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**Title:** Labor and employment law member at McGlinchey Stafford

**Education:** Bachelor of arts and juris doctor, Loyola University

**Practice:** Bickford represents management and employers in litigation, lectures and consults on best practices in the workplace and provides guidance on policies and procedures and training and education.

**Hometown:** New Orleans

**Interesting fact:** Bickford returned to law firm practice in 2001 after several years as vice president of human resources and corporate counsel at The Sunshine Pages, a regional telephone directory company headquartered in Louisiana.

## Q & A

### Magdalen Blessey Bickford



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Magdalen Blessey Bickford says 2018 will be a year of "significant and profound" changes in the landscape of laws and rules governing employment and labor.

For 30 years, Bickford has worked with clients in various industries, representing businesses with 10 employees and 10,000. She is one of a few attorneys in New Orleans with a specialty in labor law, which sets the rights and duties for employees, labor unions and employers under the National Labor Relations Act of 1935 and subsequent statutes.

As the Trump administration has gained steam, it has targeted for reversal or rollback

Obama administration precedents and rules affecting industries and workers across the economy. And as it continues to pursue a generally business-friendly approach to federal policymaking, employers and employees are trying to figure out what the changes mean for them in the year ahead.

Resurfacing as workplace issues are Obama-era initiatives aimed at expanding overtime pay and addressing discrimination and harassment. And before the new year, the GOP majority on the National Labor Relations Board overruled or revisited decisions affecting workplace rules, the parameters of union

organizing and the scope of employers' duty to bargain with labor over changes to employment terms and conditions.

Bickford talked to CityBusiness about the changes and how employers' approach to them will be guided by their unique workplace culture. She also says employers should be revising their policies and handbooks and planning how to engage employees.

—Michael Joe

**Q. The past year raised the profile of a number of business and employer issues -- from sexual harassment to cybersecurity to taxes. What are you paying attention to in the new year?**

It's a period of time where the Trump administration - and I put no value statements here - is really starting to get up and running with significant and profound changes in the world of employment law and labor law. I've been doing this for a long time, and one thing I find so problematic in this administration that we don't see in other administrations as much is the differences between the agencies on germane issues.

The Equal Employment Opportunity Commission has an initiative on the books right now that is a very activist initiative trying to identify and correct systemic discrimination and harassment. Meanwhile, the Department of Justice has taken positions counter to the

EEOC on certain issues like that. The EEOC doesn't change as quickly because the board members' terms are longer; President Trump is not going to be able to walk in there and change things on a dime because he's got to wait for these terms to expire. Whereas in the DOJ, he puts his people on a rotating basis and they can take a very activist position on issues on behalf of the Trump administration.

Another agency in a clash is the Department of Labor. Their board is changing and they are sort of in the middle of it. Last year, there was a big upset because the DOL was issuing guidelines to change who is entitled to overtime. Then a Texas court stops it and in the meantime Trump comes into office and tells the DOL to pullback on this. They've taken public comments for a new overtime rule but we don't know what we are going to see. It is going to be very different than what Obama proposed but where that is going to be, it's really premature at this point.

**Q. The National Labor Relations Board, which enforces labor law, was very active in December under a Republican majority and before its pro-employer chair stepped down. What are some of the changes happening?**

That board has terms too, but it is a quicker turnover board than the EEOC's. At the end of the year we saw a huge flurry of pro-employer decisions come out and a couple of fundamental established precedents got changed. One was on the joint employer standard - what does it take to be a joint employer and be responsible for an employee under the law?

Another was in union law and the concept of past practices, which is a term you might hear very frequently. Whenever you have a union you have got to bargain the terms and conditions of employment. That's a vast simplification, but that's basically what it is.

And the Obama board was a very activist board that took a broad paint brush to what was considered terms and conditions of employment.

In a recent decision that just came out, a company was changing its health insurance and the collective bargaining agreement with a union had expired and they hadn't put a new one in place, so it was sort of this odd period. And what the board said is that changing benefits is just sort of a normal thing, so we don't really think that is something that has to be bargained. The union was saying that changing from one carrier to the next is something management should have told them about. And the board said not really, because you are changing something that is normal to change and you weren't in the middle of a contract so the employer gets a pass. That's a huge difference than what it used to be.

The other thing that we see a softening on is how the Obama administration got very aggressive with employee handbooks and would look for language to basically say that certain types of limitations and rules in handbooks restricted protected concerted activity. Protected concerted activity is when workers can get together on their own time - not while they are engaged in work but it can be on breaks, time around the old water cooler, or after work - to complain about the terms and conditions of employment.

