

FOULSTON

ATTORNEYS AT LAW



DONALD D. BERNER

PARTNER

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PROFILE

Don Berner has more than 25 years of experience providing advice and counsel to employers on a wide range of matters involving the employment relationship. He has worked with employers across a broad range of industries that vary in size from small businesses to Fortune 500 companies. Don's years of experience allow him to provide practical solutions for employers that serve the individualized needs of his clients. Don regularly provides advice and assistance to clients on a diverse range of workplace issues relating to best employment practices and employee benefits management. He conducts training for employers and management teams on a vast range of topics in these areas.

Don is known for his vast experience in dealing with labor law matters involving employer/union relationships. His years of experience and practical problem-solving skills provide him the ability to negotiate collective bargaining agreements on behalf of his clients that ensure workforce stability, effective relationships with labor, operational flexibility, and the ability to meet productivity and profitability goals.

Don also assists employer clients in resisting union organizing efforts and in proceedings before the National Labor Relations Board (NLRB).

Don has significant experience with matters involving a wide range of immigration and nationality issues. His immigration practice is primarily focused on business immigration and he works with a wide variety of business ranging from health care institutions to manufacturing entities to technology companies. Don assists employers and individuals with obtaining non-immigrant visas, immigrant visas (permanent residence, and naturalization. He also has expertise in resolving various work authorization issues related to the employee onboarding process like I-9 audits and E-Verify issues.

Don regularly assists employers with OSHA safety and health compliance, OSHA inspection and citation matters, and whistleblower protection program enforcement actions by OSHA. Don provides advice and counsel to employers on various human resources issues and a wide variety of matters involving the employment relationship. These issues involve the application of the various local, state, and federal discrimination statutes, ADA and FMLA situations, wage and hour matters under the FLSA and various state laws, and employee benefit and ERISA issues.

Education

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- Washburn University (J.D., *cum laude*, 1997)
Washburn Law Journal
- Park College (B.S., 1992)

Admissions

- Kansas (1997)

PRACTICE AREAS

- Employment & Labor
- Employee Benefits & ERISA
- Immigration
- OSHA
- Governmental Liability
- Healthcare

INDUSTRIES

- Agribusiness
- Aviation & Aerospace
- Banking & Financial Services
- Construction
- Energy & Natural Resources
- Healthcare
- Manufacturing
- Tax-Exempt/Not-for-Profit Organizations

COMMUNITY INVOLVEMENT

- Junior Achievement, Former Board of Directors
- Girls on the Run, Former Board of Directors
- Advance Kansas, Class of 2020

RELEVANT EXPERIENCE

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- Represented employers in a wide variety of industries with health and safety compliance inspections conducted by OSHA as well as whistleblower protection program investigations conducted by OSHA.
- Defended employer clients in numerous adversarial hearings in a wide range of administrative forums as well as numerous labor and employment arbitration proceedings.
- Obtained work authorization to routinely allow foreign individuals to work for employer clients in the U.S. Assisted clients with immigration matters at the Department of Labor (DOL), Department of State (DOS), and U.S. Citizenship and Immigration Service (USCIS) involving obtaining temporary work authorization, permanent residence (green cards), and naturalization (citizenship).
- Served as the primary spokesperson in contract negotiations with labor unions for a variety of employers across multiple industries ensuring employers maintained operational flexibility and workforce stability.
- Assisted numerous employers in their efforts to remain union free during union organizing campaigns.
- Advised and assisted employers with various benefit issues related to the employment relationship.
- Provided advice and assistance to broad range of employers on a variety of labor relations issues including grievance and arbitration proceedings, collective bargaining agreement interpretation, and unfair labor practice charges with the NLRB.

PROFESSIONAL MEMBERSHIPS, AFFILIATIONS, AND HONORS

- Selected by peers for inclusion in *The Best Lawyers in America*® in the areas of Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment, 2010-2014, 2016-2024
- Identified by Chambers USA as a leading lawyer in the United States in the area of Labor & Employment, 2012-2013, 2015-2018, 2023
- American Bar Association
- Kansas Bar Association
- Wichita Bar Association
- American Immigration Lawyers Association

PRESENTATIONS

2023

- Conducting HR Investigations (Foulston Siefkin LLP, HR Training Series)
- Labor Law and You (Foulston Siefkin LLP, HR Training Series)
- Employment, Labor, and Immigration Law Update (Foulston Siefkin LLP, Health Law Institute)
- Agency Roundup: What's New and What's to Come from the EEOC, DOL, and NLRB (Foulston Siefkin LLP, Employment Law Institute)
- Employee Benefits Update: Secure Act 2.0 and Other Developments (Foulston Siefkin LLP, Employment Law Institute)
- *Employee vs. Employer: An Employment Law Case Mock Trial* (Foulston Siefkin LLP, Employment Law Institute)

