BARCLAY DAMON LLP
Labor & Employment
PODCAST

Season 4, Episode 2: "What the Trapped at Work Act Means for New York Employers"

Speakers: Rosemary Enright and Michael Sciotti, Barclay Damon

[Rosemary Enright]: Welcome to everyone to Episode 2 of Season 4 of Barclay Damon's *Labor & Employment Podcast*. I am here with my partner in crime, Mike Sciotti. Mike, give a shout out.

[Michael Sciotti]: Hi, hello, hello, how's everyone today?

[Rosemary]: So we're thrilled that you joined us all today. We're going to be talking about the Trapped at Work Act, which—I just love that name, Mike. But we'll talk about that in a minute. But for those of you who listened to our first episode, you know what we're going to do is start each of these with a quick question. So from my *New York Times*...plug for the *New York Times*...calendar so here and I did not tell Mike about this one. So look at his face. He's like, oh no, what is she going to ask? Okay, so the question is, what was your worst job—or the worst job you ever had?

[Michael]: Working at an ice cream shop because the owner was so mad all the time at everybody.

[Rosemary]: That's a bummer. I would have said I'd love to work in an ice cream shop.

[Michael]: Oh, it was great when he wasn't around and it was his wife, but when he was there, oh my, he just criticized everyone and everything all the time.

[Rosemary]: All right, well, there you go. All right. Well, mine is—and I was talking to a friend about this and she laughed and she said, really, that's your worst job... So I was a mother's helper on the cape over the summer, which I know. I know, but there's something to be said. I've been there only a few days and the family we went to, it was like a Fourth of July party, like on the beach somewhere. And we got there and I'm whatever I am, 18 or 19 years old, and get there and there's a lot of other people my age, there's a bonfire, there's all this going on. So we get there and I run over because I'm like, I'm going to have some s'mores and at the time the drinking age was 18, maybe I'll get a beer. And as I run over, the kids run with me, I'm like, what are you doing? And I realized, I have to take care of them. I'm not here for the picnic, you know, I'm like, no. But anyway, the location and the people all very nice. But in retrospect, it was like, you know, I would have read that rather than just hanging out on the cape, Mike. So that's my worst job, if you can say such a thing. But anyway, so again, welcome to our viewers. Glad you're joining us. And again, we're going to talk about Trapped at Work. And this falls under the heading when we talk about the Trapped at Work Act of, you may have heard of "stay or pay." So there are stay or pay laws. And New York is not the first jurisdiction to enact such a law. California has one. I don't know what other states do, Mike. I don't know that it matters necessarily for our listeners. But a lot of times people say, New York, it's so hard to do business in New York. But we're not the first ones with this particular type of law. Just at a high level, I'll start off and I think everybody knows Mike and I go back and forth, we chat about these things. So basically what the Trapped at Work Act says is that employers in New York cannot obligate their employees or workers, and we're going to talk about who this all applies to, but they can't obligate employees or workers to repay a sum of money if they leave before a specified timeframe. That's just a simple way to think about it. So you're trapped, I can't, I've got this... and we'll talk about what the different constructs are, but there is money that my employer gave me, and I now have to stay for the next two years or five years or 10 years or whatever it is, because if I don't, I'm going to have to repay it. Just at a very simple level, that's what it is.

[Michael]: Yes.

[Rosemary]: So with that said, and so everybody knows when did it go into effect? December 19. So it's already in effect, gang. So let's break it all down. So Mike, I said at the beginning, you know, "employers," okay, so who or what is an employer for purposes of this particular act?

[Michael]: Yeah, as you know, Rosemary, the labor law, each of the laws have... usually have their own definition of employer. And this one is no exception. And this one is basically everyone in the state of New York. A lot of times we see labor laws where the government excludes itself from coverage. Not so in this case, they didn't include themselves.

[Rosemary]: Yeah. And I love the way you said that, Mike, because I had somebody ask me that and I said, "everyone." And they're like, are you serious? I'm like, yes, I'm serious. So I love that you said that. And so it's every employer in New York state. And then I'm, and Mike, you know, when I was defining it, I said, you know, employees or workers. Well, what does that mean? So who's covered by this, Mike?

