement landscape, as well as relevant state and local requirements, to make sure our clients are prepared for both impending changes and emerging trends. We provide on-site training to in-house counsel and human resources personnel and, as mentioned previously, regularly publish e-mail legal alerts.

We represent clients across industries, including:

- Medical device manufacturing
- Pharmaceutical manufacturing
- Aerospace manufacturing
- Financial services
- Nonprofit
- Health care
- Consulting and professional services
- Investment research

## Compliance Audits

A meticulous compliance audit, conducted by an attorney who understands the letter and nuance of employment law, is a critically important part of workplace management. The attorneys on our team have been helping clients across industry sectors to avoid risk for decades, including the reputational harm that can accompany an allegation of misconduct.

Our attorneys regularly conduct audits for employers on the full range of workplace matters to ensure compliance with state and federal employment laws. We also assist companies in conducting their own compliance audits and advise them on how to take proactive steps to avoid litigation and limit liability.

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Our work includes the implementation of monitoring processes, plan analysis and drafting, and counseling on OFCCP audits. Should litigation arise, our deep team of employment litigators has a track record of successfully defending clients against a range of claims in courts across the country, as well as before administrative agencies and arbitration forums.

We advise on compliance with the following statutes and topics:

- ADA, FMLA, OSHA, and EEO compliance
- Affirmative action plans and federal contractor compliance
- Attendance, vacation, holidays, and sick leave
- Conflicts of interest
- Discipline and termination
- Discrimination
- Diversity and inclusion
- Drug and alcohol testing
- Employment application process, including criminal background and credit checks
- Immigration, including form I-9 compliance
- Internal investigations
- Interviewing, hiring, and firing
- Performance evaluations
- Permissible use of email and the internet
- Restrictive covenants
- Sexual and other prohibited harassment
- Wage and hour
- Workers' compensation
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## EEO-1 and VETS-4212 Reporting

We work with our clients on their approach to EEO-1 and VETS-4212 reporting to ensure that the relevant data has been reviewed and is sufficiently prepared for timely and accurate submission. We would notify our client of report filing due dates well in advance. Our team has counseled a national organization [American Red Cross] through the process of EEO-1 and VETS-4212 reporting, and we know what it takes to help large clients maintain compliance. Our team would provide ongoing consultation about how to compile the applicable data properly.

## Mergers and Other Transactions

Working alongside transactional lawyers, we identify and resolve workplace issues that may arise during asset sales, purchases, spinoffs, takeovers, and mergers. We examine pension liability; potential or pending employment litigation, administrative complaints, and investigations; employee privacy issues; labor organizing activities; and unfair labor practices. We also review employment agreements, noncompete and confidentiality provisions, employment policies and handbooks, and benefit plans, and we conduct internal audits to help clients evaluate their liability risks.

## Workforce Reductions

From initial program development through implementation, we guide clients through the challenges of a reduction in force (RIF). Our attorneys assist clients with RIF programs and compliance with the federal Worker Adjustment and Retraining Notification Act (WARN) and similar state and local laws for both unionized and nonunionized workforces in a variety of circumstances, including downsizings, work relocations, mergers, acquisitions, asset purchases, and plant closings.

## ERISA, MEPPAA, and Benefits Litigation

Employers must be equipped to make informed decisions about benefit plans to prevent, and be prepared for, litigation. Our attorneys have extensive experience in evaluating and litigating disputes arising under the Employee Retirement Income Security Act (ERISA) and related federal and state laws.

Our clients include employers and other plan sponsors, employee benefit plans, trustees, plan administrators, and other plan fiduciaries in all aspects of employee benefits litigation, from class actions to individual claims.

We regularly assist in matters involving:

- Breaches of fiduciary duty, including cases involving employer stock investments
- Claims for benefits under retirement, health and welfare, and executive compensation arrangements
- Cutbacks in pension and retiree health and welfare benefits
- Cash balance pension plan conversions

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- Multiemployer pension and welfare plan contributions and withdrawal liability
- ERISA Section 510 discrimination claims
- Disputes with service providers

## Executive Agreements and Compensation

Enforceable agreements that meet the needs of the client's business are imperative. We collaborate with clients to identify categories of business-critical information and other factors to draft agreements that reflect the client's risk threshold. We also monitor legal developments to ensure that agreements are free of technical defects and can withstand legal challenge.

We counsel clients on the design and operation of nonqualified deferred compensation plans, including the extent to which plans are subject to restrictions set forth by Section 409A of the Internal Revenue Code, and if so, whether they comply. We advise on Section 409A correction principles for both form and operational failures, tax-reporting and constructive receipt issues, and the calculation of applicable taxes and penalties. We also represent employers in the administrative claims process and litigation involving nonqualified deferred compensation plans.

