Insight

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The Political Pendulum Swings Again

The New Conservative "Trump" NLRB Asserts Itself

Labor practitioners have long been frustrated by the ever-changing legal landscape resulting from the politically constituted National Labor Relations Board: Each administration appoints three Board members from its own party, and two from the opposite party. Not surprisingly, when an administration shifts from Democrat to Republican, that process results in a Board whose majority will likely have stark disagreements with the views of the predecessor Board.

Whether this swinging pendulum results in significant changes to substantive labor law will depend on the extent to which a very liberal Board majority is being replaced by a very conservative majority. At this writing, the conservative Trump administration has appointed three pro-business Republican Board members, who have faced off against one Democrat—but only until that member's term expired last December. The two Democrat seats are now empty. Not surprisingly, this has resulted in significant changes in Board law, often returning to the pro-business views of the George W. Bush Board.

What follows is a summary of some recent significant Trump Board decisions and policy changes, beginning with those applicable to all employers and then discussing several that pertain only to employers that have a relationship with a union.

Board issues final rule on joint employer status. Just before we went to press, the Trump Board issued its final rule on a subject—joint employer status—that has troubled the Board and the courts for years. The Board describes the final rule as restoring the joint employer standards that the Board had applied for several decades prior to the Obama Board's decision in *Browning-Ferris Industries* (2015). The key change in the final rule is that an employer must both possess and exercise "substantial direct and immediate control" over one or more of the "essential terms and conditions" of another employer's employees. The rule also provides detailed meaning to the critical terms under the new standard. Under the Obama Board's test for joint employer status, many business relationships (*e.g.,* employee leasing, franchisor-franchisee, etc.) were in jeopardy of being labeled as joint employer relationships, potentially opening a snake pit of legal rights and obligations the parties had not anticipated. Businesses can now breathe a sigh of relief.

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Union election rules are substantially loosened. For decades unions have complained that the then-current NLRB timelines for elections seeking union representation were too lengthy, giving time for employers to mount campaigns that caused unions' win-loss ratio to be lower than they thought it should be. So, in 2014, the pro-union majority of the Obama Board put in place new rules and timelines that were pejoratively called "quickie election" rules—though that is exactly what they were. Many employers were ambushed by these new rules, resulting in an election without a realistic campaign. Ironically, though, statistics have shown that, despite the hurry-up character of the Obama Board's rules, unions did not improve their win-loss ratio. In any event, as of April 16, 2020, those quickie rules will no longer be effective.

Use of employer email systems for union organizing. Prior to the Obama Board, the NLRB's rule concerning employer email systems was that, with certain exceptions, employers could forbid the use of their email systems for union organizational efforts even though employees routinely used that email in the course of their work. But in *Purple Communications* (2014), the Obama Board flipped the rule to state that, with certain exceptions, employees who use the employer's email system for work had a presumptive right to use the employer's system for union-related activities. Late last year, in *Caesars Entertainment* (2019), the Trump Board went back to the pre-Obama rule, *i.e.*, that, so long as the employer was not discriminating against union-related email by allowing other similar non-work uses, employers can forbid its use for union purposes.

Confidentiality in investigations. The Obama Board had created a rule that employers could not tell employees to maintain the confidentiality of an investigation in which they were being interviewed or otherwise involved. Under that rule, established in *Banner Estrella Medical Center* (2015), an employer had the burden of proving the necessity for confidentiality in a particular case, such as a sexual harassment investigation, which the Obama Board rarely found satisfied. Under the Trump Board's decision in *Apogee Retail* (2019), the rule is reversed—so long as a confidentiality requirement is limited to the period and subject matter of the investigation, it is presumptively valid.

New deferential analysis for employer-issued rules and policies governing employee conduct. We all remember too well the last several years of the Obama Board members' nit-picking of employer-promulgated rules and policies to determine whether, *in the Board's view*, the rule or policy might *possibly* inhibit protected activity on the part of employees governed by the rule. In one of its first acts, the Trump Board adopted, in *Boeing Co.* (2017), a new framework for assessing whether particular rules or policies (*e.g.,* code of ethics, professionalism in the workplace, protection of the employer's non-public information, etc.) interfered with protected activity. In early 2018, the Board's General Counsel issued a comprehensive memorandum to the Regional Offices that went into greater detail. Since then, the Board has been methodically finding permissible employer rules or policies that would not have passed under the Obama Board's framework.

Access of union organizers to employer property. A frequent point of friction occurs when union organizers try to gain access to employees in the company parking lot or, for some employers, in public areas of a larger entity like a hospital or shopping mall. In two separate decisions, *Kroger Mid-Atlantic* (2019) and *UPMC* (2019), the Trump Board changed the playing field in favor of employers' right to prohibit access to union organizers even if the employer allows access for charitable, civic, and similar activities.

How much profanity and verbal abuse must an employer put up with? What has irked so many employers over the years of the Obama Board was the seeming failure to recognize that an employer must maintain certain behavioral standards for its workplace—or it will become dysfunctional, adversarial, and abusive. Indeed, there developed a conflict between the NLRB and the EEOC over the propriety of certain sexual misconduct that the NLRB declared to be protected

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whereas the EEOC declared it to run afoul of the harassment laws. The Trump Board has now changed the analysis applicable to such situations. Instead of simply asking whether certain misconduct occurred in connection with protected activity, the new test looks at whether a rule of conduct, reasonably interpreted, would interfere with employees' exercise of statutorily protected rights. If so, the test then weighs the nature and extent of the potential impact on employees' rights against the employer's legitimate justification for having the rule. When the justification for the rule outweighs arguable intrusions on protected rights, it will be found lawful. Under this new approach, countless employer-promulgated workplace rules and policies will survive scrutiny — whereas the Obama Board would have found many nonsensical violations of employees' rights.