[Michael]: Everyone except your vendors. So if you have an independent contractor that works for you, they fall within the scope of this definition. And it's interesting they use the term "worker" as opposed to "employee" in the statutory definitions. The reason they did that was to roll in interns, externs, your independent contractors. The only classification that's excluded are those that are called "vendors." if, you know, sometimes the vendor independent contractor line gets blurred. So we want to try to make them a vendor as opposed to an independent contractor. And that's really the rub here is that the law...it's not just your employees. It's all those people around you with the exception of your vendors and... unusual. But that is what we're seeing more and more here in New York.

[Rosemary]: Yeah, and they actually included, they call that even "apprentices," Mike. Like I mean, it's like you said, it's everybody across the board, other than the vendors. So, all right, so we know it's in effect. We know it applies to everybody, in terms of employers, know, anyone. And basically, I love the way you said that anyone in an employer's kind of universe who's doing any sort of work for them, vendors excluded because they're simply providing a product or a service or something. Okay, so, you know, when we look at this, and actually I'll again just cite from the act, you know, what they talk about in the act is "an employment promissory note." All right, and I've had several conversations with my clients about what is that, Rosemary? And, you know, well, you I was going to define it, but go ahead, Mike. So how does the act define the employment promissory note?

[Michael]: Yeah, let's start with an example because I think that that's helpful to sort of put some context what we're talking about here. So for years, and I mean for years, as long as I can remember now, if an employer wanted to send someone to like a high-level training, like maybe a Mercedes Benz dealership is going to send someone to become a master Mercedes Benz mechanic. And the cost of that was $25,000. They don't want that employee turning around, leaving, and going to another Mercedes Benz dealership. So they would... we would create like a training repayment document, an agreement. Doesn't really matter what you title it. It could even be called a promissory note. The title is irrelevant. What matters is you have to pay it back if you leave within a certain period of time. And that's the "trap." Meaning I can't leave because I would owe the Mercedes dealership $25,000 because they made me this master mechanic and I took the training. So it's some version of that. doesn't really make a difference what you call it. There are some exclusions that apply here, but, you know, like advanced payment of wages—that has a very specific agreement that the Department of Labor requires... that's accepted. But the title, Rosemary, doesn't make a difference. It's just the employer offered X, you accepted, you went to the training, you come back. Now you have to work for me for some period of time, or you owe me all or some of the money back. And some of the agreements that we've structured in the past were, hey, if you leave within one year, you owe it all. If you leave within two years, you owe 80 percent or three years, you owe 60 percent. So it had some type of sliding scale in it. These agreements have been pretty typical. And the scary thing here is we've really had no notice that we went from a hundred miles an hour to zero on these agreements in a matter of days. And it just came into effect on

12/19. And I'll just note that there was a lot of not too happy employers when this came out and they have made multiple proposed amendments to the agreement which we're waiting to see if they come into law. And I'm sure if we do, we'll do another podcast. But one of them calls for a delay of one year to 12/19/2026, before this goes into effect to sort of give employers the ability to get their ducks in a row. I don't know if it's going to pass. I tell people your guess is as good as mine, and whether the governor would sign it is another story. But the law does have some quirks in it. Another one is what we already pointed out with the independent contractor and the externs and the interns. So there are amendments out there. We'll see if they have any traction and they pass and they revise this.

[Rosemary]: Yeah, well, you know, it's interesting, Mike, because to your point about the amendments with the delay, I have several clients who have got agreements in place, you know, with employees who they've been paying for the training and that to enhance their skills. And all of a sudden, now it's like, wait, now, well, now what do we do? We've spent X thousands of dollars. Could this person now finish this and leave when we have this agreement. Wait a second, because it would change how they might approach this, right? It might make some adjustments. So yeah, we'll see what happens. Let's go back, we could, Mike, to the initial question, which was, let's talk about what an employment promissory note is. So I love your explanation of it. It was spot on and so easy to follow. The thing I want to add to this, and let me know your thoughts on this, Mike, is it's not just training. So a lot of individuals, a lot of my clients have read it and said, well, I don't have to worry about this signing bonus that I gave someone when they joined us and said, you've got to work for us for a year or 18 months, otherwise you've got to repay it because this talks about training, and I have this relocation bonus that I gave somebody and they've got to stay with us. And the reality is, I think, Mike, and you tell me if you agree with this, I think that people have gotten confused because when you go out and you read it, there's a specific reference to training. So I think everyone is thinking this is training specific. It's not, our dear listeners. This is any sort of agreement, instrument. They'll always use that word instrument or a provision within a contract. So inside some employment agreement that you give someone who you hire, any instrument that is going to obligate or require an applicant, that's the other thing. One of the amendments is, because right now this act says "worker and also applicants," one of the amendments is no, let's define that, let's limit that definition—anything, any instrument, as I said, agreement or provision in a contract that requires a person to pay back any sum of money that an employer has given them, except for the exclusions, which Mike and I will talk about in a minute, as there's several of those. And if they have to stay for some amount of time or they've got to repay it then guess what? It violates this law. Right? I mean, tell me if I'm crazy, Mike.

