

[Rosemary Enright]: Well, hello, everyone. And welcome to what Mike and I are calling the supplemental episode for the Trapped at Work Act. And actually, Mike, I should step back and welcome everybody. I was so excited about the topic, but welcome everybody to Barclay Damon’s *Labor & Employment Podcast*. I am Rosemary Enright, based in Buffalo, New York. I’m joined by Michael Sciotti, who’s sitting in Syracuse. And I have to say, Mike, a beautiful day here in Buffalo today, cold, but beautiful.

[Michael Sciotti]: I would agree. It is the same here, and there’s something in the sky. I wasn’t sure what it was, but I think it’s the sun.

[Rosemary]: I knew that’s where you were going with it. Exactly. Yeah. It’s brilliant sunshine today. In fact, I had a call with someone, and I made it a “walk and talk.” So I walked up Delaware Avenue because it was so nice. So anyway, but for our loyal listeners, you may be thinking, well, wait a second. I was listening to the whole handbook series. Why are you now talking about the Trapped at Work Act? And that is because our second episode, we talked about it and promised that if any... we were expecting changes or amendments, and we promised that if those came through, we would immediately get right to the, what is that saying, “hot off the presses,” I guess we get right to... that’s right so that’s why we wanted to jump in so you know the next episode will then return to the handbook series that we were doing, so anyway all right, Mike, before we jump in you know we got the question for you. So this episode’s question is, what was your favorite cereal as a child? Breakfast cereal as a child.

[Mike]: So thank you for the softball. I will change the word “was” to “was and still is.” So Lucky Charms, of course.

[Rosemary]: And you know what I love... that is mine too. That is mine too, Mike. Lucky Charms. And here’s the question, Mike. When I eat Lucky Charms, I’ll eat all the brown, I guess that would be the oats or whatever. And I try to leave as many marshmallows as I can. I mean, I’ll, you know, eat a marshmallow here or there, but I like at the end to have the bowl of all the marshmallows floating on top and then I eat them.

[Mike]: Wow, all right, different.

[Rosemary]: So you just eat it? You just eat it? Wow, that’s great. All right, well, there you go. All right. Well, so there you have it, folks. Lucky Charms. That’s the first time we’ve both landed on the same answer. So all right. So with that said, Mike, let’s get started. So first and foremost, everybody, breathe. All right? I said to Mike, I’m going to tell everybody just breathe. You know initially the Trapped at Work Act went into effect in December of 2025, which is why we immediately, in our second episode, talked about it. Well, that has now been paused, and the new effective date is December 19. So it’s an early holiday gift for everybody, but December 19 of 2026. So that means you have almost 10 full months to get everything in order. All right, so that’s why we say “breathe.” So December 19, 2026, so the end of this year. All right, and what we want to do now, is we initially thought we’d go through the Trapped at Work Act, but since this is a supplement, we’re going to hit on the changes. Those things, and most of the changes, Mike, I would say, tell me if you agree, were clarifications, right? They clarified a lot of questions we all had. Would you agree with that?

[Mike]: Yeah, I would agree with that to the extent it describes what we're talking about here meaning... what agreements qualify as trapping employees... some of the other stuff which we'll talk about in a second, I do view is substantive changes both... the two things that come to mind is now the Department of Labor has mandated to evaluate certain factors before they impose a fine. And second of all, those of you that listened to the original podcast realized there was a definition in there called "worker." So that included independent contractors. Now the law, the scope of the law has been revised only for employees, which so, but the agreements, yeah, they, had to clarify it because a lot of employers were up in arms.

[Rosemary]: Exactly. And it was confusing too. I ...people were up in arms. It was also, we were uncertain, right, Mike? We were just, you know, well, we think it means this, but we're not certain. So that is helpful to all of us. And so as Mike said, the definition, you know, they've eliminated "worker" and it's now "employee and employer." Basically, the definitions, Mike, are consistent with the New York State Department of Labor's definition of "employer" and "employee."

[Mike]: Correct. And I would just add one thing just for clarification. said in the original podcast, employee also includes prospective employee/applicant. So just keep that in mind, everyone.

[Rosemary]: Yeah, that's a great point, Mike. Thanks. I had forgotten about that. All right. So, we wanted to start with that, obviously. That is a change. So, we'll get into the other changes here in a second. But what I first want to say, Mike, is that the core rule, and again, tell me if you agree with this, the core rule is still essentially the same. So, an employer cannot or may not require an employee as a condition of employment to make a repayment unless it falls within one of the applicable exceptions. And that was the intent of it initially, and that core rule still applies. So would you agree with that, Mike?