Employers may stop withholding union dues at contract expiration. In a rather shocking deviation from decades of prior law on the subject, the Obama Board had, in *Lincoln Lutheran of Racine* (2015), overruled the standard followed since *Bethlehem Steel* (1962), which held that an employer could discontinue dues checkoff at the expiration of a collective bargaining agreement. The Obama Board held that dues checkoff was part of the "status quo" that must be maintained after a contract expires. In *Valley Hospital Medical Center* (2019), the Trump Board held that dues checkoff was not part of the "status quo" and that an employer is allowed, upon contract expiration, "to use dues checkoff cessation as an economic weapon in bargaining without interference from the Board."

"Contract coverage" standard for mid-contract unilateral changes. For many years, there has been a debate among Board members and labor practitioners about the correct legal standard to be applied by the Board (and the courts) when an employer decides to make a change in mid contract, relying on a management rights provision that it believes in good faith gives it the right to make the change without bargaining with the union. The standard the Board had generally used tested whether the union had "clearly and unmistakably waived" a right to bargain with the employer over that particular subject before the employer could make a change. As might be expected, employers were rarely able to make that "waiver" showing, which severely constricted an employer's right to rely on a management rights clause (or similar contract language). The Trump Board has now resolved that debate and held in *M.V. Transportation* (2019) that it would apply the "contract coverage" standard— which tests only whether the subject of the dispute is "covered" by applicable contract language. This will have major favorable ramifications for employers as they try to run their businesses.

Old rule for deferral to arbitrator is reinstated. In a decision that will keep the Board out of most contract disputes that have been arbitrated, the Trump Board has now, in *United Parcel Service* (2019), restored the long-standing test for deferral, *i.e.*, that the issues arbitrated were factually parallel to the NLRA issue, that the facts relevant to the statutory issue were presented, and that the arbitrator's decision was not "repugnant to federal labor laws." Under the Obama Board, disputes that had been arbitrated in the employer's favor were frequently the subject of renewed NLRB investigation and intervention in what should have been a final decision by the arbitrator.

We expect to see many more significant decisions for the balance of the Trump Board's tenure.

Thomas G. Kienbaum and
Theodore R. Opperwall

What Can Appellate Attorneys Do For You?

Law & Order. The Practice. Perry Mason. There's a reason why most of the best legal dramas are about jury trials: they showcase passionate legal advocacy by lawyers who demand the facts and the truth, whether by discovering crucial evidence at the last minute or cross-examining mendacious witnesses until they break down and confess.

But very few people would watch a show focused on the reality of appellate law, no matter how exaggerated—and that's why you probably can't even name one (excluding, of course, that classic Joe Mantegna vehicle *First Monday*). Reviewing a trial court record, researching case law, and writing briefs doesn't make for good viewing. And oral arguments—even in the most high-profile cases—would put the average viewer to sleep. It is perhaps for this reason that the average layperson, the average client, and even the average lawyer might overlook what a good appellate lawyer can bring to the table, even when the trial-level proceedings are ongoing.

An appeal is not a second trial. It is almost never an opportunity to re-litigate the facts or who was telling the truth. It is a new front in the legal battle with a different purpose and different audience, and one that demands a unique skill set. So, what can a good appellate lawyer do?

Prevent you from losing the appeal before the trial even ends. Courts of appeal decide cases based on a defined factual record, and only on legal issues properly raised in the trial court. The appeal is not the time to raise new legal arguments (or, heaven forbid, new facts). Appeals courts generally refuse to even consider legal arguments that were not adequately "fleshed out" factually in the trial court or that were not raised at the proper time. The failure to preserve issues can cause you to lose, even if the law would otherwise be on your side. Did the trial judge refuse to grant you summary judgment on a killer legal argument, but then you forgot to make the same argument in your motion for judgment in your favor notwithstanding the adverse verdict after the jury unjustly found against you? If you're in federal court, on appeal in the U.S. Court of Appeals for the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee), you're out of luck, because the argument has been waived.

There are also complex rules governing how to preserve arguments regarding jury instructions or challenges to an ambiguous or inconsistent jury verdict form. Having an appellate attorney—even one who won't yet be involved in writing—at least review key dispositive pleadings, jury instructions, and post-trial motions to ensure the proper presentation and preservation of key legal issues can be worth every penny.

Bring a fresh perspective and package arguments for appellate success. Trial lawyers who work a case, often for years, can find it hard to objectively view their case—let alone focus on the best issues that the appeals court will care about. An appellate specialist, like the appellate judge, will be approaching your case and your record fresh. Paradoxically, while an appellate attorney in the trial court will work to ensure that all of the possibly relevant legal arguments are preserved, a good appellate attorney will downplay or even disregard all but the best

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two or three. With very few exceptions (primarily in criminal appeals), rehashing all of the legal arguments raised at trial is more likely to result in a muddied, unfocused brief that is less likely to result in a favorable outcome.

Further, while your trial is about the facts of your case, an appeal is about more than that. As former Michigan Supreme Court Chief Justice Robert Young was fond of noting, the appeals court is there to decide what the rule will be—not only in your case, but in the next hundred cases like it. Win or lose at trial, if it involves an issue that you are likely to see again, a botched appeal will hurt you and others for years to come.

Appellate attorneys are frequently immersed in researching and legal writing, and are attuned to emerging trends in the law. A good appellate specialist can identify issues that are more likely to resonate on appeal, and tailor the appellate brief to focus on those issues to obtain a favorable legal ruling that may also serve as favorable legal precedent to you and others down the road.

Understand the audience and advocate accordingly. Appellate advocacy also requires a different approach from trial advocacy, and an appellate attorney must exercise different legal muscles than their trial court counterparts. The vast majority of appellate cases will be won or lost on the briefs. Judges generally have busy dockets and their attention spans can be short. The brief is the most important—and, in many cases, the *only*—chance to convince the judges to rule in your favor. Good appellate attorneys are excellent writers and skilled researchers, who know how to present written advocacy that identifies and distills the key legal points into a focused, effective message while being easy to follow and understand.