We advise publicly traded clients on executive compensation disclosure rules. This includes compliance with the SECs enhanced proxy disclosure rules, as well as additional disclosure obligations arising from Dodd-Frank, such as the "say-on-pay" and "say-on-frequency" rules.

Our attorneys regularly counsel compensation committees in all areas of executive compensation for both privately held and publicly traded companies. We do this as part of our general representation of the company or as special counsel to the compensation committee.

## Incentive Compensation Plans

To help clients achieve organizational performance and retention goals while still maximizing flexibility for executives and directors, our lawyers routinely advise clients on the taxation of equity-based and cash-based incentive awards and programs.

Our work considers the impact of the Section 162(m) deduction limitation and the Section 280G golden parachute rules. We also advise on the compensation and tax implications of inbound and outbound multinational executive transfers.

We advise on the design and operation of equity-based and cash-based incentive arrangements, including executive level arrangements, such as:

- Stock (or similar equity) options
- Deferred stock awards

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- Stock appreciation rights
- Restricted stock and restricted stock units
- Employee and agent stock purchase plans
- Long- and short-term-based and retention-based incentives

## OSHA and Workplace Safety

A company's workforce is a valuable asset. We advise on preventive measures as well as compliance considerations to minimize the risk of Occupational Safety and Health Administration (OSHA) citations, and we help clients to prepare for and respond to OSHA inspections.

We also work with clients to assess state-specific questions, since each state exempts certain industries from its plan and each has differing regulations on certain workplace safety issues. If an OSHA citation is issued, we represent clients in contests, settlement proceedings, administrative hearings, and court challenges to citations and penalties.

In cases where a fatality is involved, we consult on media relations, employee counseling, and issues involving criminal prosecution.

## Pay Equity Analysis

In the last few years, many states and the Federal Government have issued regulations implementing pay equity and enforcing equal pay laws. Our team has developed a strategy to address the need for our clients to comply with these requirements. Ballard Spahr partners with a consultant to perform compensation regression analyses that account for factors such as experience and education to determine whether pay gaps exist between women and men and between people of color and whites in similar positions. In our experience, it is advantageous to have legal counsel facilitate this project (including engagement of the consultant, if you prefer) to maximize the likelihood that the work product and/or discussions of such work product will fall under one or more privileges, such as the attorney-client privilege, work product doctrine, and/or critical self-analysis privilege. We would be able to advise our client regarding best practices in compensation and appropriate responses to the results of annual pay equity analyses. We have a close working relationship with Mercer and know they are well-regarded in this area, but we can certainly work with other consultants based on our client's preferences. Ballard Spahr typically acts as liaison between the client and the consultant, facilitating the flow of information between the two, and participating in milestone telephone calls to discuss the analysis. We also offer strategic advice and counsel based on the outcome of the study.

## Trade Secrets, Confidentiality, Non-Competition, and Non-Solicitation Agreements and Litigation

Employees and business consultants often possess confidential information that is critical to a company's competitive edge—and technology makes accessing that data even easier. We help employers protect, preserve, and recover their proprietary assets.

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We represent clients across the country and in a range of industries in drafting confidentiality, non-competition, and non-solicitation agreements to prevent and combat unfair competition. To protect clients from the damage former employees can set in motion, we draft restrictive covenants and enforce them through negotiation, arbitration, or preliminary and permanent injunctions in state and federal courts. We also represent employers who seek to invalidate overly broad restrictive covenants that apply to their new hires, and we have defended them against claims of tortious interference and unfair competition.

## **Wage and Hour Audits, Investigations, and Class/Collective Action Litigation**

### ***Wage and Hour***

Our lawyers are highly experienced in a wide variety of wage and hour matters, including audits and claims under the FLSA, state minimum wage laws and state wage payment and collection laws, and before the Department of Labor, state administrative agencies, and federal courts. We advise on issues including exempt, nonexempt, or independent contractor classification; child labor regulations; recordkeeping requirements; payroll practices; bonuses and lump sum payments; and nontraditional compensation systems. We also defend single-plaintiff wage and hour litigation, FLSA collective actions, and class actions brought under state wage and hour laws.

### ***Investigations***

Workplace claims of harassment and discrimination, breach of confidentiality, financial loss, workplace injury, and loss of trade secrets are a few situations that can trigger an investigation, either internally or by an outside entity. We help clients prepare for, initiate, and complete internal investigations or, at their request, conduct the investigation ourselves. To identify policies and practices that create or increase exposure, we conduct legal vulnerability reviews and recommend appropriate action.

### ***Class/Collective Action Litigation***

When a class action is filed, the risks are high. We have successfully defended companies in many industries against class actions in a wide range of employment related matters, including minimum wage, overtime, ERISA, and related issues.