



## → Kevin M. Cloutier

### Partner

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Kevin Cloutier is a partner in the Labor and Employment and Business Trial Practice Groups. Kevin is the Leader of the Firm's Non-Compete and Trade Secrets Teams. He is a member of the Firm's Executive and Compensation Committees. He is also a member of the Firm's Diversity and Inclusion Committee and acts as the hiring partner for the Firm's Chicago office.

### Areas of Practice

Kevin's national practice focuses on all areas of labor and employment law and business litigation, with an emphasis on high-stakes, employment-related litigation and proactive investigations and counseling of management-side clients. He is consistently recognized by his peers as one of the leading lawyers in Illinois and nationally, and has been named a Labor and Employment Star by *Benchmark Litigation*. On several occasions, former adversaries have retained Kevin and his team following the conclusion of litigation. Kevin enjoys long-standing and deep relationships with many of his clients, and several have retained Sheppard Mullin as they have moved to different in-house positions. Clients praise Kevin and his team for their responsiveness, loyalty, and outstanding results. Consistent with this team-based approach, Kevin's balanced practice includes the following areas:

### Litigation and Trial Work

Kevin is an experienced trial lawyer with first-chair trial experience before state and federal trial and appellate courts all over the country, arbitrators, FINRA, the National Labor Relations Board, and administrative agencies. He has successfully argued and won multiple law-changing and precedent-setting federal appeals on behalf of his clients. Kevin has represented clients in more than 25 states.

Kevin defends employers of all sizes in restrictive covenant and trade secrets actions, class and collective actions, multi-plaintiff and single-plaintiff cases, including whistleblower and whistleblower retaliation actions, breach of contract actions, statutory employment claims, wage and hour claims, antitrust, deceptive trade practices, unfair competition, defamation, retaliatory discharge, negligent hiring and retention, reverse discrimination claims, white-collar criminal matters, traditional labor law, employee privacy and BIPA, tort and contract claims, credit reporting "background" claims, and ERISA benefits claims.

Kevin is recognized as one of the nation's leading unfair competition, "non-compete" and trade secrets lawyers and regularly prosecutes and defends actions involving the enforcement of restrictive covenants and non-competes, deceptive trade practices, trade secret claims, the Lanham Act, unfair competition and employee raiding claims. Kevin and his team routinely prosecute and defend expedited proceedings, often mobilizing on a moment's notice and obtaining successful expedited injunctive results (temporary restraining orders and

preliminary injunctions) within days of a client engagement. Kevin is the co-head of the Firm's trade secrets and restrictive covenant teams. Kevin and his team brought one of the first lawsuits invoking the federal Defend Trade Secrets Act in 2016. He also assists clients with litigation over partnership dissolutions, deceptive trade practices and business/partner/joint-venture "break-ups."

In addition, Kevin manages class and collective actions, related to all forms of wage and hour disputes, including overtime, misclassification, and independent contractor issues. He regularly designs and then leads creative and successful defense strategies for complex class and collective actions. Most recently, he defeated conditional certification of an "off-the-clock" claim in federal court in Florida, gutting a collective of over 80,000 class members.

### **Internal Investigations**

Kevin regularly conducts internal investigations for employers, boards of directors, and special committees. Kevin and his team are experienced and skilled investigators, handling a variety of investigatory matters involving whistleblower claims, harassment and workplace misconduct, code of conduct violation claims, trade secret misappropriation, self-dealing and embezzlement, conflicts of interest, insider trading, false claims, procurement processes, and other workplace issues. In these investigations, Kevin and his team typically interview multiple witnesses, review and analyze salient documents, analyze forensic accounting materials and electronically stored information, and then prepare analytical reports for his clients. He also works with governmental agencies such as the OIG, DOJ and DOL in connection with outside investigations. Kevin's investigatory work cuts across industries and geographies; Kevin's most recent investigations occurred in Arizona, Texas, Michigan, Indiana, Illinois, Georgia and Florida. Kevin and his team also proactively investigate and assess client business plans to enter new sectors, markets and ventures, often involving potential trade secrets and NDA issues. Finally, Kevin regularly assists clients in investigating possible trade secrets misappropriation matters, often partnering with forensics experts.