Many appeals will culminate in a short, structured oral argument, which is usually around 10-15 minutes long. It is different than the often free-wheeling, open-ended arguments that lawyers make to trial judges. While most cases won't be won at oral argument, they certainly can be lost there. It is critical to know your audience. Oral argument is not the place for a jury argument, which is likely to be counter productive, as the same kind of rhetoric that stirs a jury will likely annoy an appellate judge. And since you likely won't know which judges will hear your appeal until after the briefs are filed, oral argument is likely the first and only opportunity to further tailor arguments to the specific judges deciding your case. An appellate specialist is likely to know by reputation and history the idiosyncrasies and judicial philosophies of your judges, and what arguments are likely to sway them. At the same time, a forceful position on an argument that wins over one judge is worthless if it alienates the other two. A skilled appellate advocate will know how to navigate the intricacies of addressing the concerns of multiple judges with often conflicting ideologies—including knowing when a judge is throwing you a softball or trying to extract a concession that will doom your case.

Whether you won or lost at trial, having an attorney on your side who specializes in appellate practice will increase your odds of success on appeal. If they are not already involved in your case at the trial level helping preserve key legal arguments, an appellate specialist will bring a fresh set of eyes to your case, identify the most appealing arguments in light of current legal trends, and present them in a way that will capture your new appellate audience. An appellate decision will likely be the last word on whether you win or lose your case. Hiring an appellate specialist to assist you can be the difference between failure and success.

Thomas J. Davis and
David A. Porter

The authors are members of KHVPF's skilled appellate practice team. Thomas J. Davis served as a federal appellate clerk and spent nearly a decade at Jones Day in their appellate practice group before joining KHVPF in 2014. David A. Porter recently joined KHVPF from the Michigan Attorney General's office, following clerkships at the Michigan Supreme Court and U.S. Court of Appeals.

U.S. Supreme Court to Decide Whether Religious Organizations Must Comply With Civil Rights Laws

Throughout history there has been a tension in law and politics between (a) popularly enacted laws and (b) minority religious rights. From the 1930s through the 1950s, Jehovah's Witnesses successfully challenged dozens of state and local laws as infringing on their religious freedom to proselytize. Twenty-five years ago, in *Employment Division v. Smith*, members of a Native American Church argued for their right to smoke peyote as part of religious ceremonies, even though that substance is banned as an illegal drug. In 2014, the Supreme Court decided *Burwell v. Hobby Lobby*, which recognized, for the first time, that closely held for-profit corporations had religious freedoms that granted them an exception to the Affordable Care Act's requirement that employers cover contraceptives in their health insurance policies. And most recently, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court took up without deciding whether closely held corporations should be exempt from civil rights laws that force the business to provide goods and services for same-sex weddings in violation of the owner's sincerely held religious beliefs.

The U.S. Supreme Court will again attempt to resolve this tension when it decides two new cases this term – *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*. These cases raise questions under the "ministerial exception" to the federal civil rights laws. Generally, the "ministerial exception" provides that "ministers" are not protected by civil rights laws. In other words, a church has the right to discriminate when it comes to the hiring and firing of its ministers. This exception is necessary because the government cannot tell a church who it can and cannot employ as its minister without violating the free exercise clause of the First Amendment. As the Supreme Court explained, the ministerial exception promotes the separation of church and state and ensures that the government "would have no role in filling ecclesiastical offices."

In 2012, the Supreme Court decided a similar case in *Hosanna-Tabor Lutheran Church and School v. EEOC*. In that case, the Court rejected the EEOC's proposed rule that the "ministerial exception" applied only to workers who performed exclusively religious functions. Although the Court was "reluctant to adopt a rigid formula for deciding when an employee qualifies as a minister," the justices unanimously agreed that the plaintiff school teacher was a minister. The teacher was formally ordained as a minister and performed important religious functions in the classroom in addition to her teaching duties.

The answer to the question posed by the new cases will provide further insight into who can be characterized as a "minister." In *Our Lady of Guadalupe School v. Morrissey-Berru*, a Catholic school teacher alleges her employment was terminated because of her age. *St. James School v. Biel* also involves a Catholic school teacher who claims her contract was not renewed in alleged violation of the Americans with Disabilities Act, after she developed breast cancer. The teachers in both cases primarily provided non-religious teaching, were not designated "ministers" by the schools or the internal policies of their faith traditions, and had little to no religious training. But one or both teachers also spent a few hours each week teaching about the Catholic faith, incorporated religious themes

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and symbols in the classroom environment, led students in prayer, played a role in planning Mass, and engaged in other minor religious duties. Both cases were initially dismissed at the trial court level, finding the teachers were "ministers." But the U.S. Court of Appeals for the Ninth Circuit reversed, finding the teachers were not "ministers," setting up a ruling by the U.S. Supreme Court.

In addition to the two religious school cases, the Supreme Court announced on February 24, 2019, that next term it would decide *Fulton v. City of Philadelphia*. The plaintiffs in *Fulton* include the Catholic Social Services and parents who contract with the city of Philadelphia to place foster children. Philadelphia requires that children be placed into foster care without discriminating against same-sex couples. When CSS refused to comply with Philadelphia's non-discrimination requirement, the city ended CSS's contract. CSS claims the city's actions were unconstitutional because, as a religious organization, it has a First Amendment right to refuse to comply with anti-discrimination rules that violate its religious beliefs. The Court will hear oral argument sometime in the Fall of 2020 and decide the case next year.