[Michael]: No, well, one thing has nothing to do with the other.

[Rosemary]: [Laughs] The minute I said that!

[Michael]: But I think the language of the statute, this is how harsh it is. The statute said it is unconscionable and illegal public policy violates the public policy of the state of New York. So unless you squarely fall within one of the exceptions, you are correct. No matter what you call it or whether it's for training or otherwise, the exceptions will control here and they're not very broad to be frank. So this really involves you doing a little self-audit of, hey, where in any of our stuff, be it a handbook, a policy, a note, do we have an employee having to repay X? Um, and you really have to analyze it to determine yes or no, does it fall into an exception? Um, and, uh, interesting enough, you know, the, the statute uses the term "beginning on the effective date of the law," which was 12/19. It becomes unconscionable. Then I read Rosemary, the sponsor's memo, uh, which is the legislative history. It says any, it doesn't matter if it comes into effect afterwards. The sponsor memo took it a step farther and said past agreements. So I'm like, is that retroactive or not? I mean, I just read it and it shocked me because I was expecting to see in the sponsor's memo similar language to what I see in the statute. And the sponsors memo is even broader. So I think we have to be very, very careful. Because if you violate this and you sue the employee, the employee wins. You have to pay the employee's legal fees. And if you have these agreements, the Department of Labor can fine you between $1,000 and $5,000 per

occurrence. And it's not just ...so if you have the same agreement for 20 employees, Rosemary, it's not one violation, it's 20. And so, you know, we definitely have to be very careful on the enforceability and walking away and taking a hard look at these things before an employer enters into them or at this stage tries to enforce them.

[Rosemary]: Yeah, well, that's one of the big questions, isn't it, Mike? Is it retro? What do we do? And so the counsel that we've been giving is, you know what? If one of these pops and you've got somebody who is going to leave, don't enforce it at this point. Or give us a call and we can talk it through. But I don't know that we're going to be able to get around it. As Mike said, unless something falls squarely in the exclusions, mean, unconscionable, against public policy, and unenforceable. Those are the three words they use. So what do you, you know, and I've had clients say, do I have to go back to this individual who signed it and say, oh, it's null and void? And my answer is no, just don't enforce it. All right, if, you know, I'm sorry, go ahead, Mike.

[Michael]: Yeah. Now, I agree. There are other ways to potentially recoup. But I think you have to be careful with being too creative under this particular law. So, you know, what if say, OK, Johnny's making $200,000 and he owes me $10,000 on this. How about I just turn around and reduce his salary to $190,000? Is that okay or is the department going to view that as a violation of this very broad definition of a promissory note? I think one of the important things for us to realize is that the last section of this law, Rosemary, says, they directed the Department of Labor to issue regulations and guidance. They have not done that yet. I checked, you know, right before we came on the air just to see if they popped up a web page or not. But not surprisingly, there are not any yet. So you really, really, really don't want to be overly creative at this point until we know how the department is going to interpret this. And but Mike, I may lose something. No, you don't. If it's an agreement, you have six years to sue on it. So waiting six months till we get some clarification from the department, you've lost nothing. You still have the ability to sue on it as long as it's not illegal. So take a deep breath. Let's see where the regulations go. Let's see if these any of these amendments come to come to pass and then we can reevaluate as the year goes on.