[Mike]: I totally agree with it. And I think when we go through the exceptions, this loss now makes a little bit more sense. But it does change, everyone, the advice that Rosemary, myself, our colleagues have given out for decades has now changed. And you just need to be cognizant of that. Take this, in essence, nine months we have before the effective date of the law to inventory what you have, take a look, revise it so it complies. And the other thing that's going to be... go hand in hand with this, Rosemary, is your handbook. I know this is probably going to pop in the middle of our handbook episodes, but it's actually not a bad place for it to. One of the things you're going to have to pay attention to now is defining the term "misconduct" in your handbook. I know the Department of Labor is going to issue some guidance between now and December, we hope. And they've been directed to and maybe they'll define it for us. But I think your best bet right now is a good common-sense definition of "misconduct."

[Rosemary]: Yeah, and will your probably sitting there thinking, well, why? Why do we have to do that? We'll talk about that. We'll talk about that in a minute. so again, Trapped at Work, we're talking employers are prohibited from requiring employees to repay. All right, repay funds unless they fall into one of the one of the exceptions. So let's talk about, Mike, the expanded exceptions. So one of them, the first one that comes to mind because all of us were talking about it, was the tuition assistance and that. So talk to us about that.

[Mike]: You know, after when we saw the first version of the law, it...one of the things it scooped up and probably didn't mean to was employers paying for employees' tuition or maybe the employee paying and then the employer reimbursing. That sort of fell within the meaning of the law. Now we have a nice carve out for these what I call degree/certificate type situations, but they have nailed it with five specific points, and this must be in writing. So it's not something that you can verbally agree to. If you want to take advantage of what I call the tuition exception, you're going to have to have all five of these items listed and do you want me to into those now or do you want to?

[Rosemary]: Yeah, no, yeah, let's start. Well, first of all, so let's talk about the definition when we talk about when we're talking about this exception. So the language is "the cost of tuition, fees, and required educational materials for a transferable credential," a transferable credential. All right. And so let's talk about, yeah, so let's start with that, Mike. So go ahead.

[Mike]: Yes, so they added a definition of transferable credential. It's fairly long. And there are two exceptions. Generally, and I mean generally, this is going to be degree, a diploma, license, certificate or something else. They sort of put in there a catch-all for it that is... it is something that is educational, maybe beyond the scope of the workplace. Maybe you have an employee working for you and they're a machine operator and at night they're going to get their CPA, and they want to be an accountant and they're getting an accounting degree. That's what we're talking about. And then what they did is create two exceptions to that to clarify that these are not transferable credentials. Anything that's mandatory, safety or compliance training. Many employers, employees have to undergo some type of OSHA training. Many...all employers in New York have to undergo and give to their employees' sexual harassment prevention training. That's one of the exceptions that says, no...this is not, that does not qualify. The other one they call a employer-specific or non-transferable training. So let's say you're Coca-Cola and you expose the employee to the formula for Coca-Cola and how you make it. That is an employer-specific item, and you cannot try to make that a transferable credential because it's going to fail on its face. Also, if it's instruction, they call it "instruction that does not qualify the employee for a new occupational title, classification," et cetera. That one, I read them both and I'm sort of like, I think there's more to come on this one. I think they're going to give us lots of examples. They really have zero examples here for us. But I think generally speaking, this is going to be enough to get us going to sort of figure this out as we move forward.

[Rosemary]: Yeah, and you know, can tell me if you agree with this. I think that if it is, you know, specific to you as an employer, whatever it is, you know, very specific to you, and they can't really use it any of the skill or the training somewhere else, then guess what, it doesn't it doesn't cut... it's not ...it doesn't fit in this carve out. It's just that simple. It's just that simple. Right. But anything that they could go somewhere else and use it then, yeah, that qualifies for the carve out. So it's just that straightforward. So we've got that Mike—and so there are the five, like you said, the five things. I think that's how you said the five that you need to keep in mind. so again, we're talking right now about the tuition repayment exception. So this carve out exception. This carve out. So it's got to be in writing, as we always say, if it isn't written down, never happened. So this is just another example of that. And I'll start us off with the first one, because it's easy, Mike. And then we'll go back and forth. I'm kidding. But no, but the first is that the requirements, so the agreement, it has to be a standalone agreement that is offered separate and apart from any employment agreement, all right, that this individual has. And the thinking behind that, we believe, is that somebody's trying to decide, they're looking for employment, and they've now got this employment agreement that's got all of these terms and conditions, and then all of a sudden within it is this tuition repayment, you know, these terms for a tuition repayment. And...They don't want them to have that pressure. Again, it's almost—the way I think of it, Mike, is this is called the Trapped at Work Act. Well, if you then put this within an employment agreement, they're still kind of trapped, aren't they? Because they can only accept the position, right, or sign that employment agreement if they agree to whatever those terms are, which is why they want it standalone. So this written document in which you're talking about the tuition repayment, must be standalone agreement. That's the first of the five that we're going to talk about. You want to add to that, Mike?