With the additions of Justices Gorsuch and Kavanaugh, much has been written about the new conservative majority of the Supreme Court. For this reason, most experts expect the Supreme Court to expand the ministerial exception and expand the protections of religious liberty. These new cases will require the Supreme Court to analyze the religious autonomy of parochial schools, the role of teachers in our society, and how religious organizations can work with government to provide services. Although these cases all deal with religious organizations, *Hobby Lobby* and *Masterpiece Cakeshop* indicate that the Court is willing to create exceptions for businesses on the basis of the sincerely held religious beliefs of their owners. And if the Supreme Court rules in favor of the plaintiffs in *Fulton*, it could potentially mean that other government contractors may discriminate if the company's owners claim a religious justification. We will be watching these cases for any indication whether and how the Court might expand religious freedoms in other settings.

Ryan D. Bohannon

Michigan Paid Medical Leave Act — Is It On or Off?

Readers will recall that Michigan's somewhat tepid Paid Medical Leave Act and minimum wage changes took effect in March 2019. The legislation was the result of an "adopt and amend" strategy that pro-business legislators utilized in September 2018 to avoid the business-unfriendly impact of a ballot proposal slated for the November 2018 ballot. By enacting the legislation in September, the Michigan legislature voided the ballot initiative in November, and then, after the November election, it amended the initial legislation to include more business-friendly features.

The "adopt and amend" strategy was the subject of requests to the Michigan Supreme Court by the Legislature and the Attorney General, seeking an advisory opinion declaring the Republican Legislature's chess move impermissible under the Michigan Constitution. In December 2019, the Michigan Supreme Court finally, in a fractured decision with five different opinions, declined the requests to issue an advisory opinion. We can be sure the "adopt and amend" issue will in the future be the subject of litigation and, quite possibly, new ballot initiatives. In the meantime, the Attorney General may issue an opinion.

Eric J. Pelton

The DOL Keeps Publishing at Record Speed

Opinion Letters. Since we published our last issue six months ago, the U.S. Department of Labor (DOL) has released another six opinion letters concerning the Fair Labor Standards Act (FLSA). The two most broadly applicable FLSA letters were issued on January 7, 2020.

FLSA 2020-1 addressed an overtime issue regarding non-discretionary bonuses. You probably know that non-discretionary bonuses paid to non-exempt employees must be included in the regular rate for the purposes of calculating overtime. FLSA 2020-1 provides guidance on how to calculate the regular rate when the non-discretionary bonus is paid for work conducted over several weeks.

In the scenario addressed in this opinion, the employer paid a lump sum bonus of $3,000 to employees on completion of a ten-week training. The employees were required to promise to complete an additional eight weeks of training in order to receive the bonus, but the bonus was paid even if they did not complete the next eight weeks. During the ten-week training, the employees would work overtime during two weeks. The bonus payment was not allocated to these two weeks, but was meant to motivate the employees to complete the ten-week training course. Because there was no indication the bonus was earned in any specific week, the DOL opined that it should be allocated equally over the ten weeks of training. If the facts had demonstrated that it would not be appropriate to make a weekly allocation, the bonus should be allocated over the number of hours worked in the bonus period. This could occur, for example, if an employee does not work each and every workweek of the bonus period.

FLSA 2020-2 concerned whether certain proposed payments to otherwise exempt employees constituted payment on a fee basis or salary basis. The facts involved a consultant who was assigned a project for an academic year (a 40-week duration) and would be paid a total of $80,000 for the project. Payment would be made on a biweekly basis of 20 installments of $4,000. During the same time, the consultant worked on a second project for the same employer over eight weeks, for which $6,000 was paid in four biweekly installments of $1,500. The employer sought an opinion on whether the proposed per-job payment basis was consistent with the fee basis regulations contained in Section 541.605(a), and, if not, whether the method of compensation would be permissible salary under the salary basis regulations.

The DOL concluded that the compensation for both projects satisfied the salary basis test. The employee would receive a predetermined salary in 20 equal biweekly installments, and the amount of the payment was guaranteed and not subject to a reduction based upon the quality or quantity of work. The compensation for the second project was permissible additional compensation allowed under the regulations.

The other recent DOL opinion letters concern whether active duty service members participating in a job training program would be subject to FLSA; the ordinary meaning of the phrase "not less than one month" for purposes of FLSA section 7(i)'s representative period requirement; the employment status of

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volunteer reserve deputies who perform paid extra duty work for third parties; and the application of the section 7(k) overtime exemption to public agency employees engaged in both fire protection and law enforcement activities.

Rulemaking. On January 16, 2020, the DOL published its final rule on joint employment, which will be effective March 16. The final rule sets forth a four-factor balancing test the DOL will use for determining whether two employers are actually joint employers of a worker under the FLSA. The final rule essentially tracks the proposed rule we reported on in our last issue. It provides that in determining whether a second entity is a joint employer of a worker for purposes of the FLSA, the DOL will examine whether the second employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

No single factor is dispositive in determining joint employer status, and the second employer must actually exercise one or more of the four control factors. Reserving the right to exercise this control may be relevant for determining joint employer status, but simply reserving the right, and not utilizing it, does not by itself establish a joint employer relationship. The final rule also clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA.

The newly promulgated rule includes several examples applying the four-factor test to various fact patterns, and provides practical guidance to employers with potential joint employment issues. Employers also must be cognizant of state laws regarding the joint employment liability standards applicable in the states in which they have workers, which may differ from the DOL perspective.

And, as a reminder, the DOL's new salary threshold for the white collar exemptions went into effect on January 1, 2020. As of January 1, the salary threshold went from $455 per week ($23,660 annually) to $684 per week ($35,568 annually). If you have full-time employees who you classify as exempt under the administrative, professional, or executive exemptions, they must make a salary of at least $684 per week to continue to be exempt (in addition to continuing to meet the duties test).