### **Corporate Transactions and Private Equity**

Kevin is a member of the firm's Private Equity Team and routinely represents funds and their portfolio companies in a variety of litigation and counseling matters. He also performs due diligence for fund and other corporate clients in connection with mergers and acquisitions and counsels them in connection with post-acquisition transition and restructuring issues. Kevin regularly prepares employment agreements, separation agreements, non-disclosure and confidentiality agreements, employee handbooks and human resources policies. He also counsels clients on the employment-related aspects of mergers, acquisitions and other corporate transactions.

### **Counseling and Advice**

In addition to his litigation and investigative experience, Kevin operates as a general employment counselor to his clients and regularly advises and coaches human resource professionals and other business executives on how to comply with various human resources and employment laws. Kevin is a former high school teacher and he enjoys counseling his clients. He frequently presents training sessions on critical employment issues, such as harassment prevention and investigation, responding to whistleblower complaints, independent contractor classification, restrictive covenant, trade secret and non-compete situations, trade practices, unfair competition wage payment and overtime FLSA compliance, employee privacy and biometrics, conducting effective workplace investigations, union avoidance and awareness, FMLA and time-off issues, reductions-in-force, labor

disputes and general human resources strategies.

Further, Kevin assists multinational clients, primarily Canadian-based entities, in cross-border labor and employment issues in the U.S. He partners with multinational clients on strategic planning, compliance, global movement of employees and employee compensation and benefits issues. In addition, Kevin has established strong relationships with local counsel in many countries and frequently partners with foreign counsel to assist clients.

Kevin's client base is broad and geographically diverse and includes employers in private equity, venture capital, real estate, REITs, digital marketing and advertising, energy, investment services, construction services, transportation, housing, food and beverage, security services, computer hardware and software, eBusiness, energy, logistics, financial services, retail, healthcare, pharmaceuticals, software development, insurance and manufacturing.

In addition to his corporate work, Kevin is committed to pro bono work and has successfully represented several prisoner and of-need clients in important federal court litigation. He also regularly counsels non-profit social services agencies on a wide range of employment matters.

## Honors

Labor and Employment Star - Midwest, *Benchmark Litigation*, 2018-2022

Illinois Super Lawyer, *Super Lawyers*, 2013-2022

Best Lawyer in America, *Best Lawyers*, 2014-2022

Rising Star, *Illinois Super Lawyers*, 2010-2012

## Experience

### Recent Litigation Matters

- Obtaining reversal and mandated judgment for a national carrier client in an appeal before the Eighth Circuit in an employee raiding, non-compete, and tortious interference case
- Obtaining multiple temporary restraining orders, preliminary injunctions and permanent injunctions in non-compete, unfair competition, deceptive trade practices and trade secrets cases around the country on behalf of national security services firm
- Obtained temporary restraining order and preliminary injunction in a trade secret and non-solicit case in Texas
- Representing a national transportation company in nationwide FLSA "off-the-clock" action, successfully compelling arbitrations and negotiating favorable settlement
- Successfully defending against and defeating conditional certification in a nationwide FLSA "off-the-clock" action
- Successfully representing an international pharmaceutical company in a multi-million dollar stock option breach of contract action and obtaining summary judgment in favor of client
- Successfully representing a geospatial solutions provider in trade secrets misappropriation case in Oregon State and obtaining temporary restraining order sidelining departing employees and preventing misappropriation