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- HR Mashup: What You Need to Know (Foulston Siefkin LLP, HR Training Series)

2022

- Are We There Yet? The Latest COVID-Related Legal Developments and the Legacy of COVID (Foulston Siefkin LLP, Employment Law Institute Webinar Series)
- What's New and What's to Come from the EEOC, DOL, and NLRB (Foulston Siefkin LLP, Employment Law Institute Webinar Series)

2021

- HR 101: Understanding the Basics (Foulston Siefkin LLP, HR Training Series)
- Your Fall Plans vs. The Delta Variant: How to Protect Your Workplace Against COVID-19 (Foulston Siefkin LLP, HR Training Series)
- OSHA Compliance (Foulston Siefkin LLP, HR Training Series)
- Agency Update ... What's in Store at the EEOC, DOL, NLRB, and OSHA Under the New Administration, and How Might It Affect My Organization? (Foulston Siefkin LLP, Employment Law Institute Webinar Series)

2020

- Common Pitfalls (Foulston Siefkin LLP, HR Training Series)
- OSHA Nuts and Bolts (Foulston Siefkin LLP, HR Training Series)
- Recent Awards and Settlements – and What We Can Learn from Them (Foulston Siefkin LLP, Employment Law Institute Webinar Series)
- Waves of Change from the Department of Labor, National Labor Relations Board, and Other Federal Agencies (Foulston Siefkin LLP, Employment Law Institute Webinar Series)
- COVID-19 Guidance for Hospital Employers - FFCRA, OSHA, and Confidentiality (Kansas Hospital Association)
- Implementing the Families First Coronavirus Response Act (FFCRA) (Foulston Siefkin LLP, Coronavirus Webinar)
- An Employer's Guide to Coronavirus (Foulston Siefkin LLP, Coronavirus Webinar)
- The NLRA for Non-Union Employers (Foulston Siefkin LLP, HR Training Series)

2019

- End-of-Year Update (Foulston Siefkin LLP, HR Training Series)
- The NLRA for Non-Union Employers (Foulston Siefkin LLP, HR Training Series)
- What Fresh Hell Is This? The Latest From the Legislature, Agencies, and Courts (Foulston Siefkin LLP, Kansas Employment Law Institute)
- HR's Guide to the (Hiring) Galaxy - Tips and Tricks to Avoid Common Hiring Pitfalls (Foulston Siefkin LLP, Kansas Employment Law Institute)

2018

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- End-of-Year Update: We Made the List But It's Up to You to Check It Twice (Foulston Siefkin LLP, HR Training Series)
- What to Do When OSHA Shows Up (Foulston Siefkin LLP, HR Training Series)
- Just the Facts: Difficult Conversations, Discipline, and Performance Management (Foulston Siefkin LLP, HR Training Series)
- In the Beginning: What Every HR "Newbie" Needs to Know about Employment Law (Foulston Siefkin LLP, Employment Law Seminar)
- Employment Law Round-up - The Latest from the Legislature, Agencies, and Courts (Foulston Siefkin LLP, Employment Law Seminar)

2015

- In the Beginning: What Every HR "Newbie" Needs to Know about Employment Law (Foulston Siefkin LLP, Employment Law Seminar)

2014

- How to Have Difficult Conversations with Employees (Foulston Siefkin LLP, Employment Law Seminar)

2013

- Employment Law Update: The Latest Word on Worker Documentation (Foulston Siefkin, Employment Law Seminar)

2012

- Authorized or Not? Current Trends Related to Work Authorization and Immigration Law (Foulston Siefkin Employment Law Seminar)
- Workplace Policies Workshop (Foulston Siefkin)
- Avoiding Harassment Claims (Foulston Siefkin HR Box Lunch Fall Series)
- Key Considerations in the Hiring Process (Foulston Siefkin HR Box Lunch Fall Series)

2011

- OSHA Compliance (Foulston Siefkin OSHA Workshop, Overland Park)

2010

- Workplace Staffing Issues: Hiring, Evaluating, Disciplining, and Discharging (HR Basics) (Foulston Siefkin, Employment Law Seminar - Wichita)
- OSHA Compliance (Foulston Siefkin OSHA Workshop, Wichita)
- Immigration, Deemed Exports, and Other Employment-Related Issues that Sponsors and Principal Investigators Need to Understand (Foulston Siefkin Regional Bioscience Law Conference)

2009

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- The Brave New World of Employment and Labor Law: Immigration Update (Foulston Siefkin Employment Law Seminar)
- The Brave New World of Employment and Labor Law: The Employee Free Choice Act (Foulston Siefkin Employment Law Seminar)
- The Employee Free Choice Act "EFCA" (Kansas Manufacturers Network)