Sonja L. Lengnick

Court Finds Dodd-Frank Claims Arbitrable

We reported in our Summer 2019 issue that the federal Sarbanes-Oxley Act (SOX) whistleblower provisions prohibit mandatory arbitration. However, unlike SOX, which was enacted in 2002, arbitration agreements are enforceable under the Dodd-Frank Act, enacted in 2010, according to a recent decision by the U.S. Court of Appeals for the Second Circuit, which sits in New York. In *Daly v. Citigroup Inc.,* the court differentiated Dodd-Frank claims from those under SOX. Ironically, while Dodd-Frank amended SOX to explicitly state that agreements to arbitrate disputes under SOX's anti-retaliation provision are not enforceable, it did not provide that arbitration agreements are not enforceable under its own anti-retaliation provision.

Whistleblower protections were built into SOX when it was enacted in the wake of *Enron* and other corporate financial fraud cases. In 2008, on the heels of the financial crisis, Congress passed Dodd-Frank as part of extensive financial system regulatory reforms. Like SOX, Dodd-Frank includes an anti-retaliation provision that protects employees who engage in certain activity protected by the statute. In the simplest of terms, SOX was designed to protect both internal and external whistle-

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blowing of certain activities within publicly traded companies, whereas Dodd-Frank protects whistleblowers who disclose information to the SEC.

In *Daly*, a Citigroup vice president in its Private Banking Division alleged that her supervisor directed her to violate securities laws by giving him non-public information that he would pass to his favored clients. The plaintiff's employment was terminated two weeks after she complained to Citigroup attorneys and human resources employees. She brought several claims, including a retaliation claim under Dodd-Frank. The trial court granted Citigroup's motion to enforce a pre-dispute arbitration agreement between the company and the plaintiff. The plaintiff appealed.

On appeal, the Second Circuit affirmed the trial court's decision to enforce the arbitration agreement. The court highlighted the fact that the Dodd-Frank legislation added provisions to three other statutes to prohibit arbitration agreements covering claims under those statutes: SOX; the Commodity Exchange Act; and the Consumer Financial Protection Act. Inasmuch as Congress expressly chose to add anti-arbitration language to those statutes, and not to Dodd-Frank itself, Congress could not have intended to preclude arbitration of Dodd-Frank claims. In finding that the SOX anti-arbitration provision does not extend to Dodd-Frank claims, the court also pointed to differences in Dodd-Frank's and SOX's prohibited conduct, procedural scheme, and available remedies. The court observed that the SOX anti-arbitration provision restricts its applicability to its own statutory scheme, but not to that of Dodd-Frank.

Legislation is now pending in the U.S. House and Senate to amend various aspects of Dodd-Frank. The Senate version includes a provision rendering void and unenforceable any agreement requiring arbitration of Dodd-Frank whistleblower claims. The provision appears to have bipartisan support, but other aspects of the legislation may hold up passage.

Eric J. Pelton

Notable New FMLA and ADA Court Decisions

Attendance Deemed Essential Function for Auditor Job. In *Popeck v. Rawlings Co.,* the U.S. Court of Appeals for the Sixth Circuit held that regular on-site attendance was an essential function of Popeck's claims auditor job, and therefore she was not a qualified individual under the Americans with Disabilities Act (ADA) because she could not perform that essential function. She sought and received intermittent leave under the Family and Medical Leave Act (FMLA) for Irritable Bowel Syndrome, which allowed her to occasionally arrive late or leave early due to its symptoms. When Popeck exhausted her allotted intermittent leave, her employer initially allowed her to continue coming in late or leaving early as an ADA accommodation. Popeck's performance declined, however, and the next year when she sought the same accommodation, it was denied. She was eventually terminated due to excessive absenteeism and tardiness. She sued claiming that her employer had wrongfully failed to accommodate her disability. The court rejected Popeck's argument that certain other employees were permitted to work remotely and, thus, on-site attendance was not an essential function of her job. The court found that, unlike these other employees, claims auditors were prohibited from working remotely due to the vast amounts of confidential and HIPAA protected personal information their work entailed. The court also rejected that Popeck's proposed accommodation—occasional late arrivals or early departures when her IBS symptoms flared—because she was missing work nearly 60% of the time.

Prior Accommodation Does Not Necessarily Render its Continuation "Reasonable." In *Hartwell v. Spencer,* the U.S. Court of Appeals for the Eleventh Circuit held that "just because an employer has, in the past, done more than is required to accommodate an employee who cannot fulfill all the requirements of his

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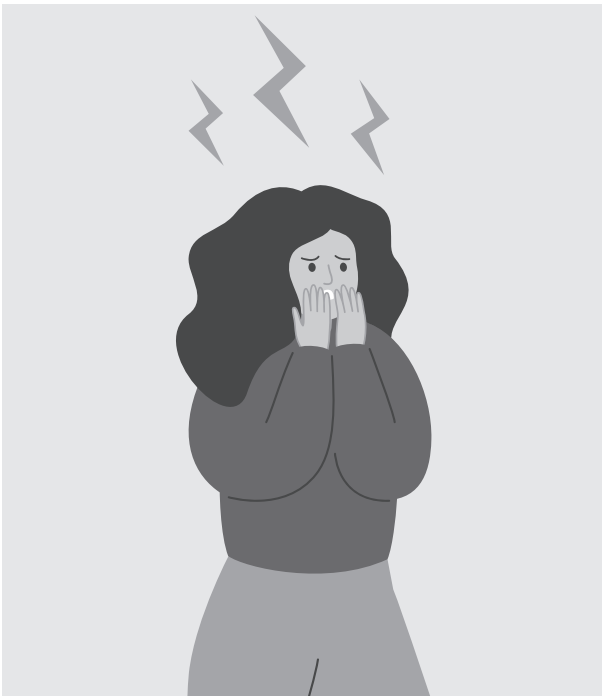
job does not mean the employer must continue to do." Hartwell was a firefighter who was chronically tardy due to drowsiness caused by his medical condition and medications. He sought an accommodation under the ADA that would allow him to be up to an hour tardy without prior notice. His former supervisor had allowed his tardiness, but a new supervisor stopped this practice, issued discipline, and eventually terminated him. Hartwell claimed that the years of prior accommodation without adverse consequences demonstrated its reasonableness. The Eleventh Circuit disagreed, finding that punctuality was an essential function of the firefighter job, and held that Hartwell was not a qualified individual with a disability because he could not perform the essential functions of his job with or without reasonable accommodation. The court noted that other employees had to cover for Hartwell's chronic lateness by staying over their assigned shifts, which decreased safety due to fatigue and increased costs of overtime.