- Representing an international carrier in a retaliatory discharge case in federal court, obtaining summary judgment in district court and successfully arguing appeal before the Seventh Circuit that resolved in favor of employers a critical and unsettled question of law regarding the proper standards for retaliatory discharge cases under Illinois law when litigated in federal courts
- Successfully representing an international carrier in a series of FLSA misclassification arbitrations
- Successfully representing a pro bono client in a Seventh Circuit discrimination action
- Representing an international construction services firm in a FLSA collective action and state law class action alleging misclassification of employee FLSA exemptions for overtime purposes and failure to pay overtime
- Successfully representing an international pharmaceutical company in False Claims Act “whistleblower” action and obtaining summary judgment in favor of client
- Successfully representing an international architectural services outsourcing firm in multi-day arbitration against former executive for severance claim
- Representing a hedge fund and a newly hired employee in Illinois state court in a “non-compete” and employee non-solicitation case, successfully overcoming the former employer’s motion for a temporary restraining order and prevailing in arbitration before FINRA
- Successfully representing a private equity client and a portfolio company’s board of directors in a commercial arbitration breach of contract case against a former executive of the portfolio company
- Successfully representing a pro bono client before the Seventh Circuit Court of Appeals in a Section 2255 motion to vacate a judgment
- Representing a national healthcare company in federal court in a “non-compete” and trade secret case, which resulted in a temporary restraining order against a former employee and a competitor
- Representing a national software development company in Alabama state court in a non-compete and employee raiding case, which resulted in a temporary restraining order and preliminary injunction against former employees and competitor
- Representing a national manufacturing company in South Carolina state court in an unfair competition, deceptive trade practices, trade secret and employee raiding case, which resulted in a preliminary injunction in favor of client against a former employee and competitor
- Representing a healthcare employer in a labor discharge arbitration, which resulted in an award denying the employee’s grievance and affirming the client’s discharge decision based on “just cause”
- Representing a national manufacturing client in a retaliatory discharge case in Illinois state court and obtaining a dismissal on summary judgment
- Representing a national healthcare employer in a breach of contract and fraud case in Illinois state court and obtaining a dismissal based on ERISA preemption
- Representing a national health and pharmaceutical research company in a disability (ADA) discrimination and denial of benefits (ERISA) case in federal court and obtaining a dismissal on summary judgment
- Representing an international financial services fund in commercial arbitration case involving enforceability of restrictive covenants, bonus compensation eligibility and forfeiture of deferred compensation benefits, which resulted in an award in favor of the employer and dismissal of the employee’s claims after a full evidentiary hearing

## Articles

- Three new laws slated for summer will require employers to be ready  
*Chicago Daily Law Bulletin*, 02.20.2020
- New marijuana law has ins, outs employers should be aware of  
*Chicago Daily Law Bulletin*, 02.13.2020
- Employers must pay attention to new laws, impact on workplace  
*Chicago Daily Law Bulletin*, 02.06.2020
- Deposition Questions in a Trade Secret Misappropriation and Breach of Restrictive Covenant Action (Plaintiff Employer to Defendant)  
*Lexis Practice Advisor*, 01.2020
- Discovery on Behalf of Plaintiffs in Trade Secret Misappropriation and Breach of Restrictive Covenant Actions  
*Lexis Practice Advisor*, 01.2020
- Employment issues to consider when expanding in the United States  
*Financier Worldwide*, 05.15.2019
- Trade Secret Litigation  
Tips on How to Allege and Establish Trade Secret Misappropriation at a Preliminary Injunction Hearing  
*IP Litigator*, 12.2017
- More Legal Employment Traps to Avoid When Expanding South of the Border (Part 2)  
*The Lawyer's Daily*, 07.20.2017
- Legal Employment Traps to Avoid When Expanding South of the Border (Part 1)  
*The Lawyer's Daily*, 07.10.2017
- Cybersecurity Measures to Protect Employers' Confidential Information and Trade Secrets  
*Lexis Practice Advisor*, 05.11.2017
- Engaging in Discovery on Behalf of Plaintiffs in Trade Secret Misappropriation and Breach of Restrictive Covenant Actions  
*Lexis Practice Advisor*, 05.2017
- Noncompete Agreements as Varied as Number of States, Courts  
*Chicago Daily Law Bulletin*, 05.04.2017
- "Engaging in Discovery on Behalf of Plaintiffs in Trade Secret Misappropriation and Breach of Restrictive Covenant Actions," *Lexis Practice Advisor*, January 27, 2017
- "What Organizations Need to Know When Facing Conditional Certification Under Section 216(B) of the FLSA," Thomas Reuters, August 2016
- Co-Author with C.T. Oblander and K. Zeabart, "EPLI, Invasion of Privacy, and Identity Theft," *The John Liner Review*, Vol. 19, No. 3, 21-35, Fall 2005
- He also has previously published articles in the *Employment Law Strategist*.