[Rosemary]: Yeah, you know, Mike, I have to say that's a great point. Would you do me a favor and just repeat what you said about the six months, you know, the six years and that I think that because I want everybody to just take a breath and hear that again. Go ahead.

[Michael]: Yeah. So in New York state, every claim is governed by what's called the statute of limitations. How long the injured party has to sue to recover for the damage. So if it's a contract or an agreement, it's six years. So we have some time here. You just take a step back and not get overly excited because Johnny went to another job. He didn't pay you the money. What do we do? We wait. We wait for the regulations. We wait to see if there's clarification. We wait to see if they change the effective date and then maybe we immediately sue Johnny before the new effective date goes into play. I mean, there's so much at stake with this that you just don't want to make a bad move because of the potential fines and the attorney fee provision for the prevailing ex-employee or ex-worker.

[Rosemary]: Right, I could see this becoming one of those little cottage industries, right? With some attorneys or firms that, look, these agreements are out there, we get attorney's fees, you know? There's a lot of areas, especially in the area where we practice labor and employment, that you get these little cottage industries that pop up, violations of the Wage Threat Protection Act, but you know, violations of this or that. So this might be an area down the line.

[Michael]: Yeah, and this also is following up on that just a little bit more of a cottage industry. I can also see class action lawsuits as a result of this. So, you know, you have a large employer, and you have 200 individuals with the same agreement. You know, suddenly the class action attorneys get involved and to them it's...how would I describe this nicely? They don't care if they're about the just cause. They care about putting money in their pocket and that you will not get a reasonable demand in a class action lawsuit. That's just the reality of it.

[Rosemary]: Yeah, exactly. So good. All right. So I think we've I think everybody's probably pretty clear how what this what this act prohibits. All right. So, Mike, what are the four exclusions?

[Michael]: Sure, the first one I mentioned, the employer advances you wages. An employer is allowed to advance you wages. New York has some very stringent regulations that must be followed in agreement. That's still going to be okay. And as a side note, I simply tell employers, don't do that. And I think a lot of my colleagues agree with that.

[Rosemary]: I do. I was going to say the same thing, Mike, before you said, I was going to say, but don't do that.

[Michael]: Yeah, so the second one is... I call it like a dual relationship. I work for the car dealership, but I also purchased a car or leased a car from the dealership, and I'm required to repay that. That's OK. That is not going to violate the law, and it's not limited to cars. You purchase, maybe it's a John Deere lawn mower or something like that, one of the big tractors, and it's going to take two years of financing to pay it back. That is okay as well. Educational personnel that have to comply with their sabbatical, you know, I think the colleges and universities, you know, if they require X, Y, and Z, that you're still going to be able to follow those requirements. And then this is actually helpful. Usually, if you have a union, you can agree otherwise in your collective bargaining agreement. I think the thought process there is that you have the union negotiating that on your behalf and the unions in a better position of strength than you are individually to go ahead and do that. So those are the four exceptions that exist right now. I know one of the other ones, Rosemary, that the proposed, new proposed legislation is some of the universities had to wish, universities and employers had like tuition repayment agreements. So, hey, you got to get A, B or C or you owe us the money back. So right now, that on its face, probably violates the law. So I know that's one of the amendments they're trying to turn around and get through.

[Rosemary]: Yeah, well, and thanks, Mike. And I loved your examples. Those were awesome. Because it was funny with the property with the second exclusion, I thought, what might be an example of that? And when you brought up the car, I'm like, that's brilliant. So I'm going to use that now when I'm talking to people. But what I'd wanted to do was...

[Michael]: And the other thing, could be, Rosemary, it could be a credit card. You work for JCPenney's and you have a JCPenney's credit card. You still have to repay the credit card.

[Rosemary]: ...that's true. Yeah. Right. Those are all great examples because that how you know, it always helps right to give people specific examples, so they get it; how it applies. So you know, we've had quite a few employers ask us, well, so what do I do now? I want to do you know, I still want to have, for example, a signing bonus. And one of the things you know, one of our colleagues and I, we were talking, and we said, well, you know what you do, you say, you know what? After six months of employment, we're going to, or after three months of employment, whatever you want to do, the timeframe doesn't matter, we're going to give you a bonus. And six months or three months later, we'll give you another bonus. And so it's, you don't have to, you're not repaying anything, we're just saying, you're still employed here, it's like with any bonus, you'll get it if you're still employed with us. So it's not a, you're not trapped there. So... go ahead.