FMLA Jury Verdict Upheld Even Though Employee Never Requested FMLA Leave. In *Valdivia v. Township High School District 214*, the U.S. Court of Appeals for the Seventh Circuit upheld a jury verdict for Valdivia on her FMLA interference claim—even though she had never requested FMLA leave. After receiving a promotion to the position of a district principal's assistant, Valdivia began to experience various mental health symptoms, including insomnia, weight loss, uncontrollable crying, exhaustion and racing thoughts. She discussed the symptoms with her principal on several occasions, refused additional projects, and requested a ten-month position as opposed to a twelve-month position, which was denied. Valdivia had a prior history of excellent performance. She ultimately resigned for medical reasons, claiming she felt pressured to do so. She was subsequently hospitalized and diagnosed with major depression and generalized anxiety disorder. She then sued the School District, claiming they wrongfully interfered with her FMLA rights by failing to provide her with notice or information about her right to take job-protected FMLA leave. A jury rendered a verdict in her favor. On appeal, the Seventh Circuit rejected the employer's position that Valdivia failed to provide sufficient notice that she had a serious condition, noting that direct notice may not be possible if the claimant "herself was unaware that she was suffering from a serious medical condition." The court found that "clear abnormalities in the employee's behavior may constitute constructive notice of a serious health condition," which was sufficient here to trigger the employer's obligations under the FMLA.

Concern About Future Disability Not Prohibited Under the ADA. The U.S. Court of Appeals for the Eleventh Circuit recently issued an opinion rejecting a position espoused by the EEOC that that ADA protects employees who are "regarded as" disabled *because of a potential future disability*. In *EEOC v. STME,* the EEOC sued on behalf of an employee, a massage therapist named Lowe, who was terminated because she refused to cancel her travel plans to West Africa. Lowe's employer feared that she could *potentially* contract the Ebola virus and cause risk to others upon her return. The EEOC claimed that the employer unlawfully

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"regarded" Lowe as disabled when it terminated her because of a potential future disability. The Eleventh Circuit affirmed the trial court's dismissal of the EEOC's case, holding that the ADA's "regarded as" provision does not apply to situations where an employer perceives an employee to be presently healthy with *only a potential* to become disabled in the future.

Benefit Under Attendance Policy That Was Denied to Those Using FMLA Interfered with FMLA Rights. In *Dyer v. Ventra Sandusky,* the U.S. Court of Appeals for the Sixth Circuit held that an employer's attendance point reduction program may have improperly interfered with Dyer's rights under the FMLA. Dyer used intermittent FMLA leave due to migraine headaches on many occasions. His employer approved his leave and he was not penalized or assessed points under the company's no-fault attendance policy. However, the policy included a point reduction schedule that permitted employees who had 30 days of perfect attendance to reduce points accumulated under the policy. The policy treated certain absences (*e.g.*, vacation, jury duty, holidays) as days "worked," and thus such absences did not stop or reset the 30-day clock for purposes of establishing 30 days of perfect attendance. FMLA leave, however, was not counted as "time worked," and therefore an employee who used FMLA would have his perfect attendance period restarted after every use. Dyer sued after he was terminated under the no-fault policy. He claimed he was denied the benefits of the points reduction program due to his use of FMLA, and this unlawfully interfered with his rights under the FMLA. The Sixth Circuit found that there was a genuine issue of material fact as to whether the point reduction program interfered with Dyer's FMLA rights, precluding the dismissal of the lawsuit. The court reasoned that, by resetting the perfect attendance clock after FMLA-qualifying absences, the employer may have denied Dyer a benefit that was received by employees who did not take FMLA leave.

Shannon V. Loverich

Arbitration Juggernaut Rolls On

Arbitration's status as an accepted method of dispute resolution continues to expand and gain force, as illustrated by actions taken in late 2019 by the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC). In *Tarlton and Son*, decided by the Board on October 30, 2019, three employees jointly filed a wage and hour suit against their employer, prompting the employer to adopt a mandatory arbitration policy several weeks later. That policy required employees to submit employment related claims to binding arbitration on an individual basis. The NLRB held that, although the employees' lawsuit constituted protected concerted activity, as the Board had recently ruled in *Cordua Restaurants* (2019), an employer can require employees to resolve employment claims through individualized arbitration without violating their rights under the National Labor Relations Act (NLRA).

And in December 2019 the EEOC rescinded (by a 2-1 vote) its position—held for over two decades—that mandatory arbitration agreements that purport to cover employment discrimination claims should not be enforced, because they undermine the proper enforcement of federal anti-discrimination laws. During that time the EEOC's policy had become increasingly out of step with developing law, as the U.S. Supreme Court held such agreements enforceable under the Federal Arbitration Act (FAA) in a growing variety of settings. The EEOC emphasized that rescission of its anti-mandatory arbitration policy did not "limit the ability of the Commission or any other party to challenge the enforceability of a particular arbitration agreement." Still, this change of direction recognizes that the growing use of arbitration gives the EEOC reduced leverage to obtain relief for employees through conciliation.