[Mike]: Yeah, I would add, you know, they use the term "agreement" and I would add the following date it, and signed by the employee. They're not saying that specifically. They're implying it. But I think going back to, if it's not in writing, it did not occur. The... this is something beyond an employee handbook provision. This is something where we want a standalone. We want the employee to put their John Hancock on it, sign and date it, and let's be clear that what this is, title it properly, don't go over-broad. This is a standalone. Don't try to combine it with anything.

[Rosemary]: Yeah, that's a great point. That's a great point. that's number one. Number two. What's number two, Mike, on your list?

[Mike]: This agreement does not require the employee to obtain a transferable credential as part of their employment. So what we talked about a few minutes ago, because then you're outside the exception.

[Rosemary]: Yeah, exactly. Exactly. All right. So that one's pretty easy. Then I'll jump in with the third, which is that you actually have to... in this agreement, you have to specify the repayment amount. And it's got to be beforehand. All right. So it's actually you're going to actually put in the agreement, this is the amount that will be repaid. And that is for "tuition, fees and required any required educational materials for the transferable credential." So what does that mean? Well, we get that Rosemary, of course that's what we put in. Well, some employers might have interest in there. They might have fees in there, right? So the fee to process it, whatever those fees might be. You can't do that. So it's ahead of time, you say, this is what the amount will be that needs to be repaid, and it is literally just the tuition fees and any cost of educational materials, nothing else.

Mike: Yeah, and I think here we're going... just a little record-keeping. Get the bill if it's... and make sure we keep that as part of our record-keeping and make sure there's nothing on the bill that's not supposed to be. So, you know, if there is, don't go there. Just keep it simple. Get the bill. Maintain the copy of the bill. And I think that is what you're looking for here. Nice and simple.

[Rosemary]: Yeah, I agree. Right. Next up. All right, Mike.

[Mike]: Yeah, number four is for no acceleration clause and proportional repayment. So how they describe it is the agreement provides for "prorated repayment amount during any required employment period that is proportional to the total repayment amount and the length required to"... the length required...how do they say it, "the length of the required employment period." So I think it's reasonable. This is where reasonableness and common sense come into play. And this is where I think you use some charts or some, you leave before this, it's X, if you leave before this, it's X, if you leave before this, it's Y. You know, and they haven't really explained to us this and what it means and how they are going to look at it. I think we're going to have to wait for the guidance from the Department of Labor to sort of fill in the gap here. But there just the reality is, and I think right now, as we're in this nine months leading up to December, proportional repayment, no acceleration. Those are the two concepts that we have to work into the agreement or in the case of acceleration, make sure it's not in the agreement. Then I think we sort of take a wait-and-see approach as we go forward. if, let's say in June, you prepare one of these agreements and you think you've been reasonable, and you think the proportional scale that you put in there is okay. And then in November, the Department of Labor rolls out the regulations, and we have to change it. We need to change it. And I can guarantee you folks, we'll do another podcast once those regulations get rolled out, because I think it's going to help fill in some of these, what I call, I don't want to say wishy-washy terms, but terms subject to multiple interpretations.

[Rosemary]: Yeah, that's a good way to say it. But you know, I will say at least we've got more clarity than we had before, Mike, which is yeah, lots of discussion around this tuition, this came up a lot. I'm glad we I'm glad we have this. And then the fifth now again, remember what we're talking about here, gang, is the agreement that you've got the standalone agreement that must be in writing for the tuition carve out. So the fifth and final piece that needs to be included in that agreement is the statement that repayment is not required if the employee is terminated. And they say that and everybody gets caught. Well, they're terminated. Remember, terminated could be they resigned, right? Basically, it's the termination of employment. Employment ended, all right? The exception is if the employee is terminated for misconduct, which is why Mike brought that up, which is why he said, look at your handbook and how it's defined. All right. And so this is one of those areas to use Mike's term, wishy-washy, you know, they weren't specific or explicit about termination when it comes to, let's say, you know, a layoff or something like that. But based on the way it's written, one can infer that basically, other than termination for misconduct, there should be no repayment required.