## Corporate & Securities Law Blog

- "Sellers Beware: Fiduciary Duty Risks to Directors," March 16, 2021

## Labor and Employment Law Blog Posts

- "Void vs. Voidable: The Distinction That Can Make or Break a Tortious Interference Claim in Light of the Great Resignation," May 9, 2022
- "Seventh Circuit Certifies Hotly-Contested BIPA Accrual Issue to Illinois Supreme Court," January 10, 2022
- "Illinois Appellate Court Affirms 5-Year Statute of Limitations Period for Certain BIPA Claims," September 20, 2021
- "President Biden and OSHA to Require Vaccine Mandate or Weekly Testing for Employers with 100+ Employees," September 10, 2021
- "Illinois Governor Signs Non-Compete Legislation," August 26, 2021
- "What Do I Do With My Workplace Drug Policy Now That Cannabis Is Legal in Illinois and My Employees Are Remote?," July 28, 2021
- "What Employers Need to Know About New Non-Compete Legislation in Illinois," June 8, 2021
- "Governor Signs Sweeping Changes to Illinois Employment Laws," May 12, 2021
- "The Critical Nature of Labor and Employment Diligence in Transactions," March 18, 2021
- "Fifth Circuit Shuts Down FLSA Conditional Certification," February 1, 2021
- "What Employers Need to Know About Colorado's New Equal Pay Act," December 9, 2020
- "Employers: Do Not Forget Your Sexual Harassment Prevention Training Requirement," May 4, 2020
- "U.S. Supreme Court Case Preview—*Van Buren v. United States*: Does Use of a Computer for an "Improper Purpose" Violate the Computer Fraud and Abuse Act?," April 30, 2020
- "DOJ and FTC Issue Joint Statement Regarding COVID-19 and Antitrust Violations," April 22, 2020
- "The CARES Act: A Comprehensive Overview for Employers," March 31, 2020
- "Illinois Statewide Stay at Home Order: What Employers Need to Know," March 20, 2020
- "Proposed Bill Would Ban Employee Non-Compete Agreements in Illinois," February 19, 2020
- "The Time Is Now for Employers in Illinois to Abide by New Laws," January 9, 2020
- "Salary History Off-Limits Under New Illinois Equal Pay Law," August 2, 2019
- "Actual Injury Unnecessary to Sue Under Illinois Biometric Law," February 5, 2019
- "Lessons Learned: Tips on How to Allege and Argue Trade Secret Misappropriation at a Preliminary Injunction Hearing," August 30, 2017
- "For Your *Consideration*: Recent State-to-State Developments on Sufficient Consideration for Employee Non-Compete Agreements," March 27, 2017
- "New Guidance for HR Professionals Regarding Wage-Fixing and No-Poaching Agreements Highlights New Focus on Criminal Prosecutions and Raises New Concerns for Employer," December 5, 2016
- "Illinois Limits Non-Compete Agreements Yet Again," September 7, 2016
- "The Defend Trade Secrets Act – Coming to a Federal Court Near You," May 9, 2016
- "An In-Depth Analysis of the NLRB's Decision to Permit Employees to Use Employer Email Systems for Union Organizing and Other Non-Work Purposes," December 12, 2014

## Trade Secrets Law Blog Posts

- "Supreme Court Narrows The Scope of Liability Under The Computer Fraud and Abuse Act," June 8, 2021
- "Diminution in Value As A Measure of Damages for Trade Secret Misappropriation," March 16, 2021
- "Fifth Circuit Affirms Attorney's Fee Award of \$2.3 million in Misappropriation Case Against Former Employee who Failed to Comply with Court's Objections Order," September 22, 2020
- "Cybercrime 2020 – The Rise of 'Vishing'," August 28, 2020

## Books

Employer's Guide To COVID-19 And Emerging Workplace Issues (Over 690 pages)  
04.21.2020

## Media Mentions

Litigator of the Week Runners-Up and Shout Outs  
*The American Lawyer*, 08.13.2021

Cybercriminals Target Remote Workers  
FBI warns employers about new wrinkle to old scams.  
*EHS Today*, 09.14.2020

Noncompete Developments To Watch For In 2020  
*Law360*, 01.14.2020

Sub Shop Settlement Shines Light on Law  
*Chicago Daily Law Bulletin*, 12.08.2016

Non-compete Agreements Banned for Low-Wage Employees in Illinois  
*Cook County Record*, 10.04.2016

7 Important Noncompete Rulings From The 1st Half Of 2015  
*Law360*, 07.16.2015

Noncompete Ruling Means Headaches For Ill. Employers  
*Law360*, 08.01.2013

6 Tips To Maximize Noncompetes' Enforceability  
*Law360*, 07.26.2013

## Speaking Engagements

Kevin is often invited to present at professional associations and industry seminars. He has presented a number of seminars on the interplay of the American with Disabilities Act, the Family and Medical Leave Act and Workers' Compensation laws. In addition, he recently delivered a presentation regarding employment issues facing private equity firms and their portfolio companies and common employment issues arising in corporate transactions. He has also presented on employee (mis)classification issues under wage and hour laws and on emerging issues in trade secrets laws and noncompetes.