Meanwhile, a U.S. District Court in the Eighth Circuit, applying Missouri law, held in *Taylor v. Dolgencorp* that a newly hired employee had made an arbitration

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agreement by clicking an electronic acceptance box online and typing her initials. The employee had been advised that those actions would constitute acceptance of the employer's arbitration policy. Applying Missouri's version of the Uniform Electronic Transactions Act, the court rejected her argument that an individual physical manifestation of consent was needed to form a valid arbitration agreement. Furthermore, the employer had shown its intent to be bound by setting up the website and its associated instructions.

Noel D. Massie

OFCCP And Contractor Changes: New Rules To Promote Transparency

The Office of Federal Contract Compliance Programs (OFCCP) closed out 2019 with a December 30 Notice of Proposed Rulemaking that it touts as promising not only more efficiency in compliance audits, but more transparency and predictability in agency decision making. The primary objectives of the Proposed Rules are two-fold: (1) establish certainty and permanency in the circumstances under which OFCCP will find disparities in affirmative action audits sufficient to warrant violation notices; and (2) define the quality of evidence necessary to support violation notices.

For over 30 years, OFCCP has used two formal notices to advise contractors that the agency has found statistically significant indicators of unlawful discrimination in workforce employment practices. But OFCCP has never before codified the notices – the Predetermination Notice (PDN) and the Notice of Violation (NOV) – in agency regulations. As a result, OFCCP's standards over the years for finding statistical wrongdoing have been fluid and even secretive. Indeed, the agency's failure to provide the advance notice PDN has become increasingly the rule rather than the exception.

OFCCP's Proposed Rules, then, should give federal contractors some sense of relief that the agency is attempting to correct the longstanding uncertainty through regulatory action. Regulations make it more difficult for future administrations to ignore existing guidelines or implement new ones more to their liking. Unfortunately, the Proposed Rules fall somewhat short of providing the clarity they promise.

For example, the Proposed Rules commit to issuing a PDN only where non-statistical evidence of intent to discriminate, such as cohort studies, corroborate a statistical finding of a disparity of two to three standard deviations from expected demographic outcomes. Only where the disparity exceeds the three standard deviations level of 99 percent certainty will the agency not require corroborating non-statistical evidence of discriminatory intent before issuing a PDN. The contractor then will have the chance to rebut that preliminary finding with its own evidence – perhaps, its own regression analysis – before the agency issues its more formal NOV.

Certainty under the Proposed Rules, however, may be somewhat elusive because these same rules provide that there will be instances where OFCCP will move forward with PDN's and NOV's with less than three standard deviations and without corroborating non-statistical evidence, *e.g.,* where "other factors" explain why non-statistical evidence could not be found. The Proposed Rules also seek to codify an exception whereby OFCCP may skip the regulatory conciliation process altogether and refer the matter directly to the Solicitor of Labor to initiate enforcement efforts. Still, making the PDN "early warning" system the general rule should benefit the contractor because the NOV – once issued – generally requires resolution through either a conciliation agreement or the more onerous enforcement proceedings.

Julia Turner Baumhart

Can Prior Pay Be Considered In Equal Pay Act Cases?

Ever the trailblazing court, the U.S. Court of Appeals for the Ninth Circuit held in an *en banc* decision that an employee's prior pay cannot justify a pay gap between genders for equal work. The Equal Pay Act (EPA), passed in 1963, when women were paid fifty-nine cents on the dollar in comparison to men, sought to eliminate gender-based discrimination. At the same time, the legislative history of the EPA evinces Congress's early recognition that equal pay for men and women was a concept easier said than done, due to the many factors that affect a given employee's pay.

Congress therefore attempted to create a system that was "meaningful to employers and workers across the broad range of industries covered by the Act," as the U.S. Supreme Court stated in its only opinion directly interpreting the EPA, *Corning Glass Works v. Brennan* (1974). The EPA as enacted included four areas that employers could use in determining an employee's pay without liability: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

The fourth factor was the catch-all, leaving the door open for employers to respond to economic and practical concerns without fear of a discrimination lawsuit, so long as their practices weren't unfair to one gender over the other. The EPA also provided that no employee's pay could be *reduced* in order to comply with gender equality. Since its passage, courts have wrestled with the fourth facto. What about an employee's negotiating ability? Labor shortages and market conditions? Prior pay in the same workplace?

For the first time, a U.S. Circuit Court of Appeals has definitively ruled out prior pay as an acceptable fourth factor. The Ninth Circuit (with jurisdiction over several western states) held in *Aileen Rizo v. Yovino*, decided February 27, 2020, that "[b]ecause prior pay may carry with it the effects of sex-based pay discrimination, and because sex-based pay discrimination was the precise target of the EPA, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision." Besides public policy arguments regarding the self-perpetuating cycle of women earning less than men, the court relied on the specific language of the EPA. "Any *other* factor *other* than sex," Judge Morgan Christen wrote, meant that courts should particularly look to the first three factors to interpret the fourth. The opinion went on to say that, even without the extra "other," the fourth factor should be interpreted in line with the other three under the principle of *ejusdem generis—i.e.*, specific examples should be used to interpret a more general term at the end of a list.

Will other Circuits follow the Ninth Circuit in its broad-based rejection of the prior pay factor, as valid arguments do exist for prior pay as an acceptable, gender-neutral part of the wage calculation process. The court's reliance on the extra "other" seems an over-reliance on one word of repetition. The two "others" could conversely be interpreted to stress that there are myriad "other" valid business reasons for setting one employee's salary differently than another's—including prior salary.

Another possible interpretation is that the EPA sought to eliminate sex-based discrimination rather than to address the greater socio-economic factors that underlie the wage gap, so the fourth factor should be broadly interpreted. Judge Christen herself noted: "The EPA did not raise women's wages nor create remedial education or training opportunities. The Act's limited goal was to eliminate only the purest form of sex-based wage discrimination: paying women less *because* they are women." Prior pay clearly is a factor that, for practical purposes, incorporates a number of acceptable reasons to set one employee's pay higher than another's, including an employee's experience and job performance.