[Michael]: Yeah. It's no longer a signing bonus. It is now a stay bonus. mean, stay. Yeah. Retention. Stay bonus. Stay with us for six months and we'll give you X. And so you sort of just reverse the timing of the payment in that regard.

[Rosemary]: Yeah, exactly. And there's a lot there's a lot of questions, as Mike and I said, you know, there these amendments that have been posed, but it's also does it apply retroactively? What is the definition of, you know, like you were talking about tuition, like tuition assistance programs? What is even the definition of

"training"? So there's all of these questions. It's still pretty vague, which is why I just loved what Mike said, which is just pause because we've got this six years and let's just wait and see. It's all going to get fleshed out over the next however many months. So wait it out.

[Michael]: Yeah. And New York has done this in the past. They rush through an employment law, and they think they got it right. And then all of a sudden everyone wakes up and says, oh, what about this? And what about this? And what about this? And they have to go back an amendment. This is not unusual in the great state of New York. And it's happened several times in the recent past.

[Rosemary]: Yeah, exactly. So just to wrap it up here, everybody, hopefully, you know, dear listeners, now you're clear on what this is when you hear about "stay or pay" and the Trapped at Work Act. But you may be sitting there thinking, OK, Rosemary and Mike, so what should we do? We know that we shouldn't be enforcing it right now. But what types of things should we be doing? And so, Mike, what would you say?

[Michael]: Number one is self-audit of existing employees and what agreements are out there and to determine whether or not any of the exceptions apply. And if not, to sort of realize these things are on hold temporarily till we get some further clarification. Number two, if you do signing bonuses, switch it to a stay or retention bonus. So they don't get the money up front. They have to work, earn it. And then they would in fact get it. Take a hard look at your handbook, any employment policies, no matter what they may be called, any agreements. Are we asking incoming employees to execute anything that could potentially violate this? And if we are, don't. Either strike that portion or if you need to revise the handbook or at least maybe a section of the handbook or whatever it may be to comply with the law as written. Well, I don't want to take the risk that I'm going to send Johnny to some $10,000 training session and not be able to recoup it. And Johnny's starting salary is supposed to be $200,000. We'll make it $190,000. OK. And then you've built in your 10 grand and you can always do a stay or retention bonus to Johnny saying after this training is completed, if you stay for some period of time, I'll give you more money or I'll pay you a bonus. So, you know, it's just... be careful and let's be smart. Because I just don't like that. The especially the fine, the one the $1,000 to $5,000 range and it's per occurrence/per employee. That that could be a lot of coin real quick for some larger employers.

[Rosemary]: Exactly. we work with a lot of larger employers who have those types of agreements. So all right. Well, great. there, Mike, I think we did a good job. What do you think for something that's...

[Michael]: Yeah, the only one other thing I will mention of the law, Rosemary, there's a provision that says, this is not your only remedy, employee. You have other remedies... if other remedies exist that you could bring a claim against your employer on, those still exist. The reason that's important is there are some employment laws out there that state, that's not the case. If you come after your employer under this law, you only get to come after them under this law. This is the wild, wild west. Any claims still exist. And again, I think batten down the hatches, more to come. And the next six months to a year will be very interesting to see what occurs via the, what I call "corrective legislation" and the regulations or guidance that will be issued by the department.

[Rosemary]: I like that "corrective legislation." So, all right, gang. Well, thanks for joining us today. As I said, it was episode two of season four. Please join us for our episode three and potentially four. We're going to be talking about the employee handbooks and what's new, exciting, different, if anything, for 2026. And as we always say, please leave us your comments, questions on Spotify and have a great day. Stay warm. It's the day we're recording here, the real feel here in Buffalo, also known as Studio B, is a -10.

[Michael]: Well, interesting, yes. Everyone stay warm. Interesting. went out at lunch. I'm in Syracuse. It was 40. One hour later, I come out. It's 25. So it's dropping real quick here.

[Rosemary]: My heavens. Yeah, all right. All right. Thanks.

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