[Mike]: I agree. I totally agree. A couple things. Number one, I think we're... you're going to do one of two things or maybe both. Define misconduct in your handbook and refer to that section in the agreement or define misconduct in the agreement and make sure those two definitions match or maybe both. I think we

need to be guided here by, believe it or not, case law, Rosemary, in the employment agreement context, because a lot of times employment agreements have a term that says unless terminated for misconduct or gross misconduct, you know, this has to be something that's bad. Johnny was late, doesn't qualify. Johnny did a bad job, doesn't qualify. Johnny punched his supervisor. I think that qualifies.

[Rosemary]: Yeah.

[Mike]: It needs to also be... take a look at your code of conduct. Remember in our handbook, we talked about the National Labor Relations Board and not going over-broad. I think references to some code of conduct may be in order. One of the things that, you know, violation of the sexual harassment policy, I think that qualifies.

[Rosemary]: I agree.

[Mike]: Some things I'm also guided by, know, under the Fair Labor Standards Act, the exempt employees docking rule...employee engages in a major safety violation. You know, lighting a cigarette in a room filled with dynamite. Yeah, I think that qualifies. You know, that, so I think we just have to use some common sense. I also think as with the last one on that the Department of Labor will come out and give us a definition or at least examples when their website goes live, their guidance goes live, and their regulations go live.

[Rosemary]: Yeah, yeah, think that's... I love that Mike you saying, you know, think about it. It's common sense because yeah, somebody's late. I don't think that's going to qualify. So I think that's great. So that's our first so that's our first... go ahead, Mike.

[Mike]: Yeah, and I've read some commentator's article on what this means, and I've read one article and it shocked me that they said a workforce reduction might qualify. And I'm like, I disagree. So be careful what you're reading out there. Some of the stuff, this didn't make a lot of sense to me. And so be careful. I think this has to be really bad to fall into that misconduct.

[Rosemary]: I think you're right because you go back to, Mike, what is the purpose of the act? Why was it implemented or enacted? So we don't want the Department of Labor looking and saying, you know what, this is pretext. It's a way for you to get this repayment, to get this money, right? And hold the employee accountable. So we don't want to get into that.

[Mike]: Yeah, let me add one thing. Let's take a step way back. Be fair to your employees. If you don't want them leaving, treat them great. Be nice to them. You know that... I know that's not legal, but I always say the backdrop to this is: are you a good employer? How do you treat your employees? You know that is a lot here. Some employers don't worry about these agreements and never have because they said, well, if he wants to leave, he can leave, but he's not going to find a better paying job or better working conditions than with us. OK.

[Rosemary]: Yeah, that's fair. That's fair. Okay. All right. So that's our that's our first kind of significant, you know, change, Mike. So second one has to do with the non-educational incentives, right, and payments. So what's what say you there?

[Mike]: Yes, so here the law is a little clearer for us. We're talking about financial bonuses, relocation assistance, or other non-educational incentives, or other payments. The other payment is like a catch-all, it's got to be something similar. But what we're looking at, did you give the employee a bonus? Did you pay a relocation expense or some other non-educational incentive. These cannot be tied to what they call "specific job performance." So guess if you're being a bad employee, you know, these are things like, hey, we're moving you from Atlanta to Syracuse, New York. That's a relocation expense. Now, we also see here, an exception, two exceptions actually. So one, if the employee was terminated for misconduct. And the second

was if you, the employer, misrepresented to the employee the job. So this is where, you know, your offer letter comes into play, your job description comes into play, and making sure the job description matches reality on the ground and not doing a bait and switch. So this really is one of the I think purposes here was to protect employees from a bait and switch... you induced me to come from Atlanta to do X and I get here, you're giving me Y, as the job.

[Rosemary]: Yeah. So it comes down to Mike, you know, this kicks in if the employee voluntarily resigns or they're let go for misconduct and we just had the misconduct discussion. That's really what it comes down to. Right?

[Mike]: Yep. Yep.

[Rosemary]: Okay. And then the three remaining from the that we talked about before with the property sold or leased and the sabbatical leave for educational and collective bargaining agreements. My reading is there aren't any changes there. Those were pretty much left as is. So you agree?

Mike: Yeah. I agree.

[Rosemary]: So it's really the biggest is the tuition and what we just talked about with the non-educational. So all right. So all right. think that's all pretty clear for our listeners, Mike. So let's talk about quickly, I'm just looking at the time here, enforcement. There are some changes in the enforcement language. So tell us about that.