If prior pay cannot be considered in setting an employee's salary, it stands to follow that, under the Ninth Circuit's narrow definition of "other factors," negotiating ability won't come into play either. Why not? If Robert negotiates $100k/year, and then Roberta comes along six months later and, through techniques she learned from reading a book by a famous hostage negotiator, gets herself $115k/year for the same job, it's

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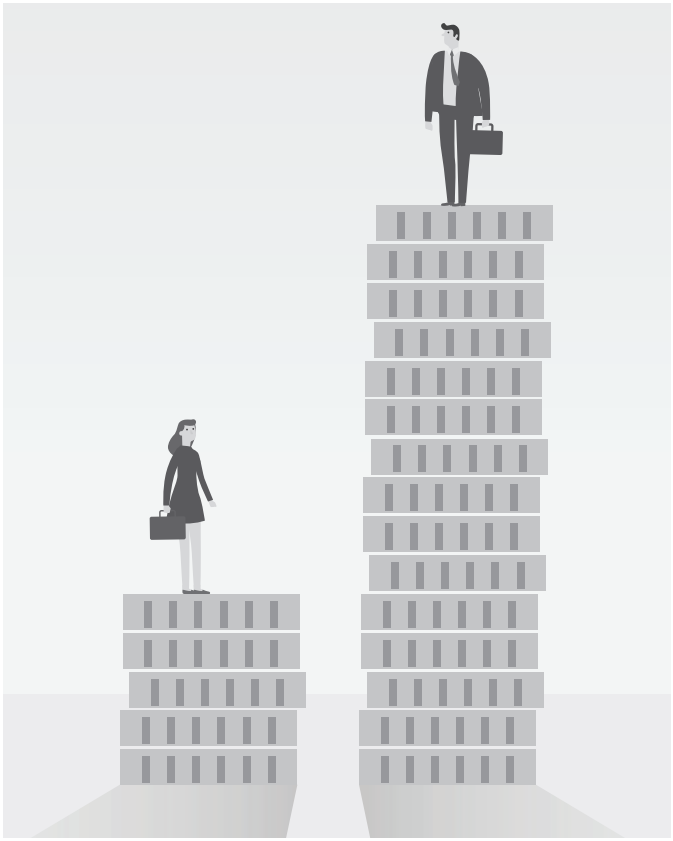
likely that the pay gap will continue over the years if both perform well. However, if Robert and other males all make $100k, the company would have to give them the benefit of Roberta's deal-making skills, because past pay can't be used to determine future compensation. Consequently, all the employees would get the benefit of Roberta's hard-dealing.

Economic conditions at the time of hiring also play into prior salary, and would be eliminated as a determinant of wages under a similar theory. Suppose Robert and Roberta are both tree surgeons hired by a county park. When Robert got hired, the trees were all doing well and didn't need to go under the knife, so the going rate for a tree surgeon was $100k/year. But by the time Roberta applied for the job, the dogwoods were all suffering from a virulent bark infection and were in need of attention. Meanwhile, there was a nationwide shortage of tree surgeons and a high demand for qualified recruits, so Roberta was offered $115k right off the bat. Under the Ninth Circuit's analysis in *Rizo* and depending on the overall gender-pay landscape of its workforce, the county may have to increase Robert's pay in order to avoid grounds for a lawsuit.



The Ninth Circuit's approach also fails to take into account nuances of the prior pay factor. Scholars have noted important distinctions between "inside" and "outside" prior salary. While an employee's outside salary with a prior employer may be more likely to carry with it the effects of past gender-based discrimination, an employer might have good reason to use prior salary *within* the same employing organization. In *Spencer v. Virginia State University* (2019), the Fourth Circuit ruled in favor of allowing a prior pay factor. A female professor brought an EPA suit against the university, where several male professors had briefly held administrative positions within the university before returning to teaching. The university cited its salary retention policy as justification for the pay discrepancy. Such a policy would allow the university to briefly promote a professor, for example, to an interim presidency, then entice the professor to step down without a huge drop in pay after a nationwide search brought in a top candidate.

Such policies can also help employers continue to employ persons who develop disabilities, as they can allow the disabled employee to take on a less demanding job while retaining pay comparable to the more demanding position.

For these and other reasons, the Fourth, Seventh, and Eighth Circuits have upheld prior pay as a valid fourth factor. The Eleventh, Tenth, and Sixth Circuits allow prior pay to be considered alongside other factors, without serving as a stand-alone justification for a gender-based wage differential. The U.S. Supreme Court's stance on this issue? Wait for the next article.

Marianne J. Grano

News From The Firm

David A. Porter is joining the firm as an associate attorney after serving with the Michigan Attorney General's office, where he handled civil and criminal appeals. Prior to that, he served as a law clerk to Judge Richard A. Griffin of the U.S. Court of Appeals for the Sixth Circuit and for Justice David F. Viviano of the Michigan Supreme Court.

Mr. Porter's specialty is in commercial and employment litigation and appellate work. He has briefed and argued dozens of appeals in the state and federal appeals courts, including several involving complex issues of constitutional law.

Mr. Porter graduated, *summa cum laude*, from DePaul University College of Law, where he was selected to join the Order of the Coif and the National Order of Barristers. He received his undergraduate degree, *cum laude*, from Michigan State University's James Madison College of Public Affairs, with a concentration in Political Theory and Constitutional Democracy.

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Birmingham Office
280 North Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
Phone (248) 645-0000 • Fax (248) 645-1385

Mount Clemens Office
48 S. Main Street, Suite 2
Mount Clemens, Michigan 48043
Phone (586) 469-1580 • Fax (586) 469-1399

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