That type of activity is protected and Obama's board was very aggressive in that everything was protected concerted activity. The Republican-controlled board put out another recent decision that diluted that position a little bit. It said that we are not going to paint a broad brush anymore. We're going to use a balancing test to see whether in reality something is really subject to protected concerted activity. These are major changes for the NLRB.

### **Q. How should employers approach this period of change?**

I think there are incredible issues right now that we are seeing shifts on. And the big thing employers need to do is to read the tea leaves. We've got to be able to figure out how employment law is going to change in the next year to two years and how it will affect employers. For example, I'm writing handbooks for two employers. What positions do I take? Do I take aggressive positions that fit with Obama agencies, or do I take more flexible positions that appear to be warranted or manifested in the changes?

I have to work closely with clients to make the call on how they want their handbook to read or how they want their culture to come out in these handbooks in this time of change. One handbook I'm working on is 117 pages and the other is 27 pages. The depth of the policy is reflective of their workplace culture.

When I sit down with a client, the first question I'm going to ask is the easy question, which is what is your business and how does it operate?

The next question is about your culture. Tell me how you interact with your employees, how you engage with your employees? These are important questions to know before I even start. And it will be different in every single experience and it's very much based on leadership.

### **Q. What is the minimum that employers need to include in employee handbooks?**

From a legal perspective, you need a handbook to set up the notice requirements of certain laws. That's essential. So, for example, you have to set up your EEO policy in a handbook. You lose certain defense opportunities and lose the ability to create a legally compliant environment if you don't set the parameters for that in a handbook.

But practically, what I know is a handbook that sits on a shelf or a handbook that is a button on your home page that doesn't get pressed is useless. So how do you make it useful? There are certain ways you can do that - by crafting the message properly and reflecting your environment. If you are very rules-driven environment, a very box-oriented place, your handbook will be very rule driven. But if you are not that, you want to make sure your message dovetails with the way you engage with your employees.

### **Q. How do you get managers and employees to think about what is in a handbook on a day-to-day basis?**

Management sets the tone. If management doesn't pay attention to the handbook and the roll-out of the handbook, that sets the tone for it to sit on a shelf or the button to remain unpressed. And sometimes that's very difficult. When human resources comes in and says, 'We need to take an hour of time to go over the handbook,' I'm taking money out of the kitty.

But we're in a different world now where producers, if they don't like what they have, they are going to jump ship. Millennials value things that baby boomers didn't. We have to view these things differently.

How do you get employee engaged into a handbook? Training is the first way. I'm here to highlight the value that the handbook brings and what the company is doing for you and I'm pulling in employee engagement. You've got to give it time and attention and help employees see why it's a valuable thing.

In all these #MeToo situations, those employers had handbooks. But guess what? They sat on a wall and they weren't living, breathing meaningful documents that people had confidence in. It's easy to let it roll over and roll over.

### **Q. Like taxes, employment policy can get complicated. For smaller employers who don't have an HR professional or attorney to turn to, where can they find help?**

There are outsourced HR agencies that do an effective job of assisting you. That may be an option. And a lot of times your workers' compensation insurer and general liability insurer have resources you can use.

But I would tell you it really doesn't cost that much more money to get an attorney involved with the review and development of an employee handbook, and in my opinion is very well worth it because it does allow you to customize it in a way to leverage its use. People assume that lawyers are very expensive and of course a lot of them are. I think you need to talk to lawyers and see if they can work out a system that works for you. I have a small nonprofit that I have on a very low retainer so they can ask questions. That way they don't have issues because they feel very comfortable picking up the phone and calling me. Sometimes you just have to ask for help and I think most lawyers will work with clients in that scenario.

Never forget, also, we are in the great state of Louisiana which does things a little differently. A lot of times people use national agencies that don't do it in a properly nuanced manner. That's something to think about, too.

### **Q. It seems that everything that has happened in the last year around sexual harassment and discrimination in the workplace has been a wakeup call for employers. What should they be thinking about going forward?**

These are absolutely workplace issues in some form or fashion. I think what is going to happen is we are going to see an incredible uptake in EEOC charges in the area of sex discrimination as well as other areas, because it's all about #MeToo. If employers are not paying more attention, they should be.

Most employers have an open-door policy to hear complaints and concerns. But because of these media events we've got to walk through the door and solicit comments, concerns and worries from our employees.

### **Q. Is there a right way to walk through that door to start a dialogue?**

It is going to be individualized. And since it hasn't happened before, people will get a little concerned, worried, paranoid because they have their own defense mechanisms. Management has to be trained how to get beyond that. Even if the dialogue is awkward, it's the employers' responsibility to go figure out how to have the dialogue. A good lawyer can help them and there are certain people who go all over the country doing training on employee sensitization. Implicit bias is also a big topic right now and how do you identify unconscious bias in the workplace.