[Mike]: Yeah, so the fine hasn't changed. The fine remains between \$1,000 and \$5,000 per violation. Key to remember, each employee is its own violation. So if you're caught and you did something wrong, it's not one violation. If it's 10 employees, it's 10 violations. So you're looking at between \$10,000 and \$50,000 in fines. So we've got to get this right. But now, you know, since this law applies to all employers in New York, regardless of size. And there was,...small business owners got a little irritated and were upset, say, wait a minute, I'm teeny tiny business. If I make good faith compliance and I'm wrong, you're telling me I'm still potentially looking at \$5,000. And what they did is they gave us some factors now for the Department of Labor to look at the size of the employer's businesses, good faith compliance, the gravity of the violation, and history of prior violations. So, and then from that, the department will make a determination. But the reality is folks, you're not looking at less than a thousand. You're looking at a thousand bucks to start. And so just make sure we get this right. We have nine months left and let's start the process of doing our inventory and then getting correct agreements in place.

[Rosemary]: Yep, and that's exactly what I going to say, Mike. You know, what are the next steps and the next steps are, let's look at the agreements because you've got time and let's make changes where we need to. And one of the areas, Mike, and again, let me know if you agree with this, is we're still not sure exactly what will happen. So December 20 comes along. So, agreements that were in place before then. So let's say somebody... some employer put something together at the end of 2025 and now it's December 20 and they've got an agreement that doesn't necessarily comply, a repayment agreement, with what we just talked about. We're not sure what are they going to do, right? Are they going to say they're going to go back and say, well, hey, now all of the... it applies retroactively or it's all agreement entered into after, you know, on and after December 19. I don't think that question was answered, Mike.

[Mike]: Yeah, it definitely hasn't been answered in the statute, and it awaits the Department of Labor weighing in on the only thing that I have seen was a one-liner in the statutory or the memo bill of the sponsor in the original law that talked about this applying to all agreements. And I don't know if that's accurate or not. Because it's just part of the legislative history. My hope is—and it's nothing more than hope—that the department says its agreements entered into honor after 12/19/2026. And that would make our lives the

easiest. But I think we're going to find that out as the year progresses. So I ...from in the original podcast, remember, we said, hey, take a breath. Let's see what happens and relax. But I think it is very important that we try to figure out what the best, your best approach, let's assume the worst and prepare for the worst and hope for the best, I guess is the motto here. But I also think Rosemary, if the Department of Labor is smart, they're going to roll this out around September 1 or somewhere in there right after Labor Day. They like rolling stuff out that weekend that relates to employers and employees. So that's when I'm going to start looking for it, because I think that is a good time for them to roll it out. Politically it's probably a good time for them to say, hey, look, this is Kathy Hochul saying this is what we're doing for you and it's Labor Day. We'll see.

[Rosemary]: We'll see. Exactly. Exactly. So, all right. Well, so Mike, think that was really helpful. I think it was really helpful. And like we said, hopefully everybody feels a little better now, a little more comfortable because we were getting a lot of questions and we kept saying, wait, wait, wait. And so I think we're in a better spot than where we were back in January, you know.

[Mike]: We'll see. Yeah, and just one thing, listening to the last podcast and this one, not enough. You have homework to do. This is meant to sort of give you a very general outline, nothing more than that to sort of give you that, yeah, I have enough now to get up to speed and move forward with that. And please make sure you reach out to counsel when you need to, because this is one of those areas I'm a little nervous about for employers.

[Rosemary]: Yeah, well, yeah, for a whole host of reasons, not the least of which is it could get real expensive, real fast. As you said, Mike, it could be \$10 to \$50,000. I mean, who know, you know, so all right. Well, as always, Mike, it was awesome. And everybody, thank you for joining us. Listen to us on Spotify and all those other places that you can that you can listen to us. Let us know what you want to hear about. Let us know if you have questions. And I don't know what we're going to be talking about next. As we said at the start, this is kind of in the middle of our handbook series. So it'll pick up after that. I think Mike and I were toying with talking about the new rules related to independent contractors. So we may be dropping that in next, right, Mike?

[Mike]: Yes.

[Rosemary]: All right, everybody. Thanks for listening. Thank you, Mike. And we'll talk soon.

[Rosemary]: *The Labor & Employment Podcast* is available on barclaydamon.com, Spotify, and all major podcast platforms. Be sure to like, follow, and stay connected for future episodes.

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