## Events

The Evolving Landscape of Biometrics Legislation – Illinois' Biometric Information Privacy Act and Beyond  
Virtual, 09.14.2021

Employee Wellness in the Time of COVID-19: Employee Mental Health and Well-Being, Vaccinations and Return to Office (Or Not)  
Webinar, 02.11.2021

Getting Back to Business Webinar Series (Part 1)  
Planning and Best Practices for Employers in a Changed Workplace  
Webinar, 05.21.2020

Labor and Employment Law Update  
Sheppard Mullin Chicago, 11.28.2018

Labor & Employment Law Update - New York  
Spring 2017  
05.23.2017

CLE Credits and Cocktails  
Sheppard Mullin Chicago  
05.18.2017

Labor & Employment Breakfast Briefing - Chicago  
09.10.2015

Sheppard Mullin's Labor & Employment Breakfast Briefing Series - Chicago  
Labor & Employment Update  
06.25.2015

Protecting Trade Secrets and Confidential Information: The Threat From Within  
06.17.2015

9th Annual Employment Law Conference  
Hosted by Law Bulletin Seminars  
09.17.2014

What Keeps You Up at Night?  
Hot Topics in Domestic & International Labor & Employment Law  
06.21.2013

2012 Labor and Employment Year in Review  
How the U.S. Presidential Election and the Current Economy Will Impact Labor and Employment Laws in 2013 and Beyond  
Grand Hyatt New York, 11.15.2012



## Memberships

Member, Society for Human Resources Management (SHRM)  
Member, Labor and Employment Section and the International Law Section, American Bar Association  
Member, Houston Bar Association  
Member, Chicago Bar Association  
Member, U.S. Soccer Federation (Licensed U.S. Soccer Coach)  
Member, Board of Directors, FC-1 Soccer Club  
Member, Board of Directors, Mary Crane Center  
Member, Board of Directors, Daniel A. Cotter Boys and Girls Club of Chicago  
Member, Sports Lawyers Association  
Member, Canadian-American Bar Association

## Podcasts & Webinars

Nota Bene Episode 117: The Critical Nature of Labor & Employment Diligence in Corporate Transactions with Kevin Cloutier and Shawn Fabian  
03.17.2021

Getting Back to Business Webinar Series: Session One  
05.21.2020

## Practices

Labor and Employment  
Labor and Employment Counseling  
Employee Hiring/Discipline/Termination  
Harassment Investigation and Training  
Unfair Competition and Trade Secrets  
Wage and Hour Regulations  
Labor and Employment Litigation  
Discrimination, Harassment, and Retaliation  
Employee Privacy and Defamation  
Wage and Hour Class Actions  
Labor Union Management Relations  
Employee Benefits/ERISA  
Trade Secrets  
Litigation

Private Equity

Healthcare

Biometric Information Privacy Act (BIPA)

Digital Health

## Industries

Cannabis

Construction

Education

Energy, Infrastructure and Project Finance

Financial Services

Food and Beverage

Healthcare

Life Sciences

Private Equity

REIT

Sports

Transportation

Trucking and Logistics

## Education

J.D., Indiana University, 1999, *cum laude*, *Indiana Law Journal*

B.A., Hamilton College, 1994, with honors

## Admissions

Indiana

Illinois

Michigan

Texas

U.S. District Court, Central District of Illinois

U.S. District Court, Northern District of Illinois

U.S. District Court, Southern District of Illinois

U.S. District Court, Northern District of Indiana

U.S. District Court, Southern District of Indiana

U.S. District Court, Eastern District of Michigan  
U.S. District Court, Western District of Michigan  
U.S. District Court, Western District of Texas  
U.S. District Court, Eastern District of Texas  
U.S. District Court, Southern District of Texas  
U.S. District Court, Northern District of Texas  
U.S. Court of Appeals for the Fifth Circuit  
U.S. Court of Appeals for the Sixth Circuit  
U.S. Court of Appeals for the Seventh Circuit  
U.S. Court of Appeals for the Eighth Circuit  
U.S. Court of Appeals for the Ninth Circuit