2008

- HR 101: Intro to Employment Law (Foulston Siefkin Employment Law Seminar)
- The Latest in Immigration Law (Foulston Siefkin Employment Law Seminar)
- Immigration-Untapped Source of Employees? (Health Law Institute)
- Union Avoidance: Maintaining a Union Free Workplace (Foulston Siefkin HR Box Lunch Workshop Series)

PUBLICATIONS

2021

- 6 General Rules for Large Employers in OSHA's ETS on Vaccine Mandates
-Midwest Employment Law Letter, Vol. 2, No. 12

2020

- U.S. Supreme Court Decides Kansas Identity Theft Case
-Midwest Employment Law Letter, Vol. 1, No. 5

2015

- DOL spouse rule on hold in four states
-Lexology
- NLRB election rule challenged
-Lexology
- NLRB quickie election rule faces Congressional attack
-Lexology
- Like a Girl Superbowl commercial
-Lexology
- Court Invalidates DOL change to companionship exemption
-Lexology
- New OSHA reporting rule goes into effect
-Lexology
- Top ten most frequently cited OSHA standards for FY2014
-Lexology
- DOL continues to add states to employee misclassification initiative
-Lexology

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- Termination goes south
-Lexology

2014

- Employment & Labor in Missouri - Lexology Q & A
-Lexology
- A freaky non-compete non-sequitur
-Lexology
- The lessons of the recent Ebola outbreak
-Lexology
- Corporate media policy runs afoul of the National Labor Relations Act
-Lexology
- Court of Appeals weighs in on H-2B wage rule
-Lexology
- NLRB opens company email up for employee use in organizing campaigns
-Lexology
- EEOC concern about targeted job advertisements
-Lexology
- EEOC catches grief over wellness plan litigation
-Lexology
- Facebook like Protected concerted activity
-Lexology
- Happy Labor Day!!!
-Lexology
- DOL proposes rule to raise minimum wage for federal contract workers
-Lexology
- Foreign student employment
-Lexology

2012

- The next wave of social media disputes: Who owns the account?
-Kansas Employment Law Letter
- Winning the social media war
-Kansas Employment Law Letter

2009

- When Free Isn't Free: The Employee Free Choice Act (EFCA)
-Kansas Employment Law Letter

2006

- Beginning the teen years: a review of the FMLA basics -- part 1
-Kansas Employment Law Letter

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2005

- 'Make up' grooming standards that avoid liability
-Kansas Employment Law Letter
- OSHA recordkeeping vs. HIPAA privacy: workplace accident in the making
-Kansas Employment Law Letter

2003

- Foreign Students: the journey from student to employee and stops along the way
-Kansas Employment Law Letter
- Means of egress: What exactly does that mean?
-Kansas Employment Law Letter

2001

- Immigration law and the workplace: recruiting foreign workers
-Kansas Employment Law Letter

2000

- How final is final when arbitrator issues ruling interpreting your CBA?
-Kansas Employment Law Letter

1999

- Stretching the ADA to make something out of nothing
-Kansas Employment Law Letter, Vol. 6, No. 1
- Update on current status of proposed ergonomics standard
-Kansas Employment Law Letter, Vol. 6, No. 6.

1998

- An ounce of prevention: OSHA offers guidance on emergency response plans
-Kansas Employment Law Letter, Vol. 5, No. 6
- Is your company complying with the Equal Pay Act?
-Kansas Employment Law Letter, Vol. 5, No 7
- Recent news and notes from OSHA`
-Kansas Employment Law Letter, Vol. 5, No. 2
- Should bonuses be included in determining overtime?
-Kansas Employment Law Letter, Vol. 5, No. 6
- Supreme Court to decide quid pro quo requirements
-Kansas Employment Law Letter, Vol. 5, No. 2
- Unionized employers caught between rock and hard place are set free
-Kansas Employment Law Letter, Vol. 4, No. 12

ISSUE ALERTS

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2023

- Securing a Strong Retirement Act of 2022 (Secure 2.0) Passed Into Law

2022

- Coronavirus: Supreme Court Green Lights Vaccine Mandate for CMS; Stalls OSHA

2021

- Coronavirus: Side Effects From OSHA's Withdrawal of COVID-19 Healthcare ETS
- Coronavirus: OSHA Vaccine-or-Test Mandate for Large Employers Active Again
- Coronavirus: UPDATE: Fifth Circuit Continues Stay of OSHA ETS for Large Employers
- Coronavirus: UPDATE: Court Stays OSHA Emergency Temporary Standard for Large Employers
- Coronavirus: OSHA Releases ETS Requiring Large Employers to Mandate Vaccines or Provide Weekly Testing

2008

- E-Verify and the New Federal Contractor Requirements